FEDERAL COURT OF AUSTRALIA

Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Bruce Highway Caloundra to Sunshine Upgrade Case) [2020] FCAFC 203

Appeal from:	*Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Bruce Highway Caloundra to Sunshine Upgrade Case)* (No 2) [2019] FCA 1737
File number:	QUD 712 of 2019
Judgment of:	**REEVES, CHARLESWORTH AND O'CALLAGHAN JJ**
Date of judgment:	24 November 2020
Catchwords:	**INDUSTRIAL LAW** – right of entry – entry by union officials under s 81(3) of the *Work Health and Safety Act 2011* (Qld) – whether exercise of "State or Territory OHS right" within meaning of s 494 of the *Fair Work Act 2009* (Cth) – *Australian Building and Construction Commissioner v Powell* (2017) 251 FCR 470 applied **INDUSTRIAL LAW** – accessorial liability for contraventions of ss 494(1), 497 and 500 of the *Fair Work Act 2009* (Cth) – conduct and state of mind of officials imputed to union under s 793 of the *Fair Work Act 2009* (Cth) – whether union thereby knowingly concerned in officials' contraventions within the meaning of s 550 of the *Fair Work Act 2009* (Cth)
Legislation:	*Fair Work Act 2009* (Cth) *Occupational Health and Safety Act 2004* (Vic) *Work Health and Safety Act 2011* (Qld)
Cases cited:	*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (Footscray Station Case)* (2017) 274 IR 460; [2017] FCA 1555 *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 357 ALR 199; [2018] FCA 122 *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy*

Union (The Brooker Highway Case) [2018] FCA 1081

Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2018] FCA 42

Australian Building and Construction Commissioner v Harris [2017] FCA 733

Australian Building and Construction Commissioner v Huddy (No 2) [2017] FCA 1088

Australian Building and Construction Commissioner v McDermott (No 2) (2017) 252 FCR 393; [2017] FCA 797

Australian Building and Construction Commissioner v O'Connor (No 3) [2018] FCA 43

Australian Building and Construction Commissioner v Powell (2017) 251 FCR 470; [2017] FCAFC 89

Australian Building and Construction Commissioner v Upton (2017) 270 IR 190; [2017] FCA 847

Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner (2017) 251 FCR 528; [2017] FCAFC 77

Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (The Yarra's Edge Case) [2016] FCA 772

Director of the Fair Work Building Industry Inspectorate v Robinson (2016) 241 FCR 338; [2016] FCA 525

EZY Accounting 123 Pty Ltd (ACN 105 317 691) v Fair Work Ombudsman (2018) 360 ALR 261; [2018] FCAFC 134

Forbes v Petbarn Pty Ltd [2018] FCA 256

Hamilton v Whitehead (1988) 166 CLR 121

Mallan v Lee (1949) 80 CLR 198

Yorke v Lucas (1985) 158 CLR 661

Division:	Fair Work Division
Registry:	Queensland
National Practice Area:	Employment and Industrial Relations
Number of paragraphs:	55
Date of hearing:	6 August 2020
Counsel for the Appellants:	Mr R Reitano with Mr P Boncardo
Solicitor for the Appellants:	Hall Payne Lawyers
Counsel for the First	Mr C Murdoch QC with Mr M Follett

Respondent:	
Solicitor for the First Respondent:	Ashurst Australia
Counsel for the Second Respondent:	Mr A Duffy QC
Solicitor for the Second Respondent:	Crown Law

ORDERS

QUD 712 of 2019

BETWEEN:	**CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION** First Appellant
	KURT PAULS Second Appellant
	BEAU SEIFFERT (and others named in the Schedule) Third Appellant
AND:	**AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER** First Respondent
	MINISTER FOR EDUCATION AND MINISTER FOR INDUSTRIAL RELATIONS OF QUEENSLAND Second Respondent
ORDER MADE BY:	**REEVES, CHARLESWORTH AND O'CALLAGHAN JJ**
DATE OF ORDER:	**24 NOVEMBER 2020**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

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

REASONS FOR JUDGMENT

REEVES AND O'CALLAGHAN JJ:

INTRODUCTION

1 The appellants seek to set aside certain declarations of contravention of several of the "right of entry" provisions in Part 3-4 of the *Fair Work Act 2009* (Cth) (**FW Act**) made by a judge of this Court.

