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Details of Filing

Document Lodged:	Submissions
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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 Closing 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

1. The respondents continue to rely upon their Outline of Submissions dated 30 January 2018 (**ROS**).

2. As identified therein,[1] the respondents identify seven issues which they contend require determination.[2] The respondents below preserve the same "issue numbering" as identified in the ROS, for ease of cross-referencing.

Issue 6(a): Mr Purvinas' reasonable suspicion

3. In addition to what is submitted at paragraphs 8-11 of the ROS, the respondents also submit as follows

4. The particular formulation of sections 481(1) and (3) of the FW Act is new but the effect is not. The only relevant statutory predecessors were sections 747 and 754

[1] Paragraphs 6-7 of the ROS.

[2] Of course, if one or more of these issues are determined favourably to the respondents, the Court may not be expressly required to resolve some others.

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of the *Workplace Relations Act 1996* (Cth) (post *Work Choices*) (**WR (WC) Act**). Section 747 preceded section 481(1) of the FW Act (which authorised entry to investigate a suspected breach, if the permit holder "*suspects, on reasonable grounds*") and section 754 preceded section 481(3) (providing for the onus).

5. There is no relevant authority of which the respondents are aware as to the proper construction of section 481(3) of the FW Act or section 754 of the WR (WC) Act. However, some benefit may be obtained from the principles derived from authorities such as *George v Rockett*.[3] This was the view taken by Greenwood J in *John Holland Pty Ltd v CFMEU*[4] in respect of the phrase "*reasonable grounds to believe*" in section 768(2)(b) of the WR (WC) Act,[5] a view endorsed by Logan J on appeal.[6] Whilst the language is not quite the same,[7] the thrust must be regarded as so. This requires the "*existence of facts which are sufficient to induce that state of mind [suspicion] in a reasonable person*".[8] The concept of a "suspicion" and how it is established was also discussed in *George v Rockett*.[9]

6. Importantly, it is necessary to identify the "subject matter" of the suspicion.[10] 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").

7. Further, in the face of an employer pressing an objection to inspection (as here), a permit holder "*must necessarily give consideration to the merits of the employer's claims and form a view as to whether the claims are well placed or not… Persons*

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3 [1990] HCA 26; (1990) 170 CLR 104.

4 [2009] FCA 786; (2009) 186 IR 408.

5 Ibid at 461-2 [170].

6 *CFMEU v John Holland Pty Ltd* [2010] FCAFC 90; (2010) 186 FCR 88 at 124 [127].

7 *George v Rockett* extends to "*reasonable grounds to suspect*", whereas section 481(3) merely says "*reasonably suspect*".

8 *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]).

9 Ibid at 115-6.

10 Ibid at 116.

in the position of permit holders or officers of Unions cannot be said to have acted reasonably in the absence of reasonable investigation and enquiry into objections made and strongly pressed denying the very right of entry relied upon by those seeking entry".[11] "*Obstinancy and bald assertion are not to be equated with the existence of reasonable [suspicion]*".[12]

8. 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 suspicion. On the evidence, the respondents submit that the applicant fails on both counts.

Was any suspicion held?

9. The respondents' contentions as to whether Mr Purvinas held any suspicion at all (as to a contravention of the Agreement) is necessarily tied to what it says about the reasonableness of any suspicion held (as articulated by Mr Purvinas). In essence, the respondents contend that Mr Purvinas' position as to suspected contraventions was so unreasonable and that Mr Purvinas was aware of the facts and circumstances which made such a suspicion unreasonable, that it should be inferred, contrary to his evidence, that he held no such suspicion at all.

10. In aid of that contention, the respondents point to, and provide the evidential foundation for, alternative endeavours that Mr Purvinas may have had in mind. The applicant and Mr Purvinas do not support "leave burn"[13] and it can be inferred, neither do the applicant's members.[14] There is an obvious incentive for Mr Purvinas to make "leave burn" as difficult for Qantas to administer as possible:

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11 *John Holland Pty Ltd v CFMEU* [2009] FCA 786; (2009) 186 IR 408 at 461-2 [170].

12 *CFMEU v John Holland Pty Ltd* [2010] FCAFC 90; (2010) 186 FCR 88 at 126 [133].

13 PN16.19-16.21.

14 PN15.31-16.21; paragraph 25 of the Saunders Affidavit.

first, it avoids (or delays) forced leave in the first place and second, it avoids (or delays) compulsory redundancies.

11. An industrial negotiation of the "surplus" figure, in the hope of reducing it from 46.5 to some lower figure, was a logical and attractive option for Mr Purvinas. An experienced industrial relations practitioner, including one who had some experience with Mr Purvinas himself, thought that this was exactly what Mr Purvinas was doing.[15] And it seems that Mr Purvinas had himself actually sought a conciliatory, negotiated "re-evaluation" of the stated surplus figure early in the piece.[16]

12. When combined with the evidence regarding the alleged suspected contraventions and the inherent unreasonableness and illogicality associated with Mr Purvinas' stated position, largely known to him, along with the repeated vague and high-level assertions of breach without any articulation or explanation,[17] the Court should find that the industrial negotiation of the surplus figure was indeed Mr Purvinas' goal and that he did not hold any suspicion as alleged.

Was any suspicion reasonably held?

13. To the extent the Court accepts that Mr Purvinas actually held a suspicion as to contraventions of clause 47 and/or 60 of the Agreement, the respondents contend that it could not be satisfied that a reasonable person in Mr Purvinas' position, knowing what he knew, would have held such a suspicion.

14. Before commencing this inquiry, it is critical to identify Mr Purvinas' stated

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15 Paragraph 38 of the Saunders Affidavit.

16 Annexure "NS-2" to the Saunders Affidavit (page 26). Mr Purvinas denied that the email should be read this way (PN62.8-62.35), but the respondents contend that it speaks for itself.

17 Consider the manner in which the clause 60 breach was articulated in paragraph 26 of the 1st Purvinas Affidavit, Annexures "NS-1", "NS-2" and "NS-3" to the Saunders Affidavit, Annexures "SRP8" and "SRP9" to the 1st Purvinas Affidavit, paragraph 48 of the 1st Purvinas Affidavit and Annexures "SRP11" and "SRP13" to the 1st Purvinas Affidavit.

suspected contraventions. It is those suspicions that were alleged to be held by him, and which must be assessed for their reasonableness.

