FEDERAL COURT OF AUSTRALIA

Australian Building and Construction Commissioner v McDermott (No 2) [2017] FCA 797

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| File number: | SAD 58 of 2015 |
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| Judge: | **CHARLESWORTH J** |
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| Date of judgment: | 17 July 2017 |
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| Catchwords: | **INDUSTRIAL LAW** – conduct of state of mind of union officials attributable to registered organisation – whether registered organisation can be directly liable for a contravention of s 500 of the *Fair Work Act 2009* (Cth) – whether a registered organisation can be vicariously liable for a contravention of s 500 of the *Fair Work Act 2009* (Cth) – whether registered organisation involved in the contraventions of it officials within the meaning of s 550 of the *Fair Work Act 2009* (Cth) – proof of participation and knowledge — registered organisation taken to have contravened s 500 by reason of its knowing involvement – registered organisation not otherwise liable  **INDUSTRIAL LAW** – contraventions of s 500 of the *Fair Work Act 2009* (Cth) by union officials – whether officials had implied licence to enter construction site to — whether officials acted in an improper manner by entering site without providing an entry notice as required by s 487 of the *Fair Work Act 2009* (Cth) |
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| Legislation: | *Acts Interpretation Act 1901* (Cth), s 13  *Fair Work Act 2009* (Cth), ss 6, 12, 480, 484, 487, 490, 492, 500, 508, 510, 512, 539, 545, 546, 550, 793  *Fair Work (Registered Organisations) Act 2009* (Cth), s 27  *Trade Practices Act 1974* (Cth), ss 52, 75B, 84  *Workplace Relations Act 1996* (Cth), ss 170NC, 349 |
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| Cases cited: | *Australian Building and Construction Commissioner v Harris* [2017] FCA 733  *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2014] FCA 148  *Australian Workers’ Union v Leighton Contractors Pty Ltd* (2013) 209 FCR 191  *Commissioners of Police v Cartman* [1896] 1 QB 655  *Construction Forestry Mining and Energy Union v Director of the Fair Work Building Industry Inspectorate* [2016] HCA 41, (2016) 338 ALR 360  *Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner* [2017] FCAFC 77  *Construction, Forestry, Mining and Energy Union v Clarke* [2007] FCAFC 87, (2007) 164 IR 299  *Darlaston v Parker* (2010) 189 FCR 1  *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36  *Director of Public Prosecutions (NT) v WJI* (2004) 219 CLR 43  *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1287  *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 199  *Director of the Fair Work Building Industry Inspectorate v McDermott* [2016] FCA 1147  *Director of the Fair Work Building Industry Inspectorate v Robinson* (2016) 241 FCR 338  *Ellis v Guerin* (1925) SASR 282  *Fair Work Ombudsman v Offshore Marine Services Pty Ltd (No 2)* [2013] FCA 943  *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89  *Giorgianni v The Queen* (1985) 156 CLR 473  *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 100 FCR 530  *Independent Commissioner Against Corruption (NSW) v Cunneen* (2015) 256 CLR 1  *Kable v New South Wales* [2012] NSWCA 243, (2012) 293 ALR 719  *Mallan v Lee* (1949) 80 CLR 198  *Maroney v The Queen* (2003) 216 CLR 31  *Morris v Tolman* [1923] 1 KB 166  *Pioneer Mortgage Services Pty Ltd v Columbus Capital Pty Ltd* [2016] FCAFC 78  *Plenty v Dillon* (1991) 171 CLR 635  *Quality Dairies (York) Ltd v Pedley* [1952] 1 KB 275  *Question of Law Reserved (No 2 of 1996)* (1996) 67 SASR 63  *R and Minister for Customs v Australasian Films Ltd* (1921) 29 CLR 195  *R v Goldie; Ex parte Picklum* (1937) 59 CLR 254  *R v Tyrrell* [1894] 1 QB 710  *Re York Street Mezzanine Pty Ltd (in liq)* (2007) 162 FCR 358  *Salomon v A Salomon & Co Pty Ltd* [1897] AC 22  *Setka v Gregor (No 2)* (2011) 195 FCR 203  *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153  *Tiger Nominees Pty Ltd v State Pollution Control Commission* (1992) 25 NSWLR 715  *Trade Practices Commission v Queensland Aggregates Pty Ltd* [1982] FCA 329, (1982) 44 ALR 391  *Trade Practices Commission v Tubemakers of Australia Ltd* [1983] FCA 99, (1983) 47 ALR 719  *Vallance v The Queen* (1961) 108 CLR 56  *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27  *Yorke v Lucas* (1985) 158 CLR 661  *Yorke v Ross Lucas Pty Ltd (No 2)* [1983] FCA 14, (1983) 46 ALR 319 |
|  |  |
| Date of hearing: | 28 November 2016 |
|  |  |
| Date of last submissions: | 3 July 2017 |
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| Registry: | South Australia |
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| Division: | General Division |
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ORDERS

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|  | | SAD 58 of 2015 |
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| BETWEEN: | AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER  Applicant | |
| AND: | MICHAEL MCDERMOTT  First Respondent  ANTHONY SLOANE  Second Respondent  AARON CARTLEDGE (and another named in the Schedule)  Third Respondent | |

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| JUDGE: | CHARLESWORTH J |
| DATE OF ORDER: | 17 JULY 2017 |

THE COURT DECLARES THAT:

1. The first respondent, on 28 April 2014, contravened s 500 of the *Fair Work Act 2009* (Cth) (Act) while attending with the second respondent at a construction site located at Sturt Street in Adelaide (site) by acting in an improper manner while seeking to exercise rights in accordance with Pt 3.4 of the Act in that he failed to provide an entry notice before entering the site as required by s 487 of the Act, failed to leave the site notwithstanding that the site manager directed him to leave, and held discussions with employees on the site in rooms or areas at the site not agreed with the head contractor (Hindmarsh) for the purposes of s 492 of the Act; and not during mealtimes or other breaks for the purposes of s 490(2) of the Act.
2. The second respondent, on 28 April 2014, contravened s 500 of the Act while attending the site with the first respondent by acting in an improper manner while seeking to exercise rights in accordance with Pt 3.4 of the Act in that he failed to provide an entry notice before entering the site as required by s 487 of the Act, failed to leave the site notwithstanding that the site manager directed him to leave, and held discussions with employees on the site in rooms or areas at the site not agreed with Hindmarsh for the purposes of s 492 of the Act and not during mealtimes or other breaks for the purposes of s 490(2) of the Act.
3. The first respondent, on 23 May 2014, contravened s 500 of the Act while attending the site by acting in an improper manner while seeking to exercise rights in accordance with Pt 3.4 of the Act, in that he failed to provide an entry notice before entering the site as required by s 487 of the Act, remained on the site when asked to leave by the site manager, and held discussions with employees on the site in rooms or areas at the site not agreed with Hindmarsh for the purposes of s 492 of the Act.
4. The first respondent, on 6 June 2014, contravened s 500 of the Act while attending the site by acting in an improper manner while seeking to exercise rights in accordance with Pt 3.4 of the Act, in that he failed to provide an entry notice before entering the site as required by s 487 of the Act, remained on the site when asked to leave by the site manager, and held discussions with employees on the site for approximately 30 minutes.
5. The first respondent, on 14 July 2014, contravened s 500 of the Act while attending the site along with the third respondent by acting in an improper manner while seeking to exercise rights in accordance with Pt 3.4 of the Act, in that he failed to provide an entry notice before entering the site as required by s 487 of the Act, remained on the site when asked to leave by the site manager, and held discussions with employees on the site for approximately 25 minutes.
6. The third respondent, on 14 July 2014, contravened s 500 of the Act while attending the site along with the first respondent by acting in an improper manner while seeking to exercise rights in accordance with Pt 3.4 of the Act, in that he failed to provide an entry notice before entering the site as required by s 487 of the Act, remained on the site when asked to leave by the site manager, and held discussions with employees on the site for approximately 25 minutes.
7. In respect of the contraventions of the first respondent on 28 April 2014, 23 May 2014, 6 June 2014 and 14 July 2014 and the contravention of the third respondent on 14 July 2014, the fourth respondent:
   1. participated in each contravention in that is taken, by s 793(1) of the Act to have also engaged in the conduct of the first and third respondents;
   2. is taken, by s 793(2) of the Act to have known of all of the essential facts constituting each contravention;
   3. was, in the aforesaid, knowingly concerned in each contravention within the meaning of s 550(2)(c) of the Act; and
   4. is taken in each instance to have contravened s 500 of the Act.

