

# FEDERAL COURT OF AUSTRALIA

## Central Queensland Services Pty Ltd v Construction, Forestry, Mining and Energy Union [2017] FCAFC 43

Review of: *Construction, Forestry, Mining and Energy Union v Central Queensland Services Pty Ltd T/A BHP Billiton Mitsubishi Alliance* [2017] FWCFB 288

File numbers: QUD 146 of 2016  
QUD 194 of 2016

Judges: **JESSUP, TRACEY AND REEVES JJ**

Date of judgment: 10 March 2017

Catchwords: **INDUSTRIAL LAW** – construction of s 492(3) of the *Fair Work Act 2009* (Cth) – where there was no agreed location for interviews or discussions by permit holders under s 492(1) – whether “purpose” of the “default location” in s 492(3)(b) requires the single or sole purpose of the room or area to be taking meal or other breaks – whether “purpose” in s 492(3)(b) requires a determination of the occupier’s subjective intentions in providing the room or area – consideration of whether the purposes of right of entry provisions in Part 3-4 of the Act include preventing the interference of the performance of work

**REMEDIES** – whether certiorari is available to quash a decision by the Full Bench of the Commission where no orders were made

Legislation: *Fair Work Act 2009* (Cth) ss 484, 490, 492, 492A, 500

Cases cited: *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564  
*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27; [2009] HCA 41  
*Australasian Meat Industry Employees’ Union v Fair Work Australia* (2012) 203 FCR 389  
*Australian Competition and Consumer Commission v Universal Music Australia Pty Ltd* (2001) 115 FCR 442; [2001] FCA 1800  
*Australian Crime Commission v AA Pty Ltd* (2006) 149 FCR 540; [2006] FCAFC 30  
*Bodruddaza v Minister for Immigration and Multicultural*

*Affairs* (2007) 228 CLR 651; [2007] HCA 14  
*Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378, [2012] HCA 56  
*Commissioner of Taxation v Consolidated Media Holdings Ltd (ACN 009 071 167)* (2012) 293 ALR 257; [2012] HCA 55  
*Forster v Jododex Australia Pty Limited* (1972) 127 CLR 421  
*Hayes v Willoughby* [2013] 1 WLR 935; [2013] UKSC 17  
*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28  
*Tamas v Victorian Civil and Administrative Tribunal* (2003) 9 VR 154; [2003] VSCA 113  
*Thiess v Collector of Customs* (2014) 250 CLR 664; [2014] HCA 12  
*Valuer-General v Fivex Pty Ltd* [2015] NSWCA 53  
*Williams v Spautz* (1992) 174 CLR 509

Date of hearing:	16 November 2016
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Division:	Fair Work Division
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Category:	Catchwords
Number of paragraphs:	50
Counsel for the Applicants:	Mr I Neill SC with Mr C Murdoch
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Solicitor for the First Respondent:	Hall Payne Lawyers
Counsel for the Second Respondent:	The Second Respondent filed a submitting notice

