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TRANSCRIPT OF PROCEEDINGS

O/N H-1009993

FEDERAL COURT OF AUSTRALIA

VICTORIA REGISTRY

MURPHY J

No. VID 285 of 2019

UNITED FIREFIGHTERS UNION OF AUSTRALIA and ANOTHER

and

MARK BROWN and ANOTHER

MELBOURNE

2.18 PM, TUESDAY, 26 MARCH 2019

MR W. FRIEND QC appears with MS S. BINGHAM for the applicant

MR POLLOCK appears for the 1st and 2nd respondents

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MR W. FRIEND QC: If your Honour pleases, I appear with my learned friend MS BINGHAM for the applicants.

HIS HONOUR: Thank you, Mr Friend.

5

MR POLLOCK: If the court pleases, I appear for the first and second respondents.

HIS HONOUR: Thank you, Mr Pollock.

10 MR FRIEND: Your Honour, can I hand up an outline of our submissions on the application.

HIS HONOUR: Can I have a moment to read them, Mr Friend?

15 MR FRIEND: Of course, your Honour.

HIS HONOUR: It might help. Which section is this an application to seek records though? Is it – is it 483D or 483?

20 MR FRIEND: 483, your Honour. 483D, I think, is - - -

HIS HONOUR: 483.

MR FRIEND: Yes, outworkers. Just let me – yes, 483.

25

HIS HONOUR: Didn't you give notice of a suspected contravention? I know that – I know that you're criticised for the particularity of it but isn't that 483D?

30 MR FRIEND: Sorry, your Honour. I thought you said – I thought you were referring to 483D.

HIS HONOUR: I am.

35 MR FRIEND: No, 483D is contained in subdivision AA which is entry to investigate suspected contraventions relating to TCF award workers.

HIS HONOUR: Yes. Okay. So what section am I looking at?

MR FRIEND: 483.

40

HIS HONOUR: Thank you. Yes.

45 MR FRIEND: Thank you, your Honour. I was planning simply to take your Honour through the submissions then to highlight the significant parts of the evidence. I won't deal with the heading under Party but should I perhaps take your Honour to the – to the scheme of the legislation in this area? Section 481 of the Act

permits a permit holder to exercise a right of entry – sorry, to enter premise and exercise a right under section 482 and 483 for the purpose of investigating suspected contravention of the Act in respect of persons whose industrial interests his or her organisation is entitled to represent and who performs work on the premises. There
5 doesn't appear to be any debate about those issues in terms of entitlement to represent and work on the premises. Section 482 permits the permit holder, while on the premises, to inspect work, interview persons about the contraventions and request to inspect and make copies of any records while on the premises. The legislature has anticipated that it – there may be circumstances where these records can't be
10 provided immediately and so section 483 permits the permit holder, after entry, to give a notice requiring the production of and provision of access to and ability to copy various records relevant to the - - -

HIS HONOUR: And - - -
15

MR FRIEND: - - - to the suspected contraventions.

HIS HONOUR: - - - it's recollection only, Mr Friend, and I've read the material over lunch, that – that the notice of entry relates to 483, not 482; is that right?
20

MR FRIEND: Notice of entry relates to 481 but the request for documents relates to 483 and - - -

HIS HONOUR: Yes.
25

MR FRIEND: - - - that's what we're in dispute about, your Honour, because - - -

HIS HONOUR: So - - -
30

MR FRIEND: - - - entry has been effected - - -

HIS HONOUR: So 483 is the relevant provision?

MR FRIEND: Yes. Entry has been effected under 481.
35

HIS HONOUR: Yes.

MR FRIEND: Two documents were provided but no others were provided and the parties had a discussion and identified a range of documents and a section 483 notice was then given. Without taking your Honour to it, I simply note that section 502
40 provides that a person must not intentionally hinder or obstruct a permit holder exercising rights under part 3-4. And section four eight – 183 itself provides that it's a contravention – it's a penalty provision not to provide the relevant documents.

HIS HONOUR: So you understand, having read Mr Pollock's submissions, the first basis upon which this application is opposed?
45

MR FRIEND: Well, I've only read them very briefly, your Honour, but I can go to our answers to that. As I understand it, there's – the first basis on which the application is proposed is a proposition that the original 481 notice is invalid.

5 HIS HONOUR: Yes.

MR FRIEND: We have two answers to that, your Honour. The first is that it's not invalid. It's a perfectly legitimate and appropriate notice in all of the circumstances.

10 HIS HONOUR: Well, how does it meet the – the requirements set out by Flick J in – in the case referred to by Mr Pollock?

MR FRIEND: Yes, all right. I will take your Honour to that directly. So the case is ALAEA v Qantas. If your Honour turns to paragraph 58 of that decision - - -

15

HIS HONOUR: I don't have it.

MR FRIEND: I'm sorry, we have a copy - - -

20 HIS HONOUR: Yes.

MR FRIEND: - - - a folder of all the decisions, your Honour, and it includes all those that we rely on. I apologise, your Honour.

25 HIS HONOUR: Yes. What page?

MR FRIEND: The page is 71. So it – his Honour there says:

30 *Lack of precision in the entry notice in the way in which the particulars required by 518 were expressed, section 518(2)(b) need not be construed as necessarily insisting upon the same degree of precision as may be required of particulars in the pleading filed in a superior court of record.*

35 HIS HONOUR: I'm on page 71 and I can't see where you're referring to.

MR FRIEND: Right. I'm sorry, your Honour. Are you reading from the industrial reports?

40 HIS HONOUR: Yes.

MR FRIEND: Yes, paragraph 58.

HIS HONOUR: Yes.