2 Although the notice of appeal contained five grounds, the appeal was conducted on the basis that two questions of law arise, viz:

(1) does s 81(3) of the *Work Health and Safety Act 2011* (Qld) (the **WHS Act**) confer a "right to enter premises" within the meaning of s 494(2) of the FW Act; and

(2) if so, can the first appellant (the **CFMMEU**) be "knowingly concerned in" a contravention of a provision of the FW Act within the meaning of s 550(2) of that Act solely by means of statutory attribution under s 793 of the conduct and state of mind of an officer of the CFMMEU necessary to establish that officer's principal contravention of the same provision?

3 The primary judge answered both questions in the affirmative.

4 For the reasons given below, the primary judge was correct to do so and the appeal will be dismissed.

THE FACTS

5 The relevant facts were admitted. It is not necessary for the purposes of addressing the two legal issues raised on appeal to rehearse them in any detail.

6 It suffices to say that Fulton Hogan Construction Pty Ltd and Seymour Whyte Constructions Pty Ltd had formed an unincorporated joint venture to construct and deliver various upgrades to the Bruce Highway between Caloundra Road and the Sunshine Coast Motorway in Queensland (the **Site**). Each of them occupied or otherwise controlled the Site.

7 Between 8 March and 18 April 2018, the second to eighth appellants (collectively, the **individual appellants**), each of whom was an officer of the CFMMEU, entered the Site and engaged in various activities there. They admit that they did so pursuant to s 81(3) of the WHS Act.

8 The first respondent (the **Commissioner**) alleged various contraventions of ss 494(1), 497 and 500 of the FW Act by the individual appellants. The Commissioner further alleged that, under s 550 of the FW Act, the CFMMEU was taken to have contravened each of those provisions, by reason of the operation of s 793 of the FW Act.

9 The second appellant, Mr Pauls, was found to have contravened s 494(1) of the FW Act when he exercised a "State or Territory OHS right" in circumstances where he was not a permit holder within the meaning of the FW Act. All the other individual appellants, other than Mr Albert, that is Messrs Seiffert, Hynes, Gibson, Parfitt and Kupsch, were found to have contravened s 497 of the FW Act (by continuing to exercise a State or Territory OHS right after having refused a lawful request by the occupier of the Site to produce a federal entry permit for inspection) and s 500 of the FW Act (in various different respects, including by refusing requests to produce entry permits and to leave the Site). Mr Albert, the fourth appellant, was found only to have contravened s 497.

10 The CFMMEU's liability was premised on it being "knowingly concerned" in the individual appellants' contraventions for the purposes of s 550(2)(c) of the FW Act.

11 The second respondent is the Minister for Education and Minister for Industrial Relations for Queensland (the **Minister**), who intervened in the proceeding at first instance pursuant to s 569A of the FW Act. Counsel for the Minister made submissions in relation to the first question, in support of the submissions made on behalf of the individual appellants.

THE FIRST QUESTION

12 The first question arises in circumstances very similar to those considered by the Full Court in *Australian Building and Construction Commissioner v Powell* (2017) 251 FCR 470; [2017] FCAFC 89 (***Powell***). In our view, the reasoning in *Powell* is dispositive of the issues here.

13 Like this appeal, *Powell* concerned the proper construction of s 494 of the FW Act, and whether the terms and operation of state legislation conferring rights of entry on union officials (among other persons), including to investigate possible contraventions of occupational health and safety laws, conferred a "right to enter premises" for the purposes of s 494.

14 As in *Powell*, the relevant question that arises here is whether the individual appellants (as officials of an organisation as defined in the FW Act) exercised a State or Territory OHS right. Inserting the meaning of the phrase "State or Territory OHS right" from s 494(2) ("[a] right to enter premises … is a State or Territory OHS right if the right is conferred by a State or

Territory OHS law …"), the question is whether the individual appellants exercised a right to enter premises that was conferred by the WHS Act.

15 The answering of that question requires the FW Act, and in particular s 494, to be construed. It also requires s 81(3) of the WHS Act "to be construed and characterised to decide whether there is 'a right to enter premises' conferred by that Act, in accordance with the meaning of that phrase in the FW Act" (*Powell* at [30] per Allsop CJ, White and O'Callaghan JJ).