## **ORDERS**

**QUD 146 of 2016**

**BETWEEN:**                   **CENTRAL QUEENSLAND SERVICES PTY LTD**  
Applicant

**AND:**                         **CONSTRUCTION, FORESTRY, MINING AND ENERGY**  
**UNION**  
First Respondent

**FAIR WORK COMMISSION**  
Second Respondent

**JUDGES:**                   **JESSUP, TRACEY AND REEVES JJ**

**DATE OF ORDER:**   **10 MARCH 2017**

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

1.       The originating application filed on 19 February 2016 is dismissed.

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

## **ORDERS**

**QUD 194 of 2016**

**BETWEEN:**            **BM ALLIANCE COAL OPERATIONS PTY LTD**  
Applicant

**AND:**                **CONSTRUCTION, FORESTRY, MINING AND ENERGY**  
**UNION**  
First Respondent

**FAIR WORK COMMISSION**  
Second Respondent

**JUDGES:**            **JESSUP, TRACEY AND REEVES JJ**

**DATE OF ORDER:**   **10 MARCH 2017**

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

1.     The originating application filed on 10 March 2016, amended on 23 June 2016, is dismissed.

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

## REASONS FOR JUDGMENT

### JESSUP J:

- 1 I have had the benefit of reading the reasons of Tracey and Reeves JJ in draft. I agree with their Honours' conclusion that the application before the court should be dismissed. My reasons for doing so are as follows.
- 2 To succeed on the application, the applicants need to establish that it was jurisdictional error on the part of the Full Bench to have held that s 492(3)(b) was engaged in the circumstances of the case, notwithstanding that the room or area in question was not provided *only* for the purpose of taking meal or other breaks. They endeavoured to do this by advancing the proposition that the subsection required the room or area to have been provided for the single purpose of taking such breaks.
- 3 The applicants' first submission in this regard was that "the context indicates that 'the' denotes the singular form". Grammatically, the definite article does not exclusively "denote the singular form", but in any event, in my view, the applicants were here setting up a straw man. For the conclusion that the noun "purpose" was in its singular form, they did not need to point to the use of the definite article. The word itself is singular as used in the statute, for the very reason that only one purpose is being referred to: the taking of meal or other breaks.
- 4 The key, in my view, to the construction of para (b) of s 492(3) lies in the connotation of the word "provided". This does not require that the room or area have been constructed, fitted out or cordoned off with a singular use in mind. It refers, rather, to the room or area having been made available for the use or purpose referred to. There is nothing in the paragraph which would disqualify a room or area from meeting that description merely because the room or area also had another purpose. There may, of course, be fact situations in which the use of a room or area for another purpose would make it impossible, or difficult, to conclude that it had been provided for the purpose of taking meal or other breaks, but that would be a different matter altogether – not one of statutory construction.
- 5 The applicants next submitted that the construction of s 492(3)(b) for which they contended was consonant with the purpose and policy of Pt 3-4, concerned as it was with balancing the competing interests of registered organisations, permit holders and employees in facilitating entry, and those of occupiers in controlling their premises. That balance was in part to be achieved by strictly constraining the times at which permit holders could enter premises, their

activities on those premises, and the parts of the premises that they could use. It was said to be a “governing principle” that permit holders could not enter or use premises “in a way that might interfere with the performance of work.”

6 In my view, while this submission invokes a stream of legislative policy that is apparent in Pt 3-4, that policy makes no contribution to the construction of the actual words of s 492(3)(b). To the extent that the subsection deals with the relationship between the uninterrupted performance of work and the activities of a permit holder who has entered the premises in question, it has done so by providing for the interview to be conducted or the discussions to be held in the room or area where at least one of the employees involved ordinarily takes his or her meal or other breaks, being a room or area provided that that purpose. The legislature has also confined the right to hold discussions under s 484 to “mealtimes or other breaks” (s 490(2)), and has prohibited permit holders from intentionally hindering or obstructing any person (s 500). For the court to introduce, as governing the construction of s 492(3)(b), the principle proposed by the applicants, would, in my view, be to attempt to improve upon the system for which the legislature has provided. I do not see, either expressly or by implication, any attempt in s 492(3)(b) to deal with the subject of interference in the performance of work.

7 Both sides in the present case sought to derive comfort from the Explanatory Memorandum that accompanied the Bill that became the *Fair Work Amendment Act 2013* (Cth), by which s 492, in the form in which it was considered in *Australasian Meat Industry Employees’ Union v Fair Work Australia* (2012) 203 FCR 389, was replaced by what are now ss 492 and 492A. In that memorandum, the following appeared:

139. Section 492 deals with the conduct of interviews or discussions in a particular location. This item repeals and replaces existing section 492 of the FW Act. New subsection 492(1) provides that the permit holder must conduct interviews or hold discussions in the rooms or areas of the premises agreed with the occupier of the premises.
140. New subsections 492(2) and (3) provide that if there is no agreement, the default location for interviews and discussions will [sic] any room or area in which one or more of the persons who may be interviewed or participate in the discussions ordinarily take meal or other breaks and is provided by the occupier for that purpose. The requirement means, for example, that a permit holder would not be authorised to hold discussions in a personal office or workspace or a room or location which is not provided for or used for meals or other breaks unless it is agreed.