45 MR FRIEND: "On the facts of the present case".

HIS HONOUR: Yes.

MR FRIEND: From there on, your Honour, was where I was reading. His Honour says:

5 *While there should be no insistence –*
this is towards the end of the paragraph –

10 *no insistence that the particulars be drafted with the precision of an
experienced legal practitioner drafting a pleading, the standard of
particularisation required should not be construed with such flexibility as to
provide an occupier with little or no idea as to whether rights sought to be
exercised is a lawful exercise of statutory power.*

15 HIS HONOUR: Yes.

MR FRIEND: And then, having made those remarks, he says that one of the specifications by Mr Purvinis in that case was sufficient:

20 *The entry notice of 3 June properly identifies a suspected contravention in
respect of 460 of the enterprise agreement, that contravention being the
statement of suspicion that Qantas are exercising 460 to order directed leave
over and above the leave they are entitled to.*

25 HIS HONOUR: Yes.

MR FRIEND: That's sufficient, in Flick Js estimation, your Honour. He did not accept as sufficient the suspected contravention in relation to clause 47 which was:

30 *Qantas has not complied with consultation requirements in clause 47.*

Now, if we look at the present notice, your Honour, that is found at page 327 of the affidavit. I haven't had an opportunity to read the submissions against us in detail but, as I apprehend it, your Honour, the – the complaint is about particularisation and or identification.

35 HIS HONOUR: Yes. That's the - - -

MR FRIEND: And - - -

40 HIS HONOUR: - - - document at page 327.

MR FRIEND: 327. That's the entry notice, your Honour. That sets out the relevant provisions of the agreement. And the alleged contributions – contraventions are:

45 *Permitting employees to work more than two consecutive shifts without an
eight hour break.*

HIS HONOUR: Yes.

MR FRIEND: I can take your Honour to the – the relevant provisions of the agreement but, for present purposes and, because of something I’m going to say in a moment, it may be unnecessary to go through all of those. Then you will see:

5
10
10 *Permitting employees to undertake overtime work without an eight hour break between the overtime and the rostered shift, not maintaining the minimum numbers of staff per operation shift as stipulated and not promoting, achieving and maintaining the highest levels of health and safety.*

15 Now, your Honour, the reason that – firstly we say that that comes within the type of specification that Flick J referred to in – in relation to contravention of clause 60, not that in clause 47. We don’t have to set this out like a pleading. We’re talking about practical people; union officials exercising the sort of rights that union officials have exercised since 1922. But there’s a – there’s an additional aspect to this, your Honour, which is that, when this notice was received, the second respondent lodged a dispute in the commission about the notice under section 505 of the Act. Just take your Honour to that briefly. So the commission is given power under 505 to deal with a dispute about the operation of part 20 3-4, which is the right of entry part. And it can deal with it by arbitration or it can deal with it more generally.

25 What occurred, your Honour, is that, on 6 March, that dispute came in for hearing – on for hearing before the occasion for the exercise of the right – yes, came on for a conference, I’m sorry, your Honour. I misspoke. The – there was a conference at the commission by telephone and we deal with this at paragraph 25 of our submissions. But if I can take your Honour to, firstly, paragraphs 37 to 44 of Mr McConville’s affidavit. He describes what happened. I beg your pardon, I’m – it begins at 42 but the important part is at 43 onwards:

30
35 *Towards the conclusion of the conference, an agreed position was reached between the parties. The position was reflected in an exchange of emails between the applicant and the respondent, copied to the chambers of the deputy president.*

So this is in relation to the complaints that the respondent had about the notice of entry, including lack of particularisation.

40 HIS HONOUR: Where do I see that it was also about lack of particularisation?

MR FRIEND: Yes, your Honour. I – that’s in the – the dispute notification. And your Honour will have to bear with me one moment while I get the exhibit number of that. GFC MC14. You will see on page 336 there sets out the paragraphs dealing with it.

HIS HONOUR: How many entry notices are there in this case?

MR FRIEND: Two.

HIS HONOUR: So there's one dated what date?

5 MR FRIEND: 4 March by Mr McConville and another one by Ms Bosan also of that date – hers is the 6th, I'm sorry.

10 HIS HONOUR: And the one you're relying on in this application is the – is the sixth?

MR FRIEND: Yes, of the – Mr McConville's of the 4th, the one that's just – we just went to. We rely on both of them, your Honour, but the – that one's sufficient.

15 HIS HONOUR: So 331 is the s- is the one dated the 6th by Ms Bosan?

MR FRIEND: Yes, that's my fault, your Honour. I should have taken you to Mr McConville but they're identical – they're relevantly identical, so.

20 HIS HONOUR: And then what was – you showed me the – the entry notice earlier. Then there's – then there's one – 340 which is 4 March by Mr McConville.

25 MR FRIEND: That's a – that's an extra copy which is attached to the notification of the dispute. The actual one that's attached as the entry notice in – in the course of the affidavit is at 327. As one normally does in these things, your Honour, there are multiple copies of things in chains.

HIS HONOUR: Okay. So - - -

30 MR FRIEND: So they're the notices. Then the – there's the dispute notification which I was – just had, your Honour. And if your Honour goes to paragraph three – page 338 - - -

HIS HONOUR: What date is the dispute notification?

35 MR FRIEND: Dispute notification is, I believe, 6 March. And, at paragraph 13 on 338, it says:

40 *Contrary to section 518(2)(b) of the FWA, the entry notice does not adequately specify the particulars of the suspected contravention or contraventions where there is underpayment of employees or breaches of work health and safety obligations.*

45 And the – the same arguments were repeated in respect of the second notice. So that was before the commission in the conference - - -

HIS HONOUR: So this is about the earlier notice?