**THE COURT ORDERS THAT:**

1. The application for declaratory relief against the fourth respondent is allowed to the extent of the relief granted in paragraph 7 of the declarations made today.
2. The application for declaratory relief against the fourth respondent is otherwise dismissed.
3. Any application for orders varying paragraph 7 of the declaratory relief granted today is to be filed on or before 24 July 2017.
4. The matter is listed for directions at 9:30am on 14 August 2017.

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

REASONS FOR JUDGMENT

CHARLESWORTH J:

1. This is a civil remedy proceeding commenced under s 545 of the *Fair Work Act 2009* (Cth) (Act) by the Australian Building and Construction Commissioner (ABCC).
2. The first to third respondents, Mr McDermott, Mr Sloane and Mr Cartledge, are officials of the fourth respondent, Construction, Forestry, Mining and Energy Union (CFMEU).
3. I have previously determined that each of the three union officials had contravened s 500 of the Act: *Director of the Fair Work Building Industry Inspectorate v McDermott* [2016] FCA 1147 (*McDermott No 1*).
4. The first and third respondents have disputed the form of declaratory relief sought by ABCC by reference to my reasons in *McDermott No 1.* For the reasons given at [19] – [38] below, declaratory relief should be granted substantially in the form sought.
5. CFMEU is alleged to be liable for contraventions of s 500 of the Act by virtue of the conduct and state of mind of Mr McDermott and Mr Cartledge. On the statement of claim in its present form (SOC), there are three pleaded bases for CFMEU’s alleged liability. They are:
6. direct liability by the attribution to CFMEU of the conduct and states of mind of Mr McDermott and Mr Cartledge by the operation of s 793 of the Act (SOC [23], [35], [45] and [59]);
7. “further and/or in the alternative”, vicarious liability (SOC [23.1], [35.1], [45.1] and [59.1]);
8. “further and/or in the alternative”, involvement in the contraventions of Mr McDermott and Mr Cartledge under s 550(1) and s 550(2)(c) of the Act by reason of conduct and knowledge attributed to it under s 793 (SOC [23.2], [35.2], [45.2] and [59.2]).
9. Despite the use of the device “and/or” in the SOC, ABCC’s submissions proceeded on the basis that the alleged routes to CFMEU’s liability were true alternatives.
10. I have determined that:
11. CFMEU is not liable for a contravention of s 500 of the Act by the application of s 793 of the Act in and of itself (see [43] to [67] below);
12. on its proper construction, the Act does not impose vicarious liability on CFMEU for a contravention of s 500 (see [68] to [93] below); and
13. CFMEU was involved in the contraventions of its officials within the meaning of s 550(1) and is thereby taken to have contravened s 500 of the Act (see [94] to [125] below).

# SECTION 500

1. Section 500 of the Act is contained in Pt 3.4 of Ch 3. It provides:

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

1. Section 500 is a civil remedy provision: see s 539. This Court may make any order it considers appropriate if it is satisfied that “a person” has contravened such a provision: s 545. The orders that may be made include an order that the person pay a pecuniary penalty: s 546.
2. The object of Pt 3.4 is expressed in s 480 as follows:

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

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

(i) this Act and fair work instruments; and

(ii) State or Territory OHS laws; and

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

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

1. That object is reinforced by s 6(5) which states what Pt 3.4 is “about”:

Part 3—4 is about the rights of officials of organisations who hold entry permits to enter premises for purposes related to their representative role under this Act and under State or Territory OHS laws. In exercising those rights, permit holders must comply with the requirements set out in the Part.

1. The Fair Work Commission (FWC) may, on an application made by an organisation under s 512 of the Act, issue a permit, known as an entry permit, to an official of the organisation. For the purposes of s 500 of the Act, a permit holder is a person who holds such a permit: see s 12 of the Act.
2. For the purposes of s 512, an “organisation” is an organisation registered under the *Fair Work (Registered Organisations) Act 2009* (Cth) (RO Act). By virtue of s 27(a) of the RO Act, an organisation is a body corporate. An “official” of an organisation is necessarily a natural person: see the definition of “official” and paragraph (a) of the definition of “industrial association” in s 12 of the Act.
3. Subdivisions A, AA and B of Div 2 of Pt 3.4 confer rights on persons who hold entry permits issued under s 512 of the Act. The rights under subdiv B include the right to enter premises for the purposes specified in s 484:

**Entry to hold discussions**

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

(a) who perform work on the premises: and

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

(c) who wish to participate in those discussions.

1. Three further provisions bearing on the respondents’ liability in this case should be mentioned. They are:

**487 Giving entry notice or exemption certificate**

*Entry under Subdivision A or B*

(1) Unless the FWC has issued an exemption certificate for the entry, the permit holder must:

(a) …

(b) before entering premises under Subdivision B—give the occupier of the premises an entry notice for the entry.

...

(3) An entry notice for an entry under Subdivision A or B must be given during working hours at least 24 hours, but not more than 14 days, before the entry.

…

**490 When right may be exercised**

(1) The permit holder may exercise a right under Subdivision A, AA or B only during working hours.

(2) The permit holder may hold discussions under section 484 only during mealtimes or other breaks.

(3) The permit holder may only enter premises under Subdivision A, AA or B on a day specified in the entry notice or exemption certificate for the entry.

…

**492 Location of interviews and discussions**

(1) The permit holder must conduct interviews or hold discussions in the rooms or areas of the premises agreed with the occupier of the premises.

(2) Subsection (3) applies if the permit holder and the occupier cannot agree on the room or area of the premises in which the permit holder is to conduct an interview or hold discussions.

(3) The permit holder may conduct the interview or hold the discussions in any room or area:

(a) in which one or more of the persons who may be interviewed or participate in the discussions ordinarily take meal or other breaks; and

(b) that is provided by the occupier for the purpose of taking meal or other breaks.

## Elements

1. In *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1287 at [22] — [23], White J observed that where a contravention of s 500 is alleged against a person on the basis that the person acted in an improper manner, the following elements must be established:
2. the person held an entry permit issued by the FWC under s 512 of the Act;
3. the person exercised, or was seeking to exercise, rights under Pt 3.4 of the Act; and
4. when exercising or seeking to exercise those rights, the person acted in an improper manner.
5. It was not necessary, his Honour observed, to also establish an intention by the person to act in an “improper” manner, or any subjective appreciation that his or her conduct bore that character. The impropriety of the conduct was to be assessed objectively (at [24]): see *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 199 at [106]; *Darlaston v Parker* (2010) 189 FCR 1 at [54] and *Setka v Gregor (No 2)* (2011) 195 FCR 203 at [35].
6. Importantly for the purposes of this action, the essential elements of the contravention that must be established by ABCC are not confined to physical acts and states of mind. The elements include the objective circumstance that the contravener has the status of a permit holder. Moreover, the physical acts or omissions that constitute acting in an improper manner must be shown to have occurred in circumstances where the contravener exercises or seeks to exercise rights “in accordance with” Pt 3.4 of the Act.

# DECLARATORY RELIEF AGAINST THE FIRST TO THIRD RESPONDENTS

1. As I have said in *McDermott No 1*, I concluded that each of Mr McDermott, Mr Sloane and Mr Cartledge had contravened s 500. The factual findings upon which the liability of each of those respondents is founded are set out in my reasons for judgment and need not be repeated in detail here.
2. By reference to my reasons in *McDermott No 1*, ABCC seeks declaratory relief in the following terms:

28 April 2014

1. The First Respondent, Michael McDermott, on 28 April 2014, contravened section 500 of the *Fair Work Act 2009* (Cth) (FW Act) while attending with the Second Respondent a construction site known as the Ergo Apartments Stage 2, located at Sturt Street, Adelaide (Site), by acting in an improper manner while seeking to exercise rights in accordance with Part 3-4 of the FW Act by failing to provide an entry notice before entering the Site as required by section 487 of the FW Act; failing to leave the Site notwithstanding that the Site Manager, Benjamin Groves (Groves) directed him to leave; **and by holding discussions with employees on Site in rooms or areas at the Site not agreed with the head contractor (Hindmarsh) for the purposes of section 492 of the FW Act**; and not during mealtimes or other breaks for the purposes of section 490(2) **of the FW Act.**
2. The Second Respondent, Anthony Sloane, on 28 April 2014, contravened section 500 of the FW Act while attending the Site with the First Respondent by acting in an improper manner while seeking to exercise rights in accordance with Part 3-4 of the FW Act by failing to provide an entry notice before entering the Site as required by section 487 of the FW Act; failing to leave the Site notwithstanding that Groves directed him to leave; **and by holding discussions with employees on Site in rooms or areas at the Site not agreed with Hindmarsh for the purposes of section 492 of the FW Act;** and not during mealtimes or other breaks for the purposes of section 490(2) of the FW Act.