- 8 In the *Meat Industry* case, it was held that a decision of the Fair Work Commission that the request of the relevant employer that the permit holder hold discussions in the training room, rather than in the lunch room as preferred by the permit holder, was reasonable, did not involve jurisdictional error. It is self-evident that such an outcome was, as a matter of policy, considered unsatisfactory. Whatever other difficulties may arise under the new form of s 492, one thing is clear: in the normal situation of a single-use lunch room, it is that room which is the default location for discussions, in the absence of agreement as between the permit holder and the occupier.
- 9 However, and regrettably, the legislature did not identify what it was about a room or area that met the description in s 492(3) that made it appropriate as a default location. As is often the case, the Explanatory Memorandum is quite unrevealing at the policy level. Neither is there any light thrown on what the legislature considered might be a “room or area” of the kind referred to. The court is, in the circumstances, thrown back on traditional techniques of statutory construction. Once there, the only available conclusion is that the applicants’ case derives support neither from the actual terms of the section nor from the background against which, or the context in which, the new provision was enacted.
- 10 The application should be dismissed.

I certify that the preceding ten (10) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jessup.



Associate:

Dated: 10 March 2017

## REASONS FOR JUDGMENT

### TRACEY AND REEVES JJ:

#### INTRODUCTION

11 Under Part 3-4 of the *Fair Work Act 2009* (Cth) (the FWA), subject to various conditions prescribed therein, a permit holder, as defined, has the right to enter work premises for two broad purposes: to investigate suspected contraventions of the FWA (ss 481 and 483A), or to hold discussions with certain employees (s 484). This matter concerns the construction of s 492, a right of entry provision which prescribes where on the work premises the aforementioned interviews or discussions may be conducted or held. The standard location is fixed by s 492(1). That location is the one agreed between the permit holder and the occupier of the premises. If agreement upon a location is not reached, s 492(3) prescribes, what may be described as, a “default location”. That subsection provides that:

The permit holder may conduct the interview or hold the discussions in any room or area:

- (a) in which one or more of the persons who may be interviewed or participate in the discussions ordinarily take meal or other breaks; and
- (b) that is provided by the occupier for the purpose of taking meal or other breaks.

This “default location” provision applied in this matter. It did so in the following circumstances.

#### FACTUAL CONTEXT

12 BM Alliance Coal Operations Pty Ltd operates the Caval Ridge coal mine in Central Queensland. A separate, but related company, Central Queensland Services Pty Ltd (CQ Services), employs the employees who undertake the coal mining operations at the Caval Ridge mine. For ease of reference, henceforth we will refer to these two entities jointly as BM Alliance.

13 In September 2014, Mr Pierce, an official of the Construction, Forestry, Mining and Energy Union (CFMEU) and a permit holder under the FWA, wished to enter the Caval Ridge mine site under s 484 in order to have discussions there with certain employees who were members of the CFMEU. Having failed to agree with BM Alliance upon a location where he could conduct those discussions, he sought to rely on s 492(3).



14 The particular employees with whom Mr Pierce wished to conduct discussions were the operators of two draglines that were used to conduct the mining operations at the Caval Ridge mine. The draglines in question are large, heavy excavators equipped with a bucket that is used to excavate and remove the layer of waste material that sits above the coal seam. Each is comprised of the following components:

- (1) a tub revolving frame;
- (2) a house;
- (3) a boom and bucket; and
- (4) a cab.

15 The cab of each dragline is approximately 2 metres by 2 metres and contains a seat and the controls for the dragline. The area behind the cab is 4.4 metres long and 1.03 metres wide. On one side of this area there is a work station which contains a computer, one or two chairs, a magnetic whiteboard/pin board, a fridge, some cupboards and a small bench. On the other side there is a “half-kitchenette”, which includes an urn, a small sink, a microwave, cupboards and drawers and a small place next to the sink which the operators use to store safety equipment, such as earplugs.

16 Broadly stated, Mr Pierce and the CFMEU claimed that, since this area behind the cab of each dragline was the area where the employees in question ordinarily took their meal or other breaks, and since BM Alliance provided facilities in that area for that purpose, that area was the default location under s 492(3).

17 In response, BM Alliance claimed that the area in question was not, in fact, provided by it for the purpose of employees taking meal or other breaks. Instead, it claimed it provided a mobile crib facility for employees to take their meal breaks. That facility was usually located approximately two to four kilometres from the two draglines. Thus, it claimed the cab area described above was not the default location within the meaning of s 492(3).

18 Before proceeding to consider the construction of s 492(3), it is first convenient to outline some of the procedural history to this matter.