16 As was the case with Mr Powell, the only basis upon which the individual appellants on appeal seek to defend the penalty proceedings brought against them is that the state law (in this case s 81(3) of the WHS Act), did not confer upon them, and they were not exercising, a right to enter premises.

17 In *Powell*, it was unsuccessfully contended that, because ss 58(1)(f) and 70 of the *Occupational Health and Safety Act 2004* (Vic) (the **Victorian Act**) did not in terms grant a "'strict legal right' that [was] enforceable by the person on whom it [was] conferred", those provisions did not confer a "right" within the meaning of s 494(1) of the FW Act (at [32]).

18 The Full Court in *Powell* made it clear that "provisions as to entry on to work sites and the regulation thereof should be construed conformably with the language used by Parliament practically and with an eye to common sense so that they can be implemented in a clear way on a day-to-day basis at work sites. The legislation needs to work in a practical way at the work site, and if at all possible not be productive of fine distinctions concerning the characterisation of entry on to a site" (at [15]).

19 Consistently with that approach, the Full Court rejected the contention that those provisions of the Victorian Act, and s 70 in particular, did not in terms grant a "strict legal right" that was enforceable by the person on whom it was conferred, reasoning as follows (at [33]-[34]):

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

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

20 Section 81 of the WHS Act provides as follows:

> **81 Resolution of health and safety issues**
>
> (1) This section applies if a matter about work health and safety arises at a workplace or from the conduct of a business or undertaking and the matter is not resolved after discussion between the parties to the issue.
>
> (2) The parties must make reasonable efforts to achieve a timely, final and effective resolution of the issue in accordance with the relevant agreed procedure, or if there is no agreed procedure, the default procedure prescribed under a regulation.
>
> (3) *A representative of a party to an issue may enter the workplace for the purpose of attending discussions with a view to resolving the issue*.
>
> (Emphasis added.)

21 In this case, the appellants contended that s 81(3) of the WHS Act was "facilitative only", and that it merely "provided that a representative of a party could (or could not) enter premises". It was contended that the provision "did not create any obligation on an occupier of premises to allow entry, or permit a representative or anyone on behalf of a representative to enforce entry".

22 Echoing the case that was rejected in *Powell*, counsel for the appellants submitted as follows:

> The word 'right' in ss 494, 497 and 500 means an entitlement to do something which creates a correlative duty imposed on another person to permit it to be done. A 'right' carries with it an ability to do (or not do) something that is legally enforceable. 'Rights' in this sense are to be found in the FW Act. For example, under Part 3-4 itself, the legislature has conferred rights to enter premises on permit holders under ss 481 and 484 which are supported by a correlative duty on persons (such as occupiers and employers) to not refuse or unduly delay entry under s 501. The rights of entry under ss 481 and 484 are enforceable at the suit of a person affected by the contravention (such as the permit holder or their union) or an inspector. It is important to recall that ss 494, 497 and 500 of the FW Act, which are relevant to the present case, are all concerned with regulating the exercise of rights concerned with entry to premises: the sections are not concerned with or directed to merely facilitative or permissive provisions of State OHS legislation. A 'right' refers to something more than a mere capacity or capability to do something.
>
> (Citations omitted.)

23 Counsel for the appellants further submitted:

(1) There is no obligation at all imposed on the occupier of a workplace to permit a representative entry to a workplace under s 81(3), which "stands in stark contrast" with ss 58(1)(f) and s 70(1) of the Victorian Act (the provisions considered in *Powell*).

(2) The WHS Act provides no direct means of enforcement of entry by a representative or the party they represent.

(3) The WHS Act provides "a detailed and carefully crafted scheme for the enforcement of 'rights' or 'obligations' concerning entry to premises where it is intended that those 'rights' be supported by obligations which are enforceable", citing among other provisions:

    (a) the power of a health and safety representative to "request the assistance of any person" in s 68(2)(g), which is "supported by a correlative obligation under s 70(1)(g) … to allow a person assisting an HSR access to the workplace if that is necessary for the assistance to be provided" and the provision making failure to comply an offence punishable by fine; and

    (b) the power to enter premises under ss 117 and 121 of the WHS Act, which it was contended "is plainly legally enforceable and satisfies the description of a 'right to enter premises'" by reason of the civil remedy provision in s 144, enforceable at the suit of the WHS prosecutor (s 260), which prohibits the refusal or undue delaying of entry to a workplace to permit holders entitled to enter.