23 May 2014

1. The First Respondent, Michael McDermott, on 23 May 2014, contravened section 500 of the FW Act while attending the Site, by acting in an improper manner while seeking to exercise rights in accordance with Part 3-4 of the FW Act, **by failing to provide an entry notice before entering the Site as required by section 487** of the FW Act; remaining on Site when asked to leave by Groves; **and by holding discussions with employees on Site in rooms or areas at the Site not agreed with Hindmarsh for the purposes of section 492 of the FW Act**.

6 June 2014

1. The First Respondent, Michael McDermott, on 6 June 2014, contravened section 500 of the FW Act while attending the Site, by acting in an improper manner while seeking to exercise rights in accordance with part 3-4 of the FW Act **by failing to provide an entry notice before entering the Site as required by section 487 of the FW Act**, remaining on Site when asked to leave by Groves; and by holding discussions with employees on Site for approximately thirty minutes.

14 July 2014

1. The First Respondent, Michael McDermott, on 14 July 2014, contravened section 500 of the FW Act while attending the Site along with the Third Respondent, by acting in an improper manner while seeking to exercise rights in accordance with Part 3-4 of the FW Act, **by failing to provide an entry notice before entering the Site as required by section 487 of the FW Act**; by remaining on Site when asked to leave by Groves; and by holding discussions with employees on Site for approximately twenty-five minutes.
2. The Third Respondent, Aaron Cartledge, on 14 July 2014, contravened section 500 of the FW Act while attending the Site along with the First Respondent, by acting in an improper manner while seeking to exercise rights in accordance with Part 3-4 of the FW Act, **by failing to provide an entry notice before entering the Site as required by section 487 of the FW Act**; by remaining on Site when asked to leave by Groves; and by holding discussions with employees on Site for approximately twenty five minutes.

(Emphasis added)

1. The words I have emphasised in bold are opposed by the respondents to which the declarations relate. Two arguments are raised.

## Implied licence

1. This argument applies to the conduct of Mr McDermott on 23 May, 6 June and 14 July 2014 and to the conduct of Mr Cartledge on 14 July 2014.
2. Counsel for Mr McDermott acknowledged that my findings in *McDermott No 1* precluded the argument being raised in opposition to the form of declaratory relief at this stage of the proceedings in relation to the events of 28 April 2014. I found (at [126]) that Mr McDermott, on that day, in seeking to exercise rights in accordance with Pt 3.4 of the Act, acted in an improper manner by (among other things) entering the site having provided no notice of entry. An equivalent conclusion was drawn in relation to Mr Sloane’s conduct on the same day (at [124]). My finding that the conduct was objectively improper is consistent with the conclusion reached by White J in *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1287 at [173] – [174] (leave to appeal refused in *Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner* [2017] FCAFC 77 (North, Besanko and Flick JJ)).
3. It is submitted that no equivalent finding was “crystallised” in my reasons in respect of the events on 23 May, 6 June and 14 July 2014, thus leaving it open to Mr McDermott and Mr Cartledge to now raise an argument founded on an implied licence at general law to enter the site on those days.
4. The existence of the implied licence was said to arise from what was said by Gaudron and Mc Hugh JJ in ***Plenty*** *v Dillon* (1991) 171 CLR 635 at 647:

A person who enters the property of another must justify that entry by showing that he or she either entered with the consent of the occupier or otherwise had lawful authority to enter the premises: *Entick*; *Morris v Beardmore*; *Southam v Smout*; *Halliday v Nevill*. … Consent to an entry is implied if the person enters for a lawful purpose. In *Robson v Hallett*, Lord Parker CJ said:

the occupier of any dwelling-house gives implied licence to any member of the public coming on his lawful business to come through the gate, up the steps, and knock on the door of the house.

This implied licence extends to the driveway of a dwelling-house: *Halliday*.

(Footnotes omitted)

1. Such an implied licence, it was submitted, was enjoyed by Mr McDermott and Mr Cartledge upon their entry to the site and persisted until it was revoked by the site manager, Mr Groves asking them to leave. The declaration concerning the impropriety of the respondents’ conduct should, it was submitted, be confined to the circumstance that they remained on the site after the implied licence was so revoked by Mr Groves.
2. The argument founded on an implied licence to enter the site was not raised in the course of closing submissions at the trial of the respondents’ liability. In my view, the argument is one that ought to have been raised before I reserved judgment on that question. That is particularly so because the written closing submissions made on behalf of ABCC expressly adverted to the failure of Mr McDermott and Mr Cartledge to provide an entry notice as a discrete aspect of improper conduct.
3. At their request, Mr McDermott and Mr Cartledge were excused from attendance at the trial. Their absence was at their own election. It was open to each of them to attend at trial for the purpose of making closing submissions concerning the factual and legal bases of their respective contraventions, including the arguments now raised in opposition to the form of declaratory relief.
4. I am nonetheless willing to grant leave to reopen closing submissions for the purpose of determining the merits of the argument now raised, for four reasons. First, ABCC did not assert any prejudice by reason of the argument being raised after the trial on questions of liability had concluded and the issues decided. Second, ABCC’s pleaded case is such that each allegation that the union officials did not provide an entry notice was not cross referenced in the pleading as a circumstance relied upon as an incident of improper conduct. To that extent, the trial was conducted on a basis that was not strictly in accordance with the pleadings as they then stood. Third, it is undesirable that the form of declaratory relief in respect of the events of 28 April 2014 be decided on a different factual and legal basis from the events on 23 May, 6 June and 14 July 2014. Fourth, I accept the respondents’ submission that my earlier findings that Mr McDermott and Mr Sloane acted in an improper manner on 28 April 2014 by entering the site without first providing an entry notice are stated with more precision than the findings of liability made in respect of Mr McDermott and Mr Cartledge on the other dates. To accept the argument now advanced (confined as it is to dates other than 28 April 2014) would not cut across the findings made in *McDermott No 1*, and it is desirable that the precise factual and legal foundations for their liability on those dates now be made plain.
5. I would, to the extent necessary, also grant ABCC leave to amend its pleading so as to accord with the actual basis upon which the liability of the union officials was advanced at trial, namely the inclusion of a cross reference to [16] in [22] and [24], the inclusion of cross references to [30] and [40] in [34] and [44] respectively and the inclusion of a cross reference to [52] in [58] and [60].
6. The respondents’ argument founded upon an implied licence should otherwise be rejected on its merits.
7. I doubt that the union officials had an implied licence at general law to enter the site to carry on discussions with construction workers there. On the facts as found, the officials, upon entering the site, went first to the site office to sign a visitor’s register. Any implied right of entry of the kind recognised by the High Court in *Plenty* would, in my view, take them no further than that. If the site were a dwelling house, they could proceed along the driveway and as far as the front door, but they could not enter the “house” without an express invitation or some other lawful authority.
8. If I am wrong in finding there was no implied licence to proceed further, I would nonetheless reject the submission that the union officials did not act in an improper manner in the relevant sense unless and until they were asked to leave. The existence of an implied and revocable licence to enter land would not preclude a finding that the person has acted in an improper manner when seeking to exercise the statutory rights of entry granted or recognised under Pt 3.4 of the Act. The respondents’ argument unduly confines the array of circumstances in which the conduct of a union official may be determined (objectively) to be improper. The argument assumes, wrongly, that conduct cannot be improper unless it constitutes an infringement of a proprietary right enjoyed by the owner or occupier of the premises in question so as to amount to a civil trespass. There is nothing to suggest that the word “improper” should be confined in that way. Furthermore, I have found in *McDermott No 1* that Mr McDermott and Mr Cartledge were in fact seeking to exercise rights in accordance with Pt 3.4. The right they subjectively sought to exercise was the right of entry conferred under s 484. Whether or not they acted in an improper manner in seeking to exercise that right may, indeed should, be assessed by reference to the statutory conditions attaching to that right. The words in the proposed declarations encapsulate the gist of the relevant failure. To the extent that it is necessary on the reopened case, I find that Mr McDermott and Mr Cartledge contravened s 500 of the Act in each instance by acting in an improper manner when seeking to exercise rights in accordance with Pt 3.4, including by entering the site without first providing an entry permit as required by s 487.

