

# FEDERAL COURT OF AUSTRALIA

## Australian Building and Construction Commissioner v Powell [2017] FCAFC 89

Appeal from: *Director of the Fair Work Building Industry Inspectorate v Powell* [2016] FCA 1287

File number: VID 1361 of 2016

Judges: **ALLSOP CJ, WHITE AND O'CALLAGHAN JJ**

Date of judgment: 2 June 2017

Catchwords: **INDUSTRIAL LAW** – right of entry – entry by official of organisation to workplace after request to assist by health and safety representative under s 58(1)(f) of the *Occupational Health and Safety Act 2004* (Vic) – obligation on employer to allow assistant entry under s 70 of the *Occupational Health and Safety Act 2004* (Vic) – whether assistant exercised “State or Territory OHS right” within meaning of s 494 of the *Fair Work Act 2009* (Cth)

Legislation: *Fair Work Act 2009* (Cth) Pt 3-4, ss 6, 478, 480, 481, 483A, 484, 486, 487, 489, 490, 491, 494, 495, 496, 497, 498, 499, 512, 513, 514  
*Workplace Relations Act 1996* (Cth) (repealed) Pt 15  
*Fair Work Regulations 2009* (Cth) reg 3.25  
*Industrial Relations Act 1979* (WA) Pt II Div 2G, ss 49H, 49I  
*Interpretation of Legislation Act 1984* (Vic) s 36  
*Occupational Health and Safety Act 1985* (Vic) (repealed) Pt IV, ss 30, 31, 32  
*Occupational Health and Safety Act 1989* (ACT) (repealed) Pt 5 Div 5.4, s 77  
*Occupational Health and Safety Act 2000* (NSW) (repealed) Pt 5 Div 3, s 77  
*Occupational Health and Safety Act 2004* (Vic), Pt 7, Pt 8, ss 54, 55, 56, 57, 58, 70, 87  
*Workplace Health and Safety Act 1995* (Qld) (repealed) ss 90I, 90J  
*Workplace Health and Safety Act 2007* (NT) (repealed) Pt 4 Div 7, s 53

Explanatory Memorandum, Workplace Relations Amendment (Work Choices) Bill 2005 (Cth)

Cases cited: *Commonwealth Custodial Services Ltd v Valuer General*  
[2007] NSWCA 365; 156 LGERA 186  
*CSL Australia Ltd v Minister for Infrastructure and  
Transport (No 3)* [2012] FCA 1261; 297 ALR 289  
*Director of the Fair Work Building Industry Inspectorate v  
Powell* [2016] FCA 1287  
*Minister for Urban Affairs and Planning v Rosemount  
Estates Pty Ltd* (1996) 91 LGERA 31  
*Valuer General v Fivex Pty Ltd* [2015] NSWCA 53; 206  
LGERA 450

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Division: Fair Work Division

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Category: Catchwords

Number of paragraphs: 61

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## **ORDERS**

**VID 1361 of 2016**

**BETWEEN:**            **AUSTRALIAN BUILDING AND CONSTRUCTION  
COMMISSIONER**  
Appellant

**AND:**                **MICHAEL POWELL**  
Respondent

**JUDGES:**            **ALLSOP CJ, WHITE AND O'CALLAGHAN JJ**

**DATE OF ORDER:**   **2 JUNE 2017**

### **THE COURT ORDERS THAT:**

1.     The appeal be allowed.
2.     The order of the Court made on 3 November 2016 dismissing the proceedings be set aside.
3.     The proceeding be remitted to the primary judge for further hearing in accordance with these reasons.

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

## REASONS FOR JUDGMENT

### THE COURT:

1 This appeal concerns the proper construction of s 494 of the *Fair Work Act 2009* (Cth) (**the FW Act**). A judge of the Court concluded that the terms and operation of ss 58 and 70 of the *Occupational Health and Safety Act 2004* (Vic) (**the 2004 Victorian Act**) did not, for the purposes of s 494, confer a right to enter premises on Mr Michael Powell, an official of an organisation, the Construction, Forestry, Mining and Energy Union (**the CFMEU**): see *Director of the Fair Work Building Industry Inspectorate v Powell* [2016] FCA 1287.

