FEDERAL COURT OF AUSTRALIA

Australian Building and Construction Commissioner v Huddy [2017] FCA 739

|  |  |
| --- | --- |
| File number: | NTD 33 of 2014 |
|  |  |
| Judge: | **WHITE J** |
|  |  |
| Date of judgment: | 30 June 2017 |
|  |  |
| Catchwords: | **INDUSTRIAL LAW** – proceedings brought against employees who stopped work during the currency of an enterprise agreement, a union organiser and the union; respondents alleged to have contravened s 417 of the *Fair Work Act 2009* (Cth) (FW Act) by engaging in industrial action while the enterprise agreement was in force – union organiser and union delegate (the union representatives) and, by reason of their conduct, the union, alleged to have organised the industrial action – consideration of the meaning of “organise” – found that the union representatives had not organised the industrial action – found that the employees had engaged in industrial action.  **INDUSTRIAL LAW** – employee respondents alleged to have contravened s 343 of the FW Act by engaging in industrial action with the intent to coerce their employer not to exercise a workplace right or to exercise it inconsistently with the enterprise agreement – union representatives alleged to have organised the action with the same intention – consideration of the meaning of “intent to coerce” – consideration of the reverse onus provision in s 361 – consideration of each respondent’s intention in withholding labour – held that all but one employee respondent had not discharged the s 361 onus and thus are taken to have engaged in the action with a proscribed intention – found that union representatives did not organise the action.  **INDUSTRIAL LAW** – employee respondents alleged to have contravened s 348 of the FW Act by taking action to coerce their employer to engage in industrial activity by complying with their lawful requests – union representatives alleged to have organised the action – the reasoning that applied to s 343 equally applied to s 348 – the employee respondents did not discharge the s 361 onus – found that they had engaged in action with a proscribed intention – found that union representatives had not organised the industrial action and had not, by reason of s 362, contravened s 348.  **INDUSTRIAL LAW** – alleged contravention by employee respondents of s 50 – consideration of dispute resolution clause in the enterprise agreement – held that the employees had contravened a term of the enterprise agreement.  **INDUSTRIAL LAW** – alleged involvement by union representatives in the contraventions by the employee respondents of ss 50, 343, 348 and 417 of the FW Act – consideration of the principles of accessorial liability under s 550 of the FW Act – held that union representatives were involved in contraventions of the provisions by each respondent.  **INDUSTRIAL LAW** – admitted allegation that union organiser contravened s 500 of the FW Act. |
|  |  |
| Legislation: | *Building Construction Industry (Consequential and Transitional Provisions) Act 2016 (Cth)* cl 19 of Sch 2  *Evidence Act 1995* (Cth) s 38  *Fair Work Act 2009* (Cth) ss 12, 13, 19, 50, 51‑54, 186, 341, 343, 347, 348, 360, 361, 362, 417, 418, 433, 484, 487, 500, 550, 793, Pt 2‑4, Pt 3‑4  *Fair Work (Registered Organisations) Act 2009* (Cth) s 27  *Fair Work (Building Industry) Act 2012* (Cth) ss 4, 10(b), 59A, 59C  *Federal Court Rules 2011* (Cth) rr 5.22, 5.23, 30.21(1) |
|  |  |
| Cases cited: | *Abigroup Contractors Pty Ltd v Construction, Forestry, Mining and Energy Union* [2012] FWA 7654  *Amcor Ltd v Construction, Forestry, Mining and Energy Union* [2005] HCA 10; (2005) 222 CLR 241  *Ashbury v Reid* [1961] WAR 49  *Australian Building and Construction Commissioner v Harris* [2017] FCA 733  *Australian Competition and Consumer Commission v Giraffe World Australia Pty Ltd (No 2)* [1999] FCA 1161; (1999) 95 FCR 302  *Australian Paper Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (1998) 81 IR 15  *Australian Securities and Investments Commission v Australian Investors Forum Pty Ltd (No 2)* [2005] NSWSC 267  *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v UGL Resources Pty Ltd* [2011] FWAFB 4777; (2011) 214 IR 237  *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd (No 3)* [2013] FCA 525; (2013) 216 FCR 70  *Barclay*, *Geelong Wool Combing Ltd v Textile, Clothing and Footwear Union of Australia* [2003] FCA 773; (2003) 130 FCR 447  *Board of Bendigo Regional Institute of Technical and Further Education v Barclay (No 1)* [2012] HCA 32; (2012) 248 CLR 500  *BTR Engineering (Australia) Ltd v Dana Corporation* [2000] VSC 246  *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] HCA 41; (2014) 253 CLR 243  *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2015] FCAFC 25; (2015) 230 FCR 298  *Construction, Forestry, Mining and Energy Union v Clarke* [2007] FCAFC 87; (2007) 164 IR 299  *Construction, Forestry, Mining and Energy Union v Williams* [2009] FCAFC 171; (2009) 262 ALR 417  *De Gruchy v The Queen* [2002] HCA 33; (2002) 211 CLR 85  *Esso Australia Pty Ltd v Australian Workers’ Union* [2016] FCAFC 72; (2016) 245 FCR 39  *Fair Work Ombudsman v Maritime Union of Australia* [2014] FCA 440; (2014) 243 IR 312  *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160  *Giorgianni v The Queen* (1985) 156 CLR 473  *Hadgkiss v Aldin (No 2)* [2007] FCA 2069  *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466  *Kucks v CSR Ltd* (1996) 66 IR 182  *National Tertiary Education Industry Union v Commonwealth of Australia* [2002] FCA 441; (2002) 117 FCR 114  *Pirrie v McFarlane* (1925) 36 CLR 170  *Port Kembla Coal Terminal Ltd v Construction, Forestry, Mining and Energy Union* [2016] FCAFC 99; (2016) 263 IR 344  *Qantas Airways Ltd v Transport Workers’ Union of Australia* [2011] FCA 470; (2011) 280 ALR 503  *R v Nifadopoulos* (1988) 36 A Crim R 137  *Rafferty v Madgwicks* [2012] FCAFC 37; (2012) 287 ALR 437  *Rural Press Ltd v Australian Competition and Consumer Commission* [2002] FCAFC 213; (2002) 118 FCR 236  *Seven Network (Operations) Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2001] FCA 456;(2001) 109 FCR 378  *Skilled Engineering Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2001] FCA 1397; (2001) 108 IR 116  *State of Victoria v Construction, Forestry, Mining and Energy Union* [2013] FCAFC 160; (2013) 218 FCR 172  *Trade Practices Commission v Australian Meat Holdings Pty Ltd* (1988) 83 ALR 299  *Victoria v Construction, Forestry, Mining and Energy Union* [2013] FCAFC 160; (2013) 218 FCR 172  *Williams v Construction, Forestry, Mining and Energy Union* [2009] FCA 223; (2009) 179 IR 441  *Yorke v Lucas* (1984) 158 CLR 661  *Young Investments Group Pty Ltd v Mann* [2012] FCAFC 107; (2012) 293 ALR 537  *Zaburoni v The Queen* [2016] HCA 12; (2016) 256 CLR 482 |
|  |  |
| Date of hearing: | 25 and 26 November 2015, 11, 12, 13, 14 and 22 April 2016 |
|  |  |
| Registry: | Northern Territory |
|  |  |
| Division: | General Division |
|  |  |
| National Practice Area: | Employment & Industrial Relations |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 479 |
|  |  |
| Counsel for the Applicant: | Mr I Neil SC with Mr D Chin |
|  |  |
| Solicitor for the Applicant: | Clayton Utz |
|  |  |
| Counsel for the Respondents: | Mr W Friend QC with Mr C Massey |
|  |  |
| Solicitor for the Respondents: | Hall Payne Lawyers |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | NTD 33 of 2014 |
|  | | |
| BETWEEN: | DIRECTOR OF THE FAIR WORK BUILDING INDUSTRY INSPECTORATE  Applicant | |
| AND: | MICHAEL HUDDY  First Respondent  CRAIG TAIT  Second Respondent  CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION (and others named in the Schedule)  Third Respondent | |

|  |  |
| --- | --- |
| JUDGE: | WHITE J |
| DATE OF ORDER: | 30 JUNE 2017 |

THE COURT ORDERS THAT:

1. The matter is adjourned to a date to be fixed by the Court for the hearing of submissions as to the relief to which the Applicant is entitled in light of the Court’s findings.

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

REASONS FOR JUDGMENT

|  |  |
| --- | --- |
| Introduction | [1] |
| The standing of the Commissioner | [25] |
| Factual setting | [26] |
| The events on 21, 22 and 23 October 2013 | [34] |
| The alleged contraventions of s 417 | [58] |
| Industrial action | [64] |
| “Organising” industrial action - principles | [66] |
| Mr Thomas’ evidence | [75] |
| Mr Robati’s evidence | [82] |
| Mr Huddy’s evidence | [103] |
| Mr Tait’s evidence | [116] |
| Other witnesses | [124] |
| Consideration | [127] |
| Section 343 | [149] |
| The workplace rights | [154] |
| The Commissioner’s allegations | [160] |
| Intent to coerce | [164] |
| The respondents’ intentions | [174] |
| The 2nd Respondent: Craig Tait | [175] |
| The 4th Respondent: Stevan Allan | [181] |
| The 5th Respondent: Richard Alley | [185] |
| The 6th Respondent: Quentin Bartlett | [186] |
| The 7th Respondent: Corinne Boyd | [190] |
| The 8th Respondent: David Bright | [193] |
| The 9th Respondent: Oliver Canute | [197] |
| The 10th Respondent: Glynn Churchyard | [198] |
| The 11th Respondent: Desmond Collins | [201] |
| The 12th Respondent: Wade Couzens | [202] |
| The 13th Respondent: Stuart Croft | [205] |
| The 14th respondent: Nathan Crossen | [206] |
| The 15th Respondent: Carl Dawson | [213] |
| The 16th respondent: Liam Day | [214] |
| The 18th Respondent: Carl Delaney | [221] |
| The 19th Respondent: Cole Diedrich | [225] |
| The 21st Respondent: Michael Elliot | [226] |
| The 23rd Respondent: Anthony Giannone | [227] |
| The 24th respondent: Clint Gibbings | [228] |
| The 25th Respondent: John Gilder | [231] |
| The 26th Respondent: Kent Grace | [232] |
| The 27th Respondent: Brett Griffiths | [233] |
| The 28th Respondent: Karl Hanley | [236] |
| The 29th Respondent: Jordan Hanson | [239] |
| The 30th Respondent: Greg Hines | [240] |
| The 31st Respondent: Matt Hore | [241] |
| The 32nd Respondent: Jarrod Jackson | [245] |
| The 33rd Respondent: Gavan James | [246] |
| The 34th Respondent: Garth Kent | [247] |
| The 35th Respondent: Matthew Kerrigan | [251] |
| The 36th Respondent: Andreas Kirchhof | [252] |
| The 37th Respondent: Phil Landrigan | [258] |
| The 38th respondent: Steven Lowe | [259] |
| The 39th respondent: Christopher Lynd | [265] |
| The 40th Respondent: Russell Mavin | [269] |
| The 41st Respondent: Timothy McCarthy | [272] |
| The 42nd Respondent: Jason Moody | [273] |
| The 43rd Respondent: Scott Morse | [276] |
| The 44th respondent: Raphael Mouauri | [280] |
| The 45th Respondent: Derick Mulhall | [284] |
| The 46th Respondent: Gary Mullins | [288] |
| The 47th Respondent: Cian Murphy | [292] |
| The 48th Respondent: Nola Ngata | [297] |
| The 49th Respondent: Bernard Niki | [302] |
| The 50th Respondent: Noovao Noovao | [303] |
| The 51st Respondent: Ashley Owen | [306] |
| The 52nd Respondent: Dimitrios Panatos | [307] |
| The 53rd Respondent: Ephraim Piiti | [310] |
| The 54th Respondent: Wayne Rossiter | [315] |
| The 55th Respondent: Michael Ryan | [320] |
| The 56th Respondent: Christopher Smith | [326] |
| The 57th Respondent: Sean Smith | [327] |
| The 58th Respondent: Michael Soul | [328] |
| The 60th Respondent: Daniel Subotic | [331] |
| The 61st Respondent: Mitchell Sutcliffe | [332] |
| The 62nd Respondent: Benjamin Teudet | [333] |
| The 63rd Respondent: Saron Thomasson | [334] |
| The 64th Respondent: Benjamin Tito | [335] |
| The 65th Respondent: Tou Uniua | [338] |
| The 66th Respondent: Jade Watson | [341] |
| The 67th Respondent: Michael Weeks | [344] |
| The 68th Respondent: Brendan Weiss | [347] |
| Evaluation | [350] |
| Section 348 of the FW Act | [412] |
| Section 50 of the FW Act | [428] |
| Section 550 of the FW Act | [442] |
| Section 500 of the FW Act | [468] |
| The Non-Represented Respondents | [471] |
| Conclusion | [476] |

WHITE J:

## Introduction

1. A dispute arose in September and October 2013 between Laing O’Rourke Construction Australia Pty Ltd (LOR) and certain of its employees (the LOR employees) at the Ichthys LNG Project at Blaydin Point near Darwin in the Northern Territory (the Project). The dispute concerned the time at which the buses transporting the LOR employees to their accommodation should depart from the LOR work site within the Project at the end of each working day.
2. The working hours for the LOR employees were 6.30 am to 5 pm. LOR had implemented a practice by which the buses departed from its worksite within the Project at 5 pm, whereas the LOR employees considered that the buses should depart from the Project site gate, approximately 5.1 km (or 15‑20 minutes) away, at that time. If that was the arrangement, the employees would have to finish work activities some 15‑20 minutes earlier than was the practice in order to be at the gate by 5 pm.
3. Things came to a head on 22 October 2013. At a meeting of LOR employees during the morning smoko break, those present resolved to stop work for the remainder of the day. They later acted in accordance with that resolution, although some performed some work in the afternoon preparing the LOR area for an approaching storm.
4. At about 8.30 pm on 22 October, LOR obtained an order from the Fair Work Commission (FWC) directing the LOR employees to return to work. The employees did so at the commencement of work (6.30 am) the next morning.
5. By reason of these events, and events associated with them, the Director of the Fair Work Building Industry Inspectorate (the Director) alleges that the respondents, or at least certain of them, contravened five separate provisions in the *Fair Work Act 2009* (Cth) (the FW Act).
6. While the former Director commenced and prosecuted these proceedings, I am by reason of cl 19 of Sch 2 of the *Building Construction Industry (Consequential and Transitional Provisions) Act 2016* (Cth), to treat the Australian Building and Construction Commissioner (the Commissioner) as replacing the Director as party to the proceedings. I will for reasons of consistency refer in these reasons to the applicant as “the Commissioner”.
7. The Commissioner seeks declarations with respect to each contravention and the imposition of penalties.
8. There were originally 69 respondents to the proceedings. The Commissioner discontinued the claims with respect to five respondents, namely, the 17th, 20th, 22nd, 59th and 69th respondents. These reasons concern the claims against the remaining 64 respondents.
9. The third respondent is the Construction, Forestry, Mining and Energy Union (CFMEU). It is an organisation of employees registered under the *Fair Work (Registered Organisations) Act 2009* (Cth) (the FW(RO) Act) and, by reason of being so registered, a body corporate (s 27). The CFMEU is an “employee organisation” within the meaning of that term used in ss 12 and 417(2) of the FW Act, an industrial association within the meaning of s 12 of the FW Act, a body corporate within the meaning of s 793 of the FW Act, and a building association within the meaning of s 4 of the *Fair Work (Building Industry) Act 2012* (Cth) (FW(BI) Act) (now repealed).
10. The first respondent, Mr Huddy, was from September 2007 until June 2014, employed by the CFMEU in the Northern Territory. His responsibilities included the organising of CFMEU members at the Project.
11. The second respondent, Mr Tait, was at material times an employee of LOR. In July 2013, he was elected as the CFMEU delegate for the LOR employees at the Project and held that position as at 22 October 2013.
12. Each of the remaining respondents was an employee of LOR on 22 October 2013 and was performing work on the Project. Each was a “national system employee” within the meaning of s 13 of the FW Act.
13. Fifty three of the respondents (the Represented Respondents) were represented at the trial. These included Mr Huddy, Mr Tait and the CFMEU. The remaining 11 respondents (the Non‑Represented Respondents) did not attend at the hearing. I was satisfied that each had been served with the proceedings.
14. One of the Non‑Represented Respondents (Mr Jackson, the 32nd respondent) had formerly been represented by Hall Payne, the solicitors for the Represented Respondents, and that firm had filed a defence on his behalf. I directed, pursuant to r 30.21(1) of the *Federal Court Rules 2011* (Cth) (FCR), that the trial proceed in his absence. No notice of acting nor defence had been filed by the remaining 10 Non‑Attending Respondents.
15. Thirty seven of the individual Represented Respondents gave evidence in the trial.
16. The Commissioner alleges contraventions of ss 417, 343, 348, 50 and 500 of the FW Act.
17. Section 417 proscribes the organisation of, and engagement in, industrial action while an enterprise agreement is in force. The Laing O’Rourke Construction Australia Pty Ltd Ichthys Onshore Construction Greenfields Agreement (the LOR Agreement) was in force in October 2013. The Commissioner alleges that each of the individual respondents, other than Mr Huddy, *engaged in* industrial action in contravention of s 417(1) by stopping work on 22 October 2013. The individual Represented Respondents admit these contraventions. By his defence, Mr Jackson denies this allegation. The Commissioner alleges that Mr Huddy, Mr Tait and, by reason of their conduct and s 793 of the FW Act, the CFMEU *organised* the industrial action. Each of Mr Huddy, Mr Tait and the CFMEU deny these allegations. The Commissioner’s pleadings are also capable of being understood as alleging that the CFMEU had, by Mr Tait’s conduct, engaged in industrial action, but such an allegation was not pursued at the hearing. That being so, if such a claim was advanced in the pleading, I have taken it to have been abandoned.
18. Section 343 of the FW Act provides that a person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person to exercise, or not exercise, a workplace right. The Commissioner alleges that each respondent contravened this prohibition by organising (in the case of Mr Huddy, Mr Tait and the CFMEU) or taking (in the case of the individual respondents other than Mr Huddy) industrial action with the intent to coerce LOR to exercise, or not exercise, workplace rights under the LOR Agreement, or to exercise them in a particular way. The Represented Respondents and Mr Jackson deny these allegations.
19. Section 348 of the FW Act provides that a person must not organise or take, or threaten to organise or take, any action against another with intent to coerce that person to engage in “industrial activity”. The Commissioner alleges that each respondent contravened this provision by organising (in the case of Mr Huddy, Mr Tait and the CFMEU) or taking (in the case of the individual respondents other than Mr Huddy) the stop work action on 22 October 2013 with the intention of coercing LOR to comply with demands concerning the bus departure times. He also alleges that each of Mr Huddy and Mr Tait contravened s 348 by reason of the operation of s 362 of the FW Act. The Represented Respondents and Mr Jackson deny these allegations.
20. The Commissioner alleges that, by reason of s 363 and/or s 793 of the FW Act, the CFMEU is to be taken to have contravened ss 343 and 348 by reason of the conduct of Mr Huddy and Mr Tait said to have constituted the organisation of “industrial action” and “action” respectively. The CFMEU denies the allegations.
21. Section 50 of the FW Act provides that a person must not contravene a term of an enterprise agreement. The Commissioner alleges that each of the LOR employees breached the dispute resolution provision in cl 18.2 of the LOR Agreement. The Represented Respondents and Mr Jackson deny these allegations.
22. Section 500 of the FW Act provides that a permit holder exercising, or seeking to exercise, rights of entry under Pt 3‑4 must not intentionally hinder or obstruct any person, or otherwise act in an improper manner. The Commissioner alleges that Mr Huddy acted in contravention of s 500 on 22 October 2013 by acting in an improper manner on the Project site, while exercising a right of entry pursuant to s 484 of the FW Act. He alleges that, by reason of s 363 and/or s 793 of the FW Act, the CFMEU is also to be taken to have contravened s 500. Both Mr Huddy and the CFMEU admit this allegation.
23. Finally, the Commissioner alleges that each of Mr Huddy and Mr Tait was involved (in the meaning used in s 550 of the FW Act) in the contraventions by the individual respondents of ss 348, 343, 417(1) and 50. Each of Mr Huddy and Mr Tait denies these allegations.
24. I directed that the trial proceed in two stages, with the alleged contraventions to be determined in the first stage, and the issues of declarations and penalties in respect of those contraventions which are either admitted or found proved to be addressed in the second stage.

## The standing of the Commissioner

1. The standing of the Commissioner to bring these proceedings by virtue of ss 10(b), 59A and 59C of the FW(BI) Act was admitted by the Represented Respondents. It was also admitted by Mr Jackson in the defence filed by him when he had legal representation.

## Factual setting

1. In this section of the reasons, I make findings as to the background circumstances from which the issues for the Court’s determination arose.
2. The Project involves the construction of a liquefied natural gas plant. It is a substantial undertaking involving the construction of infrastructure on a site occupying many hectares and, in October 2013, some 2,000 employees. The principal contractor (JKC Australia LNG Pty Ltd (JKC)) engaged various contractors to perform separate packages of work. One of these contractors was LOR, which had contracted to construct cryogenic tanks. Before work at the Project commenced, JKC negotiated a greenfields agreement with a number of the unions with coverage of the employees who would work on the Project. The contractors then entered into greenfields agreements with the relevant union or unions containing the same terms as that negotiated by JKC. The effect was that all employees at the Project were engaged on the same terms and conditions.
3. The LOR Agreement was one such agreement. It was made pursuant to Pt 2‑4 of the FW Act and approved by the FWC under Subdiv B of Div 4 of Pt 2‑4 on 15 May 2013. The parties to the LOR Agreement were LOR, the CFMEU, the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU), the Australian Workers’ Union (AWU), and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU). The nominal expiry date of the LOR Agreement was 14 May 2017 and it was, accordingly, in force as at 22 October 2013. I am satisfied that it was an enterprise agreement to which the provisions in the FW Act, in particular ss 50 and 417, apply.
4. It seems that LOR commenced work at the Project site in about July or August 2013. Its work site was well distant from the Project site gate.
5. Generally, work started on the Project each day at 6.30 am and concluded at 5 pm. A practice had developed with contractors other than LOR pursuant to which employees would finish work activities each day in sufficient time to be at the Project site gate at 5 pm to leave. However, when LOR commenced work at the Project, it did not adopt that practice. It took the view that the LOR Agreement required employees to remain at their actual work site until 5 pm and had the buses depart from its work site at that time. LOR relied in this respect on cl 8.1 of the LOR Agreement, which provided (relevantly):

8.1 Setting ordinary hours

(a) The Parties recognise that operational requirements or other circumstances may arise on the Project where different methods of working Ordinary Hours may be required to be implemented for an Employee or group of Employees.

(b) The Parties additionally recognise and support the right of the Employer to require that Employees to consistently report on time for the commencement of their shift *and not leave their designated work area prematurely prior to any designated break during the work day or at the finish time of each designated work day*. The Employer shall make clear what are the reasonable timeframes to wash‑up in prior to a break and to pack up and wash‑up prior to the end of each designated work day. The Parties commit to constructively working to resolve any issue that may arise from the enforcement of working a particular arrangement of Project Working Hours.

(c) The Parties and Employees bound by the Agreement commit to:

…

(5) be present, ready to commence work at the pre‑start meeting each day at the specified start time; and

(6) *remain at their workplace until the designated finishing time*:

…

(Emphasis added)

1. LOR considered that, whatever be the view of the other contractors in relation to the corresponding term in their enterprise agreements, the emphasised passages in cl 8.1(b) and (c) entitled it to insist that its employees remain at their actual work site until 5 pm, rather than finishing work activities earlier so as to be at the Project site gate at 5 pm.
2. Many of the Represented Respondents described the detriments to which the 5 pm bus departure time gave rise. Several of them were fly in‑fly out workers who lived in the same village accommodation used by the fly in‑fly out employees of other contractors. Those employees would get back to the accommodation before the LOR employees. This meant that they had first access to the communal facilities. It also meant that the LOR employees were the subject of some mocking by the employees of other contractors, in particular, by those who were already relaxing by the time the LOR employees arrived back at the village.
3. As it happened, Mr Huddy agreed with LOR’s view about the effect of cl 8.1. He had considered its provisions in the context of taking up the concerns of the LOR Employees with LOR. He had also discussed the position with “senior coordinators” within the CFMEU. Mr Huddy and the “senior coordinators” appreciated that it would be risky to take the bus time dispute to the FWC because, if LOR’s position was upheld, it could lead to the removal of the benefit enjoyed by the members of the CFMEU employed by other contractors at the Project and, for that matter, enjoyed by all employees at the Project. In that respect, Mr Huddy said “we were never going to entertain [taking the issue to the FWC] … because that would put at risk the other 2000 people on the Project, and this was a site standard. … We were not going to put it before the Commission to get a bad decision, are we, which could affect the other 2000 people”.

## The events on 21, 22 and 23 October 2013

1. On 21 October 2013, Mr Huddy gave notice to LOR pursuant to s 487 of the FW Act of his intention to exercise his right of entry under s 484 of the FW Act on the following day. He identified the place on the Project which he wished to enter as the “LOR Tanks”. This was a reference to the cryogenic tanks being constructed by LOR.
2. JKC had contracted with the Chamber of Commerce and Industry Western Australia (CCIWA) to manage the exercise by permit holders of the rights of entry pursuant to Pt 3‑4 of the FW Act. Construction Services Northern Territory (CSNT), a division of CCIWA, carried out this work. Ms Garland, an Employee Relations Consultant, was employed by CSNT in the day to day management of the exercise of rights of entry at the Project.
3. Ms Garland responded to Mr Huddy’s notice by an email later on 21 October confirming that entry had been approved for him to hold discussions with eligible employees of LOR on Tuesday, 22 October 2013 between 10‑10.30 am.
4. Ms Garland met Mr Huddy at the Project’s security gate at 9.35 am on 22 October and, after he had attended to induction processes, escorted him to the LOR crib room area. Many, but not all, of the LOR employees had gathered in the crib room for their morning smoko at about 10 am. On the basis of admissions in the Third Amended Defence and the evidence, I am satisfied that those present in the room included each of the Represented Respondents other than the fourth respondent (Stevan Allan). The evidence did not indicate those of the Non‑Represented Respondents who were present in the crib room. Mr Huddy then conducted a meeting with the assistance of Mr Tait.
5. During the course of the meeting, the issue concerning the bus departure time was raised (the Bus Dispute).
6. Having regard to the contraventions alleged by the Commissioner, it will be necessary to make detailed findings as to what occurred in the meeting in relation to the Bus Dispute. For the present it is sufficient to record my finding that, towards the end of the meeting, a motion was put and seconded to the effect that the LOR employees not return to work until the meeting heard from LOR concerning the bus pick up times. An overwhelming majority of employees voted in favour of that motion.
7. Mr Huddy and Mr Tait then said that they would inform LOR that the employees were stopping work.
8. The morning smoko break should have finished at 10.30 am but, because of the discussion about the Bus Dispute, it went a little over time. At the conclusion of the meeting, the LOR employees did not return to work but remained in the crib room, or in its vicinity.
9. Between 2013 and 2015, Mr Nicholls was the Civil Construction Manager employed by LOR at the Project. In October 2013, Mr Rigby was employed by LOR as the Human Resources and Industrial Relations Manager at the Project. Both gave evidence in the trial. I regarded each as an honest and reliable witness. There were some differences in the evidence of Mr Nicholls and Mr Rigby (and that of Ms Garland) but, in my assessment, these were minor and of a kind commonly experienced when two or more witnesses give evidence of events occurring over an extended period and in a tense atmosphere. In the case of these differences, I have generally preferred the evidence of Mr Nicholls.
10. I will refer shortly to the evidence of Mr Huddy and Mr Tait about their conversations with Mr Nicholls and Mr Rigby on 22 October. I indicate now that I regard the accounts of those conversations and the course of events that day given by Mr Nicholls and Mr Rigby to be more reliable, and have accepted them.
11. Mr Rigby informed Mr Nicholls shortly after 10.30 am that the LOR employees were still in the crib room. Mr Nicholls, Mr Rigby and Ms Garland then went to the crib room and entered it. As they did so, Mr Huddy and Mr Tait walked towards them. Mr Rigby asked Mr Huddy and Mr Tait “is the work force going back to work?” Mr Huddy responded with words to the effect of “[t]he workers aren’t going back to work. We want to meet to discuss the reasons why”.
12. Mr Nicholls then spoke to the LOR employees in the crib room saying words to the effect of “guys, we are going out for a quick discussion”.
13. Mr Nicholls, Mr Rigby, Ms Garland, Mr Huddy and Mr Tait then moved to an adjacent office (the First Meeting). Mr Huddy commenced the First Meeting by raising an issue about Ms Garland’s presence. The conversation was to the following effect:

Mr Huddy: Does she [Jackie Garland] really need to be here? I don’t think she does.

