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Details of Filing

Document Lodged:	Outline of Submissions
File Number:	NSD1609/2016
File Title:	Australian Licenced Aircraft Engineers Association v Qantas Airways Limited ACN 009 661 901 & Ors
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

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Important Information

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Respondents' Outline of Submissions

No. NSD1609 of 2016

Federal Court of Australia
District Registry: New South Wales
Division: Fair Work

Australian Licenced Aircraft Engineers Association
Applicant

Qantas Airways Ltd (ACN 009 661 901) and others
Respondents

Background and factual summary

1. By way of amended originating application, the applicant seeks declarations of contravention of sections 482(3) and 502(1) of the *Fair Work Act 2009* (Cth) (**FW Act**) by each of the respondents, along with the imposition of pecuniary penalties on each respondent with respect to those alleged contraventions.[1]

2. The facts are of narrow compass, in many respects are not particularly controversial and relate to events leading up to and then occurring on 7 and 8 June 2016. On each of these two days, Mr Stephen Purvinas, Federal Secretary of the applicant and "right of entry" permit holder under Part 3-4 of the FW Act, entered premises of Qantas Airways Ltd (**Qantas**), purportedly pursuant to the provisions of the FW Act. Whilst on the premises on each of those days, Mr

[1] The applicant also seeks an order in the nature of a mandatory injunction requiring the first respondent, Qantas Airways Ltd, to comply with requirements said to have been imposed by Mr Stephen Purvinas, Federal Secretary of the applicant, to provide him access to a number of documents for the purposes of inspecting and copying them.

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Purvinas is alleged to have required Qantas, within the meaning of section 482(1)(c) of the FW Act, to allow him to inspect and make copies of numerous documents kept on the premises.

3. It is not in dispute that requests to inspect and copy various documents were made on each of these days and that on each day, Qantas, as the "occupier" of the premises, failed to comply with those requests by refusing Mr Purvinas access to the documents as sought.

4. In consequence of these undisputed facts, the applicant contends that Qantas contravened:

   (a) section 482(3) of the FW Act on each of 7 and 8 June 2016, by contravening requirements under section 482(1)(c) of the FW Act, namely, the requirements of Mr Purvinas to inspect and make copies of numerous documents; and

   (b) section 502(1) of the FW Act on each of 7 and 8 June 2016, by intentionally hindering or obstructing a permit holder (namely Mr Purvinas) "*exercising rights in accordance with*" Part 3-4 of the FW Act.

5. The applicant further alleges that the two Qantas managers who dealt with Mr Purvinas on 7 and 8 June 2016 and who in essence, communicated Qantas's refusal to facilitate Mr Purvinas' request on the days in question, were "involved in" Qantas's contraventions of sections 482(3) and 502(1) of the FW Act within the meaning of section 550 of the FW Act, and are thereby taken themselves to have contravened these provisions.[2] These managers are the second respondent, Mr

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[2] Paragraphs 63, 65, 72 and 74 of the applicant's Outline of Submissions dated 22 January 2018 (**AOS**) are misconceived and not in accordance with the applicant's pleaded case. They ought not be entertained.

Christopher Tobin (then Manager Sydney Aircraft Maintenance and Customer Experience for Qantas) and the third respondent, Mr Nicholas Saunders (then Senior Manager, Industrial Relations for Qantas).

The issues for determination

6. For the purposes of assessing the liability of Qantas for any of the alleged contraventions (as distinct from what remedies, if any, should follow), the respondents contend that the following factual and legal issues require determination by the Court:[3]

   (a) did Mr Purvinas, on or around 3-8 June 2016, reasonably suspect that a contravention of one or more terms of a fair work instrument (being the *Licensed Aircraft Engineers (Qantas Airways Limited) Enterprise Agreement 10* (**Agreement**)[4]) had occurred or was occurring, for the purposes of section 481(3) of the FW Act?;

   (b) if "yes" to subparagraph (a), did Mr Purvinas exercise the "right" to inspect and make copies of requested documents on 7 and 8 June 2016 for the purpose of investigating the suspected contravention(s)?;

   (c) did the "entry notice" for the entries on 7 and 8 June 2016 (**Entry Notice**)[5] comply with section 518 of the FW Act, in that it specified the particulars of the suspected contravention(s) of a term of the Agreement as required by section 518(2)(b) of the FW Act?;

   (d) did the Entry Notice for the entries on 7 and 8 June 2016 comply with section

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3 The respondents give a brief summary/outline of the argument in respect of each issue herein. Obviously, a fuller exposition of the arguments and a more detailed analysis will be provided in closing submissions.

