**FEDERAL COURT OF AUSTRALIA**

Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Bruce Highway Caloundra to Sunshine Upgrade Case) (No 2) [2019] FCA 1737

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| File number: | QUD 238 of 2018 |
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| Judge: | **COLLIER J** |
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| Date of judgment: | 23 October 2019 |
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| Catchwords: | **INDUSTRIAL LAW** - where union officials entered site “pursuant to” s 81(3) of the Workplace Health and Safety Act 2011 (Qld) – where union officials did not produce entry permits under the Fair Work Act 2009 (Cth) – whether s 81(3) of the Workplace Health and Safety Act 2011 (Qld) creates a “State or Territory OHS right” within the meaning of s 494 Fair Work Act 2009 (Cth) – alleged contraventions of ss 494, 497 and 500 of the Fair Work Act 2009 (Cth)  |
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| Legislation: | *Building and Construction Industry (Improving Productivity) Act 2016 (Cth) s 6**Fair Work Act 2009* (Cth) ss 12, 480, 494, 494(1), 494(2), 497, 499, 500, 545(2)(a), 546(1), 546(3), 550, 550(2)(c), 569, Pt 3-4*Fair Work (Registered Organisations) Act 2009* (Cth)*Fair Work Regulations 2009* (Cth) reg 3.25*Acts Interpretation Act 1954 (*Qld) s 32CA(1)*Crown Lands Consolidation Act 1913* (NSW) s 52*Occupational Health and Safety Act 2004* (Vic) ss 58, 58(1)(f), 70, 70(1), 87*Work Health and Safety Act 2011* (Qld) ss 68, 71(4), 71(5), 80, 81, 81(2), 81(3), 102A, 117, 117(1), 118, 121(1), 124, 144, 191, 267(a), 501, 502(1), Div 3 of Pt 5, Div 7A of Pt 5, Pt 7, Div 3*Work Health and Safety Regulation 2011* (Qld) ss 22, 23, Pt 2.2 |
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| Cases cited: | *Australian Building and Construction Commissioner v Construction Forestry, Maritime, Mining and Energy Union (The Brooker Highway Case)* [2018] FCA 1081*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Parliament Square Case)* [2018] FCA 1080 *Australian Building and Construction Commissioner v Construction, Forestry, Mining, and Energy Union* [2018] FCA 42 *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Bruce Highway Caloundra to Sunshine Upgrade Case)* [2018] FCA 553*Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (Bruce Highway Separate Question Case)* [2018] FCA 771*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Laverton North and Cheltenham Premises Case)* [2018] FCAFC 88; (2017) 252 FCR 198*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (Castlemaine Police Station Case)* [2018] FCAFC 15*Australian Building and Construction Commissioner v McDermott (No 2)* [2017] FCA 797*Australian Building and Construction Commissioner v Powell* [2017] FCAFC 89; (2017) 251 FCR 470 *Australian Building and Construction Commissioner v Upton (The Gorgon Project Case)* [2017] FCA 847; (2017) 270 IR 190*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1287 *Disher v Disher* [1965] P 31*Ex parte Duncan; Re Minister of Lands* (1938) 55 WN (NSW) 37*Finance Sector Union of Australia v Commonwealth Bank of Australia* [2005] FCA 796; (2005) 147 FCR 158 *Harvey v Mutsaers* [2012] VSCA 69; (2012) 35 VR 389 *Kavanagh v Deputy Commissioner of Taxation* [2007] FCA 76; (2007) 157 FCR 551*Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees Union (No 2)* [2016] FCA 2; (2016) 259 IR 164*Webster Investments Pty Ltd v Anderson and Webster Investments Pty Ltd v North Star Developments Pty Ltd* [2016] VSC 620; (2016) 52 VR 610*Workpac Pty Ltd v Skene* [2018] FCAFC 131; (2018) 362 ALR 311 Pearce DC and Geddes RS, *Statutory Interpretation in Australia* (8th ed, LexisNexis Butterworths, 2014)  |
|  |  |
| Date of hearing: | 24 October 2018  |
|  |  |
| Date of last submissions: | 2 November 2018  |
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| Registry: | Queensland |
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| Division: | Fair Work Division |
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| National Practice Area: | Employment & Industrial Relations |
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| Category: | Catchwords  |
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| Number of paragraphs: | 154 |
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| Counsel for the Applicant: | Mr P Hanks QC and Mr M Follett |
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| Solicitor for the Applicant: | Ashurst Australia  |
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| Counsel for the Respondents: | Mr R Reitano and Mr P Boncardo |
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| Solicitor for the Respondents: | Hall Payne Lawyers  |
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| Counsel for the Intervener: | Mr A Duffy QC |
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| Solicitor for the Intervener: | Crown Law |

ORDERS

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|  | QUD 238 of 2018 |
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| BETWEEN: | AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONERApplicant |
| AND: | CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNIONFirst RespondentKURT PAULSSecond RespondentBEAU SEIFFERT (and others named in the Schedule)Third Respondent |
|  | MINISTER FOR EDUCATION AND THE MINISTER FOR INDUSTRIAL RELATIONS FOR THE STATE OF QUEENSLANDIntervener |

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| JUDGE: | COLLIER J |
| DATE OF ORDER: | 23 OCTOBER 2019 |

THE COURT ORDERS THAT:

1. Within 14 days, the parties provide the Chambers of Justice Collier with draft orders giving effect to these reasons.
2. Within 14 days, the parties provide the Chambers of Justice Collier with draft case management orders to take the proceedings to further hearing in respect of pecuniary penalties.

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

REASONS FOR JUDGMENT

COLLIER J:

1. Issues in these proceedings were the subject of consideration in *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Bruce Highway Caloundra to Sunshine Upgrade Case)* [2018] FCA 553 and *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (Bruce Highway Separate Question Case)* [2018] FCA 771.
2. In summary, the applicant (**Commissioner**) contends that the respondent union (**CFMMEU**) and the six individual respondents (each of whom were officials with the CFMMEU) contravened provisions of the *Fair Work Act 2009* (Cth) (**FW Act**) referable to entry by those individual respondents on to a section of the Bruce Highway between Caloundra and the Sunshine Coast Motorway which was being upgraded at material times. I will refer to the relevant section of highway as the “**Site**” and the work being undertaken as the “**Project**”.
3. It is common ground that the entries by the individual respondents on to the Site were “made pursuant to s 81(3)” of the *Work Health and Safety Act 2011* (Qld) (**WHS Act**). The parties agree that the WHS Act is a “State or Territory OHS law” within the meaning of that expression in s 494(2) of the FW Act, on the basis that it is prescribed as such by s 494(3) of the FW Act and item 3 of reg 3.25 of the *Fair Work Regulations 2009* (Cth).
4. The Commissioner claims that, in so entering the Site, the individual respondents were exercising a “State or Territory OHS right” within the meaning of that expression in s 494(2) of the FW Act. The Commissioner accepts that, if the individual respondents were not exercising a State or Territory OHS right within the meaning of s 494(2) of the FW Act, the current application must be dismissed.
5. Fundamentally, the respondents’ case is that s 81(3) of the WHS Act does not create or confer a right to enter premised on a trade union official, or anyone else, and that accordingly no individual respondent exercised any State or Territory OHS right as contemplated by the FW Act. They further submit that even if the Court finds contraventions by the individual respondents, the CFMMEU has no accessorial liability in respect of the contraventions.
6. The Minister for Education and Minister for Industrial Relations for the State of Queensland (**Minister**) intervened in the proceeding pursuant to s 569A of the FW Act, exercising her right to do so in the public interest of the State, where the Court is required to determine a question of construction of the provisions of Commonwealth legislation insofar as they affect the operation of State legislation.
7. In an amended originating application filed on 19 June 2018 the Commissioner sought the following relief:
8. Declarations that each of the First to Third and Fifth to Eighth Respondents engaged in conduct which contravened civil remedy provisions, being sections 494(1), 497, 499 and 500 of the Fair Work Act 2009 (Cth) (**FW Act**) as alleged in the statement of claim.
9. Orders pursuant to section 546(1) of the FW Act, imposing pecuniary penalties on each of the First to Third and Fifth to Eighth Respondents as a result of their contraventions of the civil remedy provisions in 1 above.
10. Declarations that the Fourth Respondent engaged in conduct which contravened a civil remedy provision, being section 497 of the FW Act as alleged in the statement of claim.
11. Orders pursuant to section 546(1) of the FW Act, imposing a pecuniary penalty on the Fourth Respondent as a result of his contravention of the civil remedy provision in 3 above.
12. An order pursuant to section 546(3) of the FW Act, requiring that any pecuniary penalties imposed on the Respondents under 2 and 4 above, be paid to the Commonwealth of Australia within 28 days of the Court’s order.
13. Orders that any pecuniary penalties imposed on the Second to Eighth Respondents be paid personally by them and that they be prohibited from procuring, seeking or accepting the payment of any monies referable to those penalties, whether directly or indirectly or by way of reimbursement or otherwise, from any other Respondent.
14. An order pursuant to section 545(2)(a) of the FW Act permanently restraining the First Respondent from causing, requesting, advising, encouraging or inciting any official of the First Respondent to exercise a right pursuant to section 81 of the *Work Health and Safety Act 2011* at the Fulton Hogan Seymour Whyte Joint Venture Bruce Highway Upgrade Project (**Project**) unless:

(a) he or she is a permit holder within the meaning of the FW Act; and

(b) he or she produces his or her entry permit for inspection if and when requested to do so by employees, agents or representatives of the occupiers of the Bruce Highway Upgrade – Caloundra Road to Sunshine Motorway Stage 1 site (**Site**).

8. An order pursuant to section 545(2)(a) of the FW Act permanently restraining each of the Second to Eighth Respondents from exercising a right pursuant to section 81 of the WHS Act at the Project unless:

(a) he is a permit holder within the meaning of the FW Act; and

(b) he produces his entry permit for inspection if and when requested to do so by employees, agents or representatives of the occupier of the Site.

9. Any other orders as the Court may consider appropriate.

1. I note that the Commissioner no longer presses any alleged contravention of s 499 of the FW Act against any respondent.
2. The Commissioner and the respondents filed a Statement of Agreed Facts (**SOAF**) in the proceedings in respect of the question whether the individual respondents were exercising a State or Territory OHS right within the meaning of s 494(2) of the FW Act. It is convenient to have regard to those agreed facts before turning to the issues in dispute.