MR FRIEND: This is about the first two notices. So, your Honour, there are only
- - -

HIS HONOUR: You told me there were only two.

5

MR FRIEND: Yes.

HIS HONOUR: So what do you mean the first two?

10 MR FRIEND: Well, I thought your Honour had found another one. But, yes,
you're right. There are only two. This is about both of those notices.

HIS HONOUR: Yes, okay.

15 MR FRIEND: 13 is about the first notice of 4 March, paragraph 14 picks up
paragraphs 1 to 13 in respect of the second notice.

HIS HONOUR: Yes.

20 MR FRIEND: So that's the dispute at the commission. Then back to the affidavit
itself of Mr McConville at 42.

HIS HONOUR: You were in the middle of telling me, remember, how you deal
with the complainant about a lack of particularisation. Your first point was it is
25 adequately particularised having regard - - -

MR FRIEND: The second point is there - - -

HIS HONOUR: - - - having regard to what Mr Flick said.

30

MR FRIEND: - - - was a dispute about lack of particularisation that was resolved at
the commission.

HIS HONOUR: And - - -

35

MR FRIEND: That's what I'm getting to.

HIS HONOUR: And how do I know that?

40 MR FRIEND: Yes. 43.

HIS HONOUR: 43 of the affidavit?

MR FRIEND: Of the affidavit.

45

Towards the conclusion of the conference, an agreed position was reached between the parties. The position was reflected in an exchange of emails between the applicant and respondent, copied to the deputy president.

5 HIS HONOUR: Well, I've read that – I've read that and my recollection is that it's not agreed that – well, in terms, that that email doesn't say, "We've agreed that they're submission particulars." It says, in terms, that it – that the deputy president foreshadowed what he considered to be records and documents relevant to the suspected contravention. Where – is there anywhere where that's set out?

10

MR FRIEND: No, not in terms, your Honour.

HIS HONOUR: But you say it was settled and it seems that - - -

15 MR FRIEND: It's settled and - - -

HIS HONOUR: - - - both parties accepted it was settled.

20 MR FRIEND: Yes. And Mr McConville says:

I understand it's more than likely that not all of those documents will be held at the premises. Accordingly, consistent with the intent of the entry notice, I suggest that, upon entry, a practical discussion occur about what records can be produced and how and when they may be provided.

25

So we – we submit that the outcome of that is that the question of the validity of the notice is behind them. They've settled that by resolving the dispute at the commission. Ms Besame has sworn an affidavit which has been provided to us which deals with this.

30

HIS HONOUR: Well - - -

MR FRIEND: Does your Honour have that?

35 HIS HONOUR: I do. But - - -

MR FRIEND: Paragraph 14.

40 HIS HONOUR: - - - I – I'm not sure I could agree with the proposition you just put, Mr Friend, which is that the question of the validity of the notice was settled at the commission. That is, it's either valid under the Act or it's not. And if – if it's not valid, the resolution of the dispute wouldn't assist me to know whether it was valid or not. It might be that – that it's valid because both – it might be that what it shows is that there is no real dispute about particulars - - -

45

MR FRIEND: It shows that there are sufficient particulars on the notice arising out of the conference at the commission where the parties discussed everything and

agreed that Mr McConville will enter the next day – or both of the permit holders would enter the next day and some documents would be provided and there would be a discussion about others.

5 HIS HONOUR: And what's put against you, but we can come to that in time, is that that doesn't show that there are sufficient particulars in the notice. It – what it shows is the parties agreed as to what would be produced but - - -

MR FRIEND: Your Honour, section 505 of the Act is there for a purpose and it
10 allows the parties to regulate their rights with the assistance of the commission. In fact, it allows the commission to determine the rights. If the commission arbitrated it and said the particulars are sufficient, that would be the end of it, in my submission. The question is whether there are sufficient particulars for the employer to know
15 whether it's a lawful entry. There can't be any serious debate that that was not the position at the end of the proceeding in the commission which the respondent had brought because of its concerns about the notice.

HIS HONOUR: Well, what concerns me, Mr Friend, is this: the – the debate that is
20 being had about de-identification looks to me to be - - -

MR FRIEND: Yes.

HIS HONOUR: - - - expressing a preliminary view, arid.
25

MR FRIEND: Yes.

HIS HONOUR: I don't see how it's sensitive – how it's sensitive information for a
30 union member to have their pay disclosed to the union for the purpose of investigating award breaches.

MR FRIEND: We – we – we - - -

HIS HONOUR: But I will – of course I will hear Mr Pollock about that but, having
35 read his submissions and yours, that's my present view. But the – and, if it be the case that – that you had to de-identify pay records to comply with a right of entry dispute seeking – to comply with the right of entry which is entitled to get records, I don't know how employees would ever enforce their rights in relation to
40 underpayments because you wouldn't know who they were.

MR FRIEND: No. That's right, your Honour.

HIS HONOUR: So there – it doesn't – doesn't sound right.

45 MR FRIEND: I'm not going to come to that part of the debate - - -

HIS HONOUR: No, I follow that.

MR FRIEND: - - - for a little while but I understand.

HIS HONOUR: But I'm – I'm troubled about the specificity point.

5 MR FRIEND: Yes.

HIS HONOUR: If you had asked me, without reading Flick Js judgment, I would have probably taken a different view, that is, that as long as the employer had a rough understanding of what was being asked for, the right of entry ought be allowed
10 but I can't say Flick J is plainly wrong and I certainly can't do so in the context of a – of an interlocutory application. So why – it looks to me like what you're on the path towards doing, are you seeking to persuade me to – to make a – to reach a conclusion that – that the notice is valid and (b) having found that, you then want to proceed with a – with an underlying awards breach application saying that they
15 haven't complied with the Act. And you're always going to have, hanging over that application, a problem which is whether or not notification is appropriate. Why wouldn't you just redo it? I would leave this application alive and you can come back.