4 Annexure "SRP2" to the Affidavit of Stephen Ross Purvinas affirmed on 25 October 2017 (**Purvinas Affidavit**).

5 Annexure "SRP15" to the Purvinas Affidavit.

518 of the FW Act, in that it contained the requisite declaration required by section 518(2)(c) of the FW Act?;

(e) is a requirement to inspect and make copies of a class of documents a requirement which can be validly imposed under section 482(1)(c) of the FW Act and contravened under section 482(3) of the FW Act?;

(f) if "yes" to subparagraph (e), in order for the employer or occupier to contravene a requirement to inspect and make copies of a class of documents under section 482(1)(c) of the FW Act, do all documents in the class have to be:

(i) "directly relevant to" the suspected contravention(s) of a term of the Agreement?; and

(ii) not "non-member records" within the meaning of section 482(2A) of the FW Act?;

(g) if "yes" to subparagraph (f), were any/all of the documents within each of the classes of required documents sought by Mr Purvinas on each of 7 and 8 June 2016:

(i) "directly relevant to" the suspected contravention(s) of a term of the Agreement?; and

(ii) not "non-member records" within the meaning of section 482(2A) of the FW Act?; and

(h) did Qantas "intentionally" hinder or obstruct Mr Purvinas on 7 and 8 June 2016?

7. For the purposes of assessing the liability of Messrs Tobin and Saunders for any

of the alleged contraventions (as distinct from what remedies, if any, should follow), the respondents contend that the following additional factual and legal issue requires determination by the Court: did each of Messrs Tobin and Saunders intentionally participate in any established contraventions of sections 482(3) and/or 502(1) of the FW Act as against Qantas, with knowledge of the "essential matters/elements" of each of those contraventions?

Issue 6(a): Mr Purvinas' reasonable suspicion

8. In order to generate any right to enter premises (and then whilst on those premises, exercise a right to require the occupier to allow a permit holder to inspect and copy directly relevant documents), the permit holder must "*reasonably suspect that the [suspected] contravention has occurred, or is occurring*". Section 481(3) of the FW Act makes it clear that the burden of proving (a) that the suspicion was held (subjective) and (b) that the holding of it was reasonable (objective), lies on the person asserting the fact, being the applicant here.

9. This phraseology likely requires the "*existence of facts which are sufficient to induce that state of mind [suspicion] in a reasonable person*".[6] The concept of a "suspicion" and how it is established was also discussed in *George v Rockett.*[7]

10. Importantly, it is necessary to identify the "subject matter" of the suspicion.[8] Here, it is not merely a state of facts or the existence of facts: rather, it is with a legal conclusion drawn from facts (a "suspected contravention").

11. It is for the applicant to establish that Mr Purvinas held the requisite suspicion and that a reasonable person in Mr Purvinas' position would also have held such a

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6 *George v Rockett* [1990] HCA 26; (1990) 170 CLR 104 at 112; *DPP (Vic) v Le* [2007] HCA 52; (2007) 232 CLR 562 at 595 [127]-[128] (Gleeson CJ agreeing at 565 [1]).

7 *George v Rockett* [1990] HCA 26; (1990) 170 CLR 104 at 115-6.

8 Ibid at 116.

suspicion. He will need to explain why the facts he asserted or suspected amounted to a "suspected contravention" of a term of the Agreement and persuade the Court that a reasonable person in his position would have reasoned in a similar way. He will likely fail in that endeavour.

Issue 6(b): the purpose of the entry and imposition of the requirements

12. There is an additional element in the operation of section 482(1) of the FW Act which is fatal to the applicant's allegations. The powers of entry and inspection/copying granted by those provisions are purposive. They are to be exercised for the purpose for which they are conferred. Here, that is "*for the purpose of investigating a suspected contravention*". If they are not exercised for that purpose, the powers are not enlivened/exercised and no contravention of either sections 482(3) or 502(1) of the FW Act can be established.