# Agreed Background facts

1. The CFMMEU is an organisation registered under the *Fair Work (Registered Organisations) Act 2009* (Cth), and an industrial association within the meaning of that term in s 12 of the FW Act.
2. In summary, the individual respondents are as follows:
* The second respondent, Mr Pauls, at material times held the position of Organiser with the CFMMEU, and was an officer and official of the CFMMEU within the meaning of s 12 of the FW Act. He did not hold an entry permit.
* The third respondent, Mr Seiffert, at material times held the position of Organiser with the CFMMEU, and was an officer of the CFMMEU. He held an entry permit, having been issued the permit by the Fair Work Commission on 24 August 2017.
* The fourth respondent, Mr Albert, at material times held the position of Organiser with the CFMMEU, and was an officer of the CFMMEU. He held an entry permit, having been issued the permit by the Fair Work Commission on 28 March 2017.
* The fifth respondent, Mr Hynes, at material times held the position of Organiser with the CFMMEU, and was an officer of the CFMMEU. He held an entry permit, having been issued the permit by the Fair Work Commission on 9 March 2018.
* The sixth respondent, Mr Gibson, at material times held the position of Organiser with the CFMMEU, and was an officer of the CFMMEU. He held an entry permit, having been issued the permit by the Fair Work Commission on 28 March 2017.
* The seventh respondent, Mr Parfitt, at material times held the position of Organiser with the CFMMEU, and was an officer of the CFMMEU. He held an entry permit, having been issued the permit by the Fair Work Commission on 4 September 2015.
* The eighth respondent, Mr Kupsch, at material times held the position of Workplace Health and Safety Co-ordinator with the CFMMEU, and was an officer of the CFMMEU. He held an entry permit, having been issued the permit by the Fair Work Commission on 27 August 2015.
1. The parties agree that the Site was a “premises” within the meaning of that term in sections 494(2) and 497 of the FW Act. The upgrades comprising the Project involved the construction, alteration and demolition of sections of road, bridges, ramps and other works attached to the land of the Site, and constituted “building work” within the meaning of that term in s 6 of the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth).
2. At material times, Fulton Hogan Construction Pty Ltd (**Fulton Hogan**) was part of an unincorporated joint venture with Seymour Whyte Constructions Pty Ltd (**Seymour Whyte**) known as the Fulton Hogan Seymour Whyte JV (ABN 23 446 040 210) (**FHSWJV**). The joint venture was formed to construct and deliver the Project. Both Fulton Hogan and Seymour Whyte employed workers to perform work at the Site, and occupied or otherwise controlled the Site.
3. Each of Fulton Hogan and Seymour Whyte, as part of the FHSWJV, established and imposed occupational health and safety requirements (**OHS Requirements**) for the Project that applied to the Site. This was by way of posting or making available these requirements at the entrance to the Project Site Office (**Site Office**), which was located on the Site at 120 Cresswell Road, Meridan Plains. The OHS Requirements included:
* All visitors to the Site must be accompanied by a fully site-inducted FHSWJV representative at all times; and
* Only authorised personnel were permitted to access exclusion zones on the Site.
1. The Second to Eighth Respondents were not authorised personnel for this purpose.
2. The following workers acted on behalf of the joint venturers at material times:
* Adam Derksen – Site Superintendent, Southern Zone;
* Cherie Ellis – Human Resources Manager;
* Peter Barnes – Site Superintendent, Northern Zone;
* Bradley Carberry – Site Foreman.

## 8 March 2018

1. At approximately 8.30 am on Thursday 8 March 2018, Mr Pauls, Mr Seiffert and Mr Albert attended at the Site Office and told Mr Derksen and Mr Barnes that they wished to enter the Site pursuant to s 81(3) of the WHS Act.
2. Mr Derksen and Mr Barnes said to Mr Pauls, Mr Seiffert and Mr Albert words to the effect that they were not permitted to enter the Site without producing entry permits, and requested that each of Mr Pauls, Mr Seiffert and Mr Albert produce for inspection their entry permits. Each of Mr Pauls, Mr Seiffert and Mr Albert refused to and did not produce their entry permits. Notwithstanding this they subsequently entered and walked around parts of the Site.
3. The respondents admit the entry by each of Mr Pauls, Mr Seiffert and Mr Albert, and further admit that the entry was made pursuant to s 81(3) of the WHS Act.

## 9 April 2018

1. At approximately 7.40 am on Monday 9 April 2018, Mr Pauls, Mr Seiffert and Mr Hynes attended at the Site Office and told Ms Ellis and Mr Derksen that they wished to enter the Site pursuant to s 81(3) of the WHS Act. Ms Ellis told Mr Pauls, Mr Seiffert and Mr Hynes in effect that they were not permitted to enter the Site without producing entry permits and requested that they produce their entry permits for inspection. Each of Mr Pauls, Mr Seiffert and Mr Hynes refused to and did not produce their entry permits. Notwithstanding this they subsequently entered, walked and drove around parts of the Site.
2. The respondents admit the entry by each of Mr Pauls, Mr Seiffert and Mr Hynes, and further admit that the entry was made pursuant to s 81(3) of the WHS Act.

## 10 April 2018

1. At approximately 8.15 am on Tuesday 10 April 2018, Mr Pauls and Mr Seiffert attended at the Site Office and, in a separate meeting room, told Ms Ellis and Mr Derksen that they wished to enter the Site pursuant to s 81(3) of the WHS Act. Ms Ellis said to Mr Pauls and Mr Seiffert words to the effect that they were not permitted to enter the Site without producing entry permits and requested that each of Mr Pauls and Mr Seiffert produce their entry permits for inspection. Each of Mr Pauls and Mr Seiffert refused to and did not produce their entry permits. Notwithstanding this they subsequently entered, and walked and drove around, parts of the Site.
2. Further, during their time on the Site, each of Mr Pauls and Mr Seiffert refused to produce entry permits when requested by Mr Carberry, and refused requests of Mr Carberry to wait and not walk around the Site until the Superintendent had been called. They also walked around the Site, refused requests from Mr Derksen to leave the Site and failed to comply with several requests from police to leave the Site, resulting in their arrest for trespassing. The charges of trespass against Mr Pauls and Mr Seiffert were subsequently discontinued. The SOAF annexed an email dated 7 June 2018 at 4:24:01 pm from the Senior Sergeant of the Sunshine Coast Police Prosecution Corps to, *inter alia*, the lawyers for the respondents, in which (materially) the following was stated:

I have finalised my determination in relation to your clients.

I have determined that in this instance, and only on a Public Interest basis, that I am agreeable to discontinue the charges against your clients.

This decision should in no way be regarded, or used as a basis to suggest that the sufficiency of evidence test was not adequately addressed in my deliberations.

1. The parties agree that the entries by each of Mr Pauls and Mr Seiffert were made pursuant to s 81(3) of the WHS Act.

## 11 April 2018

1. At approximately 8.45 am on Wednesday 11 April 2018, Mr Pauls, Mr Seiffert, Mr Hynes and Mr Gibson attended at the Site Office. In a separate meeting room they told Ms Ellis and Mr Derksen that they wished to enter the Site pursuant to s 81(3) of the WHS Act. Ms Ellis said to Mr Pauls, Mr Seiffert, Mr Hynes and Mr Gibson words to the effect that they were not permitted to enter the Site without producing entry permits and requested that each of Mr Pauls, Mr Seiffert, Mr Hynes and Mr Gibson produce their entry permits for inspection.
2. Each of Mr Pauls, Mr Seiffert, Mr Hynes and Mr Gibson refused to and did not produce their entry permits. Notwithstanding this they subsequently entered, and walked and drove around, parts of the Site.
3. During their time on the Site, Mr Seiffert and Mr Hynes refused a request from Mr Carberry to produce for inspection their entry permits and failed to comply with the OHS Requirements by entering a part of the Site identified as an "exclusion zone" restricted to authorised persons.
4. Further, each of Mr Pauls and Mr Gibson refused a request from Mr Derksen to leave the Site.
5. Mr Pauls, Mr Seiffert, Mr Hynes and Mr Gibson failed to comply with the OHS Requirements by walking around the Site without supervision or accompaniment by an inducted Site representative, despite requests that this not occur.
6. Mr Pauls, Mr Hynes and Mr Gibson failed to comply with a request from Mr Derksen that they not pull up in a vehicle, get out and stand around on a live access haul road.
7. The entries by each of Mr Pauls, Mr Seiffert, Mr Hynes and Mr Gibson were made pursuant to s 81(3) of the WHS Act.

## 12 April 2018

1. Between approximately 7.30 am and 8.15 am on Thursday 12 April 2018, Mr Seiffert, Mr Hynes and Mr Gibson attended at the Site Office. In a separate meeting room, they told Ms Ellis that they wished to enter the Site pursuant to s 81(3) of the WHS Act.
2. Ms Ellis told Mr Seiffert, Mr Hynes and Mr Gibson words to the effect that they were not permitted to enter the Site without producing entry permits, and requested that they produce their entry permits for inspection.
3. Each of Mr Seiffert, Mr Hynes and Mr Gibson refused to and did not produce their entry permits, and subsequently entered and walked around parts of the Site.
4. During their time on the Site, each of Mr Seiffert, Mr Hynes and Mr Gibson refused a request from Mr Derksen to produce for inspection their entry permits. They refused a request from Mr Derksen to leave the Site, and failed to comply with the OHS Requirements by walking around the Site without supervision or accompaniment by an inducted Site representative.
5. Mr Seiffert, Mr Hynes and Mr Gibson also failed to comply with requests from police to leave the Site, resulting in their arrest for trespassing. The charges of trespass against Mr Seiffert, Mr Hynes and Mr Gibson were subsequently discontinued on a public interest basis.
6. The parties agree that the entry by each of Mr Seiffert, Mr Hynes and Mr Gibson were entries made pursuant to s 81(3) of the WHS Act.

## 13 April 2018

1. At approximately 8.00 am on Friday 13 April 2018, Mr Pauls and Mr Parfitt attended at the Site Office. In a separate meeting room they told Ms Ellis and Mr Barnes that they wished to enter the Site pursuant to s 81(3) of the WHS Act. Ms Ellis responded to the effect that Mr Pauls and Mr Parfitt were not permitted to enter the Site without producing entry permits, and requested that they each produce their entry permits for inspection. Mr Pauls and Mr Parfitt refused to and did not produce their entry permits. They subsequently entered, walked and drove around, parts of the Site.
2. During their time on the Site, each of Mr Pauls and Mr Parfitt refused a request from Mr Peter Kelly (Senior Project Engineer) to leave the Site, and refused numerous requests from Mr Barnes to leave the Site. Mr Pauls and Mr Parfitt failed to comply with the OHS Requirements by failing to comply with requests from Mr Kelly and Mr Barnes that they remain with their vehicles and not walk around the work area.
3. Mr Pauls and Mr Parfitt were ultimately charged by police with trespass. The charges of trespass against Mr Pauls and Mr Parfitt were subsequently discontinued on a public interest basis.
4. The entry by each of Mr Pauls and Mr Parfitt was an entry made pursuant to s 81(3) of the WHS Act.

## 16 April 2018

1. At approximately 8.30 am on Monday 16 April 2018, Mr Pauls and Mr Seiffert attended at the Site Office. In a separate meeting room they told Ms Ellis and Mr Barnes that they wished to enter the Site pursuant to s 81(3) of the WHS Act. Ms Ellis responded to the effect that Mr Pauls and Mr Seiffert were not permitted to enter the Site without producing entry permits, and requested that they produce their entry permits for inspection.
2. Each of Mr Pauls and Mr Seiffert refused to and did not produce their entry permits, and subsequently entered and walked around parts of the Site.
3. During their time on the Site, each of Mr Pauls and Mr Seiffert failed to comply with requests from police to leave the Site, resulting in them being issued with Notices to Appear for trespassing. The charges of trespass against Mr Pauls and Mr Seiffert were subsequently discontinued on a public interest basis.
4. The entry by each of Mr Pauls and Mr Seiffert was an entry made pursuant to s 81(3) of the WHS Act.