20 MR FRIEND: I hear what your Honour says. Can I just direct your Honour's attention to paragraph 39 of Flick Js decision - - -

HIS HONOUR: Yes.

25 MR FRIEND: - - - where his Honour – and this is not precisely, perhaps, on exactly that point because it deals with reasonable suspicion. But his Honour is certainly alive to the prospect that a discussion about the reasonable suspicion can inform the employer's view about whether or not it is a reasonable suspicion when the employer is deciding - - -

30

HIS HONOUR: Let me read that.

MR FRIEND: - - - whether - - -

35 HIS HONOUR: Let me read that.

MR FRIEND: Yes, I'm sorry, your Honour.

HIS HONOUR: Yes.

40

MR FRIEND: And so your Honour will recall that all of the proceeding in the commission on 6 March were before the entry. The question is whether it's a valid entry. While there is an underlying principle – at least Flick J has set out an underlying principle that you should bear in mind that the employer needs to know
45 whether the entry is lawful and needs to have sufficient information to know whether the entry is lawful. Once the matter is dealt with in the commission in the way it has been dealt with here, all those concerns fall away because the employer said, "You

can come on and we will talk about the documents. And here's two documents." And then the – and the only argument until Mr Pollock became involved – and I can take your Honour to the exchange of emails last week – but the only argument was a debate about redaction. Now, it would literally, your Honour, be a trial for form over
5 substance to say, in those circumstances, that my client shouldn't have access to the unredacted documents.

If that – this has a potential to create a problem in the future, we can deal with that in due course but no doubt this case for contravention will be heard before any
10 application for penalties in relation to breach. But your Honour has to also understand that at every – at every turn in this case, my client meets an application to the commission or resistance in some way. And this is a – this is a system that has to work and it has to be allowed to work. We submit that there are sufficient particulars in the notice and that, moreover, the parties have accepted the particulars. And
15 whatever – if there were defects, they are cured by the agreement at the commission. And the further discussions which occurred on 7 March when there was significant discussions, your Honour will have seen it in the material, about what documents are relevant to the contraventions. We have - - -

20 HIS HONOUR: What documents are – and where do I see that?

MR FRIEND: Right. Your Honour will see that in the affidavit – I'm taking a little moment to turn it up because I'm going out of order, your Honour. Sorry. Paragraph
25 30 of the affidavit which – sorry, of the submissions. Paragraphs 52 and 53 of the affidavit on pages 19 and 20. I'm sorry, my learned junior is telling me to go back to paragraph 43. I'm sorry, your Honour, it's – 46, I'm sorry.

HIS HONOUR: Why do you only want records going back a year? I thought you
30 said your application - - -

MR FRIEND: Yes.

HIS HONOUR: - - - was urgent because you wanted to - - -

35 MR FRIEND: Yes.

HIS HONOUR: - - - recover six years.

MR FRIEND: Because, your Honour, if we can get a year, we can have a look at it
40 and then we can get on to six years. It's a staged process, your Honour. This is taking – your Honour will – might recall that my instructors wrote a letter of demand in December and the response was to put it off into – try and put it off into the commission which has got them involved in other litigation. That was in respect to four employees. The clock is ticking, your Honour, and it's – it's – we did not want
45 to be met with the proposition that six years would be too much and take too long and it's – we can do it in stages and work it out and refine things. It will be better and quicker in the end. But the clock is ticking. Now, in relation to those paragraphs

that I've just taken you to in Mr McConville's affidavit about what happened on the 7th, the - - -

5 HIS HONOUR: Well, you haven't yet.

MR FRIEND: I'm sorry, your Honour.

10 HIS HONOUR: You haven't yet. You were going to but you got waylaid back to 46.

MR FRIEND: I meant to go to 46, your Honour.

15 HIS HONOUR: So you've done that. Now, then you said – and then you say the discussion which occurred, which is detailed at 52, where you say a series of documents were identified by - - -

MR FRIEND: Yes:

20 *...don't identify specific documents and records that will be directly relevant to the suspected contraventions there were.*

HIS HONOUR: What does Ms - - -

25 MR FRIEND: She's - - -

HIS HONOUR: - - - Besame say about that?

MR FRIEND: Her – she deals with this at 16, your Honour:

30 *I confirm that, as stated by the –*

paragraph 47, I said words to the effect my client will need to de-identify. Did not, as stated, cite note 2. The second applicant is happy about that. This is about the - - -

35 HIS HONOUR: But Ms Besame - - -

MR FRIEND: - - - identification.

40 HIS HONOUR: - - - doesn't disagree with - - -

MR FRIEND: Doesn't disagree.

HIS HONOUR: - - - with 52 and 53.

45 MR FRIEND: No, your Honour. Just doesn't deal with it.

HIS HONOUR: Yes.

MR FRIEND: And, for those reasons, your Honour, we say that it would be – that it is clear that the purpose of the legislation would be frustrated if, for some reason, the fact that an anterior document, which has gone through a whole process of negotiations between the parties and agreements between the parties where one party said they couldn't provide the documents on a – on an argument which is plainly wrong about redaction, then turned around and went back to an earlier document and said, "That's not good enough. Let's start again." It's like something out of Dickens, your Honour.

HIS HONOUR: Yes.

MR FRIEND: Your Honour, we've made submissions in the written submissions. I don't want to take up too much of your Honour's time. That's – that's the – obviously the gravamen of the case. It would, of course, be tantamount to final relief but the test is the same. We've referred to

HIS HONOUR: I don't think it is the same.