24 It is not necessary to burden these reasons with a recital of the other provisions of the WHS Act referred to in those submissions, the gist of which is that "where the Queensland legislature intended a power to enter premises to be enforceable, it did so in direct and express terms", because we do not accept their premise, namely that a "right" to enter must be a strict, enforceable legal right. We also do not accept the further premise of the submissions that the decision in *Powell* turned on the presence in the Victorian Act of a specific enforcement mechanism. It did not.

25 In our view, the submissions advanced on behalf of the appellants, if we may say so with respect, fly in the face of the unchallenged reasoning in *Powell*, in particular in the passages set out above.

26 In our view, the "facilitative" construction of s 81(3) of the WHS Act contended for by the appellants cannot be accepted. Quite apart from anything else, to hold, as the appellants would have it, that a provision that says that a person (in this case a union official) "may enter"

premises means no more than that they "may or may not" enter, would render it meaningless. That is something which, obviously enough, Parliament cannot be taken to have intended.

27 For those reasons, the answer to the first question is yes.

THE SECOND QUESTION

28 The appellants' fifth ground of appeal is as follows:

> The primary judge erred in concluding that the first appellant was liable as an accessory under s 550(2)(c) of the FW Act by being 'knowingly concerned' in the principal contraventions of the second to eighth appellants in circumstances where:
>
> a. no conduct by the first appellant separate and distinct to that engaged in by the second to eighth appellants was pleaded;
>
> b. the first appellant's liability was pleaded to derive solely because of the acts of the second to eighth appellants as principal contraveners.

29 In his closing submissions before the primary judge, the Commissioner relied upon a number of single judge decisions of this Court bearing on this issue. As recorded by the primary judge, they were as follows (at [139]):

> The Commissioner relies on authorities including *Australian Building and Construction Commissioner v McDermott (No 2)* [2017] FCA 797 at [104]-[125], *Australian Building and Construction Commissioner v Upton (The Gorgon Project Case)* [2017] FCA 847; (2017) 270 IR 190 at [227]-[235], *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] FCA 42 at [290]-[300], *Australian Building and Construction Commissioner v Construction Forestry, Mining and Energy Union (The Parliament Square Case)* [2018] FCA 1080 at [102]-[108], [and] *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Brooker Highway Case)* [2018] FCA 1081 at [136]-[140] for the proposition that where a union official contravenes the right of entry provisions of the FW Act directly with knowledge of the essential facts making up that contravention, the conduct and knowledge of the contravening official are attributed to the union so as to make the union knowingly concerned in the contraventions, and therefore an accessory.

30 In response, the appellants contended (at [140]):

> … in summary, that the approach adopted in these cases is wrong and should not be followed because it offends legal orthodoxy in that the conventional approach is that an accessory must do something additional to what a principal offender does in order to aid, abet, counsel, procure, or otherwise be directly or indirectly knowingly concerned with the principal offender's contravention.

31 The primary judge was not persuaded that the decisions referred to above were plainly wrong. Accordingly, her Honour was "satisfied that the CFMMEU was knowingly concerned in or party to the contraventions of each of the individual respondents, all of whom were officers of the CFMMEU acting in that role, within the meaning of s 550(2)(c) of the FW Act" (at [141]).

32 To these conclusions, her Honour added the following observations (at [142]-[143]):

> I note further that the parties agreed at [10] of the [statement of agreed facts] that:
>
> (a) all actions and conduct of each of the Second to Eighth Respondents as admitted herein (including hereafter) were also the actions and conduct of the CFMMEU; and
>
> (b) the CFMMEU possessed the same states of mind as each of the Second to Eighth Respondents in relation to those actions and conduct, as admitted herein (including hereafter).
>
> In those circumstances it is difficult to understand the position of the respondents that the CFMMEU was not an accessory to the contraventions of the individual respondents.