2 For the reasons that follow, we respectfully disagree with his Honour's conclusion.

3 On four occasions in 2014, a Mr Curnow, who was elected as the health and safety representative on a construction project at Ringwood, Victoria, asked Mr Powell to attend the building site to assist him in dealing with health and safety issues relating to various matters. Mr Powell came on to the site. When challenged and asked for his permit, he asserted that he was on the site to assist the "site rep" with "OHS issues" and did not need a permit. More detailed reference to the events is made below.

4 Mr Powell had no permit under Part 3-4 of the *FW Act*. The Australian Building and Construction Commissioner (**the Commissioner**) proceeded against Mr Powell for a civil penalty for asserted contraventions of s 494(1) of the *FW Act*.

5 Section 494(1) is in the following terms:

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

*Official must be permit holder*

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

6 The meaning of "State or Territory OHS right" is given by s 494(2) which is in the following terms:

**Meaning of State or Territory OHS right**

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

- (i) a constitutional corporation;
- (ii) a body corporate incorporated in a Territory;
- (iii) the Commonwealth;
- (iv) a Commonwealth authority; or
- (b) the premises are located in a Territory; or
- (c) the premises are, or are located in, a Commonwealth place; or
- (d) the right relates to requirements to be met, action taken, or activity undertaken or controlled, by any of the following in its capacity as an employer:
  - (i) a constitutional corporation;
  - (ii) a body corporate incorporated in a Territory;
  - (iii) the Commonwealth;
  - (iv) a Commonwealth authority; or
- (e) the right relates to requirements to be met, action taken, or activity undertaken or controlled, by an employee of, or an independent contractor providing services for, any of the following:
  - (i) a constitutional corporation;
  - (ii) a body corporate incorporated in a Territory;
  - (iii) the Commonwealth;
  - (iv) a Commonwealth authority; or
- (f) the exercise of the right will have a direct effect on any of the following in its capacity as an employer:
  - (i) a constitutional corporation;
  - (ii) a body corporate incorporated in a Territory;
  - (iii) the Commonwealth;
  - (iv) a Commonwealth authority; or
- (g) the exercise of the right will have a direct effect on a person who is employed by, or who is an independent contractor providing services for, any of the following:
  - (i) a constitutional corporation;
  - (ii) a body corporate incorporated in a Territory;
  - (iii) the Commonwealth;
  - (iv) a Commonwealth authority.

7 The assertion of Mr Powell (and the only basis of his (successful) defence of the penalty proceedings before the primary judge) was that the provisions of the *2004 Victorian Act*

under which he came to be on the site (ss 58(1)(f) and 70) did not confer on him, and he was not exercising, a right to enter premises that was conferred by the *2004 Victorian Act* (which is prescribed to be a State OHS law by item 2 of reg 3.25 in the *Fair Work Regulations 2009* (Cth)).

8 The *2004 Victorian Act* provides for health and safety representatives (**HS representatives**) in workplaces. Division 4 of Pt 7 contains provision for their election by members of a designated work group (s 54), for their term of office (s 55), for their disqualification by the Magistrates' Court for various reasons (s 56), and for deputy HS representatives (s 57). Division 5 of Pt 7 is headed "Powers of health and safety representatives". Section 58 is likewise entitled. Subsection 58(1) is in the following terms:

- (1) A health and safety representative for a designated work group may do any of the following –
  - (a) inspect any part of a workplace at which a member of the designated work group works –
    - (i) At any time after giving reasonable notice to the employer concerned or its representative; and
    - (ii) immediately in the event of an incident or any situation involving an immediate risk to the health or safety of any person;
  - (b) accompany an inspector during an inspection of a workplace at which a member of the designated work group works;
  - (c) require the establishment of a health and safety committee;
  - (d) if a member of the designated work group consents, be present at an interview concerning occupational health and safety between –
    - (i) the member and an inspector; or
    - (ii) the member and the employer concerned or its representative;
  - (e) if the health and safety representative is authorised to represent a person mentioned in section 44(1)(e) or 48(1)(e) and that person consents, be present at an interview concerning occupational health and safety between –
    - (i) the person and an inspector; or
    - (ii) the person and the employer concerned or its representative;
  - (f) **whenever necessary, seek the assistance of any person.**

(emphasis added)

9 The “any person” in the words of s 58(1)(f) emphasised above could be, and was in this case, a union official, or to put it in the language of s 494(1), an official of an organisation. That assistance may or may not involve the person coming on to the work site, where the HS representative works. In this case it did.