## The s 492 argument

1. It is then submitted that Mr McDermott and Mr Cartledge did not act in an improper manner by “holding discussions with employees on Site in rooms or areas at the Site not agreed with the occupier of the premises (Hindmarsh) for the purposes of section 492 of the FW Act”. Section 492 is set out at [15] above.
2. The submission is to the effect that:
3. the respondents would have been entitled to hold discussions with workers in any room or area described in s 492(3) if the occupier of the premises (in this case Hindmarsh) did not agree to the use of any other room or area for that purpose;
4. the findings in *McDermott No 1* are to the effect that the meetings were in fact held in a place referred to in s 492(3); and
5. accordingly, the impropriety attending the respondents’ conduct was limited to a failure to seek an agreement from Hindmarsh as to the place at which the meetings should occur.
6. In my view, this argument is one that ought to have been raised in the course of the trial on questions of liability, and leave should not be granted to rely upon the argument now in opposition to the grant of declaratory relief. ABCC’s pleaded case is to the effect (and has always been to the effect) that the holding of discussions in rooms or areas at the site not agreed with Hindmarsh for the purposes of s 492 of the Act constituted acting in an “improper manner” within the meaning of s 500. None of the respondents demurred to that plea on the basis now sought to be argued at any time prior to the delivery of judgment on the issue of liability. The findings made in *McDermott No 1* directlyaddress the parties’ pleaded cases (see at [90], [124], [126]) and the proposed declaratory relief is consistent with those findings.
7. The argument now advanced is one that invites the Court to draw a different conclusion on a mixed question of fact and law to that drawn in *McDermott No 1*. Mr McDermott and Mr Cartledge had every opportunity to answer this particular aspect of ABCC’s pleaded case in the course of the trial on the issue of their liability (including by making submissions as to the law in closing submissions) and yet, as I have said, they elected to remain absent from the trial. They should not now be permitted to raise an argument that effectively invites the Court to make findings that are inconsistent with those previously made in the same action. I would arrive at the same conclusion irrespective of whether ABCC were prejudiced by the introduction of the new argument at this stage of the proceedings.
8. Declaratory relief will be granted substantively in the terms sought by ABCC.

# THE ALLEGATIONS AGAINST CFMEU

## History of the proceedings

1. As I explained in *McDermott No 1*, the issue of CFMEU’s liability was originally listed for hearing at the same time as the trial in relation to the liability of the three individual respondents. CFMEU had, at that time, pleaded admissions in its defence to the effect that s 793 of the Act would apply so as to render it liable for contraventions of s 500 of the Act by reason of the facts admitted or proven against Mr McDermott and Mr Cartledge. Presumably because of its admissions, CFMEU’s legal representatives were not in attendance at the first day of the trial on questions of liability.
2. At the commencement of that hearing, I made an order of my own motion that CFMEU’s liability be tried as a separate question. I invited the parties to make submissions concerning the interrelation between s 500 and s 793 of the Act so as to satisfy the Court that it was appropriate to grant declaratory relief against CFMEU in the terms sought, irrespective of CFMEU’s admissions of liability: see *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2014] FCA 148 at [21] (Greenwood J).
3. I subsequently granted an application by CFMEU for leave to withdraw its admission that it was liable for contraventions of s 500 of the Act by the operation of s 793 in respect of the actions of Mr McDermott and Mr Cartledge. I also granted leave to ABCC to amend its statement of claim so as to plead the further two alternate bases for CFMEU’s liability identified at [5(2)] and [5(3)] above.
4. Delivery of judgment was deferred pending the resolution of other proceedings in which CFMEU anticipated the same questions of law may be determined. Those proceedings did not yield an answer to the substantive questions: *Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner* [2017] FCAFC 77 at [44] – [52] (North, Besanko and Flick JJ); *Construction Forestry Mining and Energy Union v Director of the Fair Work Building Industry Inspectorate* [2016] HCA 41; (2016) 338 ALR 360 (Nettle J).

# DIRECT LIABILITY

1. In *Australian Building and Construction Commissioner v* ***Harris*** [2017] FCA 733, Siopis J held that CFMEU was not liable for a contravention of s 500 of the Act by the operation of s 793 in and of itself. Siopis J held there was no previously decided authority that would preclude a single judge from deciding CFMEU’s construction argument on its substantive merits. I respectfully agree. Indeed, it was acknowledged by ABCC in the present case that although liability has been assumed against CFMEU in previous matters (usually on the basis of CFMEU’s own admissions) the particular question of law now agitated by CFMEU had not been previously advanced or finally determined.
2. The issue is now determined in *Harris*.
3. Judgment in *Harris* was delivered after judgment in this matter was reserved. Submissions were reopened for the purpose of allowing ABCC to submit that the decision in *Harris* is plainly wrong and should not be followed: see *Re York Street Mezzanine Pty Ltd (in liq)* (2007) 162 FCR 358 at [22] – [23] (Finkelstein J); *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [135]. ABCC confirmed its reliance on the same submissions originally made in closing submissions concerning the meaning and operation of s 793 of the Act. For the reasons that follow, the arguments advanced by ABCC do not establish that the decision in *Harris* is plainly wrong. I would, with respect, arrive at the same conclusion as that arrived at by Siopis J.

## Consideration

1. Section 793 of the Act provides:

**793 Liability of bodies corporate**

*Conduct of a body corporate*

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

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

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

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

*State of mind of a body corporate*

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

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

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

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

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

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

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

*Disapplication of Part 2.5 of the Criminal Code*

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

Note: Part 2.5 of the *Criminal Code* deals with corporate criminal responsibility.

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

1. The word “conduct” is defined non-exhaustively in s 12 of the Act to include an omission.
2. Section 793 is a provision of general application. It operates on its own force whenever it is necessary, for the purposes of the Act, to ascertain whether a body corporate has engaged in particular conduct and whenever it is necessary to establish the state of mind of the body corporate in relation to that particular conduct. It is to be construed in accordance with its text, context and purpose: *Independent Commissioner Against Corruption (NSW) v Cunneen* (2015) 256 CLR 1 at [57] – [62].
3. In respect of CFMEU’s liability for a contravention of s 500, ABCC contends that s 793 supplies proof of all of the elements of the contravention, including the essential element that the person said to have contravened the provision have the status of a permit holder. ABCC advanced three interrelated arguments in support of its contention that the provision operates in that way.
4. First, the heading to the provision indicates that its purpose is to fix liability for contraventions of the Act on a body corporate (in this case a union) by reference to the conduct and state of mind of its officials.
5. Second, the word “conduct” is to be construed so as to encompass all of the external elements of the contravention, in the same way that the concept of *actus reus* in criminal law encompasses all elements of the definition of a crime other than the *mens rea* or fault element.
6. Third, the particular conduct and state of mind of the officials attributable to CFMEU under s 793 was so inextricably connected with their status and purposes as permit holders that it would be absurd if CFMEU were to escape liability by arguing that the same status and purposes cannot be attributed to it.
7. The heading “Liability of bodies corporate” forms a part of the text of the section and must be taken into account in discerning its meaning: *Acts Interpretation Act 1901* (Cth) s 13(1). Read in the context of the section as a whole, the heading indicates that the provision is intended to (at least) facilitate proof of the conduct and state of mind of a body corporate for which a body corporate will be answerable for any purpose under the Act. There can be no doubt that s 793 may facilitate proof of the liability of a body corporate for contravention of a civil remedy provision. The question is not whether it applies, but how it applies.
8. In *Australian Workers’ Union v* ***Leighton Contractors*** *Pty Ltd* (2013) 209 FCR 191 at [85], the Full Court considered an argument that s 793 was “only concerned with making a body corporate vicariously liable for the conduct of its officers, employees or agents” in proceedings in which a contravention of the Act by the body corporate was alleged. In rejecting the argument, Katzmann J said (at [86]):

… In *Trade Practices Commission v Tubemakers of Australia Ltd* (1983) 76 FLR 455 at 475 Toohey J said of s 84(2) of the *Trade Practices Act 1974* (Cth) (now the *Competition and Consumer Act 2010* (Cth)) (which was in similar terms to s 793) that it did not seek to make a corporation vicariously responsible. Rather, its effect is to attribute to the corporation the conduct of the individuals referred to in the section. It is true that s 84(2) provides that the conduct shall be deemed (as opposed to ‘taken’) for the purposes of the Act to have been engaged in also by the body corporate. But that is a distinction without a difference. The words mean the same thing. Indeed, in *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 100 FCR 530 (*Hanley*) the Full Court said at [58] that s 349(2) of the WR Act (which is relevantly identical to s 793(1)) ‘in substance, deems conduct engaged in by the prescribed persons on behalf of the body corporate to be conduct also engaged in by the body corporate’.