What was the alleged suspected contravention of clause 47?

15. It is submitted that Mr Purvinas' alleged suspected contravention of clause 47 of the Agreement is that Qantas had failed to consult with the applicant in relation to unidentified workplace changes unknown to Mr Purvinas which must have occurred between 2014 and 2016, to justify or explain why the surplus figure of 46.5 had not reduced further, in light of what Mr Purvinas regarded as more work "in" and less LAMEs to do it.[18]

16. It did not start this way. Initially, Mr Purvinas contended that the announcement of the surplus itself, was subject to consultation which had not occurred.[19] On 5 January 2016, the day the surplus was announced, Mr Purvinas alleged a breach of clause 47 (consultation procedures) by seeking to discuss leave burn after the number had been struck and staff advised of the program to burn that number accordingly.[20] On 6 January 2016, he articulated the breach in the same terms.[21] Such a contention was misconceived: consultation only arises once a definite decision to introduce major changes has been made.[22]

17. By 1 April 2016 however, Mr Purvinas had changed the allegation to a hybrid of this initial allegation and the one identified in paragraph 15 above. He refers to increases and decreases in workload (that Qantas had asserted to justify its surplus figure) and that employees and the ALAEA "*were not consulted in relation*

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18 PN69.26-69.39; PN77.25-77.30.

19 Annexure "SRP4" to the 1st Purvinas Affidavit (page 144); Annexure "SRP5" to the 1st Purvinas Affidavit (page 146-7).

20 Annexure "SRP4" to the 1st Purvinas Affidavit (page 144).

21 Annexure "SRP5" to the 1st Purvinas Affidavit (page 146.5).

22 Clause 47.1.1 of the Agreement.

to any of the increases or purported decreases before the company declared the implementation of the 2016 program".

18. Mr Purvinas' 13 May 2016 letter did not advance matters.[23] Qantas then ask (on 27 May 2016)[24] for details of that bare conclusory allegation and Mr Purvinas responds on 1 June 2016.[25] This letter clearly aligns with paragraph 15 above. The bottom of page 177 identifies a complaint about alleged increases in work for LAMEs, but the surplus staying the same. The consultation concerns are then set out. Roman numeral (i) has nothing to do with any consultation breach and neither does roman numeral (iv) (other than asserting a supposed consequence of it). Roman numeral (iii) is a mere statement of fact: if leave balances are exhausted through leave burn and there remains a surplus, redundancies may follow.

19. Roman numeral (ii) ties in with the complaint about work increases. That is, it was not clear to Mr Purvinas (lack of visibility) how "new work" had been sourced, but that Qantas had not adjusted (down) the alleged surplus. The concern identified is that something else must have occurred, of which Mr Purvinas had no visibility, to maintain the surplus at 46.5 despite new work coming in and other work increases.

20. The Entry Notice itself ties directly into this same allegation. This is where Mr Purvinas says he gives adequate particulars of his suspected contravention of clause 47. The first two bullets of the "particulars" allege new work "in" since 2014 and some LAMEs "out" (in terms of their capacity to acquit the work) since 2014.[26]

21. The fourth bullet identifies that because Qantas asserts that "*organisational*

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23 Annexure "SRP11" to the 1st Purvinas Affidavit (page 174 (point 14)).

24 Annexure "SRP12" to the 1st Purvinas Affidavit (page 175.6).

25 Annexure "SRP13" to the 1st Purvinas Affidavit (page 177-8).

26 PN69.26-69.39; PN77.25-77.30.

changes, about which the [ALAEA] has not been consulted, have resulted in there being no reduction in surplus employees", a failure to comply with clause 47 is suspected. Read in context, this is a reference to unidentified and unknown changes made by Qantas which have "offset" the alleged increases in workload/decrease in LAME availability. The alleged increases (identified and explained previously by Mr Purvinas) should have resulted in a reduction in the surplus, but some unidentified "organisational changes" have resulted in there being no such reduction.

22. This was exactly how Qantas read the allegation: that Qantas had not consulted in relation to each and every change to the surplus.[27]

23. Mr Purvinas' after-the-event attempts to resile from this articulation or its consequences, should be seen for what they are and rejected.[28]

24. It should be noted that there is no evidence in any of the documents, or anywhere else, that Mr Purvinas suspected a contravention of clause 47, manifested by a failure to provide any particular documents as requested,[29] or that the declaration of the surplus itself was a major change which triggered an obligation to consult thereafter.[30]

What was the alleged suspected contravention of clause 60?

25. This is easier. The alleged contravention of clause 60 is that in the absence of a surplus (or adequate surplus), a leave burn program could not be operated and to do so (through directions to LAMEs to take leave) is a contravention of clause

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27 Annexure "CJT-14" to the Tobin Affidavit (page 62.7).

28 PN78.1-78.3; PN79.36-80.17; PN80.35-80.47. Prior to the surplus being declared, there had never been any complaint by Mr Purvinas about an obligation to consult over the workload increases he placed reliance on, nor any complaint about a failure to consult over those matters.

29 Cf PN59.14-59.19.

30 Cf PN43.7-43.8. To the contrary, see PN79.19-80.17.

60.[31]

The reasonableness of the suspected contravention of clause 47?

26. Having regard to the actual suspected contravention disclosed on the evidence and the terms and operation of clause 47 of the Agreement, any suspicion held by Mr Purvinas to the effect articulated was demonstrably unreasonable.

27. It was not reasonable to suspect that clause 47 could be engaged for a series of unknown work changes. Absent specific knowledge of the actual change, it could not reasonably be suspected that it was a "major change",[32] that it was "introduced" by Qantas (rather than the consequence of actions by others), that it was a change of the requisite type (production, program, organisation, structure or technology) or that it was likely to have significant effects as required.[33]

28. Further still, the prospect of any such change of which Mr Purvinas was not directly aware of, being of a kind to trigger a clause 47 obligation is extremely slim. If a work change was major or significant, Mr Purvinas was likely to have heard about it.[34] The failure to consult related to matters he had not heard about.