## 17 April 2018

1. At approximately 8.00 am on Tuesday 17 April 2018, Mr Pauls, Mr Parfitt and Mr Kupsch attended the Site Office. In a separate meeting room they told Ms Ellis, Mr Derksen and Mr Seann Cuffe (a Safety Adviser) that they wished to enter the Site pursuant to s 81(3) of the WHS Act.
2. Ms Ellis told Mr Pauls, Mr Parfitt and Mr Kupsch words to the effect that they were not permitted to enter the Site without producing entry permits, and requested them to produce their entry permits for inspection. Mr Pauls, Mr Parfitt and Mr Kupsch did not produce their entry permits for inspection. They subsequently entered and walked around parts of the Site.
3. During their time on the Site, Mr Pauls, Mr Parfitt and Mr Kupsch refused a request from Mr Carberry to produce their entry permits for inspection, and refused requests from Mr Derksen and Ms Ellis to leave the Site. They entered the bridge deck at Bridge 31, causing Mr Carberry to instruct workers to stop work because he was concerned that the presence of Messrs Pauls, Parfitt and Kupsch could create a safety hazard. As a result, work stopped for approximately 2 hours from 9.00 am.
4. Messrs Pauls, Parfitt and Kupsch failed to comply with requests from police to leave the Site. They were arrested for trespassing, however the charges were discontinued on public interest grounds.
5. Further, Mr Pauls failed to comply with the OHS Requirements by walking around the Site without supervision or accompanied by an inducted Site representative, and entering a part of the Site identified as an “exclusion zone” restricted to authorised persons.
6. The entry by Messrs Pauls, Parfitt and Kupsch was pursuant to s 81(3) of the WHS Act.

## 18 April 2018

1. At approximately 8.15 am on Wednesday 18 April 2018, Mr Pauls and Mr Seiffert attended at the Site Office. They told Mr Derksen and Ms Monique Turner that they wished to enter the Site pursuant to s 81(3) of the WHS Act.
2. Mr Derksen and Ms Turner told them, in effect, that they were not permitted to enter the Site without producing entry permits. Mr Derksen and Ms Turner requested that Mr Pauls and Mr Seiffert produce their entry permits. Mr Pauls and Mr Seiffert refused to and did not produce their entry permit. They subsequently entered and walked around parts of the Site. The entry by each of Mr Pauls and Mr Seiffert was pursuant to s 81(3) of the WHS Act.

# Submissions of the Commissioner

1. As I noted earlier, the Commissioner accepts that if the Court finds that, in entering the Site, the individual respondents did not exercise a State or Territory OHS right within the meaning of s 494(2) of the FW Act, the application should be dismissed. However, the Commissioner further submits that if the individual respondents did exercise a State or Territory OHS right, the contraventions of ss 494(1) and 497 of the FW Act are established on the basis of the SOAF.
2. The Commissioner submits that further issues for resolution regarding contraventions of s 500 of the FW Act are as follows:
* In the circumstances admitted in paragraphs 32 and 33 of the SOAF, did Mr Seiffert act in an improper manner and thereby contravene s 500 of the FW Act?
* In the circumstances admitted in paragraphs 37 and 38 of the SOAF, did Messrs Seiffert, Hynes and/or Gibson act in an improper manner and thereby contravene s 500 of the FW Act?
* In the circumstances admitted in paragraphs 42 and 43 of the SOAF, did Messrs Seiffert, Hynes and/or Gibson act in an improper manner and thereby contravene s 500 of the FW Act?
* In the circumstances admitted in paragraphs 47 and 48 of the SOAF, did Mr Parfitt act in an improper manner and thereby contravene s 500 of the FW Act?
* In the circumstances admitted in paragraphs 52 and 53 of the SOAF, did Mr Seiffert act in an improper manner and thereby contravene s 500 of the FW Act?
* In the circumstances admitted in paragraphs 57 and 58 of the SOAF, did Messrs Parfitt and/or Kupsch act in an improper manner and thereby contravene s 500 of the FW Act?
* Was the CFMMEU directly or indirectly knowingly concerned in any or all of the contraventions established against the individual respondents, so that it too also contravened each of the relevant provisions?
* Was Mr Pauls liable as an accessory in relation to any or all of the contraventions established against the individual respondents, so that he too contravened each of the relevant provisions?
1. In relation to whether s 81(3) of the WHS Act confers a State or Territory OHS right, the Commissioner contends, in summary:
* The respondents admit that each of the relevant entries were made pursuant to s 81(3) of the WHS Act;
* The WHS Act is a “State or Territory OHS law” for the purposes of the definition in s 494(2) of the FW Act;
* The question ultimately becomes whether s 81(3) of the WHS Act confers on the “representative” referred to in s 81(3) a “right to enter premises” within the meaning of s 494(2) of the FW Act;
* It was not clear to the Commissioner why the question was in dispute given that s 81(3) confers on the “representative” a “right” to enter premises, and the nature of the function undertaken by the representative pursuant to s 81(3) does not take that function out of the statutory right of entry regime regulated by the FW Act;
* Based on this analysis, the contraventions of s 494(1) alleged against Mr Pauls, and s 497 alleged against Messrs Seiffert, Albert, Hynes, Gibson, Parfitt and Kupsch were established;
* Section 494 was considered by the Full Court in *Australian Building and Construction Commissioner v Powell* [2017] FCAFC 89; (2017) 251 FCR 470 in respect of s 58(1)(f) of the *Occupational Health and Safety Act 2004* (Vic). In that case the Full Court found that a relevant right was created;
* Contrary to the submissions of the respondents and the Minister, the right under s 81(3) is capable of being enforced.
1. In relation to the allegations of contravention of s 500 of the FW Act, the Commissioner contends that:
* The only issue in apparent dispute is whether, in acting as admitted on each of the relevant days, the individual respondents acted in an improper manner within the meaning of s 500;
* One aspect of acting in an improper manner concerned the exercise of rights of entry in circumstances where the relevant permit holders had not produced their entry permit for inspection upon request thereby contravening s 497 of the FW Act. This contravention of s 497 should be considered in conjunction with other circumstances in each case, and constitute acting in an “improper manner”.
1. In relation to accessorial liability:
* The CFMMEU was liable as an accessory to each of the right of entry contraventions alleged against each individual respondent pursuant to s 550 of the FW Act, because the individual respondents knew of the facts making their conduct a contravention of the FW Act, and their conduct and knowledge were attributed to the CFMMEU;
* Mr Pauls was liable as an accessory for each of the right of entry contraventions alleged against the other individual respondents because, with the exception of the entry on 12 April 2018, Mr Pauls was there in company with the individual respondent contraveners, engaging in the same or similar acts and either leading or supporting their stated positions and actions. Mr Pauls also knew of those facts and acts of the contraveners.

# Submissions of the Respondents

1. In relation to the issue of “exercising rights” and “State or Territory OHS rights” the respondents submit, in summary:
* Section 81(3) of the WHS Act does not create or confer a right to enter premises on a trade union official (or anyone else);
* Contraventions of ss 494, 497 and 500 have a common element, namely the “exercise” of a “right”;
* Section 81(3) falls to be construed by reference to the language of the WHS Act viewed as a whole;
* Section 81(3) is contained in Pt 5 of the WHS Act which is concerned with consultation about work health and safety issues, and the representation and participation of workers in relation to those issues;
* The ability of a representative of a party to enter the workplace to have discussions about the issue in dispute is not referable to any entitlement to be represented during the course of issue resolution. Properly understood, s 81(3) is no more than facilitative;
* Failure to allow a representative on site is not enforceable. Absent such a power there is no right to enter premises created by s 81(3). Where the WHS Act intended to create a right, legal authority or legal entitlement it did so only by a correlative provision that ensured its enforceability;
* The Industrial Relations Commission is empowered by Div 7A of Pt 5 of the WHS Act to resolve disputes about WHS matters, which are defined exhaustively by s 102A of the WHS Act. A dispute or issue about entry on to premises under s 81(3) is not a matter which can be dealt with by the Industrial Relations Commission.
* Contrary to the submissions of the Commissioner, because s 58(1)(f) of the Victorian legislation examined by the Full Court in *Powell* is so different from s 81(3) of the WHS Act, *Powell* is distinguishable.
* Section 267(a) of the WHS Act makes clear that s 81(3) confers no right or entitlement to enter premises.

# Submissions of the Minister

1. The Minister supports the position of the respondents that the application should be dismissed. In particular the Minister submitted:
* Part 7 of the WHS Act provides for rights of entry for workplace health and safety issues, and sets up a scheme providing for rights of entry in similar terms to that contained in Div 2 of the FW Act;
* Part 7 does not include s 81(3) of the WHS Act;
* The main operative provision in the WHS Act is s 117. Section 118 sets out what may be done when a right of entry under s 117 is exercised;
* The power to enter for consultation about suspected contraventions in s 118(1)(b) is supplemented by a power in s 121(1) to enter for the purpose of consulting with and advising workers on work health and safety matters;
* Section 124 makes provision in similar terms to s 494(1) of the FW Act, restraining WHS entry permit holders from entering a workplace unless they also held entry permits under the FW Act;
* Division 5 of the WHS deals with “issue resolution”, and includes s 81. Section 23 of the *Work Health and Safety Regulation 2011* (Qld) (**WHS Regulation**) sets out a default procedure referred to in s 81(2);
* Section 81(3) does not permit a person to enter premises to speak to employees generally, or to speak to employees about safety matters generally. The “discussions” referred to in s 81(3) are those discussions required by s 81 for the purpose of resolving the issue that has arisen;
* For s 81(3) to be engaged there must first be an “issue”. The parties must engage with each other to attempt to resolve the issue, and for that purpose may be represented by a person nominated by them. Section 81(3) permits any such person appointed by a party to represent them in discussions to enter the site. If the discussions are not taking place on the site, s 81(3) will not be engaged;
* Any person representing a worker in discussions for the purpose of s 81 may go into a workplace for a different and more limited purpose than that provided for under either Pt 7 or Div 3, and does not enjoy any of the powers given to persons who do so for those purposes. All that a representative taking part in discussions under s 81 may do is to take part in those discussions to try and resolve the issue that has arisen;
* The WHS Act is a law of Queensland prescribed by reg 3.25 of the *Fair Work Regulations 2009* (Cth), and accordingly is a State or Territory OHS law within the meaning of s 494(2) of the FW Act. Whatever “right” is given by s 81(3) of the WHS Act, s 494(1) will apply to it if it is a “right to enter premises, or to inspector otherwise access an employee record of an employee that is on premises” within the meaning of s 494(2);
* In *Powell,* the Full Court considered a provision of Victorian legislation which was not equivalent to s 81(3) of the WHS Act. The decision of the Full Court in *Powell* is distinguishable;
* Section 81(3) does not grant a “right of entry” in any real sense. There is no entitlement on the part of a representative to instigate an entry;
* For a representative to be allowed by s 81(3) to enter, at least four preconditions must be present. Those preconditions are:
	1. An issue relating to work health and safety must have arisen;
	2. The employer and employees embarked on their obligations under s 81(2) to discuss the issue to attempt to resolve it;
	3. One of the parties appointed a person to represent them in the discussions; and
	4. The discussions must be being held on the relevant premises.

None of these things are within the control of the representative and if the representative is denied entry, he or she has no power to enforce entry.

# Relevant legislation

1. The key statutory provisions in dispute in this case are s 81(3) of the WHS Act, read with ss 494, 497 and 500 of the FW Act.
2. Section 81 of the WHS Act provides as follows:

**Resolution of Health and Safety Issues**

(1) This section applies if a matter about work health and safety arises at a workplace or from the conduct of a business or undertaking and the matter is not resolved after discussion between the parties to the issue.

(2) The parties must make reasonable efforts to achieve a timely, final and effective resolution of the issue in accordance with the relevant agreed procedure, or if there is no agreed procedure, the default procedure prescribed under a regulation.

(3) A representative of a party to an issue may enter the workplace for the purpose of attending discussions with a view to resolving the issue.

1. Section 494 of the FW Act provides:

**Official must be permit holder to exercise State or Territory OHS right**

*Official must be permit holder*

(1) An official of an organisation must not exercise a State or Territory OHS right unless the official is a permit holder.

Note: This subsection is a civil remedy provision (see Part 4-1).