33 In this appeal, the appellants' submissions adopted the same theme. They contended the primary judge erred in holding that the same acts, conduct and state of mind of the individual appellants were sufficient to ground the CFMMEU's liability. They argued that *Hamilton v Whitehead* (1988) 166 CLR 121 (***Hamilton***) is the "mirror image of this case" in that it concerned a natural person who was held to be liable as an accessory to the contraventions of a corporation. In that case, they contended, the individual's conduct was directly attributed to the corporation as he did the things that constituted, and thereby contributed to causing, the principal offence. The appellants further contended that the present circumstances are "completely different" as there is no allegation that the CFMMEU did something, or failed to do something, which caused, or contributed to, the individual appellants committing any of the contraventions. They contended that the CFMMEU could not therefore be said to have been implicated in, or associated with, the commission of the contraventions so as to be accessorily liable under s 550(2)(c).

34 The Commissioner contended that statutory attribution is sufficient to engage s 550 as it is that attribution which "implicates" the person in the offending conduct, citing *EZY Accounting 123 Pty Ltd (ACN 105 317 691) v Fair Work Ombudsman* (2018) 360 ALR 261; [2018] FCAFC 134 (***EZY Accounting***) at [13]. The Commissioner rejected the distinction sought to be drawn between *Hamilton* and this case claiming that in each case the sum total of the conduct and the state of mind leading to the contraventions was identical and was present in two separate parties: the principal and the accessory.

35 The Minister made no submissions on this ground of appeal.

36 The earliest of the authorities mentioned in the Commissioner's contentions before the primary judge in which this issue was considered was *Australian Building and Construction*

Commissioner v McDermott (No 2) (2017) 252 FCR 393; [2017] FCA 797 (***McDermott***). At [94]-[121], Charlesworth J reviewed a number of authorities dealing with accessorial liability under s 550 and the circumstances in which s 793 applied such that both an official of the CFMMEU, and the CFMMEU itself, could be held liable for a contravention of s 500 of the FW Act.

37 As the Commissioner's submissions before the primary judge correctly noted, her Honour's judgment on these issues has since been followed in numerous first instance decisions of this Court. To the list provided by the Commissioner in his submissions (see at [29] above) may be added: *Australian Building and Construction Commissioner v Huddy (No 2)* [2017] FCA 1088 (***Huddy***) at [19]-[38] per White J; *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (Footscray Station Case)* (2017) 274 IR 460; [2017] FCA 1555 (the ***Footscray Station Case***) at [14]-[18] per Tracey J; *Australian Building and Construction Commissioner v O'Connor (No 3)* [2018] FCA 43 (***O'Connor***) at [149] per Besanko J; *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 357 ALR 199; [2018] FCA 122 at [190]-[194] per Tracey J; and *Forbes v Petbarn Pty Ltd* [2018] FCA 256 at [73] per Charlesworth J.

38 Furthermore, in at least two of these decisions, the CFMMEU put, and the Court rejected, an argument in almost identical terms to the one it has put in this appeal (see *Huddy* at [31]-[32] per White J and *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Brooker Highway Case)* [2018] FCA 1081 at [137]-[139] per Tracey J). It is also worth recording that a Full Court of this Court refused leave to the CFMMEU to raise this issue in *Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner* (2017) 251 FCR 528; [2017] FCAFC 77 (at [44]-[52]) because it had not been argued at first instance. Consequently, this is the first time this particular issue has been considered by a Full Court.

39 When counsel for the appellants was asked at the hearing of this appeal why Charlesworth J was wrong in *McDermott*, he responded in essentially the same terms as are set out above (at [33]). That is to say, he contended that her Honour had identified the same conduct and the same state of mind which gave rise to the contravention by the official concerned as giving rise to the CFMMEU's participation in the contravention. He contended that, for the CFMMEU to be knowingly concerned in those acts, it had to do something more which indicated that it was associating itself with the conduct and state of mind in question.

40 We do not agree. To explain why, it is necessary to begin with some contextual background to *McDermott* and various of the decisions that have followed it. A convenient starting point is s 500 of the FW Act, to which both *McDermott* and this ground of this appeal relate. It 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.
>
> (Notes omitted.)