13. The assessment of whether the powers are exercised for that purpose is "objective".[9] Objectively, are the documents required directly relevant to any contravention of a term of the Agreement and would access to the required documents actually further the purpose of investigating *that* contravention of the Agreement? Is access to the required documents "*related with sufficient proximity to the object of [investigating a contravention of a term of the Agreement]*"?[10]

14. Here, there is and was no prospect of Qantas being held liable to a contravention of either clauses 47 or 60 of the Agreement (or any "terms" within them). Certainly one has never been articulated by Mr Purvinas or the applicant (see paragraph 23

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9 *Curran v Thomas Borthwicks & Sons Ltd* [1990] FCA 67; (1990) 26 FCR 241 at 252-3; *AFAP v Australian Airlines Ltd* [1991] FCA 62; (1991) 28 FCR 360 at 372.

10 *Curran v Thomas Borthwicks & Sons Ltd* [1990] FCA 67; (1990) 26 FCR 241 at 253.

below).[11]

15. Even if Mr Purvinas had a reasonable suspicion of a contravention of a term of the Agreement as he asserts, the document inspection/copying sought was not, objectively, exercised for the purpose of investigating a suspected contravention because what Mr Purvinas wanted to inspect had no reasonable prospect of being evidence of any contravention of a term of the Agreement.

Issue 6(c): specification of the particulars of the suspected contraventions

16. The respondents contend that the Entry Notice did not "*specify the particulars of the suspected contravention*" as required by section 518(2)(b) of the FW Act. If correct in this contention, this is fatal to all aspects of the applicant's case.[12]

17. A failure to provide an entry notice in accordance with section 518 deprives Mr Purvinas of any statutory right to enter the premises and impose the requirements which he did, which are said to have been contravened (section 482(3)).[13] Further, it also means that Mr Purvinas was not "*exercising rights in accordance with*" Part 3-4 of the FW Act, for the purposes of section 502(1) of the FW Act.[14]

18. There are two principal deficiencies with the Entry Notice in this case:

    (a) it does not identify any suspected contravention of any term of the relevant fair work instrument (namely, the Agreement); and

    (b) alternatively, it merely provides particulars/an explanation of Mr Purvinas' allegation of fact, rather than how that allegation of fact amounted to, or could

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11 The same situation prevails, even subsequent to receipt of the AOS: see paragraph 34 (combined with paragraph 32) of the AOS (clause 60), along with paragraph 39 (combined with paragraphs 36-37) of the AOS (clause 47).

12 See sections 486, 487 and 518 of the FW Act.

13 *ABCC v CFMEU* [2017] FCA 802 at [56]-[73].

14 *ABCC v CFMEU* [2017] FCA 802 at [48]-[51] and [86]-[91].

possibly/arguably amount to, a contravention of a term of the Agreement.

19. As to the first deficiency, the relevant suspected contravention must be of a "*term of a fair work instrument*" (section 481(1)). To give particulars of such a suspected contravention, the relevant "term" must at least be identified. Relevantly, a "term" of an award or enterprise agreement is a reference to "each separate obligation" imposed by or spelt out in the instrument.[15]

20. The Entry Notice refers to clauses 47 and 60 of the Agreement, each of which impose several, different substantive obligations. Those clauses are not "terms" for the purposes of section 481(1) of the FW Act and as such, the Entry Notice does not give sufficient particulars of the suspected contravention(s).

21. Further and in any event, the Entry Notice does not provide any relevant particularisation of the suspected contraventions of clauses 47 and/or 60 of the Agreement.

22. It cannot be discerned from the Entry Notice how or what aspect of clause 47.1.1 of the Agreement is engaged, or what the "significant effects" for the purposes of clauses 47.1.1 and 47.1.2 of the Agreement are. Further, there is no allegation or particularisation of any request to consult with the applicant from any employee as required by clauses 47.1.1, 47.2.1 and 47.2.3 of the Agreement (such as to enliven any consultation obligation with the applicant in any event).