*Meaning of State or Territory OHS right*

(2) A right to enter premises, or to inspect or otherwise access an employee record of an employee that is on premises, is a State or Territory OHS right if the right is conferred by a State or Territory OHS law, and:

(a) the premises are occupied or otherwise controlled by any of the following:

(i) a constitutional corporation;

(ii) a body corporate incorporated in a Territory;

(iii) the Commonwealth;

(iv) a Commonwealth authority; or

(b) the premises are located in a Territory; or

(c) the premises are, or are located in, a Commonwealth place; or

(d) the right relates to requirements to be met, action taken, or activity undertaken or controlled, by any of the following in its capacity as an employer:

(i) a constitutional corporation;

(ii) a body corporate incorporated in a Territory;

(iii) the Commonwealth;

(iv) a Commonwealth authority; or

(e) the right relates to requirements to be met, action taken, or activity undertaken or controlled, by an employee of, or an independent contractor providing services for, any of the following:

(i) a constitutional corporation;

(ii) a body corporate incorporated in a Territory;

(iii) the Commonwealth;

(iv) a Commonwealth authority; or

(f) the exercise of the right will have a direct effect on any of the following in its capacity as an employer:

(i) a constitutional corporation;

(ii) a body corporate incorporated in a Territory;

(iii) the Commonwealth;

(iv) a Commonwealth authority; or

 (g) the exercise of the right will have a direct effect on a person who is employed by, or who is an independent contractor providing services for, any of the following:

(i) a constitutional corporation;

(ii) a body corporate incorporated in a Territory;

(iii) the Commonwealth;

(iv) a Commonwealth authority.

*Meaning of State or Territory OHS law*

(3) A State or Territory OHS law is a law of a State or a Territory prescribed by the regulations.

1. Section 497 of the FW Act provides:

*Producing entry permit*

A permit holder must not exercise a State or Territory OHS right unless the permit holder produces his or her entry permit for inspection when requested to do so by the occupier of the premises or an affected employer.

Note: This section is a civil remedy provision (see Part 4-1).

1. Section 500 of the FW Act provides:

*Permit holder must not hinder or obstruct*

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

Note 1: This section is a civil remedy provision (see Part 4-1).

Note 2: A permit holder, or the organisation to which the permit holder belongs, may also be subject to an order by the FWC under section 508 if rights under this Part are misused.

Note 3: A person must not intentionally hinder or obstruct a permit holder, exercising rights under this Part (see section 502).

# Whether State or Territory OHS right exercised

1. The key issue in this case is whether, in entering the Site on relevant days pursuant to s 81(3) of the WHS Act, the individual respondents were exercising a “State or Territory OHS right” within the meaning of s 494(2) of the FW Act. Section 494(1) specifically provides that an official of an organisation must not exercise a State or Territory OHS right unless the official is a permit holder, and s 497 specifically provides that a permit holder must not exercise a State or Territory OHS right unless the permit holder produces his or her entry permit for inspection when requested to do so by the occupier of the premises or an affected employer. The respondents concede that all relevant entries were made by individual respondents “pursuant to” s 81(3), and that even though the second to eighth respondents all held entry permits none of them produced permits in accordance with s 497 of the FW Act. The respondents deny that s 81(3) created a “***right***” referable to those entries within the meaning of s 494.
2. In essence, this is also the position of the Minister.
3. The Commissioner relied on the Full Court’s decision in *Powell*, which both the respondents and the Minister contend is distinguishable. It is convenient at this point to turn to *Powell* and the findings of the Full Court in that case.

## *Powell*

1. In *Powell,* the Full Court considered the proper construction of s 494 of the FW Act, and whether ss 58 and 70 of the *Occupational Health and Safety Act 2004* (Vic) (**OHS Act**) conferred a right to enter premises on a union official (Mr Michael Powell) for the purposes of s 494 of the FW Act.
2. The evidence showed that on a number of occasions a health and safety representative on a construction project had asked Mr Powell to attend the building site to provide assistance in dealing with various health and safety issues. Mr Powell came on to the site. When challenged and asked for his permit, he asserted that he was on the site to assist the “site rep” with “OHS issues” and did not need a permit. Mr Powell had no permit under Pt 3-4 of the FW Act. Proceedings were commenced by the Commissioner against Mr Powell for asserted contraventions of s 494(1) of the FW Act.
3. As the Full Court explained at [7], the assertion of Mr Powell (and the only basis of his successful defence of the penalty proceedings before the primary judge) was that the provisions of the OHS Act under which he came to be on the relevant site (ss 58(1)(f) and 70) did not confer on him, and he was not exercising, a right to enter premises that was conferred by the OHS Act. The OHS Act was prescribed to be a State OHS law by item 2 of reg 3.25 in the *Fair Work Regulations 2009* (Cth).
4. Section 58 of the OHS Act provided:

*Powers of health and safety representatives*

(1) A health and safety representative for a designated work group may do any of the following—

(a) inspect any part of a workplace at which a member of the designated work group works—

(i) at any time after giving reasonable notice to the employer concerned or its representative; and

(ii) immediately in the event of an incident or any situation involving an immediate risk to the health or safety of any person;

(b) accompany an inspector during an inspection of a workplace at which a member of the designated work group works;

(c) require the establishment of a health and safety committee;

(d) if a member of the designated work group consents, be present at an interview concerning occupational health and safety between—

(i) the member and an inspector; or

(ii) the member and the employer concerned or its representative;

(e) if the health and safety representative is authorised to represent a person mentioned in section 44(1)(e) or 48(1)(e) and that person consents, be present at an interview concerning occupational health and safety between—

(i) the person and an inspector; or

(ii) the person and the employer concerned or its representative;

(f) whenever necessary, seek the assistance of any person.

(2) However, a health and safety representative may do those things only for the purpose of—

(a) representing the members of the designated work group, or persons mentioned in section 44(1)(e) or 48(1)(e) whom the representative is authorised to represent, concerning health or safety; or

(b) monitoring the measures taken by the employer or employers in compliance with this Act or the regulations; or

(c) enquiring into anything that poses, or may pose, a risk to the health or safety of members of the designated work group, or of persons mentioned in section 44(1)(e) or 48(1)(e) whom the representative is authorised to represent, at the workplace or workplaces or arising from the conduct of the undertaking of the employer or undertakings of the employers; or

(d) attempting to resolve (in accordance with section 73) with the employer concerned or its representative any issues concerning the health or safety of members of the designated work group, or of persons mentioned in section 44(1)(e) or 48(1)(e) whom the representative is authorised to represent, that arise at the workplace or workplaces or from the conduct of the undertaking of the employer.

(3) Nothing in this Act or the regulations imposes, or is to be taken to impose, a function or duty on a health and safety representative in that capacity.

1. It was important to consider s 58 with s 70 of the OHS Act, which provided:

*Obligation to persons assisting health and safety representatives*

(1) An employer, any of whose employees are members of a designated work group must allow a person assisting a health and safety representative access to the workplace unless the employer considers that the person is not a suitable person to assist the representative because of insufficient knowledge of occupational health and safety.

(2) If an employer does not allow a person assisting a health and safety representative access to the workplace, the representative may apply to the Magistrates' Court for an order—

(a) directing the employer to allow that access; and

(b) specifying the terms and conditions of that access.

1. At [13] and [14] the Full Court noted key aspects of the OHS Act as follows:

13. The legal characterisation of ss 58 and 70 will be discussed in due course. But it is of utility to note at this point certain salient features of the provisions: Neither section is directed to or mentions union officials. Neither section uses the word “right”, but clearly enough, the HS representative has a power under s 58(1)(f) to seek assistance and to request a union official to come to the work site to assist him or her. The employer owes an obligation to “allow [the] person ... access to the workplace”, unless the employer considers the person unsuitable because of insufficient knowledge of occupational health and safety. This obligation is described by the heading to the section as one owed to the person who is assisting. A statutory right of direct enforcement is given by s 70(2) to the HS representative.

14. From these salient features, the outline of the debate can be perhaps anticipated: that ss 58(1)(f) and 70 do not confer “a right” on the assistant within the meaning of s 494(1) of the FW Act….

1. Despite the different statutory language, I note that the debate identified at [14] in *Powell* is, in essence, the same as is before me in the present proceedings, namely whether respondent was exercising a State or Territory OHS right within the meaning of s 494 of the FW Act.
2. Returning to *Powell*, their Honours observed that, to the extent that a provision is a civil remedy or civil penalty provision, a necessary clarity of meaning should be striven for (at [15]). They also observed that:

15 ….notwithstanding the closely regulated environment of industrial and employment legislation, provisions as to entry on to work sites and the regulation thereof should be construed conformably with the language used by Parliament practically and with an eye to commonsense so that they can be implemented in a clear way on a day-to-day basis at work sites. The legislation needs to work in a practical way at the work site, and if at all possible not be productive of fine distinctions concerning the characterisation of entry on to a site.

1. Their Honours noted that it was clear that Mr Powell considered that he was authorised and entitled by the OHS Act to enter and remain upon the site because he was assisting the health and safety representative pursuant to s 58(1)(f). They noted further that Mr Powell exercised that entitlement by entering the premises without asking the employer, and by refusing to leave when asked to do so because he believed that he was authorised and entitled to remain on the site (at [20]).
2. Mr Powell submitted in summary, that:
* The phrase “right of entry” or “right to enter” was a term of art signifying a provision of an Act that was expressed as giving a union official a right to enter premises in certain circumstances, generally of the kind set out in the awards and relevant legislation.
* When in s 494(2) (and so by incorporation s 494(1)) there is a reference to “[a] right to enter premises” it is a reference to this class of State and Territory provisions.
* It is not apt to refer to provisions of the character of ss 58(1)(f) and 70 of the OHS Act which do not in terms grant “a right of entry” or a “right to enter” (or some similar phrase) to union officials, but operate in respect of the person requested by the health and safety representative to assist under the power to ask “any person”, who may or may not be a union official.
1. The primary Judge in *Powell* found that the assistant did not have a “right” under s 70 within the meaning of s 494(1) of the FW Act, because that subsection required the existence of a “strict legal right” that must be enforceable by the person on whom it is conferred. The Full Court observed:

33. The words of s 70(1), however, are tolerably clear: the employer has a statutory obligation to the person of whom the HS representative has requested assistance to allow access to that person to the workplace. Undoubtedly, the HS representative can enforce the efficacious exercise of his power under s 58(1)(f) by the means contained in s 70(2). One may in the legal lexicon call that a right. But also, it is difficult to see how the statutory obligation upon the employer to allow access to the person assisting is not a legal authorisation to, or a legal entitlement of, that person to enter the premises and have access to the extent that it is necessary for his or her giving of assistance to the HS representative. That statutory entitlement or authorisation would be a defence to any claim or charge of civil or criminal trespass. The statutory entitlement or authorisation can be legitimately described as a right to enter and be on the premises, that is the workplace.

34. In practical terms, there is little doubt that someone on the work site having been asked by the HS representative to come to the site to assist that representative who was challenged about his or her presence there, could say, as a matter of plain English: “You are obliged by law to allow me to enter and have access; I have an entitlement to access, and so an entitlement or right to enter (unless you form the view that I am unqualified)”.

35. Alternatively, or indeed in addition, the right can be seen as a right of the HS representative to have the assistant enter. That is a right to enter that can be exercised by the assistant, albeit in a derivative sense (to use the phraseology of the Solicitor-General’s submissions), at the request of the HS representative.