41 It follows that this provision, like s 497, hinges on the conduct of a "permit holder". That status is essentially confined by s 512 of the FW Act to an "official" of the "organisation" applying for the permit (in this case the CFMMEU). Both of these expressions are defined in s 12 of the FW Act: the former to mean "of an individual association, a person who holds an office in, or is an employee of, the association" and the latter to mean "an organisation registered under the Registered Organisations Act". We interpose to compare the former definition with the definition achieved by the parenthesis in s 793(1)(a) (see at [44] below). Hence, only a natural person is able to hold a permit under the FW Act. As a consequence, *McDermott* and the decisions that followed it on this point held, correctly in our view, that s 793 of the FW Act could not be utilised to find the CFMMEU liable as a principal contravener under s 500 (see *McDermott* at [43]-[67] per Charlesworth J relying in part on *Australian Building and Construction Commissioner v Harris* [2017] FCA 733 (***Harris***) per Siopis J; and, as for examples of cases that have followed *McDermott* on this point, see *Huddy* at [36] per White J; *Australian Building and Construction Commissioner v Upton* (2017) 270 IR 190; [2017] FCA 847 (***The Gorgon Project Case***) at [232] and [235] per Barker J; the *Footscray Station Case* at [9]-[13] per Tracey J; and *O'Connor* at [149] per Besanko J).

42 However, as was correctly found in *McDermott* and a number of subsequent decisions, while the CFMMEU could not be found liable as a principal contravener, it could be found to have contravened s 500 as a person "involved in" a contravention of that section by one of its officials, within the provisions of s 550 of the FW Act, specifically s 550(2)(c) (see *McDermott* at [94]-[118] particularly the conclusion at [113] and [118] and, as examples of cases that have followed *McDermott* on this point, *Huddy* at [32]-[35] per White J; *The Gorgon Project Case* at [228]-[231] and [235] per Barker J; the *Footscray Station Case* at [14]-[19] per Tracey J; *Australian Building and Construction Commissioner v Construction, Forestry, Mining and*

Energy Union [2018] FCA 42 (***Taylor***) at [46]-[58] and [300] per Flick J; and *O'Connor* at [149] per Besanko J).

43 We interpose to note that the liability that arises under this provision may properly be described as accessorial liability because, even though it concerns a contravention of a *civil* remedy provision of the FW Act, it engages the same concepts of accessorial liability as are found in the criminal law (see *Yorke v Lucas* (1985) 158 CLR 661 at 669 per Mason ACJ, Wilson, Deane and Dawson JJ).

44 That brings us to s 793 of the FW Act. It is trite to observe that a corporate person such as the CFMMEU can only act through the agency of a natural person. Consequently, under the heading "Liability of bodies corporate", s 793 of the FW Act sets out to address that state of affairs. That section relevantly provides:

> *Conduct of a body corporate*
>
> (1) Any conduct engaged in on behalf of a body corporate:
>
> (a) by an officer, employee or agent (an ***official***) of the body within the scope of his or her actual or apparent authority; or
>
> (b) by any other person at the direction or with the consent or agreement (whether express or implied) of an official of the body, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the official;
>
> is taken, for the purposes of this Act and the procedural rules, to have been engaged in also by the body.
>
> *State of mind of a body corporate*
>
> (2) If, for the purposes of this Act or the procedural rules, it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is enough to show:
>
> (a) that the conduct was engaged in by a person referred to in paragraph (1)(a) or (b); and
>
> (b) that the person had that state of mind.
>
> *Meaning of* ***state of mind***
>
> (3) The ***state of mind*** of a person includes:
>
> (a) the knowledge, intention, opinion, belief or purpose of the person; and
>
> (b) the person's reasons for the intention, opinion, belief or purpose.
>
> …

45 It can be seen that, under this provision, a body corporate's liability is dependent on the conduct engaged in by (s 793(1)), and state of mind of (s 793(2)), its "official" within the scope of his

or her actual or apparent authority. The word "official" refers to an "officer, employee or agent" of the body corporate (see s 793(1)(a)), or those acting under an official's direction, or with their consent or agreement (s 793(1)(b)). In the circumstances described in s 793(1)(a) or (b), that conduct "is taken", for the purposes of the FW Act, "to have been engaged in also" by the corporate body concerned. Further, if it is necessary to establish the state of mind of the body corporate concerned "in relation to particular conduct, it is enough to show" that the conduct was engaged in by the official, as mentioned above, and that official had the requisite state of mind. The expression "state of mind" is then defined in s 793(3)(a) of the FW Act to include "the knowledge, intention, opinion, belief or purpose of the person".