### **PROCEDURAL HISTORY**

19 This issue first arose in September 2014 when the CFMEU applied to the Fair Work Commission under s 505 of the FWA. That section allows the Commission to deal with a

dispute with respect to a right of entry under Part 3-4. Subsequently the parties agreed to submit the following questions to arbitration by a member of the Commission:

1. Where a right of entry is exercised under section 484 of the Fair Work Act 2009 (the Act), are the specified locations a “room or area” in which discussions may be held for purposes of subsection 492(3) of the Act?

2. In all the circumstances, was Mr Pierce [a permit holder] entitled to hold discussions with employees in the specified locations on 6 September 2014 when exercising a right of entry under section 484 of the Act?

NOTE: The “specified locations” are areas on Draglines 34 and 35 located at BMA’s Caval Ridge Mine between the Operator’s cabins and the operational housing. The “specified locations” are described as “crib rooms” by the CFMEU and “corridors” by BMA.

20 On 2 November 2015, a Deputy President of the Commission answered both of these questions in the negative.

21 On 5 February 2016, a Full Bench of the Commission granted the CFMEU permission to appeal the Deputy President’s decision and, having done so, it then allowed the appeal, it quashed the Deputy President’s decision and, in its place, it substituted an affirmative answer to each of the above questions.

22 By an amended application filed on 23 June 2016, BM Alliance (in its own right – CQ Services sought similar relief in a separate proceeding) sought the following relief:

1. Pursuant to section 39B of the *Judiciary Act 1903* (Cth) (**Judiciary Act**), sections 21, 22, and 23 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) and sections 562 and 563 of the *Fair Work Act 2009* (Cth) (**FW Act**), an order declaring that, on the proper construction of subsection 492(3) of the FW Act, the room or area for the purposes of subsection 492(3)(b) is a room or area that is provided for the purpose of taking meal or other breaks only and not for any other or multiple purposes.

2. Further to Order 1, pursuant to section 39B of the Judiciary Act, sections 21, 22, and 23 of the FCA Act and sections 562 and 563 of the FW Act, an order declaring that, on the proper construction of subsection 492(3) of the FW Act, the area between the operator cabin and the operational housing on each of draglines 34 and 35 operating at the Caval Ridge Mine (**specified locations**):

(a) is not provided by the occupier for the purpose of taking meal and other breaks for the purposes of subsection 492(3) of the FW Act;

(b) is not a room or area in which an interview may be conducted or in which discussions may be held for the purposes of subsection 492(3) of the FW Act.

3. Pursuant to section 39B of the Judiciary Act, section 23 of the FCA Act and section 563 of the FW Act, a writ of certiorari be issued to the [Commission]

removing into this Court the decision made by the [Commission] on 5 February 2016 ... and quashing that decision and the orders made at paragraph [46] of that decision.

4. Such further or other declarations and orders as [this] Court thinks fit.

(Emphasis in original)

### **CONTENTIONS ON THE CONSTRUCTION OF SECTION 492(3)**

23 BM Alliance contended that the Full Bench of the Commission made a jurisdictional error in misconstruing and misapplying s 492(3) of the FWA. It contended that error was contained in the following paragraphs of the Full Bench’s findings:

40 ... The words of the paragraph do not require a sole purpose or a sole use and there would be few areas of any workplace that could fit such a description. To read such a concept into paragraph (b) would be to offend the principles of statutory interpretation set out above.

41 In our view the key consideration is the purpose or purposes of providing the area from the employer's perspective. As the area is provided, in part, for the taking of meal and other breaks it satisfies the description in paragraph (b). In our view, that is the grammatical and ordinary sense of the words in paragraph (b). No absurdity or inconsistency arises from this interpretation. The provision of alternative areas such as the mobile crib facility, the lack of certain amenities compared to the designated mobile crib facility and the nature of other uses and purposes of the area does not change our conclusion.

24 It contended that the Full Bench erred in these paragraphs because the grammatical and ordinary sense of the words “the purpose” in s 492(3)(b) stipulated that the room or area must be provided by the occupier for the single or sole purpose of taking meal or other breaks, rather than for multiple purposes that included taking meal or other breaks. It submitted that the use of the definite article before the word “purpose” in the subsection supported this construction. It also submitted that the words “the purpose” required a determination of the occupier’s subjective intentions in providing the room or area.