36. On either of these views, the state OHS law confers a right to enter premises that is exercised by the assistant.

1. The Full Court then turned to the question whether the right to enter premises referred to in s 494 was a right contemplated by ss 58(1)(f) and 70 of the OHS Act, or only included rights of a representational character conferred on union officials to enter premises for the kinds of reasons identified in the State and Territory legislation (for example, Pt 8 of the OHS Act which dealt with authorised representatives of registered employee organisations, and s 87 of the OHS Act which provided that authorised representatives who reasonably suspected that a contravention of the legislation had occurred could enter the place during working hours to enquire into the reputed contravention). After examining relevant provisions the Court continued:

56. The words of s 494(1) prohibit an official of an organisation (Mr Powell is such a person) from exercising a right to enter premises if the right is conferred by a State OHS law (the *2004 Victorian Act* is such a law). Those plain words are apt and ample to cover the matters in para (a) of s 480, the objects clause; but they reach also to apply to the official of an organisation exercising his or her right to enter and have access to the premises or the HS representative’s right to have him or her enter and have access to the premises, he or she having been the person asked by the HS representative for assistance.

57. To apply the words of s 494(1) and (2) to the operation of ss 58(1)(f) and 70 of the *2004 Victorian Act* in no way undermines the statutory object of s 494 and Pt 3-4 set out in s 480. Indeed it reinforces it. The plain purpose is to regulate by permit the lawful entry of officials of organisations on to workplace sites in respect of rights of entry given by Commonwealth, State or Territory legislation. ***There is no reason of policy or commonsense why one would distinguish between differently worded conditions that by their operation provided a right to enter premises for occupational health and safety reasons, to require a permit if the official has a reasonable suspicion of a contravention of a State or Territory or Commonwealth law about occupational health and safety, but not to require a permit if the official is asked to assist an HS representative deal with an issue about occupational health and safety, which may or may not have a connection with such a contravention***.

58. To make such a distinction would lead to practical confusion at the workplace site in circumstances where such confusion may lead to allegations of trespass and the involvement of the police, as occurred here. Such practical confusion would tend to reduce the utility of Part 3-4.

59. The plain words of s 494(1) and (2) and the construction of ss 58(1)(f) and 70 of the 2*004 Victorian Act* mean that Mr Powell as an official of an organisation required a permit under the FW Act to enter the premises because he was exercising his right to enter the premises or the HS representative’s right to have him enter the premises to assist the HS representative in his task.

(Emphasis added.)

1. Finally, the Full Court noted the conclusion at first instance that only strict legal rights of a representational character were encompassed by the phrase “right to enter”, however considered that in that case there had been the exercise of a so-called strict legal right, and that the right did not have to be characterised as strictly representational as the primary Judge had found.

## This case

1. While s 81(3) of the WHS Act is not in equivalent terms to s 58(1)(f) of the OHS Act, I am satisfied that s 81(3) creates a “legal right” for the purposes of ss 494 and 497 of the FW Act. I have formed this view the following reasons.
2. First, as the Commissioner submits, and as is clearly demonstrated by the facts to which the respondents agreed, individual respondents attended at the Site day after day after day, asserting an entitlement to enter the Site under s 81(3) of the WHS Act without showing an entry permit as requested at the time. As a general principle, I agree with the Commissioner that it would be a nonsense to accept the argument advanced by the respondents (and the Minister) that, in so attending, the respondents had proceeded on the assumption that s 81(3) conferred ***no*** right of entry on anyone (including them), and was completely unenforceable by anyone. Indeed, the fact that all individual respondents refused to leave the Site despite being asked by representatives of the joint venturers to do so indicates that the individual respondents believed that they had exercised a right to enter the Site in accordance with s 81(3) of the WHS Act.
3. Second, it is necessary to consider the appropriate construction of s 81(3) in the context of the WHS Act itself. In *Workpac Pty Ltd v Skene* [2018] FCAFC 131; (2018) 362 ALR 311 where the Full Court examined the meaning of the phrase “casual employee” they made the following observations:

105. …Ordinarily, the meaning of an undefined expression is discerned by reference to the language of the Act viewed as a whole. As French CJ, Hayne, Kiefel, Gageler and Keane JJ said in *Thiess v Collector of Customs* [2014] HCA 12; (2014) 250 CLR 664 at [22], the task of statutory construction involves the attribution of meaning to statutory text. It is a task which must begin with the consideration of the text itself, but the meaning of the text must be construed by reference to context and legislative purpose of the provision. Similar guidance emphasising the need to discern the statutory purpose of a provision was given by Kiefel CJ, Nettle and Gordon JJ in *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34 at [39] where their Honours said that “integral” to the making of constructional choices “is discernment of statutory purpose”. Similar guidance also is derived from *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 at [47] (Hayne, Heydon, Crennan and Kiefel JJ).

106. It is ordinarily considered a sound rule of construction that the same word appearing in different parts of a statute should be given the same meaning. Such an assumption is a logical starting point or a sensible working hypothesis, particularly where an expression is used in the same division or in closely proximate provisions of a statute. However, it is not an assumption that is to be rigidly adopted and it may be rebutted where the context, purpose or surrounding text provide reason to do so. Whether the context, purpose or surrounding text so require must be considered on a case by case basis…

1. Part 7 of the WHS Act is entitled “WORKPLACE ENTRY BY WHS ENTRY PERMIT HOLDERS” and includes s 117(1) which provides that a WHS entry permit holder may enter a workplace for the purpose of inquiring into a suspected contravention of the Act that relates to or affects, a relevant worker. Section 118 of the WHS Act sets out what may be done when a right of entry under Pt 7 Div 2 (which includes s 117) is exercised. Penalties apply under Pt 7 of the WHS Act for refusing entry to a permit holder and for hindering or obstructing a permit holder: s 144 WHS Act.
2. Part 5 of the WHS Act is entitled “CONSULTATION, REPRESENTATION AND PARTICIPATION”. Part 5 Div 3, which includes s 81(3), is entitled “DIVISION 3 - HEALTH AND SAFETY REPRESENTATIVES” and sets up a regime of health and safety representatives at workplaces. Section 68 sets out powers and functions of health and safety representatives including to represent the workers in the work group in matters relating to work health and safety (s 68(1)(a)). Section 70 sets out obligations of persons conducting businesses or undertakings, and provides:

(1) The person conducting a business or undertaking must—

(a) consult, so far as is reasonably practicable, on work health and safety matters with any health and safety representative for a work group of workers carrying out work for the business or undertaking; and

(b) confer with a health and safety representative for a work group, whenever reasonably requested by the representative, for the purpose of ensuring the health and safety of the workers in the work group; and

(c) allow any health and safety representative for the work group to have access to information that the person has relating to—

(i) hazards (including associated risks) at the workplace affecting workers in the work group; and

(ii) the health and safety of the workers in the work group; and

Note—

The issue resolution procedures in division 5, and the dispute resolution process in division 7A, can be used to resolve a dispute arising in relation to paragraph (c).

(d) with the consent of a worker that the health and safety representative represents, allow the health and safety representative to be present at an interview concerning work health and safety between the worker and—

(i) an inspector; or

(ii) the person conducting the business or undertaking at that workplace or the person’s representative; and

(e) with the consent of 1 or more workers that the health and safety representative represents, allow the health and safety representative to be present at an interview concerning work health and safety between a group of workers, which includes the workers who gave the consent, and—

(i) an inspector; or

(ii) the person conducting the business or undertaking at that workplace or the person’s representative; and

(f) provide any resources, facilities and assistance to a health and safety representative for the work group that are reasonably necessary or prescribed under a regulation to enable the representative to exercise his or her powers or perform his or her functions under this Act; and

(g) ***allow a person assisting a health and safety representative for the work group to have access to the workplace if that is necessary to enable the assistance to be provided***; and

(h) permit a health and safety representative for the work group to accompany an inspector during an inspection of any part of the workplace where a worker in the work group works; and

(i) provide any other assistance to the health and safety representative for the work group that may be required under a regulation.

Maximum penalty—100 penalty units.

(2) The person conducting a business or undertaking must allow a health and safety representative to spend the time reasonably necessary to exercise his or her powers and perform his or her functions under this Act.

Maximum penalty—100 penalty units.

(3) Any time that a health and safety representative spends for the purposes of exercising his or her powers or performing his or her functions under this Act must be with the pay that he or she would otherwise be entitled to receive for performing his or her normal duties during that period.

(Emphasis added.)

1. Subsections 71(4) and (5) provide exceptions to the obligations under s 70(1), including where a representative has had his or her WHS entry permit revoked or suspended (s 71(4)) and on reasonable grounds (s 71(5)).
2. Dispute resolution procedures are set out in ss 22 and 23 of the WHS Regulation. They provide:

**22 Agreed procedure—minimum requirements**

(1) This section sets out minimum requirements for an agreed procedure for issue resolution at a workplace.

(2) The agreed procedure for issue resolution at a workplace must include the steps set out in section 23.

(3) A person conducting a business or undertaking at a workplace must ensure that the agreed procedure for issue resolution at the workplace—

(a) complies with subsection (2) ; and

(b) is set out in writing; and

(c) is communicated to all workers to whom the agreed procedure applies.

Maximum penalty—36 penalty units.

**23 Default procedure**

(1) This section sets out the default procedure for issue resolution for section 81(2) of the Act.

(2) Any party to the issue may commence the procedure by telling each other party—

(a) that there is an issue to be resolved; and

(b) the nature and scope of the issue.

(3) As soon as parties are told of the issue, all parties must meet or communicate with each other to attempt to resolve the issue.

(4) The parties must have regard to all relevant matters including the following—

(a) the degree and immediacy of risk to workers or other persons affected by the issue;

(b) the number and location of workers and other persons affected by the issue;

(c) the measures (both temporary and permanent) that must be implemented to resolve the issue;

(d) who will be responsible for implementing the resolution measures.

(5) A party may, in resolving the issue, be assisted or represented by a person nominated by the party.

(6) If the issue is resolved, details of the issue and its resolution must be set out in a written agreement if any party to the issue requests this.

Note—

Under the Act, *parties* to an issue include not only a person conducting a business or undertaking, a worker and a health and safety representative, but also representatives of these persons, see section 80 of the Act .

(7) If a written agreement is prepared all parties to the issue must be satisfied that the agreement reflects the resolution of the issue.

(8) A copy of the written agreement must be provided to—

(a) all parties to the issue; and

(b) if requested, to the health and safety committee for the workplace.

(9) For the avoidance of doubt, nothing in this procedure prevents a worker from bringing a work health and safety issue to the attention of the worker’s health and safety representative.

1. Section 80 of the WHS Act defines “parties to an issue” for the purposes of Pt 5 Div 5 of the WHS Act as follows:

 (1) In this division, **parties**, in relation to an issue, means the following—

(a) the person conducting the business or undertaking or the person’s representative;

(b) if the issue involves more than 1 business or undertaking, the person conducting each business or undertaking or the person’s representative;

(c) if the worker or workers affected by the issue are in a work group, the health and safety representative for that work group or his or her representative;

(d) if the worker or workers affected by the issue are not in a work group, the worker or workers or their representative.

(2) A person conducting a business or undertaking must ensure that the person’s representative (if any) for the purposes of this division—

(a) is not a health and safety representative; and

(b) has an appropriate level of seniority, and is sufficiently competent, to act as the person’s representative.