Mr Rigby: Are you asking us to remove her?

Mr Huddy: This is an issue between the work force and Laing O’Rourke, so can you see any reason as to why Jackie needs to be here?

Ms Garland: Look, if it means that we can find a resolution, then I’ll step outside for a few minutes.

Ms Garland then left the First Meeting.

1. Mr Nicholls and Mr Rigby gave evidence of the conversation which then occurred. There are some slight differences in their respective accounts but I do not consider these to be material. I am satisfied that a conversation to the following effect occurred:

Mr Huddy: The workforce aren’t happy with the current situation with the bussing times on site … The buses are leaving the Laing O’Rourke compounds on site at 5 o’clock and you’re the only one on site doing so. Other contractors are leaving earlier to, leaving the site gate at 5 o’clock … You’re not applying the agreement as written.

Mr Tait: This issue has been made aware to Laing O’Rourke previously and nothing has been done about it.

Mr Nicholls: Well, no, that’s not correct. We’ve actually told the workforce our reasoning why 5 o’clock bussing time has been done … The workforce is employed to work in cryogenic tanks from 6.30am to 5pm. That’s what the letters of offer stated.

Mr Rigby: Is there something we can potentially talk about in terms of how we can get these guys back to work today?

Mr Huddy: No, the guys have voted and they don’t want to go back to work until this matter is resolved.

Mr Tait: We could take that to the workforce, however, we cannot answer that on behalf of the workforce.

Mr Nicholls: We do want the workforce to go back to work. We need to speak to Jackie Garland and get our manager, Ian Baker, and the senior management in head office in Brisbane.

1. The First Meeting then concluded. It seems that Mr Huddy and Mr Tait returned to the crib room.
2. Mr Nicholls, Mr Rigby and Ms Garland entered the crib room again shortly after 11 am. Mr Rigby spoke to the LOR employees, saying words to the effect of “we do understand this is industrial action, however, we are trying to find a way to get you guys back to work as we’re talking to our senior management”.
3. Subject to one qualification, the LOR employees remained in the crib room, or in its vicinity, until 5 pm that day when they left, pursuant to the usual arrangements. There were numerous discussions between LOR management, Mr Tait and Mr Huddy as well as the employees themselves during the course of the day.
4. The qualification just mentioned is this. At one stage in the afternoon, a “Yellow Alert” was issued at the Project warning of an approaching electrical storm. A number of the employees then returned to the places at which they worked for about 30 minutes in order to make the area safe before the storm arrived. This was in accordance with normal practice when a Yellow Alert was issued. Having made the work area safe, the LOR employees then returned to the crib room or its vicinity.
5. In the late afternoon, LOR applied to the FWC for an order pursuant to s 418 that the industrial action cease. At about 4.15 pm, after the application had been made but before it was heard by the FWC, Mr Nicholls, Mr Rigby and Ms Garland re‑entered the crib room, in which the majority of the LOR employees were still located. Mr Nicholls and Mr Rigby addressed those present, including Mr Huddy and Mr Tait, saying words to the effect of:

Mr Nicholls: Guys, we believe this is unprotected industrial action. We believe the issue is about the bussing times. Laing O’Rourke has gone to the Fair Work Commission to seek orders. We’ve got the hearing time down late this afternoon and as information comes out of that hearing, we’ll pass that on. But what those orders may mean, I’ll let Matt explain that.

Mr Rigby: Guys, if we do get these orders asking you to go back to work, we will present them to you in the morning … Guys, if we do get these orders, we strongly advise you to go back to work. If you want to take it further, it then gets raised to a higher level, and there’s dire consequences if people take that type of action.

Mr Huddy: Why wasn’t this discussed with me first?

Mr Rigby: We advised that we would provide feedback to the workers, and that is what we are doing.

LOR employees: Why hasn’t an application been lodged before this?

Mr Rigby: We’re following the dispute resolution procedure, and all parties had the right to take the matter to the Fair Work Commission, including your CFMEU organiser sitting here. Once we have the decision, Laing O’Rourke will stand by it. You’re required to return to work until the matter is resolved. …

Mr Hines

(LOR Employee) Why are you treating us differently to how the other contractors treat their workforce?

Mr Nicholls: This is what we believe the agreement means and our letters of offer, however, we are going to go to the Commission and get a ruling on it and that will tell both of us, you guys and us, which is the understanding of the agreement.

Mr Ramshaw

(LOR employee): Every other contractor on site is looking after their workforce. Why aren’t you all looking after the workforce?

Mr Rigby: Well, we do a lot of things that we are trying to help you guys with. It’s outside of this bussing arrangement. We’re being flexible with your guys’ R and R flights. We’re trying to build up employee morale a little bit. We’re looking at recognition schemes amongst the workforce etc.

Mr Ramshaw: There’s other contractors who are leaving before we are and we don’t understand why we should be treated differently.

Mr Nicholls: Which is why we are going to the Commission to get a ruling on the issue.

Mr Ramshaw: But that would mean that every other contractor on site, if Laing O’Rourke’s understanding was correct, it would mean that every other contractor on site, their understanding was actually different or wrong.

Mr Nicholls: That may actually be the case. We will be seeking orders. If we do get the orders, we’ll get that information to you guys and we’ll reconvene again tomorrow morning and we’ll have a communication meeting. You guys are going to have to go to your pre‑starts after that meeting.

This meeting (the Second Meeting) occurred at about 4 pm.

1. At about 4.45 pm, Mr Huddy left the site.
2. At about 8.30 pm on 22 October, the FWC made an order that all employees of LOR employed at the Project covered by the LOR Agreement who were participating in industrial action “not further engage in, recommence, or threaten to engage in, any industrial action” while the order remained in force. The order was expressed to come into effect at 9 pm on 22 October 2013 and remain in force for a period of one month. Mr Rigby printed out copies of the FWC order. He put some on the LOR noticeboards and left others on the tables in the crib room.
3. The LOR employees arrived at the Project in the usual way at 6.30 am on the following day, 23 October 2013. Mr Rigby addressed a meeting of the LOR employees in the crib room and told the meeting of the FWC orders. Mr Tait then led a discussion and conducted a vote as to whether they should return to work. Some were in favour of continuing the stop work action but others voted in favour of returning to work. Given the lack of unanimity, Mr Tait announced to the meeting that all should return to work, and they did so. Mr Tait informed Mr Rigby that the LOR employees would be returning to work.
4. The effect was that there was a stoppage of work from about 10.30 am to 5 pm on 22 October 2013.
5. It is convenient to address the Commissioner’s allegations with respect to the Represented Respondents first. The allegations concerning the Non‑Represented Respondents will be addressed separately.

## The alleged contraventions of s 417

1. Section 417, which proscribes the organisation or engagement in industrial action during the currency of an enterprise agreement, provides (relevantly):

*No industrial action*

(1) A person referred to in subsection (2) must not organise or engage in industrial action from the day on which:

(a) an enterprise agreement is approved by the FWC until its nominal expiry date has passed; or

(b) a workplace determination comes into operation until its nominal expiry date has passed;

whether or not the industrial action relates to a matter dealt with in the agreement or determination.

(2) The persons are:

(a) an employer, employee, or employee organisation, who is covered by the agreement or determination; or

(b) an officer of an employee organisation that is covered by the agreement or determination, acting in that capacity.

…

1. As can be seen, s 417 proscribes a particular form of activity (industrial action) during the nominal term of enterprise agreements and workplace determinations, irrespective of the purpose of the industrial action. Its evident purpose is to ensure an absence of industrial action in these periods: *CFMEU v BHP Coal Pty Ltd* [2015] FCAFC 25; (2015) 230 FCR 298 at [146].
2. The elements of a contravention of s 417(1) are:

(a) either the organising of or the engagement in;

(b) industrial action;

(c) by a person within the class to which subs (2) refers;

(d) during the nominal life of an approved enterprise agreement or workplace determination.

1. I have found that the LOR Agreement is an enterprise agreement to which s 417(1)(a) applies. The Represented Respondents admitted that they were persons covered by the LOR Agreement and I am satisfied that each was, on 22 October 2013, a person to whom the s 417(1) prohibition applied.
2. The Commissioner alleges that, by stopping work at about 10.45 am on 22 October 2013, each of the individual respondents, other than Mr Huddy, *engaged in* industrial action in contravention of s 417(1) and that, by their conduct that day, Mr Huddy and Mr Tait (and thereby the CFMEU) had *organised* the industrial action. The individual Represented Respondents admitted that they had *engaged in* the industrial action. Each of Mr Huddy and Mr Tait denied that he had *organised* industrial action in contravention of s 417.
3. It is accordingly necessary to address the allegation that Mr Huddy and Mr Tait (and thereby the CFMEU) had *organised* industrial action.

### Industrial action

1. The term “industrial action” is defined (relevantly) in s 19 of the FW Act as follows:

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

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

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

(c) a failure or refusal by employees to attend for work or a failure or refusal to perform any work at all by employees who attend for work;

(d) the lockout of employees from their employment by the employer of the employees.

1. The Commissioner’s allegation focused in particular on subparas (b) and (c). He contends that the stoppage of work after 10.45 am on 22 October 2013 constituted a “ban, limitation or restriction on the performance of work” by the LOR employees or, in the alternative, a failure or refusal to perform any work at all. That allegation is made out on the evidence. In any event, the individual Represented Respondents admitted that they had not returned to work after the smoko and admitted that they had thereby engaged in industrial action. Accordingly, this aspect of the Commissioner’s allegations is established.

### “Organising” industrial action - principles

1. The term “organise” used in conjunction with “action” or “industrial action” in ss 343, 348 and 417 of the FW Act is not defined. It is a commonly used term in industrial parlance but lacks a precise definition.
2. The “organisation” of “action” (ss 343(1) and 348) or “industrial action” (s 417(1)) involves the intentional arranging, bringing about, putting in place, procuring or coordinating the action in question. Meanings of this kind seem consistent with the first meaning given by the Macquarie definition to the word “organise”, namely:

To form as or into to a whole consisting of interdependent or coordinated parts, especially for harmonious or united action: *to organise a party*.

However, saying this begs questions about the kind of conduct required. The circumstance that the proscription is on the organisation of a form of human activity and not inanimate objects suggests that organising has the connotation of positive conduct which is intended to, and does, induce or procure others to engage in conduct and/or which marshalls or coordinates the activities of those who are willing to do so. Understood in this way, conduct constituting organising in the relevant sense may take a variety of forms. As was said by Isaacs J, in a different statutory context, in *Pirrie v McFarlane* (1925) 36 CLR 170 at 203 the word “organise” is “of large connotation”.

1. Some authorities indicate that organising industrial action will be constituted by conduct which “procures” or “encourages” that conduct. In *Australian Paper Ltd v CEPU* (1998) 81 IR 15 at 22, North J said:

Engaging in industrial action is the taking of direct action which interferes with usual work patterns, while organising industrial action involves *procuring others* to take the direct action. A union official or employee who is not employed at the worksite which is the subject of disruption does not engage in industrial action for the purposes of Div 8 by *encouraging* employees to stop work. This conduct amounts to organising industrial action.

(Emphasis added)

1. However, in *Skilled Engineering Ltd v AMWU* [2001] FCA 1397; (2001) 108 IR 116, Finkelstein  J at [10] expressed the view that, having regard to the statutory definition of “industrial action” then under consideration, *Australian Paper* had been wrongly decided. It is not clear whether the disagreement of Finkelstein J extended to the observations of North J concerning conduct which would constitute the organising of industrial action.
2. The notion that the procuring of industrial action may constitute the organisation of that action is supported by the reasoning of Jessup J in *Williams v CFMEU* [2009] FCA 223; (2009) 179 IR 441.

[79] In the light of the evidence to which I have referred, it would be naïve not to recognise that the burden of Mr Mates’ message to the workers in the meeting on 31 July 2006 was that they should perform no further work on the site that day. No doubt he had his own good reasons for conveying that message. I accept also that it was not a direction. It was, however, a recommendation with the authority of a union organiser. Neither would it have appeared to the workers to be any spur-of-the-moment thing: Mr Mates’ reference to something having been raised with the builder on the Friday, and not sorted out, would have given an element of considered seriousness to what he was recommending. I accept also that the workers generally agreed with Mr Mates’ assessment of the situation on site, but he himself added an opinion about Mr Leonard’s ability to control matters of safety on site which would not otherwise have been known to the workers. That Mr Mates would have felt able to make a comment about such a subject could only have added further authority to what he said.

[80] For the above reasons, I accept the applicant’s allegation that, on 31 July 2006, Mr Mates organised a stoppage of work on the site. I also accept the alternative, and effectively indistinguishable, formulation relied on by the applicant, namely, that Mr Mates “took … steps to procure” such a stoppage.

This aspect of the reasons was not disturbed on appeal: *CFMEU v Williams* [2009] FCAFC 171; (2009) 262 ALR 417.

1. Some decisions of Fair Work Australia indicate that conduct by way of encouragement for, or support to, industrial action will constitute an organisation of the industrial action in the relevant sense: see *AMWU v UGL Resources Pty Ltd* [2011] FWAFB 4777, (2011) 214 IR 237 at [22] and *Abigroup Contractors Pty Ltd v CFMEU* [2012] FWA 7654 at [73] (overturned on appeal but not with respect to this point). This may be so but encouragement can take a variety of forms, ranging from active exhortation, on the one hand, to passive acquiescence, on the other. That being so, one would not expect that any form of encouragement at all may amount to the organisation of industrial action. In my opinion, it will be a rare case, if any, in which a person may be found to have organised industrial action without having engaged in a form of positive conduct which brings about, manages, or maintains the industrial action.
2. Counsel for the Commissioner submitted that, in the context of industrial action, organising includes words and actions which “encourage and enable” individual employees to act as a collective. Conduct of that kind may commonly be found in the organisation of “action” and “industrial action” for the purposes of ss 343, 348 and 417, but I would not regard such conduct as being necessarily sufficient to constitute organisation. In part, that is because a formulation in those terms does not incorporate satisfactorily the element of intention necessarily involved in the concept of organising. It is not difficult to envisage cases in which a person has both encouraged and enabled the industrial action but has not organised it. A detached observer who expresses support for industrial action proposed by others and then, as a favour, does no more than carry a message from one group of employees to another by which their action was coordinated may be said to have both encouraged and enabled the industrial action but would not, on common understandings, be regarded as having organised that action.
3. The above analysis suggests that close attention must be given to the conduct of Mr Huddy and Mr Tait alleged by the Commissioner to constitute the organising of the work stoppage in the present case.
4. In addition to the evidence of Mr Nicholls, Mr Rigby and Ms Garland to which I have already referred, the Commissioner led evidence from two LOR employees who were present at the meeting in the crib room during the morning smoko. These were Mr Thomas, a plant operator, and Mr Robati, a steel fixer. Mr Huddy and Mr Tait also gave extended accounts of what had occurred. The evidence of several of the individual Represented Respondents also canvassed aspects of the meetings on 22 October 2013, but generally not in the same detail.

### Mr Thomas’ evidence

1. Mr Thomas was present in the crib room throughout the smoko meeting. I thought that Mr Thomas gave his evidence honestly and was doing his best to report accurately to the Court what occurred. I regard his evidence as generally reliable, although it was incomplete in some respects.
2. Mr Thomas’ account of the smoko meeting in his affidavit of evidence commenced with the discussion about the bus departure time as he did not recount any of the matters which had preceded that discussion. He said that a number of workers “all over the smoko room” spoke of being unhappy about the bus pickup time and about the difference in practice between LOR and the other subcontractors. At some stage during this discussion Mr Tait (who he described as “not a stirrer”) said words to the effect of “if there is a problem, it has to be put to a motion, [that] is put forward and seconded and a vote is made on the motion”. Shortly afterwards, Mr Tait said words to the effect of “is there anyone who wants to put a motion forward?” Someone in the crib room (I am satisfied that it was an LOR employee and not Mr Huddy or Mr Tait) responded by saying “I propose that we go on strike”. This proposal was seconded by a number of other employees. Mr Tait then said words to the effect of “we’ve got a motion and it’s been seconded by these guys, now we have to vote on it”. He asked those who wished to go on strike to raise their hands. About 90% of those present did so. Mr Tait then asked anyone who did not wish to go on strike to raise their hands. No one did so. Mr Thomas did not vote.
3. Mr Tait then said words to the effect of “the motion has passed, I will now go and inform [LOR] that we are proceeding with strike action”. Mr Thomas said that Mr Tait “went to see management” and returned a short time later, saying that he had told [LOR] that “we were going on strike”.
4. Mr Thomas said that, later, Mr Nicholls and another person, who I find was Mr Rigby spoke to the persons in the crib room saying words to the effect of “we should not be going on strike” and “to go back to work”. Despite that everyone stayed in the crib room.
5. Shortly afterwards, Mr Thomas informed one of his supervisors that he did not wish to be on strike. The supervisor suggested that he “just follow what is going on and we’ll hopefully sort it out later during the day”. Mr Thomas said that he also recalled Mr Tait saying words to the effect that he had been advised that, because they were on strike, the matter has to go to the Fair Work Commission and that a decision was to be made by “a Magistrate” in Brisbane.
6. Although Mr Thomas referred to Mr Huddy in another context, he did not otherwise refer to Mr Huddy at all in his affidavit of 9 January 2014. This must be a gap in Mr Thomas’ recollection because I am satisfied that Mr Huddy was present in and about the crib room from 10 am until 4.45 pm. I think that some of the conduct which Mr Thomas attributed to Mr Tait may in fact have been conduct of Mr Huddy.
7. Mr Thomas said that on the morning of the following day, 23 October, Mr Tait spoke to the employees at about 6.30 am, saying words to the effect of “do we want to vote to continue with the strike action?” A large majority voted in favour of continuing the action but some (Mr Thomas thought five or six people) voted against. Mr Tait then said words to the effect of “the vote was not unanimous and therefore has not passed, so we are going back to work fellas”. Everyone then went back to work.

### Mr Robati’s evidence

1. Mr Robati’s evidence took an unusual course.
2. On 23 December 2013, he affirmed an affidavit prepared by employees of the Commissioner during an interview with him on that same day. It is necessary to explain the finding that Mr Robati had made the affidavit because, at the hearing, he did not concede that fact. In giving that explanation, I will, for convenience, describe the document in question as Mr Robati’s affidavit, even though that is established only by my present findings.
3. Mr Robati attended to give evidence in compliance with a subpoena served on him by the Commissioner’s solicitors. It was evident that Mr Neil SC, senior counsel for the Commissioner, intended following the course of having Mr Robati identify his affidavit and then tendering it as a convenient way of providing Mr Robati’s evidence in chief.
4. However, this course could not be followed because, at the outset of his evidence, Mr Robati denied that he had made an affidavit in the proceedings and denied, when the affidavit was presented to him, that it was his affidavit. He accepted that the signature on the affidavit “looks like my signature” and made a like admission with respect to the initials at the foot of the first three pages. It transpired that Mr Robati based his denials on two errors in the jurat, which was in the following terms:

Affirmed by Rahooi Robati at Perth this 23rd of December 2014

Before me [signature]

Stephen Pemberton, a Solicitor who has been admitted for 2 years and who holds a current practising certificate.

The errors were that the affidavit was said to have been made in Perth on 23 December 2014 when, as will appear, I am satisfied that it had in fact had been made in Cairns on 23 December 2013.

1. Mr Robati said, honestly, that he had never been to Perth, let alone in December 2014 and for this reason said that the affidavit could not be his affidavit. However, Mr Robati went further at the commencement of his evidence and asserted that he had not placed his signature and initials on the affidavit at all, whether in Perth or elsewhere.
2. Mr Neil SC then applied under s 38 of the *Evidence Act 1995* (Cth) for leave to cross‑examine Mr Robati. I allowed a *voir dire* on that question. In the *voir dire*, the Commissioner adduced evidence from Mr Kelleher, the solicitor with the conduct of the matter on his behalf. Mr Kelleher’s evidence was that he had arranged the service of a subpoena on Mr Robati on 6 November 2015 which required him to attend to give evidence and that he had provided Mr Robati with a copy of his affidavit. He also deposed that he had participated in a telephone discussion (together with the Commissioner’s junior counsel) with Mr Robati on 23 November 2015 in which Mr Robati had said, amongst other things words to the following effect:

I signed an affidavit about a year or so ago. I gave it but I didn’t want to go to Court.

…

I realise I have to show up. I asked not to come to court when I gave the statement. I wished I didn’t cooperate now.

… I haven’t been in any courts. I will show but I’m not going to say anything. I don’t have to. It’s affecting my relationship with my work colleagues. I will quit after this job. I’ll throw the towel in.

… I’m going to have to say “yes, it’s [the affidavit] mine”. I can’t say no.

1. In the light of that evidence, I granted leave to Mr Neil SC to cross‑examine Mr Robati about the matters to which s 38(1)(c) of the Evidence Act refers, namely, whether he had at any time made a previous inconsistent statement. In the cross‑examination which followed, Mr Robati accepted that he had made an affidavit on 23 December 2013 in Cairns and gave some evidence of the circumstances in which that had occurred. These included that he had read the affidavit carefully to ensure that its contents were accurate before approving it but he maintained that the affidavit which Mr Neil had produced to him was not the affidavit which he had made in Cairns.
2. During the course of this cross‑examination, Mr Robati explained that he was now being shunned by his work colleagues; that they did not want him coming to their home; that he attributed this to their having learnt that he was giving evidence in the trial; and that he had planned to come to Court in answer to the subpoena but not to say anything in order, in part, to save his relationship with his colleagues.
3. I then adjourned the further cross‑examination of Mr Robati in order to permit the Commissioner to lead further evidence about the circumstances in which Mr Robati had made the affidavit. That evidence came from Ms Te Maro, a senior investigating officer employed by the Commissioner in Darwin in November and December 2013; Mr Mathers, a senior investigating officer employed by the Commissioner in Adelaide; and Mr Pemberton, an in‑house lawyer employed by the Commissioner in Perth. I consider that the evidence of each of these witnesses was honest and reliable.
4. The evidence of Ms Te Maro, Mr Mathers and Mr Pemberton established the following (without identifying in relation to each matter the particular witness or witnesses who gave the evidence):

(a) on 22 November 2013, Ms Te Maro conducted an interview with Mr Robati by telephone. Her notes of that interview became an exhibit in the trial;

(b) subsequently, Ms Te Maro obtained approvals and made the arrangements to travel to Cairns to conduct a formal interview with Mr Robati on 23 December 2013;

(c) the interview took place in a conference room in the premises of the Fair Work Ombudsman and commenced in the early afternoon;

(d) those present at the interview were Mr Robati, Ms Te Maro, Mr Pemberton and Ms Rowe, another investigator employed by the Commissioner;

(e) the interview proceeded by Ms Te Maro or Mr Pembeton asking questions and Mr Pemberton typing Mr Robati’s responses in the form of an affidavit. This took about one hour;

(f) at the conclusion of the interview, Mr Pemberton printed the affidavit and Mr Robati “went through it”. He asked for some changes which were made;

(g) when Mr Robati was satisfied with the accuracy of the affidavit, he affirmed and signed it with Mr Pemberton witnessing it;

(h) this was the only affidavit made by Mr Robati at the instigation of the Commissioner’s staff;

(i) the Commissioner’s staff kept the original of the affidavit in safe custody until it was produced to the Court during the trial;

(j) Mr Pemberton was based in Perth at the time and the precedent affidavit on his laptop contained the form of jurat for affidavits made in Perth. He overlooked this when preparing Mr Robati’s affidavit and so did not alter the precedent entry to Cairns;

(k) Mr Pemberton entry of the date 23 December 2014 instead of 23 December 2013 was a “typo” on his part;

(l) the affidavit produced by the Commissioner in the trial was the affidavit made by Mr Robati in Cairns on 23 December 2013.