46 Clearly, this provision can be utilised to establish both the principal, or direct liability, of a corporate body like the CFMMEU for a contravention of a provision of the FW Act, and its accessorial liability for such a contravention as mentioned earlier. However, in the case of the former, it is important to emphasise that it operates so that the official's conduct and state of mind are attributed to the body corporate for the contravention concerned, not that official's *liability* for that contravention. That is to say, it is still necessary to establish, as a matter of fact, that the official's conduct and state of mind so attributed to the body corporate constituted the contravention of the FW Act that is alleged against it (see *Director of the Fair Work Building Industry Inspectorate v Robinson* (2016) 241 FCR 338; [2016] FCA 525 at [50] per Charlesworth J; *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (The Yarra's Edge Case)* [2016] FCA 772 at [19] per Jessup J; and *Harris* at [51] per Siopis J).

47 Finally, we turn to the way in which ss 793 and 550 interact to fix accessorial liability on a body corporate like the CFMMEU for a principal contravention committed by an individual. First, it is convenient to dispose of the appellants' "mirror image" contention based on *Hamilton* (see at [33] above). In that matter, both the company and Mr Whitehead, its managing director, were found to be guilty of the offences as charged. The company was found guilty on the appeal from the magistrate's order dismissing the charges against it (see at 124). Mr Whitehead was found guilty as a consequence of the High Court's judgment. Of this situation, Mason CJ, Wilson and Toohey JJ said (at 128):

> … The company is the principal offender and [Mr Whitehead] is charged as an accessory. Franklyn J. thought that it was 'wrong and oppressive' to prosecute [Mr Whitehead] for the identical acts and decisions as were relied on as the acts of the company. There is nothing conceptually wrong in such a course since 'it is a logical consequence of the decision in *Salomon's Case* that one person may function in dual

> capacities': *Lee v. Lees Air Farming Ltd.*. In *Reg. v. Goodall* Bray C.J. discussed what his Honour described as: 'some sort of metaphysical bifurcation or duplication of one act by one man so that it is in law both the act of the company and the separate act of himself as an individual' and expressed his conclusion as follows: 'my view is that the logical consequence of *Salomon's Case* ... is that the company, being a legal entity apart from its members, is also a legal person apart from the legal personality of the individual controller of the company, and that he in his personal capacity can aid and abet what the company speaking through his mouth or acting through his hand may have done.' We agree with this view.
>
> (Citations omitted.)

See also *McDermott* at [121] and *Huddy* at [34]-[35].

48 Having regard to these observations, we do not see how *Hamilton* assists the CFMMEU in this appeal. We would add that, if the CFMMEU intended this contention instead to refer to the "inversion of … conceptions" mentioned in *Mallan v Lee* (1949) 80 CLR 198, that matter was also dealt with in *Hamilton* (at 126-127 and 129). See also *McDermott* at [104]-[112] and *Huddy* at [29]-[32]. Again, if that is what was intended, we do not see how it assists the CFMMEU in this appeal.

49 Next, it is convenient to make a number of observations about the Full Court decision in *EZY Accounting* upon which the Commissioner relied. First, that judgment did not relate to a contravention of the right of entry provisions in Part 3-4 of the FW Act. Instead, it involved a contravention of an Award under s 45 of the FW Act by an employer company called Blue Impression Pty Ltd. EZY Accounting 123 Pty Ltd was an incorporated firm of accountants which provided assistance and advice to Blue Impression in connection with its compliance (or non-compliance, as it turned out) with the applicable Award. The central issue was whether Mr Lau, EZY Accounting's sole director, had the requisite knowledge to be involved in the principal contravention of the Award by Blue Impression. The question was not, therefore, whether EZY Accounting was accessorily liable for a contravention by Mr Lau, but rather whether, based on Mr Lau's knowledge, it was so liable for the principal contravention by the separate corporate entity, Blue Impression. Two realms of knowledge were therefore relevant: the knowledge of the human actor within Blue Impression with respect to the Award in question, and Mr Lau's knowledge of the essential elements of Blue Impression's contravention.