25 BM Alliance submitted that this construction was “consonant with the purpose and policy of Part 3-4” which, it claimed, balances the competing interests of registered organisations, permits holders and employees in facilitating entry to premises, and the interests of occupiers in controlling their premises. It submitted this balance is specifically recognised in the objects of Part 3-4 and is, in part, achieved by strictly constraining the times at which permit holders can enter premises, their activities on those premises, and the parts of the premises that they can use. It contended that the governing principle in each of these constraints is that permit holders cannot enter or use premises in a way that might interfere with the performance of work on those premises. Thus, it submitted, a stipulation that permit holders

may only hold discussions in a room or area that is provided for the single or sole purpose of taking meal or other breaks is one way of ensuring that those discussions do not interfere with the performance of work.

26 In making these submissions, BM Alliance relied on the Explanatory Memorandum to the Fair Work Amendment Bill 2013, which relevantly provided:

140. New subsections 492(2) and (3) provide that if there is no agreement, the default location for interviews and discussions will [be] any room or area in which one or more of the persons who may be interviewed or participate in the discussions ordinarily take meal or other breaks and is provided by the occupier for that purpose. The requirement means, for example, that a permit holder would not be authorised to hold discussions in a personal office or workspace or a room or location which is not provided for or used for meals or other breaks unless it is agreed.

27 The CFMEU contended that the Full Bench correctly construed s 492(3)(a). It submitted that the ordinary and grammatical meaning of the words in s 492(3)(b) do not require that the room or area be used solely for the purpose of taking meal or other breaks. It submitted that, to construe the provision as, in effect, requiring a purpose-built dining room or lunchroom would undermine the purpose of the section. It submitted the Explanatory Memorandum supported this construction because it indicated the provision was intended to authorise permit holders to hold discussions in a personal office, or workspace, or a room or a location which is provided for, or used for, meals or other breaks in default of agreement. That being so, it submitted that “[t]he area behind the operator’s cabin on the dragline was a workspace or a room or location provided for and used for taking meals”. It submitted that this construction of the provision allowed for a wide and general operation consistent with its purpose.

### **RELEVANT PRINCIPLES ON STATUTORY CONSTRUCTION**

28 In *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28, the High Court said (at [69]):

The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined “by reference to the language of the instrument viewed as a whole”.

(Footnotes omitted)

29 More recently, the Court has reiterated that principle in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27; [2009] HCA 41 (*Alcan*) at [47],

*Commissioner of Taxation v Consolidated Media Holdings Ltd* (ACN 009 071 167) (2012) 293 ALR 257; [2012] HCA 55 (*Consolidated Media Holdings*) at [39]; *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378; [2012] HCA 56 at [23]–[26] and *Thiess v Collector of Customs* (2014) 250 CLR 664; [2014] HCA 12 at [22]–[23]. For example, in *Consolidated Media Holdings*, the Court said (at [39]):

“This court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text”. So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself.

(Footnote omitted)

### **CONSTRUING SECTION 492(3) OF THE FWA**

30 It is convenient to do as the High Court suggests and begin with a consideration of the statutory text. Putting to one side the effect of the use of the definite article, to which we will return below, in any view, there is nothing in the text of the phrase “the purpose of taking meal or other breaks” in s 492(3)(b) which, by the ordinary or grammatical meaning of the words used in it, conveys any concept of exclusivity. That is to say, none of those words, taken individually or collectively, conveys any sense that the room or area concerned must be used for the single or sole purpose of taking such breaks. To the contrary, in our view, those words go no further than signifying that the purpose for which the room or area is provided must include the taking of such breaks. The question then is whether the use of the definite article in the first two words of that phrase: “the purpose” alters this conclusion.

31 As the Full Court observed in *Australian Crime Commission v AA Pty Ltd* (2006) 149 FCR 540; [2006] FCAFC 30 (at [28]): “The *Cambridge Australian English Style Guide*, describes the definite article as signalling ‘that a noun is to follow, and it very often implies that the noun is one with which the reader is already acquainted’ so that ‘*the*’ says: “You know which one I mean”, and reminds us of an earlier reference to the same thing in the text’ (emphasis in original): Peters, P, *Cambridge Australian English Style Guide* (Cambridge University Press, 1995) pp 747-748.” Similarly, in *Tamas v Victorian Civil and Administrative Tribunal* (2003) 9 VR 154; [2003] VSCA 113 (at [8]), Callaway JA pointed out: “it is a natural and correct use of English to employ the definite article when one is referring to a person or thing already identified expressly or by implication”.