10 The powers of the HS representative in s 58(1) may only be exercised for the purposes set out in s 58(2), they being:

...

- (a) representing the members of the designated work group, or persons mentioned in section 44(1)(e) or 48(1)(e) whom the representative is authorised to represent, concerning health or safety; or
- (b) monitoring the measures taken by the employer or employers in compliance with this Act or the regulations; or
- (c) enquiring into anything that poses, or may pose, a risk to the health or safety of members of the designated work group, or of persons mentioned in section 44(1)(e) or 48(1)(e) whom the representative is authorised to represent, at the workplace or workplaces or arising from the conduct of the undertaking of the employer or undertakings of the employers; or
- (d) attempting to resolve (in accordance with section 73) with the employer concerned or its representative any issues concerning the health or safety of members of the designated work group, or of persons mentioned in section 44(1)(e) or 48(1)(e) whom the representative is authorised to represent, that arise at the workplace or workplaces or form the conduct of the undertaking of the employer.

11 Division 6 of Pt 7 of the *2004 Victorian Act* is entitled “Obligations of employers to health and safety representatives”. Section 70 is within Pt 7 and is headed “Obligation to persons assisting health and safety representatives”. (It is to be noted that by s 36(1) and (2A) of the *Interpretation of Legislation Act 1984* (Vic) headings to Chapters, Parts, Divisions and Subdivisions (s 36(1)), and sections (s 36(2A)) into which an Act is divided form part of the Act.) Section 70 is in the following terms:

**70. Obligation to persons assisting health and safety representatives**

- (1) An employer, any of whose employees are members of a designated work group must allow a person assisting a health and safety representative access to the workplace unless the employer considers that the person is not a suitable person to assist the representative because of insufficient knowledge of occupational health and safety.
- (2) If an employer does not allow a person assisting a health and safety representative access to the workplace, the representative may apply to the Magistrates' Court for an order—

- (a) directing the employer to allow that access; and
- (b) specifying the terms and conditions of that access.

12 The position of the HS representative had its origin in Pt IV of the *Occupational Health and Safety Act 1985* (Vic) (**the 1985 Victorian Act**), which provided for the election of HS representatives for designated work groups (s 30), for the functions of HS representatives (s 31) and for assistants of HS representatives (s 32). Section 32 broadly did the work of ss 58 and 70 in the *2004 Victorian Act*, and was in the following terms:

**32. Provisions concerning assistants of health and safety representatives**

- (1) A health and safety representative may for the purposes of performing a function or duty under this Part seek whenever necessary the assistance of any person.
- (2) An employer shall allow a person assisting a health and safety representative access to the workplace unless the employer considers that the person by reason of a lack of knowledge of occupational health and safety is not a suitable person to assist a health and safety representative.

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

14 From these salient features, the outline of the debate can be perhaps anticipated: that ss 58(1)(f) and 70 do not confer “a right” on the assistant within the meaning of s 494(1) of the *FW Act*. To understand that debate it is helpful to do two things: first, say something as to what happened to throw up this controversy from the agreed facts; and, secondly, describe the provisions of State, Territory and Commonwealth legislation that provide for rights of entry to workplaces, in particular as they existed at 2009 when the *FW Act* was passed.

15 Before doing these two things, it is helpful to say something as to the approach to the provisions, in both the *FW Act* and the *2004 Victorian Act*, and indeed in the other legislation to be mentioned. First, to the extent that a provision is a civil remedy or civil penalty provision a necessary clarity of meaning should be striven for, to the extent that is possible

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

16 The facts relevant to this proceeding were agreed by the parties. Relevantly, they may be summarised as follows. On 21 May 2014, Mr Curnow contacted Mr Powell and asked him to attend the site to provide assistance in relation to a safety issue. Mr Powell entered the premises later in the day. He was asked by a representative of the employer what he was doing. He replied that he was there “to assist the HSR” and quoted s 58 of the *2004 Victorian Act*. He was asked to show his permit and he said “I don’t have to as I am not attending under the *Fair Work Act*”. He was asked to leave. He did not do so, and proceeded to carry out inspections related to the request. This refusal to leave was consistent with Mr Powell believing that he had an entitlement to be on the land. Police were called. They refused to remove Mr Powell. That was consistent with the police believing he had an entitlement to be on the land.