23. One cannot discern how the factual allegations made in the first three bullet points of the Entry Notice amount to any contravention of clause 60 of the Agreement, what that contravention is and how it arises. Mr Purvinas' allegation of fact was

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[15] *Gibbs v Mayor, Councillors and Citizens of the City of Altona* [1992] FCA 374; (1992) 37 FCR 216 at 222-3; *Kelly v Fitzpatrick* [2007] FCA 1080; (2007) 166 IR 14 at 17 [11]; *McIver v Healey* [2008] FCA 425 at [16]-[18]. See also *Fair Work Ombudsman v South Jin Pty Ltd* [2015] FCA 1456 at [169]-[183].

particularised, but that allegation does not nearly translate into any reasonably suspected contravention of clause 60 of the Agreement.

24. For these reasons, the Entry Notice was deficient and the originating application should be dismissed on this basis alone.

Issue 6(d): requisite declaration

25. The respondents also contend that the Entry Notice did not contain the declaration as required by section 518(2)(c) of the FW Act. If correct in this contention, this too is fatal to all aspects of the applicant's case, for the reasons explained in paragraph 17 above.

26. As a matter of construction,[16] to comply with section 518(2)(c) of the FW Act, the entry notice must contain a declaration referable to a particular member or members who work on the premises and to whom the suspected contravention(s) are said to relate/affect. That is, the declarant must have a particular member or members in mind and make the declaration referable to them, such that the occupier or affected employer is in some position to assess the legitimacy and lawfulness of the intended entry (having regard to section 502 for example).[17]

27. There is no declaration, specific or otherwise, that the suspected contravention(s) relate to or affect the particular member who is said to perform work at the premises. Absent a declaration of actual correlation between the member who works at the premises and who the contraventions affect/relate to, the Entry Notice is deficient.

28. The originating application should also be dismissed on this basis alone.

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16 Including having regard to the surrounding provisions in subsections (2) and (3) of section 518 of the FW Act.

17 See also paragraph 2063 of the Explanatory Memorandum to the *Fair Work Bill 2008*.

Issue 6(e): the validity of "class" requirements under section 482(1)(c)

29. It is not in dispute, factually, that most of Mr Purvinas' eleven requirements (on each day) to inspect documents were "class" requirements: that is, requirements to inspect documents in particular classes, as opposed to particular documents.[18]

30. Is a "class" requirement a "requirement" of the kind described in section 482(1)(c) of the FW Act, which can in turn be contravened for the purposes of section 482(3) of the FW Act? The respondents contend not.

31. The surrounding context to section 482(1)(c)[19] points strongly to a construction of that obligation which extends only to a record or document in the singular, rather than the plural.[20] Section 482(1)(c) itself only speaks of documents in the singular ("*a record or document*" and "*a non-member record or document*"), whereas it uses the plural ("copies" instead of "a copy") when desired.[21]

32. A valid "requirement" in relation to the inspection/copying of records or documents for the purposes of section 482(1)(c) of the FW Act, is one which is imposed individually by reference to an individual record or document.

33. It follows that of the 22 requirements said to have been made and contravened,[22] only requirements 3 (and 14)[23] and 4 (and 15)[24] were validly made on this

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18 Paragraphs 86-87 of, and Annexure "SRP16" to, the Purvinas Affidavit; paragraphs 63 and 67 of the Tobin Affidavit; paragraphs 53, 56, 62 and 64 of the Saunders Affidavit. This is so for all of the 22 requirements alleged, except requirements 3 (and 14) (a particular Memo) and 4 (and 15) (a particular email). See also paragraphs 44-56 of the AOS.

19 Including for example, the drafting of sections 482 and 483 as a whole. See also sections 483AA and 518(2)(c) of the FW Act.

20 A sufficient contrary intention for the purposes of section 23 (through section 2(2)) of the *Acts Interpretation Act 1901* (Cth)). See also *Blue Metal Industries Ltd v Dilley* (1969) 117 CLR 651.

21 Note too, the change in language from the statutory predecessors (which were plural): section 285B(3)(a) of the *Workplace Relations Act 1996* (Cth) (any time sheets, pay sheets, or other documents); section 748(4) of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (any records).

22 Paragraphs 43, 43A-43J, 49 and 49A-49J of the Second Further Amended Statement of Claim dated 21 August 2017.

23 A particular memo.

particular basis, such that only those requirements could be contravened under section 482(3) (and Mr Purvinas hindered or obstructed by reference to them).