32 These observations therefore suggest that the usual grammatical use of the definite article is to indicate that there is an earlier reference to that expression in the writing in question. Applied to s 492(3)(b), that suggests that the definite article has most likely been employed before the noun “purpose” to refer to an earlier use of the expression “purpose” or the same thing or concept in s 492(3), or elsewhere in the FWA. If that is so, then BM Alliance’s contention that the definite article has been used in s 492(3)(b) to confine the meaning of the word “purpose” to a single or sole purpose could not be accepted. However, at first blush, the proposition that the definite article has been used in its usual grammatical sense in s 492(3)(b) might be thought to be invalid because there is no earlier express use of the expression “purpose” in s 492(3) or, relevantly, Part 3-4 of the FWA. Nonetheless, when regard is had to the words “ordinarily take meal or other breaks” in s 492(3)(a), we consider those words contain an earlier implicit reference to the same thing or concept. Specifically, the circumstance prescribed in s 492(3)(a) involving the persons there identified “ordinarily tak[ing] meal or other breaks” in the room or area describes the same thing or concept as the purpose prescribed in s 492(3)(b) for which the occupier provides the room or area. It follows, in our view, that the definite article has been used in s 492(3)(b) to signal that the noun “purpose” is referring to the concept conveyed by the words “ordinarily take meal or other breaks” in s 492(3)(a). Conversely, we do not consider it has been used to confine the meaning of the word “purpose” in the way BM Alliance contends.

33 These conclusions concerning the text of s 492(3) are sufficient to dispose of BM Alliance’s originating application. However, for completeness, we will also briefly deal with the other main contentions it has advanced. The first is its contention that the words “the purpose” in s 492(3)(b) require a determination of the occupier’s subjective intentions in providing the room or area. While it is difficult to discern how this contention assists in construing the meaning of s 492(3), we consider it must also be rejected. Purpose is a protean concept: *Hayes v Willoughby* [2013] 1 WLR 935; [2013] UKSC 17 at [9] per Sumption LJ. Its meaning is particularly affected by context: *Valuer-General v Fivex Pty Ltd* [2015] NSWCA 53 at [37] per Leeming JA and the discussion in *Hayes v Willoughby* at [10]–[14] per Sumption LJ. In s 492(3)(b), the word “purpose” is used in the context of setting a default location in the absence of the permit holder and the occupier agreeing on a location. The correlated criterion in s 492(3)(a), mentioned above, is used in the same context. Significantly, that criterion is expressed in terms that plainly require an objective assessment of the past behaviour of the persons identified therein to determine whether they have

ordinarily taken meal or other breaks in the room or area in question. That being so, we do not consider it could have been intended that the criterion for setting a default location expressed in s 492(3)(b) is to be determined by reference to the subjective intentions of the occupier. It follows, in our view, that the occupier's purpose in providing the room or area under s 492(3)(b) has to be assessed objectively.

34 Of course, as Hill J observed in *Australian Competition and Consumer Commission v Universal Music Australia Pty Ltd* (2001) 115 FCR 442; [2001] FCA 1800 at [469] (in a very different context), there may not be any practical difference between the subjective assessment advanced by BM Alliance and an objective one because "in most cases, the best evidence of subjective purpose will be objective effect". This observation is consistent with the definition of "purpose" provided by Brennan J in an abuse of process case (see *Williams v Spautz* (1992) 174 CLR 509), where his Honour said (at 532):

Purpose, when used in reference to a transaction, has two elements: the first, a result which the transaction is capable of producing; the second, the result which the person or persons who engage in or control the transaction intend it to produce. Or, to express the concept in different terms, the purpose of a transaction is the result which it is capable of producing and is intended to produce. When the transaction is the commencement or maintenance of a legal proceeding, its purpose is to be ascertained by reference to the intention of the party who commences or maintains it (hereafter "the plaintiff"). The intention of the plaintiff can be proved by what the plaintiff said and did, and from any inference that might be drawn from what was said or done (including the commencing and maintaining of the proceeding) in the circumstances of the case. The testimony of the plaintiff, though admissible to prove intention, is not conclusive.