17 On 22 May 2014, Mr Powell returned to the site at Mr Curnow’s request. Once again he was asked why he was there and to show his permit. Once again he said he was there “to assist the HSR” and refused. Once again he was asked to leave. Once again he refused. An inspector under the *2004 Victorian Act* came on site and after speaking with Mr Curnow and Mr Powell informed them and representatives of the employer that Mr Curnow had the right to have the assistance of Mr Powell. Later, Mr Powell was removed from the site by the police and charged under s 9(f) of the *Summary Offences Act 1996 (Vic)* for refusing to leave a private place without lawful excuse. That charge was laid after advice to the police from the Commissioner. The charges were later withdrawn.

18 About two months later, on 15 July 2014, Mr Curnow again requested Mr Powell to attend the site to assist him. Mr Powell entered the premises. He was asked whether he had a permit, refused to produce one and said he was here under the “OHS Act”. He was asked to leave and refused. Police were called again, but refused to remove him.

- 19 On 28 October 2014, Mr Curnow once again called Mr Powell and asked him to attend the site. Mr Powell entered the site. Once again he was asked what he was doing to which he replied that he was there to “assist the site rep with OHS issues”. He was asked to leave because he did not have a permit. He refused to leave, saying he was allowed to be on the premises.
- 20 Even through the anodyne language of the agreed facts it is clear that Mr Powell considered that he was authorised and entitled by the *2004 Victorian Act* to enter and remain upon the site because he was assisting Mr Curnow. He exercised that entitlement by entering the premises without asking the employer, and by refusing to leave when asked to do so, because he was authorised and entitled to remain on the site.
- 21 The *2004 Victorian Act* and the *FW Act* deal with the rights of union officials to enter premises under permits. Part 8 of the *2004 Victorian Act* deals with “authorised representatives of registered employee organisations” (**ARREOs**). Division 2 of Pt 8 concerns entry permits. Division 3 of Pt 8 concerns entry by ARREOs. Section 87 provides that if an ARREO reasonably suspects that a contravention of the Act or the regulations has occurred, he or she **may enter** the place during working hours to enquire into the reputed contravention.
- 22 Division 2 of Pt 3-4 of the *FW Act* deals with entry rights under that Act. Entry rights are given to permit holders (by the use of the expression “may enter”) to investigate suspected contraventions of the *FW Act* (s 481), to investigate suspected contraventions relating to the TCF award workers (s 483A), and to hold discussions with employees or TCF award workers (s 484).
- 23 The primary judge undertook a detailed and careful discussion of the history of rights of entry in awards and in Commonwealth legislation in [37]-[54] of his reasons. To this discussion can be added the existence in State and Territory legislation as at 2009 of rights of entry being given by statute to union officials, generally under a permit regime, for various purposes including to enquire about or investigate into possible contraventions of occupational health and safety laws, to investigate possible contraventions under award payments or to meet members. See, Div 3 of Pt 5 and in particular s 77 of the *Occupational Health and Safety Act 2000* (NSW); ss 90I and 90J of the *Workplace Health and Safety Act 1995* (Qld); Div 2G of Pt II and in particular ss 49H and 49I of the *Industrial Relations Act 1979* (WA); Div 5.4 of Pt 5 and in particular s 77 of the *Occupational Health and Safety Act*

1989 (ACT); Div 7 of Pt 4 and in particular s 53 of the *Workplace Health and Safety Act 2007* (NT).

24 All these provided for a statutory permission to enter (the words “may enter” generally being used) to a union official who held a permit, for the purposes of, and with the powers and limitations contained in, each statute.

25 As at 2009, no other State or Territory had provisions in terms substantially the same as ss 58 and 70 of the *2004 Victorian Act* or s 32 of the *1985 Victorian Act* (although since 2009 various such provisions have been enacted under model legislation involving most States and the Territories).

26 In argument, Ms Doyle SC, who with Ms Watson appeared for Mr Powell, submitted that the phrase “right of entry” or “right to enter” was a term of art signifying a provision of an Act that was expressed as giving a union official a right to enter premises in certain circumstances, generally of the kind set out in the awards and legislation discussed by the primary judge and referred to in the legislation referred to above. With respect, it is going too far to call it a term of art, but it can be accepted that some statutes refer to “right of entry” such as, in particular, Pt 15 of the *Workplace Relations Act 1996* (Cth) (**the *WR Act***) and Pt 3-4 of the *FW Act*. It is a phrase in a form that is apt at least to refer to or identify the kinds of provisions to which we have referred.