Issue 6(f): directly relevant and non-member records with classes of documents

34. This issue (and consequently, issue 6(g)) arises in the alternative to the argument identified in issue 6(e). It also brings into sharper focus the questions in issue 6(e). If "class" requirements can be validly imposed under section 482(1)(c) of the FW Act, is the requirement so imposed one "indivisible" requirement such that if any aspect of the class of documents required does not meet the necessary statutory criteria, the "requirement" is bad and need not be complied with? The respondents contend that the answer must be "yes".

35. Section 482(1)(c) of the FW Act operates like standard discovery under the *Federal Court Rules 2011*. If the requirement is imposed as a class, all documents in the class still need to be directly relevant in order for the requirement to be validly imposed.

36. It cannot be the case that an occupier has to themselves, search out, examine and assess potentially hundreds of documents in a required class, and then produce for inspection only those that are "directly relevant" or that are not "non-member records". Nor can it be the case that the occupier is liable to a contravention of the FW Act and a civil penalty if the occupier gets that assessment wrong with respect to any single document in the class requested.

37. An occupier should not be required to provide access to everything marginally relevant or arguably a non-member record, many documents which the permit holder may ultimately have no right to see, merely so as to avoid this potentiality

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[24] A particular email.

(as occurs commonly with discovery).[25]

38. If the "class" requirements were validly imposed, it is for the applicant to demonstrate that each and every document falling within the class was itself "directly relevant" and was itself not a "non-member record or document", before that particular requirement was valid so as to be capable of contravention for the purposes of section 482(3) (and hence, section 502(1)).

Issue 6(g): were all documents "directly relevant" and not "non-member records"?

39. Not only can the applicant not establish that every document in the class requirements meet these statutory descriptors, but the applicant cannot demonstrate that any of the documents sought in any class are themselves "directly relevant".

40. "Direct relevance" is to be distinguished from "train of inquiry" relevance. "Directly relevant" means relevant to proving or disproving the suspected contravention, as opposed to relevant to proving a fact or issue which itself might be relevant to proving the "suspected contravention".[26] Further, direct relevance is also to be assessed objectively.[27] It is not what Mr Purvinas may have regarded as directly relevant to his suspected contravention,[28] but what was in fact directly relevant to that contravention.

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25 See references to the same problem with discovery (and direct relevance) in *Central Queensland Mining Supplies Pty Ltd v Columbia Steel Casting Co Inc* [2011] QSC 183 at [16]-[19].

26 *Quenchy Crusta Sales Pty Ltd v Logi-Tech Pty Ltd* [2002] SASC 374 at [11]; *Mercantile Mutual Custodians Pty Ltd v Village/Nine Network Restaurants and Bars Pty Ltd* [1999] QSC 276; [2001] 1 Qd R 276 at 282-3 [7]-[8]; *Peninsula Shipping Lines Pty Ltd v Adsteam Agency Pty Ltd* [2008] QSC 317 at [41]-[43]. See also *CFMEU v BHP Coal Pty Ltd (No 2)* [2011] FCA 1396; (2011) 212 IR 313 at 320-1 [33]-[37]. Or "absolutely", "exactly" and "precisely" relevant: *NTEIU v Central Queensland University* [2009] FWA 780. See also paragraph 201 of the Supplementary Explanatory Memorandum to the *Fair Work Bill 2008*.

27 *Independent Education Union of Australia v Australian International Academy of Education Inc* [2016] FCA 140 at [307].

28 Hence the irrelevance of paragraph 15 of the 2nd Purvinas Affidavit.

41. There are three cascading problems with the applicant's case on this issue:

    (a) first, the entire foundation for Mr Purvinas' alleged suspicion is nothing more than a "train of inquiry" assessment of relevance;

    (b) second, Mr Purvinas' suspicion was not capable of being reasonably regarded as a contravention of a term of the Agreement because the concept of an "objective" surplus which can be "built" (by the applicant or a Court) does not exist.[29] None of the required documents were relevant, let alone directly relevant; and

    (c) third, even if a surplus could be built, directions to take annual leave beyond the "built" surplus level do not amount to a contravention of a term of the Agreement in any event,[30] and hence, documents relevant to "building" a surplus are not relevant (or directly relevant) to any suspected contravention.