1. In his further evidence, Mr Robati confirmed that he had met Mr Pemberton in Cairns on 23 December 2013 and that Mr Pemberton had assisted him in making an affidavit. Despite this, Mr Robati continued to deny that the affidavit with his signature and initials was the affidavit which he had affirmed in Cairns on 23 December 2013. He acknowledged, however, that if the Court was to accept Mr Pemberton’s evidence about the mistakes in the jurat, then the affidavit was the affidavit he had affirmed in Cairns on 23 December 2013.
2. Subsequently, Mr Neil SC tendered Mr Robati’s affidavit without objection from Mr Friend SC, counsel for the Represented Respondents, and it became an exhibit in the trial.
3. I do accept Mr Pemberton’s evidence about the two mistakes in the jurat.
4. The Court therefore had evidence from Mr Robati in the form of his affidavit as well as his oral evidence in the trial. In the case of differences between those forms of evidence, I attach greater weight to the content of Mr Robati’s affidavit as I consider that evidence to have been generally reliable. It was made only two months after the events which Mr Robati was describing and, accordingly, when those events were likely to have been fresher in his mind. Mr Robati acknowledged that his memory was clearer on 22 November 2013 and 23 December 2013 than it was at the time of trial. Further, it was obvious that Mr Robati was a reluctant witness in the trial and I considered that he had, to an extent, “sanitised” his oral evidence in an attempt to preserve or restore his relationship with his work colleagues.
5. Mr Robati’s affidavit evidence was to the following effect. During the morning smoko he (as part of a group five) had stayed outside the crib room in a sheltered area. He said that there were about 30 employees inside the crib room. Mr Robati and his group entered the crib room at about 10.15 am. At that time, he heard Mr Tait “putting a motion forward” and saying words to the effect of “we won’t be going back to work until we hear from [LOR] about our bus time pickups. Let’s see a raise of hands for those who are not going [to] back out”. Mr Robati said that he, along with all others in the room raised their hands.
6. Mr Robati said that, after Mr Tait had “passed the motion”, Mr Huddy said words to the effect of “we didn’t get this far without a fight. With this bus time issue, we need to stick together. We can’t have half of you going back to work and half here waiting in the crib room and then everyone reaping the benefits. We’ve got to be together on this”. Mr Tait said words to the effect of “I will get back to you after I see [LOR]”.
7. Mr Robati and others remained in and about the crib room for the remainder of the day. At different times he observed Mr Nicholls, Mr Rigby and Ms Garland but could not hear what they were saying. At one stage Mr Tait and Mr Huddy called everyone back into the crib room and Mr Tait said words to the effect of “I’ve gone to [LOR] and told them what we want fixed with the bus times and [LOR] have lodged a dispute against us with Fair Work”. A short time after that, either Mr Nicholls or Mr Rigby addressed the employees saying “all this industrial action is illegal and [you] should go back to work. There is a way to resolve a dispute and what [you are] doing by sitting in the crib room is illegal. No action will be taken if you go back to work”. This prompted some of the employees to speak up and some said things like “we’ve brought this issue up twice about the bus issue but you’ve done nothing about it”, to which the LOR managers responded with words to the effect of “it [is] illegal and not the right way to resolve it. There is a protocol to bring up this issue and this is not how you should do it, what you are doing is illegal”.
8. After the managers left the crib room, one of the employees asked Mr Huddy “what is illegal about sitting in the crib room? Isn’t [it] just a peaceful protest?” to which Mr Huddy replied with words to the effect of “they are just bluffing. Don’t give into these fellas. One day of protest is nothing compared to 4 years of 20 minutes every day”.
9. The rest of the day was uneventful and Mr Robati left the work site at 5 pm in the usual way.
10. Mr Robati said that at the meeting the following morning, there were “mixed feelings” amongst the employees about returning to work. His impression was that about three‑quarters wished to continue the work stoppage but the rest wished to return to work. Mr Tait said words to the effect of “listen guys, we can’t have 90% in here and 10% out there. If we win this bus dispute, that 10% will also reap the benefits. [We’ve] got to be all in together”. Another vote occurred following which the employees returned to work.
11. As indicated, I regarded Mr Robati’s affidavit evidence as generally reliable. In particular, I accept his evidence that Mr Rigby had told the meeting that the industrial action was illegal and was not in any event the correct way to resolve the Bus Dispute. This was consistent with Mr Rigby’s own evidence.

### Mr Huddy’s evidence

1. Mr Huddy was actively engaged as the CFMEU organiser at the Project, sometimes attending there twice a day and sometimes on several occasions each week, as a number of contractors employed persons who were CFMEU members or eligible for membership in the CFMEU. LOR employees had raised the bus departure time issue with him on several occasions and he had spoken to a LOR human resources manager and to Mr Jones, LOR’s manager in the Northern Territory, about it. It was following his discussions with Mr Jones that Mr Huddy looked at cl 8.1 of the LOR Agreement and formed the view that LOR was probably correct in its understanding of the effect of that clause.
2. On 21 October 2013, Mr Huddy gave notice pursuant to s 487 of the FW Act of two intended entries onto the Project site on 22 October 2013: one for the meeting with LOR employees at 10 am and one to meet the employees of another contractor at 2 pm. He said that he had no particular issues which he wished to raise with the LOR employees at the 10 am meeting – he was attending as part of his general activities in servicing CFMEU members. Mr Huddy said that, shortly after 10 am on 22 October 2013, Mr Tait announced the meeting and introduced him. Mr Huddy stood alongside Mr Tait in the middle of the room where he could be seen and heard by all those present. There followed a discussion about a number of general matters before someone in the meeting raised the Bus Dispute. Mr Huddy said that some of the employees became “angry, agitated [and] talking over the top of each other”. He said that he informed the meeting that LOR was relying on the terms of the LOR Agreement and that “we’re at the end of it”, by which he had intended to convey that LOR would not change their position in discussions.
3. The motion to stop work came from the floor. Mr Huddy described that motion as being “that they sit down for the rest of the day and protest against [LOR]”. Mr Huddy understood at the time that the motion was that the LOR employees would “withdraw their labour until there was a resolution of their dispute with LOR about the bus time pickups or finishing times” and that “it was a protest that was directed to changing LOR’s mind on the bus time pickups or finishing times”.
4. Mr Huddy said that Mr Tait asked for a seconder to the motion. He said that at some stage he informed those present that stopping work would be unlawful industrial action and that they would not be paid. Mr Tait then conducted the vote by a show of hands. Mr Huddy thought that the vote to stop work had been unanimous.
5. In his cross‑examination, Mr Huddy agreed that, after the vote had been taken, he had said to the meeting words to the effect of:

With this bus – time issue, we need to stick together … We can’t have half of you going back to work and half here waiting in the crib room and then everyone reaping the benefits. … We’ve got to be together on this.”

In relation to those statements, Mr Huddy then gave the following evidence:

XXN: … what you were seeking to communicate by those words to everyone who was at the meeting [was] that, once the decision had been taken, all Laing O’Rourke employees had to withdraw their labour – stick together, correct?

A: Yes.

XXN: You couldn’t have some people going off to work and then taking the benefits [that they were hoping to achieve] [which] might be won by the withdrawal of labour, correct?

A: Correct.

XXN: And the benefits that you had in mind when you were talking about that was the hoped for benefit of persuading Laing O’Rourke, by means of the industrial action, to change its mind, correct?

A: Correct.

…

XXN: To force it to do so. Do you agree?

A: Well, you know, that was what the process was about.

1. Mr Huddy did not agree, however, that he had used the words attributed to him by Mr Robati, namely, “we didn’t get this far without a fight”.
2. Mr Huddy said that after the meeting he informed Mr Rigby and Mr Nicholls of the decision of the meeting, saying words to the effect of “the guys have decided that they have had enough, they [aren’t] happy with LOR’s position, and felt they were getting victimised”. Either Mr Rigby or Mr Nicholls asked a question along the lines of “how can we get them back to work?” to which he responded “well, nothing to do with me, mate … the guys have made their decision”.
3. At the request of the members, Mr Huddy remained with them for the rest of the day. He knew (and he was in any event reminded by Ms Garland from time to time during the day) that by doing so he was breaching the terms of his right of entry pursuant to s 484 of the FW Act.
4. Mr Huddy said that he had not made a recommendation, one way or the other, as to whether the LOR employees should stop work but that, when the employees voted to do so, he had supported them because he had regarded it as part of his duty as organiser to do so. Because of that he did not counsel the employees against stopping work. He regarded his position instead as that of being “guided by the membership”.
5. I had the distinct impression during the course of Mr Huddy’s evidence that he had an awareness of the issues in the trial and of the significance which his evidence may have on them. His repeated reference to the work stoppage as a “protest” is one example. I consider that that is a benign characterisation which Mr Huddy has adopted only for the purposes of these proceedings. At times during the course of Mr Huddy’s evidence, I thought that he sought to minimise his own role and activities on topics which could possibly implicate him in the conduct alleged by the Commissioner. There were some matters upon which I regarded Mr Huddy’s evidence as implausible, for example, his claim that the LOR Employees knew about the dispute resolution provisions within the LOR Agreement. I am satisfied that few of those members had an awareness of the provisions and doubt that Mr Huddy could have thought, as at 22 October 2013, that they did have that familiarity.
6. I am also not satisfied that Mr Huddy had informed the membership of the view which he and the CFMEU coordinators had formed that it was strategically unwise to take the Bus Dispute to the FWC. Mr Huddy said that he could not recall discussing this with the LOR employees but said at one stage that it may have been discussed “at the pub”. In my opinion, Mr Huddy did not disclose this to the members for the reason he gave:

So I don’t know if it would’ve been put out there on the loud speaker but we didn’t want to risk that for all the members.

1. I also thought that Mr Huddy had not been wholly frank with the Court as to the identity of the other officials within the CFMEU to whom he had spoken in connection with the Bus Dispute and who had participated in the strategic decision not to take the dispute to the FWC.
2. However, Mr Huddy’s account of the course of events on 22 October 2013 is generally consistent with the evidence of other witnesses. Despite my reservations, I accept his evidence that he did not attend the meeting at 10 am with any intention of suggesting or promoting the stoppage of work which occurred; that he did not speak in favour of the stoppage; that he warned the LOR employees that the stoppage was unlawful and that they would lose pay; and that once they had decided to stop work, he had considered it part of his role as CFMEU organiser to provide support to the employees.

### Mr Tait’s evidence

1. Mr Tait’s evidence was that there were about 70‑80 LOR employees present at the crib meeting. He said that he introduced himself and Mr Huddy, who spoke on matters of a general kind, including the advantages of membership of the CFMEU.
2. Mr Tait was clear that it was not Mr Huddy who first raised the Bus Dispute. He said that it was one of the members present and that the discussion which followed got “a bit vocal”. In that discussion, one worker suggested that the employees withdraw their labour “until [LOR] would talk to us … to resolve the busing issue”. Mr Tait then called for speakers for and against the motion. Several spoke in favour and none against. Mr Tait then conducted a vote by show of hands which he thought had been unanimously in favour of stopping work. Although Mr Tait said that he supported the motion, he did not speak on it or otherwise indicate his attitude to the meeting. He did not himself vote on it. After the vote had been taken, he announced to the meeting that it had been unanimous.
3. Mr Tait and Mr Huddy then went to speak to Mr Nicholls and Mr Rigby. Ms Garland was also present but she was asked to leave, and did so. Mr Tait said that he and Mr Huddy told Mr Rigby that the employees had withdrawn their labour “due to the bussing issue” and, in answer to a question from Mr Rigby, confirmed that they had told the employees that they would be behaving unlawfully. Mr Rigby responded by saying that LOR would take the matter to the FWC.
4. Mr Tait gave the following evidence concerning his own purpose:

XN: And what did you want to occur as a result of the action that you took in accordance with the motion?

A: What I wanted to occur was that Laing O’Rourke management would sit down with Mr Huddy and myself and any other relevant parties and discuss why we remain on the job 15 minutes longer than anyone else.

XN: And how did you think stopping work would achieve that?

A: From previous experience that’s how things have been done.

XN: Now, was there anything else that you wanted to achieve?

A: No.

XN: Was there any other reason that you stopped work?

A: No.

1. Mr Tait’s account of what occurred on the morning of 23 October 2013 was slightly different from that of Mr Thomas and Mr Robati. He said that Mr Rigby informed him at about 6.15 am of the order made by the FWC the previous evening and that he (Mr Rigby) wished to address the workers in the crib room. Mr Rigby did so, explaining the effect of the FWC order, and then left in order that the employees could discuss the position between themselves. Mr Tait took a vote by a show of hands in which about 80% of those present favoured the continuance of the stoppage. However, he told the meeting that there was no point in continuing the stoppage without 100% support and, given that that was lacking, he would notify management that the employees would resume work. This occurred. In my opinion, this more detailed account of the events on the morning of 23 October is more likely to be accurate than the relatively truncated accounts of Mr Thomas and Mr Robati, and I accept it.
2. As at 22 October 2013, Mr Tait was an experienced CFMEU delegate. He had received widespread support from the LOR employees for appointment to the position as delegate. Mr Tait accepted that in these circumstances he may have been seen by the membership as dependable and reliable and that, on 22 October 2013, he had thought that the workers were looking to him for leadership in relation to the proposed industrial action. Nevertheless, he had tried to remain impartial during the consideration of the motion and the taking of the vote, and had not indicated to the meeting his personal view.
3. I had some reservations at the trial about the plausibility of some of Mr Tait’s evidence on certain topics. These reservations have been confirmed on reading and re‑reading the transcript. The topics in question include Mr Tait’s evidence about his purpose in stopping work, his claim that all he wanted was to sit down with LOR management and to discuss the issue, and his account of what he said to Mr Nicholls and Mr Rigby regarding the reason for the work stoppage.
4. Nevertheless, I consider that Mr Tait’s account of some of the key matters which occurred on 22 October 2013 was, in the main, accurate. In particular, I accept his evidence that Mr Huddy had not said anything concerning the Bus Dispute before it was raised from the floor in the course of the meeting; that he had chosen to conduct the vote because he believed it was his role as delegate to do so; that he had called for speakers both for and against the motion; and that he had attempted to maintain (and had maintained) impartiality in dealing with the motion and the taking of the vote.

### Other witnesses

1. As I have said, Mr Thomas, Mr Robati, Mr Huddy and Mr Tait were the witnesses who gave the most detailed evidence about the events on 22 October. Some of the respondent witnesses also gave some evidence about the discussions in the crib room but it is not necessary to recount that evidence separately. I will refer to some of it shortly.
2. There are two other matters of context to mention. Mr Rigby deposed that Mr Huddy had discussed the Bus Dispute with him on 30 September 2013. He said, and I accept, that he had told Mr Huddy at that time that the Bus Dispute should be dealt with “via the issue resolution procedure”.
3. Mr Rigby also deposed that he had initiated a meeting with Mr Tait in the period between 30 September and 22 October 2013 in order to update him on the Bus Dispute. In that meeting, he told Mr Tait that the Bus Dispute “had gone to the most senior level of [LOR]” and that “if the workers [wish], they can take the matter to the [FWC] as [LOR] believes it is correct in [its] interpretation of the agreement”. That evidence was not challenged and I accept it.

### Consideration

1. The Commissioner submitted that a number of matters considered in combination pointed to Mr Huddy and Mr Tait having organised the work stoppage on 22 October 2013.
2. Counsel referred first to the motive of Mr Huddy and Mr Tait. He submitted that Mr Huddy knew at the time of the meeting that LOR could not be induced to change its mind about the Bus Dispute by further discussion, he knew that the CFMEU could not risk taking the matter to the FWC, and could thereby be taken to have known that resort to industrial action was the only remaining option by which the LOR employees could achieve equality with the employees of the other contractors.
3. Mr Tait said that he had the view that there was little point in the CFMEU taking the matter to the FWC, although he said that that view was based on some 28 years’ experience in the industry. He also said that he thought that the best way to resolve the dispute was by undertaking industrial action instead of making use of the dispute resolution procedures in the LOR Agreement. Mr Tait was not asked whether he had, on or before 22 October 2013, read cl 8.1 of the LOR Agreement and whether he had formed his own view of the correctness of the position adopted by LOR. However, I consider it likely that he had, especially in view of Mr Rigby’s express reference to the interpretation which LOR placed on the LOR Agreement.
4. Secondly, counsel noted that the crib meeting had been convened by reason of Mr Huddy’s attendance at the site that day. Mr Huddy had exercised his right of entry in order to hold discussions with the LOR employees. Counsel then submitted that it was Mr Huddy and Mr Tait who had brought the individual employees together as a group. I indicate now that I do not accept that particular submission, as it turns the reality of the situation on its head. Mr Huddy and Mr Tait were taking advantage of the presence of the employees in the crib room for their morning break to hold the union meeting, rather than organising their attendance there for the purpose of the meeting.
5. Thirdly, counsel emphasised that the crib meeting had been controlled, in effect, by Mr Tait and Mr Huddy. Mr Tait had opened the meeting and had introduced Mr Huddy. Mr Huddy then addressed the meeting and had taken questions from those present. It was Mr Tait who controlled the process by which the resolution to stop work had been made, as he had called for a seconder, invited speakers for and against, had conducted the vote by taking a show of hands, and had announced the result of the vote to the meeting.
6. Fourthly, counsel noted that Mr Huddy had not told the employees that they could refer the Bus Dispute to the FWC.
7. Fifthly, counsel pointed the fact that each of Mr Huddy and Mr Tait supported personally the taking of industrial action. Although in positions of influence, neither had spoken against the motion or sought to dissuade the employees from stopping work. Mr Huddy was confident that the CFMEU members knew that he would support their decision to take industrial action and agreed with the proposition that he had taken “every step” to ensure that the LOR employees who withdrew their labour knew that they had his support and that of the CFMEU.
8. Sixthly, after the vote had been taken, Mr Huddy had taken active steps to ensure solidarity by the LOR employees by saying “we need to stick together” and “we can’t have half of you going back to work and half here waiting in the crib room and then everyone reaping the benefits”.
9. Next, counsel relied on the fact that it was Mr Huddy and Mr Tait who had reported the workers’ decision to Mr Nicholls and Mr Rigby.
10. Finally, counsel relied on the statement which Mr Robati said Mr Huddy had made to the LOR employees after Mr Nicholls or Mr Rigby had encouraged them to return to work and had pointed out that their conduct was illegal. I accept Mr Robati’s evidence that Mr Huddy then said to the group “they are just bluffing. Don’t give in to these fellas. One day of protest is nothing compared to four years of 20 minutes every day”. I accept that evidence because it was contained in the affidavit made by Mr Robati shortly after the occurrence of the events and at a time when those events were likely to be fresh in his mind.
11. In summary, the Commissioner submitted that Mr Huddy and Mr Tait had organised the industrial action because they had “encouraged and enabled” the individual employees to act as a collective in withholding their labour. In Mr Huddy’s case, the encouragement and enablement occurred by reason of his conduct in:
12. causing the 22 October meeting to be held;
13. supporting the employees’ decision to take industrial action and ensuring that they knew that the CFMEU supported that action;
14. doing so without informing the employees of the fact or content of his discussions with LOR about the Bus Dispute or their obligation to comply with the dispute resolution mechanisms in the LOR Agreement;
15. by not speaking against the motion;
16. actively counselling employees to take the industrial action as a collective by the statements summarised above; and
17. by communicating the employees’ demands to LOR.
18. In Mr Tait’s case, the Commissioner submitted that he had “encouraged and enabled” the individual employees to withhold their labour by:
19. conducting and coordinating the meeting, the vote on the motion to stop work and the discussion among the employees that immediately proceeded the vote;
20. communicating the employees’ demands to LOR; and
21. not speaking against the motion in a circumstance in which he was aware that the employees were looking to him for leadership.
22. In my opinion, a number of considerations point against a conclusion that either Mr Huddy or Mr Tait organised the industrial action in the requisite sense. First, it is significant in my opinion that the proposal for a stoppage of work arose without forewarning during the course of the smoko meeting. On my findings, Mr Huddy did not exercise the right of entry on 22 October 2013 with the intention of procuring a stoppage of work in connection with the Bus Dispute and, in fact, counsel for the Commissioner did not submit that that was so. The evidence of all witnesses giving an account of the meeting is that the proposal for a work stoppage in connection with the Bus Dispute arose spontaneously during the course of the meeting and, it seems, in the latter part of the meeting. The fact that the proposal for the work stoppage emerged during a meeting convened by reason of Mr Huddy’s attendance for union business generally is a matter of happenstance, and does not point to either Mr Tait or him having organised the work stoppage.
23. Likewise, the circumstance that Mr Tait and Mr Huddy “controlled” the meeting once the issue arose does not of itself indicate organisation of the industrial action. Of more significance is what Mr Tait and Mr Huddy did in the exercise of that control. I am satisfied that Mr Tait did, as he claimed in his evidence, endeavour to adopt a neutral stance in relation to the proposal, by ensuring that the motion was put to a vote only after conventional meeting procedures had been followed and by not disclosing his personal view. Mr Tait’s conduct in calling for a seconder, asking for speakers on each side, and taking the vote may in a sense have enabled the subsequent work stoppage but that conduct does not, in my opinion, amount to the procuring, arranging or bringing about the industrial action any more than it would had a disinterested third party conducted the vote. It lacks the quality of procurement involved in the notion of organising. Mr Thomas’ evidence that Mr Tait was “not a stirrer” seems pertinent in this respect.
24. Thirdly, I accept the evidence of Mr Huddy and Mr Tait that Mr Huddy had warned the meeting that the stoppage of work would be unlawful industrial action and that they would lose pay for its duration. The giving of such warning is not of course inconsistent with Mr Huddy having, at the same time, procured the industrial action but it is one matter, along with other matters, which points against him having done so.
25. The circumstance that Mr Huddy (and for that matter Mr Tait) appreciated that the CFMEU members could confidently expect that they (Mr Huddy and Mr Tait) would support them in their stoppage and endeavours to achieve quality in the bus departure time does not, in my opinion, bespeak organisation of the industrial action. It is hardly surprising that the CFMEU members expected that their union (represented by Mr Huddy and Mr Tait) would support them, but the absence of disavowal of support by Mr Huddy and Mr Tait cannot reasonably be regarded as constituting positive conduct by them amounting to the organisation of the industrial action.
26. The fact that Mr Huddy and Mr Tait acted on behalf of the LOR employees in communicating the decision to stop work to LOR management does not indicate that they had organised the stop work, any more than it would have had the employees delegated that task to someone else. The identity of the messenger announcing the industrial action says very little about the organisation of that action.
27. The statements of Mr Huddy upon which the Commissioner relies require particular consideration. The statements about “sticking together” and “not getting this far without a fight” were exhortations to solidarity. The statements that “they are only bluffing” was a statement of encouragement to maintain the stoppage. However, in context, I do not regard them as being of particular significance. In the first place, Mr Huddy made the first statement only after the resolution had been passed and the employees had made their decision. Secondly, the statement in context seemed to be in the nature of a warning or reminder to the employees that, if the work stoppage on which they had resolved was to be effective, it would be necessary for all to be involved. Although there was no evidence that any of the LOR employees had in fact been influenced by Mr Huddy’s first statement, I accept that it may have had the effect of encouraging any who had doubts about acting in accordance with the resolution to do so and may in that sense have been a procuring of industrial action by some employees. However, the Commissioner’s allegations related to the stoppage of the LOR employees generally, and not to the stoppage of particular employees only.
28. The “they are only bluffing” statement was made well after the industrial action had already been agreed upon and implemented. It is difficult to see how it can be characterised as the organisation of the industrial action itself, as opposed to an encouragement to the employees to maintain the conduct which had already been organised and implemented. As already noted, the industrial action which Mr Huddy is alleged to have organised is the stoppage of work commencing at 10.45 am on 22 October and not the continuation of that stoppage during the afternoon of 22 October 2013.
29. In any event, and in relation to both statements, the Commissioner’s submission was that the course of the stoppage was not to be segmented but rather seen as “a single event”, commencing when the employees did not report back to work after the crib break, and continuing until the end of the day. The submission was that in that context, Mr Huddy’s statements formed part of his overall conduct constituting the alleged organising. The difficulty in accepting that submission is that the Commissioner has not proven other conduct of Mr Huddy capable of being regarded as organisation of the pleaded industrial action in respect of which Mr Huddy’s statements may have been an incident, or which in combination with the statements, could comprise the organisation of the pleaded industrial action.
30. The submissions of the Commissioner depended, to a significant extent, on it being accepted that a person will organise industrial action in the requisite sense if the person “encourages and enables” that action. For the reasons given above, I do not accept that that analysis is appropriate. Instead, I consider that organising involves acts of positive and intentional conduct bringing about or maintaining, or contributing in a material way to the bringing about or maintenance, of industrial action. On my assessment, the conduct of neither Mr Huddy nor Mr Tait satisfies that description in relation to the industrial action pleaded by the Commissioner.
31. For these reasons, the Commissioner’s claim that each of Mr Huddy and Mr Tait (and thereby the CFMEU) had organised the industrial action on 22 October 2013 fails. The claimed contraventions of s 417 by the remaining Represented Respondents were, as already noted, admitted.

## Section 343

1. Section 343(1) of the FW Act provides:

A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to:

(a) exercise or not exercise, or propose to exercise or not exercise, a workplace right; or

(b) exercise, or propose to exercise, a workplace right in a particular way.

1. In the present case, the Commissioner does not allege a threat to organise or to take action, so that that means by which s 343(1) may be contravened need not be considered further.
2. The elements of a contravention of s 343(1) which are pertinent in the case are these:
3. a person has a “workplace right” or “workplace rights”;
4. another person organised or took action against the first person;
5. in organising or taking the action, the person intended to coerce the first person to exercise, or not to exercise, its workplace right or, alternatively, to exercise the workplace right in a particular way.
6. By virtue of s 341(1) of the FW Act, a person has workplace right for the purposes of s 343(1) if (relevantly) the person is entitled to the benefit of a “workplace instrument” made by an “industrial body”. A workplace instrument means (relevantly) “an instrument which is made under, or recognised by a workplace law”: s 12 of the FW Act. A workplace law includes the FW Act. The FWC is an “industrial body”: s 12.
7. It was common ground that the LOR Agreement made in accordance with Pt 2‑4 of the FW Act is a workplace instrument of the requisite kind.

### The workplace rights

1. The Commissioner alleges that LOR had two workplace rights in particular. These were a right to the benefit of the dispute resolution clause in the LOR Agreement (the Dispute Resolution Right) and the right to have its employees report on time at the commencement of each shift and not leave their designated work area before the finishing time of each shift (the Working Time Right).
2. For the Dispute Resolution Right, the Commissioner relied on cl 18 of the LOR Agreement. Clause 18 provides (relevantly):

**18.1 Objective of the Dispute Resolution Process**

(a) The objective of this procedure is to:

(1) Avoid the escalation of disputes or grievances; and

(2) Provide prompt resolution of issues of concern.

**18.2 Steps in the Dispute Resolution Process**

(a) Any disagreement or dispute in respect of any matter arising under the Agreement or the National Employment Standards (NES) will be dealt with as outlined in this clause 18.2.

(b) Subject to clause 18.2(c), a disagreement or dispute will be dealt with as follows:

(1) The Employee concerned shall raise the matter with the appropriate team leader for resolution.

(2) If not resolved, the Employee may raise the matter with the supervisor/superintendent of the Employer for resolution.

(3) If the matter remains unresolved, either the Employee or the supervisor/superintendent shall request a formal meeting with the Employer’s most senior manager on the Project Site, or that manager’s representative.

(4) At any stage of this process the Employee may elect to have an Employee representative in attendance.

(5) Once this dispute resolution process has been invoked, both the Employee and the Employer shall attempt in good faith to resolve the issue by utilising the above steps until resolution is achieved. In the event that resolution is not achieved, any party or the Employee may refer the matter to Fair Work Australia for conciliation and/or arbitration.

(6) While the above process is being pursued, work shall continue as normal. Failure to work within the process described in the subclause and/or the failure of any Employee to continue work as normal shall constitute a fundamental breach of the Agreement by the Employee(s) involved.

…

(e) Any settlement of a dispute pursuant to this clause shall not vary the terms and conditions contained in this Agreement. It is a condition of employment that no industrial action be taken during the life of the Agreement. Industrial action of any nature will be contrary to the Dispute Resolution Process set out in this clause and a breach of the Agreement.