MR FRIEND: Pardon?

HIS HONOUR: I don't think it is the same.

MR FRIEND: Well - - -

HIS HONOUR: Well – well, it's – the –

In cases in which the grant or refusal of interlocutory injunction will, in a practical sense, determine the substance of the matter in issue on a final basis, the court should give particular attention to the strength of the applicant's case.

That's ABC v O'Neill at 72 and ACCC v Allphones Retail at 27/28.

MR FRIEND: I'm not going to argue with ABC v O'Neill, your Honour. We've relied on it. We accept that but part of our case is that it is a very strong case. And, for that reason, it's not a bar to us obtaining - - -

HIS HONOUR: Thank you.

MR FRIEND: - - - relief. Thank you, your Honour.

HIS HONOUR: Mr Pollock.

MR POLLOCK: Thank you, your Honour. I might deal very briefly with the first ground of opposition to the prima facie case and take your Honour briefly through

the – the notices and address your Honour briefly on how that relates to what his Honour Flick J had to say in the ALAEA v Qantas case. I will then grapple with what your Honour has foreshadowed - - -

5 HIS HONOUR: Yes.

MR POLLOCK: - - - will be a significant challenge to our second limb of the argument and, perhaps - - -

10 HIS HONOUR: Yes.

MR POLLOCK: - - - propose a – a way through that – that terrain. To be clear, your Honour, there are – there are, of course, two entry notices: one for Mr McConville and - - -

15

HIS HONOUR: Are they relevantly the same?

MR POLLOCK: - - - one for Ms Bosan. Yes, they're relevantly the same. There is, of course, a – a third notice which was issued under section 483 which was an aid notice seeking later access to documents. So the two - - -

20

HIS HONOUR: But that is – that isn't the subject of today?

MR POLLOCK: Well, the – it relates back to – it relates back to the earlier notices insofar as it seeks – it presses a claim for certain documents but does not articulate of itself the particular suspected contraventions to which that request is made. It relates back to the earlier entry made on 7 March to which those first two notices were issued. That third notice, for completeness, your Honour, is at court book 370 which is exhibit – or annexure GF - - -

30

HIS HONOUR: Am I right in understanding - - -

MR POLLOCK: - - - MC24.

35 HIS HONOUR: - - - the application by the applicant is made on the basis of the two earlier notices?

MR POLLOCK: That's as I understand - - -

40 MR FRIEND: Your Honour, the – the earlier notices are preconditions to the notice under – 483 is a request for documents. It's an entry notice as such.

HIS HONOUR: Okay.

45 MR POLLOCK: Correct. That – precisely.

MR FRIEND: And it's the – it's the request for documents that we seek to have enforced.

HIS HONOUR: Yes.

5 MR POLLOCK: Yes.

HIS HONOUR: But it isn't the subject of the application today?

10 MR FRIEND: Well, it – it's the basis on which we - - -

HIS HONOUR: Well, you're seeking - - -

MR FRIEND: - - - say we can get the documents.

15 HIS HONOUR: But you're not – I follow.

MR FRIEND: I'm sorry if I wasn't clear before, your Honour.

20 HIS HONOUR: Well, you're – you don't seek they provide you with documents. You seek an order that – that you be allowed to go in and inspect and make copies. So you – you're applying under 482, aren't you, not under 483?

MR FRIEND: No. 483 provides:

25 *The permit holder may, by written notice, require an affected employer to produce, or provide access to a record or document other than a non-member record or document that is directly relevant - - -*

30 HIS HONOUR: I follow that. But that's not what you've asked for in your orders. You've asked in your orders that you be allowed to go in and inspect, not that they – not that they give you documents.

MR FRIEND: “Produce or provide access to a record or document”, your Honour.

35 “Inspect and make copies of the following documents” is the same thing - - -

HIS HONOUR: Is it?

MR FRIEND: - - - we would say to your Honour.

40 HIS HONOUR: Okay.

MR FRIEND: Yes. Copies is in subsection (5), at the premises or in another place.

45 HIS HONOUR: Okay. So you – you say it's the same. All right.

MR POLLOCK: For the purposes of dealing with our first ground of challenge, your Honour, I think we can comfortably focus on the – the pair of notices which are at court book 324 through to 327 and 328 through to 331. And that’s for each of Mr McConville and Ms Bosan respectively. Now, it was - - -

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HIS HONOUR: Can I just have those numbers again? 321 is the first one.

MR POLLOCK: Three – sorry, 324 is where the annexure begins through to 327. And you will find the – the entry notice itself at court book 327. That’s for Mr McConville. And then, at court book 328 and following you will find the covering correspondence and the notice for - - -

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HIS HONOUR: And that’s at - - -

MR POLLOCK: - - - Ms Bosan.

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HIS HONOUR: - - - 331?

MR POLLOCK: And 331 is where the relevant notice is for her.

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HIS HONOUR: Yes.

MR POLLOCK: Now, my learned friend took you to relevant passages of his Honour Flick Js reasons in the ALAEA v Qantas case and sought to distinguish that which his Honour observed in that case with reference to the particular sections of the notice which were extracted at paragraph 59 of the decision - - -

25

HIS HONOUR: Yes.

MR POLLOCK: - - - which is at page 71. Now, of course, in my outline, I’ve extracted the broader observations that his Honour makes by way of introduction to that part of the analysis. You will see that at paragraph 7 of the – of my outline. But the point of distinction here, your Honour, is that whilst my learned friend is right that the first limb of the notice in Qantas – and that’s found in the first dot point at paragraph 59 of the decision, that is, his Honour observes that:

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The entry notice properly identifies a suspected contravention in respect of 460 of the enterprise agreement, that contravention being the statement of suspicion that Qantas are exercising 460 to order directed leave over and above the leave they are entitled to.