42. The individual documents sought by Mr Purvinas may have assisted in establishing one particular aspect of one or more particular areas of work (including to some extent, the amount) performed by LAMEs employed at Qantas. Those facts have no direct relevance to any alleged contravention of a term of the Agreement, nor any suspected contravention of a term of the Agreement.[31]

Issue 6(h): intentionally hinder or obstruct (section 502(1))

43. The prohibition in section 502(1) of the FW Act is against "intentionally" hindering or obstructing the permit holder. The element of intention requires that the alleged

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29 Paragraphs 7-21, 45-46 and 76(b) of the Tobin Affidavit; paragraphs 18-20, 29 and 68(c) of the Saunders Affidavit.

30 Paragraph 23 above.

31 Note paragraphs 57-58 of the AOS on this issue. The documents are asserted to be relevant to the concept of a "surplus". By themselves (or in combination), they go nowhere near that far. But in any event and assuming they were, where does one go from there?

contravener subjectively intend to hinder or obstruct the permit holders.[32] That is, an intention to bring about the consequence/effect (hinder or obstruct) rather than an intention to do an act (willed conduct) which has that consequence/effect.[33]

44. In order to form the requisite intention with respect to the consequence (being a "specific intent" as opposed to a "basic intent"),[34] the contravener must intend (desire/wish) to actually interfere with the exercise of rights,[35] including through actual knowledge[36] of the circumstances which makes their conduct a hindrance or obstruction of the exercise of rights by a permit holder.[37] A person cannot intend to hinder or obstruct a permit holder from exercising lawful rights, without an appreciation that the permit holder was exercising those lawful rights (as a fact).[38]

45. Further or alternatively, a genuine, reasonable and honest but mistaken belief that the permit holder did not have the rights asserted would exclude a conclusion of intentional hindrance or obstruction.[39]

46. On the facts here, it cannot be shown that any respondent had any relevant

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32 *CFMEU v John Holland Pty Ltd* [2010] FCAFC 90; (2010) 186 FCR 88 at [26] and [46]; *Pine v Doyle* (2005) 222 FCR 291 at [22]. See also *John Holland Pty Ltd v CFMEU* [2011] FCA 770; (2011) 195 FCR 280 at 312-13 [163]-[168].

33 Ibid.

34 *He Kaw Teh v The Queen* [1985] HCA 43; (1985) 157 CLR 523 at 568-70.

35 Ibid at 570.

36 Rather than presumed or attributed knowledge: *Giorgianni v The Queen* [1985] HCA 29; (1985) 156 CLR 473 at 504-5; *CFMEU v John Holland Pty Ltd* [2010] FCAFC 90; (2010) 186 FCR 88 at 92-4 [13]-[26].

37 *He Kaw Teh v The Queen* [1985] HCA 43; (1985) 157 CLR 523 at 568-70; *Setka v Gregor (No 2)* [2011] FCAFC 90; (2011) 195 FCR 203 at 209 [36].

38 *He Kaw Teh v The Queen* [1985] HCA 43; (1985) 157 CLR 523 at 572; *Giorgianni v The Queen* [1985] HCA 29; (1985) 156 CLR 473 at 506-9; *Ostrowski v Palmer* [2004] HCA 30; (2004) 218 CLR 493 at 503 [10] and 511-12 [41]. This is shown (in reverse) in *John Holland Pty Ltd v CFMEU* [2011] FCA 770; (2011) 195 FCR 280 at 312-13 [163]-[168], where a genuine belief that the permit holders had a right to enter (*i.e.* a lack of knowledge that they had no such right) meant that they could not be found to have intended to hinder or obstruct the occupier by requiring them to manage/deal with the entry.

39 *He Kaw Teh v The Queen* [1985] HCA 43; (1985) 157 CLR 523 at 572-9; *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536; *Ostrowski v Palmer* [2004] HCA 30; (2004) 218 CLR 493 at 512 [42]-[43]. Justice Flick considered, but did not determine, the availability of such a defence to the immediate predecessor to section 500 of the FW Act in *Darlaston v Parker* [2010] FCA 771; (2010) 189 FCR 1 at 22-4 [81]-[86].

intention to hinder or obstruct Mr Purvinas exercising lawful rights because no respondent knew he had such rights and on the contrary, they each genuinely believed that he had no such rights.[40] There was an intention to prevent him from inspecting and copying documents, but that is not the intention to which section 502(1) speaks.