1. As can be seen, cl 18 contains provisions of a familiar kind concerning the way in which disputes “arising under” under an enterprise agreement are to be dealt with. Employees are to raise unresolved disputes at escalating levels in the employment hierarchy, starting with the employees’ team leader, then their supervisor or superintendent and then LOR’s most senior manager on the Project site. If no resolution is achieved at those levels, the dispute may then be referred to the FWC for conciliation and/or arbitration. Clause 18.2(b)(6) requires expressly that work is to “continue as normal” while these processes are followed, and that a failure by employees to do so will constitute “a fundamental breach” of the LOR Agreement. Clause 18.2(e) makes express that industrial action of any kind will be a breach of the dispute resolution procedure and a breach of the LOR Agreement.
2. The Commissioner alleges that cl 18 established a workplace right of LOR, namely, a right to the benefit of the Dispute Resolution clause in avoiding the escalation of disputes or grievances and in providing a means of prompt resolution of issues of concern while work continues. Put slightly differently, LOR had the right to have its employees continue working while the Bus Dispute was resolved in accordance with the dispute resolution procedure.
3. For the Working Time Right, the Commissioner relied on cl 8.1 of the LOR Agreement set out earlier in these reasons. He alleges that it established the right of LOR to have employees report on time at the commencement of their shift and not leave their work area before the finish time of each designated work day.
4. The Represented Respondents conceded that LOR possessed these two workplace rights at the relevant time.

### The Commissioner’s allegations

1. The Commissioner alleges that each of the individual respondents (other than Mr Huddy) *took* (“engaged in”) the industrial action with the intent to coerce LOR not to exercise its Dispute Resolution Right, or to exercise it in a way which was inconsistent with the terms of cl 18.2 of the LOR Agreement (by not resorting to the FWC) and with the intent to coerce LOR not to exercise the Working Time Right, or to exercise it in a way which was inconsistent with the terms of cll 8.1(b) and (c) of the LOR Agreement (by allowing its employees to finish work earlier than stipulated in the LOR Agreement).
2. In Mr Huddy’s case, the Commissioner alleges that he *organised* the industrial action with both intentions and in Mr Tait’s case that he *organised* and *took* (“engaged in”) the industrial action with both intentions.
3. My finding in relation to the alleged contraventions of s 417(1) that neither Mr Huddy nor Mr Tait *organised* the industrial action is equally applicable to the Commissioner’s allegations concerning the contraventions of s 343 and, for that matter, of s 348. Accordingly, those claims fail, as do the Commissioner’s claims that the CFMEU had, by the conduct of Mr Huddy and Mr Tait, committed contraventions of s 343.
4. It was not in dispute that, apart from the claims of organising made against Mr Huddy and Mr Tait, elements (a) and (b) of the contraventions of s 343(1) alleged by the Commissioner were established as against the individual respondents. Accordingly, the question for resolution is whether the individual respondents had the requisite intention.

### Intent to coerce

1. It was common ground that the phrase “intent to coerce” is used in ss 343 and 348 of the FW Act with the same meaning: see *Fair Work Ombudsman v Maritime Union of Australia* [2014] FCA 440; (2014) 243 IR 312 at [301]‑[304] (Siopis J).
2. Coercion involves two elements: first, the exertion of pressure which, in a practical sense, will negate choice and, secondly, conduct which is unlawful, illegitimate or unconscionable: *Seven Network (Operations) Ltd v CEPU* [2001] FCA 456,(2001) 109 FCR 378 at [41]; *State of Victoria v CFMEU* [2013] FCAFC 160, (2013) 218 FCR 172 at [70]‑[71] (Buchanan and Griffiths JJ); *Esso Australia Pty Ltd v AWU* [2016] FCAFC 72, (2016) 245 FCR 39 at [174] (Buchanan J, with whom Siopis J agreed). Accordingly, proof of an “intent to coerce” involves proof of two elements: first, that the actor intended to exert pressure which, in a practical sense, would negate choice; and, secondly, that the pressure involved conduct which was unlawful, illegitimate or unconscionable: *Seven Network* at [41]; *Victoria v CFMEU* at [71].
3. The element of intent concerns the first element of coercion. It is not necessary for the Commissioner to prove that the respondents had an intention to use unlawful, illegitimate or unconscionable means to bring about the negation of choice of LOR: *Esso Australia v AWU* at [175]‑[177].
4. The Represented Respondents conceded the unlawfulness of their industrial action. Accordingly, the issue for determination in relation to the element of “intent to coerce” is that of whether the individual respondents intended to negate LOR’s choice about its exercise, or the manner of exercise, of the Dispute Resolution Right and the Working Time Right.
5. In *National Tertiary Education Industry Union v Commonwealth of Australia* [2002] FCA 441; (2002) 117 FCR 114 at [103] (*NTEU*), Weinberg J elaborated the concept of an intention to negate choice:

The approach to the expression “intent to coerce” taken in each of the authorities set out above makes it clear that what is required is an intent to *negate*choice, and not merely an intent to influence or to persuade or induce. Coercion implies a high degree of compulsion, at least in a practical sense, and not some lesser form of pressure by which a person is left with a realistic choice as to whether or not to comply.

(Emphasis in the original)

1. The Commissioner has the onus of proving that each individual respondent had an intention to coerce in the requisite way. The determination of whether a respondent had that intention requires an examination of the respondent’s purpose in taking the action: *CFMEU v BHP Coal Pty Ltd* [2014] HCA 41; (2014) 253 CLR 243 at [19] (French CJ and Kiefel J); *Board of Bendigo Regional Institute of Technical and Further Education v Barclay (No 1)* [2012] HCA 32; (2012) 248 CLR 500 at [44]‑[45] (French CJ and Crennan J). In this case, the assessment must be made in relation to each individual respondent. See, in addition to what was said in *BHP Coal* and *Barclay*, *Geelong Wool Combing Ltd v Textile, Clothing and Footwear Union of Australia* [2003] FCA 773, (2003) 130 FCR 447 at [17]‑[18]; and *Victoria v CFMEU* [2013] FCAFC 160, (2013) 218 FCR 172 at [84]. That is because the intentions of the individual respondents may have been diverse. That does not mean that the intention of the group, to the extent to which it may be discerned, may not inform the determination of the intentions of the individuals. In some circumstances it is possible to infer that persons who go along with decisions made by others have adopted their purpose for engaging in the conduct.
2. In discharging the onus of proving that the individual respondents had an intention to coerce in the requisite sense, the Commissioner has the benefit of the presumption contained in s 361 of the FW Act. Section 361 provides (as it then was):

**361 Reason for action to be presumed unless proved otherwise**

(1) If:

(a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and

(b) taking that action for that reason or with that intent would constitute a contravention of this Part;

it is presumed, in the proceedings arising from the application, that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.

(2) Subsection (1) does not apply in relation to orders for an interim injunction.

1. Section 360 of the FW Act is also pertinent because it provides that, for the purposes of provisions which include ss 343 and 348, a person takes action for a particular reason if the reasons for action include that reason.
2. It was common ground that s 361 has the effect in the present case that the individual respondents are to be taken to have had the proscribed intention unless they prove the contrary. As was observed by French CJ and Crennan J in *Barclay* at [45], it is generally “extremely difficult” for respondents to displace the statutory presumption imposed by s 361 if they do not give direct testimony. Counsel for the Represented Respondents recognised that that was so and 36 of the individual Represented Respondents (excluding for this purpose Mr Huddy) gave evidence of their intention. Their evidence is to be assessed with all the other evidence bearing upon the nature of their intentions.
3. I indicate now my conclusion that the absence of evidence from 14 of the individual Represented Respondents and all of the 11 Non‑Represented Respondents has the effect that they have not discharged the onus cast on them by s 361(1). Their intention to coerce in the requisite sense is taken to have been established.

### The respondents’ intentions

1. In this section of the reasons, I will identify the intention pleaded by each of the individual Represented Respondents and summarise the evidence of those who attended at the hearing. In the case of most of the respondents, it is more convenient to make findings about their intentions at the conclusion of the summary, keeping in mind, of course, that it is the intention of each individual and not the group which is to be assessed. However, in some cases I will indicate my findings at the conclusion of the summary of the evidence of the particular witness.

#### The 2nd Respondent: Craig Tait

1. Mr Tait’s pleaded defence was that his intention was to have LOR consult and to try to have the LOR employees treated fairly, at [23].
2. In evidence in chief, Mr Tait said that the motion on which the meeting voted was “we … withdraw our labour until – so [LOR] will discuss it with us, to resolve the bussing issue”. As already noted, Mr Tait did not vote on the motion but acknowledged that he had, personally, supported it. He explained his intention as follows:

Q: And what did you want to occur as a result of the action that you took in accordance with the motion?

A: What I wanted to occur was that Laing O’Rourke management would sit down with Mr Huddy, and myself and any other relevant parties and discuss why we remain on the job 15 minutes longer than anyone else.

Q: And how did you think stopping work would achieve that?

A: From previous experience of that’s how things have been done.

Q: Now, was there anything else that you wanted to achieve?

A: No.

Q: Was there any other reason that you stopped work?

A: No.

1. In cross‑examination, Mr Tait said that before 22 October 2013, he had taken up the Bus Dispute with LOR senior management including Mr Nicholls, Mr Rigby, Mr Foster and Mr Baker and had told them that CFMEU members wanted LOR to change its position so as to allow them to finish work earlier. He said that LOR management had responded, not by referring to the LOR Agreement but by saying that they were looking for a direction from the head contractor on the Project. Mr Huddy had told him that he had taken the issue up with senior management but not that he had spoken to Mr Jones, LOR’s senior manager in the Northern Territory. He had not heard from Mr Huddy nor from anyone else that LOR’s position was that they were entitled to have their employees finish at 5 pm. He also said that Mr Huddy had not told him that his own view was that LOR were within their rights under the LOR Agreement in having its employees finish later than those of the other contractors. Mr Tait said that he had never had a report back from the principal contractor on the Project.
2. Mr Tait agreed that in October 2013, and before the 22nd, Mr Rigby had told him that the Bus Dispute had gone to the most senior level of LOR and that, if the workers wished, they could take the matter to the FWC. He denied, however, that Mr Rigby had told him at the time that LOR believed that it was correct in its interpretation of the LOR Agreement. As already indicated, I prefer Mr Rigby’s evidence about this conversation.
3. Mr Tait gave the following answers in cross‑examination about his state of mind in relation to the stoppage of work:

Q: You thought – you personally thought – that the best way to resolve this dispute was not to use the dispute resolution procedure but instead to undertake industrial action that was to your knowledge illegal and involved a loss of wages?

A: Yes.

Q: Is that right?

A: Yes.

Q: Why?

A: Because, again, through years of experience, when you take that decision, the company that you work for … sit down and talk to the relevant parties to resolve the issue.

Q: Yes. And the resolution of the issue that you wanted – you personally wanted – was for Laing O’Rourke to change its position and allow you and other Laing O’Rourke employees to finish at the same earlier time as everyone else on the site. Is that right?

A: That’s right.

Q: That’s the resolution that you were after.

A: Yes.

Q: Do you agree?

A: Yes.

Q: And to your knowledge, to your certain knowledge, that’s what the motion was calling for, the motion that was put to the meeting on 22 October. Do you agree?

A: Yes.

…

Q: And you knew that, because you knew that there [had been] endless discussions before that time for months, and that Laing O’Rourke’s position was fixed. Do you agree?

A: Up until that stage, yes.

Q: And that the only option you had as at 22 October, you and any other Laing O’Rourke employee had as at 22 October 2013, to cause Laing O’Rourke to change its mind, was to refer the dispute to the Commission and see what happened or try and force the issue by use of industrial action. Do you agree?

A: Yes.

Q: You personally preferred the second of those courses; correct?

A: Yes.

Q: That was mood of the meeting, as you perceived it; is that right?

A: The latter part of the meeting, yes.

Q: No discussion about the first possibility, the reference to the Commission. That’s correct, isn’t it?

A: Yes.

1. There were some respects in which Mr Tait was an impressive witness. However, much of his evidence was marked by a stubbornness and stolidity, and some was so implausible as to be unreliable. In particular, I consider it implausible (and do not accept) that Mr Tait did not know that LOR’s position was based on the terminology of cl 8.1 of the LOR Agreement. Mr Tait had had a number of discussions with Mr Rigby before 22 October in which he had been told that LOR’s position was that the LOR employees had “no entitlement” to leave the site security gate at 5 pm. I accept Mr Rigby’s evidence about that, as well as his evidence that at one of the meetings he or Mr Baker had told Mr Tait that they had now exhausted the steps in the dispute resolution process and that either party was now in a position to take the matter to the FWC. It is improbable that Mr Tait did not know precisely the reason for LOR’s position. It is not necessary to make more detailed findings concerning the aspects of Mr Tait’s evidence which I regarded as unsatisfactory. The passages of his cross‑examination set out earlier indicate that he appreciated that the purpose of the stop work, and acknowledged that his own purpose, had been to “force the issue” by the use of industrial action. In these circumstances, Mr Tait cannot discharge the s 361 onus of proving that he did not intend to coerce LOR (in the sense discussed by Weinberg J in *NTEU*) into not insisting on its right to have its employees continue at their work site until 5 pm, and into conceding the issue concerning the Bus Dispute without referring the dispute to the FWC.

#### The 4th Respondent: Stevan Allan

1. Mr Allan, a rigger/crane driver who commenced at the Project in August 2013, pleaded that he stopped work on 22 October 2013 “to support the position his mates had taken”, and to ensure that the employees, who he felt were “not being treated fairly or with respect”, were taken seriously.
2. Mr Allan was not present at the crib meeting as he and others had taken an early smoko in order to unload a truck which arrived at 10 am. He joined the stoppage when someone came and told his group “we [are] all sitting down in the sheds”.
3. In evidence in chief, Mr Allan gave the following evidence:

Q: Why did you [stop working]?

A: I just wanted to be with everyone else, just do the same as everyone else.

Q: Did you want to achieve anything by doing that?

A: Well, we thought we were going to find out about the buses, so that’s why I went in there.

Q: What do you mean, find out about the buses?

A: See if they were going to change it or if it could be changed.

Q: … Was there anything else you were trying to achieve?

A: No. That’s it.

Q: Was there any other reason that you took that action?

A: No.

1. In cross‑examination, Mr Allan said that the bus departure time had been raised at least once a week at pre‑start meetings and as early as August 2013. By 22 October, he thought that the workers were meeting “a brick wall” at the pre‑start meetings when the Bus Dispute was raised. He felt that strike action was the last resort to reaching a resolution. By stopping work, Mr Allan wanted to be treated “fairly” and, “like every other worker on the site”, to be permitted to leave the site gate at 5 pm. He was not aware of anyone raising any other means of resolving the dispute, nor aware of the dispute resolution clause in the LOR Agreement or the option of referring the matter to the FWC.

#### The 5th Respondent: Richard Alley

1. Mr Alley pleaded that he stopped work because he wanted “the workers to be treated the same as every other worker on the site not employed by [LOR]”. Mr Alley did not give oral evidence at trial. I note that the defence filed on behalf of this respondent spelt his last name as “Elly”, but nothing turns on this.

#### The 6th Respondent: Quentin Bartlett

1. Mr Bartlett is a logistics leading hand and commenced at the Project on 9 July 2013. He pleaded that he stopped work because he thought the situation was unfair and that all employees on the Project should be “on a level playing field”, and also because “the decision had been made by the group together”.
2. In evidence in chief, Mr Bartlett said that the motion was to “withdraw our labour until we got clarification and an answer back from management”. He then gave the following evidence:

Q: …Why did you vote in favour of [the stop work motion]?

A: Just so we could get – try and get an answer from management – clarification.

Q: Did you then sit in the shed for the rest of the day?

A: Yes.

Q: Okay. And what did you hope to achieve by sitting in the shed?

A: Just to get an answer from management and just to clarify the issue.

Q: And how did you think sitting in the shed would do that?

A: Just – hopefully, just prompt them to go and to give us an answer, and come over and actually speak to us.

Q: … Was there any other reason you sat in the shed that day?

A: No.

Q: Was there anything else you were trying to achieve?

A: No.

1. There was some difference between this evidence and Mr Bartlett’s pleaded case but it transpired that the statement which he had given to his solicitors had also included a statement that he had “wanted the issue to be clarified”. He said that either Mr Huddy or Mr Tait had told the crib meeting on 22 October that management was not willing “to speak to us” concerning the Bus Dispute so as to give “clarification”.
2. In cross‑examination, Mr Bartlett confirmed the reasons he had pleaded, particularly that he thought it “should be just on level playing field”, that the finishing times should be exactly the same as everybody else’s, and that the decision had been made by the group together. He also agreed that he had stopped work to “bring [the finishing times] in line with everyone else”. Mr Bartlett said that he was aware on 22 October 2013 that the FWC could resolve disputes between LOR and its employees, and that either side could ask it to do so, but did not think about adopting that course. He was aware of a dispute resolution process in the LOR Agreement but had not read the relevant clause.

#### The 7th Respondent: Corinne Boyd

1. Ms Boyd is as a labourer and commenced with LOR in August 2013. She pleaded that she had stopped work because the situation with the buses was unfair, and she “was not going to walk away from the other employees as she felt she had to support them”.
2. In evidence in chief, Ms Boyd said that “we decided that, since we hadn’t had any answers previously, to sit in the crib room till someone came and addressed us as to the reasons why”. She then gave the following evidence:

Q: Why did you vote in favour of [the motion to strike]?

A: Because any way – which way I looked at it – I thought it was unfair that everyone, every other contractor on site, including JKC, were at the guardhouse at 5 o’clock, and we were leaving our site at 5. Any which way I looked at it, I saw it was unfair.

Q: And did you want that to change?

A: Of course I did.

Q: Yes. Now, did you then sit down in the crib rooms?

A: I did.

Q: – for the rest of the day?

A: I did.

Q: And why did you do that?

A: Because we were waiting for someone to come talk to us.

Q: What did you hope to achieve by sitting down?

A: Just for them to come and talk to us and, maybe, compromise our time.

Q: Compromise – ?

A: Maybe they could have said, “Can’t give you 15 minutes, but we can give you five.” That’s a win. That’s something. At least someone spoke to us.

Q: Yes. And how did you think that sitting down in the crib room might help that?

A: Well, nothing else had, so, well, probably, that was our last resort, I guess.

Q: … Was there anything else you were trying to achieve by sitting in the crib room?

A: No.

Q: Was there any other reason you did it?

A: No, not really.

1. In cross‑examination, Ms Boyd said that the Bus Dispute was raised regularly at pre-start meetings and, although she had assumed that Mr Tait and Mr Huddy had spoken to LOR about it, she had not heard Mr Tait report back on what they had found out from management. In relation to stopping work, Ms Boyd said that “we just agreed as a group that that was our only option”, and that “one of the guys in the room” said “[l]et’s just sit down. Let’s not go back to work until management come and directly tell us why we can’t catch the bus, because that’s what we’re – all we ever wanted to know.” She was “sort of” aware of the provision in the LOR Agreement for dealing with industrial disputes, but was not aware that the dispute could be referred to the FWC.

#### The 8th Respondent: David Bright

1. Mr Bright, a plumber, who had commenced with LOR at the beginning of October 2013, pleaded that he had stopped work because “he respected the decision of workers not to return to work”.
2. In evidence in chief, Mr Bright said that the motion was “to sit down and withdraw our labour until they actually give us … an answer”. He then said:

Q: Why did you vote in favour of that motion?

A: I could just see how everyone was very frustrated when I got there. I – I sort of came into it late, but they were – they were frustrated, and Laing – Laing O’Rourke weren’t really communicating.

Q: All right. And did you want a particular answer yourself?

A: Yes. I was just wanting – you just want a yes or a no.

Q: But did you want an answer that they would move the buses, or didn’t you care?

A: Of course I wanted – course I would have liked to have been out the front gate a 5 o’clock with everybody else. Yes.

…

Q: Why did you sit in the shed?

A: Because [you’ve] got to stand united. Everybody else sitting in the shed, and I – yes.

Q: …What were you trying to achieve by sitting in the shed?

A: To get an answer.

…

Q: What did you have to achieve by sitting in the shed?

A: For them to move the bus times.

Q: All right. And how did you hope to achieve that?

A: I suppose it would be interrupting productivity.

Q: Yes. And what made you think that that would help?

A: Well, nothing else – nothing really else was – was working.

1. In cross‑examination, Mr Bright said that he had known that Mr Tait had raised the issue with LOR but that he had not been being told of LOR’s position. All Mr Tait, a fellow plumber, told him was that LOR “hadn’t made a decision on it”. He confirmed that he wanted to be able to leave the workplace earlier than 5 pm with the rest of the work site.
2. Mr Bright also acknowledged that he was aware of the dispute resolution procedure in the LOR Agreement and of the elements of the required procedure.

#### The 9th Respondent: Oliver Canute

1. Mr Canute is a Non-Represented Respondent and did not give evidence at trial.

#### The 10th Respondent: Glynn Churchyard

1. Mr Churchyard, a steel fixer, pleaded that he stopped work because he did not wish to be known by his colleagues as “the person who walked out”.
2. In evidence in chief, Mr Churchyard said that he had only started work at the Project on 21 October 2013 and at the time of the meeting in the crib room did not know that there was an issue about bus departure times. He said that he voted in favour of the stop work motion because it was his second day on the job and he “wasn’t going to go against all the other work colleagues” and “didn’t want to go against the crowd”. He denied trying to achieve anything else by participating in the strike.
3. In cross‑examination, Mr Churchyard confirmed that he wanted to do the same thing as the rest of the workers, to be seen to be doing that, and to be supporting them in “what they wanted to achieve”. He acknowledged that he had known that his fellow workers wanted to achieve a change in the bus departure times so that they could leave the site at the same time as everyone else.

#### The 11th Respondent: Desmond Collins

1. Mr Collins pleaded that he stopped work because he felt that “the workers were being unfairly treated”. He did not give evidence at trial.

#### The 12th Respondent: Wade Couzens

1. Mr Couzens, a plumber, commenced working on the Project in September 2013. He pleaded that he had stopped work on 22 October 2013 because he took the view that the LOR employees “needed to find a way to resolve the issue about finishing times” and because he felt “a strong bond of collectivism and mateship with his colleagues and wanted to support the position that the group was taking”.
2. Mr Couzens’ evidence in chief included the following:

Q: What was your reason for voting in favour of the motion?

A: To be equal … with everybody else on site.

Q: Yes. And what was your reason for not going back to work?

A: I don’t know. Probably to – just to show a point to [Laing O’Rourke].

1. In cross‑examination, Mr Couzens gave the following evidence:

Q: Mr Couzens, what was the point that you wanted to make to Laing O’Rourke by taking the industrial action?

A: Just to get an answer:

Q: An answer on the finishing time issue?

A: Yes.

Q: You wanted Laing O’Rourke to bring your finishing times forward to be the same as everyone else on the site, is that right?

A: Yes.

Q: That was the answer that you wanted to get by taking the industrial action, is that right?

A: Yes.

#### The 13th Respondent: Stuart Croft

1. Mr Croft is a Non‑Represented Respondent and did not give evidence at trial.

#### The 14th respondent: Nathan Crossen

1. Mr Crossen’s pleaded case was that he had stopped work because he “hoped to get to the bottom of the bus issue and believed that by doing so he was making clear his stance on the issue, namely that the present situation was unfair”.
2. Mr Crossen commenced at the Project in July 2013 as a carpenter and became a leading hand in October 2013. He was the second of the respondents to give evidence. I mention this because the first few of the respondents were subjected to more extensive cross‑examination than those who came later. He said that the Bus Dispute had been raised numerous times at pre‑start meetings, that the answer from LOR had been that “that’s the way it [is]”, and that it was entitled under the LOR Agreement to have its workers finish later than the workers of other contractors.
3. In his evidence in chief, Mr Crossen gave the following evidence as to his reasons:

Q: And what were you trying to achieve by voting in favour of the resolution of staying in the shed?

A: Further consultation with management in regards to the issue. Positive outcome for everyone.

Q: Yes. What do you mean by positive outcome?

A: That I was hoping that it would be taken to a third party for a third party to rule whether we were right or management was right or – so, you know, it wasn’t just a one‑sided affair.

Q: Was there any other reason that you took that action?

A: No.

1. Mr Crossen said that he could not recall the terms of the motion to stop work.
2. In cross‑examination, Mr Crossen said that the LOR employees had concerns that their finishing time was not “in line” with that of the employees of other contractors on the site. He thought that the different finishing time was costing the LOR employees money. He accepted that Mr Rigby had told the LOR employees that LOR considered that it was entitled under the LOR Agreement to have its employees finish later than the other workers on site. He said that the employees felt frustrated that LOR was “just sticking to its guns and not making a change”. He wanted the LOR employees to finish at the same time as everybody else. Mr Crossen disagreed with the suggestion that the debate at the meeting on 22 October had been about taking action to cause LOR to make a change to bus departure times so as to line up with the departure times of other workers. He said instead that the LOR employees were chasing further consultation with LOR and for “a third party to rule whether we were right or wrong”. Later he maintained that by the industrial action he was “hoping that an independent party would make a ruling on the dispute instead of it being one‑sided”.
3. Mr Crossen acknowledged that he had been aware that the LOR Agreement contained a dispute resolution procedure by which the employees could have taken the issue to the FWC.
4. I indicate now that I regarded some of Mr Crossen’s evidence as implausible. This includes his evidence that he had thought that the dispute could not be taken to the FWC unless the workers first took industrial action and that the workers were “chasing further consultation with the company and a third party to rule whether we were right or wrong”. On the critical matters, I do not accept his evidence.

#### The 15th Respondent: Carl Dawson

1. Mr Dawson is a Non‑Represented Respondent and did not give evidence at trial.

#### The 16th respondent: Liam Day

1. Mr Day, a steel fixer, was the first of the Represented Respondents to give evidence. He had commenced at the Project in July 2013.
2. Mr Day’s pleaded case was that he had stopped work on 22 October 2013 because he was “unhappy about the finishing times issue and thought it was important for the workers [to] stick together”.
3. In evidence in chief, Mr Day said that the LOR employees were regarded as a “joke” by the employees of other contractors; that the bus departure time had been raised at pre‑start meetings “pretty much on a weekly basis” between July and October 2013, and that he had supported the motion to withdraw labour for the rest of 22 October “out of frustration pretty much”. His frustration was that the LOR employees were not being treated the same as other employees. He said that by withdrawing his labour for the balance of 22 October, he had been “[j]ust trying to communicate our frustration, … [t]rying to get them to come and talk to us about it”. There had not been anything else which he had been trying to achieve.
4. Mr Day said that, as at 22 October 2013, he had been unaware that the LOR Agreement contained a dispute resolution provision.
5. In cross‑examination, Mr Day stated that by 22 October 2013 he wanted the finishing time situation of LOR employees to change, but that he had not cared whether they finished earlier. He simply wanted everyone to finish at the same time. He agreed that, as at 22 October, he knew that LOR’s position was that it had an entitlement under the LOR Agreement to have its workers leave their actual place of work at 5 pm. He repeated that when he voted in favour of taking industrial action, his aim was to have everyone treated the same and said that it did not worry him if that meant everyone else on the site had to finish at 5 pm like the LOR employees. Mr Day denied that what he wanted by the industrial action was to have LOR change its position on finishing times and said instead that it was to have LOR take it to Fair Work Australia.
6. I considered that Mr Day’s evidence that he took the action with a view to obtaining a change to a position in which all employees on the Project were treated equally (by all finishing at their work sites at 5 pm) to be implausible. I am not willing to accept it. The LOR employees were taking the industrial action against LOR only. LOR did not have the capacity to change the practice of all other contractors at the Project. Mr Day must have known that. I thought that Mr Day recognised the implausibility of his evidence while he was giving it. Ultimately he conceded that he had wanted LOR to make a change and that the purpose of taking the industrial action was to cause it to do so.
7. I indicate now my finding that Mr Day took the industrial action with a view to causing LOR to make a change which was within its power, namely, to bring its finishing time in line with that of the other contractors on the site. He has not discharged the s 361 onus with respect to either the Working Time Right or the Dispute Resolution Right.