50 The factual and legal situation in *EZY Accounting* was therefore significantly different to that of the present appeal. Accordingly, the principles relating to accessorial liability which are

outlined at [11]-[15] of that judgment must be considered in that context. Nonetheless, they do provide some guidance in this appeal. In particular, the following observations (at [13]-[14]):

> To be '*involved in'* conduct there has to be some conduct which '*implicates*' a person in the offending conduct such that they become '*involved in*' or '*associated with*' that conduct: *Fair Work Ombudsman v Priority Matters Pty Ltd* [2017] FCA 833 at [116]. It was there said that a person cannot be '*involved in*' conduct for the purposes of s 550 '*merely by reason of his knowledge of the conduct being pursued*'.
>
> In reliance upon *Devine Marine*, and with reference to the liability of an accessory for a contravention of s 50 of the *Fair Work Act*, in *Australian Building and Construction Commissioner v Parker* (2017) 266 IR 340; [2017] FCA 564 (*Parker*) at [126]–[128] a potential divergence in the authorities was noted as follows:
>
> [126] For a person to be 'knowingly concerned in or a party to the contravention' for the purposes of s 550(2)(c), the person must have been an intentional participant with knowledge at the time of the contravention of the essential elements constituting the contravention: cf. *Yorke v Lucas* (1985) 158 CLR 661 at 670; 62 ALR 307 at 312–13. Actual knowledge is required — mere constructive or imputed knowledge is not sufficient. But actual knowledge may be inferred from 'exposure to the obvious': [*Giorgianni v R* (1985) 156 CLR 473 at 507–8; 58 ALR 641 at 665–6; 2 MVR 97 at 121–2].
>
> …

51 With those principles in mind, we turn to the particular accessorial liability which arises in this appeal. It has three features. First, it involves accessorial liability by the CFMMEU, a corporate person, for the direct, or principal, contraventions of the FW Act by its officials, all of whom are natural persons. Secondly, all but one of those officials (the third to eighth appellants) were concurrently permit holders under the FW Act. As earlier explained, only a permit holder can contravene ss 497 and 500 of the FW Act. The second appellant, who did not have a permit, was found to have contravened s 494, a provision that can only be contravened by an official. Thirdly, therefore, the natural persons who committed the principal contraventions, and the natural persons whose conduct and state of mind was attributed to the CFMMEU under s 793, for the purposes of s 550, namely its officials, were one and the same persons. This combination of features is, in our view, sufficient to find the CFMMEU accessorily liable for the contraventions. As Charlesworth J explained in *McDermott* (at [121]):

> To the extent that it is necessary to show that CFMEU involved itself in some tangible way in the contraventions of its officials, there is no reason why s 793 should not facilitate proof of that requirement. Section 793 is premised on an accepted fiction that a body corporate is a separate legal entity from those who participate in it: *Salomon v A Salomon & Company Ltd* [1897] AC 22. Accepting that fiction, it does not matter that the deemed physical acts of the secondary participant are the same acts in fact engaged in by the primary contravener. CFMEU did not make any submission to the contrary. Accordingly, the physical acts of Mr McDermott and Mr Cartledge are, in each instance, taken also to be the acts of CFMEU. That is sufficient to demonstrate

CFMEU's participation in each contravention.

See also *Huddy* at [34]-[35] and [37]; *The Gorgon Project Case* at [230]-[231] and [235]; the *Footscray Station Case* at [15]-[18] and *Taylor* at [56]-[58].

52 We respectfully agree.

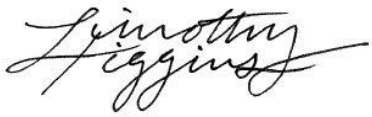
53 For these reasons, we do not accept that the primary judge erred in applying *McDermott* and the subsequent decisions mentioned above to conclude that the CFMMEU was liable as an accessory under s 550(2)(c) of the FW Act for the contraventions of the individual appellants. This ground of appeal is therefore rejected.

DISPOSITION

54 The appeal will accordingly be dismissed.

I certify that the preceding fifty-four (54) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Reeves and O'Callaghan.

Associate:



Dated: 24 November 2020

REASONS FOR JUDGMENT

CHARLESWORTH J:

55 I have had the benefit of considering the reasons for judgment of Justices Reeves and O'Callaghan in draft. I agree with the reasons and join in the orders dismissing the appeal.

I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment of the Honourable Justice Charlesworth.

Associate:

Dated: 24 November 2020

SCHEDULE OF PARTIES

QUD 712 of 2019

Appellants

Fourth Appellant:	TE ARANUI ALBERT
Fifth Appellant:	BLAKE HYNES
Sixth Appellant:	LUKE GIBSON
Seventh Appellant:	MATTHEW PARFITT
Eighth Appellant:	ROYCE KUPSCH