(Footnote omitted)

35 The second of BM Alliance's other contentions is the proposition that one of the purposes or objects of the right of entry provisions in Part 3-4 of the FWA is to prevent permit holders from interfering with the performance of work when they enter work premises. This contention was advanced in support of the sole or single purpose construction of s 492(3)(b) set out above. It, too, must be rejected. The objects or purposes of Part 3-4 are stated in s 480 of the FWA. That section identifies a need to balance the rights of four groups: organisations, employees, occupiers of premises and employers. It also identifies the relevant right held by each of those groups. With organisations such as the CFMEU, it is "the right ... to represent their members in the workplace, hold discussions with potential members and investigate suspected contraventions". With occupiers of premises and employers such as BM Alliance, it is "the right ... to go about their business without undue inconvenience". Importantly, s 480 makes no mention of preventing persons, when exercising a right of entry

under the provisions of Part 3-4, from interfering with the performance of work at the work premises so entered. Furthermore, it uses the words “undue inconvenience” to describe the nature of the protection occupiers and employers can expect to obtain when their premises are entered. In this respect, it is to be noted that Part 3-4 contains a number of specific provisions that are obviously designed to reduce the possibility of an occupier experiencing that undue inconvenience. As well as s 492 itself, they include provisions relating to: prior notice before a permit holder enters premises (s 487), the time when a right of entry may be exercised (s 490), and the route that must be taken to reach the location of the interview or discussion (s 492A). It is also necessary to bear in mind that s 492 is intended to apply to two distinct categories of persons and during two different time periods. That is, it includes a circumstance where a union official wishes to have discussions with a union member (s 484), and a situation where a union official wishes to have discussions with any person (not necessarily a member of his/her union) about a suspected contravention of the FWA (s 482(1)(b)). Furthermore, while the former discussions may only be held during meal times or other breaks (s 490(2)), the latter interviews may be held during the whole working day (s 490(1)). In our view, there is therefore no indication in s 480, or in the provisions of Part 3-4 more broadly, that one of the purposes or objects of that Part of the FWA is to prevent permit holders from interfering with the performance of work when they enter a workplace. That being so, there is no merit in BM Alliance’s contention that s 492(3)(b) should be construed so as to advance that non-existent purpose.

36 Finally, we do not consider that any of the statements made in the Explanatory Memorandum (see at [26] above) provide any support for BM Alliance’s narrow construction of s 492(3)(b).

37 For these reasons, we do not consider the Full Bench erred in concluding that the words of s 492(3) do not require that the room or area concerned must be provided for the single or sole purpose of taking meal or other breaks (see at [23(40)] above). BM Alliance’s originating application must therefore be dismissed.

#### **AVAILABILITY OF THE RELIEF SOUGHT**

38 Even had we been persuaded that the Full Bench had misconstrued s 492(3) of the Act, BM Alliance would have confronted considerable difficulty in establishing that it should be granted the relief sought by it. The remedies sought by BM Alliance were declarations and certiorari (see [22] above).



39 The impugned orders of the Full Bench are recorded at [46] of its reasons as follows: “We allow the appeal, quash the decision of the Deputy President and substitute affirmative answers to both of the agreed questions submitted by the parties.” The “agreed questions” on which the Deputy President had been asked to “arbitrate” were, it will be recalled:

1. Where a right of entry is exercised under section 484 of the Fair Work Act 2009 (the Act), are the specified locations a “room or area” in which discussions may be held for purposes of subsection 492(3) of the Act?

2. In all the circumstances, was Mr Pierce [a permit holder] entitled to hold discussions with employees in the specified locations on 6 September 2014 when exercising a right of entry under section 484 of the Act?

NOTE: The “specified locations” are areas on Draglines 34 and 35 located at BMA’s Caval Ridge Mine between the Operator’s cabins and the operational housing. The “specified locations” are described as “crib rooms” by the CFMEU and “corridors” by BMA.

40 It was common ground that the words “for purposes of” in the first question were to be understood as “within the meaning of”.