#### The 18th Respondent: Carl Delaney

1. Mr Delaney, a carpenter, pleaded that he had stopped work because “he supported the decision of the group”. Although he had worked with LOR for longer, he commenced at the Project on 2 August 2013.
2. In his evidence in chief, Mr Delaney, said that the motion had been for Mr Tait “to go and approach LOR management … to discuss if … an outcome could be resolved”. He gave the following evidence:

Q: Now, why did you vote in favour of the motion?

A: Well, because of the issues that we have brought up. We [had] all agreed the time that we were leaving the crib room and getting out the gate was different from the other contractors.

…

Q: And what were you trying to achieve by sitting in the shed for the day?

A: To get management to address and see if we could get our bus times changed to the other contractors on the job.

Q: Yes. And how did you think that sitting in the shed would help that?

A: Well, it was the only way that – for me – that we could discuss our problems with the management with our delegate.

1. Mr Delaney said that he had not been aware that the LOR Agreement contained a dispute resolution provision.
2. In cross‑examination, Mr Delaney said that, as at 22 October 2013, he had not been aware of discussions between the union and LOR about the Bus Dispute.

#### The 19th Respondent: Cole Diedrich

1. Mr Diedrich pleaded that he stopped work because “it was the consensus of his colleagues and he wanted to make a point and bring light to the issue”. Mr Diedrich did not give oral evidence at trial. The defence filed on behalf of this respondent spells his name as “Deitrichs” but it was not suggested that anything turned on this.

#### The 21st Respondent: Michael Elliot

1. Mr Elliot pleaded that he stopped work because he believed that “everyone agreed and should stick together and that if individual workers went against the group then they would be picked off”. Mr Elliot did not give evidence at trial.

#### The 23rd Respondent: Anthony Giannone

1. Mr Giannone is a Non‑Represented Respondent and did not give evidence at trial.

#### The 24th respondent: Clint Gibbings

1. Mr Gibbings is a rigger and commenced at the Project in September 2013. His pleaded case was that he had stopped work because he “wanted to be treated the same as the rest of the workers on the Project”.
2. In evidence in chief, Mr Gibbings said that the motion had been to “withdraw our labour”. He said that, by not returning to work, he had wanted to “let Laing O’Rourke [know] we wanted a better answer”.
3. In cross‑examination, Mr Gibbings said that he was looking for a “just a fair answer, just any answer. We sort of hadn’t got any feedback so, yes, just some feedback, what they could possibl[y] do for us”. He thought that an “ideal outcome” at the time was to have the finishing times of LOR employees line up with that of everyone else. Mr Gibbings said that he was seeking “a better outcome”. He declined to accede to the cross‑examiner’s question that he had taken the industrial action to “force” LOR to give the employees what they wanted, but agreed that he had had the purpose of putting “some pressure” on it to do so.

#### The 25th Respondent: John Gilder

1. Mr Gilder pleaded that he stopped work because he felt that “the finishing times issue was unfair and wanted to agree with and support the other workers who were present”. Mr Gilder did not give evidence at trial.

#### The 26th Respondent: Kent Grace

1. Mr Grace is a Non‑Represented Respondent and did not give evidence at trial.

#### The 27th Respondent: Brett Griffiths

1. Mr Griffiths, a leading hand who commenced at the Project at the end of May 2013, pleaded that he stopped work because “he was frustrated with LOR’s failure to sensibly discuss a resolution of the issue with the workforce and the union” and sought to get LOR’s attention to “engage in constructive discussions to see whether a compromise could be reached”.
2. In his evidence in chief, Mr Griffiths gave the following evidence:

Q: And did you go back to work after the smoko, or did you sit in the shed?

A: No. I stayed in the shed.

Q: Why?

A: Because I wasn’t happy with the lack of response, basically, from our company.

Q: What did you want to achieve by staying in the shed?

A: Well, I thought that Laing O’Rourke would probably adjust their bus timetable to accommodate the workforce, basically.

Q: Why did you think they would do that?

A: Just because I don’t – I think there’s a grey area in the – in the agreement, basically. And, from my perspective, I signed up to work on the Ichthys Project and that’s what my letter of offer said. I was signing up to the Ichthys Project, and that’s – the Ichthys Project starts at the front gate. So… that was my issue with it.

Q: And how did you think sitting in the shed that day would help achieve that change?

A: Because there was quite a number of other people that did the same thing, and I just would assume – I would have assumed that the – it would be in the company’s interest to have their workforce go back to work.

Q: Yes?

A: So actually coming to the – to speak to people – might have been – they might have done that.

1. In cross‑examination, Mr Griffiths said that he had not been aware at the time of the dispute resolution provision in the LOR Agreement, nor had he been aware of discussions between the union and LOR about the Bus Dispute. His belief was that LOR had not tried to resolve the issue at all and that the workers were “fed up” due to the lack of feedback.

#### The 28th Respondent: Karl Hanley

1. Mr Hanley, a carpenter who commenced at the Project on 18 September 2013, pleaded that he stopped work because “the majority had voted to do so and he did not want to go against the crowd”.
2. In evidence in chief, Mr Hanley gave the following evidence:

A: Why did I vote [for the stop work motion]? Well, I just kind of followed the crowd really. I was new at the job…I was only there a month, and I was only just kind of…going with the flow.

Q: Did you then stay in the sheds with everyone else that day?

A: Yes.

Q: Why did you do that?

A: The motion was - the majority voted, and that was the result of it.

Q: All right. And what did you hope to achieve by sitting in the sheds?

A: Well, just following my colleagues …Just supporting my workers. So I just sat in with them.

…

Q: Was there anything else you were trying to achieve?

A: No.

1. In cross‑examination, Mr Hanley said that he understood that his workmates wanted to talk to management to get LOR to change the bus times so that they finished at the same time as everyone else. He was not aware of the dispute resolution procedures, and did not know that the dispute could be taken to the FWC.

#### The 29th Respondent: Jordan Hanson

1. Mr Hanson pleaded that he stopped work because he wanted to “support his mates and was firmly of the view that the workers should stick together”. Mr Hanson did not give evidence at trial.

#### The 30th Respondent: Greg Hines

1. Mr Hines pleaded that he stopped work because he wanted to “be treated like all of the other employees on the project”. Mr Hines did not give evidence at trial.

#### The 31st Respondent: Matt Hore

1. Mr Hore, who was employed as a dogman at the Project in August 2013, pleaded that he had stopped work because “it was the general consensus of his co-workers” and because he considered that “they were not being listened to by management”.
2. In evidence in chief, Mr Hore said that the bus time issue had been raised several times at pre‑start meetings before 22 October 2013 and that he had raised the issue possibly two times with his supervisor Mr Benedict. He said that the workers had been told that it would be referred to upper management. However, they had never received a response. He said that the motion was that the workers “stay in the crib room until we, sort of, heard some more information back from management”.
3. Mr Hore then gave the following evidence:

Q: Why did you vote for the motion [to stop work]?

A: I just felt that if we were leaving – we weren’t leaving our crib rooms until 4.30, and so we were actually leaving the site at – getting offsite at sometimes 4.45. Under that mindset I thought that we should be only coming in the gate at 6.30 in the morning, and that’s why I [v]oted.

Q: All right. Did you then sit in the shed for the rest of the day?

A: Yes. I’m pretty sure it was the rest of the day.

Q: Now, what did you hope to achieve by sitting in the shed?

A: I hoped that management might come back to us and sit down and, yes, maybe discuss – you know, discuss the sort of grievances we had had with them because given that we had had no feedback prior to that.

Q: And how did you think that sitting in the shed would help that occur?

A: I just thought maybe management might realise, sort of, how seriously I thought about it.

Q: And was there any other reason you sat in the shed?

A: No.

Q: Anything else you were trying to achieve?

A: No.

1. In cross‑examination, Mr Hore disagreed that withdrawing his labour had been a serious step to take, and stated again that his hope had been that “by sitting there management might come and speak with us and it might be resolved pretty much immediately”. He confirmed that he wanted someone from management to address the matter and be “reasonable about the departure and arrival times”, and hoped that a change in the start or finish times would result. He was not aware of any discussions between Mr Huddy and LOR about the Bus Dispute, nor was he aware of the dispute resolution clause in the LOR Agreement or of the capacity to involve the FWC.

#### The 32nd Respondent: Jarrod Jackson

1. Mr Jackson is a Non‑Represented Respondent. As noted earlier, he did for a time have legal representation and a defence was filed in his name which denied the allegation. He did not give evidence at trial.

#### The 33rd Respondent: Gavan James

1. Mr James is a Non‑Represented Respondent and did not give evidence at trial.

#### The 34th Respondent: Garth Kent

1. Mr Kent, a rigger, started at the Project in October 2013. He pleaded that he stopped work because he felt that the employees had “legitimate concerns which were being ignored” and because he wanted LOR to speak with the workers through the union about the dispute.
2. In evidence in chief, Mr Kent said that he could not remember the terms of the motion and then gave the following evidence:

Q: Did you vote in favour or against [the stop work motion]?

A: For it.

Q: For it – why did you do that?

A: Just so we could get Laing O’Rourke to talk to us, actually.

…

Q: And how did you think that sitting in the shed would get Laing O’Rourke to talk to you?

A: I don’t know. I just – they might – a bit more serious that we would want to talk to them and have discussions.

Q: Yes. All right. Was there anything that you were trying to achieve by sitting in the shed?

A: Just – yes. Just maybe get them to talk to us.

Q: Nothing – anything else?

A: I – and the buses, obviously, about the buses.

1. In cross‑examination, Mr Kent said that he would not take strike action as a first step, that he had known that he would lose pay and that the work stoppage was unlawful. He said that the union had already tried talking to LOR on behalf of the workers and had been unsuccessful. He was aware that LOR’s response was that it was entitled to require workers to finish at 5 pm. Mr Kent also said that he felt that LOR’s position was unfair, and that he felt disadvantaged in comparison with the workers of other contractors. Mr Kent understood that LOR would not change its position (“wasn’t going to budge an inch”) to allow workers to leave earlier. Being dissatisfied with that position, he wanted to force LOR to talk about the issue and resolve it by having the buses leave the Project site gate at 5 pm. The resolution he wanted was for “the buses to finish at the gate, not in the crib rooms”.
2. Mr Kent knew on 22 October 2013 that the FWC could resolve disputes of this kind, but did not recall any discussion in the crib room about taking the matter to the FWC.

#### The 35th Respondent: Matthew Kerrigan

1. Mr Kerrigan pleaded that he stopped work because he considered that “a lot of the workers who had been on the project much longer than he … were angry about the issue and [LOR’s] lack of action on the matter”. Mr Kerrigan did not give evidence at trial.

#### The 36th Respondent: Andreas Kirchhof

1. Mr Kirchhof, a carpenter, started at the Project in July 2013. He pleaded that he had stopped work because he felt that the workers had “a legitimate issue to raise” and that he wanted to support them as “walking out of the meeting would give a bad impression to his workmates”.
2. In evidence in chief, Mr Kirchhof said that he had not been aware of any issue about the bus departure times, that no one had raised it with him and he had not heard anything said on the topic at pre‑start or toolbox meetings. This was curious evidence given the length of time Mr Kirchhof had worked and the evidence of the other workers as to the frequency with which the issue had been raised. I indicate now that I do not accept it.
3. Mr Kirchhof’s explanation for stopping work was as follows:

Q: What was the vote about? Do you know what the motion was?

A: We wanted Laing O’Rourke to come to some sort of agreement with our bus times.

…

Q: Why did you vote in favour [of stopping work]?

A: Because I was doing what the rest of the boys were doing and I wanted to stand by them.

Q: Did you sit in the shed the rest of the day?

A: Yes, I did.

Q: Why did you do that?

A: Because I chose to and I wanted to be part of the group.

Q: What did you want to achieve by sitting in the shed?

A: I wanted Laing O’Rourke to come to us with a fair agreement and how we could resolve it.

…

Q: And how did you think that sitting in the shed would achieve that?

A: Well, I thought that management would come to some sort of agreement with us.

Q: … And was there any other reason that you sat in the shed that day?

A: No.

Q: Was there anything else you were trying to achieve.

A: No.

1. Mr Kirchhof said that the kind of agreement he wanted with LOR was “fair time for the buses to leave”.
2. In cross‑examination, Mr Kirchhof said that a fair time for the buses to leave would have been an earlier time, and that was the agreement he wanted to achieve. He denied, however, joining with the group to achieve that agreement. Asked about the purpose of the strike, he stated that, “[w]e wanted them to negotiate with us”. Mr Kirchhof acknowledged that he and his co-workers were unhappy with the later leaving time and had resolved to take action that day to change the situation.
3. Mr Kirchhof was not aware of the dispute resolution procedure in the LOR Agreement. He also said that he had not been aware of the union negotiations with LOR.

#### The 37th Respondent: Phil Landrigan

1. Mr Landrigan pleaded that, although he personally was not concerned about finishing times, he stopped work because he wanted to “support the workers”. Mr Landrigan did not give evidence at trial.

#### The 38th respondent: Steven Lowe

1. Mr Lowe’s pleaded case was that he had stopped work because he “felt that it was unfair that [LOR’s] employees were being treated differently to the employees of every other contractor”.
2. In his evidence in chief, Mr Lowe, a scaffolder who had commenced on 24 July 2013, said that he had thought that it was unfair that, while the enterprise agreements of other contractors were in the same terms as the LOR Agreement, the LOR employees were finishing approximately 15 minutes later each day. The issue had been raised on numerous occasions at pre‑start meetings.
3. Mr Lowe’s explanation for stopping work on 22 October 2013 was as follows:

Q: What were you trying to achieve by not returning to work?

A: A fair outcome.

Q: What do you mean by that?

A: Either some type of communication from maybe JKC or someone that could be a third party, or just – just a solid answer that this is the EBA or however it works, this is black and white, this is at the time or end of or, if not that, change of bus times … to line up with everyone else.

…

Q: Was there … anything else you were trying to achieve apart from what you’ve just described?

A: No.

1. Mr Lowe also said that he was aware that there were dispute resolution provisions in the LOR Agreement but that he was not familiar with their detail.
2. In cross‑examination, Mr Lowe said that he was aware that the LOR Agreement required disputes to be resolved, if possible, by agreement, through discussion first with the supervisor and then with the manager and thought that if matters were not resolved at that level, it had to go somewhere else. He was also aware that while that procedure was being followed, work was to continue as normal. Mr Lowe then made the following concessions in his cross‑examination:

Q: And the whole idea of it [the industrial action] was to put pressure on Laing O’Rourke to make some change to bring you in line with everyone else and treat you fairly?

A: Be treated fairly. I would – I would agree with. Yes.

Q: Do you agree with everything that I’ve put to you: that the idea of the industrial action was to … force them to bring you in line with everyone else?

A: Either that or explain to us how the EBA exactly reads and give us in detail – this is how it is, and so everyone’s on the same page. We never seem to – we never got that sort clear explanation from, you know – as a group from – from one source.

Q: You were aiming at either one of these two … results. Is that right?

A: Yes.

Q: And you wanted to use the industrial action to force Laing O’Rourke to do either one of those two things. Is that correct?

A: We wanted to use it to probably ask them – ask them more so than we had before, because we had asked for six months or five months and hadn’t got to that next step where they – we’re – where we would seek an extra person or some sort of change, so …

Q: The idea of the strike was to put some pressure on Laing O’Rourke, was it?

A: Yes.

Q: To achieve either one of the two outcomes you were looking for?

A: Yes.

1. Earlier, Mr Lowe said that he had just been seeking “a solid response” about the finishing times. He explained that by that he meant that he had wanted to force LOR to come into line with the practices of other contractors or, alternatively, to give a clear explanation as to why their practice was different from that of other contractors. He agreed in short, that his purpose had been to put “some pressure” on LOR to achieve either of these two outcomes.

#### The 39th respondent: Christopher Lynd

1. Mr Lynd is a rigger and started at the Project in about September 2013. His pleaded case was that he had stopped work because he had “hoped to get an earlier finishing time by agreement and because he wanted to support the other workers and not go against their wishes [after] they had decided not to work for the rest of the day”.
2. In evidence in chief, Mr Lynd gave the following evidence:

Q: What were you trying to achieve by [staying in the shed the rest of the day]?

A: I don’t know. I didn’t really care about the bus times, to tell you the truth, but I was there to support the boys, and that’s what I [did].

…

Q: Did you have a reason for doing that?

A: I could see where some of the boys were getting frustrated. I had only been there a short time, and probably a bit disheartening when you’re getting on site first and getting home last and you’re on the same agreement. Well, I was on the understanding we were on the same agreement and that’s how it was and everyone should be treated the same, and I thought we were getting the raw end of the stick and so I thought, “Well, bugger them. We’re going to see if they will change the …” – we hadn’t got an answer from them. They wouldn’t give us an answer and we thought we would try and get one.

Q: Was there anything else that you were trying to achieve?

A: No.

1. In cross‑examination, Mr Lynd made the following admission:

Q: When you voted in favour of [going on strike], you knew that you were voting in favour of a strike to try and put pressure on Laing O’Rourke to make a change to the finishing times?

A: That’s correct.

Q: Do you agree?

A: Yes.

1. Mr Lynd said that he understood that there was a procedure whereby employees could raise an issue with their supervisors who would then raise the issue with management. He had not been aware that the stop work was illegal.

#### The 40th Respondent: Russell Mavin

1. Mr Mavin, a steel fixer, had worked with LOR since 2009 and started at the Project in August 2013. He pleaded that he had stopped work because “he respected the verdict of the members in the room”, wanted to support them, and considered it important that “members make a point about the matter as they were being treated unfairly and not being listened to by management”.
2. In evidence in chief, Mr Mavin gave the following evidence:

Q: Why did you vote in favour of that motion?

A: I thought it was the right thing at the time.

Q: What was the right thing? To vote in favour of it or to get the buses earlier?

A: To get the buses earlier.

Q: All right. Did you then sit in the shed for the rest of the day?

A: Yes.

Q: All right. What did you hope to achieve by doing that?

A: Leave our work area at 15 minutes before knock-off.

Q: Okay. And how did you think that sitting in the shed would help you achieve that?

A: I’m not quite sure.

Q: All right. Was there any other reason that you sat in the shed?

A: No.

1. In cross‑examination, Mr Mavin said that he was not aware of the dispute resolution procedure or that the dispute could be taken to the FWC. He thought that the employees had, a few weeks prior to the 22 October, talked about discussing the dispute with LOR with an eye to resolving it. He had not been aware that the stop work was illegal.

#### The 41st Respondent: Timothy McCarthy

1. Mr McCarthy pleaded that he stopped work because “he did not want to let his colleagues down by not supporting the stance that they were taking about the issue of finishing times which he considered should be the same for all employees”. Mr McCarthy did not give evidence at trial.

#### The 42nd Respondent: Jason Moody

1. Mr Moody, a leading hand steel fixer, had started at the Project in August 2013. He pleaded that he had stopped work because he wanted to support his fellow workers and wanted the finishing time issue to be addressed.
2. In evidence in chief, Mr Moody added that he would have benefitted from an earlier departure time because of difficulties at home associated with his partner’s recuperation from surgery. He then gave the following evidence:

Q: Why did you vote in favour of it?

A: I voted in favour of it because I wanted to be heard and I wanted what was fair as to what other people on the job site were getting.

Q: Well, when you say you wanted what was fair, what do you mean by that?

A: Just a fair outcome.

Q: But what do you mean by “a fair outcome”?

A: The buses to turn up early.

…

Q: And what did you hope to achieve by sitting in the shed?

A: Basically, our voices to be heard; someone to listen.

Q: And how did you think that sitting in the shed would achieve that?

A: Maybe management may have came in and addressed it maybe. Yes, it was just – yes, wanted to be heard, basically.

Q: Yes. Was there any other reason that you sat in the shed?

A: No.

1. In cross‑examination, Mr Moody said that he was not aware of the dispute resolution clause in the LOR Agreement and had not been aware of the option of taking the dispute to the FWC. He had learned later on 22 October that the latter course of action had been taken by LOR.

#### The 43rd Respondent: Scott Morse

1. Mr Morse, a carpenter who had been employed on the Project since September 2013, pleaded that, although he had voted against the motion, he stopped work because it was “the decision the majority had made” and he had felt that “the employees were a team and should stick together”. He also pleaded that he had thought that, if he returned to work, the other employees would not speak to him again.
2. In evidence in chief, Mr Morse gave the following evidence:

Q: Was there a motion that you voted on?

A: Yes. Yes.

Q: Do you know what the motion was?

A: To try and get Laing O’Rourke to go to the Fair Work Commission I think.

…

Q: Why did you vote against the motion?

A: I thought we were getting a pretty good deal already. I mean, we got to leave – at the time it was 5 o’clock on the dot.

Q: Yes?

A: I thought that was all right.

Q: Notwithstanding that you voted against the motion, did you go back to work?

A: No.

Q: Why not?

A: If I went back to work I’m sure no one at – on-site would probably speak to me.

Q: Yes. And was there any other reason that you didn’t go back to work?

A: Not really. No.

Q: Was there anything that you were trying to achieve yourself by not going back to work?

A: Only to keep my work mates.

1. In cross‑examination, Mr Morse denied that his co‑workers were using industrial action to bring about a change in LOR’s position and maintained that “we wanted it to go to the [FWC]”. He said, however, that as at 22 October he had not himself discussed the Bus Dispute with LOR, was unaware of any discussions with LOR on the topic and had not been told by anyone that LOR’s position was that it would not change the bus departure time. He agreed that discussions with LOR should precede taking the matter to the FWC and could not explain why the workers would stop work in order to get the matter referred to the FWC without first discussing the matter with LOR.
2. Mr Morse said that he learned that it was possible to approach the FWC during the 22 October meeting. He denied that the meeting attendees wanted LOR to change its mind on the bus departure time and said “we just wanted an answer from a higher power”, believing that the FWC would take it out of LOR’s hands and make a decision. He agreed that he had decided to stop work to be seen to support what his workmates were doing. Mr Morse denied knowing, or having been informed on 22 October, that the work stoppage was unlawful.

#### The 44th respondent: Raphael Mouauri

1. Mr Mouauri is a steel fixer. He pleaded that he stopped work because he “wanted to stay with the group and wanted to know why LOR employees were not finishing at the same time, which he thought was unfair”.
2. Mr Mouauri was the third of the individual respondents to give evidence.
3. In evidence in chief, Mr Mouauri said that he thought the difference in finishing times was unfair and that he had raised the issue with his supervisor, Paul De Nittis. He said that he had voted in favour of stopping work, and had later stopped work, because he wanted “fair treatment across the site”. He also said that the vote was “to stop work and let this bus issue [be] solved anyway, I would say”.
4. In cross‑examination, Mr Mouauri said that he had been concerned about the finishing times since he started on the job on 1 October 2013 and knew that there had been efforts through the union and Mr Tait to persuade LOR to change the finishing times. He had become increasingly annoyed and frustrated at the lack of success Mr Tait had had in getting LOR to change the finishing time. Mr Mouauri confirmed that he stopped work to “let this bus issue be solved” and to get “a fair go” from LOR. He denied that he had sought, by stopping work, to cause LOR to change the finishing time, saying that he had just wanted a “fair go”. He did, however, agree that getting “a fair go” meant being allowed to finish at the same time as everyone else on site and that that was why he had voted in favour of the industrial action.

#### The 45th Respondent: Derick Mulhall

1. Mr Mulhall, a leading hand carpenter, had worked for LOR since 2010 and started at the Project in around September 2013. He pleaded that he stopped work because “the majority of the workforce had voted for that course of action and he did not want to go against his colleagues”.
2. In evidence in chief, Mr Mulhall gave the following explanation for stopping work:

Q: Do you remember what [the motion put to the meeting] was?

A: That we stay in the sheds till somebody comes and actually just tells us what’s going on with the – with the buses.

Q: Okay. And did you vote for or against that motion?

A: I can’t – I can’t remember, but I think I voted for it.

…

Q: I suppose, if you can’t remember voting, you – well, maybe you can tell his Honour whether you supported it or not?

A: I can’t remember.

…

Q: Why did you sit in the shed for the rest of the day?

A: Just to get an answer of what the go was with – yes, with the buses.

Q: Were you trying to achieve anything else by sitting in the shed?

A: No, not at all, no.

1. In cross‑examination, Mr Mulhall said that the situation with the finishing times was unfair, and that the issue had been raised with supervisors at pre-start meetings, with queries why they were unable to leave at the same time as everyone else on the site. He agreed to having known that it was LOR’s position that the workers should finish at the work site at 5 pm and that he had understood that this was the position required by the LOR Agreement. He maintained, however, that “the site” started at the front gate.
2. Later, in answer to the proposition that he wanted LOR to change its position and treat him and his co-workers “fairly”, Mr Mulhall stated that he withdrew his labour “just for an answer” and added that “it wasn’t for anything else”. He was aware that the union had been in talks with LOR about the Bus Dispute but believed that they had not received an answer. He had not been aware of the dispute resolution provision in the LOR Agreement nor the possibility of intervention by the FWC.

#### The 46th Respondent: Gary Mullins

1. Mr Mullins is a rigger who started at the Project site in about June 2013. He pleaded that he had stopped work because “he thought it was unfair that he had to stay at work in his work area until 5:00pm while other workers were able to go back to camp or back to their families”.
2. In evidence in chief, Mr Mullins stated that he “thought it was a bit unfair that we’re sort of getting penalised our 15 minutes or so each day”. He said that the meeting took a vote to “withhold our labour until [LOR] are prepared to talk to us”. He then gave the following evidence:

Q: Why did you vote in favour of [the stop work motion]?

A: Because I didn’t think it was fair at the time like we were getting.

Q: Okay. And did you in fact withhold your labour?

A: Yes. I did.

Q: And what did you seek to achieve by withholding your labour?

A: We were just trying to – just trying to see whether Laing O’Rourke would talk to us a bit more about – about it, but as it come out they didn’t.

Q: Well, what did you hope to achieve by having them talk to you a bit more?

A: We were hoping to achieve to get that 10, 15 minutes leaving the actual crib huts to get to the front gate.

Q: Yes. Was there anything else you were trying to achieve?

A: Not that I can recall. No.

Q: Did you have any other reason for taking the action?

A: No. I can’t remember. Sorry.

1. In cross‑examination, Mr Mullins said that he did not recall whether he had known on 22 October that there had already been discussions with LOR about the finishing times, and that he had not known that LOR had relayed to Mr Huddy and Mr Tait that it would not change the finishing times.
2. Mr Mullins said that he knew that the LOR Agreement provided for there to be discussions to resolve any dispute which arose but not that the agreement provided that a dispute could be referred to the FWC.