Issue 7: were Messrs Tobin and/or Saunders "involved in" any proven contraventions by Qantas?[41]

47. Neither of Messrs Tobin or Saunders were involved in any relevant contravention which may have been established against Qantas.

48. Firstly, the applicant must establish the existence of a relevant contravention by Qantas first, and for the reasons set out above, it has failed in that endeavour. Accordingly, no question of section 550 can arise.[42]

49. In the alternative (and assuming Qantas is found liable for one or more contraventions), to be "involved in" any contravention for the purposes of section 550 of the FW Act, the relevant person must have actual knowledge of the essential matters/elements[43] making up the primary contravener's contravention.

50. For the purposes of section 482(3) of the FW Act, that would include knowledge that there was a valid entry notice which complied with section 518(2) of the FW

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40 Paragraphs 76-80 of the Tobin Affidavit; paragraphs 48-50, 53, 56, 62, 64 and 67-69 of the Saunders Affidavit. See also Annexure "CJT-14" to the Tobin Affidavit.

41 By reason of the applicant's misconception of its own case (see footnote 2 above), the AOS does not address these issues.

42 *Fair Work Ombudsman v Grouped Property Services Pty Ltd* [2016] FCA 1034; (2016) 152 ALD 209 at 352 [970], 353 [979] and [987] and 354-5 [994]; *Fair Work Ombudsman v South Jin Pty Ltd* [2015] FCA 1456 at [53]. See also *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] FCAFC 37; (2015) 228 FCR 346 at 403 [251].

43 *Giorgianni v The Queen* [1985] HCA 29; (1985) 156 CLR 473 at 479, 481, 494 and 500; *Yorke v Lucas* [1985] HCA 65; (1985) 158 CLR 661 at 667 and 670; *Port Kembla Coal Terminal Ltd v Construction, Forestry, Mining and Energy Union* [2016] FCAFC 99; (2016) 248 FCR 18 at 135 [448]; *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] FCAFC 37; (2015) 228 FCR 346 at 402 [242] and 404 [254].

Act, the existence of a reasonable suspicion, the existence of the relevant purpose of the exercise of the "right" and that the documents requested were directly relevant to the suspected contravention(s). It is plain that neither Messrs Tobin or Saunders had actual knowledge of any of these matters.[44]

51. For the purposes of section 502(1) of the FW Act, the same elements exist by reason of the required knowledge that Mr Purvinas was "*exercising rights in accordance with*" Part 3-4.[45] Further, they would need knowledge of their own intent, which cannot be formed by reason of the matters addressed in paragraphs 43-46 above.

52. Accordingly, irrespective of any other findings made, the originating application as against Messrs Tobin and Saunders (the second and third respondents) ought be dismissed.

Conclusion

53. The allegations made by the applicant in these proceedings are flawed in a number of separate respects. For any one or more of the reasons advanced above, Qantas did not itself contravene either of sections 482(3) or 502(1) of the FW Act on either 7 or 8 June 2016, such that neither of Messrs Tobin or Saunders could have been "involved in" such contraventions pursuant to section 550 of the FW Act.[46]

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44 Paragraphs 76-80 of the Tobin Affidavit; paragraphs 48-50 and 67-69 of the Saunders Affidavit.

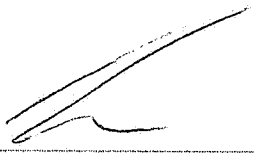
45 Again, this is not established (see the references in the immediately preceding footnote).

46 For the reasons given in paragraphs 49-51 above, they were not so "involved in" any contraventions which may be established as against Qantas in any event.

54. The originating application should be dismissed in its entirety.[47]

Matthew Follett

Date: 30 January 2018



Signed by Rohan Doyle
Herbert Smith Freehills
Lawyer for the Respondents

47 The question of relief, including the question of any mandatory injunction, should be dealt with separately in the event that one or more contraventions of the FW Act are established.