41 BM Alliance sought declarations from this Court that, on the proper construction of s 492(3) of the FWA (see at [22] above):

1. ... the room or area for the purposes of subsection 492(3)(b) is a room or area that is provided for the purpose of taking meal or other breaks only and not for any other or multiple purposes.

2. ... the area between the operator cabin and the operational housing on each of draglines 34 and 35 operating at the Caval Ridge Mine ...:

(a) is not provided by the occupier for the purpose of taking meal and other breaks for the purposes of subsection 492(3) of the FW Act;

(b) is not a room or area in which an interview may be conducted or in which discussions may be held for the purposes of subsection 492(3) of the FW Act.

42 It may be accepted that BM Alliance has standing to seek declaratory relief. It has a real interest in the underlying controversy: see *Forster v Jododex Australia Pty Limited* (1972) 127 CLR 421 at 437. While the Court has power to grant declaratory relief, the power is discretionary in nature: see *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 (*Ainsworth*) at 581–2, 596. The making of declarations in the terms sought would, to say the least, have been problematic. Furthermore, the making of declarations in those terms would have been of questionable utility. The Court’s construction of s 492(3) would have been exposed in its reasons. The declarations sought would have involved the Court in going further and itself effectively exercising a discretionary power, which, arguably, was conferred

by the FWA on the Commission. The application of the sub-section, as properly construed, to the facts would normally be a task for the fact finding tribunal and not the Court.

43 Certiorari was sought to quash the Full Bench's orders.

44 Certiorari is available as a remedy ancillary to those provided for specifically in s 75(v) of the *Constitution*. In order to obtain certiorari, an applicant must establish that the respondent tribunal has committed a jurisdictional error: see *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651; [2007] HCA 14 at 664, 675. Had the Court determined that the Full Bench had misconstrued s 492(3) and that, in doing so, it had committed a jurisdictional error, it would not, necessarily, have followed that certiorari would have been available.

45 The High Court has held that certiorari only lies to quash a "determinative" decision: see *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 158; *Aronson and Groves*, "Judicial Review of Administrative Action" (5th ed), Law Book Company 2013 at 795-6. In *Ainsworth*, at 581 and 595, it held that certiorari would not lie to quash a Commission report because the report had no legal effect upon an executive power over the applicant: his legal position was not changed by the report, nor did the report or its findings operate as a legal precondition to further administrative actions against him.

46 When answering the questions posed by the parties, the Deputy President was purportedly exercising power under Division 5 of Part 3-4 of Chapter 3 of the Act. Section 492(3) appears in Part 3-4. So too does s 505. Section 505(1) empowers the Commission to "deal with a dispute about the operation of [the] Part" including disputes about whether a request, made under s 492, was reasonable. Section 505(2) provides that one method which is available to the Commission to deal with a dispute is by arbitration with discretionary power to make a range of "orders". By s 506 a person must not contravene an order made under s 505(2). Section 506 is a civil remedy provision and, as a result, any breach of s 506 could attract monetary penalties: see s 539.

47 The Full Bench exercised power under s 607(3)(a) when it quashed and varied the Deputy President's decision.

48 Although the Fair Work Commission had been invited to arbitrate in the dispute, it did not make any orders of the kind contemplated by s 505(2). Rather, the Deputy President agreed to hear argument and answer two questions. Those questions raised issues relating to the

lawfulness of past conduct on the part of BM Alliance. The Deputy President gave negative answers to both questions. The Full Bench allowed an appeal, quashed “the decision” of the Deputy President and substituted affirmative answers to both questions.

49 The answers to those questions did not constitute orders which were binding on the parties. They reflected the views of the Deputy President and the Full Bench as to the proper construction of s 492(3) and the application of that sub-section to the facts before them. No doubt the parties would have treated the answers with appropriate respect but the answers were not rendered binding on them by any provision of the FWA or otherwise. No order was made with which the parties were required to comply on pain of penalty. In these circumstances it is difficult to identify any relevant alteration to the legal position of either party effected by either the Deputy President’s or the Full Bench’s decisions. The availability of certiorari would, for this reason, have been a contentious issue.

#### **CONCLUSION**

50 For these reasons, the originating applications filed by BM Alliance and CQ Services must be dismissed.

I certify that the preceding forty (40) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Tracey and Reeves.



Associate:

Dated: 10 March 2017