27 Ms Doyle submitted that when in s 494(2) (and so by incorporation s 494(1)) there is a reference to “[a] right to enter premises” it is a reference to this class of State and Territory provisions. It is not apt, so it was submitted, to refer to provisions of the character of ss 58(1)(f) and 70 of the *2004 Victorian Act* which do not in terms grant “a right of entry” or a “right to enter” (or some similar phrase) to union officials but operate in respect of the person requested by the HS representative to assist under the power to ask “any person”, who may or may not be a union official. For various reasons, that was essentially the conclusion of the primary judge.

28 It is the legitimacy of this argument and the attendant consideration of the content and operation of ss 58(1)(f) and 70 of the *2004 Victorian Act* and Pt 3-4 of the *FW Act* to which we now turn.

29 The relevant question is whether Mr Powell (as an official 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), the question is whether Mr Powell exercised a right to enter premises that is conferred by the *2004 Victorian Act*.

30 The answering of that question requires the *FW Act*, and in particular s 494 to be construed, but also requires ss 58(1)(f) and 70 of the *2004 Victorian 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*.

31 It is here that the significance of Ms Doyle’s argument, and the substance of the approach of the primary judge becomes relevant: Is the “right to enter premises...conferred by a State or Territory OHS law” to be understood as a reference only to the type of existing provisions in all State and Territory OHS laws (as set out in reg 3.25) that conferred on union officials (variously described) a right to enter premises (by the words “may enter”) in various circumstances set out in the State and Territory legislation?

32 Though the principal task is to construe the *FW Act*, it is helpful to commence with an analysis of ss 58(1)(f) and 70. The primary judge concluded that the assistant did not have a “right” under s 70 within the meaning of s 494(1) of the *FW Act* because that subsection requires the existence of what his Honour referred to as a “strict legal right” that must be enforceable by the person on whom it is conferred. This was also the burden of the submissions of Ms Doyle and Ms Watson for Mr Powell and of the Solicitor-General and with him Mr Palmer intervening. It was submitted that s 70 was intended to be for the benefit of the HS representative who had the statutory means of enforcement in s 70(2).

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

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

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

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

37 The critical question then is whether the right to enter premises in s 494 reaches such a right or only reaches so far as to cover the rights which are referred to at [21] above: being rights conferred on union officials to enter premises for the kinds of reasons in the State and Territory legislation, of a representational character. The answer to this question depends upon the proper construction of the *FW Act*.

38 Section 6 of the *FW Act* is entitled “rights and responsibilities of employers, employees organisations etc.” It is a guide to purpose for interpretation and not an operative provision. Subsection (5) describes what Pt 3-4 “is about”, as follows:

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

39 There are two ways to read this subsection. First, it could be read as:

Part 3-4 is about the rights of officials of organisations who hold entry permits to enter premises for purposes related to their representative role

- under this Act and
- under State or Territory OHS laws ...

Secondly, it could be read as:

Part 3-4 is about the rights of officials of organisations who hold entry permits to enter premises for purposes:

- related to their representative role under this Act and

- under State or Territory OHS laws ...

40 If read the first way, it is some support, though it is not conclusive, for the view that s 494, as part of Pt 3-4, is directed only to the kinds of rights of entry granted to or conferred on officials of organisations, rather than a provision such as ss 58(1)(f) and 70 where the right to enter arises not by dint of being a union official, but because of being a person who happens to be requested to assist by a HS representative.

41 The better construction of s 6(5) is, in our view, the first construction. That however does not take one far. It is true that that is what the Part “is about”. But that does not mean that it is **only** about that subject or that the meaning of words should be read down to conform only with that subject.

42 Section 478 is also a guide to Pt 3-4. It is in the following terms:

This Part is about the rights of officials of organisations who hold entry permits to enter premises for purposes related to their representative role under this Act and under State or Territory OHS laws.