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HIS HONOUR: Yes.

MR POLLOCK: The distinction between that scenario and that which we have here, of course, is that we’re not talking about the notice which impugns one particular term of an enterprise agreement and levels a particular criticism at that term and that term only. Rather, we have a notice which rolls up eight – eight

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separate terms of the agreement dealing with disparate subject matter, these terms, of course, including various subclauses which establish specific obligations on the employer, rolling those up altogether and then rolling up four – I've described them in the outline as types of contravening conduct that then follow in four dot points.

5 But what's entirely unclear on the face of the notice, your Honour, is which particular subclauses within the agreement are relied upon to found the suspected contravention and which particular conduct of the very broadly described types of that those four dot points in the centre of the notice, how they relate to one or more of those terms.

10 It's all very well in the Qantas case and there being one mode of conduct that's said to give rise to a suspected contravention but my client is left to guess as to which of those eight clauses dot point 1 of the alleged conduct is said to relate to, two, three or four, is it one – is it – do they relate to clause 149, 149 and 125, 149 and 125 and 52?

15 The permutations and combinations are vast. And, with respect, it is plainly inadequate to point to a clause in an enterprise agreement at the headline, subject matter level without grappling with the relevant subclauses that actually give rise to the obligation. Now, of course, that reflects the observations of his Honour Flick J around the purpose of a notice which is to reasonably inform the employer to make a

20 decision as to whether or not they are required to acquiesce their common law rights in favour of statutory rights of entry. And, simply put, the – the sheer number of permutations and combinations and the ability – inability of my client to properly assess whether or not - - -

25 HIS HONOUR: But there's an air of unreality in that submission, Mr Pollock. And the unreality is is that your client seems to well understand what this dispute is about.

MR POLLOCK: Well - - -

30 HIS HONOUR: And, until you came along, hadn't articulated this problem.

MR POLLOCK: I accept that, on the face of the materials that are – that are in the – that my learned friend took your Honour to, on the face of the – the first – I should say the second commission application. There are – there are three separate

35 commission applications and I will deal with the third in a moment. But I accept that there is one paragraph in that dispute notice that refers to a lack of particularity.

HIS HONOUR: Yes.

40 MR POLLOCK: I wasn't in the matter until yesterday and so I can't speak to precisely how that was articulated outside of that – that application. I will say this though, your Honour: the second makes no inquiry as to the – as to anything beyond the four walls of the entry notice itself. It is the notice itself that is required to provide the – specify the relevant particulars. Correspondence around the matter

45 and, insofar as it's – my learned friend relies upon the exchange of letters in December or really anything beyond the four walls of the notice, it simply flies in the face of the section. It's the notice that's required to specify the relevant particulars.

And it may well be that one or more employees of a particular employer in a given case might have a greater degree of awareness of what the union might be trying to get to but, ultimately, the purpose of the notice is to unambiguously inform any recipient - - -

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HIS HONOUR: Well, it's – it's worse than that view, isn't it? You went to a commission hearing, on your application, and, at the commission hearing, on the evidence, you agreed a category of documents or a number of categories of documents which you said was – were relevant - - -

10

MR POLLOCK: Well - - -

HIS HONOUR: - - - which you accepted were relevant. And – and the dispute was – was thought to be resolved but then it founded on the de-identification issue.

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MR POLLOCK: Well, I would – I would cavil with the characterisation, as your Honour rightly did, in some observations to my learned friend around the state of the evidence on what happened in that proceeding. At least on my instructions, of course an agreed position was reached around a practical way forward. But at no stage was there a – a compromise of my client's ability to - - -

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HIS HONOUR: Well, I'm – I'm - - -

MR POLLOCK: - - - press the point.

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HIS HONOUR: - - - I'm talking about paragraph 52 and 53 of the applicant's affidavit where Mr McConville said that – that in – it was a – Mr McConville, Ms Besame, Mr Brown and I suspect Ms Bosan but I can't recall whether she was there or not - - -

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MR POLLOCK: I – I – I - - -

HIS HONOUR: - - - and – and no – and no – it's uncontradicted by Ms Besame in her affidavit.

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MR POLLOCK: That this – that these were the - - -

HIS HONOUR: That the - - -

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MR POLLOCK: - - - these were the subject of discussions?

HIS HONOUR: No, they were identified. Identified - - -

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MR POLLOCK: Well, they may – they may – your Honour, they may well have been identified in the context of – of that discussion. There's – you're right: there's no evidence of Ms Besame. I would need to get some instructions as to – and Ms Besame, of course, is in the – the body of the court and I can take some instructions

as to what – what that position might be and, if need be, we can put her in the box and get that evidence if that’s contradicted. But my primary submission is this, your Honour: it matters not what was discussed in the context of the conference. That doesn’t impact upon whether or not the notice validly - - -

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HIS HONOUR: I follow that’s your primary submission. It’s - - -

MR POLLOCK: The difficulty, of course, is that my learned friend seeks to press - - -

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HIS HONOUR: It’s not very - - -

MR POLLOCK: - - - an application for civil - - -

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HIS HONOUR: It’s not a very attractive proposition in the industrial arena, is it, that there is no – and the proposition, cut away, boiled down, is there is no real dispute but the form is wrong.