1. An issue in *Leighton Contractors* was whether a union was bound by an agreement executed by an official who, it was said, was not authorised to sign it under the union’s rules. It was in that context that Katzmann J said (at [87]), in relation to the heading to s 793:

In any event, in its ordinary meaning ‘liability for conduct’ merely means the condition of being answerable for or bound by the conduct. Liability may be assumed or attributed. Indeed, that is what the law of agency is all about. Had Parliament intended to confine the operation of the section to cases involving contraventions of the FW Act, it could easily have said so.

1. That passage is relied upon by ABCC as supporting a conclusion that “the effect of the deeming provision is that [CFMEU] is taken to have contravened section 500 of the … Act where that provision has been contravened by its officials”. In my view, the observations of Katzmann J do not support ABCC’s contention. The decision in *Leighton Contractors* is to be understood having regard to the limited question there under consideration. No occasion arose in that case for the Full Court to determine the different point of construction now raised by ABCC. Furthermore, ABCC’s contention is inconsistent with the more general observations by Katzmann J to the effect that s 793 is concerned with the attribution of conduct, and not with the imposition of vicarious liability. Her Honour’s remarks in that respect were obiter. I respectfully agree with them: see also *Director of the Fair Work Building Industry Inspectorate v Robinson* (2016) 241 FCR 338 at [48].
2. In *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27, the Full Court considered the meaning and purpose of s 84 of the then-named *Trade Practices Act 1974* (Cth) (TPA), a provision cast in similar terms to s 793 of the Act. In that case, a corporate respondent was alleged to have contravened a provision of Pt V of the TPA. The state of mind of the corporate respondent was a fact in issue. Section 84(1) of the TPA operated to attribute to the corporation the state of mind of certain persons (compare s 793(2)). Lockhart J said (at 36):

… Where a contravention of a provision of Pt V of the Act requires an intent by the corporation, without s 84(1) the corporation would not be guilty unless the requisite intention was a state of mind of one or more of the persons who constituted the directing mind and will of the corporation, the test enunciated by the House of Lords in *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153. But s 84(1) adopts a different test to *Tesco*: see *Universal Telecasters (Qld) Ltd v Guthrie* (1978) 32 FLR 360 and *Tubemakers*, case (supra). Under s 84(1) it is not necessary for the intent to be that of a person who possesses the directing mind and will of the corporation, it is sufficient if the person having the intent is a servant or agent of the corporation. This is a large extension to the organic theory enunciated in Tesco.

1. It is not necessary for present purposes to give a detailed analysis of the “organic theory” of corporate responsibility enunciated in ***Tesco*** *Supermarkets Ltd v Nattrass* [1972] AC 153. It is sufficient to observe that the principles stated by the House of Lords in that case are concerned with the imposition of direct rather than truly vicarious liability against a corporation and that the “organic theory” recognises a very limited range of persons who are to be regarded as constituting a corporation’s directing mind and will.
2. It is to be accepted that the language of s 793 discloses an intent to extend, rather than limit, the circumstances in which a body corporate may be found to have itself contravened a civil remedy provision: *Trade Practices Commission v* ***Queensland Aggregates*** *Pty Ltd* [1982] FCA 329; (1982) 44 ALR 391 at 404 (Morling J). *Trade Practices Commission v* ***Tubemakers*** *of Australia Ltd* [1983] FCA 99; (1983) 47 ALR 719 at 739. Although the provision employs concepts of agency in its proscription of the particular persons whose conduct may be “taken also to have been engaged in by” the body corporate, it is not cast in language that in and of itself deems the body corporate to be liable for a contravention of the Act.
3. However, a finding that a registered organisation is taken also to have engaged in the conduct of its officials may have the forensic consequence that the registered organisation is proven to have contravened the same civil remedy provision of the Act as has been contravened by the officials themselves. That consequence will ordinarily follow because s 793 will, in most cases, facilitate proof of all of the essential elements of a contravention that must be established in the proceedings alleging an actual contravention by the organisation.
4. None of the authorities to which the parties referred deal with a case, such as the present, where a body corporate is alleged to be personally (that is, directly) liable for breach of a statutory prohibition that is directed, on its expressed terms, to a natural person having a particular statutory status (in this case that of a permit holder). ABCC sought to overcome that difficulty by contending that the word “conduct” should be construed to include any “act” which, in turn, should encapsulate all external elements of the alleged contravention. Reliance was placed on *Director of Public Prosecutions (NT) v* ***WJI*** (2004) 219 CLR 43,which concerned the wide meaning of the word “act” in s 31 of the *Criminal Code* *Act* (NT) and ***Vallance*** *v The Queen* (1961) 108 CLR 56 at 59 (Dixon CJ). In the latter case, Dixon CJ held (at 59) that at common law the *actus reus* of a criminal offence encapsulates not only the physical acts or omissions of a person accused of a criminal offence, but all other “external elements” proof of which is necessary to establish the person’s liability. The word “act” in other statutory contexts has been given a wide meaning by reference to these principles: *WJI* at [39] – [40].
5. I do not derive meaningful assistance from the authorities relied on by ABCC. Whatever be the width of the concept of *actus reus* in criminal law, or the meaning of the word “act” in other statutory contexts, in my view ABCC’s contention is at odds with the plain words of s 793, construed as a whole.
6. The word “conduct” does not appear in isolation. It appears together with the words “engaged in”. The whole phrase bears its ordinary meaning. In that phrase, the word “conduct” refers to any physical act (and, by reason of s 12, an omission to do an act) engaged in by a person referred to in s 793(1). It does not encapsulate the objective circumstance that the person have the status of a permit holder.
7. I accept ABCC’s submission that the imposition of direct liability on CFMEU in circumstances such as the present would advance the objects of the Act. The scheme of Pt 3.4 of the Act is intended in part to facilitate the performance of important representative functions of registered organisations. So much is clear from s 484, which confers the right of entry that Mr McDermott and Mr Cartledge were admittedly seeking to exercise. Moreover, a permit holder under the Act is a person who only has that status by virtue of an application made by his or her registered organisation. However, the advancement of the statutory objective cannot justify the strained construction of s 793 for which ABCC contends. That is especially so when regard is had to other provisions of the Act that may operate to impose consequences upon a registered organisation for misuse by permit holders of the rights conferred on them: see, for example s 508 and s 510(1)(d).
8. I also accept ABCC’s submission that the conduct and state of mind of the officials in the present case (as in the case of all contraventions of s 500) are inextricably connected with their statutory status as permit holders. But that circumstance, to my mind, only serves to reinforce the legislature’s intention that s 500 (read in conjunction with s 539 and s 545 and absent any other deeming provision) impose actual liability only upon persons having that status. Section 793, being a provision of general application, cannot, on its plain words, overcome the clear intention evident in s 500. Insofar as ABCC’s attempt to utilise s 793 in that way results in conceptual confusion, the confusion arises because the provision has been invoked to do work that its plain words are not capable of doing.
9. The decision in *Harris* is not plainly wrong. It is appropriate that I follow it.
10. Accordingly, the first alleged basis for CFMEU’s liability is not made out.

# VICARIOUS LIABILITY

## The issue

1. ABCC’s pleaded case is that CFMEU is vicariously liable for each “contravention of” Mr McDermott and Mr Cartledge: (SOC [4], [8], [12], [16] and [22]). Submissions in support of that plea focussed on the question of whether the contravening acts of the officials were authorised in the sense that there was “a broad authority encompassing a class of act in respect of which the act complained of falls.” CFMEU’s vicarious liability is alleged to extend to the officials’ unauthorised and unlawful modes of performing the tasks falling within their actual authority.
2. CFMEU submits that s 500 of the Act does not impose any duty upon it that may be breached vicariously by the acts of its officials in any event. Accordingly, it was submitted, the doctrine of vicarious liability cannot apply at all, irrespective of whether the officials’ acts were authorised.
3. The parties’ respective positions reflect the two sides of an unresolved debate at common law concerning the theoretical justification for the imposition of vicarious liability in tort cases. This is not a tort case. However, the jurisprudence in tort illustrates the importance of identifying precisely what is meant in each case by the phrase “vicarious liability”. The parties’ submissions to some degree, employed different meanings for the phrase, one focusing on the attribution of liability, the other focusing on the attribution of acts. The phrase “common law” was used, in my view, too loosely in the course of submissions. The rights and “liabilities” at issue in the present case are purely statutory. Where it is said that a “common law” doctrine applies, care must be taken to identify the particular body of law relied upon.
4. CFMEU’s argument is founded on the absence of any duty imposed upon it by s 500 that is capable of being breached through the actions of its servants or agents. For the reasons that follow, that argument, based as it is on the “act” theory of vicarious liability, should be accepted. To explain why that is so it is necessary to discuss how the term “vicarious liability” has been used (or perhaps misused as the case may be) in tort and criminal law contexts. In my view, as s 500 is a statutory penal provision, the approach to statutory interpretation adopted in criminal law cases is the more appropriate body of law to apply.