Division 2 allows permit holders to enter premises to investigate suspected contraventions of this Act and fair work instruments. The Division makes special provision in relation to TCF award workers. Division 2 also allows permit holders to enter premises to hold discussions with certain employees and TCF award workers. In exercising rights under Division 2, permit holders must comply with the requirements set out in the Division.

Division 3 sets out requirements for exercising rights under State or Territory OHS laws.

Division 4 prohibits certain action in relation to the operation of this Part.

Division 5 sets out powers of the FWC in relation to the operation of this Part.

Division 6 deals with entry permits, entry notices and certificates.

Division 7 deals with accommodation and transport arrangements in remote areas.

43 The first paragraph of s 478 is in the same terms as the first sentence of s 6(5). Its repetition does not add to the force of s 6(5). As in s 6(5), it is a correct statement. The question is whether the Part is only about such matters, or, put another way, whether the guide controls the limits of construction of provisions within the Part.

44 Section 480 sets out the statutory object of the Part, in the following terms:

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

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

suspected contraventions of:

- (i) this Act and fair work instruments; and
- (ii) State or Territory OHS laws; and
- (b) the right of employees and TCF award workers to receive, at work, information and representation from officials of organisations; and
- (c) the right of occupiers of premises and employers to go about their business without undue inconvenience.

45 The balance referred to is of competing “rights”. Certainly the “right” in para (c) is not a strict legal right. Importantly perhaps, and it is a matter relied upon by Ms Doyle, the “right” in para (a) is “of organisations” to do certain things including “investigate suspected contraventions of State or Territory OHS laws”. Certainly the expression of the matter in para (a) is support for the proposition that the object of the Part was to balance rights one of which was that of unions, through their officials, to come on to premises for purposes of the kind dealt with in State and Territory legislation that in terms conferred rights on union officials to enter premises for the kinds of purposes referred to in para (a) in s 478 and in the legislation to which we have referred.

46 It goes without saying that the purpose or object of an Act or Part of an Act is important to the process of ascription of meaning to any provision in the Act or Part of the Act. For instance, if there were two constructions available from the words, one of which fulfilled the object fully, the other of which did not fully do so, that would provide a reason or a consideration to prefer the former. But it does not follow that words that have a meaning that go beyond the object, and so can be seen to fulfil the object, should be read down to conform only with the boundaries or parameters of the stated object. As Spigelman CJ (with whom Santow JA agreed) said about the operation of the mischief rule in *Commonwealth Custodial Services Ltd v Valuer General* [2007] NSWCA 365; 156 LGERA 186 at 191 [16]:

... [T]he purpose of the introduction of the predecessor of s 6A(2) was to overcome a particular problem that had arisen. However, the words chosen are not necessarily limited to that situation. The mischief rule is a valid approach to statutory interpretation so as to ensure that the purpose of the legislature is achieved. It does not necessarily lead to a reading down of general words, so as to confine the legislation to the mischief alone. Merely because a particular problem has been the trigger for a statutory amendment does not lead to the conclusion that the words are incapable of extending beyond the particular matter which caused the amendment.

47 See also *Valuer General v Fivex Pty Ltd* [2015] NSWCA 53; 206 LGERA 450 at 459 [41]-[42].

48 Relatedly, an “objects” provision within a statute “does not control clear statutory language” but, rather, is properly to be considered as an aid in construing the statute: *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31 at 78 per Cole JA; *CSL Australia Pty Ltd v Minister for Infrastructure and Transport (No 3)* [2012] FCA 1261; 297 ALR 289 at 314 [99] per Robertson J. Such a provision does not definitively determine the meaning of the statutory text. This is not, however, to say that a statement of the legislative object is not an important assistance in interpreting the words of the statute; it is one aspect of considering the meaning and reach of the words used by Parliament.

49 The Solicitor-General referred to para 2481 of the Explanatory Memorandum to the Workplace Relations Amendment (Work Choices) Bill 2005 concerning the Part dealing with the Right of Entry in the *WR Act* that stated the following:

State and Territory OHS laws contain their own limitations and obligations for permit holders for when they seek to exercise OHS right of entry. These limitations would continue to apply.

