FEDERAL COURT OF AUSTRALIA

Australasian Meat Industry Employees' Union v Fair Work Australia

[2012] FCAFC 85

Citation:	Australasian Meat Industry Employees' Union v Fair Work Australia [2012] FCAFC 85
Parties:	**AUSTRALASIAN MEAT INDUSTRY EMPLOYEES' UNION v FAIR WORK AUSTRALIA and SOMMERVILLE RETAIL SERVICES PTY LTD**
File number:	VID 694 of 2011
Judges:	**JESSUP, TRACEY AND FLICK JJ**
Date of judgment:	8 June 2012
Catchwords:	**INDUSTRIAL LAW** – right of entry – whether room allocated to permit holder a reasonable request of occupier **PRACTICE AND PROCEDURE** – application for certiorari and mandamus – not appellate review – jurisdictional error **PRACTICE AND PROCEDURE –** matter remitted to Federal Court – power of Federal Court to grant amendment to grounds of application
Legislation:	*Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5 *Fair Work Act 2009* (Cth) ss 480, 481, 482, 483, 484, 490, 491, 492, 499, 505, 506, 512, 575, 578, 604 *Federal Court of Australia Act 1976* (Cth) s 20 *Judiciary Act 1903* (Cth) ss 39B, 44 *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) *Federal Court Rules* O13 r 2, O13 r 3 *Federal Court Rules 2011* r 8.21 *Conciliation and Arbitration Act 1904* (Cth) s 42A
Cases cited:	*Cam v Minister for Immigration and Multicultural Affairs* (1998) 84 FCR 14, cited *Craig v State of South Australia* (1995) 184 CLR 163, considered *Darlaston v Parker* [2010] FCA 771, 189 FCR 1, cited *Dinnison v Commonwealth of Australia* (1997) 74 FCR 184, applied

Entick v Carrington (1765) 19 St Trials 1029, considered
Gardner v Wallace (1995) 184 CLR 95, cited
Lane v Arrowcrest Group Pty Limited (1990) 27 FCR 427, cited
Meneling Station Pty Ltd v Australasian Meat Industry Employees' Union (1987) 18 FCR 51, considered
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24, considered
Minister for Immigration and Multicultural Affairs, Re; Ex parte Cohen [2001] HCA 10, 177 ALR 473, cited
Minister for Immigration and Multicultural and Indigenous Affairs v VOAO [2005] FCAFC 50, cited
Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323, considered
Minister for Immigration and Citizenship v SZOCT [2010] FCAFC 159, 119 ALD 90, cited
Plaintiff M70/2011 v Minister for Immigration and Citizenship [2011] HCA 32, 122 ALD 237, cited
Plenty v Dillon (1991) 171 CLR 635, cited
Robinson v Shirley (1982) 149 CLR 132, cited
Sagar v O'Sullivan [2011] FCA 182, 193 FCR 311, considered
Scott v Bowden [2002] HCA 60, 194 ALR 593, cited
Sean Investments Pty Ltd v Mackellar (1981) 38 ALR 363
Semayne's case (1604) 5 Co Rep 91a, 77 ER 194, cited
SFGB v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 231, 77 ALD 402, cited
Somerville Retail Services Pty Ltd v Australasian Meat Industry Employees' Union [2011] FWAFB 120, 203 IR 258, approved
Southam v Smout [1964] 1 QB 308, cited
State Bank of New South Wales v Commonwealth Savings Bank of Australia (1984) 154 CLR 579, cited
SZMWQ v Minister for Immigration and Citizenship [2010] FCAFC 97, 187 FCR 109, cited

Date of hearing:	21 February 2012
Place:	Melbourne
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	100
Counsel for the Plaintiff:	Mr D Rangiah SC with Mr C Buckley
Solicitor for the Plaintiff:	Maurice Blackburn Lawyers as town agents for Fisher

Dore Lawyers

Counsel for the First Defendant:	The first defendant filed a submitting appearance.
Counsel for the Second Defendant:	Mr F Parry SC with Mr C O'Grady
Solicitor for the Second Defendant:	Mallesons Stephen Jaques

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 694 of 2011**

ON REMITTAL FROM THE HIGH COURT OF AUSTRALIA

BETWEEN:	**AUSTRALASIAN MEAT INDUSTRY EMPLOYEES' UNION** **Plaintiff**
AND:	**FAIR WORK AUSTRALIA** **First Defendant**
	SOMMERVILLE RETAIL SERVICES PTY LTD **Second Defendant**

JUDGES:	**JESSUP, TRACEY AND FLICK JJ**
DATE OF ORDER:	**8 JUNE 2012**
WHERE MADE:	**MELBOURNE**

THE COURT ORDERS THAT:

1. The parties are to file and serve within fourteen days a draft short minute of orders to give effect to these reasons together with brief submissions on the question of any proposed orders as to costs.