MR POLLOCK: Well, your Honour, that, perhaps, takes us neatly to our - - -

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HIS HONOUR: But – but – no, address that. That’s what you’re really saying, boiled down, “We didn’t really have a dispute about what documents. We understood what they were. We’ve identified some here -” and if you want to call your instructor you can – “We’ve – but we say they weren’t adequately specified in the notice.” If that’s what it is then you ought to confront it.

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MR POLLOCK: Your Honour, I’m – I am confronting it - - -

HIS HONOUR: Okay. So is that - - -

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MR POLLOCK: - - - right here.

HIS HONOUR: - - - is that – it is what you’re saying, that, if the notice didn’t adequately specify it, notwithstanding that both sides knew the documents that were being sought and, in fact, they agreed what they were, they ought be denied relief.

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MR POLLOCK: Your Honour, on the face of the notice, we would say it’s inadequately specified. As to what further clarity was provided in the conference, again, subject to taking instructions on that, I – I don’t think I would be in a position to say that, following that conference, there was – there was doubt as to what – what broad suspected contraventions were in play. But your Honour must remember two things: firstly, if one is inquiring as to which of the parties is seeking to find a practical, industrial resolution to this, it’s my client that has got an application in the commission on foot right now to answer this question which would - - -

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HIS HONOUR: What question?

MR POLLOCK: To – well, I – I apologise.

HIS HONOUR: You're moving on to the second question now. So – you're moving on to the question which – the de-identification question, I think.

5

MR POLLOCK: Yes.

HIS HONOUR: Yes.

10 MR POLLOCK: But perhaps if I can – perhaps before I do that, to grapple squarely with - - -

HIS HONOUR: Yes.

15 MR POLLOCK: - - - what your Honour has put, if we are to be criticised for the fact that we take issue with the form of the notice, notwithstanding that, at a later point, some clarity was provided, your Honour needs to – needs to keep squarely in mind that the application that is put against us is an application for relief by way of civil penalties. My client is entitled to take the point that there was not a – a proper
20 trigger for the application of those provisions.

HIS HONOUR: Well, you're entitled to take – you're entitled to take the point for the civil penalty part of your application but it's not – not what I'm hearing. I'm hearing an application by a union for interlocutory relief seeking to inspect wage
25 records.

MR POLLOCK: Well - - -

HIS HONOUR: It cannot – it cannot found any application for a civil penalty.
30 That's a matter for the evidence then.

MR POLLOCK: That's right, your Honour. But before you can make an interlocutory order for the inspection of those documents, there must have first been a compliant notice. And, as your Honour quite rightly pointed out to my learned
35 friend, what's to stop them from issuing a notice that provides the – the necessary particulars.

HIS HONOUR: Right.

40 MR POLLOCK: And that's a matter that can be dealt with on its – on its merits. But, as it stands, your Honour is not in a position to make orders which gives effect to a notice which was, on its face, defective. Now, if – if my learned friend's client has provided the – the necessary particulars by way of a conference then, by all
45 means, they can provide those details in a compliant notice. But there's no mechanism under part 3-4 of the Act for a defective – a notice which is defective for the purposes of section 518, sub (2), sub (b) to be rectified after the fact by way of correspondence or discussions or otherwise.

HIS HONOUR: What – what do you say about the – the passage in Flick Js decision that Mr Friend took me to?

5 MR POLLOCK: Well, it deals with entirely – an entirely – this is paragraph 39, I take it?

HIS HONOUR: I think so.

10 MR POLLOCK: That's dealing with a different requirement. That's dealing with the question of whether or not – whether or not the permit holder holds a reasonable suspicion. Now, for the purposes of responding to this application for interlocutory relief, we don't take the point around the reasonableness of the suspicion. His Honour says nothing about curing a lack of specificity in the notice at paragraph 39. So, before I move on to that second limb, your Honour, I haven't taken you through
15 subclause by subclause each of those eight provisions of the enterprise agreement
- - -

HIS HONOUR: I – and I don't - - -

20 MR POLLOCK: - - - that are - - -

HIS HONOUR: I don't need you to in the sense that, having seen a lot of industrial agreements in my time, I don't doubt that they work in that way.

25 MR POLLOCK: No, of course.

HIS HONOUR: The – thank you.

30 MR POLLOCK: As to the second limb which, of course, I take on board your Honour's observations of the possible arid – arid nature of the – the debate - - -

HIS HONOUR: Well, all – all I'm trying to do is tell you what my preliminary view is, having read your submissions. So don't feel - - -

35 MR POLLOCK: Yes.

HIS HONOUR: - - - inhibited in making your argument.

40 MR POLLOCK: No. Well, I – I feel no – no limitation at all.

HIS HONOUR: Yes.

45 MR POLLOCK: The – the basis upon which the challenge is pressed, of course, is that my client finds itself on the horns of a dilemma. In compliance with the notice – in strict compliance with the notice, it would walk squarely into, on its view, a contravention of the Information Privacy Act.

HIS HONOUR: Not if I order it.

MR POLLOCK: Not if you order it. That's exactly right.

5 HIS HONOUR: So it's not really a dilemma, is it?

MR POLLOCK: Well, your Honour, if – I – perhaps this really cuts to the quick.

10 HIS HONOUR: Let me deal with that. So you're – you're a responsible employer, you're a fire bridge in – in the ACT. The – we're not talking here about a clothing trades manufacturer, know, putting – running a bunch of outworkers and trying to dodge your obligations. I – so - - -

MR POLLOCK: Of course, your Honour.

15 HIS HONOUR: - - - the – the correspondence is replete with acceptance that if – if there is a reasonable suspicion, which you say you don't challenge, that you're in – that you're in breach of the award, that the – that the union is entitled to come in and inspect the wages books. And what – I'm not sure whether, these days, they're
20 called wages books but the records. The reason that you proffer and have consistently proffered through – throughout this dispute is that you've got a concern about your privacy obligations.