#### The 47th Respondent: Cian Murphy

1. Mr Murphy, a carpenter, started at the Project in June 2013. He pleaded that he had stopped work to “stick with” the other workers, and because he had “thought the practice in relation to finishing times was unfair” and he did not want to give the impression that “he did not support the other workers”.
2. In evidence in chief, Mr Murphy said that the motion had been not to go back to work until “upper management come speak to us”. He then gave the following evidence:

Q: And why did you vote in favour of [the stop work motion]?

A: In all honesty because everybody else did. Some portion of it and then to another degree, I was also frustrated that the buses were leaving at 4.45 as opposed to – 5 o’clock as opposed to 4.45.

Q: Yes. And did you sit in the shed for the rest of the day?

A: I did.

Q: Why did you do that?

A: I had made my decision, you know ... I agreed with the motion as everybody else in the room did… We all stuck together.

Q: And what were you trying to achieve by sitting in the shed?

A: For management to come and speak to us.

Q: And how did you think sitting in the shed would help that?

A: I didn’t think at all to be honest. There was a – you know, the motion was raised and I went with it and – I can’t answer that … I just presumed that if we did do what we done, then maybe they would come and speak to us and explain why some contractors were leaving at 4.45 and why we were there until 5 o’clock because it’s all the same agreement, you know.

Q: And was there anything else you were trying to achieve?

A: Nothing.

Q: No. Was there any other reason you sat in the shed that day?

A: Absolutely not.

1. In cross‑examination, Mr Murphy said that he had regarded the finishing times as unfair and had been “frustrated” that he was staying at work 15 minutes longer than the employees of other contractors. He had wanted the finishing times to change so that the LOR employees could leave at the same time as everyone else. However, he denied that the point of the work stoppage was to get LOR to agree to change the finishing times, and maintained that it was “to get them to come and speak to us”.
2. Mr Murphy conceded that it was possible that the discussions between the union and LOR may have been mentioned during meetings but maintained that he had not known that such discussions had already occurred. He said that “it was [more] the fact the management hadn’t come to speak to us, directly, as the workers” which was the grievance and emphasised the employees’ wish to have an explanation. Mr Murphy then said:

Q: Are you suggesting that if management had come along and spoken to you directly, and said, “well, the reason why we’re requiring you to stay longer than everyone else is that the Enterprise Agreement allows us to do so,” that would have satisfied you?

A: It would – it would probably have made things a bit more clearer, you know.

Q: Were you aware … when you decided to sit in the shed – that that was illegal?

A: I wasn’t.

1. Mr Murphy was not aware of the dispute resolution clause in the LOR Agreement, and did not recall being told about the possibility of FWC involvement.

#### The 48th Respondent: Nola Ngata

1. Ms Ngata is a cleaner and started at the Project in September 2013. She pleaded that she had stopped work because she wanted to ensure that “the employees’ working conditions were fair and the same as other workers” and did not want to “defy the will of the collective as it was clear that the majority of the workers wanted to withdraw their labour”.
2. In evidence in chief, Ms Ngata stated that she “wanted the same treatment as other people on the site for our group” and thought that stopping work would help to achieve that by drawing “attention to the different [finishing] times” and “how we were different from the other workers”. She voted “with the collective” because it was “obvious to me that we all thought … we were being treated differently and we wanted to be treated the same”. Ms Ngata said that she did not have any other reason for stopping work.
3. In cross‑examination, Ms Ngata said that that she was unhappy because the LOR employees “weren’t being treated the same” and she had felt that this was unfair. She confirmed that the matter had been discussed with supervisors and the union representative, and that there had been no change throughout that period. Ms Ngata denied having discussions with anyone about FWC involvement, and denied being aware that it was possible for the FWC to intervene to resolve the dispute or even that the CFMEU had been in discussions with LOR about the topic.
4. As to her reasons for stopping work Ms Ngata said:

Q: Ms Ngata, prior to 22 October 2013, you knew that your complaint about the finishing times, and your co‑workers’, had been drawn to the attention of Laing O’Rourke prior to 22 October; correct?

A: Yes.

Q: Yes, on more than one occasion?

A: Yes.

Q: And still nothing had been done to make the situation fair, as you saw it?

A: Yes.

Q: And so you voted to, along with your other co‑workers – to withdraw your labour on that day, you say, because you wanted to draw attention to this ongoing dispute that you’re having with Laing O’Rourke: correct?

A: Yes.

Q: And you wanted to draw attention to it for the purpose of achieving a change in the situation; isn’t that right?

A: Yes.

…

Q: You wanted to achieve a situation whereby Laing O’Rourke would allow you to leave the site at the same time as the other workers, at an earlier time; is that correct?

A: Yes.

1. Mr Ngata acknowledged that she had known on 22 October 2013 that the work stoppage was unlawful. She later said in cross‑examination that she had known on 22 October that the Bus Dispute could be resolved by the FWC.

#### The 49th Respondent: Bernard Niki

1. Mr Niki is a Non‑Represented Respondent and did not give evidence at trial.

#### The 50th Respondent: Noovao Noovao

1. Mr Noovao, a steel fixer, started work at the Project on 21 October 2013, the day before the stoppage. He pleaded that, although he personally had not been overly concerned about finishing times, he had stopped work because he wanted to “assist his colleagues with having the issue dealt with properly”.
2. In evidence in chief, Mr Noovao said that the vote was about “withholding our labour for the day and having [LOR] come and address our issue”. He also said that he was not concerned with the finishing times himself and explained “I didn’t want to be the odd one out, as it was my second day at work”.
3. In cross‑examination, Mr  Noovao said:

Q: When you voted in favour of the industrial action, you knew, didn’t you, that the reason why industrial action was to be taken was to force Laing O’Rourke to do something about the finishing time; is that right?

A: Yes.

Q: And when, through the rest of the day, you didn’t go back to work, you knew that was the reason for the industrial action, didn’t you?

A: Yes.

#### The 51st Respondent: Ashley Owen

1. In the Defence, Mr Owen did not admit the allegation that he had had an intent to coerce and pleaded that he “[did] not recall his reason for ceasing work”. He did not give evidence at trial.

#### The 52nd Respondent: Dimitrios Panatos

1. Mr Panatos, a concreter, had started at the Project in September 2013. He pleaded that, although he personally was not overly concerned about the finishing times, he stopped work because “a number of his colleagues were very upset and were trying to resolve the issue of finishing times” and he wanted to support them “out of loyalty”.
2. In evidence in chief, Mr Panatos described the motion on which the meeting voted as “we were asking for an answer from our management about the buses”. He then gave the following evidence:

Q: And why did you vote in favour of the motion?

A: Because we just wanted an answer. We had – needed to know. We asked for something and we just wanted an answer.

…

Q: [W]hat answer did you want the management to give to you?

A: If they could get the buses to come a little bit earlier, so we can be at the gates at 5 o’clock.

Q: … Now, did you sit in the shed for the rest of the day?

A: Yes.

Q: And what did you hope to achieve by sitting in the shed?

A: To get an answer from the bosses.

Q: … And how did you think that sitting in the shed would help you get that answer?

A: I think it was the right play, because the management offices were just, like, five metres away. Someone could come and give us an answer. Yes. Now, there’s nothing else we could do.

Q: All right. And was there any other reason that you sat in the shed?

A: No.

Q: Was there anything else you were trying to achieve?

A: No.

1. In cross‑examination, Mr Panatos said that the LOR employees had asked multiple times for an answer, to no avail, and that he and his co-workers were unhappy about this. He denied being aware of the possibility of referring the dispute to the FWCand said that he had not been aware on 22 October 2013 of any way other than “sitting down” of getting the answer he wanted.

#### The 53rd Respondent: Ephraim Piiti

1. Mr Piiti, a steel fixer, had started at the Project on 15 October 2013, only one week before the work stoppage. He pleaded that, although he personally was not concerned about finishing times, he stopped work because he “did not want to cause any hassle or any trouble”.
2. In evidence in chief, Mr Piiti said that he stayed in the shed which had “air con” because “all my mates were in the shed and it was too hot outside to go back”. He then denied wanting to achieve anything by staying in the shed other than “a short break”.
3. In cross‑examination, Mr Piiti denied being aware that his co-workers were unhappy about finishing later than other workers and, although present at the 22 October meeting, denied hearing complaints about it. He said that he could hear what was being said in the meeting but “wasn’t concentrating”. In fact, he learnt only after the meeting that the workers were not resuming work. Asked whether he was joining his workmates to strike because he and they were unhappy about the finishing times, Mr Piiti was unable to recall. Mr Piiti said that he had not known that his workmates were sitting “in the shed” because they were trying to get LOR to allow them to finish at an earlier time. He claimed to having been unaware that he would lose pay if he did not resume work and to having been unaware that the work stoppage amounted to strike action.
4. Later in cross-examination, Mr Piiti again stated that he stayed in shed because “it was hot outside, yes, plus my workmate was still in the shed, so I stayed with him”.
5. Mr Piiti’s evidence was marked by a poor memory and implausibility. I did not regard his evidence as reliable and find now that he has not discharged the s 361 onus with respect to the Working Time Right and the Dispute Resolution Right.

#### The 54th Respondent: Wayne Rossiter

1. Mr Rossiter, a formwork carpenter, had started working for LOR in May 2013. He pleaded that he had stopped work because “he thought the policy in regard to finishing times was unfair”.
2. In evidence in chief, Mr Rossiter said that the Bus Dispute had been raised “a good few times” and that the supervisors had never provided an answer. He then gave the following evidence:

Q: Did you agree with the decision to sit in the sheds?

A: Yes.

Q: Why?

A: Because we wanted an answer.

Q: What answer did you want?

A: We just wanted to resolve about the buses and to know that something was going to be happening about it, or else just to let us know about it.

Q: Yes. Did you want a particular answer yourself?

A: No. No. I just wanted to know why other companies were doing a different practice, and we were leaving later, basically. I thought the overall outcome was we just wanted everything to be done fairly.

…

Q: Did you want Laing O’Rourke to do something about [the finishing times]?

A: Well, we just wanted an answer out of them. We wanted acknowledgment that there was a problem.

Q: Okay. Now, you sat in the shed. What did you hope to achieve by doing that?

A: I think we wanted the bosses to acknowledge that we weren’t happy about it, and just – that was it, really, acknowledgement.

Q: And how did you think that sitting in the shed would help you achieve that?

A: Because if you – if you’re not working, I mean, it gets people’s attention, I guess … I guess we were hoping to get the bosses’ attention and, like, the – let them know that we wanted acknowledgement for the problem.

…

Q: Was there anything else that you wanted to achieve by sitting in the shed?

A: No. Not to – not to the best of my knowledge no.

1. In cross‑examination, Mr Rossiter said that if someone from LOR management had acknowledged the problem and “[given] us a bit of a solution or something”, he may have returned to work. However, he then said that the workers “just wanted acknowledgment for the problem” and denied that they wanted LOR to deal with “an unfair situation”. He also stated:

I just think that was the main thing that they just kept telling us that they’d give us an answer tomorrow and tomorrow, and tomorrow didn’t ever seem to come.

1. Mr Rossiter agreed that despite workers raising the Bus Dispute, nothing had changed, but maintained that he decided to sit in the shed to “get acknowledgement” for the issue. He said that LOR did not answer the questions raised by the employees and said that they would deal with it “the next day, and the next day, and never came”, which caused many of the workers to be upset. He maintained that if LOR had stated that the LOR Agreement entitled it to set the finishing time later than for the others he would have received the acknowledgement that he wanted. However, Mr Rossiter later stated that his recollection was “very vague” and that it was possible that the reason he went on strike was to bring about change in the finishing times.
2. Mr Rossiter said that he did not know that the union had been in discussions with LOR about the issue, that Mr Huddy had taken the issue to LOR’s most senior manager in the Northern Territory, that the LOR Agreement included a dispute resolution clause, or that the matter could be referred to the FWC.

#### The 55th Respondent: Michael Ryan

1. Mr Ryan, a carpenter, had started at the Project on about 5 July 2013. He pleaded that he had stopped work because “he was not prepared to go back to work when everyone else around him was sitting down”.
2. In evidence in chief, Mr Ryan said that the motion was “to stay seated until somebody comes in and tells us … if we are entitled to leave site early or not”. He stated that he did not vote, but did sit in the shed for the rest of the day. He gave the following evidence:

Q: Why did you [stop work]?

A: Because everybody else was sitting there … I’m pretty new to – we were pretty new to the job. There was – I just wanted to stay with – stay with the boys, if that’s what the motion was put to the floor. I wanted to stay there with them.

…

Q: And was there any other reason that you stayed seated?

A: There – at our table there’s a few – my fellow countrymen, Irishmen. I just didn’t want to be the – didn’t want to be seen as getting up and walking out. I wanted to stand with the – with whatever motion was put, stand with the boys and just - - -

Q: And what did you hope to achieve by sitting down with everyone else?

A: Just an answer, basically.

Q: All right. Was there anything else you wanted to achieve?

A: No.

1. In cross‑examination, Mr Ryan said that he decided to sit in the shed to support “the rest of the boys” and to support the motion that was carried. In doing so, he wanted to cause LOR to give them an answer to the questions they had asked on “numerous occasions”. He rejected the suggestion that they were asking for a change in the finishing times and instead said that the LOR employees were asking “were we entitled to have the bus times changed”. He was not aware of discussions between the union and LOR about the Bus Dispute, nor that LOR had told Mr Huddy that it considered itself entitled to set the finishing time it had, but that the CFMEU could take the issue to the FWC if it wished.
2. Asked about why sitting in the sheds was an appropriate way to get LOR to respond to the workers’ queries, Mr Ryan stated that the sheds were close to the office where LOR management were located, and “they could have just walked across and told us” whether the workers were entitled to a change in the times.
3. Noting that the workers got their answer that evening, Mr Ryan then added that “when we did get our answer … we went back to work” the next day, and that answer had been all that they wanted. He denied wanting LOR to change the bus times, and maintained that he “just wanted to know why we weren’t leaving early” like other companies.
4. However, when it was put to Mr Ryan that the idea was to force LOR to give an answer by stopping work, Mr Ryan neither agreed nor disagreed, instead stating that he sat in the shed because everyone else had, that he did not vote on the motion, and that he was “very new to a big site like that”. He repeated that he wanted to support his workmates by sitting in the shed, and wanted LOR to change the finishing times if the workers were entitled to have them changed, but stated that “we weren’t trying to force them to change”. He was not aware of the LOR Agreement provision relating to dispute resolution, or the possibility of involving the FWC.

#### The 56th Respondent: Christopher Smith

1. Mr Christopher Smith is a Non‑Represented Respondent and did not give evidence at trial.

#### The 57th Respondent: Sean Smith

1. Mr Sean Smith pleaded that he stopped work because he wanted “to stick together with and support the other employees”. He did not give evidence at trial.

#### The 58th Respondent: Michael Soul

1. Mr Soul, a scaffolder, had worked for LOR for about nine years and at the Project from about August 2013. He pleaded that he had stopped work because “he wanted to remain in the crib shed as moral support for the other workers”. The defence spells his name as “Sole”. It was not suggested that anything turns on this.
2. In evidence in chief, Mr Soul said that the motion was to “withdraw our labour for the afternoon [and] try get some results out of this bus issue”. He then gave the following evidence:

Q: Why did you vote in favour of the motion?

A: Just give moral support to the fellow workers as well as, you know, like – probably like to prefer to spend that time at home with my loved ones and my family.

Q: All right. And, did you then stay in the shed for the rest of the day?

A: For the afternoon, yes.

Q: And what did you hope to achieve by staying in the shed?

A: Just to be treated a bit fairly across the site amongst other subcontractors as well as us.

Q: And how would staying in the shed help you achieve that?

A: Just sort of like trying to get results. Like just withdrawing our labour resists sort of, you know, just listen to us.

Q: To get them to listen to you?

A: Yeah. Yeah. Definitely.

1. In cross‑examination, Mr Soul again said that he wanted to support his work mates in achieving a resolution or result, and that the result he wanted was to be treated the same as everyone else. He was aware of the dispute resolution clause in the LOR Agreement and the possibility of referring the dispute to the FWC.

#### The 60th Respondent: Daniel Subotic

1. Mr Subotic pleaded that he stopped work because he felt that “the finishing time issue was not fair” and because he was “upset that he had not been told about the amount of unpaid travelling time that he would be required to do, before he commenced his employment”. Mr Subotic did not give evidence at trial.

#### The 61st Respondent: Mitchell Sutcliffe

1. Mr Sutcliffe pleaded that he stopped work because he felt that “the workers were being unfairly treated in relation to finishing times and were being exploited”. Mr Sutcliffe did not give evidence at trial. The defence gives his first name as “Michael”. Again, it was not suggested that anything turns on this.

#### The 62nd Respondent: Benjamin Teudet

1. Mr Teudet is a Non‑Represented Respondent and did not give evidence at trial.

#### The 63rd Respondent: Saron Thomasson

1. Mr Thomasson is a Non‑Represented Respondent and did not give evidence at trial.

#### The 64th Respondent: Benjamin Tito

1. Mr Tito, a steel fixer, had started at the Project in October 2013. He pleaded that he stopped work because “he wished to support the other workers so that they would be treated fairly compared with other employees of other contractors on the project”.
2. In evidence in chief, Mr Tito said that the motion on which the meeting voted was that “we would not go back to work until we heard from [LOR] what was going to happen with the bus times”.He then gave the following evidence:

Q: Why did you vote in favour of [the stop work motion]?

A: Because I was upset, and then I thought that it would affect me in that way, that I wasn’t treated fairly.

Q: Yes. Okay. And so you sat in the shed for the rest of the day?

A: Yes.

Q: What did you think you would achieve by doing that?

A: That we would get a decision or outcome of – from Laing O’Rourke.

Q: What sort of decision or outcome?

A: Just an answer from them what was happening with our bus times.

Q: How did you think that sitting in the shed would help that occur?

A: I don’t know.

1. In cross‑examination, Mr Tito said he was upset that he and his fellow workers were not being treated fairly by having to work later than other workers. He was of the view that everyone should finish at the same time and he wanted to achieve that by voting for the motion and stopping work. He was not aware of the LOR Agreement dispute resolution procedure nor of the possibility of FWC involvement.

#### The 65th Respondent: Tou Uniua

1. Mr Uniua, whose name in the defence is spelt “Unuia”, is a steel fixer and started work at the Project in September 2013. He pleaded that he had stopped work because he thought “the finishing times issue was unfair” and that LOR “should have discussed it with the workers”.
2. In evidence in chief, Mr Uniua said:

Q: … And what did you hope would happen because you sat in the sheds, if anything?

A: To be a fair go for everybody for the buses.

Q: To be fair for everybody about the buses?

A: Yes.

Q: … How did you think that sitting in the sheds would make that happen?

A: I don’t know.

1. Mr Uniua was not cross-examined.

#### The 66th Respondent: Jade Watson

1. Mr Watson, a rigger, started work at the Project on 13 July 2013. He pleaded that he had stopped work because he believed “it was important that he stick with the other employees” and he was upset that “[the LOR] workforce were being treated differently from the employees of other subcontractors”.
2. In evidence in chief, Mr Watson said that the Bus Dispute was disheartening, and that he had just wanted to be treated fairly and the same as the other contractors. He also stated that the matter had been raised with supervisors, but the response had only ever been “[w]e will get back to you”. He then gave the following evidence:

Q: … [W]hat were you trying to achieve by sitting in the sheds?

A: I just wanted a clear answer. I was sick of – it just – it was just all grey. There was no clear answer. Do we leave our compound at 5 or do we leave the security hut at 5. And that – and I just stick with the boys. You’re all one group, I don’t know, and - - -

Q: All right. Was there any other reason you did it?

A: No, that’s all.

1. In cross‑examination, it was put to Mr Watson that the point of the work stoppage was to put pressure on LOR to do something about the Bus Dispute, but he maintained that the group only “wanted an answer” about the finishing times. He said that he wanted to be “treated fairly” and wanted “that grey area to be black and white” and to have “a yes or a no answer”, in reference to the finishing times. He agreed that he wanted to be treated just like everyone else on the site and to finish at the earlier time, but maintained that, rather than aiming to change the finishing times, he was seeking an “answer” and that he was putting pressure on LOR to give an “answer”. By striking, he hoped that LOR would approach the workers and talk to them.

#### The 67th Respondent: Michael Weeks

1. Mr Weeks, a licensed builder and formwork carpenter, started at the Project in July 2013. He pleaded that he had stopped work because he thought “the practice in respect of finishing times was unfair and there should not be a difference between [LOR] employees and other employees”.
2. In evidence in chief, Mr Weeks gave the following evidence:

Q: Did you sit down?

A: Yes.

Q: Why?

A: Well, just the reason I just said. You know, the buses were getting at the security gates at 5 and we were the furtherest closest to the harbour and we were leaving there and it took 15 or whatever minutes to get there. They’re either getting – JKC are either letting them out early or we were out late then.

Q: So what did you want to achieve by sitting down?

A: Well, look, I did get a question of whether they – Leightons and these people are leaving early or we were leaving late.

Q: What do you mean by that? Can you explain what that [means]?

A: Well, what I mean is Leightons and all the other people [are] at the security gates at 5 and we were right back at the harbour and we were leaving at 5. So either they were getting away early or we were getting away late. So I thought we should get to the gates with them. Why should everyone else be at the gates and we’re stuck at bloody work?

Q: All right. And did you want Laing O’Rourke to change its position in relation to that?

A: Well, I think – *well, I’m just guessing now, sir*. I think just to, yes, to give them the notice – notify them that – that why? You know, *I think it* was probably more to go to JKC really.

…

Q: How did you think just sitting in the sheds would help you?

A: Well, I thought sitting in the sheds, as far as I’m concerned myself – *I’m just sort of half-guessing now because it’s a long time ago* – that Leighton – Laing O’Rourke would notice that we weren’t going out to work and then I thought, well, then they would notify JKC which would look into the whole area why Leightons were getting out early, you know. Or bring them back or let us go out with them.

(Emphasis added)

1. In cross‑examination, Mr Weeks said that he did not consider that the right way to address the issue was to talk to LOR about it, and did not know about the possibility of taking the dispute to the FWC.

#### The 68th Respondent: Brendan Weiss

1. Mr Weiss, a crane driver and rigger, commenced at the Project in August 2013. He pleaded that he had stopped work because “there was a clear majority and he supported the collective will of the room not to return to work”.
2. In evidence in chief, Mr Weiss said that the motion “was something about just withdrawing labour for the afternoon until we got to talk with management about the bus situation”. He then gave the following evidence:

Q: Did you vote in favour of the motion [to stop work] or against it?

A: In favour.

Q: Yes. Now, why did you do that?

A: Just – well, we – we rock up to work at quarter to 6 and we – we’re not starting till 6 and I just thought, bit of give and take, you know.

Q: So did you then not return to work that day?

A: We sat in the sheds for the rest of the day.

Q: All right. So what did you want to achieve by doing that?

A: Just to get an answer from management about the situation.

Q: What sort of answer did you want to get?

A: Just sort of a meet you halfway sort of an answer, like, maybe leave a little bit earlier just to make up the 15 minutes travel down to the front gate.

Q: Yes. And how did you think that sitting in the sheds would help you do that?

A: Well, I didn’t – it’s just what’s done, I suppose.

1. In cross‑examination, Mr Weiss said that he had understood the seriousness of the decision to go on strike and that stopping work is not the first response to a dispute with management. He was aware of the dispute resolution process in the LOR Agreement and of the possibility for the matter to be referred to the FWC. He was aware at the time that the withdrawal of labour was a last resort to be adopted when all other methods of dispute resolution had failed. He felt that the LOR employees were being treated unfairly compared with other workers due to the finishing times, and wanted to get to the site gate at 5 pm like everyone else. Mr Weiss believed that this was his entitlement under the LOR Agreement, with the 5 pm finishing time referring to finishing at the gate, and he wanted LOR to act consistently with that understanding. He was aware that the union had raised the matter with LOR management, that LOR had not changed its position and that it “wouldn’t budge an inch”. He acknowledged that he had wanted LOR to do something about this situation.