1. Although not specifically stated in s 81, the “discussions” referred to in ss 81(1) and (3) appear to refer to the procedure in s 81(2), as explained further in ss 22 and 23.
2. The respondents and the Minister refer in their submissions to the very limited nature of s 81(3), including the limited purpose for the entry compared with reasons for entry contemplated by Pt 7 or Pt 5 Div 3, that s 81(3) does not constitute permission to participate in discussions held for any other purpose or to speak to employees, and that a representative under s 81(3) does not go into a workplace enjoying any of the powers given to persons under Pt 7 or Pt 5 Div 3. They further submit that a representative under s 81(3) does not have powers akin to that of a health and safety representative under s 70, and that there is no express obligation on an employer or occupier of premises to allow entry under s 81(3). It follows, in the submission of the respondents and the Minister, that a representative under s 81(3) does not have the same potential to impact on the workplace, or the conduct of the business of the employer, as a health and safety representative.
3. Having regard to all of these legislative provisions, I am not persuaded that the structure of the WHS Act, read with the WHS Regulation, requires a conclusion that s 81(3) creates no rights in respect of the access by the representative to the workplace. In particular:
* That there is detailed provision in the WHS Act for health and safety representatives – including their powers, and the obligation of an employer or occupier of premises to allow them access – is in my view of minimal relevance to the question whether a representative of a party has a right to enter a workplace pursuant to s 81(3) of the WHS Act. The representative referred to in s 81(3) is not a health and safety representative. To find that there are no rights associated with a representative in respect of s 81(3), simply because, in a different part of the WHS Act, detailed provision is made for powers and rights of a different type of representative, would in my view be an incorrect approach to the construction of s 81(3).
* That the purpose for which the representative is entitled to enter the workplace pursuant to s 81(3) is limited is, in my view, irrelevant. Section 81(3) appears in a Division of the WHS Act dealing with resolution of work safety issues. Part 5 Div 3 of the WHS Act, and Pt 2.2 of the WHS Regulation, deal specifically with issue resolution. There must be either an agreed procedure for resolution of work health and safety issues or the default procedure set out in s 23 of the WHS Regulation applies. Importantly as soon as parties are told of the issue, all parties **must** meet or communicate with each other to attempt to resolve the issue (s 23(3)). No place of the meeting is prescribed by either the WHS Act or the WHS Regulation, however if the place of the meeting to discuss the issue is determined by the parties to be the workplace, then under the terms of s 81(3) the representative of a party to the issue is entitled to enter the workplace for the purpose of attending discussions with a view to resolving the issue.
* I do not accept, to the extent that a representative may enter for the purpose identified by s 81(3) (that is, attending discussions), that s 81(3) is “merely facilitative” rather than referable to the existence of a right. As I have already indicated, that the entry of the representative is for a limited purpose is neither here nor there. The respondents relied on the discussion of “facilitative provisions” by Bromberg J in *Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees Union (No 2)* [2016] FCA 2; (2016) 259 IR 164 at [142] and I note that his Honour in turn referred to observations of Merkel J in *Finance Sector Union of Australia v Commonwealth Bank of Australia* [2005] FCA 796; (2005) 147 FCR 158 at [78]. In *Finance Sector,* Merkel J referred to “facilitative provisions” as those that provide for the parties to agree upon the details of the manner in which a particular clause is to operate, however his Honour was considering this issue in the context of the general requirement of the statutory scheme for certification that an agreement contain all necessary terms in the context of the now-repealed s 521 of the *Workplace Relations Act 1996* (Cth). In that respect his Honour opined that a facilitative provision was unlikely to affect the Commission’s ability to be satisfied that the pre-conditions to certification of an agreement had been met. In *Teys*, Bromberg J’s consideration of facilitative provisions concerned the prospect of the parties’ agreement upon the details of the manner in which a particular clause in an enterprise agreement was to operate. However I also note that his Honour in that case at [142] rejected submissions relating to alleged facilitative provisions, including, because the observations of Merkel J in *Finance Sector*:

142 … related to a different nature of agreement (a certified agreement) made under different legislation. I was taken to nothing in the FW Act, or in cases considering it, that suggested that any special provision for, or treatment of, “facilitative provisions” was intended.

I do not consider that *Finance Sector* and *Teys* are of assistance in the present matter. To the extent that legislative provisions may be facilitative, there are examples in other contexts (for instance, in respect of the manner in which notices were served by the Commissioner of Taxation as discussed in *Kavanagh v Deputy Commissioner of Taxation* [2007] FCA 76; (2007) 157 FCR 551 or the power of a person claiming an interest in land the subject of a caveat to make application for the removal of the caveat as discussed in *Webster Investments Pty Ltd v Anderson and Webster Investments Pty Ltd v North Star Developments Pty Ltd* [2016] VSC 620; (2016) 52 VR 610). The prospect that the meeting or communications which the parties ***must*** have to attempt to resolve a work health and safety issue, will take place at the workplace, means that the legislation referring to the representative of one of those parties being able to enter on to the workplace is more than merely facilitative.

1. Third, the plain language of s 81(3) of the WHS Act whereby a representative of a party to an issue ***may enter the workplace*** for the purpose of attending discussions with a view to resolving the issue, contemplates the party with control over the workplace – presumably the employer – permitting that representative to enter for that purpose. As is clear from the legislation, the place of the meeting is the choice of the parties, and in circumstances where the parties choose the meeting and discussions to take place at the workplace it is in circumstances where one of them – almost certainly the employer – has control over that site.
2. This conclusion is supported by s 32CA(1) of the *Acts Interpretation Act 1954* (Qld) which provides:

(1) In an Act, the word ***may***, or a similar word or expression, used in relation to a power indicates that the power may be exercised or not exercised, at discretion.

1. While this definition is traditionally utilised to distinguish between permissive and mandatory exercises of power, it is a short step from the provision that a representative “may” enter premises – at his or her discretion – to recognition that if the representative seeks to enter the premises for the prescribed statutory purpose the legislation confers a right on the representative to do so. There is clear authority that the exercise of such a power by a person (such as the representative with power under s 81(3)) may impose a statutory obligation on another person (such as the employer in control of the workplace): see for example Pearce DC and Geddes RS, *Statutory Interpretation in Australia* (8th ed, LexisNexis Butterworths, 2014) ch 11.
2. In *Ex parte Duncan; Re Minister of Lands* (1938) 55 WN (NSW) 37 for example, s 52 of the *Crown Lands Consolidation Act 1913* (NSW) relevantly provided:

The holder of a conditional lease having a term of forty years may upon application as prescribed made during the last five years of the lease have the term thereof extended for the period of twenty years.

1. The Court of Appeal of New South Wales held that the word “may” in that section gave the holder of a conditional lease an absolute right to have the term extended on the making of the prescribed application. As their Honours pointed out, “may” in that legislation meant "may if he chooses”, not "may if someone else chooses."
2. Similarly in *Disher v Disher* [1965] P 31, r 18(2) of the *Magistrates' Courts Rules 1952* provided:

At the conclusion of the evidence for the complainant the defendant may address the court.

1. Cairns J observed at 35 :

What to my mind is clear is that under rule 18 (2) the defendant's counsel is entitled to address the justices once on the facts and that until he has done so he has not exhausted his client's rights under that rule. I think, therefore, that the justices were in breach of the rule in not allowing him to do so. Paragraph (2) is permissive in its language – “At the conclusion of .the evidence for the complainant the defendant may address the court” but it is a permission given to the defendant or his advocate. The effect is the same as if the words were: “Justices shall allow the defendant or his advocate to address the court.” In my opinion, the paragraph requires that the justices shall allow the defendant or his advocate to address them upon all issues of law arising and on the facts of the case.

1. (See also *Harvey v Mutsaers* [2012] VSCA 69; (2012) 35 VR 389 at [21])
2. Fourth, I do not accept the submission that the decision of the Full Court in *Powell* related only to the exercise by officials of “industrial” style powers. The Full Court discussed, in detail, the meaning of the words “may enter” (at [24]), whether the phrase “right of entry” was a term of art (a proposition which the Full Court rejected at [26]), and whether right of entry related only to “strict legal rights” (at [32] et seq). Their Honours noted that a person with an entitlement to access a worksite had an entitlement or right to enter that worksite (at [34]). The principles articulated by the Full Court, in these respects, are on point in these proceedings.
3. Fifth, I note the submission of the Minister that it is consistent with the fulfilment of the objective set out in s 480 of the FW Act that s 494 operates to regulate activities of officials that have the potential to significantly interfere with the employer’s or the occupier’s right to go about their business with minimal inconvenience, but do not regulate those activities that do not have the same potential. The Minister submitted further that the entry on to a site by a person to represent employees in discussions with employers as part of an issue resolution process does not have the potential to cause substantial inconvenience.
4. I do not accept the proposition that the impact of the presence of the representative under s 81(3) in the workplace will invariably be minimal. While the representative under s 81(3) may not have the statutory powers of health and safety representatives (for example, access to workers), I consider it very likely as a general rule that discussions to resolve a work health and safety issue at a workplace will involve active engagement by participants to the discussion – in the course of that discussion – with the working environment in which the health and safety issue has arisen.
5. On the facts of this particular case, for example, the parties agreed in the SOAF that, on 17 April 2018, Mr Carberry was sufficiently concerned that the presence of Messrs Pauls, Parfitt and Kupsch on the bridge deck at Bridge 31 could create a safety hazard, that Mr Carberry instructed workers to stop work, and that work on Bridge 21 stopped for approximately 2 hours. It appears that this stoppage constituted a significant disruption to work on the site.
6. Sixth, a major plank of the position of both the respondents and the Minister concerns the absence of a specific provision for enforcement of s 81(3) by either the parties or their representatives.
7. In *Powell*, the Full Court observed:

33. The words of s 70(1), however, are tolerably clear: the employer has a statutory obligation to the person of whom the HS representative has requested assistance to allow access to that person to the workplace. Undoubtedly, the HS representative can enforce the efficacious exercise of his power under s 58(1)(f) by the means contained in s 70(2). One may in the legal lexicon call that a right. ***But also, it is difficult to see how the statutory obligation upon the employer to allow access to the person assisting is not a legal authorisation to, or a legal entitlement of, that person to enter the premises and have access to the extent that it is necessary for his or her giving of assistance to the HS representative. That statutory entitlement or authorisation would be a defence to any claim or charge of civil or criminal trespass. The statutory entitlement or authorisation can be legitimately described as a right to enter and be on the premises, that is the workplace***.

34. In practical terms, there is little doubt that someone on the work site having been asked by the HS representative to come to the site to assist that representative who was challenged about his or her presence there, could say, as a matter of plain English: “***You are obliged by law to allow me to enter and have access; I have an entitlement to access, and so an entitlement or right to enter (unless you form the view that I am unqualified)***”.

35. Alternatively, or indeed in addition, ***the right can be seen as a right of the HS representative to have the assistant enter. That is a right to enter that can be exercised by the assistant, albeit in a derivative sense*** (to use the phraseology of the Solicitor-General’s submissions), at the request of the HS representative.

(Emphasis added.)

1. The terms of ss 58(1) and 70(1) of the OHS Act are clearly different from the language of s 81(3) of the WHS Act. However, as I have already observed, to the extent that s 81(3) of the WHS Act grants a power of access to the representative for the purpose contemplated by s 81(3), as a matter of common sense there must be a corresponding obligation on the employer controlling the workplace to allow that access. Notwithstanding the differences in the statutory language I am satisfied that the s 81(3) gives rise to an entitlement or authorisation which can legitimately be described as a right to enter as explained by the Full Court in *Powell*. It follows that the absence of a mechanism specifically directed at s 81(3) does not mean that there is no “right of entry” created by s 81(3).
2. Further, and in any event notwithstanding the absence of specific provision, I am not persuaded that there is no power to enforce any entitlement to enter pursuant to s 81(3). I note in particular s 191 of the WHS Act which provides as follows:

**191 Issue of improvement notices**

(1) This section applies if an inspector reasonably believes that a person—

(a) is contravening a provision of this Act; or

(b) has contravened a provision in circumstances that make it likely that the contravention will continue or be repeated.

(2) The inspector may issue an improvement notice requiring the person to—

(a) remedy the contravention; or

(b) prevent a likely contravention from occurring; or

(c) remedy the things or operations causing the contravention or likely contravention.