29. In addition, Mr Purvinas did not take any sufficient steps to "stress test" his suspicion, even in the face of assertions from Qantas that he had not explained himself. He had not given any sufficient or reasonable consideration to the operation of the clause[35] nor the entirely reasonable questions from Qantas about

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31 PN59.21-59.25; PN65.8-65.34; see also footnote 17 above.

32 *Port Kembla Coal Terminal Ltd v Construction, Forestry, Mining and Energy Union* [2016] FCAFC 99; (2016) 248 FCR 18; *ANMF v BUPA Aged Care Australia Pty Ltd* [2017] FCA 1246 at [22]-[31].

33 It should be noted that there is no sufficient evidence before the Court enabling it to conclude that any other work changes that Mr Purvinas might want to rely upon, including those of which he knew, triggered an obligation to consult such that it could assess the reasonableness of any view held about that. The Court only has the vaguest, generalised explanations of these matters. The applicant has failed in its burden in this respect in any event (section 481(3) of the FW Act).

34 PN16.32-16.44; PN17.8-17.10.

35 PN80.25-80.33; PN81.1-81.18.

what is the change and what is the failure to consult about it.[36]

30. In any event, the Court knows nothing sufficient about any changes of any type, to enable it to assess the likelihood of such changes triggering a clause 47 obligation, so as to enable the Court to assess the reasonableness of any alleged suspected contravention about that. The burden is on the applicant on this issue (section 481(3) of the FW Act) and it will have failed in these circumstances in any event.

The reasonableness of the suspected contravention of clause 60?

31. No matter which way it is expressed, this suspected contravention relies on the proposition that the "surplus" figure for the purposes of clause 60 of the Agreement is capable of being determined and proven by someone other than Qantas, through proof in Court.[37] The respondents challenge the reasonableness of this suspected contravention at four, related and intertwining levels:

(a) it is unreasonable to regard a six monthly, estimated "surplus" for the purposes of clause 60 of the Agreement as capable of being proven externally and independently (by someone other than Qantas), such that the foundational premise for the suspected contravention could never be made good;

(b) relatedly, it was unreasonable for someone in Mr Purvinas' position to form the view that the surplus could be calculated and determined (as in a maths equation), because of the various matters associated with the business and the concept of the surplus, which he was himself aware of;

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[36] See the quotes in paragraph 7 above.

[37] Or to borrow the Court's terminology, "challengeable" or "able to be challenged": PN60.9-60.21.

(c) assuming (on the contrary) that the "surplus" could be calculated and proven (or that it was reasonable to hold that view), the chain of reasoning employed by Mr Purvinas to give rise to his alleged suspicion, was so fundamentally flawed that any reasonable person in his position would not have reached the conclusion he did; and

(d) in any event, assuming that a surplus could be calculated externally and identified as a figure less than what Qantas determined (and the basis upon which the leave burn program was predicated),[38] directions to take leave in these circumstances does not reasonably arguably give rise to a contravention of clause 60 of the Agreement, such that a suspicion that it did was not reasonable.

32. As to subparagraph (a) (and putting aside irrelevant hypotheticals),[39] only one person can decide how much LAME work Qantas will perform, when it will perform it, where it will perform it, how quickly it wants it done and by reference (at least in part) to these criteria, how many LAMEs it wants or chooses to have to perform it. That is Qantas. These foundational propositions cannot be gainsaid as a matter of logic and reality. Mr Purvinas essentially accepted all of them,[40] although he would not accept the logical consequence of those acceptances.[41]

33. Once Qantas says that over the next 6 months it plans to run its business in a particular way and have sufficient LAME work for "X - 46.5 LAMEs" (where X is the current LAME headcount) such that it has a surplus of 46.5 heads to requirements,

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38 Whether it is "less than" in the sense of say 30 instead of 46.5, or "less than" as in zero, makes no difference.

39 Such as activities or changes that breach some regulatory, industrial or other legal obligation. There is no suggestion that any decisions made by Qantas along the way to determining the "surplus" are of this type.

40 PN13.22-14.27; PN15.6-15.23; PN23.14-23.42; PN33.7-35.41.

41 PN21.38-21.43.

that determination or declaration is unchallengeable and is only as accurate or correct as Qantas determines it to be. It could be a horrendously bad series of decisions, but they are just that: bad, not wrong. This Court (or the Fair Work Commission) is capable of telling Qantas what it "can or cannot do", not what it "should or should not do".

34. Trying to find the "one true surplus" is an arid and flawed exercise. The best it could achieve was to show that the documents did not support the conclusion. Where does one go from there? Theoretically, if Qantas ran a model and came up with a surplus figure, from the model, of 30, it could nevertheless decide it will run its business with "X – 46.5" and deal with the operational and commercial consequences of that decision. All the models and plans and documents in the world will only establish one way of reaching one conclusion. It will be no better, worse, correct or incorrect than whatever Qantas otherwise decides. It is no surprise therefore that the definition of redundancy in clause 55.11.2 of the Agreement, mimics these propositions.[42]

35. Accordingly, no reasonable person could have held a suspicion of the kind asserted by Mr Purvinas.

36. As to subparagraph (b), this in essence follows from the references in footnote 40 above. He was aware of and accepted the accuracy and force of the premises which make good the contention about the "surplus" figure. He accepted, for example, that the leave burn surplus was the precursor to (or alternative for)

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[42] The cross-examination of Messrs Tobin and Saunders about the concluding words of this definition is irrelevant at two levels. First, there is no suggestion (nor evidence) that Mr Purvinas ever turned his mind to this definition and rationalised his suspected contravention of clause 60 by reference to it. Second, it adds nothing at the constructional level. Qantas is entirely free to determine that the quantity of a particular LAMEs work has diminished such that they are surplus. The reduction in work is a consequence of Qantas's own decisions and prerogatives. It is equally not a proposition that can be tested in Court.

compulsory redundancies based on surplus.[43] By then accepting that the only person who can determine how many LAMEs to make redundant (as surplus to requirements) is Qantas,[44] he logically must have realised (or at least a reasonable person would have realised) that the same logic would have to apply to the leave burn surplus. His attempted denials of this logical conclusion in cross-examination were nonsensical.[45]

37. In addition, it was apparent to Mr Purvinas that the logical endpoint of the premises relied upon, was what the respondents contend. He accepted that if a "true" surplus was not capable of being identified, then there was no way to identify a breach of the Agreement.[46] Such an obvious conundrum in his suspicion was not even considered before seeking to enter Qantas's premises.[47]

38. As to subparagraph (c), no reasonable person in Mr Purvinas' position could have reasonably suspected a contravention of clause 60 on the basis of a lower than 46.5 (or non-existent) "actual surplus", because the logic employed to get where Mr Purvinas says he got to, and the evidence of what he knew and did not know, gave him no basis at all (let alone a reasonable basis) for suspecting that the Qantas figure of 46.5 was too high.