### Evaluation

1. A number of matters bear on the evaluation of the intentions of the individual employees and, in particular, whether each has discharged the s 361 onus. I commence by referring to some matters which are of general application.
2. The first is the nature of the industrial action which the individual respondents took. It was a stoppage of work and, at the time it commenced, a stoppage of indefinite duration. Some of the employees acknowledged in their evidence that they had known at the time that they were engaging in unlawful activity and in any event, on my findings, Mr Rigby had informed the employees that the industrial action was unlawful. So also had Mr Huddy. I am satisfied that all of the employees knew that they were engaging in a form of unlawful activity. Further, the individual respondents either knew, or can be taken to have known, that they would not be paid for the duration of the stoppage. I am not overlooking in this respect the evidence of Mr Piiti (the 53rd respondent) that he was not aware that he would have his pay docked because of the stoppage. I have already indicated my view that Mr Piiti’s evidence was unreliable and my finding that he has not discharged the s 361 onus.
3. Several of the individual respondents acknowledged that stopping work and engaging in a form of strike was a last resort for workers, in the sense that it was to be taken only when other methods of dispute resolution had failed. I consider it reasonable to infer that each of the individual employees knew that that was so, even if, as seems likely, they had not engaged in any sophisticated reasoning on the topic when voting.
4. Employees may decide to engage in industrial action for a variety of purposes. However, the fact that the employees in this case chose a drastic and unlawful form of action provides some evidence that they did so as a form of coercion of LOR.
5. The second matter is the extent to which the LOR employees knew both LOR’s stance on the Bus Dispute and the reasons for that stance. Mr Huddy knew both matters and, on my findings, so did Mr Tait. I think it probable that Mr Tait, at least, had earlier passed on to the LOR employees why LOR was insisting that they continue at their work site until 5 pm. It is probable that Mr Huddy did not, given that the CFMEU had earlier made the decision not to push the issue on behalf of the LOR employees, lest it jeopardise the benefit enjoyed by all the workers at the Project. It had in effect made the decision to subordinate the interests of the LOR employees to the interests of its membership more generally, and Mr Huddy appears to have been reticent to state that position expressly.
6. I accept, however, that not all of the LOR employees may have heard Mr Tait’s earlier explanation: they may have commenced employment only after he had provided the information or may have not been present, or not paying attention, when he had done so. Even if present, they may not have understood Mr Tait’s explanation.
7. A third general consideration is the way the industrial action came about. I am satisfied that the motion to stop work was not planned or premeditated, at least by the individual respondents who gave evidence, but arose spontaneously during the discussion of the Bus Dispute which occurred in the latter part of the meeting in the crib room. Until that time, the meeting had, seemingly, been of an unremarkable kind, and occurring while the employees were otherwise engaged in the usual activities of a crib break. That is to say, there was nothing to alert the workers that something significant was going to occur so as to cause them to have a heightened awareness of the situation.
8. I also think it probable that the discussion which occurred after the motion was put and seconded was of relatively short duration. The individual respondents had had the opportunity to speak in the open meeting but, at the time of voting, had not had the opportunity to reflect quietly on the matter or to discuss it between themselves in small groups or with trusted fellow workers. One consequence of this was that the thinking of several of the individual respondents in relation to the motion was probably relatively undeveloped at the time they voted on it. In these circumstances some thought it easiest to fall in with the perceived mood and pressure of the group or, at least, thought that it would be unwise not to do so. That is, I think it probable, in the case of several of the respondents, that they had not articulated clearly in their own minds their reason or reasons for taking the action other than knowing that the general goal was to be able to finish at the same (and earlier) time as did the other workers on the Project. I also think that this may account in part for the subsequent rationalisation by several employees of their conduct, to which I will return shortly.
9. A fourth general consideration concerns the terms of the motion on which the respondents voted. There was considerable diversity in the witnesses’ accounts on this topic. This is understandable given the circumstances in which the motion arose. I have already found that it was one of the employees “on the floor” who moved the motion and, although the identity of that worker was not revealed in the evidence, I think it reasonable to infer that he or she did not have a prepared motion. It seems that no record was made of the terms of the motion.
10. Several of the witnesses said that the effect of the motion was the workers stop work until they received “an answer” from LOR management on their finishing time. There is some obvious ambiguity in that terminology. Literally, it could mean that the employees were stopping work until LOR provided an answer in the sense of an explanation for its finishing time being different from those of other contractors. The evidence of some of the individual respondents was to the effect that they had understood the motion in this way. The terminology of wanting “an answer” could also be understood as seeking an answer in the sense of a resolution of the employees’ grievance, by LOR agreeing to change its practice. The evidence of several of the individual respondents indicated that they had understood the resolution in this way. Mr Tait’s evidence to which I referred earlier is one example. See also the evidence of Mr Bartlett, Ms Boyd, Mr Bright, Mr Couzens, Mr Gibbings, Mr Hore, Mr Kent, Mr Lynd, Mr Mullins, Mr Murphy, Mr Panatos and Mr Weiss.
11. In coming to an understanding of the way the motion was understood by the individual respondents generally at the time, I consider that the way in which, at the conclusion of the meeting, Mr Huddy and Mr Tait reported the situation to Mr Nicholls and Mr Rigby is pertinent (although not decisive). I have previously indicated that I regarded the evidence of Mr Nicholls and Mr Rigby as being reliable. Mr Huddy did not tell Mr Nicholls and Mr Rigby that the employees wanted an explanation or an understanding of LOR’s position. Neither Mr Huddy nor Mr Tait asked these managers to come into the crib room and provide the employees with such an explanation. Instead, on my findings, Mr Huddy said that the employees were not happy that they were the only workers who were leaving the employer’s “compound” at 5 pm and that LOR was not applying the LOR Agreement “as written”. When Mr Rigby enquired whether there was any way to get the employees back to work that day, Mr Huddy did not respond with words to the effect that the employees wanted an explanation of LOR’s position. Instead, he said: “No, the guys have voted and they don’t want to go back to work until this matter is resolved”.
12. Further, on my findings, neither Mr Huddy nor Mr Tait disputed Mr Rigby’s statement that management had previously given the workforce its “reasoning” for the 5 pm finish time.
13. Accordingly, I am satisfied that Mr Huddy and Mr Tait did not convey that the employees wanted an answer, in the sense of an explanation. They conveyed that the employees wanted an answer, in the sense of a concession to their demand. In doing so, they were, on my assessment, conveying accurately the employees’ demands.
14. Of course, this does not foreclose individual workers having had a different intention or understanding. As I have already indicated, employees who had commenced at the Project only shortly before the industrial action may not have heard LOR’s explanation. Other respondents may not have taken in the detail. Those, and other, possibilities have to be considered. But in making the assessment of the individual’s evidence, I consider it appropriate to take the matters just mentioned into account.
15. A fifth general matter is that, on my assessment at the time of trial and confirmed on reading the transcript subsequently, the evidence of several of the respondents was the product of a retrospective rationalisation. Such a rationalisation is understandable given the natural human tendency to personal exculpation. In the present case it is even more understandable given the circumstances I have already described: the relative speed with which the motion to stop work emerged and was voted upon; the absence of a written record of the motion; and the passing (it seems) of several months before the employees were asked to state what their intentions had been on 22 October 2013, and then in a context in which they had to justify that intention. I say that because the Commissioner did not commence the proceedings until 5 September 2014. Whatever be the explanation, I had the firm impression that the evidence of several of the individual respondents was marked by a retrospective rationalisation of their position on 22 October 2013. That is not a finding that the individual respondents were consciously trying to mislead the Court, as it may well have been the consequence of an unconscious process.
16. The respondents whose evidence was on my assessment affected by a retrospective rationalisation, thereby causing me to doubt the reliability of their evidence on critical matters, included Ms Boyd, Mr Bright, Mr Day, Mr Delaney, Mr Gibbings, Mr Hore, Mr Kirchhof, Mr Morse and Mr Soul.
17. The next general matter is the distinction between motive and intention. These two states of mind are not identical, because motive may be the explanation for a person forming a particular intention. Some assistance in identifying the distinction between motive and intention can be derived from authorities in the criminal law because intention, when it is an element of an offence, is to be proved beyond reasonable doubt, whereas the motive for the commission of a crime, while an item of circumstantial evidence, does not have to be so proved: *De Gruchy v The Queen* [2002] HCA 33; (2002) 211 CLR 85 at [53] (Kirby J). Kiefel, Bell and Keane JJ referred to the distinction between intention and purpose, on the one hand, and motive, on the other, in *Zaburoni v The Queen* [2016] HCA 12; (2016) 256 CLR 482 at [17]:

In ordinary parlance, purpose, desire and motive may be used interchangeably. However, in law motive describes the reason that prompts the formation of the accused's intention. The accused may fire a pistol at his business partner. His intention or purpose in pulling the trigger may be to kill. His motive for forming that intention may be to avoid repaying a debt he owes to his partner. Where liability for an offence requires proof of the intention to produce a particular result, the prosecution must establish that the accused had that result as his or her purpose or object at the time of engaging in the conduct. Purpose here is not to be equated with motive.

(Citation omitted)

1. I consider that the distinction between motive and intention is important in the present case. Proof that the individual respondents had a motive for joining in the industrial action, such as a conviction that workers should act collectively, or a desire to avoid the disapprobation of their colleagues, is not, in my opinion, inconsistent with the existence of the proscribed intention of coercing LOR. That is to say, states of mind of this kind may help explain *why* they joined in the industrial action but say little about the intention of the industrial action in which they engaged (if it be the case that they held, or at least shared, that intention).
2. The next general matter concerns the two workplace rights alleged by the Commissioner. The effect of the Commissioner’s written submission (in paras [28] and [29]) seemed to be that each of the individual respondents had had a proscribed intention in relation to each of the Dispute Resolution Right and the Working Time Right. However, in his oral closing submissions, senior counsel for the Commissioner said of those individual respondents who had testified that they had undertaken the industrial action in order to obtain “an answer without saying what the answer was one way or another. We’ve not invited your Honour to disbelieve them”, “[w]e have submitted that those employees contravened s 343 in relation to the dispute resolution provisions, but not in relation to the working hours provision”. Unfortunately, counsel’s submissions did not identify the respondents said to be in this category. I consider that there are nine respondents who satisfy counsel’s description and will identify them later.
3. I will proceed on the basis that the contraventions of s 343 which the Commissioner alleges in relation to the nine respondents concern only the Dispute Resolution Right, but that otherwise the Commissioner relies on both of the pleaded workplace rights.
4. Neither counsel submitted that in order for a respondent to have an intention to coerce an employer to exercise, or not exercise, a workplace right, or to exercise it in a particular way, the respondent must know of the existence of the right. Accordingly, it is not necessary for the resolution of this case to examine that question. Nor is it necessary to examine whether the evidence establishes that each respondent knew of the workplace rights of LOR on which the Commissioner relies.
5. The final general matter is to repeat again that it is for each individual respondent to discharge the s 361 onus. They have to establish a negative proposition, which requires proof by them that a proscribed intention did not form any part of their intention. If their evidence is insufficient to discharge the onus, then it is unlikely that any other evidence could achieve the same effect.
6. I have described the matters above as being general considerations. I note again that it is the state of mind of each individual respondent which is to be considered.
7. I consider that the individual respondents fall into a number of categories and that the existence or otherwise of the proscribed intention can be addressed by reference to those categories.
8. The first, and most obvious, category comprises the Non‑Represented Respondents and those of the Represented Respondents who did not give evidence. None of these respondents has proved that he did not act with the proscribed intention. The 25 respondents in this category are:

|  |  |  |  |
| --- | --- | --- | --- |
| **Respondent** | **Name** | **Respondent** | **Name** |
| 5th | Mr Alley | 33rd (NRR) | Mr James |
| 9th (NRR) | Mr Canute | 35th | Mr Kerrigan |
| 11th | Mr Collins | 37th | Mr Landrigan |
| 13th (NRR) | Mr Croft | 41st | Mr McCarthy |
| 15th (NRR) | Mr Dawson | 49th (NRR) | Mr Niki |
| 19th | Mr Diedrich | 51st | Mr Owen |
| 21st | Mr Elliot | 56th (NRR) | Mr Christopher Smith |
| 23rd (NRR) | Mr Giannone | 57th | Mr Sean Smith |
| 25th | Mr Gilder | 60th | Mr Subotic |
| 26th (NRR) | Mr Grace | 61st | Mr Sutcliffe |
| 29th | Mr Hanson | 62nd (NRR) | Mr Teudet |
| 30th | Mr Hines | 63rd (NRR) | Mr Thomasson |
| 32nd (NRR) | Mr Jackson |  |  |

1. The second category comprises those whose evidence contained, expressly or in effect, an admission of a proscribed intention. Several of these witnesses had testified to other motives or reasons but I consider that the admissions, whether made in examination in chief or in cross‑examination, reflected their states of mind on 22 October 2013. The 10 respondents in this category are:

|  |  |  |  |
| --- | --- | --- | --- |
| **Respondent** | **Name** | **Respondent** | **Name** |
| 2nd | Mr Tait | 27th | Mr Griffiths |
| 8th | Mr Bright | 38th | Mr Lowe |
| 12th | Mr Couzens | 39th | Mr Lynd |
| 16th | Mr Day | 50th | Mr Noovao |
| 24th | Mr Gibbings | 58th | Mr Soul |

1. In the passages from his evidence quoted earlier, Mr Tait acknowledged that he had thought on 22 October 2013 that the best way to resolve the Bus Dispute was to “force the issue” by use of industrial action (and see my earlier findings concerning Mr Tait); Mr Bright acknowledged that he had sought to achieve a change in the bus departure times by “interrupting productivity”; Mr Couzens acknowledged that the “answer” which he had wanted by taking the industrial action was to have LOR change its finishing time to match that of the other contractors on the site; Mr Day conceded that he had wanted LOR to make a change and that the purpose of the industrial action was to cause it to do so (and see my earlier findings concerning Mr Day); although Mr Gibbings did not concede that he taken the industrial action to “force” LOR to give the employees what they wanted, he agreed that he had had the purpose of putting “some pressure” on it to do so; Mr Griffiths admitted that he had thought that stopping work would achieve a change in the finishing time because “I would have assumed that … it would be in the company’s interest to have their workforce go back to work”; Mr Lowe conceded that the idea of the strike had been to put pressure on LOR either to explain how the LOR Agreement worked or to change its practice so as to match that of other contractors; Mr Lynd accepted that his intention in voting in favour of the strike was to put pressure on LOR to make a change to the finishing times; Mr Noovao’s cross‑examination contained a frank admission by him that he had voted in favour of, and engaged in, the industrial action “to force [LOR] to do something about the finishing time”, and I am satisfied, in context, that that “something” was to have its finishing time match that of other contractors; and Mr Soul said that he wanted to support his workmates in achieving a resolution or result and that the result he wanted was to be treated the same as the other contractors.
2. Each of these statements amounted to an admission by the respondent that he had wanted to apply pressure to LOR to achieve the desired change.
3. Counsel for the respondents submitted that it is not every form of strike or stop work action applying pressure which will amount to attempt to coerce, in the sense of negating the choice by an employer. I accept that that is so. However, I do not accept that any of the respondents in this case were seeking to impose only some lesser form of pressure. As I have said, the respondents took a drastic form of action, knowing that it was unlawful and that it would be to their own financial detriment by reason of the loss of pay. In my opinion, it would be naïve to regard the employees as having intended only to apply a form of pressure which fell short of coercion. At the very least, these respondents have not proven that they intended a form of pressure falling short of coercion.
4. In my opinion, the evidence of the respondents in this category indicates that they had the proscribed intention in relation to both the workplace rights on which the Commissioner relies.
5. If I am mistaken in my assessment of the evidence of Mr Bright, Mr Day, Mr Gibbings and Mr Soul, I would in any event not accept their evidence about their intentions given that it is, on my assessment, a product of a process of retrospective rationalisation.
6. Accordingly, the Commissioner’s allegations that the employees in this category contravened s 343 are established.
7. The third category comprises those respondents whose evidence, even if accepted at face value, is, in my opinion, insufficient to discharge the s 361 onus. These were also witnesses whose evidence on my assessment was affected by the retrospective rationalisation to which I referred earlier, thereby giving an unrealistically benign explanation of their conduct. There are 10 respondents in this category:

|  |  |  |  |
| --- | --- | --- | --- |
| **Respondent** | **Name** | **Respondent** | **Name** |
| 4th | Mr Allan | 42nd | Mr Moody |
| 7th | Ms Boyd | 44th | Mr Mouari |
| 28th | Mr Handley | 46th | Mr Mullins |
| 36th | Mr Kirchhof | 65th | Mr Uniua |
| 40th | Mr Mavin | 67th | Mr Weeks |

1. Mr Allan said that he had joined the work stoppage “to find out about the buses … [to] see if they were going to change it or if it could be changed”.
2. Ms Boyd acknowledged that she had voted in favour of the motion because she thought that LOR’s finishing time was unfair and she wanted it changed. She had stopped work because “we were waiting for someone to come and talk to us … and, maybe, compromise our time”. Ms Boyd explained that, by this, she wanted LOR to make some concession about the time, even if it was less than the full 15 minutes necessary in order to get to the Project site gate at 5 pm.
3. Mr Handley’s evidence was that by voting for the stop work motion he had been “going with the flow” and that he had stopped work because that had been the majority decision. He acknowledged, however, that by stopping work he had been “supporting my workers” and that he had known at the time that his fellow workers wanted to have LOR change the bus times to match those of everyone else.
4. Mr Kirchhof’s evidence was to the effect that he had voted for the motion and had stopped work with a view to having LOR “come to some sort of agreement with us” concerning the bus times, that he had wanted LOR “to negotiate with us” and that he and his co‑workers, being unhappy about the later leaving time, had resolved to take action to change the situation.
5. Mr Mavin, said that, by sitting in the shed, he had hoped that the employees would be able to “leave” [their] work area 15 minutes before knock off”, but could not say how he had thought stopping work would achieve that result.
6. Mr Moody said that he had voted in favour of the motion because he had wanted to be heard and wanted a “fair outcome”, by which he meant the buses to “turn up early”. He said that he had stopped work for the same reason. This evidence is insufficient to establish that Mr Moody did not have either of the proscribed intentions alleged by the Commissioner as it is consistent with him having had one or other or both of the proscribed intentions alleged.
7. Although Mr Mouauri did not accept that he had stopped work to *cause* LOR to change to finishing time, he said that he had done so with a view to getting a “fair go” which meant being permitted to finish at the same time as the employees of other contractors.
8. Mr Mullins withheld his labour because he wanted LOR “to talk to us” and was hoping that they might “get that 10, 15 minutes leaving the actual crib huts to get to the front gate”.
9. Mr Uniua said no more than that by staying in the shed he had hoped to get a fair go for everyone.
10. Mr Weeks acknowledged that he was “guessing” or “half guessing” in his evidence about his intentions. Evidence of that kind is insufficient to discharge the onus of proof.
11. None of the employees in this category denied having a proscribed intention, although it would have been easy for them to have done so, had that been the case. All that they did was to describe the outcome which they sought, or their motive for joining in the industrial action, but this is insufficient to establish an absence of proscribed intention. Given that they carried the s 361 onus, the absence of the evidence of this kind is stark.
12. I am accordingly satisfied that each respondent in this category had a proscribed intention in relation to each of the workplace rights on which the Commissioner relies.
13. I also repeat my view that the evidence of two members in this category (Mr Boyd and Mr Kirchhof) was affected by a process of retrospective rationalisation.
14. The next category comprises the respondents whose evidence I did not regard as credible or reliable. There are seven respondents in this category:

|  |  |  |  |
| --- | --- | --- | --- |
| **Respondent** | **Name** | **Respondent** | **Name** |
| 14th | Mr Crossen | 47th | Mr Murphy |
| 18th | Mr Delaney | 48th | Ms Ngata |
| 31st | Mr Hore | 53rd | Mr Piiti |
| 43rd | Mr Morse |  |  |

1. If my inclusion of Mr Day in the second category be inappropriate, then I would include him also in this category.
2. I indicated earlier that I did not accept Mr Crossen’s evidence. Aspects of it were unreliable, including Mr Crossen’s evidence that the LOR employees on 22 October had been “chasing further consultation with LOR” and seeking for “a third party to rule whether we were right or wrong”, as well as his claim that he had thought that the dispute could not be taken to the FWC until industrial action had been taken.
3. I regarded Mr Delaney’s evidence that the motion had been for Mr Tait to approach LOR management “to discuss” whether an outcome could be achieved was not credible, as it must have been obvious to him that a motion to the effect could be carried and Mr Tait act on it, without all the LOR employees stopping work. Mr Delaney’s claim that he had thought that stopping work was the only way that “we could discuss our problems with the management” is implausible and I do not accept it.
4. On my assessment, the evidence of Mr Hore that the workers had stopped work in order that “management might come back to us and sit down and … maybe discuss … the grievances we had with them” was not credible. I am satisfied that Mr Hore wanted more than a mere discussion: he wanted a change in the finishing time.
5. I considered the evidence of Mr Morse that he had stopped work because he wanted to avoid the reaction from his fellow employees if he did not was reliable. However, his claim that those at the meeting wanted an answer from a “higher power” and that the LOR employees had stopped work because they wanted the Bus Dispute referred to the FWC is implausible. I do not accept that explanation.
6. Likewise, Mr Murphy’s evidence that he had stopped work only because he wanted management “to come and speak to us” is implausible. It does not in any event discharge the s 361 onus.
7. I regarded Ms Ngata’s claim that she had stopped work only in order to “draw attention” to the ongoing dispute to be implausible and do not accept it.
8. I have previously indicated my view that the evidence of Mr Piiti was unreliable.
9. The fifth category comprises the nine respondents who sought an “answer” and to whom I referred earlier. The nine respondents are:

|  |  |  |  |
| --- | --- | --- | --- |
| **Respondent** | **Name** | **Respondent** | **Name** |
| 6th | Mr Bartlett | 55th | Mr Ryan |
| 34th | Mr Kent | 64th | Mr Tito |
| 45th | Mr Mulhall | 66th | Mr Watson |
| 52nd | Mr Panatos | 68th | Mr Weiss |
| 54th | Mr Rossiter |  |  |

1. In relation to these nine respondents, I accept the Commissioner’s submission that their evidence constituted an admission that they had sought to coerce LOR to provide an answer otherwise than in accordance with the dispute resolution procedure. I record that the Commissioner did not contend, in relation to this category, that these employees had a proscribed intention in relation to the Working Time Right.
2. I add that, even if my conclusions in respect of the other respondents concerning the Working Time Right be wrong, I consider that they have not discharged the s 361 onus with respect to the Dispute Resolution Right, in that their evidence indicates (or at least does not disprove) that they sought to prevent LOR having the dispute resolved in accordance with the provisions of the dispute resolution provisions *while work continued*.
3. There is one remaining respondent: the 10th respondent, Mr Churchyard. He started at the Project on 21 October 2017, only the day before the industrial action. I accept his evidence that at that time he did not even know that there was an issue about the bus departure times and joined in the industrial action so as not to “go against the crowd”. I accept that in those circumstances he did not have either of the alleged proscribed intentions, that his intention was more confined, and accordingly, the s 361 onus has been discharged.
4. That conclusion may be seen as inconsistent with my conclusion concerning Mr Noovao who had also commenced on 21 October 2017. However, Mr Noovao admitted in his cross‑examination that he had stopped work in order to force LOR to do something about the finishing time.
5. For these reasons, I consider that only the 10th respondent (Mr Churchyard) of the individual respondents has discharged the s 361 onus.
6. In summary, the Commissioner has not established that Mr Huddy or the CFMEU contravened s 343 but, other than in the case of Mr Churchyard, has established contraventions by each of the remaining Represented Respondents. At face value, the Commissioner’s pleading that the CFMEU was to be taken to have contravened s 343 by the conduct of Mr Tait could encompass the allegation that he took the industrial action as well as the allegation that he had organised it. However, I have taken the allegation to be confined to the latter conduct. I did not understand counsel for the Commissioner to make any submission to the contrary.

## Section 348 of the FW Act

1. Section 348 provides:

**348 Coercion**

A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to engage in industrial activity.

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

1. The term “engage in industrial activity” appearing in s 348 is defined in s 347 as follows (relevantly):

**347 Meaning of *engages in industrial activity***

A person ***engages in industrial activity*** if the person:

…

(b) does, or does not:

…

(iv) comply with a lawful request made by, or requirement of, an industrial association; or

…

…

1. The Commissioner alleges that the individual respondents (other than Mr Huddy) contravened s 348 by taking the industrial action (stopping work) against LOR with the intention of coercing it to engage in industrial activity, namely, by complying with “a lawful request made by, or requirement of, an industrial association” within the meaning of s 347(b)(iv) of the FW Act. He alleges that the lawful request or requirement was made by the CFMEU (an industrial association as defined) and comprised the “Bus Departure Demands”. These demands were said in the Statement of Claim to comprise Mr Tait’s words at the time of putting the stop work motion to the meeting in the crib room:

We’ve got a motion and it’s been seconded by these guys, now we have to vote on it. Hands up who wants to go on strike.

We won’t be going back to work until we hear from Laing O’Rourke about our bus time pick‑ups.

1. My acceptance of the evidence of Mr Thomas and Mr Robati means that I am satisfied that the words said to constitute the Bus Departure Demands were spoken by Mr Tait.
2. As against Mr Huddy, the Commissioner alleges that he had contravened s 348 in two ways: first, by *organising* the industrial action “with the intent to coerce, and for the purpose of coercing, LOR to comply with the Bus Departure Demands”; and, secondly, pursuant to s 362(1) of the FW Act, because he had “advised, encouraged and/or incited” the individual employees to take the industrial action to coerce LOR to comply with the Bus Departure Demands.
3. As against Mr Tait, the Commissioner alleges that he too had contravened s 348 in two ways: first, because he had *organised* and *engaged in* the industrial action with “the intent to coerce, and for the purpose of coercing, LOR to comply with the Bus Departure Demands”; and, secondly, because, pursuant to s 362(1) he too was to be taken to have “advised, encouraged and/or incited” the LOR employees to take the industrial action in order to coerce LOR to comply with the Bus Departure Demands.
4. Section 362 provides:

**362 Advising, encouraging, inciting or coercing action**

(1) If:

(a) for a particular reason (the ***first person’s reason***), a person advises, encourages or incites, or takes any action with intent to coerce, a second person to take action; and

(b) the action, if taken by the second person for the first person’s reason, would contravene a provision of this Part;

the first person is taken to have contravened the provision.

(2) Subsection (1) does not limit section 550.

1. The Commissioner’s claims relying upon s 362 can be disposed of shortly. The conduct which the Commissioner alleges constituted the advice, encouragement or inciting of the LOR employees is the same conduct relied upon for the allegation that Mr Huddy and Mr Tait had *organised* the industrial action. For the reasons given in relation to the alleged contravention by these two respondents of s 417, I am not satisfied that either Mr Huddy or Mr Tait engaged in conduct of this kind. Accordingly, the Commissioner has not established the alleged contraventions of s 348 by reason of the operation of s 362 or otherwise. That has the consequence that the allegation that Mr Huddy contravened s 348 is dismissed altogether. In the case of Mr Tait, the allegation that he “engaged in” the industrial action with the proscribed intention remains to be considered.
2. The Commissioner submits, and the Represented Respondents do not contest, that the request or requirement concerning the bus departure times was lawful, as there was no impediment to the LOR employees making the request or stating their requirement, as opposed to taking action to enforce it.
3. It could be said that the words spoken by Mr Tait at the time of, and immediately after, taking the vote on the motion did not constitute a *request* by the CFMEU, as the notion of a request usually involves some communication to the person of whom it is made. It would have been more natural to think of the request or requirement as having been constituted by the words spoken by Mr Huddy and Mr Tait when speaking to Mr Nicholls and Mr Rigby immediately after the meeting in the crib room and indeed the Commissioner submitted that the Bus Departure Demands had been communicated to LOR by Mr Huddy in that subsequent meeting. However, no point was taken about this at the hearing.
4. The subject matter of the Commissioner’s s 348 claim is different from the subject matter of his s 343 claim. In the case of s 348, the Commissioner alleges that the respondents took the industrial action to coerce LOR to provide a response to their demands concerning the bus departure times, whereas, in the case of s 343, the Commissioner’s claim is that the respondents took the industrial action to coerce LOR to change the bus departure time or, alternatively, not to use the dispute resolution procedure which would culminate in a referral to the FWC.
5. The essential matter of difference between the parties in relation to the alleged contravention of s 348 is whether the individual respondents have discharged the onus under s 361 of proving that, in taking the industrial action, they did not have the proscribed intention alleged.
6. Again, that question has to be considered separately in relation to each of the individual respondents.
7. Counsel for the respondents submitted that each of the individual respondents who had given evidence had discharged that onus. Counsel repeated in this respect the submissions he had made with respect to intention under s 343.
8. In my opinion, those submissions should not be accepted, and the respondents should be found not to have discharged the s 361 onus with respect to s 348. The assessment of the respondents’ evidence with respect to s 343 applies also in the case of s 348. In fact, the conclusion may be reached with even greater confidence in the case of the respondents whose evidence was that they had engaged in the industrial action in order to get an “answer” from LOR.
9. I am satisfied that the Commissioner has made good his allegations of contraventions of s 348 by the individual Represented Respondents (excluding the 10th respondent, Mr Churchyard) other than the allegations of organising action with the proscribed intention made against Mr Huddy and Mr Tait. Both claims of contraventions by the CFMEU of s 348 fail, as again I did not understand the Commissioner to allege that Mr Tait’s conduct in engaging in the conduct gave rise to a liability of the CFMEU pursuant to either s 363 or s 793 of the FW Act.

## Section 50 of the FW Act

1. Section 50 of the FW Act provides:

**50 Contravening an enterprise agreement**

A person must not contravene a term of an enterprise agreement.

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

Note 2: A person does not contravene a term of an enterprise agreement unless the agreement applies to the person: see subsection 51(1).