1. During the course of the hearing there was dispute between the Commissioner on the one hand, and the respondents and the Minister on the other, in respect of the admission of an affidavit affirmed by Ms Cherie Ellis, Human Resources Manager for the Project, on 19 October 2018. In Ms Ellis’ affidavit there was a reference to improvement notices served on Fulton Hogan by inspectors pursuant to s 191 of the WHS Act, in respect of the refusal of access by Fulton Hogan to the respondents. The respondents and the Minister objected to the affidavit for reasons including relevance (in particular, that the views of inspectors of contraventions of the WHS Act are of no assistance in construing that legislation), the fact that this affidavit of Ms Ellis was filed after the SOAF had been agreed and filed, and finally that the case did not depend on any right created by s 191 of the WHS Act. I provisionally admitted the affidavit, pending a final ruling in this judgment.
2. In my view the affidavit of Ms Ellis is relevant and admissible, as evidence of the exercise of an enforcement power provided by s 191 of the WHS Act in respect of alleged contraventions of s 81(3). I agree with the submission of Counsel for the Minister that the views of the inspectors as to contraventions (or otherwise) are not necessarily of assistance to the Court in construing s 81(3), however the fact that improvement notices were issued in respect of understood contraventions in this case is relevant to the existence of an enforcement power. Further, while I note that the affidavit was filed after the SOAF, I also note that submissions of the respondents (to the effect that there was no enforcement mechanism referable to s 81(3)) were filed after the SOAF, and that Ms Ellis’ affidavit was filed in response to those submissions. In particular, I note the following paragraphs of Ms Ellis’ affidavit:

4. On 9 April 2018, Workplace Health and Safety Queensland Principal Inspector Luke Ellis (Mr Ellis) issued an improvement notice under the *Work Health and Safety Act 2011* (Qld) (WHS Act) to Seymour Whyte, requiring Seymour Whyte to take steps to prevent a likely contravention of section 81(3) of the WHS Act (First Improvement Notice). The First Improvement Notice related to the entries of Messrs Pauls, Seiffert and Hynes on that day. Annexed to my affidavit and marked CE-1 is a copy of the First Improvement Notice.

5. On 9 April 2018, I filed an application for internal review of the decision to issue the First Improvement Notice.

6. On 4 May 2018, I received a letter from the Queensland Government Office of Industrial Relations confirming the decision to issue the First Improvement Notice. Annexed to my affidavit and marked CE-2 is a copy of that decision letter.

7. On 11 April 2018, Mr Ellis issued an improvement notice under the WHS Act to Seymour Whyte, requiring Seymour Whyte to take steps to prevent a likely contravention of section 81(3) of the WHS Act (Second Improvement Notice). The Second Improvement Notice related to the entries of Messrs Pauls, Seiffert, Hynes and Gibson on that day. Annexed to my affidavit and marked CE-3 is a copy of the Second Improvement Notice.

8. On 11 April 2018, I filed an application for internal review of the decision to issue the Second Improvement Notice.

9. On 4 May 2018, I received a letter from the Queensland Government Office of Industrial Relations confirming the decision to issue the Second Improvement Notice. Annexed to my affidavit and marked CE-4 is a copy of that decision letter.

10. On 18 April 2018, Workplace Health and Safety Queensland Principal Inspector Brian Drake issued an improvement notice under the WHS Act to Seymour Whyte, requiring Seymour Whyte to take steps to prevent a likely contravention of section 81(3) of the WHS Act (Third Improvement Notice). The Third Improvement Notice related to the entries of Messrs Pauls and Seiffert on that day. Annexed to my affidavit and marked CE-5 is a copy of the Third Improvement Notice.

8. On 19 April 2018, I filed an application for internal review of the decision to issue the Third Improvement Notice.

9. On 4 May 2018, I received a letter from the Queensland Government Office of Industrial Relations confirming the decision to issue the Third Improvement Notice. Annexed to my affidavit and marked CE-6 is a copy of that decision letter.

(Emphasis removed.)

1. I am satisfied that s 191 of the WHS Act makes provision for the enforcement of a right of entry contemplated by s 81(3), by improvement notices issued by inspectors in appropriate cases.
2. Further in this context, I note that ss 501 and 502(1) of the FW Act specifically enforce the right of permit holders exercising State or Territory OHS rights (including rights under s 81(3)).
3. For these reasons, I am satisfied that s 81(3) of the WHS Act creates a “State or Territory OHS right” within the meaning of the FW Act.
4. It follows that contraventions of s 494(1) and 497 of the FW Act for the relevant entries are substantiated:
* In respect of s 494(1) insofar as concerns Mr Pauls, where he was an official of the CFMMEU, exercising a State or Territory OHS right, and was not a permit holder; and
* In respect of s 497 insofar as concerned Messrs Seiffert, Albert, Hynes, Gibson, Parfitt and Kupsch, in circumstances where they were permit holders, required to produce their entry permits, were requested to produce their entry permits by the occupier and/or an affected employer, did not produce their entry permits when requested to so do, and subsequently exercised a State or Territory OHS right.

# Alleged contraventions of section 500 of the FW Act – “improper manner”

1. At relevant times Messrs Seiffert, Hynes, Gibson, Parfitt and Kupsch were permit holders under the FW Act. In light of my findings concerning s 81(3) of the WHS Act, and in light of the facts admitted in the SOAF, I find that they exercised, or sought to exercise, State or Territory OHS rights, which are rights of entry in accordance with Pt 3-4 of the FW Act.
2. The question arises whether, in doing so, they acted “in an improper manner” within the meaning of s 500 of the FW Act on relevant occasions, namely:
* On 10 April 2018: the entry on to the workplace by Mr Seiffert
* On 11 April 2018: the entries on to the workplace by Messrs Seiffert, Hynes and Gibson
* On 12 April 2018: the entries on to the workplace by Messrs Seiffert, Hynes and Gibson
* On 13 April 2018: the entry on to the workplace by Mr Parfitt
* On 16 April 2018: the entry on to the workplace by Mr Seiffert
* On 17 April 2018: the entries on to the workplace by Messrs Parfitt and Kupsch
1. The Commissioner submits that they did act improperly.
2. Section 500 of the FW Act is a civil remedy provision. Acting “in an improper manner” for the purposes of s 500 of the FW Act was discussed by White J in *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1287 where his Honour said:

24. The parties were not agreed as to whether the Director must also establish, as an element of a s 500 contravention, an intention by the respondents to act in that manner. I am satisfied that the Director does not have to establish an intention of this kind. In a number of decisions, this Court has held that the impropriety or otherwise of conduct for the purposes of s 500 is to be assessed objectively: *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 199 (*CFMEU (No 2)*) at [106]; *Director of the Fair Work Building Industry Inspectorate v Bragdon* [2015] FCA 668 at [97]. The Court has also held that it is not necessary for the Director to establish that the alleged contravenor intended to engage in conduct having that character: *Darlaston v Parker* [2010] FCA 771, (2010) 189 FCR 1 at [54]; *Setka v Gregor (No 2)* [2011] FCAFC 90, (2011) 195 FCR 203 at [35]; *CFMEU (No 2)* at [106]; and *Bragdon* at [96].

25. I note in addition, that the words in s 500 “or otherwise act in an improper manner” comprehend acts other than those constituting obstruction or hindering: *Setka v Gregor (No 2)* at [30].

1. His Honour later observed:

170. The concept of “improper conduct” for the purposes of s 500 has been discussed in the authorities. In *Bragdon* at [97], Flick J described “improper conduct” as being conduct which falls below that standard which can reasonably be expected of those occupying the relevant provision.

171. In *CFMEU (No 2)*, Mansfield J said:

[106] Consequently, as they were seeking to exercise powers under Pt 3-4 of the FW Act, s 500 may be contravened when their conduct exceeds that authorised by the exercise of those rights. Section 500 requires an objective assessment or determination whether there was conduct or action of an improper manner. It does not depend upon intention.

[107] In *R v Burns and Hopgood* [1995] HCA 1; (1995) 183 CLR 501, the High Court said in the majority judgment at 514-515:

Impropriety does not depend on an alleged offender’s consciousness of impropriety. Impropriety consists in a breach of the standards of conduct that would be expected of a person in the position of the alleged defendant by reasonable persons with knowledge of the duties, powers and authority of the position and circumstances of the case. When impropriety is said to consist in an abuse of power, the state of mind of the alleged offender is important: the alleged offender’s knowledge or means of knowledge of the circumstances in which the power is exercised and his purpose or intention in exercising the power are important factors in determining the question whether the power has been abused. But impropriety is not restricted to an abuse of power. It may consist in the doing of an act which a director or officer knows or ought to know that he has no authority to do.

See also *Director of the Fair Work Building Industry Inspectorate v Cartledge* [2015] FCA 453 at [171].

172. Ordinary principles of judicial comity indicate that I should give effect to these authorities, unless satisfied that they are wrong. I am not so satisfied.

1. In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Laverton North and Cheltenham Premises Case)* [2018] FCAFC 88; (2017) 252 FCR 198 the Commissioner’s case at trial was not confined to allegations of a bare failure to provide notices of entry or to produce the entry permits – rather the Commissioner also relied on other circumstances connected with those failures. Accordingly, the Full Court was not required to determine whether a failure to provide a notice of entry or to produce an entry permit on request may, by itself, constitute conduct in an improper manner. Allsop CJ said:

7. What is improper is an evaluative conclusion by way of characterisation. An accidental oversight leading to a failure to comply with a statutory obligation may well not be capable of being characterised as improper. An egregious, flagrant and defiant flouting of the statute is likely to be so characterised. I do not consider, however, that impropriety is always to be found in the failure to satisfy statutory obligations. Were it so it would necessarily convert each of the requirements in Subdivision C into penalty provisions through s 500.

1. White J observed at [192], that the more critical issue was whether such conduct may be part of the circumstances warranting a finding that a permit holder had acted in an improper manner. His Honour continued:

193. It is established that permit holders act in an improper manner for the purposes of s 500 when they fail to conform with the standards of conduct to be expected of them by reasonable persons having knowledge of their duties, powers and authority, and of the circumstances of the case: *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 199 at [106]-[108]; *Director of the Fair Work Building Industry Inspectorate v Cartledge* [2015] FCA 453, (2015) 239 FCR 405 at [171]. The characterisation of conduct as improper does not depend on the permit holder’s intention: *Setka v Gregor (No 2)* [2011] FCAFC 90; (2011) 195 FCR 203 at [30], [35][37], [42].

1. In relation to the question whether the mere failure of a permit holder to have provided a notice of entry was sufficient to warrant conduct being characterised as improper, White J did not reach any conclusion, however noted at [199] that it could be an element of the overall conduct to be taken into account in considering whether the conduct should be characterised as improper. His Honour continued:

200. There may well be circumstances in which a permit holder’s failure to comply with ss 487 or 489 would not warrant the characterisation of the conduct as improper. Innocent mistakes by a permit holder may be one example.

1. Tracey J referred to the earlier decision of the Full Court in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (Castlemaine Police Station Case)* [2018] FCAFC 15, noting that it had:

115. … endorsed the decisions in earlier cases that impropriety, for the purposes of s 500, arises if there is a “breach of the standards of conduct that would be expected of a person in the position of the alleged offender by reasonable persons with knowledge of the duties, powers and authority of the position and the circumstances of the case.”

1. His Honour also found:

122. In my view a permit holder acts “in an improper manner” for the purposes of s 500 if he or she exercises a right, conferred on permit holders by Part 3-4 of the FW Act, without complying with one or more of the requirements of Subdivision C. The relevant impropriety is to be found in the failure of permit holders who hold privileged rights and associated responsibilities to satisfy their statutory obligations. If that failure is inadvertent or unintentional, liability will still arise but such ameliorative factors will be relevant in determining appropriate penalties for the contraventions.