39. Firstly, was the knowledge gap. Mr Purvinas is only in Sydney part-time and rarely (if ever) sees LAMEs working.[48] Everything he relies upon is hearsay from ALAEA members. He accepts that Qantas (and its managers) know far more about the business and are far more capable of making assessments of work requirements

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43 PN15.25-15.29; PN38.21-38.41.

44 PN13.22-14.27.

45 PN39.27-39.35.

46 PN31.34.31.40. Somewhat extraordinarily, he attempted to walk away from this evidence shortly thereafter: PN32.33-33.5

47 PN31.38-31.42.

48 PN10.10-10.34.

than he is.[49]

40. Second, he knew almost nothing of the many, many variables which were relevant to assessing LAME work requirements and the capacity of LAMEs to acquit that work.[50] He was almost completely in the dark on the vast majority of the factors that might bear upon any "surplus" (and which he accepted would all change the calculations and surplus figures),[51] but nevertheless thought he could decide his own surplus figure based on vague estimates[52] derived from the snippets of information he did have (second-hand). No reasonable person would take a similar view.

41. The Panasonic example was a case in point. In the circumstances, the rudimentary "20 for 20" calculation process[53] was devoid of any logic or merit and unreasonable.

42. Third, he undertook this calculation process (as the foundation for his suspicion) based on a set of figures and materials from 2014, "frozen in time", absent any knowledge of any of the many potential changes in the business or decisional changes made by management in a national air carrier between 2014-2016, bearing upon any assessment of the "surplus".[54]

43. Fourth, he based it on a calculation methodology of which he was aware of from 2014, simply because that was done then, without any idea as to whether it had been changed and recognising that if it had of changed, the numbers (for the

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49 PN20.35-20.36; PN29.14-29.18.

50 PN18.18-20.25. See generally PN20-27.

51 PN22.1-22.20; PN25.16-26.39; PN27.19-27.44; PN 31.1-31.12.

52 PN18.28-18.32; PN24.1-24.41.

53 PN19.26-20.25.

54 PN24.1-26.24; PN27.12-27.44.

surplus) would be all different.[55]

44. Fifth, the methodology and surplus figure from 2014 upon which Mr Purvinas based his subsequent calculations (which founded his alleged suspicion), was to his mind incorrect in the first place.[56] It was not explained how a fundamentally flawed calculation process, based on an incorrect starting figure and using an incorrect methodology, was going to yield a correct ending figure which Mr Purvinas could compare to Qantas's figure of 46.5 and then allege no (or no adequate) surplus.[57] What was explained was even more unreasonable: Mr Purvinas just decided to pick and choose which pieces of information or methodology he would rely upon/use and jettisoned the rest.[58] The suggestion that this whole approach was genuine is almost impossible to accept, let alone reasonable.

45. Sixth (and relatedly), Mr Purvinas accepted that there was potentially more than one way to calculate a "true surplus figure" and that Qantas's method could be correct and that his could also be correct.[59] When asked how if both methods are correct but nevertheless may produce different figures, he essentially conceded this part of the case. He said that he did not know if there was a correct answer and that of describing a surplus figure as "correct" or "not correct" (the fundamental premise for his entire suspicion),[60] "*it's not the type of matter that you would describe in that manner*".[61] Despite that, he was describing Qantas's figure as incorrect and inaccurate[62] and when asked whether this meant there were two

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55 PN28.1-28.13.
56 PN28.15-28.16.
57 See PN28.37-28.42.
58 PN28.15-29.21.
59 PN29.23-29.30.
60 PN31.22-31.40.
61 PN29.32.29.37.
62 PN29.39-29.41.

"truly correct" figures, he said that there was another figure (presumably his figure) that was more applicable and more correct.[63]

46. Mr Purvinas' asserted suspicions regarding clause 60 had no semblance of reasonableness to them.

47. Finally as for subparagraph (d), a direction to take leave, even absent a surplus justifying the direction, breaches no obligation in clause 60 of the Agreement. There is nothing in the language of clause 60 which prohibits directions in this circumstance. Mr Purvinas accepted this and said it would need to be implied.[64]

48. When clause 60 and its purpose is considered in the legislative context, it is clear that it is facilitative: it exists to give legal foundation to a direction from an employer to an employee to take leave, even at a time not agreed by the employee.[65] Otherwise, such a direction would not be enforceable by the employer and could be ignored by an employee.[66]

49. Clause 60 of the Agreement permits and gives force to directions which otherwise would have none. If clause 60 does not justify the directions, the directions are not given in breach of clause 60 of the Agreement. The directions are merely not cloaked with the authority of clause 60 and section 93(3) of the FW Act, such that the position under section 88(1) of the FW Act remains: the direction need not be complied with.

50. For all of these reasons, Mr Purvinas' alleged suspicion of a contravention of clause 60 was not reasonable. Such a conclusion disposes of the entirety of the originating application.

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63 PN29.43-29.46.

64 PN84.1-84.9.

65 This is the import of section 93(3) of the FW Act.

66 See section 88(1) of the FW Act.

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

51. In addition to what is submitted at paragraphs 12-15 of the ROS, the respondents also submit as follows.

52. The assessment of whether the powers are exercised for the requisite purpose is "objective".[67] That is, it matters not whether Mr Purvinas believed he was exercising the powers for that purpose. The question is whether he was in fact so exercising those powers.

53. The inquiry moves beyond any reasonable suspicion held by the permit holder (and whether documents are directly relevant to that suspicion) and looks at the actual facts and circumstances: objectively, are the documents required directly relevant to any contravention 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 the Agreement]*"?[68]

54. The reason for this limitation is correctly explained by Gray J in *Curran v Thomas Borthwicks & Sons Ltd*[69] and applies aptly to the facts of this case: if it were otherwise, a permit holder with a reasonable suspicion (which suspicion nevertheless turned out to be completely wrong) would be entitled to lawfully demand access to and copy documents they otherwise have no business seeing. Further, an occupier could deny them access on completely correct legal grounds,[70] yet still be held to have contravened section 482(3) and be liable to a civil penalty.