## The debate in tort

1. The conceptual distinction between the attribution of acts and the attribution of liability in tort was recently considered by the Full Court in ***Pioneer*** *Mortgage Services Pty Ltd v Columbus Capital Pty Ltd* [2016] FCAFC 78 (Davies, Gleeson and Edelman JJ). Liability based on the attribution of the acts of another was, their Honours observed, a “misnomer meaning of vicarious liability” that had become dominant in the 18th and 19th centuries (at [50]). Their Honours continued (at [51]):

In contrast with these 19th century cases vicarious liability began to acquire its literal meaning in the 20th century. In *Scott v Davis* [2000] HCA 52; (2000) 204 CLR 333, 369 [106], McHugh J said that the liability of an employer for the wrongful acts of the employee has ‘evolved in the last 150 years to a vicarious liability’. Lord Denning played a large part in this evolution: see *Young v Edward Box & Co Ltd* [1951] 1 TLR 789, 793; *Rose v Plenty* [1976] 1 WLR 141, 144. It is now undeniable that in England it is possible to attribute *either* acts or liability. In England, the former is now confined to agency and vicarious liability to the latter.

1. In ***Darling Island*** *Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36*¸* Kitto J spoke of the “true principle” as one that “makes the master responsible for the servant’s acts and not for his liabilities” (at 63). Taylor J agreed (at 66). Kitto J’s “true principle” has been referred to as the “conduct” theory of vicarious liability: ***Kable*** *v New South Wales* [2012] NSWCA 243; (2012) 293 ALR 719 at [54] (Allsop P).
2. Fullagar J expressed a different view as to the principles underlying the doctrine (*Darling Island* at 57):

The rule is, in my opinion, rightly stated, as it always is, in terms of liability and not in terms of duty. The liability is a true vicarious liability: that is to say, the master is liable not for a breach of a duty resting on him and broken by him but for a breach of duty resting on another and broken by another. The notion of liability without breach of personal duty is not a legal impossibility.

1. As the Full Court observed in *Pioneer¸* where vicarious liability in the sense described by Fullagar J is imposed in a tortious context, the liability is truly vicarious and indirect. In contrast, when rules of agency are invoked to render an employer liable by reason of the *acts* of the servant (the theory favoured by Kitto J), the resulting liability is direct and hence not truly vicarious. It is for that reason that the Court in *Pioneer* referred to the label “vicarious” in the latter cases to be a misnomer. The Court could not discern from the authorities a clear statement as to whether the rule preferred by Fullagar J (which reflects the current position in England) has gained acceptance in Australia, although Allsop P in *Kable* concluded that it has (at [53]). It was unnecessary for the Court in *Pioneer* to decide the question.
2. If an approach resonant with the “liability” theory stated by Fullagar J were to be adopted in the current statutory context, it would follow that CFMEU may be vicariously liable for a contravention of s 500 of the Act, notwithstanding that the provision sanctions the conduct by a natural person (namely a permit holder) and no other person.

## The decision in *Hanley*

1. In ***Hanley*** *v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 100 FCR 530, Ryan, Moore and Goldberg JJ considered alternative legal bases for the liability of a union for a contravention of s 170NC of the *Workplace Relations Act 1996* (Cth) (WR Act). Section 170NC(1) provided:

(1) A person must not:

(a) take or threaten to take any industrial action or other action; or

(b) refrain or threaten to refrain from taking any action; with intent to coerce another person to agree, or not to agree, to:

(c) making, varying or terminating, or extending the nominal expiry date of, an agreement under Division 2 or 3; or

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

…

1. The union’s liability was alleged to be founded on the conduct of its organiser, Mr Dowling. A magistrate had found that Mr Dowling was liable for a contravention of s 170NC(1) but the union was not. The magistrate held that s 349 of the WR Act (a provision expressed in relevantly the same terms as s 793 of the Act as now in force) was the only basis upon which the union may be liable by reference to Mr Dowling’s conduct, but that provision had not been pleaded. The magistrate rejected a submission that the union may be found to be vicariously liable at common law.
2. The Full Court held (at [59]) that the presence of s 349 in the WR Act did not exclude the operation of either “common law vicarious liability” or direct corporate liability under the principles in *Tesco*. Moreover, vicarious liability was not excluded merely because s 170NC could be characterised as a penalty provision (at [60] – [61]). The same must be concluded about s 500 and s 793 of the Act now under consideration: see also *Fair Work Ombudsman v Offshore Marine Services Pty Ltd (No 2)* [2013] FCA 943 at [148] (Gilmour J).
3. In the result, the union respondent in *Hanley* was not shown to be directly liable for a contravention of s 170NC(1) under the principles in *Tesco* because Mr Dowling had not been shown to be the “directing mind and will” of the union (at [64]). The union was, however, “vicariously liable, or liable by the operation of s 349, for Dowling’s breach of s 170NC(1)” (at [85]).
4. In concluding that the common law principles of vicarious liability applied, the Full Court said (at [61]):

In our view, common law vicarious liability is not excluded merely because s 170NC can be characterised as a penalty provision. It will be recalled that the passage from the speech of Lord Reid in *Tesco Supermarkets Ltd v Nattrass*, relied upon by his Worship, spoke of statutes creating civil liabilities only ‘exceptionally’ excluding vicarious liability. There is nothing to suggest that s 170NC falls into that exceptional category. Indeed, it may be doubted whether, even if s 170NC created an offence (which it does not: see s 170NF(1)), vicarious liability would necessarily be excluded (as seems to be the effect of his Worship’s reasoning). That question would probably have to be answered by the application of the following test suggested by Atkin J in *Mousell Brothers Ltd v London and North-Western Railway Co* [1917] 2 KB 836 at 845, 846 (applied by the High Court in *R v Australasian Films Ltd* (1921) 29 CLR 195 at 214-215 and by Franklyn  J in *Ducasse*):

‘I think that the authorities cited by my Lord make it plain that while prima facie a principal is not to be made criminally responsible for the acts of his servants, yet the Legislature may prohibit an act or enforce a duty in such words as to make the prohibition or duty absolute; in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not regard must be had to the object of the statute the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed.’

1. The Court’s reasoning assumes that there exists a common law doctrine of vicarious liability applicable in private civil law cases that applies in a penal statutory context subject to the statute expressly or impliedly providing to the contrary. The Court identified nothing in the terms of s 170NC itself that would preclude the application of vicarious liability principles. It was unnecessary for the Court to consider the distinct theoretical basis for the imposition of vicarious liability because the “duty” in s 170NC was directed to a “person”, which necessarily included a body corporate such as the union respondent.
2. In this case, neither party referred the Court to any authority in which a body corporate employer or principal had been held vicariously liable for the contravention of a provision directed on its express terms exclusively to a natural person. In resolving the issue now before me, *Hanley* is to be followed to the extent that the Full Court found that vicarious liability principles are not precluded merely because the remedy sought in the proceedings is penal in nature. I otherwise do not consider the decision in *Hanley* to be directed at the same issue to be determined in this case.

## The approach in criminal cases

1. In the criminal law context, the distinction between primary and “vicarious” corporate criminal liability may be obscured, either because the cases do not directly address the theoretical underpinnings for the imposition of liability or because the offence in question is one that expressly or impliedly fixes liability on an employer for breach of the employer’s own duty by the acts of an employee in any event: see generally Fisse WB “The Distinction between Primary and Vicarious Corporate Criminal Liability”, (1967) 41 ALJ 203 esp at 204 and 209.
2. In ***Tiger Nominees*** *Pty Ltd v State Pollution Control Commission* (1992) 25 NSWLR 715, Gleeson CJ (as he then was ) said at 718 – 719:

As a rule the common law refused to impose criminal responsibility on a person, as a principal, for the misdeeds of others: *R v Huggins* (1730) 2 Ld Raym 1574 at 1580; 92 ER 518 at 522-523; *Halsbury’s Laws of England* 4th ed, vol 11 par 51 at 40. The development and extension of principles imposing vicarious liability in the nineteenth and twentieth centuries reflect, to some extent, difficulties encountered in law enforcement. Principles were abstracted from developments in the law of tort, and this was done most readily when the offences could be characterised as regulatory in substance although criminal in form. Such offences were sometimes characterised as ‘public welfare offences’. Laws relating to fair trading, consumer protection, and safeguarding the environment provide examples.