50 Once again, this does not provide a foundation for reading down the meaning of s 494.

51 Division 2 of Pt 3-4 deals with “Entry rights under this Act”. Sections 481 to 483AA (Subdiv A) concern entry to investigate suspected contraventions of the Act. Under s 481 a “permit holder may enter”. Sections 483A to 483E (Subdiv AA) concern entry to investigate suspected contraventions relating to TCF award workers. Under s 483A a “permit holder may enter”. Section 484 (Subdiv B) deals with entry to hold discussions with employees or TCF award workers . Under it a “permit holder may enter”. Sections 486 to 493 (Subdiv C) deal with requirements for permit holders. Those requirements include notice being given to the occupier before entry (s 487), the production on request of the permit (s 489), the requirement only to enter in business hours (s 490), compliance with reasonable occupational health and safety requests (s 491). It is to be noted that the requirements in ss 486, 487, 489 and 490 are directed expressly to exercising a right under Subdivisions A, AA or B.

52 Division 3 deals with State or Territory OHS rights. Subsections 494(1) and (2) are set out above. Section 495 deals with giving notice of entry; s 496 deals with complying with conditions on his or her permit; s 497 deals with producing the permit for inspection when requested; s 498 limits the exercise of a State or Territory OHS right to working hours; and s 499 deals with compliance with occupational health and safety requirements.

53 Division 6 of Pt 3-4 deals with entry permits, entry notices and certificates. Section 512 permits the Fair Work Commission to issue permits to an official if it is satisfied that he or she is a fit and proper person to hold the entry permit. Section 513 sets out various mandatory considerations, as follows:

- (1) In deciding whether the official is a fit and proper person, the FWC must take into account the following *permit qualification matters*:
  - (a) whether the official has received appropriate training about the rights and responsibilities of a permit holder;
  - (b) whether the official has ever been convicted of an offence against an industrial law;
  - (c) whether the official has ever been convicted of an offence against a law of the Commonwealth, a State, a Territory or a foreign country, involving:
    - (i) entry onto premises; or
    - (ii) fraud or dishonesty; or
    - (iii) intentional use of violence against another person or intentional damage or destruction of property;
  - (d) whether the official, or any other person, has ever been ordered to pay a penalty under this Act or any other industrial law in relation to action taken by the official;
  - (e) whether a permit issued to the official under this Part, or under a similar law of the Commonwealth (no matter when in force), has been revoked or suspended or made subject to conditions;
  - (f) whether a court, or other person or body, under a State or Territory industrial law or a State or Territory OHS law, has:
    - (i) cancelled, suspended or imposed conditions on a right of entry for industrial or occupational health and safety purposes that the official had under that law; or
    - (ii) disqualified the official from exercising, or applying for, a right of entry for industrial or occupational health and safety purposes under that law;
  - (g) any other matters that the FWC considers relevant.
- (2) Despite paragraph 85ZZH(c) of the *Crimes Act 1914*, Division 3 of Part VIIC of that Act applies in relation to the disclosure of information to or by, or the taking into account of information by, the FWC for the purpose of making a decision under this Part.

54 Section 514 identifies circumstances when the Fair Work Commission must not issue a permit:

The FWC must not issue an entry permit to an official at a time when a suspension or

disqualification, imposed by a court or other person or body:

- (a) applies to the official's exercise of; or
- (b) prevents the official from exercising or applying for;

a right of entry for industrial or occupational health and safety purposes under a State or Territory industrial law or a State or Territory OHS law.

55 None of the provisions of Div 6 lead to the conclusion that the permit is limited to rights to enter when conferred in terms upon officials of an organisation such as in Div 2 of Pt 3-4 or as in the State or Territory laws to which reference has been made.

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

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

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

59 The plain words of s 494(1) and (2) and the construction of ss 58(1)(f) and 70 of the *2004 Victorian Act* mean that Mr Powell as an official of an organisation required a permit under

the *FW Act* to enter the premises because he was exercising his right to enter the premises or the HS representative's right to have him enter the premises to assist the HS representative in his task.

- 60 The primary judge concluded that only strict legal rights of a representational character were encompassed by the phrase "right to enter". For the reasons set out above, we are respectfully of the view that there was the exercise of a so-called strict legal right, however analysed and we are of the view that the right does not have to be characterised as strictly representational, as his Honour found.
- 61 We would allow the appeal, set aside the orders of the primary judge and remit the matter for further hearing in accordance with these reasons.

I certify that the preceding sixty-one (61) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop and Justices White and O'Callaghan.

Associate:



Dated: 2 June 2017