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67 *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.

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

69 Ibid.

70 Because there was no contravention to be suspected, reasonably or otherwise.

55. The applicant must show, objectively, that inspecting the required documents said to be directly relevant to a contravention, would in fact assist in investigating that contravention.[71] Relevantly, if there is no actual contravention to investigate (because of an honest but mistaken belief as to a contravention by the permit holder), the purpose fails. The purpose may reside subjectively, but not objectively.

56. Here, there is and was no prospect of Qantas ever being held liable to a contravention of either clauses 47 or 60 of the Agreement (or any "terms" within them), for the reasons set out above.

57. Even if Mr Purvinas had a reasonable suspicion of a contravention 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

58. In addition to what is submitted at paragraphs 16-24 of the ROS, the respondents also submit as follows.

59. 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.

60. Section 482(3) of the FW Act is located in Subdivision A of Division 2 of Part 3-4. Section 486 of the FW Act provides that Subdivision A does not authorise a permit

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[71] A reasonable prospect that the documents will constitute some evidence of a contravention: *Curran v Thomas Borthwicks & Sons Ltd* [1990] FCA 67; (1990) 26 FCR 241 at 253.

holder to enter premises or "*exercise any other right*",[72] if he or she contravenes Subdivision C. Within Subdivision C is section 487, which provides that an "entry notice" must be given before entry (subsection (1)) and that it must comply with section 518 (subsection (2)). Section 518 of the FW Act sets out various requirements for an entry notice, one of which (relevantly) is that it must "*specify the particulars of the suspected contravention*" (section 518(2)(b)).

61. 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)).[73] 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.[74]

62. There is no relevant authority of which the respondents are aware as to the proper construction of section 518(2)(b) of the FW Act. It has one relevant predecessor, being section 749(2)(c) of the WR (WC) Act. The Explanatory Memorandum to that provision included the following:

> "*The requirement to specify particulars means that specific details of the alleged breach must be provided beyond merely identifying what instrument or areas of the Bill are alleged to have been breached. The details should be sufficiently specific to enable the employer to identify which particular parts of the business or categories of employees are affected by the alleged breach.*"[75]

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72 Including relevantly, that in section 482(1)(c) of the FW Act.

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

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

75 Paragraph 2466 of the Explanatory Memorandum to the *Workplace Relations Amendment (Work Choices) Bill 2005*. The Explanatory Memorandum to the *Fair Work Bill 2008* does not advance matters.

63. Some guidance may be taken from the notion of "particulars" in pleadings, which essentially limit the generality of allegations of material fact to ensure that trials are conducted fairly, openly and without surprises.[76] The degree of particularity required in an entry notice might, like pleadings, vary with the circumstances of the case.[77]

64. The apparent purpose of section 518(2)(b) is to ensure that an occupier in receipt of an entry notice can determine with "reasonable clarity" whether the entry is authorised and importantly, can properly determine whether requirements imposed under section 482(1)(c) for example, are properly authorised such that the occupier can clearly understand whether they are acting lawfully or unlawfully in responding to such a requirement.[78]

65. 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' allegations of fact,[79] rather than how those allegations of fact amounted to, or could possibly/arguably amount to, a contravention of the Agreement.

66. As to the first deficiency, see paragraphs 19-20 of the ROS.

67. 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

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76 See for example, *Queensland v Pioneer Concrete (Qld) Pty Ltd* [1999] FCA 499; (1999) ATPR 41-691 at [12].

77 *Power Infrastructure Pty Ltd v Downer EDI Engineering Power Pty Ltd (No 3)* [2011] FCA 539 at [10]; *Police & Nurses Credit Society Ltd v Burgess Rawson (WA) Pty Ltd* [2006] FCA 1395 at [17].

78 See by parity of reasoning, *MEAA v Advertiser Newspapers Ltd* [1995] IRCA 69; (1994) 59 IR 23 at 25.

79 PN69.44-70.8.

Agreement. The so-called "particulars" are contained in four bullet points, the first three dealing with clause 60 (at least most directly) and the fourth dealing with clause 47.[80]

68. Dealing with clause 47 first, the best one can do from the Entry Notice is discern that Qantas has allegedly made unidentified "organisational changes" which have resulted in there being "no reduction" in surplus employees, absent consultation. The reduction in surplus employees must be a reference to Mr Purvinas' allegations (including as in the preceding bullet points) that the "surplus" should have reduced for various reasons. That is, the Entry Notice is alleging that the unidentified "organisational changes" must have decreased work demand for LAMEs[81] sufficiently to offset alleged increases in work identified by Mr Purvinas.

69. As noted above and under cross-examination, Mr Purvinas conveniently attempted to reframe the alleged suspected contravention of clause 47, under pressure to explain how any contravention arose.[82] It should not be accepted but if it were, it adds nothing and if anything, just serves to add to the vagueness and uncertainty surrounding this alleged contravention. If Mr Purvinas' evidence is to be accepted, Qantas has prepared its case on a misunderstanding of the suspected contravention even still. Irrespective of the argument now put by the applicant, the purpose of the "particulars" has not been met.

70. 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. No explanation or

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80 Mr Purvinas attempted to suggest (after the event of course) that the first and second bullets related to clause 47 as well: PN69.23-69.24; PN77.25-77.41. Whether or not that be so, it does not advance his argument about adequate particulars.

81 Licensed Aircraft Maintenance Engineers.

82 PN78.1-78.3; PN79.19-80.17; PN80.35-80.47.

particularisation is given of how any such unidentified changes are "major" or why that is so.[83] It is these types of matters which Qantas requested further information about on 27 May 2016.[84] The only relevant response was on 1 June 2016[85] and it added nothing.

71. 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).