1. The Commissioner alleges that each of the individual respondents had contravened s 50 by not complying with cl 18.2, the dispute resolution procedure. At the trial, the Commissioner did not pursue this allegation with respect to Mr Huddy. The Commissioner does, however, maintain the allegation that Mr Huddy was “involved in” the contraventions of s 50 by the individual respondents and it will be necessary to return to that.
2. The statement of claim also includes allegations that the CFMEU had, by reason of the contraventions of Mr Huddy and Mr Tait, contravened s 50, but those allegations were not pursued at the hearing.
3. Each of the Represented Respondents and Mr Jackson (the 32nd Respondent) denies this allegation.
4. Sections 51 to 54 of the FW Act contain provisions identifying the circumstances in which an enterprise agreement imposes obligations on a person which may be contravened for the purposes of s 50: a person will not contravene a term of an enterprise agreement unless the agreement *applies* to the person (s 51(1)); an enterprise agreement *applies* to an employee, employer or employee organisation if the agreement is in operation and the agreement *covers* the employee, employer or organisation (s 52(1)); an enterprise agreement *covers* an employee or employer if the agreement is expressed to *cover* (however described) the employee or the employer (s 53(1)); an enterprise agreement which is a greenfields agreement covers an employee organisation, if it was made by that organisation (s 53(2)); and an enterprise agreement is in operation from the date seven days after its approval by the FWC or, if a later day is specified in the agreement, from that later day (s 54(1)).
5. It was common ground at the hearing that the LOR Agreement is an enterprise agreement imposing obligations on each of the respondents, including Mr Huddy and the CFMEU. Insofar as is necessary to make a finding to that effect in respect of the Non‑Represented Respondents, I am satisfied that the LOR Agreement also imposed obligations on them.
6. Although this was not spelt out clearly in the statement of claim, the Commissioner’s opening submissions indicated that he alleges that the individual respondents contravened cl 18.2 of the LOR Agreement by failing to:
7. refer the Bus Dispute to the FWC;
8. continue working normally while the dispute resolution procedure was invoked.
9. The Represented Respondents accept that they had not referred the dispute to the FWC and had not continued to work while the FWC dealt with the dispute. The issue between the parties centred on the terminology of cl 18.2(a) of the dispute resolution procedure. It does not specify that “any dispute at all” between the parties is to be dealt with in accordance with the agreed procedure, only that any disagreement or dispute in respect of (relevantly) matters “arising under the agreement” should be dealt with in this way. The respondents contend that the Bus Dispute did not arise under the LOR Agreement because it was about whether LOR “would apply the site policy which allowed employees to finish earlier”, and such a policy “stood entirely outside” the LOR Agreement and, accordingly, that they could not be said to have been in breach of cl 18.2.
10. The expression “arising under the agreement” in cl 18.2(a) can be understood as deriving from s 186(6) of the FW Act. That provision provides (relevantly) that, before the FWC approves an enterprise agreement, it must be satisfied that the agreement includes a term:

(a) that provides a procedure that requires or allows the FWC, or another person who is independent of the employers, employees or employee organisations covered by the agreement, to settle disputes:

(i) about any matters arising under the agreement; and

(ii) in relation to the National Employment Standards.

It can readily be inferred that cl 18 was included in the LOR Agreement in order that it would conform with the requirements of s 186(6) of the FW Act. Nevertheless, the words to be construed are the words in the LOR Agreement and not those in the FW Act (although it is doubtful that there would in reality be any difference in their respective meanings).

1. In construing these words, the Court adopts the canons of construction applicable to the interpretation of industrial awards and agreements: see *Kucks v CSR Ltd* (1996) 66 IR 182 at 184 (Madgwick J) which was quoted with approval in *Amcor Ltd v CFMEU* [2005] HCA 10, (2005) 222 CLR 241 at [96] (Kirby J) and [129]‑[130] (Callinan J). Some assistance can also be derived from authorities in other contexts, in particular, from authorities concerning the construction of arbitration clauses in commercial contracts. In that context, provisions containing the parties’ agreement to refer “disputes arising out of the agreement” to arbitration have been construed broadly. Thus, in *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466, Handley JA said at 487:

The arbitration clause in this case covered “any controversy or claim arising out of or related to this Agreement or the breach thereof”. That part of the submission which contained an agreement to refer controversies or claims “arising out of the Agreement or the breach thereof” appears to cover every conceivable claim which either party might have against the other in contract. In a particular context the same words may also cover other claims as well.

See also *BTR Engineering (Australia) Ltd v Dana Corporation* [2000] VSC 246 at [18]‑[23] and the cases cited therein; and *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 in which Gleeson CJ said at 165:

When the parties to a commercial contract agree, at the time of making the contract, and before any disputes have yet arisen, to refer to arbitration a dispute or difference arising out of the agreement, their agreement should not be construed narrowly. They are unlikely to have intended that different disputes should be resolved before different tribunals, or that the appropriate tribunal should be determined by fine shades of difference in the legal character of individual issues, or by the ingenuity of lawyers in developing points of argument.

1. A similar approach is also appropriate in the present context as I am unable to discern any consideration indicating that a narrow construction should be given to the terminology used in cl 18.2(a). The indications are to the contrary. It is not just disputes about a matter “arising under the Agreement” which are to be dealt with in accordance with the dispute resolution procedure but “any” dispute “in respect of” such a matter. These words are capable of catching a broad range of disputes having some connection with the LOR Agreement.
2. In *BTR Engineering*, Warren J (as her Honour then was) said at [24] that the word “under” in the expression “a dispute involving their respective rights and obligations under this Purchase Agreement” referred to a dispute including or affecting the parties’ rights and obligations *governed, controlled or bound by or in accordance with* the agreement. I consider that a formulation of this kind is appropriate in the present context.
3. Adopting this approach, it is plain that the Bus Dispute is a dispute “in respect of” a matter “arising under” the LOR Agreement. The dispute has its origins in the provisions in cl 8.1 requiring the LOR employees to remain at their work place until the designated finishing time. That the LOR employees may have wished LOR to adopt a different practice which reflected a site policy (or perceived site policy) does not alter that circumstance. LOR was maintaining that it had a right based on the terminology of cl 8.1 and the LOR employees wanted it to adopt a different practice. Plainly, this was a dispute in respect of a matter arising under the LOR Agreement.
4. Accordingly, the contraventions of s 50 alleged by the Commissioner are as established. As already noted, these are contraventions by each of the individual respondents (including Mr Churchyard), as the Commissioner did not pursue the pleaded allegation that the CFMEU had, by reason of the conduct of Mr Huddy and Mr Tait, also contravened s 50.

## Section 550 of the FW Act

1. Section 550 of the FW Act provides:

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

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

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

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

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

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

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

1. The Commissioner alleges that each of Mr Huddy and Mr Tait was involved in the contraventions of ss 417, 343, 348 and 50 by each of the individual respondents and therefore are, by reason of s 550(1), to be taken to have contravened those provisions. The Commissioner alleges that Mr Huddy and Mr Tait were involved in the contraventions in the relevant sense because each:
2. aided, abetted and/or procured the contraventions by the individual respondents, or any one of them; and/or
3. was directly or indirectly knowingly concerned in or party to the contraventions by the individual respondents, or any one of them.
4. The principles relating to accessorial liability under s 550 are settled. A person “aids and abets” the contravention of another if the person was present at the contravention and took some part in it, whereas the words “counsel and procure” refer to the person who, although not present at the contravention, encouraged its commission: *Giorgianni v The Queen* (1985) 156 CLR 473 at 480 (Gibbs CJ); *Australian Securities and Investments Commission v Australian Investors Forum Pty Ltd (No 2)* [2005] NSWSC 267 at [115]. Generally speaking, a person will aid and abet a contravention if the person helps, assists or encourages its occurrence, and a person will counsel or procure a contravention if the person takes action to bring it about, that is, when there is a causal connection between their action, on the one hand, and the contravention by another, on the other.
5. To be “knowingly concerned” in a contravention, the person must have engaged in some act or conduct which “implicates or involves him or her” in the contravention so that there be a “practical connection between” the person and the contravention: *CFMEU v Clarke* [2007] FCAFC 87, (2007) 164 IR 299 at [26]; *Qantas Airways Ltd v Transport Workers’ Union of Australia* [2011] FCA 470; (2011) 280 ALR 503 at [324]‑[325]. In *Trade Practices Commission v Australian Meat Holdings Pty Ltd* (1988) 83 ALR 299, Wilcox J at 357 quoted with approval the following passage from the judgment of the Full Court of the Supreme Court of Western Australia in *Ashbury v Reid* [1961] WAR 49:

The question which a Court should ask itself in determining whether an act or omission on the part of an individual comes within the terms of s 44 is whether on the facts it can reasonably be said that the act or omission shown to have been done or neglected to be done by the defendant does in truth implicate or involve him in the offence, whether it does show a practical connection between him and the offence.

The statement in *Ashbury v Reid* was also approved in *R v Nifadopoulos* (1988) 36 A Crim R 137 at 140 with the Court (Kirby ACJ, Maxwell and Carruthers JJ agreeing) saying that “a person cannot become criminally involved in an act made unlawful by mere knowledge or inaction on his part – some act or conduct on his part is necessary”.

1. In order to aid, abet, counsel or procure the relevant contravention, the person must intentionally participate in the contravention with the requisite intention: *Yorke v Lucas* (1984) 158 CLR 661 at 667. In order to have the requisite intention, the person must have knowledge of “the essential matters” which go to make up the offence, whether or not the person knows that those matters amount to a crime: *Yorke v Lucas* at 667. Although it is necessary for the person to be an intentional participant and to have knowledge of the matters or things constituting the contravention, it is not necessary for the person to know that those matters or things do constitute a contravention: *Rural Press Ltd v Australian Competition and Consumer Commission* [2002] FCAFC 213; (2002) 118 FCR 236 at [159]‑[160]. That is to say, it is not necessary that the accessory should appreciate that the conduct in question is unlawful: *Australian Competition and Consumer Commission v Giraffe World Australia Pty Ltd (No 2)* [1999] FCA 1161; (1999) 95 FCR 302 at [186]. The Full Court in *Rafferty v Madgwicks* [2012] FCAFC 37; (2012) 287 ALR 437 summarised the position in this respect at [254]:

[W]hile the identification of the elements of a contravention requires careful legal analysis, “[i]n order to know the essential facts, and thus satisfy s 75B(1) … and like provisions, it is not necessary to know those facts are capable of characterisation in the language of the statute”. … This is another aspect of the long standing principle that it is not necessary for a person to “recognise” the contravention as such, or explicitly to think about the relevant legislation that their actions may contravene … .

1. Actual knowledge of the essential elements constituting the contravention is required. Imputed or constructive knowledge is insufficient: *Young Investments Group Pty Ltd v Mann* [2012] FCAFC 107; (2012) 293 ALR 537 at [11]. Proof that a person had actual knowledge of each of the essential elements making up a contravention may be derived from direct evidence but more commonly will be a matter of inference from all the circumstances found to be proved. In some cases, actual knowledge can be inferred from the combination of a respondent’s knowledge of suspicious circumstances and the decision by the respondent not to make enquiries to remove those suspicions. Nevertheless, it is actual knowledge which is required: *Giorgianni v The Queen* at 505, 507‑8.
2. The Commissioner did not contend that he had the benefit of the reverse onus in s 361 in proving the knowledge of Mr Huddy and Mr Tait, and there are authorities indicating that he does not: *Port Kembla Coal Terminal Ltd v CFMEU* [2016] FCAFC 99, (2016) 263 IR 344 at [448] (Rangiah J); *AMWU v Visy Packaging Pty Ltd (No 3)* [2013] FCA 525, (2013) 216 FCR 70 at [241] (Murphy J).
3. The conduct of Mr Huddy and Mr Tait which the Commissioner alleges comprised their counselling and procuring is the same conduct on which he relied for the allegation that they had organised the industrial action. That allegation fails for the reasons given earlier in relation to the allegation of organising. Further, the requisite causal relationship between their conduct and the industrial action is lacking.
4. However, on my assessment, the conduct of Mr Huddy and Mr Tait did amount to the aiding and abetting the contraventions of the individual. I will identify the relevant conduct shortly.
5. Earlier, I set out the elements of a contravention of s 417. Relevantly for present purposes, the matters of which Mr Huddy and Mr Tait had to have knowledge are:

(a) the LOR Agreement, being an enterprise agreement approved by the FWC covered the employment of the LOR employees;

(b) the nominal expiry date of the LOR Agreement had not passed;

(c) the LOR employees were engaging in industrial action.

1. On my findings, each of Mr Huddy and Mr Tait knew, on 22 October 2013, of these matters, and their counsel did not submit to the contrary.
2. The elements of the s 50 contraventions of which Mr Huddy and Mr Tait had to have knowledge are:

(a) the LOR Agreement is an enterprise agreement;

(b) the LOR Agreement covered the LOR employees;

(c) the LOR employees engaged in conduct contravening the LOR Agreement.

1. The evidence established each of these matters and, again, counsel for the Represented Respondents did not contend to the contrary.
2. The accessorial claims with respect to ss 343 and 348 need to be considered separately. Counsel for the respondents submitted that these claims of the Commissioner should fail because the Commissioner could not establish that Mr Huddy or Mr Tait had had knowledge of the individual reasons of each employee for taking the industrial action and, therefore, that they had had knowledge of all the essential elements of the contraventions by each individual respondent. It was implicit in counsel’s submissions that he accepted that Mr Huddy and Mr Tait had knowledge of the other elements of each of these contraventions, so that these do not need to be considered further.
3. As noted above, a person’s actual knowledge of each element of a contravention may be a matter of inference from all the circumstances found to be proved in a given case. In those cases in which the primary contravenor must have a particular state of mind in order for the contravention to be found, knowledge by a putative accessory that that state of mind existed will often be a matter of inference from the other evidence.
4. In my assessment, an inference that Mr Huddy and Mr Tait knew that the individual respondents (other than Mr Churchyard) had the requisite intention can, and should be, drawn in this case from the circumstances in which the LOR employees stopped work, identified earlier in these reasons. These include the attempts made before 22 October 2013 to have LOR align its finishing time with other contractors; the awareness that further negotiation and discussion would be fruitless; that Mr Huddy had conveyed this to the meeting by telling the employees “we are at the end of it”; that the employees were aware of these matters when they made their decision; the terms of the motion; and the very nature of the employees’ action in stopping work (being action adapted to coercion).
5. At the time that the motion to stop work was voted upon, Mr Huddy understood that the motion was for the LOR employees to withdraw their labour until there was a resolution of their dispute and was directed to changing LOR’s position as to the bus pickup times. Mr Huddy was aware that the stop work was unlawful; indeed as I found earlier, he warned the LOR employees of that fact.
6. In addition to the matters already mentioned from which Mr Huddy’s knowledge of the intention of the LOR employees may be inferred, Mr Huddy’s own evidence contained admissions that he knew the intention of those present in the meeting:

Q: And all I’m seeking to understand is this: that as you listened to what was said at the meeting, you came to understand that the mood of the meeting was that they were – members were at the end of their tether, they had had enough and they knew that the bussing issue was not going to be resolved by discussion with Laing O’Rourke management; correct?

A: That’s fair to say, yes.

1. Mr Huddy gave further evidence to like effect in later cross‑examination:

Q: The motion was, was it not, that they would sit down or crib up, or not go back to work, until they heard from Laing O’Rourke about the bus time pick‑ups; is that correct?

A: Well, that was – yes. That was what the protest was about.

Q: The motion, as you understood it, was that there would be – that employees – Laing O’Rourke employees would withdraw their labour until there was a resolution for their dispute with Laing O’Rourke about the bus time pick‑ups or finishing times; correct?

A: Correct.

Q: And you were quite confident in your own mind, were you, throughout the meeting that that was to be the purpose of the industrial action?

A: It was – it was a protest, you know. They had had enough. They wanted to protest.

Q: But you were quite confident, weren’t you, that it wasn’t a pointless protest?

A: Look it was – it was what it was. It was what the guys agreed on.

Q: It was a protest that, as you understood it, listening to the debate at the meeting and the … terms of the motion – it was a protest that was directed to changing Laing O’Rourke’s mind on the bus time pick‑ups or finishing times. Correct?

A: Yes. Yes.

I refer in relation to this passage to my earlier finding concerning Mr Huddy’s use of the word “protest”.

1. None of the LOR employees at the crib room meeting said or did anything in the meeting to indicate that he or she did not have the intention to coerce LOR which was implicit in the conduct on which each had resolved. Those who voted against the motion may constitute an exception in this respect, but even those employees acted in accordance with the motion.
2. Mr Huddy knew that LOR relied on cl 18.1 of the LOR Agreement in relation to the bus departure time issue. He had looked at the clause himself and had formed the view that LOR was probably correct in its understanding of the effect of the clause. He was also aware of the dispute resolution clause in the Agreement and knew that CFMEU did not wish to risk taking the matter to the FWC.
3. Mr Tait admitted in his evidence in cross‑examination to which I referred earlier that he had perceived that the mood of the meeting was to force LOR to change its mind by the use of industrial action. I am satisfied that he too had actual knowledge of the intention of the LOR employees. The matters mentioned in the case of Mr Huddy also apply in his case.
4. On my findings, Mr Tait was also aware that LOR relied on cl 18.1 of the LOR Agreement and had been told by either Mr Rigby or Mr Baker at a meeting prior to the industrial action that the LOR employees had exhausted the steps in the dispute resolution process and that either party was in a position to take the matter to the FWC.
5. Mr Huddy involved himself in the industrial action in a number of ways, in particular by his statements to the LOR employees “we didn’t get this far without a fight”, “we need to stick together, we can’t have half of you going back to work and half here waiting in the crib room and then everyone reaping the benefits. We’ve got to be together on this”, and his later statement “they are just bluffing, don’t give in to these fellas”. In addition, he remained at the crib room, in breach of his right of entry conditions, to demonstrate his support to the LOR employees and I am satisfied that while there, he did just that.
6. Mr Tait involved himself in the industrial action after the taking of the vote, by conveying the resolution to Mr Nicholls and Mr Rigby, by the discussions with those men during the course of the day and, although knowing that the LOR employees were looking to him for leadership on the issue, by not, until the following morning, discouraging the LOR employees from continuing the industrial action. He too lent his support to the LOR employees during the course of 22 October 2013.
7. For these reasons, I consider that the Commissioner has made good the allegations of accessorial involvement by Mr Huddy and Mr Tait in the contraventions by each of the individual Represented Respondents of ss 417, 343, 348 and 50. Mr Tait cannot of course have been involved as an accessory to his own contraventions of those provisions.

## Section 500 of the FW Act

1. Section 500 of the FW provides:

**500 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).

1. The Commissioner alleges that Mr Huddy contravened s 500 on 22 October 2013 when exercising his right of entry to hold discussions with the LOR employees by conducting the meeting which went beyond the time permitted by s 490(2) of the FW Act, by remaining on site despite having been requested more than once by Ms Garland to leave, and by reconvening a meeting of the LOR employees in the crib room after the morning break. In fact, instead of leaving at 10.30 am Mr Huddy remained at or near the LOR crib room until 4.45 pm. Mr Huddy admits the allegations concerning the contraventions of s 500. He also admitted that he had acted in an improper manner by engaging in conduct contrary to s 343, 348 and 417 of the FW Act. However, as that is inconsistent with his defence to the separately alleged contraventions of these provisions, I have treated these particular admissions as slips and have not relied on them.
2. The CFMEU admits that, by reason of s 793 of the FW Act, it also contravened s 500. However, there is an issue yet to be resolved at Full Court level, as to whether s 793 can operate so as to make an organisation liable for a contravention of s 500 (see: *Director, Fair Work Building Industry Inspectorate v Bolton (No 1)* [2016] FCA 816 and *Director of the Fair Work Building Industry Inspectorate v Bolton (No 2)* [2016] FCA 817, both of which are presently subject to appeal, and see also *CFMEU v Australian Building and Construction Commissioner* [2017] FCAFC 77 at [44]‑[52]; *Australian Building and Construction Commissioner v Harris* [2017] FCA 733 at [21]‑[52]). Although the CFMEU did not argue that position in this case and, as noted, admitted in its defence that it was to be taken to have contravened s 500, I consider that the parties should have the opportunity to make submissions on the topic. That can occur conveniently in the second stage of the trial. If there is any application to withdraw the admission, account will have to be taken of any prejudice which may thereby be occasioned to the Commissioner, as well as of the interests of the administration of justice in the manner of conduct of trials.

## The Non-Represented Respondents

1. The 32nd respondent, Mr Jackson, is different from the other Non‑Represented Respondents because he had for a time been represented in the proceedings and, while so represented, had filed a defence. The Court directed on the first day of trial that it proceed against him in his absence.
2. The findings which I have made to date are sufficient to indicate that each of the alleged contraventions by Mr Jackson is established.
3. The Commissioner proved service of the proceedings on each of the remaining non‑represented respondents. None has filed an appearance or a defence and each is, accordingly, a “party in default” within the meaning of r 5.22 of the FCR. Rule 5.23(2) provides that the Court may give judgment against a respondent who is in default for the relief claimed in the statement of claim to which the Court is satisfied that the applicant is entitled.
4. The Commissioner submits that the evidence in the trial establishes that he is entitled to the same relief sought against the Non‑Represented Respondents as established against the Represented Respondents. I uphold that submission. Indeed, if it was necessary to be more confident in doing so, I would have that confidence. As was observed by Gilmour J in analogous circumstances in *Hadgkiss v Aldin (No 2)* [2007] FCA 2069 at [13]:

As a matter of principle, where it can be shown that a party has been served with the originating process, and if that party thereafter declines to take any of the steps required as a result of such service (such as entering an appearance, filing a defence or attending at directions hearings), the party may (and often ought) be regarded as having waived his or her rights and as having, in effect, consented to judgment on the basis of the facts alleged in the statement of claim.

1. Accordingly, I find that the Commissioner has established that each of the Non‑Represented Respondents also committed the alleged contraventions of ss 417, 343, 348 and 50. I also find that each of Mr Huddy and Mr Tait was involved in their contraventions, within the meaning of s 550 of the FW Act.

## Conclusion

1. In summary, for the reasons given above, I am satisfied that:

(a) each of the individual respondents other than the 1st, 17th, 20th, 22nd, 59th and 69th respondents (and in the case of ss 343 and 348, the 10th respondent) engaged in industrial action in contravention of s 417 of the FW Act, engaged in action with a proscribed intention in contravention of ss 343 and 348 of the FW Act, and contravened a term of the LOR Agreement in contravention of s 50 of the FW Act;

(b) each of the first respondent Mr Huddy and the second respondent, Mr Tait was involved in the individual respondents’ contraventions of ss 417, 50, 343 and 348 and thereby, by the operation of s 550 of the FW Act, contravened those provisions (save that Mr Tait was not an accessory to his own contraventions of those provisions); and

(c) Mr Huddy contravened s 500 of the FW Act.

1. The following allegations by the Commissioner are dismissed:

(a) the claim that each of Mr Huddy and Mr Tait organised the industrial action on 22 October 2013 in contravention of ss 417, 343 and 348 (by operation of s 362 or otherwise); and

(b) the claim that the CFMEU had, by the conduct of Mr Huddy and Mr Tait, contravened ss 417, 343 and 348.

1. The Commissioner’s claim that the CFMEU contravened s 500 by reason of s 793 will be addressed in the second stage of the trial.
2. I will hear from the parties as to the orders which are appropriate to give effect to these findings and on the question of penalties.

|  |
| --- |
| I certify that the preceding four hundred and seventy-nine (479) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice White. |

Associate:

Dated: 30 June 2017

SCHEDULE OF PARTIES

|  |  |
| --- | --- |
|  | NTD 33 of 2014 |
| Respondents |  |
| Fourth Respondent | STEVAN ALLAN |
| Fifth Respondent | RICHARD ALLEY |
| Sixth Respondent | QUENTIN BARTLETT |
| Seventh Respondent | CORINNE BOYD |
| Eighth Respondent | DAVID BRIGHT |
| Ninth Respondent | OLIVER CANUTE |
| Tenth Respondent | GLYNN CHURCHYARD |
| Eleventh Respondent | DESMOND COLLINS |
| Twelfth Respondent | WADE COUZENS |
| Thirteenth Respondent | STUART CROFT |
| Fourteenth Respondent | NATHAN CROSSEN |
| Fifteenth Respondent | CARL DAWSON |
| Sixteenth Respondent | LIAM DAY |
| Seventeenth Respondent | MATTHEW DE-NITTIS |
| Eighteenth Respondent | CARL DELANEY |
| Nineteenth Respondent | COLE DIEDRICH |
| Twentieth Respondent | GREGORY DUFTY |
| Twenty First Respondent | MICHAEL ELLIOT |
| Twenty Second Respondent | CHRIS FOWLES |
| Twenty Third Respondent | ANTHONY GIANNONE |
| Twenty Fourth Respondent | CLINT GIBBINGS |
| Twenty Fifth Respondent | JOHN GILDER |
| Twenty Sixth Respondent | KENT GRACE |
| Twenty Seventh Respondent | BRETT GRIFFITHS |
| Twenty Eighth Respondent | KARL HANLEY |
| Twenty Ninth Respondent | JORDAN HANSON |
| Thirtieth Respondent | GREG HINES |
| Thirty First Respondent | MATT HORE |
| Thirty Second Respondent | JARROD JACKSON |
| Thirty Third Respondent | GAVAN JAMES |
| Thirty Fourth Respondent | GARTH KENT |
| Thirty Fifth Respondent | MATTHEW KERRIGAN |
| Thirty Sixth Respondent | ANDREAS KIRCHHOF |
| Thirty Seventh Respondent | PHILL LANDRIGAN |
| Thirty Eighth Respondent | STEVEN LOWE |
| Thirty Ninth Respondent | CHRISTOPHER LYND |
| Fortieth Respondent | RUSSELL MAVIN |
| Forty First Respondent | TIMOTHY MCCARTHY |
| Forty Second Respondent | JASON MOODY |
| Forty Third Respondent | SCOTT MORSE |
| Forty Fourth Respondent | RAPHAEL MOUAURI |
| Forty Fifth Respondent | DERICK MULHALL |
| Forty Sixth Respondent | GARY MULLINS |
| Forty Seventh Respondent | CIAN MURPHY |
| Forty Eighth Respondent | NOLA NGATA |
| Forty Ninth Respondent | BERNARD NIKI |
| Fiftieth Respondent | NOOVAO NOOVAO |
| Fifty First Respondent | ASHLEY OWEN |
| Fifty Second Respondent | DIMITRIOS PANATOS |
| Fifty Third Respondent | EPHRAIM PIITI |
| Fifty Fourth Respondent | WAYNE ROSSITER |
| Fifty Fifth Respondent | MICHAEL RYAN |
| Fifty Sixth Respondent | CHRISTOPHER SMITH |
| Fifty Seventh Respondent | SEAN SMITH |
| Fifty Eighth Respondent | MICHAEL SOUL |
| Fifty Ninth Respondent | KRIS STEELE |
| Sixtieth Respondent | DANIEL SUBOTIC |
| Sixty First Respondent | MITCHELL SUTCLIFFE |
| Sixty Second Respondent | BENJAMIN TEUDET |
| Sixty Third Respondent | SARON THOMASSON |
| Sixty Fourth Respondent | BENJAMIN TITO |
| Sixty Fifth Respondent | TOU UNIUA |
| Sixty Sixth Respondent | JADE WATSON |
| Sixty Seventh Respondent | MICHAEL WEEKS |
| Sixty Eighth Respondent | BRENDAN WEISS |
| Sixty Ninth Respondent | NATHAN WHITFIELD |