MR POLLOCK: Yes.

25 HIS HONOUR: I can deal with that.

MR POLLOCK: You can.

30 HIS HONOUR: Yes. So is it really a dilemma?

MR POLLOCK: Well, it – it is on – it is on a couple of bases although I suspect there may well be a - - -

35 HIS HONOUR: Because – because - - -

MR POLLOCK: - - - road through it - - -

40 HIS HONOUR: You know what the – the terrible outflow of this would be, if I had to rule on this? You will have to produce the wage records for the members of the union, not for anyone else. It doesn't look like there's any great harm going to be suffered by the ACT fire brigade.

MR POLLOCK: Your Honour, if – and I will - - -

45 HIS HONOUR: Yes.

MR POLLOCK: I will take this subject to instructions which I will confirm in a moment but I – I would venture that if your Honour were to make an order for the purposes of item 6.2, subitem (b) of the – of the Information Privacy Act - - -

5 HIS HONOUR: Yes.

MR POLLOCK: - - - I – not pursuant to that – that - - -

HIS HONOUR: Well – yes.

10

MR POLLOCK: - - - you – not pursuant to any power - - -

HIS HONOUR: Yes.

15 MR POLLOCK: - - - but an order which would be recognised by 6.2, subitem (b), that would, of course, grapple with the application or otherwise of 482(1)(a) and 483(1)(a). It would, of course, then give my clients some – some comfort that, until your Honour would make that order, there would be no contravention because would never have been an obligation until such time as that order was made. And that, of
20 course, would give my clients comfort - - -

HIS HONOUR: Well - - -

25 MR POLLOCK: - - - that it wasn't in breach of the IP Act nor would there be – it – would it be walking into an immediate contravention claim being advanced by those opposite.

HIS HONOUR: Thank you.

30 MR POLLOCK: I will take instructions on that but I suspect - - -

HIS HONOUR: Can you take some - - -

MR POLLOCK: - - - that that may well be the - - -

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HIS HONOUR: Can you take some instructions?

MR POLLOCK: Yes.

40 HIS HONOUR: And let me say something to, Mr Friend: it's one thing for me to deal with this an interlocutory application. There is a way through this which is emerging. I'm going to stand down for 10 minutes - - -

MR FRIEND: Yes.

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HIS HONOUR: - - - and you're going to have a meeting and you're going to solve it. And – and – and the solving of it will include an abandonment of this case for the award breach. Get over it and - - -

5 MR FRIEND: You mean the breach of the Act, your Honour?

HIS HONOUR: The breach of the Act, yes.

10 MR FRIEND: Yes. I will – I will take that on board and take those instructions. If we get the documents, I don't doubt that we will have a difficulty, your Honour.

HIS HONOUR: I will stand down for 10 minutes.

15 **ADJOURNED** [3.22 pm]

RESUMED [3.56 pm]

20 MR FRIEND: Thank you, your Honour. The parties have resolved the matter. We're preparing the order but, in order to speed things up, I will just indicate to your Honour what the orders we're proposing are and one other matter which I need to just say to your Honour. The proposal is that most of the documents – in fact, all of
25 them other than payroll records for employees who've worked overtime, electronic copies of those will be provided to the applicants within 48 hours. The payroll records will be provided – I think that's electronic copies as well. It is – within 14 days. But, your Honour, we – we accept that, if there is a problem in doing that within 14 days – these are payroll records of persons who have worked overtime
30 over the 12 month period, the respondents will come to us with some affidavit material explaining that and we will consent to an extension of that time. It, unfortunately, means that the proceeding will need to remain on foot but, upon the provision of the documents, the proceeding would then – I think – I don't know that it makes any difference, your Honour. Can your Honour make a – or would your
35 Honour be minded, I beg your pardon, to make what is, in effect, a self-executing order that, upon the provision of the – all of the documents, the proceeding is dismissed.

40 HIS HONOUR: I don't think I need to. I think if the parties write to me when – when the documents are received and tell me that they seek no further orders, I will just dismissed the application then - - -

MR FRIEND: We're content for that, your Honour.

45 HIS HONOUR: - - - rather than dealing with it by some self-executing process which – which might go wrong.

MR FRIEND: Yes. That's what I was concerned about. But, on the other hand, we've got to trouble your Honour about it again. but - - -

5 HIS HONOUR: No, it won't trouble me. I mean, I wouldn't need appearances. All I would need is a – is a joint email - - -

MR FRIEND: Yes.

10 HIS HONOUR: Well, an email from one party copied to the other explaining that your joint position is X, whatever it is.

MR FRIEND: Yes. Thank you, your Honour. We – we will – and so there's liberty to apply implied in that, of course, your Honour, because of the need to, perhaps, extend the 14 days. There is, of course, no order as to costs. We will prepare a draft
15 order and have it through to your Honour's associate within a very short time, if that's - - -

HIS HONOUR: Okay. Well - - -

20 MR FRIEND: - - - convenient.

HIS HONOUR: - - - I will make that order this afternoon. And thank you, Mr Pollock, for your sensible approach and thank you – I don't know what you've agreed to, Mr Friend, but it might - - -

25 MR FRIEND: We're dismissing this proceeding.

HIS HONOUR: But, if you're dismissing the proceeding, that too is sensible.

30 MR FRIEND: Thank you, your Honour.

HIS HONOUR: And the – and I'm grateful that was given, this has been of assistance.

35 MR FRIEND: Thank you, your Honour.

HIS HONOUR: Adjourn the court.

40 **MATTER ADJOURNED at 3.59 pm ACCORDINGLY**