72. Consultation is about the "major changes" introduced, the effects of the changes and measures to avert or mitigate these effects (clause 47.2.1). Relevant information required is about the changes including their nature, expected effects and related matters (clause 47.2.3). Absent at the least, clear identification of the alleged "organisational changes", how they were "major" and whom they had "significant effects" on, Qantas could never know whether a document requested was "directly relevant" to its alleged consultation obligations and hence, any suspected contravention of clause 47 of the Agreement. At the very least, the particular change said to have triggered the obligation to consult would need to be particularised.

73. Qantas could also never know whether it was acting lawfully or otherwise in refusing any such requirement for such documents sought to be imposed. The purpose of section 518(2)(b) and the Entry Notice was frustrated.

74. Turning to clause 60 of the Agreement, one cannot discern how the mere factual

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83 See for example, *Port Kembla Coal Terminal Ltd v Construction, Forestry, Mining and Energy Union* [2016] FCAFC 99; (2016) 248 FCR 18; *ANMF v BUPA Aged Care Australia Pty Ltd* [2017] FCA 1246 at [22]-[31].

84 Annexure "SRP12" to the 1st Purvinas Affidavit (page 175).

85 Annexure "SRP13" to the 1st Purvinas Affidavit (page 177-8).

allegations made[86] in the first three bullet points of the Entry Notice amount to any contravention of clause 60, what that contravention is and how it arises. The first two allege new work "in" since 2014 and some LAMEs "out" (in terms of their capacity to acquit the work) since 2014.[87]

75. The third bullet point relies upon the first two ("these factors") and information from 2014 (being the previous consultation). Based on more work and less people to acquit it, Mr Purvinas alleges that a direction to take leave over and above a particular "surplus" level is a contravention of clause 60 of the Agreement.[88] Of necessity, this means that the work changes had allegedly decreased or eliminated the surplus.

76. No details or explanation of how or why a direction to take leave absent a surplus amounted to a contravention of clause 60 were ever provided by Mr Purvinas in correspondence (despite several requests)[89] or on 7 June 2016,[90] and no details or particulars are set out in the Entry Notice. What obligation under clause 60 of the Agreement is Qantas contravening by directing leave over a specified "surplus" level and how does that contravention arise?

77. None of this was ever explained or particularised.[91] In the words of Mr Saunders, Mr Purvinas never drew or articulated any "link" between the factual allegations made and any obligations in clause 60 of the Agreement.[92] The best Mr Purvinas

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86 PN69.44-70.8.

87 PN69.26-69.39; PN77.25-77.30.

88 PN70.10-70.23.

89 Annexure "SRP12" to the 1st Purvinas Affidavit (page 175-6); Annexure "CJT-14" to the Tobin Affidavit (page 62-3). See also paragraph 38 of the Saunders Affidavit.

90 Paragraphs 53 and 56 of the Saunders Affidavit.

91 Nor is it explained now. See the bland, conclusory assertions in paragraph 11 of the Affidavit of Stephen Ross Purvinas affirmed on 20 December 2017 (**2nd Purvinas Affidavit**).

92 PN114.7-114.16.

could do, well after the event, was to refer to an implied obligation.[93] No doubt Mr Purvinas' allegations of fact were particularised, but these allegations do not nearly translate into any reasonably suspected contravention of clause 60 of the Agreement, having regard to the construction issues set out above.

78. Absent these details, again, Qantas was left in the position that it was simply not possible to determine whether any requested documents were directly relevant to the suspected contravention of clause 60 and could not determine whether it was acting lawfully or otherwise in refusing any such request.[94]

79. Whatever case or spin might be sought to be put on these things at the hearing or in closing submissions, does not assist in demonstrating a reasonable suspicion at the time or an adequately particularised Entry Notice at the time.

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

Issue 6(d): requisite declaration

81. In addition to what is submitted at paragraphs 25-28 of the ROS, the respondents also submit as follows.

82. Following on from paragraph 26 of the ROS, the Entry Notice here is merely formulaic and does not satisfy the requirements of section 518(2)(c). Mr Purvinas declares that the applicant is entitled to represent the interests of "a member" who performs work at the premises (*i.e.* some specific person is apparently in mind), but then goes on to declare that the suspected contravention or contraventions

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93 PN83.39-84.1.

94 Messrs Tobin and Saunders say this very thing (paragraphs 76(e) and 79 of the Tobin Affidavit; paragraphs 49-50 and 68 of the Saunders Affidavit), as does the other Qantas correspondence at the time (Annexure "SRP12" to the 1st Purvinas Affidavit (page 175-6); Annexure "CJT-14" to the Tobin Affidavit (page 62-3)).

"*relate to or affect ALAEA members*". 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. It could be any ALAEA members, employed by Qantas or otherwise. It could be some ALAEA members employed by Qantas, or all of them. The non-specific declaration that the contraventions relate to or affect "*ALAEA members*" may or may not encapsulate the specific member in question. 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.

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

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

84. In addition to what is submitted at paragraphs 29-33 of the ROS, the respondents also submit as follows.

85. 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.[95]

86. Given the nature of the alleged "requirements", a question arises as to whether a "class" requirement of this kind is 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.

87. The surrounding context to section 482(1)(c) points strongly to a construction of that obligation which extends only to a record or document in the singular, rather

[95] Paragraphs 86-87 of, and Annexure "SRP16" to, the 1st 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).

than the plural.[96] 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.[97]

88. More relevantly though, the various tests or attributes that the "document" must have/not have in order for the requirement to be validly imposed, strongly suggest that each requirement must relate to a single document, enabling those assessments to be properly carried out on a case by case basis.

89. The particular record/document in each case has to be "directly relevant" in order to be inspected/copied. This is necessarily an individualised document inquiry.[98] Even with a "class" of documents, the test has to be individually asked *vis a vis* each document in the class: the test is not whether the "documents" are directly relevant (as a category or class), but whether each document (within the category or class) is directly relevant. The same analysis follows for "*a non-member record or document*". Inevitably, the assessment must be undertaken for each individual document. The same can be said of the assessments under sections 482(1A), 482(2A) and those in section 483 of the FW Act.

90. The limitation to the "singular", as suggested by the language and surrounding context, also avoids the capricious and unfair consequences of the alternative construction. For example, say a permit holder requests a class of documents with 100 individual documents in it. Does the occupier have to, in response to the "requirement", then and there, locate, examine and assess every single one of

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96 For the reasons given, 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.

97 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 WR (WC) Act (any records).