Questions of statutory construction commonly require consideration in this context. **The ultimate issue in the present case is whether or not the legislature has, expressly or by necessary implication, created a criminal offence for which one can be found vicariously responsible.**

**Whatever may be the outer limits of the principles attracting the imposition of vicarious liability it is necessary that the relevant statutory offence be of such a nature that it is capable of commission vicariously.**

(Emphasis added)

Mahoney JA and Campbell J agreed at 722.

1. The principles of construction referred to by Gleeson CJ direct attention to the statutory words creating the offence, with a particular focus on the nature of the prohibition that is said to have been breached. Some cases focus on the verb employed in the statute to define the prohibited act, so as to identify whether a principal can perform that act by the actions of a servant for which it is vicariously responsible: see, for example, *Commissioners of Police v Cartman* [1896] 1 QB 655 (“sell”), and *Quality Dairies (York) Ltd v Pedley* [1952] 1 KB 275 (“use”) and *Tiger Nominees* itself at 720 (“pollute”). The question of whether or not the imposition of vicarious liability is intended may also be answered by reference to the class of persons to whom the offence is directed. That question will not arise where (as in the majority of cases) the offence prohibits conduct by “a person”, which would include a body corporate principal acting through the agency of its servants: see *R and Minister for Customs v Australasian Films Ltd* (1921) 29 CLR 195 at 215 – 216.
2. Ultimately, the task is to identify whether the act prohibited by the offence in question is one that can be done by the accused principal through acts of his or her servant that, by virtue of their relationship, the principal is “vicariously” answerable for. Notions of authorisation and agency are employed to resolve those questions, but any resulting liability is not vicarious in the true sense. The word “vicarious” in cases such as *Tiger* *Nominees* is used in the same sense used by Kitto J in *Darling Island*: it refers to the attribution of acts that may constitute a contravention, not the attribution of liability *for* a contravention. In my view, the result reached in *Hanley* is explained by (or at least not inconsistent with) that approach. There was nothing in that case to suggest that a contravention of s 170NC of the WR Act could not be committed by the union (a person) through the acts of its officials for which it was answerable: “common law vicarious liability” principles were employed to identify those acts.

## The proper construction of the Act

1. I have already observed that Section 545 of the Act empowers the Court to grant certain remedies if satisfied that a person “has contravened” a civil remedy provision. The words “has contravened” to my mind indicate that the person in question must be shown to have actually (or otherwise deemed to have actually) contravened the prohibition in question. For an example of a deeming provision, see s 550 of the Act, extracted at [94] below. The text of s 545 tends against an outcome where a permit holder may pay a penalty for his or her contravention and a registered organisation also pay a penalty in respect of liability that is truly vicarious in its nature, rather than direct or deemed to be direct.
2. Read as a whole, Pt 3.4 evinces an intention that the objectives of that Part (which advance the objectives of the Act as a whole) be achieved by the conferral of rights on certain natural persons on the one hand, and the imposition of responsibilities upon those same persons specifically affecting the manner of exercise of those personal rights. There may well have been other means by which to achieve the statutory objective, but that is the means Parliament has chosen.
3. The Act then makes separate provision for consequences that may befall a registered organisation in the event that its officials misuse their personal rights. It is in that wider context that s 500 is to be considered.
4. The “duty” of a permit holder not to act in an improper manner when exercising or seeking to exercise a right is not, in my view, a duty the breach of which can result in the imposition of vicarious liability upon any other person.
5. If the imposition of vicarious liability on a non-permit holder for a contravention of s 500 of the Act is considered desirable from a policy perspective, Parliament may readily give effect to that policy by making its intention clear. As presently framed, however, the language of s 500, construed in the context of s 545 and Pt 3.4, tells against its imposition.
6. This alleged basis for CFMEU’s liability should be rejected.

# ACCESSORIAL LIABILITY

## Principles

1. Section 550 of the Act has the heading “Involvement in contravention treated in same way as actual contravention”. It provides:

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

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

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

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

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

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

1. The phrase “taken to have contravened” is one that permits a court in civil remedy proceedings to treat a person as though he or she “has contravened a civil remedy provision” within the meaning of s 545 (which concerns the making of any order the Court considers appropriate against the person) and s 546 (which concerns the imposition of pecuniary penalties against the person).
2. ABCC specifically relies on s 550(2)(c). The principles concerning the imposition of accessorial liability under such a provision are well settled.
3. In ***Yorke*** *v Lucas* (1985) 158 CLR 661, the High Court discussed the state of mind that is to be proven on an allegation of accessorial liability under the TPA. The respondent, Mr Lucas, was alleged to have been liable as an accessory to a contravention of s 52 of the TPA committed by a company of which he was the sole director. It was said that Mr Lucas either aided, abetted, counselled or procured the company’s contravention within the meaning of s 75B(1)(a) or was directly or indirectly knowingly concerned in, or party to, the contravention within the meaning of s 75B(1)(c) as then in force. The latter is equivalent to s 550(2)(c) of the Act.
4. Section 52 of the TPA prohibited a company, in trade or commerce, from engaging in conduct that was misleading or deceptive. The company’s misleading conduct involved the provision of incorrect turnover figures to a purchaser in a contract for the sale of a business. Proof of the company’s contravention involved no question of intent. The company was found liable for an unwitting contravention of s 52 by reference to the conduct of Mr Lucas attributed to it under s 84(2): see, at first instance, *Yorke v Ross Lucas Pty Ltd (No 2)* [1983] FCA 14; (1983) 46 ALR 319 at 320 – 321 (Fisher J).
5. The primary judge held that Mr Lucas was not to be taken to be liable for a contravention of s 52 by the operation of s 75B because he was not aware, and had no reason to suspect, that the information concerning turnover which he relayed to the purchaser was incorrect. An appeal by the purchaser to the Full Court was dismissed.
6. On appeal, the High Court rejected an argument that s 75B of the TPA did not require proof of intent on the part of Mr Lucas based upon knowledge of the material facts.
7. In respect of the equivalent to s 550(2)(c), the plurality recognised that the provision contained alternative bases for liability – that of being “knowingly concerned” in the contravention, and that of being “party to” the contravention (at 669 – 670 (Mason ACJ, Wilson, Deane and Dawson JJ). In respect of the first limb, their Honours said (at 670):

There can be no question that a person cannot be knowingly concerned in a contravention unless he has knowledge of the essential facts constituting the contravention.

1. Although the word “knowingly” did not, in a textual sense, extend to the phrase “party to”, their Honours held that the concept of being a party to a contravention necessarily involved being an “intentional participant, the necessary intent being based upon knowledge of the essential elements of the contravention” (at 670).
2. In the present case, it is sufficient that ABCC show that CFMEU was involved in its officials’ contraventions under the first limb in s 550(2)(c), that of being knowingly concerned. To the extent that the two limbs involve different tests, it is difficult to see how the second limb might be satisfied in circumstances where the first limb is not.

## Does s 550 apply?

1. All of what I have said assumes that s 550 is intended, as a matter of statutory construction, to apply in circumstances where the alleged secondary participant is not a “permit holder” for the purposes of s 500. CFMEU submits that s 550 cannot apply in that way. Its submissions were based in part on the following observations of Dixon J (as he then was) in ***Mallan*** *v Lee* (1949) 80 CLR 198 at 216:

There is a number of cases which show that the application of sections dealing with aiding and abetting may be excluded by the nature of the substantive offence or the general tenor or policy of the provisions by which it is created.

1. His Honour cited *R v* ***Tyrrell*** [1894] 1 QB 710; ***Morris*** *v Tolman* [1923] 1 KB 166 and ***Ellis*** *v Guerin* (1925) SASR 282. It is submitted that the authorities cited by Dixon J show that accessorial liability is inapplicable when the prohibition is intended to apply solely to a particular class of contravener. The authorities cited by Dixon J may be briefly summarised.
2. In *Tyrrell* it was held that the victim of a sexual offence could not be held liable as an accessory because the policy underlying the offence was the protection of a class of persons into which the victim fell.
3. In *Morris* it was held that the respondent could not be convicted of aiding and abetting the commission of an offence when the case alleging primary liability against the principal had not been proven.
4. In *Ellis* the respondent purchased cigarettes from “a certain ham and beef shop” in Adelaide after 8 pm. The shopkeeper was convicted of an offence prohibiting the sale of goods after closing time. The respondent was charged with aiding and abetting the shopkeeper’s offence. Angas Parsons J held that it would be contrary to the tenor of the legislation to find the respondent liable as an accessory. The legislation in question created a separate and distinct offence to the effect that no person shall enter a shop after closing time for the purpose of buying goods. Parliament had, by creating the alternative offence with lower penalties, evinced an intention that a buyer not be held liable as an accessory to the shopkeeper’s offence and thus exposed to higher penalties.
5. In *Mallan* itself, a company was charged with a statutory tax offence expressed in the following terms (at 204):

Any person who, or any company on whose behalf the public officer, or a director, servant or agent of the company in any return knowingly and wilfully understates the amount of any income or makes any misstatement affecting the liability of any person to tax or the amount of tax shall be guilty of an offence.