123. In any event, the circumstances which attended each of the five entries involved additional conduct, on the part of either or both Mr MacDonald and Mr Long, which also supported the Commissioner’s complaint that one or both of them had acted in an improper manner. The details of the various entries are recounted above at [29]-[33]. They need not be repeated. It was a common feature of each entry that representatives of companies managing the sites challenged the officials and directed their attention to relevant statutory requirements. In each case the representatives were met with a dismissive response and (save on the second entry) the permit holder proceeded on to the construction site despite being warned that he would be trespassing if he did so.

1. In respect of each alleged contravention the Commissioner submits that the failure to comply with s 497 was in conjunction with other circumstances of the case.
2. In relation to conduct of Mr Seiffert on 10 April 2018, I note the agreed facts that Mr Seiffert:
* refused to produce entry permits when requested by Mr Carberry;
* refused requests of Mr Carberry to wait and not walk around the Site until the Superintendent had been called;
* walked around the Site;
* refused requests from Mr Derksen to leave the Site; and
* failed to comply with several requests from police to leave the Site, resulting in his arrest for trespassing.
1. I am satisfied that this conduct of Mr Seiffert constitutes a breach of the standards of conduct that would be expected of a person in his position by reasonable persons with knowledge of the duties, powers and authority of the position and circumstances of the case. This conduct of Mr Seiffert was improper within the meaning of s 500.
2. In relation to the conduct of Messrs Seiffert, Hynes and Gibson on 11 April 2018, I note the agreed facts that:
* each of Mr Seiffert and Mr Hynes refused to produce entry permits when requested by Mr Carberry;
* Mr Gibson refused a request from Mr Derksen to leave the Site;
* each of Mr Seiffert, Mr Hynes and Mr Gibson failed to comply with the OHS Requirement by walking around the Site without supervision or accompaniment by an inducted Site representative, despite requests that this not occur; and
* each of Mr Hynes and Mr Gibson failed to comply with a request from Mr Derksen that they not pull up in a vehicle, get out and stand around on a live access haul road.
1. I am satisfied that the conduct of Mr Seiffert, Mr Hynes and Mr Gibson constituted a breach of the standards of conduct that would be expected of persons in their position by reasonable persons with knowledge of the duties, powers and authority of the position. In the circumstances of the case their conduct was improper within the meaning of s 500.
2. In relation to the conduct of Messrs Seiffert, Hynes and Gibson on 12 April 2018, I note the agreed facts that each of Mr Seiffert, Mr Hynes and Mr Gibson:
* refused a request from Mr Derksen to produce for inspection their entry permits;
* refused a request from Mr Derksen to leave the Site;
* failed to comply with the OHS Requirement by walking around the Site without supervision or accompaniment by an inducted Site representative; and
* failed to comply with requests from police to leave the Site, resulting in their arrest for trespassing.
1. I am satisfied that the conduct of Messrs Seiffert, Hynes and Gibson constituted a breach of the standards of conduct that would be expected of persons in their position by reasonable persons with knowledge of the duties, powers and authority of the position. In the circumstances of the case their conduct was improper within the meaning of s 500.
2. In relation to the conduct of Mr Parfitt on 13 April 2018, I note that Mr Parfitt:
* refused a request from Mr Peter Kelly (Senior Project Engineer) to leave the Site and refused numerous requests from Mr Barnes to leave the Site;
* failed to comply with the OHS Requirement herein by failing to comply with requests from Mr Kelly and Mr Barnes that he remain with the vehicles and not walk around the work area; and
* was ultimately charged by police with trespass.
1. I am satisfied that this conduct of Mr Parfitt constitutes a breach of the standards of conduct that would be expected of a person in his position by reasonable persons with knowledge of the duties, powers and authority of the position and circumstances of the case. This conduct of Mr Parfitt was improper within the meaning of s 500.
2. In relation to the conduct of Mr Seiffert on 16 April 2018, I note that Mr Seiffert:
* refused to and did not produce his entry permit;
* subsequently entered and walked around parts of the Site; and
* failed to comply with requests from police to leave the Site, resulting in him being issued with a notice to appear for trespassing.
1. I am satisfied that this conduct of Mr Seiffert constitutes a breach of the standards of conduct that would be expected of a person in his position by reasonable persons with knowledge of the duties, powers and authority of the position and circumstances of the case. This conduct of Mr Seiffert was improper within the meaning of s 500.
2. In relation to the conduct of Messrs Parfitt and Kupsch on 17 April 2018, I note that they each:
* refused requests from Mr Carberry to produce for inspection their entry permits;
* refused requests from Mr Derksen and Ms Ellis to leave the Site;
* entered the bridge deck at Bridge 31, causing Mr Carberry to instruct workers to stop work because he was concerned that the presence of Mr Pauls, Mr Parfitt and Mr Kupsch on the bridge deck could create a safety hazard. Work stopped for approximately 2 hours from 9.00am; and
* failed to comply with requests from police to leave the Site, resulting in their arrest for trespassing.
1. I am satisfied that the conduct of Messrs Parfitt and Kupsch constituted a breach of the standards of conduct that would be expected of persons in their position by reasonable persons with knowledge of the duties, powers and authority of the position. In the circumstances of the case, their conduct was improper within the meaning of s 500.

# Accessorial liability of the CFMMEU

1. The Commissioner submits that the CFMMEU is liable as an accessory to each of the right of entry contraventions by each individual respondent, pursuant to s 550 of the FW Act. Section 550 provides:

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

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

Note: If a person (the involved person) is taken under this subsection to have contravened a civil remedy provision, the involved person’s contravention may be a serious contravention (see subsection 557A(5A)). Serious contraventions attract higher maximum penalties (see subsection 539(2)).

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

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

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

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

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

1. The Commissioner relies on authorities including *Australian Building and Construction Commissioner v McDermott (No 2)* [2017] FCA 797 at [104]-[125], *Australian Building and Construction Commissioner v Upton (The Gorgon Project Case)* [2017] FCA 847; (2017) 270 IR 190 at [227]-[235], *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] FCA 42 at [290]-[300], *Australian Building and Construction Commissioner v Construction Forestry, Mining and Energy Union (The Parliament Square Case)* [2018] FCA 1080 at [102]-[108], *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Brooker Highway Case)* [2018] FCA 1081 at [136]-[140] for the proposition that where a union official contravenes the right of entry provisions of the FW Act directly with knowledge of the essential facts making up that contravention, the conduct and knowledge of the contravening official are attributed to the union so as to make the union knowingly concerned in the contraventions, and therefore an accessory.
2. The respondents submit, in summary, that the approach adopted in these cases is wrong and should not be followed because it offends legal orthodoxy in that the conventional approach is that an accessory must do something additional to what a principal offender does in order to aid, abet, counsel, procure, or otherwise be directly or indirectly knowingly concerned with the principal offender’s contravention.
3. I am not persuaded that the decisions of Judges of this Court to which referred above are plainly wrong. I am satisfied that the CFMMEU was knowingly concerned in or party to the contraventions of each of the individual respondents, all of whom were officers of the CFMMEU acting in that role, within the meaning of s 550(2)(c) of the FW Act.
4. I note further that the parties agreed at [10] of the SOAF that:

(a) all actions and conduct of each of the Second to Eighth Respondents as admitted herein (including hereafter) were also the actions and conduct of the CFMMEU; and

(b) the CFMMEU possessed the same states of mind as each of the Second to Eighth Respondents in relation to those actions and conduct, as admitted herein (including hereafter).

1. In those circumstances it is difficult to understand the position of the respondents that the CFMMEU was not an accessory to the contraventions of the individual respondents.

# Accessorial liability of Mr Pauls

1. The Commissioner claims that Mr Pauls is liable as an accessory for each of the right of entry contraventions alleged against the other individual respondents.
2. On each occasion on which the other individual respondents engaged in conduct contravening the FW Act other than on 12 April 2018, Mr Pauls was present in company with that individual respondent. The Commissioner submits that:
* Mr Pauls clearly knew of the facts and the acts of the contraveners when he was there and was witness to them;
* It can be readily inferred that Mr Pauls knew each of the individual respondents were permit holders;
* Mr Pauls had knowledge of all essential facts and participated in each contravention.
1. The respondents submit, in summary:
* There is no pleading that Mr Pauls knew that any of the other officials were permit holders;
* In such circumstances the allegations that Mr Pauls was knowingly concerned or aided and abetted the contraventions of ss 497 and 500 cannot be sustained;
* The mere fact that Mr Pauls was present is insufficient;
* There was no allegation that Mr Pauls associated himself with the conduct of the other individual respondents;
* Mr Pauls could not be said to “aid and abet” the conduct in circumstances where there is no pleaded allegation or evidence that he took part in their contravening conduct by actually doing something to help, assist or encourage its occurrence.
1. While the ASOC does not specifically plead that Mr Pauls knew that the other individual respondents were permit holders, nonetheless at [86] of the ASOC the Commissioner pleads:

At all material times when acting as alleged herein, Mr Pauls was aware of and had knowledge of:

(a) the actions of the other Respondents who he was in the presence of or who were accompanying him on each occasion;

(b) the essential facts and matters necessary to establish each of the contraventions of sections 497, 499 and 500 of the FW Act alleged against each of the Third to Eighth Respondents herein on each of those occasions; and

(c) intentionally participated in and/or assisted them in those contraventions by reason of the matters alleged against Mr Pauls herein.

**Particulars**

Mr Pauls’ awareness and knowledge is to be inferred from the whole of the surrounding facts and circumstances, including the matters alleged herein.

1. The Commissioner contends that no complaint was made in respect of these allegations, or that Mr Pauls misunderstood the nature of the case advanced against him.
2. I consider it likely that Mr Pauls understood the case against him in these proceedings, including the claim of the Commissioner that Mr Pauls knew that the third to eighth respondents were permit holders. I further consider the evidence supports a finding that Mr Pauls knew that the other officials in whose company he attended the Site were permit holders – they were all officials of the same union, attending the Site at the same time, and the other individual respondents did not produce their entry permits because they considered they did not have to because of the operation of s 81(3) of the WHS Act.
3. I also reject the respondents’ submission that Mr Pauls did not associate himself with the relevant contraventions, in circumstances where he attended the Site in company with the other individual respondents for the same reason and prosecuted the same claim that production of an entry permit was unnecessary.
4. I am satisfied that Mr Pauls was an accessory to the contraventions of the FW Act relating to the entries by the third to eighth respondents, with the exception of the entries on 12 April 2018 when Mr Pauls was not in attendance at the Site.

# Appropriate orders

1. The Commissioner is entitled to declaratory orders in accordance with these reasons. I will direct the parties to provide me with draft orders giving effect to these reasons within 14 days.
2. In light of my findings concerning s 81(3) of the WHS Act, the Commissioner is also entitled to the injunctive orders sought in the originating application.
3. Finally I will ask the parties to prepare draft case management orders to take the proceedings for further hearing in respect of pecuniary penalties.

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| I certify that the preceding one hundred and fifty-four (154) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Collier. |

Associate:

Dated: 23 October 2019

SCHEDULE OF PARTIES

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|  | QUD 238 of 2018 |
| Respondents |  |
| Fourth Respondent: | TE ARANUI ALBERT |
| Fifth Respondent: | BLAKE HYNES |
| Sixth Respondent: | LUKE GIBSON |
| Seventh Respondent: | MATTHEW PARFITT |
| Eighth Respondent: | ROYCE KUPSCH |