98 Note also section 518(2)(c) of the FW Act. The suspected contravention is an individual member-based exercise, suggesting that it was intended that documents related to a suspected contravention relating to that individual should be separately identified individually.

these 100 documents for direct relevance, non-member record status and compliance with other laws, and then allow inspection of only those that satisfy each of these criteria? When will the delay necessarily inherent in this exercise turn into an appreciable delay such as to amount to a hindrance/obstruction? Will trials be fought (and penalties sought) over whether the occupier should have undertaken the searches and assessments more quickly? What if the occupier gets its assessment wrong, gives over 23 documents and the Court later decides that a 24th document out of the 100 required for inspection (but not produced), was "directly relevant"? Further, how is the occupier to know whether documents in classes are "a non-member record or document" or not, when most employers do not know which of its employees are members of unions or not?

91. Finally, section 483AA of the FW Act suggests that the singular requirement is referred to in section 482, and that access to categories or classes of "documents" is regulated through a much narrower, Fair Work Commission assessed process (for "specified" records or documents).[99]

92. For these reasons, 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.

93. It follows that of the 22 requirements said to have been made and contravened,[100] only requirements 3 (and 14)[101] and 4 (and 15)[102] were validly made on this particular basis, such that only those requirements could be contravened under section 482(3) (and Mr Purvinas hindered or obstructed by reference to them).

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99 Appreciating of course that this provision relates to access to non-member records.

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

101 A particular memo.

102 A particular email.

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

94. In addition to what is submitted at paragraphs 34-38 of the ROS, the respondents also submit as follows.

95. Following on from paragraph 34 of the ROS, analogy here can be drawn with the differences between standard and non-standard discovery under the *Federal Court Rules 2011*. Standard discovery under Rule 20.14 has its own overarching requirement that documents be "directly relevant". If standard discovery is sought in categories/classes (which is not uncommon), all documents in the category/class still need to satisfy the "directly relevant" test before they are to be produced.[103] Non-standard discovery under Rule 20.15 need not be so limited: it is the class itself which needs to be produced, whether or not each document within it separately met a test of "direct relevance" itself.

96. Section 482(1)(c) of the FW Act operates like standard discovery. 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, for the reasons given in paragraphs 36-38 of the ROS.

97. For these separate reasons, 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"?

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[103] On the assessment of the person obliged to give discovery.

98. In addition to what is submitted at paragraphs 39-42 of the ROS, the respondents also submit as follows.

99. Having regard to the nature of these proceedings and the gravity of the allegations in them, section 140(2) of the *Evidence Act 1995* (Cth) applies.[104] Having regard to these principles, not only can the applicant not establish that every document in the class requirements meet these statutory descriptors, but the applicant cannot establish that any of the documents sought in any class are themselves "directly relevant".

100. The "directly relevant" requirement is new. In the most recent statutory predecessors, the requirement had been tied to "*relevant*" records or documents, as opposed to those that were "*directly relevant*".[105]

101. The concept of "direct relevance" ought be construed consistently with the same phrase in the *Uniform Civil Procedure Rules 1999* (Qld) regarding discovery.[106] It 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".[107] Further, direct relevance is also to be assessed objectively.[108] It is not what Mr Purvinas may have regarded as directly relevant to

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104 *Australian Building and Construction Commissioner v Parker* [2017] FCA 564 at [58]-[59]; *Construction, Forestry, Mining and Energy Union v De Martin & Gasparini Pty Limited (No 2)* [2017] FCA 1046 at [158]-[160].

105 Section 285B(3)(a) of the *Workplace Relations Act 1996* (Cth) ("*relevant to the suspected breach*"); section 748(4) of the WR (WC) Act ("*relevant to the suspected breach*").

106 *CFMEU v BHP Coal Pty Ltd (No 2)* [2011] FCA 1396; (2011) 212 IR 313 at 320-1 [33]-[37].

107 *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*.

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

his suspected contravention,[109] but what was in fact directly relevant to that contravention.

102. 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 the Agreement because the concept of an "objective" surplus which can be "built" (by the applicant or a Court) does not exist.[110] 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 the Agreement in any event,[111] and hence, documents relevant to "building" a surplus are not relevant (or directly relevant) to any suspected contravention.

103. There is a further, more telling and fundamentally fatal defect with the applicant's case on this issue. None of the documents required by Mr Purvinas, in relation to which the Court must make the objective assessment of direct relevance, are before the Court or in evidence. Moreover, there is nothing other than the most tangential, vague and uncertain evidence as to exactly what any of these documents are, what is in them and what they show (or do not show).

104. Almost all of Mr Purvinas' "evidence" as to the documents and what they contain is

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

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

111 Paragraphs 68-74 above.

inadmissible and objected to on that basis.[112] It is all speculative opinion or hearsay, including because Mr Purvinas had not seen any of them. He can give no probative evidence as to their contents.

105. Examples of daily workload sheets (document classes 1 and 2), albeit for a different time period, are in evidence.[113] On their face, documents of that type, assuming that the 2016 documents are in a similar format (an assumption the Court would firstly need to be prepared to draw), are not relevant, let alone directly relevant, to anything. No-one knows what is in them.

106. Mr Tobin's evidence did not relevantly advance the applicant's case in this respect. There was some cross-examination of documents referred to in the letter of 13 May 2016,[114] but not of the documents actually in issue for the purposes of direct relevance, being the required documents.

107. Whilst it is possible that some of the documents cross-examined upon might form part of the Ninth (and Twentieth) Requirements (upon which there is no evidence),[115] the evidence (such as it is) of their contents does not disclose anything useful to the applicant.[116]

108. Further still, there is no evidence anywhere that any of the required documents were used by Qantas in relation to the surplus. The only witness who could have possibly given evidence as to that matter (Mr Tobin), did not know.[117]

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112 See the objections to paragraphs 91(a) and following in Part 2of the Respondents' Objections to the Applicant's Affidavit Material dated 12 February 2018.

113 Annexure "SRP14" to the 1st Purvinas Affidavit.

114 Annexure "SRP11" to the 1st Purvinas Affidavit (pages 170-74). PN96.19-100.1.

115 Paragraphs 43H and 49H of the Second Further Amended Statement of Claim.

116 PN96.28-97.36; PN99.30-99.38.

117 PN100.3-100.10. In truth, this was only a question about the documents in the 13 May 2016 letter. There remains no evidence as to what if any of the required documents were used in any way in relation to the determination of the surplus.