1. The company was convicted by reference to the acts and state of mind of its public officer, Mr Mallan. Mr Mallan was charged with the same offence on the basis that he was knowingly concerned in the company’s contravention within the meaning of what was then s 5 of the *Crimes Act 1914* (Cth) (relevantly equivalent to s 550 of the Act).
2. Dixon J construed the provision creating the offence as one having the purpose of making a corporation “vicariously liable” for the acts of its public officers. His Honour continued (at 215 — 216):

On the interpretation I have given to s 230(1), for more than one reason s 5 of the *Crimes Act* cannot apply to a public officer so as to make him an accessory to the offence of the company. In the first place, the public officer’s act on behalf of the company making it an offender *ipso facto* amounts to a substantive offence on his part under s 230(1). In the second place, the sub-section makes him the actor, the principal, for whose guilty conduct the company is responsible vicariously. It would be an inversion of the conceptions on which the degrees of offending are founded to make the person actually committing the forbidden acts an accessory to the offence consisting in the vicarious responsibility for his acts.

1. It is clear that Dixon J did not regard the offence as one intended to apply only to a primary contravener in the nature of a company. To the contrary, his Honour made express reference to the circumstance that a public officer could be directly liable for the same offence as that proven against the company, including in circumstances where the company’s liability was founded on the public officer’s acts and guilty mind. His Honour reasoned that a person should not be held liable as an accessory to the company’s contravention because the company’s liability was, on the terms of the statute itself, truly vicarious in its nature. It was in that respect that the case alleged against Mr Mallan involved an inversion of the conceptions on which degrees of offending are founded. No inversion of that kind arises in the present case: compare *Hamilton v Whitehead* (1988) 166CLR 121.
2. Unsurprisingly, the results in the authorities upon which CFMEU relied turned on the construction of the statute in question. In my view, the results arrived at in the cases do not demand the conclusion that CFMEU cannot be liable as an accessory under s 550 of the Act for a contravention of s 500.
3. As the High Court observed in *Yorke* (at 667)*,* statutory provisions of the kind presently under consideration are derived from common law principles of accessorial liability enunciated in ***Giorgianni*** *v The Queen* (1985) 156 CLR 473. In that case, one Mr Renshaw was charged with the offence of culpable driving causing death. Mr Giorgianni was charged on the basis of having aided, abetted, counselled or procured the commission of Mr Renshaw’s offence. Mr Giorgianni sought to escape liability on the basis that he was not himself the driver of a motor vehicle. The particular offence was, he submitted, not an offence for which he could in law be found liable. In rejecting that argument, Mason J (as he then was) said (at 492):

Contrary to the argument of counsel for the appellant, the mere description of the offender under s 52A as the driver of the motor vehicle cannot, therefore, be seen as evidencing a legislative intention to exclude the operation of the common law with respect to secondary participation. Nor, in my opinion, can any such intention be otherwise extracted from the nature of the offence or the terms of the section by which it is created. It follows that the applicant, although charged as a matter of procedure with the substantive offence, was liable to conviction on the basis of having aided, abetted, counselled or procured the commission of the misdemeanour of culpable driving by Renshaw.

1. To similar effect, the majority in *Maroney*  *v The Queen* (2003) 216 CLR 31 said (at [11]):

The effect of statutory deeming provisions is often to arrive at results quite different from those which the ordinary meanings of words would produce. One of those results is that a person can be convicted of aiding, abetting, counselling or procuring the commission of a statutory offence even though the statute creating the offence deals only with the liability of the principal offender, and even if the offence is of such a nature that the person convicted of aiding, abetting, counselling or procuring, could not have committed the offence as a principal offender.

1. The same principles apply in respect of common law offences: see *R v Goldie; Ex parte Picklum* (1937) 59 CLR 254 at 271-272 (Evatt J) (concerning the accessorial liability of a wife in respect of a rape perpetrated by her husband), *Question of Law Reserved (No 2 of 1996)* (1996) 67 SASR 63 (concerning accessorial liability of a person not being a public officer for the common law offence of misfeasance in public office).
2. Other examples are to be found under the *Competition and Consumer Act 2010* (Cth), and its predecessor the TPA, concerning the imposition of accessorial liability upon natural persons for contraventions of provisions that are confined in their operation to corporations. *Yorke* is a case in point (although the director in that case was not liable on the facts).
3. The weight of authority is against CFMEU’s contention. In my view, the circumstance that s 500 of the Act speaks directly to permit holders (and only to permit holders) does not provide an answer to ABCC’s claim that CFMEU may be “taken” to be liable for a contravention of s 500 by the operation of s 550.
4. It remains to consider how s 550 operates on the facts, in respect of both the physical acts and state of mind established against CFMEU.

## CFMEU’s participation and knowledge

1. In *Construction, Forestry, Mining and Energy Union v Clarke* [2007] FCAFC 87; (2007) 164 IR 299 at [26], the Full Court said that accessorial liability:

… depends upon the accessory associating himself or herself with the contravening conduct – the accessory should be linked in purpose with the perpetrators (per Gibbs CJ in *Giorgianni v The Queen* (1985) 156 CLR 473 at 479–480; see also Mason J at 493 and Wilson, Deane and Dawson JJ at 500). The words ‘party to, or concerned in’ reflect that concept. The accessory must be implicated or involved in the contravention (*Ashbury v Reid* [1961] WAR 49 at 51; *R v Tannous* (1987) 10 NSWLR 303 per Lee J at 307E–308D (agreed with by Street CJ at 304 and Finlay J at 310)) or, as put by Kenny J in *Emwest Products Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2002) 117 FCR 588 at [34], must participate in, or assent to, the contravention.

1. To the extent that it is necessary to show that CFMEU involved itself in some tangible way in the contraventions of its officials, there is no reason why s 793 should not facilitate proof of that requirement. Section 793 is premised on an accepted fiction that a body corporate is a separate legal entity from those who participate in it: *Salomon v A Salomon & Co Pty Ltd* [1897] AC 22. Accepting that fiction, it does not matter that the deemed physical acts of the secondary participant are the same acts in fact engaged in by the primary contravener. CFMEU did not make any submission to the contrary. Accordingly, the physical acts of Mr McDermott and Mr Cartledge are, in each instance, taken also to be the acts of CFMEU. That is sufficient to demonstrate CFMEU’s participation in each contravention.
2. For the purposes of establishing CFMEU’s knowledge it is enough to show that Mr McDermott and Mr Cartledge knew of all of the essential facts constituting their respective contraventions: see s 793(2). In respect of the contravention committed by Mr McDermott on 28 April 2014, I infer from the evidence and admissions that Mr McDermott knew that he:
3. was a permit holder;
4. was, at the time of his acts and omissions, seeking to exercise rights in accordance with Pt 3.4 of the Act;
5. did not show an entry notice before entering the site;
6. had been directed to leave the site; and
7. held discussions in rooms not agreed with the head contractor and otherwise not during meal breaks.
8. It was not suggested by CFMEU that these inferences were not available to be drawn on the facts, nor was it suggested that CFMEU must be shown, as a secondary participant, to have known that the officials’ conduct in each instance was objectively improper within the meaning of s 500 of the Act.
9. I would adopt the same reasoning in respect of the facts constituting Mr McDermott’s contraventions on 23 May 2014, 6 June 2014 and 14 July 2014 and the facts constituting Mr Cartledge’s contravention on 14 July 2014.
10. It follows that CFMEU is taken to be liable for five contraventions of s 500 of the Act. The Court may make orders against CFMEU pursuant to s 545 in respect of each contravention. I will grant ABCC declaratory relief in terms that reflect these reasons.

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| I certify that the preceding one hundred and twenty-five (125) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Charlesworth. |

Associate:

Dated: 17 July 2017

SCHEDULE OF PARTIES

|  |  |
| --- | --- |
|  | SAD 58 of 2015 |
| Respondents |  |
| Fourth Respondent: | CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION |