TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT CROSS
DEPUTY PRESIDENT SAUNDERS

C2023/4513

s.604 - Appeal of decisions

Appeal by Shop, Distributive and Allied Employees Association (006N) (C2023/4513)

Sydney

10.03 AM, TUESDAY, 19 SEPTEMBER 2023

PN1

VICE PRESIDENT CATANZARITI: Yes, I will take the appearances. Mr Gibian.

AUDIO MALFUNCTION/10:04:13 AM to 10:05:35 AM

PN2

MR M GIBIAN: - - - two issues in relation to some other matters that the Deputy President took into account, one infers relevance to a residual discretion in section 483AA.

PN3

The respondent has raised in its written submissions, and it foreshadowed its intention to do so in correspondence prior to that, a point which is in the nature of a notice of contention point, as we understand how it is put. Just to be clear, we put on written submissions consistent with the Commission's directions in relation to our appeal. We filed some submissions yesterday, as we foreshadowed we would, that deal with the notice. They are not generally submissions in reply; they deal specifically with the notice of contention point that has been raised.

PN4

What I wanted to do by way of oral submissions is just briefly go to the basis upon which my client sought the records and made the application, then refer to the statutory provisions and, having done that, I hope I can deal relatively briefly with the grounds of appeal.

PN5

An updated appeal book was filed, I think only to add certain annexures to the respondent's witness affidavit which had been omitted in error in the initial appeal book that was filed.

PN6

Can I ask the Full Bench firstly to turn to my client's application, which commences at page 22 of the updated appeal book.

PN7

VICE PRESIDENT CATANZARITI: Yes.

PN8

MR GIBIAN: Going to the third page of that application, at point 2 on page 24 of the appeal book, the form asks for the suspected contravention to be described and it is described as being that, from March 2017 and continuing, ALDI had required its employees working in supermarkets and distribution centres across Australia to perform work before and after rostered shift times without payment and that, as a consequence of that conduct, it suspected contraventions of the hours of work, breaks, overtime and minimum rates provisions of the relevant enterprise agreements resulting in a contravention of section 50 and the consequent failure to pay wages of section 323 of the Fair Work Act.

PN9

The documents that were sought to be covered by the order are described at 2.2 on the bottom half of that page, being records relevant to hours of work and the payments received with respect to hours of work by employees.

PN10

Over the page, on page 25 of the appeal book, the form asks for an applicant to specify the grounds and reasons in support of the application. Can I just note at paragraphs 3 and 4, it's noted that the SDA is entitled to represent the industrial interests of employees working in supermarkets and a number of those employees are members of the SDA. There is then, at paragraph 5, a reference to the relevant enterprise agreements that applied on a geographical basis.

PN11

Then can I just note, at paragraphs 6 and 7, that the SDA indicated that it had been informed by employees of ALDI that they had been directed to attend work before their rostered start time and perform work and sign off at the end of their rostered finish time but continue to perform work without being paid for such work, and emphasise, at paragraph 7, the assertion that the significant number and geographic spread of ALDI employees informing the SDA of these practices leads the SDA to suspect that the contraventions are systematic and widespread across ALDI supermarkets and distribution centres, and that was put from the outset of the application.

PN12

I probably don't have to go to it at any length, but, in addition to that, evidence was put on by Mr Worsley, who is the permit holder who was proposing to exercise right of entry powers. The first of his witness statements commences at page 97 of the updated appeal book. I don't need to read it in great detail, but I just wanted to emphasise, in paragraph 10 on page 98, Mr Worsley describes the background to the present application, including the reference to Federal Circuit Court proceedings involving employees at a particular location, mainly the Prestons Distribution Centre in Western Sydney, and the conclusions of the Court in that respect that employees, or certain employees at least, at that location had been required to perform at least pre-start work without payment, resulting in contravention of the relevant enterprise agreement and provisions of the Act.

PN13

Then, from paragraph 17 onwards on page 99, really following over to the end of that statement, Mr Worsley describes how, arising from those proceedings, information he had received, or the SDA more generally had received, indicated that that type of conduct found by the Circuit Court to have occurred at the Prestons Distribution Centre was also occurring at both other distribution centres and supermarkets more generally.

PN14

Can I particularly note, again without reading, what is said at paragraphs 18 and 19 on page 99, referable to other parts of the Prestons Distribution Centre, that ALDI had contacted employees with a view to resolving issues as to underpayment for pre-start duties and the difficulty that had been experienced by organisers and employees in verifying their claims because of the absence of documents as to the instances in which shifts had been worked and not paid. The

same type of evidence in relation to information provided by Mr Worsley and the SDA with respect to supermarkets is contained at paragraphs 26 and 27 of the statement on the following page.

PN15

Noting the evidence of Mr Worsley that the suspected contravention prompting the application in the present proceedings arose from the proceedings in the Federal Circuit Court and the concern that the type of conduct that resulted in the contraventions found in that case was present at other locations, both distribution centres and supermarkets, can I just briefly note the basis of the conclusion in the Federal Court proceedings that contraventions had occurred in that respect.

PN16

The decision commences at page 103 in the appeal book. It is annexure MLW to Mr Worsley's first statement. As will be apparent to the members of the Full Bench, on page 105, at paragraph 3, the nature of the claim made in those proceedings is described, namely, a claim that:

PN17

> *From August 2018, and continuing, ALDI directed, and continued to direct, employees at the Prestons Distribution Centre to work in excess of their contracted hours by directing them to commence work 15 minutes prior to their rostered starting time.*

PN18

And, at paragraph 6, that that was said to give rise to breaches of the enterprise agreements applicable at that location and sections 50 and 323 of the Act.

PN19

A factual issue arose as to the direction issue or the requirement issue to perform that work or work during that period. The Full Bench will have seen that that is resolved on page 108 of the appeal book, or page 111 of the reported decision.

PN20

Firstly, at paragraph 30, the Court resolved the dispute as to whether there had been an explicit direction given and concluded that, there being evidence in both directions, it was unable to be positively satisfied, as I read the reasoning, that an explicit direction was given to employees that they were to be at work 15 minutes prior to commencement time of the shift.

PN21

However, then from paragraphs 31 to 33, the Court went on to consider whether, nonetheless, there was an implied direction and concluded, at paragraph 33, that the Court was reasonably satisfied as a fact that there was a clear implied direction that employees were to arrive early prior to shift commencing and that there would be consequences for a failure to comply with that implied direction, arising in part from what was described as the expectation and referred to in the evidence in the preceding two paragraphs.

PN22

So, ultimately, it was in that instance a factual dispute as to whether there was an explicit direction resolved in the manner that I have just described, but the contravention ultimately found was one of implied direction arising from an expectation and practice and consequence in the event that the individual employee did not commence performing the work a period of time before the start of the rostered shift. That's relevant, as the Full Bench will apprehend, when we come to consider what is necessary to investigate whether that type of contravention is also present, or has been occurring, or is occurring at other locations.

PN23

Finally, in relation to the background or the basis upon which the application was put, a supplementary statement was put by Mr Worsley which commences at page 126 of the updated appeal book. Can I just note in that respect that two additional matters were set out substantiating Mr Worsley's suspicion that this type of contravention was occurring at other locations. From paragraph onwards, there's a reference to a survey which was conducted by my client and the outcome of the survey is summarised at paragraph 13, namely that of the 959 responses, 842 responders said they had both performed work before or after their shifts and not been paid for that time.

PN24

I perhaps don't need to go to it, but, at MLW6 and MLW7, the annexures, it's made clear that the respondents to the survey were covered by various enterprise agreements applying at various geographic locations around the country, so there was a spread of - it wasn't located and wasn't concentrated purely in one geographical area but was spread around ALDI's operations both in supermarkets and distribution centres.

PN25

In addition to that, at paragraph 19 at the bottom of page 128 of the appeal book and marked as annexure MLW8, there was an example of internal communications which had been obtained by my client and had been distributed by store managers of ALDI essentially acknowledging that the employees had been performing work without pay for certain periods and proposing to address that issue, again, both of those matters substantiating both suspicion that Mr Worsley had and the suspicion as to the extent and widespread nature of the concern.

PN26

That is made explicit in the final paragraph of that statement on page 130 of the updated appeal book, paragraph 27 of the statement, in which Mr Worsley makes clear that he suspects that there is both knowing contravention because the SDA had brought the issue to ALDI's attention and that, because of the extent of the survey results and the information with which he had been provided, that there was a systematic pattern of contraventions involving pre-start or post-shift work without pay and that he, as a result, suspected that the contraventions were serious contraventions.

PN27

With that introduction, unless there is anything that's unclear as to the factual background, can I just turn briefly to the relevant statutory provisions contained within part 3-4 of the Act. I think we did provide a list of authorities, but your Honours no doubt have - - -

PN28

VICE PRESIDENT CATANZARITI: We have that, yes.

PN29

MR GIBIAN: As the Bench knows, part 3-4 deals with right of entry and division 2 of that Act deals with entry rights and subdivision A of division 2, entry to investigate suspected contraventions. It commences, as both sets of submissions make clear, at section 481, which permits a permit holder to enter premises and exercise rights under either sections 482 or 483 for a particular purpose, namely, investigating a suspected contravention of the Act or a Fair Work instrument that relates to or affects a member of the permit holder's organisation, so long as it is entitled to represent the industrial interests and the person performs work on the premises.

PN30

We accept that the starting point is that the purpose of exercise of rights to investigate a suspected contravention is to investigate a suspected contravention that relates to or affects a member of the permit holder's organisation. Subsection (3) makes it clear that a permit holder must reasonably suspect that the contravention has occurred or is occurring to enter the premises for that purpose.

PN31

The rights that then flow are described in sections 482 and 483 and, relevantly, at 482(1)(c) - sorry, 482(1) deals with what the permit holder may do whilst on the premises, having entered for the purposes of investigating a suspected contravention, and the third matter that is identified is that the permit holder may:

PN32

require the occupier or an affected employer to allow the permit holder to inspect, and make copies of, any record or document...

PN33

and then in brackets:

PN34

...(other than a non-member record or document) that is directly relevant to the suspected contravention and that:

PN35

(i) is kept on the premises; or

PN36

(ii) is accessible from a computer that is kept on the premises.

PN37

The limitations upon the right to request or to require that the permit holder be allowed to inspect or make copies of documents are that it must be directly relevant to the suspected contravention and kept on or accessible from the premises.

PN38

The exclusion of reference to a non-member record or document is the matter that is addressed in section 483AA. It is, as Jessup J explained in the IEU proceedings - it makes clear that what the Act contemplates is that non-member records or documents may be directly relevant to a suspected contravention, otherwise there's no reason for the bracketed exclusionary words, but that even if directly relevant, the permit holder is not entitled to require that they be produced for inspection or to be copied, absent the order being made by the Commission lifting that exclusion.

PN39

I don't think much turns on it in the present instance, but subsection (2A) of section 482 contains the definition of what a non-member record is. As I say, I don't think there's any issue in that respect.

PN40

Section 481(1) then provides for the capacity for a permit holder, by written notice, to require an affected employer to produce or provide access to a document subsequently, again in brackets:

PN41

> *...(other than a non-member record or document) that is directly relevant to the suspected contravention.*

PN42

The same words that appear in 481(2)(c).

PN43

Then the relevant or critical provision for present purposes at 483AA(1) allows a permit holder to apply to the Commission for an order allowing the permit holder to do either of the previous things, that is, exercise a power under either 482(1)(c) whilst at the premises or 483(1) after, at a later date by notice to require the occupier or the affected employer to allow the permit holder to inspect and make copies of specified non-member records or to require, in the case of 483, an employer to produce or provide access to specified non-member records subsequent to the rights of entry being exercised.

PN44

Perhaps what is significant is the effect of the section is not that the Commission is ordering the production of documents, it is to allow a right that otherwise exists in section 482 or 483 to be exercised, but to, in the manner that Jessup J described, lift the exclusions that appears in the words in parentheses in either 482(1)(c) or 483(1).

PN45

The circumstances in which the Commission may make such an order are then, as the Full Bench will have seen, set out in subsection (2):

PN46

The FWC may make the order if it is satisfied that the order is necessary to investigate the suspected contravention.

PN47

And that:

PN48

Before doing so, the FWC must have regard to any conditions imposed on the permit holder's entry permit.

PN49

There are two observations to make about the section. The first is that we are inclined to accept that the word 'may' in the first sentence is indicative of a discretion, and that's as supported by the second sentence in the sense that there is a requirement to have regard to a matter, namely, any conditions that may be imposed upon the permit holder's entry permit. The remainder of the first sentence of subsection (2) sets a prerequisite by reference to the satisfaction of the Commission, namely, that the Commission must be satisfied or may make the order if it is satisfied that the order was necessary to investigate the suspected contravention.

PN50

We accept that the reference to 'the suspected contravention' is the suspected contravention which would, in any event, enliven the capacity of the permit holder to do the things set out in section 482 or 483, namely, a suspected contravention that relates to or affects a member or members - plural - of the permit holder's organisation for the purposes of section 481(1).

PN51

The form of the application is then dealt with in subsection (4). I note that for the purposes of the notice of contention arguments, but the application for the order is required to be made in accordance with the regulations and must set out the reason for the application. I don't think there are actually requirements, at least unless I've overlooked it, in the regulations, so the only matter is that it must set out the reasons for the application.

PN52

Can I then just ask the members of the Bench to turn briefly to Jessup J's decision, not to read it - there's passages that have been set out - but just to provide it as an example of the way in which non-member records may be relevant and necessary for the investigation of a suspected contravention. We have provided a bundle of authorities, I think, in electronic form.

PN53

VICE PRESIDENT CATANZARITI: Yes, we have those.

PN54

MR GIBIAN: Tab 7 is the decision or judgment of Jessup J in *Independent Education Union of Australia v Australian International Academy of Education Inc* [2016] FCA 140. The issue that was sought to be investigated for the purpose of those proceedings - - -

PN55

VICE PRESIDENT CATANZARITI: What page is this on?

PN56

MR GIBIAN: I'm sorry. The judgment itself commences at page 205.

PN57

VICE PRESIDENT CATANZARITI: Yes.

PN58

MR GIBIAN: The issue that was sought to be investigated was whether there was compliance with the fixed term employment provisions of the relevant enterprise agreement applying to the teachers concerned. The provision is set out right at the bottom of page 209 of the bundle within paragraph 3 of the judgment, and right at the bottom of the page, clause 10.6 deals with fixed term employment and, over the page, constrains the circumstances in which fixed term employment is permissible, that is, it must be both constrained in time but also for a particular purpose to undertake a specific project, a specific task, or to replace an employee on leave, which was the subject of the suspected contravention.

PN59

His Honour then, from paragraph 88 of the judgment on page 232 of the bundle, deals with what is a judicial review of an order made under 483AA and notes the background to the application and the suspicion held by the two permit holders from the IEU. Can I just note on page 237, at paragraph 99, that part of the suspicion - again without reading it - was that the suspicions held by Mr Matson and Mr Schmidt, who were the permit holders:

PN60

> *...travelled well beyond the teachers to whom they had spoken and related both to primary and to secondary teachers and both to members of the applicant and to non-members. The metaphor was not used, but is clear that the case being put to FWA by Messrs Matson and Schmidt, and accepted by FWA, was that they suspected that the circumstances of the teachers to whom they had spoken may have been the tip of the iceberg.*

PN61

Then from 102, his Honour deals with the validity of the order and his Honour deals with the history of the rights of entry provisions from paragraph 105, and the restriction in relation to non-member records introduced in the course of originally the Work Choices amendments in 2006. At the conclusion of that discussion, at paragraph 109 on page 241, his Honour notes that the extent of a permit holder's right to inspect and copy documents which related only to employees who are not members has been a sensitive question at a policy level, and the balance which the legislature sought to achieve was discussed by Flick J in another judgment. His Honour notes:

PN62

The provisions are beneficial ones, and should be construed with an eye on the important role of organisations in protecting their members against contraventions of statutory and award provisions. But the particular provisions with which I am concerned in this case have been the subject of very detailed attention by the legislature...

PN63

His Honour then construes those provisions from paragraph 110 onwards in the passages that are extracted by the Deputy President at first instance. Can I note at paragraph 112, his Honour noted, on page 242, that:

PN64

Section 483AA shows that the legislature recognised that there may be situations in which, for the proper investigation of the suspected contravention, it was necessary for the parenthetical exclusion in section...

PN65

I think it should be section 482(1)(c), I think in that sentence -

PN66

...to be lifted.

PN67

That being the power that was sought to be exercised. Then:

PN68

The notion of 'necessary' in section 483AA(2) carries the meaning that the investigation could not be properly investigated with that exclusion in place. Whether or not that would be so in a particular case was a matter for the satisfaction of FWA.

PN69

Then the submissions of the parties in that respect are set out and, at 115 on the following page, page 243, his Honour set out the question that the Commission, then Fair Work Australia, was required to address, namely, that:

PN70

...the question which FWA was required to address under section 483AA was whether it was necessary, for the proper conduct of the investigation, that the documents which the permit-holder was entitled to require to be inspected or copied under section 482(1)(c), as being directly relevant to the contravention, included non-member records and documents as defined.

PN71

Finally, in paragraphs 116 and 117, his Honour addressed whether the Commission had addressed the correct question, which it had. I won't read them, but, in essence, the Commission had addressed the question of whether or not accessing records, particularly contracts and leave and other records relating to non-members, was necessary to investigate whether the members of the IEU had been employed on a fixed term basis consistently with one or other of the

categories of permitted circumstances for the purpose of clause 10.6 of the enterprise agreement because to know whether one of those circumstances existed, one would need to know whether, for example, another employee, who may be a member or a non-member, was on leave and the person in relation to whom it was suspected a contravention had occurred had been employed or not in one of the restricted circumstances in which fixed term employment was permissible for the purposes of that enterprise agreement.

PN72

As I say, that is both an explanation of the provisions but also an example of the way in which the derivation of non-member records would be relevant.

PN73

Can I go back then to the decision of the Deputy President at first instance. It is, obviously enough, in the updated appeal book commencing at page 11. The Deputy President's conclusions are set out from paragraph 26 on page 20. Relevantly to the matter raised by subsection (2) of section 493AA, that is, whether the order is necessary to investigate the suspected contravention, the Deputy President dealt with that really in paragraphs 27 and 28. In paragraph 27, the Deputy President, in a manner which, as we understand it is attacked in the notice of contention point by the respondent, accepted that she was satisfied, or she describes the suspected contravention, namely, that:

PN74

> *...ALDI required its employees working in its stores and distribution centres to perform work before and after shift times without payment. Given the Court proceedings and related decisions, and the fact that ALDI has made payments to a number of employees as a result of those proceedings...*

PN75

she was satisfied that Mr Worsley holds a suspicion that a contravention had occurred.

PN76

Then, however, at paragraph 28, her Honour expressed a conclusion that she was not satisfied on the evidence before the Commission that the order is necessary to investigate the suspected contravention and, in the second sentence, noted the understanding of 'necessary' adopted by Jessup J, and then, in the third sentence, the assertion is made that:

PN77

> *The evidence in my view does not support a finding that Mr Worsley is unable to properly investigate the alleged contravention without having access to the non-member records that are sought. There is no evidence, for example, about why the inspection of member records would not be sufficient to investigate the suspected contravention.*

PN78

That conclusion is repeated then at paragraph 34, the second-last paragraph of the decision on the following page.

PN79

I will return to the intermediate aspects and deal with grounds 4 and 5. Essentially, the conclusion at paragraph 28, in our respectful submission, demonstrates error. It does so by overlooking at least two critical features of what was sought to be investigated in the suspected contravention which the SDA and Mr Worsley wished to inquire into.

PN80

The first is that addressed in ground 1 of the notice of appeal, namely, that the Deputy President erred in not being satisfied that access to non-member records was necessary to investigate the suspected contravention because Mr Worsley suspected that this was a serious contravention, that is, involving knowing contravention on a systematic basis.

PN81

The concept of a serious contravention, as the members of the Bench will know, is dealt with in section 557A of the Act. It requires, in subsection (1), that two matters be satisfied, that is:

PN82

A contravention of a civil remedy provision by a person is a serious contravention if:

PN83

(a) the person knowingly contravened the provision; and

PN84

(b) the person's conduct constituting the contravention was part of a systematic pattern of conduct relating to one or more other persons.

PN85

Subsection (2) then sets out matters that the Court may have regard to in determining whether a person's conduct constituting the contravention was part of a systematic pattern of conduct, and they included, relevantly, in (a), (b) and (c) in subsection (2) of section 557A, the number of the contraventions, the period over which the relevant contraventions occurred, and the number of other persons affected by the relevant contraventions. That is, to be able to ascertain and investigate whether a contravention is a serious contravention, one has to be able to investigate the number of contraventions, the period over which they have operated, at least, and the number of persons affected by the contravention.

PN86

Where a permit holder suspects that a contravention has occurred, or is occurring, and suspects that it was knowing and undertaken on a systematic basis, then it may be - it will depend on the case - but it may be insufficient to properly investigate that suspicion for the permit holder to be limited to accessing records with respect to persons who are members of the organisation of which the permit holder is a part because it will not provide a fulsome picture or allow investigation of, in its full scope, the number of contraventions, the period - - -

PN87

DEPUTY PRESIDENT SAUNDERS: Doesn't that depend on how many members are in a particular distribution centre, for example? For example, if 95 per cent of the employees in a particular distribution centre were members of the SDA, do you say it would be necessary to obtain access to non-member records to investigate the suspected contraventions?

PN88

MR GIBIAN: We do say that it is necessary to be able to investigate, to properly investigate, to get a full picture of the number of contraventions in order to be able to form a view about whether or not there is a basis to establish a serious contravention by way of systematic conduct. Whatever the rate of union membership is at a particular site, it will only ever be a partial picture of the conduct that is suspected.

PN89

That doesn't mean that, in every case, a permit holder can just say, 'I want to investigate whether there's a serious contravention and need every record.' There would have to be a reasonable suspicion, there would have to be a reasonable basis upon which the permit holder suspected that a systematic contravention or contraventions were occurring in order to get to first base, as it were, but here Mr Worsley has explained the basis upon which the information was available to him and the basis upon which he formed the view that this conduct was systematic and widespread on the basis of the information provided to the survey and the conduct of ALDI itself in notifying employees of underpayments.

PN90

That was an issue which was dealt with by then Hampton C in the Re Scudds matter, which is tab 11 in our bundle, commencing at page 381. Can I note at paragraph 35, after setting out the submissions of the parties, at paragraph 35 on page 391 of the bundle, the then Commissioner accepted that Mr Scudds held a genuine suspicion that a breach of the agreement has occurred, and the relevant contravention related to the payment of travel allowance. Then, at paragraph 39 on page 393, it is indicated that:

PN91

During closing submissions, the CEPU relied upon the concept of a serious contravention offence...

PN92

Not sure it's an offence, but, anyway a serious contravention under section 557A, and that provision is set out, and the Commissioner dealt with that submission from paragraph 42 on page 398, and the submissions of the parties are set out at paragraphs 42 and 43, including the submission, which I think I really just answered in answer to your Honour Deputy President Saunders' question, namely, the contention that reliance upon an assertion of a serious contravention would undermine the limitations on access to non-member records, but then, at paragraphs 44 and 45, the Commissioner, in a manner which, in our submission, is correct, concluded that:

PN93

... it is not critical that the non-member records would not reveal all elements of the alleged (serious) contravention, only that they be directly relevant. Confirmation of the extent and incidents of the alleged underpayments would appear to be directly relevant to those elements of a serious offence. The fact that the records would not tend to shed any light on whether the practice of the employer was a knowing or deliberate breach is, in my view, not of concern in the present context.

PN94

I might say the extent of contraventions may be relevant to whether it was knowing, perhaps, in a particular case, but it might depend upon the circumstances. It wouldn't perhaps necessarily mean it was knowing. I think that's a fair observation.

PN95

Then at paragraph 45:

PN96

Further, although care should be applied not to allow an artificial alleged contravention to be constructed so as to undermine the statutory intention of s.483AA, there is no reason to read down or limit the provision so as to exclude the investigation of a genuinely held suspicion of a serious contravention from consideration in the present context.

PN97

Essentially underlining the submission that I made earlier, namely, that one has to consider whether it is necessary to investigate whether a contravention is a serious contravention is relevant to whether an order should be made under section 483AA.

PN98

In the instant case, the Commissioner concluded, at paragraph 46, that he wasn't satisfied that there was in fact a suspicion of a genuine contravention - of a serious contravention, I should say - because of the absence of evidence in that respect.

PN99

Here we have both the direct evidence of Mr Worsley, which was not subject to any challenge, that he suspected the contraventions were serious on the basis that they were widespread and systematic and that he wished to investigate that very matter.

PN100

The respondent's submissions on appeal appear to simply assert quite blandly that whether a contravention is suspected to be a serious one is not relevant to an order under section 483AA. We don't understand why that would be correct and, with respect, we endorse what is said by then Hampton C at paragraphs 44 and 45 of Re Scudds.

PN101

If a permit holder suspects that there has been, or is, a serious contravention, or serious contraventions, occurring and there is nothing to suspect that it is not

intended that the provisions of part 3-4 would not permit investigation of whether, in fact, a serious contravention had occurred, including in a manner which would allow the permit holder to investigate such matters as the number of contraventions, the number of persons affected and the period over which they have occurred, which are expressly matters to be taken into account for the purposes of section 557A(2), and it would be, indeed, surprising if the Act did not intend, having been amended to put serious contraventions provisions in the Act, did not intend that permit holders be able to investigate the more serious end of contraventions and whether those provisions were able to be utilised in a particular case.

PN102

Very briefly, ground 3 in the notice of appeal is essentially to the effect that this submission, or at least the gist of it, was put at first instance to the Deputy President, namely, that it was necessary to obtain the records to investigate whether there was a serious contravention, and the Deputy President doesn't appear to have dealt with it at all in the decision, and that is a failing rising to a jurisdictional level to deal with a substantial submission which had been advanced at first instance, which, in itself, should give rise to success on appeal.

PN103

I don't think I need to really say anything more about that, other than to make that observation. We have given references to where the submission was made in the written submissions and I don't need to take the Bench to it.

PN104

Ground 2 then deals with the second matter which, in our respectful submission, was overlooked by the Deputy President in considering whether or not it was necessary to obtain non-member records in order to investigate the suspected contraventions, that is, that the Deputy President failed to appreciate the nature and features of the suspected contravention.

PN105

As I have described, the suspicion commenced, and it was informed by information provided to Mr Worsley directly by employees, by organisers and through the survey process and through ALDI's documents, but it commenced with a suspicion that the contraventions of the type found by the Federal Circuit Court were occurring at other locations.

PN106

As I have explained, the finding in the Federal Circuit Court proceedings was based upon an implied direction. The prevalence of, or the number of, employees at ALDI at particular locations who were involved in or performing pre-start of post-shift work without pay and the pervasiveness of that conduct occurring is not only relevant to whether or not the contraventions were serious but whether or not, in any individual case, the union was likely to be able to establish that there was an implied direction by way of an expectation upon employees to turn up and commence work prior to the shift occurring.

PN107

If everyone was doing that, that would plainly be supportive of a submission that there was an implied direction by way of the type of expectation that the Federal Circuit had found was present at the distribution centre at Prestons. If it was very few, then it would no doubt be much harder to establish that type of argument at a particular location.

PN108

That provides, as I say, a further reason why the Deputy President ought to have, if properly considering the nature and features of the suspected contravention, found it was necessary to be able to investigate how many people were in fact involved in working in this manner in order to properly investigate whether or not, in relation to its members, the SDA would be able to establish a contravention.

PN109

Again, the respondent's submissions assert that the nature of the contravention is not relevant. As I have tried to explain by reference to the IEU judgment of Jessup J, obviously the nature of the contravention and what is necessary to establish it will be directly relevant to properly investigate whether the suspected contravention has in fact occurred in any particular case. Here, the nature of the suspected contravention, as I say, was at least likely to involve reliance upon an implied direction to perform work, in which case, the extent to which that conduct was occurring was directly relevant.

PN110

For those reasons, with respect, the Deputy President erred in the conclusions reached, particularly at paragraphs 28 and 34, in not being satisfied that the order was necessary for Mr Worsley to properly investigate the suspected contraventions, which in relation to which she accepted he had a suspicion.

PN111

Finally, and quite briefly, grounds 4 and 5 in the notice of appeal deal with two further matters that the Deputy President relied upon. As I indicated at the outset, they are perhaps superfluous to the reasoning in the sense that, if it is not necessary to obtain the order in order to investigate the suspected contravention, then the order can't be made and any residual discretion that exists was not available to be exercised.

PN112

However, there were two additional matters which, with respect, we think were taken into account which were either not relevant or involved error. They are, firstly, so far as ground 4 is concerned, the observation at paragraph 31 of the decision on page 20 of the appeal back that the order extended to a number of classifications, such as store managers, who had access to time off in lieu arrangements and who may otherwise be required to work reasonable additional hours.

PN113

In that respect, as the Bench will have seen, we have made two short observations. One is that doesn't necessarily mean that the availability of time in lieu arrangements for certain classes of, essentially, managerial or supervisory employees does not mean that there could not have been a contravention, that is, if

it leaves latent the question as to whether or not time in lieu was in fact afforded those employees. Secondly, and in any event, that was not a basis to refuse the application as a whole as it related to other classes of employees other than the store managers and the like who had access to time in lieu arrangements.

PN114

The second matter is that dealt with by ground 5 at paragraph 33 of the decision on page 21 where the Deputy President recorded that in deciding not to exercise the discretion to grant the orders sought, she had had regard to the volume of work and time involved in producing the records sought by the SDA.

PN115

In that respect, as we have said in the written submissions, we don't think that the asserted effort likely to be involved in either providing for inspection or producing the documents sought to be covered by the order is relevant even in a discretionary sense. That is the case when one has regard to the structure of the provisions of the Act to which I have taken the Bench. The effect of 483AA is, as made clear by Jessup J in the IEU matter, to lift the restriction on the exercise of a power under 482 or 483. It is not itself an order of the Commission to produce particular documents; it facilitates, if the circumstances otherwise justify it, the exercise of a right of entry under 481 and the powers that arise in that circumstance under 482 or 483.

PN116

The power to enter or the capacity of a permit holder to enter premises for the purposes of investigating a suspected contravention are limited only by those matters that are raised in those sections, namely, that the documents be directly relevant to a suspected contravention. There is no capacity of an employer or an occupier of the premises, if a permit holder attends and requires the documents be provided for inspection or produced subsequently, it is no answer to say, 'Well, that will require a lot of work for us to get the documents together.' There is nothing in those sections which allows the employer - so long as it passes the threshold of being directly relevant, in the case of 482 also kept at the premises or accessible from a computer at the premises, it is no basis for an employer to say, 'Well, although directly relevant, I'm not going to produce the documents to you because it would take too much time or too much effort for me to do so.'

PN117

In that circumstance, we don't see how it could be relevant to lifting of the non-member record exclusion when the Commission comes to consider an application under 483AA for the employer to say, 'Well, I don't want to do it because it would be too much work.' It would not be an answer under the direct application of the powers of the permit holder under those sections.

PN118

It would also be a surprising outcome as a matter of the intention of the legislation, that is, essentially, if there was a particularly widespread and systematic pattern of contraventions which would, to investigate, require examination of a large number of records, then the employer would, by protesting the amount of effort and work involved, make themselves immune from being investigated for the more serious and more systematic form of contraventions,

whereas if there is limited and more isolated contraventions, then they would be able to be properly investigated, and that would be a surprising outcome and not one that was intended by the legislature, in our respectful submission.

PN119

Unless there's anything else, that was what I wished to say on our appeal. I can deal with the notice of contention or deal with it in reply, as seems convenient. Perhaps in reply is the more logical course, but I'm in the Commission's hands.

PN120

VICE PRESIDENT CATANZARITI: No, I'll get you to do it in reply.

PN121

MR GIBIAN: May it please.

PN122

VICE PRESIDENT CATANZARITI: Thank you, Mr Hatcher.

PN123

MR HATCHER: If it please the Commission, the sojourn through the legislation my learned friend took the Commission through omitted, with respect, some rather important parts. Particularly in relation to that last matter he deals with, can I invite the Commission to turn to section 450 of the legislation, the object of the part. Importantly, you will see one of the objects is:

PN124

The right of occupiers of premises and employers to go about their business without undue inconvenience.

PN125

Her Honour had before her an application to have made available the records for some 13,000 employees over a period of six years. That would, on the evidence before her Honour, have taken some six months to make available and, on the evidence before her Honour, as brittle as it was, the union felt that it might take them about three months if they had them available to inspect. Now that does seem to fall within an object of the Act that her Honour might have regard to as a matter of discretion.

PN126

Can I then travel to 482 and draw the Commission's attention to subsection (1A) that my learned friend omitted reference to:

PN127

An occupier or affected employer is not required under paragraph (1)(c) to allow the permit holder to inspect or make copies of a record or document if to do so would contravene a law of the Commonwealth or a law of the State or Territory.

PN128

His Honour Jessup J referred to the Privacy Act considerations underpinning the introduction of section 483AA, and the Privacy Act, of course, requires an employer to maintain privacy in his employees' records. I should concede, and will make available to the Commission a copy of the relevant section, that there is a provision whereby an exception is made where production of the documents is reasonably - and I will get the provision, if it please. It's item 4:

PN129

The collection, use or disclosure is reasonably necessary for the establishment, exercise or defence of a legal or equitable claim.

PN130

So the employer is only able to release the documents if the disclosure is reasonably necessary for the establishment, exercise or defence of a legal or equitable claim. Can I hand up copies of an extract of the Privacy Act and can I note that that appears at page 87 of the extract, which is about five folios in, that is, page 87 of the legislation, about five folios into the extract.

PN131

That necessity under the Privacy Act is a necessity established to the satisfaction of the Privacy Commissioner, and so when the Commission comes to exercise its power to consider whether a contravention is reasonably held, it would have to, in our respectful submission, consider that the necessity was such that it would be found by a court for the purposes of the Privacy Act to be necessary.

PN132

I don't intend to be critical of her Honour, but, at one stage, her Honour said, 'Why wouldn't I just make available one or two areas or zones for you to inspect, at least to start with, and then we can see whether the nature of the suspicion...' It is, with respect, a far more exacting test that the Commission must apply in satisfying itself that it is reasonably necessary. To do otherwise is to invite the employer simply to say, 'Well, (1A) applies and we cannot produce those documents.'

PN133

There is a similar provision in 483.

PN134

VICE PRESIDENT CATANZARITI: Mr Hatcher, was this issue about the Privacy Act raised below?

PN135

MR HATCHER: Only through the reference to Jessup J's judgment, Commissioner.

PN136

Can I then turn to another provision that my learned friend has omitted reference to. Can I observe that under section 505, the Commission may deal with a dispute about the operation of the part, and that's any dispute about the operation of the part, but specific provisions are dealt with, which do not include the area we presently consider, but it is made clear in subsection (5) that so far as the area with which we are attendant upon today, the Commission cannot confer any additional

rights. So the wide rights that the Commission may otherwise have are restricted to the statutory provisions here.

PN137

We then have, at subdivision B, the requirements for entry notices, section 518. So this is the notice that must be provided before entry is effected. We then go to 519 and that makes provision for the Commission to issue an exemption certificate to an organisation for an entry under section 481, which deals with entry to investigate suspected contraventions:

PN138

If the organisation has applied for the certificate and the Fair Work Commission reasonably believes that advance notice of the entry given by an entry notice might result in the destruction, concealment or alteration of relevant evidence.

PN139

And 520:

PN140

The FWC must, on application by an organisation, issue a certificate (an affected member certificate) to the organisation if the FWC is satisfied that:

PN141

(a) a member of the organisation performs work on particular premises; and

PN142

(b) the organisation is entitled to represent the industrial interests of the member; and

PN143

(c) a suspected contravention of a kind referred to in subsection 481(1) relates to, or affects, the member.

PN144

And that certificate must state the premises to which it relates, the organisation to which it relates, the particulars of the suspected contravention, or contraventions, to which it relates, and that the Fair Work Commission is satisfied as to each of those matters.

PN145

My friend says, 'Well, we can forget all about that.' He actually put a submission that section 520 is optional. It's there for a reason. The legislature has said, 'If you don't want to reveal your member who you say is affected by the contravention, this is the procedure you follow', and before the Commission is going to acknowledge or give effect to any right of entry, it's got to be satisfied of the particulars of the suspected contravention.

PN146

We turn then to the particulars of the suspected contravention and there are none provided. The generality is breathtaking. '13,000 employees may have - we

suspect that they may have performed some duties before or after work for which they were not paid and for which they were entitled to be paid because there was an express or implied direction.'

PN147

If we go to the proceedings before the Circuit Court, there's no reference to the time and payment of wages records, the rosters and so forth. The issue was very confined. There was no issue but that the employees had clocked in 15 minutes early; there was no issue that the employees had been told to attend for work ready for work - it's really not that unusual a direction from an employer to an employee - at the allotted time.

PN148

Where the dispute arose is that in the Prestons Distribution Centre, three employees established that to be ready for work, they had to get their forklift or their pallet jack and they had to be satisfied that the pallet jack was in a sufficient state to be able to perform their work. Now the Court found that that was a work task and that they were entitled to be paid for that task. Plainly ALDI had been operating under a different a view, a view that one might suspect other employers might well have legitimately held. It hardly bespeaks a serious contravention.

PN149

It wasn't put in issue the particular tasks that were being performed. All that was in issue before the Court was whether there was an implied direction, or, more particularly, whether that was work in the sense of being work that was directed to be performed by the employer.

PN150

To say on the basis of that, and it appears to be that plus a survey, which I will come to address, and some vague hearsay evidence about what some organisers may have said that some members may have said to them, to, at the third hand, Mr Worsley, that this suspicion of serious contraventions, in a circumstance where not only did ALDI not put at issue the basic facts in the proceedings before the Circuit Court, they proceeded to immediately pay not only those employees but everyone in that unit subject to the same potential express direction. And it wasn't the 15 minutes that they clocked in early; it was agreed by the union in the ultimate that none of the employees had worked for 15 minutes, the duties couldn't take 15 minutes, and some other figure was arrived at by consent.

PN151

Again, I am not critical of them for that, but it just displays how, if the contravention is non-payment for work before the official start of work, you need to have regard to the circumstances of the individual site. Your particulars must identify where it is, what work the employees are said to have done and why it is said that that work constitutes work for which they were entitled to be paid. How else can the Commission or the employer form a view as to whether it's reasonable, reasonably necessary to have regard to time and payment records?

PN152

VICE PRESIDENT CATANZARITI: Mr Hatcher, am I right in my understanding that in relation to the members of the union, no claim has been put on for their records at this stage?

PN153

MR HATCHER: That's correct.

PN154

VICE PRESIDENT CATANZARITI: So we've gone straight to the claim for the non-members?

PN155

MR HATCHER: It was put, your Honour, that there was no need for the union to do that because they would simply front the premises with the certificate and say, 'Now give us all your records because they're either members or non-members and we can exercise a right under 481 to access the members and we've now got a certificate under 483, so we can have the non-members, so just give us everyone.'

PN156

VICE PRESIDENT CATANZARITI: But if they had the members' records, the members could or could not show whether there was in fact a contravention?

PN157

MR HATCHER: Well, with respect, no, your Honour. This is another point we wish to make. Those records aren't going to tell you whether there's a contravention. They will tell you that employees clocked on 15 minutes early.

PN158

VICE PRESIDENT CATANZARITI: Sorry, they will tell you whether they clocked on 15 minutes or not?

PN159

MR HATCHER: Yes.

PN160

VICE PRESIDENT CATANZARITI: Or 10 minutes, or whatever?

PN161

MR HATCHER: Yes. But that's all. So how it can possibly assist a suspected contravention that an employee, even a group of employees, performed work without being paid by bringing in 13,000 records of all the employees that is just going to display when they were meant to start work and what time they clocked on. It's hardly an unusual practice for employees to clock on before they start work.

PN162

One hates to digress into reminiscences, but, in an earlier life, I worked as an audits clerk and one of the most fearsome jobs was standing by the Bundy clock at a factory watching the hordes descend to clock in and clock out at the appointed time. Now, more civilised employers adopted a practice of, 'So long as you've

clocked in before your appointed start and' - often enough - 'within some time after your appointed start and you clock off in that span, we're content.'

PN163

So if it please the Commission, there is, in our respectful submission, a fundamental problem with the Commission accepting that there's a reasonable suspicion on the basis of the material.

PN164

I said I would come to the survey. Can I ask the Commission, in the appeal book, to turn to Mr Worsley's cross-examination at appeal book - I'm afraid mine's not numbered - PN 93, which is on page 38. Can I firstly observe that - appeal book 38.

PN165

VICE PRESIDENT CATANZARITI: Yes, we have that, PN 93, yes.

PN166

MR HATCHER: Yes, your Honour. Can I firstly observe that the evidence is that there were, I think, some 900 employees who responded, 800 of whom said that they had performed some work before start of shift or after the start of shift without payment and Mr Worsley is asked:

PN167

Now, if we have a look at those classifications, store manager, assistant store manager and store management trainees, they're full-time employees?---Don't know. Typically they would be, typically they'd be full time.

PN168

And they're salaried employees? As a full-time salaried employee, they can be required to work reasonable additional hours before and after their rostered time?---Well, if it's allowed by the enterprise agreement.

PN169

This is the person that's giving the evidence of the reasonable suspicion that these employees have to have their records inspected to see whether they have been working before or after the hours. PN 103:

PN170

If they worked before or after their shift and it was reasonable additional hours, there wouldn't be a separate payment for that, would there?---I don't know. I'd have to consider that. I haven't considered that.

PN171

Employees - the three classifications that we're dealing with, they're also able to avail of a time off in lieu arrangement, aren't they?---That's my understanding, yes.

PN172

Doesn't involve a separate payment either, does it?---No, it does not.

PN173

And the other classifications you've got, they're - well, they're what ALDI call ALDI rate employees?---Yes.

PN174

Yes, and the warehouse employees, so that would be employees from - that don't have a rostered finish time, do they?---No, that's - that's my understanding, they don't have a rostered finish time.

PN175

And if they're ALDI rate employees, they're able to avail of what ALDI has in its agreement as a bankable hours arrangement, don't they?---I think they have it. It's an option, from what I understand. I'm happy to double-check that.

PN176

At PN 11, it deals with the bankable hours arrangement:

PN177

Mr Worsley, an employee, if they have or if they are willing to avail of the bankable hours arrangement, they get time they can use at a later time. They don't get payment. That's right, isn't it?---I just need a minute to read that. Yes, yes, of course, I think it's an option that can be banked.

PN178

And if it's banked, there's no additional payment?---No, you take time off in lieu.

PN179

And it proceeds. If it please the Commission, it's hardly surprising that her Honour wasn't greatly assisted by the survey.

PN180

It's even less surprising that her Honour wasn't satisfied of the reasonable suspicion that would warrant invading the privacy of 13,000 employees, and she had to assume it was 13,000 she was dealing with because there was no evidence. There was an assertion of members and an assertion that's not rebutted. I'm not meaning to suggest that there are no SDA members in ALDI stores - no doubt there are - but ALDI don't know.

PN181

The Commission didn't know how many that might be and the Commission is being asked to make an order that may well affect 13,000 employees who would prefer to have their privacy protected, without even condescending to saying, 'This is the basis upon which we hold the reasonable suspicion', beyond the fact that three employees at Prestons in a distribution centre were able to satisfy the Court that getting their pallet jacks ready for work under an implied direction as a result of being told to attend for work at the appointed time ready to start leads to a conclusion that all employees, wherever they may be, in whatever store, under whatever supervision arrangement were being required to work before or after start time, and that this was a serious contravention because the employer was knowingly concerned in it in a circumstance where it was conceded in the Court

proceedings that the employer had a different view, as it happened an incorrect view, as to the proper operation of the law. That's not a serious contravention.

PN182

On the question of discretion, can I remind the Commission of the submissions that were put to her Honour. This appears on appeal book page 60, paragraph 333. Now, Deputy President, submissions of the applicant are made out in paragraphs 31 really to 34 of the court book:

PN183

As you would be aware, Deputy President, in order to - the Commission is provided with a wide discretion to make this order. It is a discretion, it is ultimately a discretion of the Commission, but it is only the requirements legislatively is that the Commission is satisfied with the order as necessary to investigate the suspected contravention before making any such order.

PN184

In our submission, the Commission had no basis, her Honour had no basis upon which she could form a satisfaction that there was a reasonably held suspicion of contravention of an instrument in the terms sought, and the terms sought were everywhere that this company operates, every department, every distribution centre.

PN185

She couldn't form that satisfaction and, even if she did, she had what was characterised quite properly by the applicant in the proceedings before her as a wide discretion, a discretion which, with respect, an Appeal Bench has no business interfering in, unless it's a discretion not permitted by law, and given that one of the objects of this part of the Act is to ensure that the employer is entitled to go about their business without undue inconvenience, the prospect of having to spend six months isolating and producing records for 13,000 employees. That's existing employees. If one then goes to previous employees, it's a greater number and a much greater inconvenience.

PN186

If her Honour was satisfied that this suspicion was a real reasonably-held suspicion across the entire operation and sufficient to warrant invading the privacy of the employees, in our respectful submission, her Honour was well entitled, as a matter of discretion, to have regard to the inconvenience that would be caused, particularly in circumstances where it was conceded in the proceedings below that ALDI was investigating of its own motion and seeking to redress any similar circumstance to that which had occurred in that limited area of the Prestons Distribution Centre, a matter that her Honour was entitled to take into account in the exercise of her discretion.

PN187

It is not, and could not be, enough to satisfy the scheme of this legislation, given the way it works in conjunction with the Privacy Act, to simply stand up and assert that a contravention is suspected to be a serious contravention, to put at nought the protections that the legislature put in place in 583AA and 520. It is very deliberate, the way this legislation has been drafted. It is designed to give

effect to the employer's obligations at law under the Privacy Act. We see that at 482(1A) and 483(1A). It is designed to ensure that the objects in 480 are met; it's designed to ensure that the employer has reasonable particulars of what the suspicion is, how it arises, where it arises and when it arose.

PN188

A contravention is constituted by an act or omission in the ultimate. If you can't identify that act or omission, then there is nothing upon which the law can operate, be it a suspicion or otherwise. There must be something, some act or omission, which gives rise to a reasonable suspicion that there has been a contravention, and the employer, and more particularly the Commission, is entitled to be told what that act or omission is. In this case, all that's pointed to in any real sense is a matter that has already been addressed by the Courts.

PN189

May it please the Commission. I'm sorry, will the Commission bear with me one moment.

PN190

I think, Commissioner, you asked me a question of whether the Privacy Act had been addressed. Might I supplement my earlier submissions by reference to appeal book page 74 at paragraph 438 where my learned junior specifically addressed the privacy issues.

PN191

May it please.

PN192

VICE PRESIDENT CATANZARITI: Yes, thank you. Yes, Mr Gibian.

PN193

MR GIBIAN: Can I just deal with the Privacy Act issues. With the greatest respect, the Privacy Act was not mentioned in the proceedings at first instance and neither was it mentioned in our learned friend's written submissions on appeal. Until my learned friend rose to his feet, not a single mention was made of subsection (1A) of section 342 or 343 or any reliance upon the Privacy Act. It is, with respect, unsatisfactory to just wave the Privacy Act under the noses of your Honours and suggest that it creates some difficulty.

PN194

The legislation - no doubt the members of the Bench have had opportunity to have to deal with it before. It is complex. There would have to be established that ALDI is in fact an APP entity to which the obligations and the Privacy Principles apply. It may well be. As I understand my general knowledge of the matter, there are certain thresholds in terms of turnover and size and the like, but none of that was suggested before or established before the Deputy President or in any material that's before the Full Bench.

PN195

There are then also various exemptions other than that one that my learned friend referred to. There's exemptions in relation to employee records which one would

have to look at. There's an exemption in principle 6.2 of the Privacy Principles which deals with the use and disclosure of personal information. It is in the other parts of it. The employee records parts are not in the extract which the Commission was given, so one can't even trace it through and make a sensible submission about it.

PN196

There is also an exemption in principle 6.2, which is on page 330 of the extract numbered 330, and it is disclosure where the use or disclosure is required or authorised by or under an Australian law or by a court or tribunal order, or you'll see a permitted situation exists in relation to the issue or disclosure of information by the APP entity. A permitted general situation is then defined in a series of sections earlier on in the legislation.

PN197

I don't want to say that I can make comprehensive submissions about that issue. It's never been raised up until now and it should not be entertained now in the absence of any evidentiary foundation before you. If the Full Bench would wish to hear further submissions about it, we can put on a short note about it, but it's not something that we can deal with very briefly.

PN198

VICE PRESIDENT CATANZARITI: Yes, just pardon us a moment, please. Yes, the difficulty, Mr Gibian, is that it is something that can't actually be ignored, notwithstanding how it was run below and based on those couple of paragraphs, so we think the parties should put on some submissions because it is something that elsewhere might become relevant and us not dealing with it would be problematic.

PN199

MR GIBIAN: Yes. As I say, I understand what your Honour says and we are content to put on a short note about it. As I say, I am not in a position to deal with it comprehensively at the moment.

PN200

VICE PRESIDENT CATANZARITI: No, I understand. How long would you want to put on something?

PN201

MR GIBIAN: May it please.

PN202

VICE PRESIDENT CATANZARITI: How long would you want and then we will ask Mr Hatcher if he wants to, so we can have a time frame in relation to this? I don't want it drifting into the never never.

PN203

MR GIBIAN: One week?

PN204

VICE PRESIDENT CATANZARITI: Yes. Mr Hatcher, another week to respond?

PN205

MR HATCHER: Yes, please.

PN206

VICE PRESIDENT CATANZARITI: Yes. We will send a short note after the hearing about that timetable, thank you.

PN207

MR GIBIAN: May it please.

PN208

Can I deal briefly then with the notice of contention and then with some supplementary matters. In part, perhaps, the notice of contention issues were raised in my learned friend's general submissions. The gist of it seems to be that there was not sufficient evidence that there was a reasonable suspicion of a contravention. The submission seems to me, and it is aligned with an assertion about the particulars, that in order to exercise a right of entry, a permit holder has to say, 'Mr Smith, on 25 September at 3.55 am, was subject of a contravention and that's what I want to investigate.' That is not the way in which these provisions work.

PN209

The basis of the exercise of a right of entry stemming from section 481 is that the permit holder reasonably suspects that a contravention has occurred or is occurring. We have set out in our written submissions - sorry, those headed 'Written Submissions in Reply' - particularly at paragraph 6, authorities dealing with the concept of reasonable suspicion, that it, obviously enough, involves a state of conjecture or surmise based on sufficient grounds to reasonably induce that state of mind and is something falling well short of certainty and may be based on hearsay material and materials that would otherwise be inadmissible in evidence.

PN210

Indeed, stepping back from the circumstances of this case, that is precisely what one would envisage is contemplated by the permit holder provisions, that is, that a member of an organisation will report to an official of the union that certain events have occurred or contravention of an instrument has taken place, and that will provide, if credible and reasonably relied upon, the basis upon which a permit holder will seek to exercise a right of entry for the purposes of inquiring into whether in fact the contravention has or has not occurred.

PN211

Here what we had was the Federal Circuit Court had found that, at a particular location, ALDI had contravened the applicable enterprise agreement, which was in common terms in other locations, by requiring its employees to perform work pre-start without pay. Mr Worsley, for the reasons that he has explained, about which he was not subject of any cross-examination or challenge, described the

basis upon which he suspected that that form of contravention occurred in other places.

PN212

It was not, as my learned friend put, limited to a survey; it was based upon information that was given by organisers and by employees of ALDI directly that this was occurring, namely, that they had been required to perform work outside of rostered hours without pay; it was based upon disclosures by ALDI itself in the context of the Federal Circuit Court proceedings; it was based upon internal communications within ALDI, which ALDI itself identified that persons had performed work at various locations without pay, either in a pre-start or post-finish circumstance, and the survey that was being undertaken.

PN213

It is not disputed, my learned friend made clear, that the employees likely to be affected by that form of conduct included persons who were members of the SDA, either in supermarkets or in distribution centres. That provided an ample basis upon which Mr Worsley could reasonably suspect that a contravention had occurred which related to, in effect, members of the SDA.

PN214

The attack on the survey appeared to be limited solely to those passages in cross-examination to which my learned friend took the Full Bench, namely, that some of the employees who completed the survey, not all, but some of them, it was said, were managers or assistant managers who were under a time in lieu or salary type arrangement. That does not mean the survey had no value at all. It is not suggested that was the entirety of those who completed the survey and, indeed, Mr Worsley's evidence, again unchallenged, was that that was not the case; it included the various other classifications.

PN215

Secondly, on the notice of contention point and in oral submissions today, reliance was placed upon an assertion that there were not adequate particulars required, the suggestion being, as I say, essentially that, on an application of this type under section 483AA, the permit holder had to say, 'This was the person who I say is subject to contravention, this is the day, this is the conduct.'

PN216

What we have said in the reply submissions in that respect is, firstly, that misunderstands what an application under section 483AA does. It doesn't constitute the exercise of a right of entry; it is a provision which allows an order to be made which then enlivens or expands, I should say, the capacity which otherwise exists to require the permit holder be allowed to inspect documents or to have documents produced under 482 or 483. It is only when one gets to exercising that right that notice has to be given under section 518 to be including identifying and providing particulars. Even at that stage, on any view, it does not require the type of particulars that my learned friend would suggest is necessary.

PN217

Can I just take your Honours to the decision of Flick J in the matter involving ALAEA and Qantas which dealt with those provisions. It's the ninth case, starting

at page 320 in the bundle, dealing with a dispute in relation to a notice of entry by the Licensed Aircraft Engineers. Can I just note, at paragraph 20 of the decision at page 330 in the bundle, the entry notice is set out and in the box on the bottom half of that page, the particulars that were provided in that case are set out under four dot points. It's a little hard to read, but the particulars are that:

PN218

Qantas determined that a set surplus of LAMEs existed in 2014. Members report that Qantas has added new work to the complement of work that existed over and above the work Qantas declared formed the pool of work that was performed on the basis of overstaffing calculations.

PN219

Secondly:

PN220

Members also report that some LAMEs who formed the basis of overstaffing calculations as per consultation undertaken in 2014 are now working in different departments or undertaking other functions not considered in the surplus calculation.

PN221

Then in the third dot point:

PN222

As a result of these factors and information supplied during the previous consultation sessions, I suspect Qantas are exercising clause 60 to order directed leave over and above the level they are entitled to.

PN223

Just stopping at that point, his Honour goes on later in the decision to address whether there are adequate particulars of that contravention, the alleged suspected contravention of clause 60 of the relevant enterprise agreement, and separately, the matter that is dealt with in the fourth dot point, the alleged or suspected contravention of the consultation provision, clause 47.

PN224

Dealing firstly with the third dot point, his Honour was satisfied, albeit, with respect, adopting what, in my respectful submission, was a relatively tight view of the particulars required, that the third dot point was sufficient particulars of a suspected contravention of clause 60 in relation to directed leave, that is, Mr Purvinas, who was the permit holder, there saying:

PN225

As a result of these factors and other information supplied...I suspect Qantas are exercising clause 60 to order directed leave over and above the level they are entitled to.

PN226

The fourth dot point under the heading 'Particulars' on page 330 dealt with consultation and, to foreshadow, ultimately his Honour was not satisfied that there

were sufficient particulars of the consultation because all it said was, in the fourth dot point, 'I suspect Qantas has not complied with the consultation requirements in clause 47' without saying anything about what ought to have been consulted upon, in short.

PN227

One sees the reasoning in that respect, and perhaps I don't have to tire your Honours with it at great length, but it commences at about paragraph 48 on page 342. The conclusion is at paragraph 59 on page 344 where, having looked at the provisions and the notices, his Honour concludes that the entry notice dated 3 June 2016:

PN228

...properly identifies the suspected contravention in respect of clause 60 of the enterprise agreement, that contravention being the statement of suspicion that 'Qantas are exercising clause 60 to order direct leave over and above the level they are entitled to.'

PN229

Then, in the second part of the second dot point of paragraph 59, that there was not sufficient particulars of the consultation or the suspected breach of the consultation provisions.

PN230

So if one applies that in the present circumstance, even once one got to the level of serving a notice to exercise a right of entry under section 481 or powers under 482 and 483, it would have been sufficient for Mr Worsley to give particulars that were in the nature of that ALDI was contravening the specified provisions of the enterprise agreement dealing with hours of work and pay and thereby breaching section 50 and 323 of the Act by requiring employees to perform pre-start or post-shift work without pay. That is exactly the form of the notice that Flick J thought adequate in the Qantas proceedings.

PN231

There was, as I say, an ample basis upon which Mr Worsley held that suspicion, and reasonably did so and, with respect, there was not a case put to the Deputy President that that was not the situation.

PN232

Finally, just a few small matters that arose from my learned friend's oral submissions. Firstly, it was suggested that the records that are sought would not tell you everything. What they will tell you is when workers clocked on and whether they were paid for all of the working hours that they performed. It may be relevant also in terms of prevalence, for the reasons I explained earlier, to a question as to whether or not there was at least an implied direction or requirement to perform that work outside of rostered hours, but, in any event, it is not necessary to be relevant to investigate a suspected contravention that records necessarily establish every element of a suspected contravention, and that was precisely the point made by then Hampton C in re Scudds at paragraph 34, I think. So whether they would establish everything about the contravention is not

the test; it is only whether they are relevant to investigating the suspected contravention.

PN233

It was put by my learned friend that the Full Bench had no business interfering in an exercise of discretion by the Deputy President. In this matter, the decision was indeed properly turned upon, but, in any event, was informed by the, with respect, erroneous conclusions the Deputy President drew as to whether it was necessary to obtain the records to properly investigate the suspected contraventions. That is, even if it were relevant to ask what effort or volume of documents were involved, to properly consider that matter as a matter of discretion, one would have to weigh that with the relevance of the documents that were being sought to the suspected contravention and their necessity or significance in the context of the investigation. So no part of the decision could survive given the errors that existed in that part.

PN234

Finally, my learned friend placed some reliance upon section 520 of the Act, which allows for what's referred to as an 'affected member certificate' to be issued. The gist of the submission, as I understood it, was either a permit holder had to, to exercise a right of entry, go to the employer and say, 'This individual is a subject of the suspected contravention' or they had to approach the Commission under section 520.

PN235

Whilst section 520 is a facility which is available to an organisation to provide evidence to an employer to substantiate the right of entry, there's nothing in the Act which suggests that that is a process that necessarily has to be followed. It is, one infers, a facility available to a union if it wishes to break the deadlock in some kind of dispute as to whether it has members or whether it is entitled to exercise a right of entry under section 481.

PN236

Having looked at it briefly, I could only find two cases in which there had been an application for such a certificate in the Commission, both appearing to involve the CFMEU. There's nothing in the practice of the Commission or industrial parties which suggests it's a process that must be followed in the alternative to naming a particular employee and nothing in the Act which would support that conclusion. It is, with respect, entirely irrelevant to the question as to whether there is a suspected contravention entitling a permit holder to exercise the rights under sections 481 to 483.

PN237

Unless there's anything further, those were the submissions in reply.

PN238

VICE PRESIDENT CATANZARITI: No. The decision is reserved.

PN239

MR HATCHER: If it please, your Honour, there is one matter I would wish to draw attention to very briefly. It's something my friend put about the effect of

Flick J's judgment. Can I simply say I do not accept his characterisation of the conclusion Flick J drew, and if one reads paragraph 58 in its entirety, one will understand why I put that submission.

PN240

VICE PRESIDENT CATANZARITI: Thank you. The decision is reserved. The Commission is adjourned.

ADJOURNED INDEFINITELY **[11.52 AM]**