109. As such, the applicant has not proven what any of the required documents are (other than classes 1 and 2) nor what the actual contents of any of them are. The Court could not possibly make a finding of direct relevance in these circumstances, having regard to the appropriate standard. Nor has the applicant proven that a single one of them was used in calculating and determining the surplus. To borrow from the Court: "*If they're not used, they can't be directly relevant.*"[118] The respondents endorse that proposition.

110. Putting these fatal defects aside, even taking the applicant's case at its highest and speculating about the documents and their contents, the individual documents sought by Mr Purvinas, at best, 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 the Agreement, nor any suspected contravention of the Agreement: at best, they may be relevant to proving a fact or issue which itself might be relevant to proving the "suspected contravention".[119]

111. Even on Mr Purvinas' own case, all any particular document would have amounted to was one of potentially many hundred pieces of a broader puzzle (in an effort to create a picture of workflows/levels for LAMEs).[120] They might have sent Mr Purvinas on inquiries in different directions to obtain further information towards building the picture. They may even have assisted Mr Purvinas in establishing whether Qantas's stated surplus figure was consistent with what was disclosed by those documents (or indeed, consistent with the way the surplus was determined

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118 PN99.18.

119 See paragraph 101 above.

120 Paragraphs 88-133 of the Purvinas Affidavit; PN82.6-82.29.

in 2014).[121] But themselves, they were not relevant to anything other than what they showed, which itself was merely part of the (ultimately irrelevant) puzzle.[122] None of them could meet the requirement of being "directly relevant" in that context.

112. There is a further problem in relation to the alleged failure to consult. A failure to consult under clause 47.2.1 would be established by proving an obligation to consult and then a failure to "consult" as required by clause 47.2.1 and a failure to provide relevant information as required by clause 47.2.3. If changes are identified and there was no consultation about them, there are no documents which would assist in proving that allegation one way or another.

113. The only documents which could have any relevance to such an allegation are documents which might show whether the changes were "major changes" with "significant effects", so as to trigger the obligation to consult in the first place. None of the required documents, even assuming what they may or may not contain, bear any relevance to that question.

114. For these reasons, there is no evidence that a single required document was, objectively, directly relevant to any suspected contravention of clauses 47 or 60 of the Agreement. The application fails on this basis alone also.

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

115. In addition to what is submitted at paragraphs 43-46 of the ROS, the respondents

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121 Mr Purvinas places much on the fact that the 2014 surplus figure determined by Qantas was explained/calculated (by Qantas) in a particular manner, thereby suggesting that this was the way (and the only way) in which it could ever be done again: paragraphs 3 and 10 of the 2nd Purvinas Affidavit. The flaw in the logic (and the lack of a connection to any obligation in the Agreement) is obvious.

122 In this sense, they were not a piece of circumstantial evidence which can be patched together with other such evidence to build an inferential case. They are themselves proof of what they show, which is exactly what Mr Purvinas sought them for: paragraphs 88-133 of the 1st Purvinas Affidavit.

also submit as follows.

116. The prohibition in section 502(1) of the FW Act is against "intentionally" hindering or obstructing the permit holder. Prior to 1996, authorised officials of unions could enter premises and inspect documents for the purpose of ensuring observance of an award.[123] It was an offence to "hinder or obstruct" such a person exercising those powers.[124]

117. It was decided in 1991 that this offence did not require any specific *mens rea*, nor was it an offence of strict liability. Rather, *mens rea* was presumed unless the defendant introduced evidence of an honest and reasonable belief of innocence, which belief then needed to be negatived by the prosecutor beyond reasonable doubt.[125]

118. Presumably as a legislative response,[126] the successor provision to section 306(a) of the *Industrial Relations Act 1988* (Cth) was amended to introduce a specific mental element: "intention".[127]

119. This element of intention requires that the alleged contravener subjectively intend to hinder or obstruct the permit holders.[128] The respondents refer to and repeat paragraphs 43-44 of the ROS.

120. This carries with it, as an essential element, knowledge that the permit holders had rights under the FW Act to do what it is said they have been hindered or

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123 Section 286(1) of the *Industrial Relations Act 1988* (Cth).

124 Section 306(a) of the *Industrial Relations Act 1988* (Cth).

125 *AFAP v Australian Airlines Ltd* [1991] FCA 62; (1991) 28 FCR 360 at 374-6.

126 Although not the subject of any explanatory materials.

127 Section 285E(4) of the *Workplace Relations Act 1996* (Cth). This was no longer an offence, but was rather subject to a civil penalty (which remains the case with section 502(1) of the FW Act): section 285F(2) of the *Workplace Relations Act 1996* (Cth).

128 *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].

obstructed from doing (that is, that they were "*exercising rights in accordance with*" Part 3-4). That is an ingredient which must exist, in order for a contravention to be established.[129] 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).[130]

121. 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.[131]

122. On the facts here, it cannot be shown that any respondent had any relevant intention to hinder of 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.[132] 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?

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129 *He Kaw Teh v The Queen* [1985] HCA 43; (1985) 157 CLR 523 at 572, citing *R v Turnbull* (1943) 44 SR (NSW) 108 at 109; *Ostrowski v Palmer* [2004] HCA 30; (2004) 218 CLR 493 at 503 [10] and 511-12 [41].

130 *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.

131 *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]. If it were otherwise, the addition of the word "intention" would have worked detrimentally to the alleged contravener (whereby the defence was previously available and is now not).

132 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.

123. The respondents refer to and rely upon paragraphs 47-52 of the ROS. Further to the concluding sentence of paragraph 50 of the ROS, it is noted that nothing to the contrary was suggested to either of them in cross-examination.

Conclusion

124. The allegations made by the applicant in these proceedings are, for the above reasons, 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.[133]

125. The originating application should be dismissed in its entirety.[134]

Matthew Follett

Date: 14 February 2018

Signed by Rohan Doyle
Herbert Smith Freehills
Lawyer for the Respondents

[133] For the reasons given in the ROS, they were not so "involved in" any contraventions which may be established as against Qantas in any event.

[134] 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.