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

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VICTORIA DISTRICT REGISTRY
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BETWEEN:	**AUSTRALASIAN MEAT INDUSTRY EMPLOYEES' UNION** **Plaintiff**
AND:	**FAIR WORK AUSTRALIA** **First Defendant**
	SOMMERVILLE RETAIL SERVICES PTY LTD **Second Defendant**

JUDGES:	**JESSUP, TRACEY AND FLICK JJ**
DATE:	**8 JUNE 2012**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

JESSUP J

1 I have had the advantage of reading in draft the reasons for judgment prepared by Flick J in this proceeding. His Honour's reasons absolve me of the need to deal with the factual and procedural circumstances of the proceeding. With respect to the amendment sought by the plaintiff, and with respect to the question of costs, I agree with his Honour's reasons. I also agree with his Honour that the application for certiorari and mandamus should be dismissed, but my reasons for arriving at that conclusion are as stated hereunder.

2 Chapter 3 of the *Fair Work Act 2009* (Cth) ("the Act") deals with the subject of "rights and responsibilities of employees, employers, organisations etc". Within that chapter, Pt 3-4 is concerned with "right of entry", namely, the right of persons identified by the provisions in that Part to enter premises occupied by others. The rights themselves are the subject of Div 2 of Pt 3-4. That division deals with the rights by reference to the purpose for which the person concerned seeks to enter the premises. Subdivision A is concerned with "entry to investigate suspected contravention", and gives to someone who holds a permit under the Act a right to enter premises and to "exercise a right under section 482 or 483" for the purpose of investigating a suspected contravention of the Act, or of an instrument of the

kind referred to in the section. Under s 482, a person who has entered under s 481 may do certain things, including inspect any work, process or object, and –

> (b) interview any person about the suspected contravention:
> (i) who agrees to be interviewed; and
> (ii) whose industrial interests the permit holder's organisation is entitled to represent; ….

Under s 483, a person who has entered under s 481 has a right to require production of, or to be given access to, certain records or documents. Corresponding rights in relation to what the Act describes as "TCF outworkers" are given under Subdiv AA of Div 2.

3 By contrast to Subdivs A and AA, Subdiv B of Div 2 of Pt 3-4 consists only of s 484, as follows:

> A permit holder may enter premises for the purposes of holding discussions with one or more employees or TCF outworkers:
> (a) who perform work on the premises; and
> (b) whose industrial interests the permit holder's organisation is entitled to represent; and
> (c) who wish to participate in those discussions.

Subdivision B provides, for a person who has entered premises under s 484, no additional rights or entitlements as to what he or she may do, or may require, whilst on the premises.

4 Subdivision C of Div 2 of Pt 3-4 deals with the subject of "requirements for permit holders". Section 486 provides as follows:

> Subdivisions A, AA and B do not authorise a permit holder to enter or remain on premises, or exercise any other right, if he or she contravenes this Subdivision, or regulations prescribed under section 521, in exercising that right.

Under s 490(2), discussions under s 484 may be held "only during mealtimes or other breaks". Section 491 requires the permit holder to comply with any "reasonable request" by the occupier of the premises for the permit holder to comply with an occupational health and safety requirement that applies to the premises.

5 Section 492, which is relevant in the present case, provides as follows:

> (1) The permit holder must comply with any reasonable request by the occupier of the premises to:
> (a) conduct interviews or hold discussions in a particular room or area of the premises; or
> (b) take a particular route to reach a particular room or area of the premises.

(2) Without limiting when a request under subsection (1) might otherwise be unreasonable, a request under paragraph (1)(a) is unreasonable if:
  (a) the room or area is not fit for the purpose of conducting the interviews or holding the discussions; or
  (b) the request is made with the intention of:
    (i) intimidating persons who might participate in the interviews or discussions; or
    (ii) discouraging persons from participating in the interviews or discussions; or
    (iii) making it difficult for persons to participate in the interviews or discussions, whether because the room or area is not easily accessible during mealtimes or other breaks, or for some other reason.

(3) However, a request under subsection (1) is not unreasonable only because the room, area or route is not that which the permit holder would have chosen.

(4) The regulations may prescribe circumstances in which a request under subsection (1) is or is not reasonable.

6 Division 5 of Pt 3-4 is also relevant in the present case. Subdivision A thereof is headed "Dealing with disputes", and contains ss 505 and 506 as follows –

505(1) FWA may deal with a dispute about the operation of this Part (including a dispute about whether a request under section 491, 492 or 499 is reasonable).

(2) FWA may deal with the dispute by arbitration, including by making one or more of the following orders:
  (a) an order imposing conditions on an entry permit;
  (b) an order suspending an entry permit;
  (c) an order revoking an entry permit;
  (d) an order about the future issue of entry permits to one or more persons;
  (e) any other order it considers appropriate.

(3) FWA may deal with the dispute:
  (a) on its own initiative; or
  (b) on application by any of the following to whom the dispute relates:
    (i) a permit holder;
    (ii) a permit holder's organisation;
    (iii) an employer;
    (iv) an occupier of premises.

(4) In dealing with the dispute, FWA must take into account fairness between the parties concerned.

(5) In dealing with the dispute, FWA must not confer rights on a permit holder that are additional to, or inconsistent with, rights exercisable in accordance with Division 2 or 3 of this Part, unless the dispute is about whether a request under section 491, 492 or 499 is reasonable.

506 A person must not contravene a term of an order under subsection 505(2).

7 It was s 505(1) that provided the source of the jurisdiction of Fair Work Australia ("FWA") for the decisions which were reached by Commissioner Roe on 1 September 2010 and by the Full Bench on 10 January 2011. A majority of the Full Bench, Watson VP and Sams DP, took the view that the request by the occupier of the premises with which the proceeding was concerned, the second defendant Sommerville Retail Services Pty Ltd ("Somerville"), for Mr Collin Ross, the organiser of the plaintiff, the Australasian Meat Industry Employees' Union ("the Union") to hold his discussions with employees in the training room, rather than in the lunch room, was a reasonable one. The Union contends that, in doing so, the majority failed properly to exercise the jurisdiction which FWA was given under s 505 of the Act. The grounds upon which that contention is based are set out in the reasons of Flick J.

8 Before turning to those grounds as such, I should refer to the published reasons of the majority of the Full Bench. Having referred to the statutory framework, to the facts of the case, to the reasons of Commissioner Roe, to Sommerville's grounds of appeal from the decision of the Commissioner, and to previous industrial decisions which were thought to provide some guidance, the majority gave critical consideration to the approach which had been taken by the Commissioner, and to the correctness of that approach.

9 As to the appropriateness of the training room for discussions of the kind contemplated by s 484, the majority said:

> Subject to one qualification, the Commissioner considered the training room at Somerville fit for purpose. The qualification was that because it only holds 20-25 people it was possibly too small for access during meal times. In our view, this conclusion is questionable on two grounds. First, the entire issue concerns a room for discussions with employees pursuant to the rights of entry under the Act and the Act requires that these rights arise only at meal times. Second, discussions with employees as contemplated by the Act primarily involve discussions individually or in small groups. In our view, a room is fit for the purpose of conducting interviews or holding discussions even though it may not accommodate all employees on their meal break at the same time.

As to Sommerville's reasons for not allowing the discussions to be held in the lunch room, the majority said:

> Nor do we consider that the grounds advanced by Somerville for refusing access to

> the lunch room bear upon its intention of requesting access to the union in the training room. As noted above, the interests of employees who may not wish to participate in discussions with unions has been held in various cases to be a legitimate consideration in assessing the reasonableness of an employer request. An employer who takes into account such considerations cannot in our view be criticised for doing so. Nor can such an employer be found to have an impermissible intention by having regard to such considerations. Such a conclusion is also quite inappropriate in circumstances that the union did not argue that such an intention existed.

Having reached this point, (and it should be understood that I have not set out the whole of the majority's reasoning in relevant respects), the majority came to the conclusion that Commissioner Roe had "applied an incorrect principle and had regard to irrelevant considerations" on the matter of unreasonableness under s 492 of the Act.

10 The majority then observed that the Commissioner's conclusion that Sommerville's request was otherwise unreasonable was based on his finding that the effect of the request was to hamper the Union's ability to exercise its rights, and thus to achieve the objects of Pt 3-4 of the Act. In the view of the majority, the Commissioner's reasoning was "flawed in several respects", as to which the majority said:

> First, we consider that the necessary balance of the interests of all affected persons requires a consideration of the interests of employees who may not wish to participate in discussions. If discussions are held in the training room, only those who wish to participate will attend. If discussions are held in the lunch room, others who may not wish to participate will have discussions occur in their presence. If the permit holders seek to conduct meetings of members in the lunch room then others who do not wish to participate will be inconvenienced. The evidence establishes that there is no other practical venue for employees to have their lunch, even to exit the plant and have lunch away from the premises. There is therefore a likelihood in this case that employees who do not wish to participate will be inconvenienced. This inconvenience affects Somerville because it has an obligation to provide suitable lunch amenities for all employees.

11 The majority then turned to consider, for themselves, whether Sommerville's request that Mr Ross use the training room rather than the lunch room was a reasonable one. They said:

> We have set out the approach to exercising the discretion above and apply that approach. In this case, it is accepted that there is only one room in which employees can practically undertake their lunch break, and that is the canteen or lunch room. There are only two rooms where the union can be granted right of access for the purposes of discussions with employees - the training room or the lunch room. The lunch room is the larger of the two rooms and is used by AMIEU members and non-members, including supervisory employees, during meal breaks.
>
> Somerville has requested for many years that the training room be utilised for right of

> entry visits. Somerville allows access for a longer period than during meal times. However, the dispute concerns the right of entry for discussions with employees which, under the Act must be during meal times or other breaks. That must be the context in which the matter is considered. The AMIEU contends that Somerville's request is unreasonable. That is the question that falls for determination.
>
> In our view the training room is fit for purpose. It can hold up to 25 people at a time. It is 30 metres from the canteen - accessible through a corridor from near the canteen. Employees do not walk past management when they access the training room from the production area. Blinds can be drawn to ensure privacy. Private discussions can be held with employees in that room, individually or in small groups. We do not consider that the inability to hold a mass meeting of all employees in the training room renders it unfit for the purposes of interviewing employees or holding discussions with employees.
>
> In our view, access during meal times to the training room does not involve any intimidation, discouragement or difficulty for persons to participate in discussions with permit holders. Nor do we believe that the request to use the training room is made with such intention. We note that the AMIEU has not argued that such intention exists.
>
> We note that the AMIEU prefers to utilise the canteen. It appears that its reasons for doing so relate to enhancing its ability to approach employees to request them to participate in discussions and to hold meetings with a greater number of employees than can be accommodated within the training room. We can understand why the AMIEU would have such a preference.
>
> We also note that the reason given by Somerville for not permitting access to the lunch room relates to concerns of inconvenience to employees who do not wish to participate in discussions. In our view, Somerville is entitled to consider such a matter.
>
> The preference of the AMIEU is not sufficient to make Somerville's request unreasonable. Somerville's concerns are not sufficient to make its request unreasonable. The practices regarding access during meal times and the size and location of the room do not make Somerville's request unreasonable. In all of the circumstances, we conclude that the AMIEU has not established that Somerville's request to use the training room is unreasonable.

For those reasons, the majority quashed the decision and order of Commissioner Roe, and dismissed the Union's application under s 505 of the Act.

12 The first ground of the Union's application for certiorari and mandamus invoked the conventional administrative law grounds to challenge the validity of the ostensible exercise of a statutory power or function constituted by a disregard of relevant material, or a failure to take into account relevant considerations. The Union accepted that it must bring itself within the established jurisprudence laid down, for example, by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39-42. In particular, "the ground of failure

to take into account a relevant consideration can only be made out if a decision-maker fails to take into account a consideration which he is *bound* to take into account in making that decision" (162 CLR at 39). In a case in which the factors to be taken into account are not expressly stated by the statute conferring the power, "they must be determined by implication from the subject-matter, scope and purpose of the Act" (162 CLR at 39-40).

13 It is at this point that it becomes important, in my view, to keep firmly in mind the nature of the jurisdiction which FWA was required to exercise under s 505 of the Act in the present case. Often, a statutory power to decide will involve, say, the granting of a permit, licence or other benefit, or the imposition of a detriment or penalty, or of conditions, in relation to some entity, activity or subject-matter. *Peko-Wallsend* itself was such a case. However, the power arising under s 505 was not of that character. The section in effect constituted FWA a dispute-settling tribunal. Undoubtedly it was obliged to exercise the relevant power in a way which involved no antagonism with the scheme of Pt 3-4 of the Act, but, subject to that, what it was obliged to take into account in any particular case was very much dependent on how the parties to the dispute presented their cases to it.

14 The first of the passages from the judgment of Mason J in *Peko-Wallsend* quoted in para 12 above was based substantially on something said by Deane J in this court in *Sean Investments Pty Ltd v Mackellar* (1981) 38 ALR 363, 375. The whole of what his Honour had to say about the relevant subject should, however, be referred to in the context of the present case. Having referred to subss (1) and (2)(b) of s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), Deane J said (38 ALR at 375):

> This does not, however, mean that a party affected by a decision is entitled to make an exhaustive list of all the matters which the decision-maker might conceivably regard as relevant and then attack the decision on the ground that a particular one of them was not specifically taken into account. In this regard, I consider that the following comments of the United Kingdom Court of Appeal (Megaw, James and Geoffrey Lane LJJ) in *Elliott v Southwark London Borough Council* [1976] 2 All ER 781; [1976] 1 WLR 499 at 507, in relation to a local authority, are appropriate in respect of the recommendations of the Committee and the decision of the Minister in the present case: "It is clear that the matters which the local authority should consider … vary from case to case. It is not for the court to prescribe a list of matters which must always be considered or to prescribe which factors should be given more weight than others. It is worth repeating that the function of the court, where such issues are raised, is not to substitute its own opinion or decision on matters which Parliament has left to the judgment of the local authority but to decide whether the local authority in reaching its decision has acted in accordance with the statutory provisions."

> In a case such as the present, where relevant considerations are not specified, it is largely for the decision-maker, in the light of matters placed before him by the parties, to determine which matters he regards as relevant and the comparative importance to be accorded to matters which he so regards. The ground of failure to take into account a relevant consideration will only be made good if it is shown that the decision-maker has failed to take into account a consideration which he was, in the circumstances, bound to take into account for there to be a valid exercise of the power to decide.

It is against this understanding of the relevant jurisprudence that I turn to the Union's first ground in the present case.

15 Part (a) of the Union's first ground was based upon a perception of the Act which, although variously expressed by counsel for the Union in presenting their client's case, is most pithily encapsulated in the following passage in their outline of submissions:

> The right described in s. 480(a) to represent the members and hold discussions with potential members involves the ability to directly approach employees within the workplace. The employees may wish to be represented or hold discussions, or they may reject the offer. However, the right is diminished if access to employees is screened by an employer preventing a direct approach to employees.

The point was that the Act necessarily contemplated that someone entering premises under s 484 would be able "to directly approach employees within the workplace" with a view at least to inquiring about their preparedness to engage in the discussions referred to. If that were a correct perception of the Act, I doubt whether the reasons of the majority of the Full Bench would rightly be described as infected by an omission to take some relevant circumstance into account. Rather, it might be said that their discretion miscarried in the sense that their decision was antagonistic to the scheme of that part of the legislation under which it was made. Indeed, as the passages above demonstrate, it could not be said that the majority overlooked what was, it seems, a central feature of the Union's case, namely, that the request by Sommerville to use the training room would compromise Mr Ross' opportunity to approach the generality of employees at the workplace, with a view to enquiring whether they desired to engage in discussions.

16 However, I do not consider that a perception of the scheme of the relevant provisions in Pt 3-4 of the Act of the kind referred to in the previous paragraph would be an accurate one. It is notable that the legislature has chosen to give no rights under Subdiv B other than the right to enter premises for certain purposes. The individual paragraphs in s 484 identify

the employees with respect to whom those purposes must exist, at the point of entry. One characteristic specified in the section is that the employees must, at the time when the right of entry comes to be exercised, "wish to participate in those discussions". The right of entry is not given for the holding of discussions with employees generally. Dealing with the matter at this high level as it does, s 484 undoubtedly leaves scope for disputation in particular cases, and it may be that this is, in part at least, the justification for giving FWA its dispute-settling function under s 505. It is sufficient for present purposes to say that a decision by FWA to resolve a dispute arising under s 492 in a way which did not leave scope for the person entering to cast about generally amongst the employees at the particular workplace with a view to discovering which, if any, of them desired to enter into discussions could not be said to be jurisdictionally infected by a failure to take into account a circumstance which FWA was bound to take into account in the *Peko-Wallsend* sense.

17 Turning to part (b) of the Union's first ground, it is here alleged that the majority failed to take into account the rights of Sommerville's employees under s 480 of the Act to receive information from the Union. But s 480 creates no such rights. It is an "objects" provision, and makes it clear that the object of Pt 3-4 itself is to "establish a framework" that balances various things, including "the right of employees … to receive, at work, information and representation from officials or organisations". The way this balance has been achieved is by the enactment of the provisions to which I have referred, amongst others. On the facts of the present case, there could be no suggestion that Sommerville's request under s 492 compromised the ability of those of its employees who attended discussions in the training room to receive information from Mr Ross, and others in a like position. Essentially, the Union's point was that, by not giving Mr Ross the facility to approach employees generally, the "right" of those employees to receive information from him had been compromised. As so identified, this point is different from that advanced under part (a) of the first ground only in its manner of formulation. In substance, and to the extent that might be thought relevant to certiorari and mandamus, the point is the same as that arising under part (a), and should be decided accordingly.

18 Under part (c) of its first ground, the Union contended that the majority failed to take into account the length of the meal and other breaks during which the permit holder was able to hold the discussions referred to in s 484 of the Act. Although the context for this

submission was provided by the limitation in s 490(2) to which I have referred above, the submission amounted, in my view, to little more than a challenge to the merits of the conclusion reached by the majority. It is here that the function of FWA under s 505 is significant. That function does not involve the determination of a question articulated directly by the Act. Rather, it involves the treatment of a dispute between parties about the reasonableness of an occupier's request under s 492. In that setting, the range of circumstances which FWA would take into account would depend very much upon the nature of the dispute and, in an adjudicative setting, upon the submissions that had been made to it. If, in a particular case, there were a concern that the holding of a meeting at a place apart from the room or area within which employees wishing to attend the meeting would normally be taking their meal would compromise the utility of the discussions, one would expect that such a proposition would be front and centre of the case put to FWA under s 505. However that may be, the Union's present point must be understood as involving the proposition that, whether or not such an issue was raised in the case under s 505, the power to settle a dispute could not be validly exercised without taking account of it. I do not consider that there is any warrant in the legislation for such a categorical conclusion. In the view I take, whether, in a particular case, it was either necessary or appropriate to consider the extent to which the ability of employees and their union representatives to have discussions was compromised by a lack of coincidence as between the venue for those discussions and the place where meals or other breaks were taken would depend very much upon the facts of the individual case, and the extent to which FWA fell under any obligation to consider problems lying along this axis would depend largely upon the nature of the respective cases put to it.

19 The Union's second ground was centred upon the observation made by the majority of FWA that the "discussions with employees as contemplated by the Act primarily involve discussions individually or in small groups". The Union submitted that this was a clear error of law, as there was nothing either in the terms of the Act or in the relevant statutory context to limit discussions of the kind referred to in s 484 to those which involved only individuals or small groups of employees. Unless introduced by the connotation of the word "discussions", there is no such limitation in the Act. In terms at least, if there is a large number of employees wishing to have discussions with the permit holder, his or her right to enter the premises for the purpose of holding those discussions arises under s 484, no less than if the discussions were sought by a small group of employees.

20 Whether there was any such limitation introduced by the connotation of the word "discussions" is a question upon which we were not addressed by counsel in the present case. For that reason, I would be reluctant to enter upon it. I note, however, that, before the enactment of the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth), there was no statutory right for a union representative to enter premises for the purposes of having discussions with employees. Such a right was first introduced by the amending act of 1996, but neither the Explanatory Memorandum for, nor the parliamentary record in respect of, the relevant Bill throws any light on the subject. In my view, we must, therefore, decide the present point unassisted by such limitation as may derive from the connotation of the word "discussions" itself.

21 In those circumstances, the conclusion that the majority misdirected themselves in this respect is inescapable. However, that conclusion does not make good the Union's case for certiorari and mandamus.

22 In the relevant passage of the reasons of the majority, set out at para 9 above, the observation as to the contemplation of the Act with respect to the nature of the discussions for which entry is permitted under s 484 was made in the context of Commissioner Roe's conclusion as to the training room's fitness for purpose, as made relevant by s 492(2)(a) of the Act. The Commissioner had held that, because the training room could accommodate only 20-25 people, it was not fit for purpose. But whether a room, because of its size, is unfit for the purpose of discussions would depend entirely upon the number of persons seeking to engage in those discussions. It could not be determined in the abstract. Section 492 operates on a case by case basis, "the discussions" referred to therein being the ones which the permit holder proposes to have on the particular occasion.

23 The Union's case before the Full Bench was not that the training room had proved inadequate on any particular occasion. Rather, it was that, against an assumed set of facts under which more than 25 employees would wish to meet with the permit holder, the training room would then be too small. If those facts ever arose, however, the reasonableness of Somerville's request that the persons proposing to engage in discussions do so in the training room might then be assessed in a practical situation. Absent the existence of those facts, any

conclusion about the reasonableness of Somerville's requirements (or at least any such conclusion which would hold them to be unreasonable) would be hypothetical only.

24 In its own consideration of the dispute before it, the majority of the Full Bench concluded that the training room was fit for purpose, observing that it could hold up to 25 people at a time. I would not regard that conclusion as dependent to any extent upon the majority's view as to the contemplation of the Act, expressed earlier in their reasons. Rather, I consider it to be no more than a reflection of the case which was run, and of the evidence which was led. Particularly in the absence of any suggestion that the training room had, because of its size, ever been found wanting for the purpose of these discussions, I consider that the majority's conclusion was, in effect, a pragmatic way of settling the dispute which arose before it.

25 Although I do consider that the majority mistook the effect of the Act, and to that extent erred in law, for reasons given above, I do not accept that this was an error of a jurisdictional kind. That is to say, it was not an error which involved the constructive failure to exercise jurisdiction, or involved the majority in deciding a question other than that which was required to be decided under the statutory provisions in question.

26 The Union's third ground was that the majority had erred in point of jurisdiction because they found, in the absence of evidence, that there were employees of Sommerville who did not wish to participate in discussions with Mr Ross. In my opinion, the majority made no such finding. Their relevant observations were, first, that, if the permit holders sought to conduct meetings of members in the lunch room, then others who did not wish to participate in those meetings would be inconvenienced; and, secondly, that Sommerville had given as a reason for not permitting access to the lunch room a concern as to the inconvenience that might be visited upon those other employees. In neither of these respects did the conclusion of the majority depend upon evidence as to the extent, if any, to which there were employees who did not wish to participate in discussions. Rather, the majority's point of reference was s 484(c) of the Act itself, which confined the right of entry to a situation in which the discussions would be with employees who wished to participate in them. It did not need evidence for the majority to reason, following the Act, that there were presumptively two classes of employees: those who wished to participate, and those who did

not. FWA is, of course, a tribunal with specialised knowledge, a circumstance which comes significantly into play when a "no evidence" point of this kind is made. The purpose of the lunch room being given by its name, it was amply within the scope of the majority's jurisdiction under the Act to take into account the interests of those who did not wish to participate. There is, in my view, nothing in the Union's third ground.

27 The same conclusion applies with respect to the Union's fourth ground. What the majority said, as set out in para 10 above, was: "This inconvenience affects Sommerville because it has an obligation to provide suitable lunch amenities for all employees." This was a statement by way of reasoning, not an evidentiary finding that there had been, on some previous occasion, a concrete situation in which Sommerville had in fact been "adversely affected" (to adopt the terms of the Union's submission in the present case). The Union made no suggestion that Sommerville was not obliged to provide suitable lunch amenities for its employees, and, beyond that, it was quite within the competence of the majority to link that circumstance with their earlier conclusion that, for employees not participating, the discussions would constitute, potentially at least, a source of inconvenience.

28 The application should be dismissed.

I certify that the preceding twenty-eight (28) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jessup.

Associate:

Dated: 8 June 2012

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 694 of 2011**

ON REMITTAL FROM THE HIGH COURT OF AUSTRALIA

BETWEEN:	**AUSTRALASIAN MEAT INDUSTRY EMPLOYEES' UNION** **Plaintiff**
AND:	**FAIR WORK AUSTRALIA** **First Defendant**
	SOMMERVILLE RETAIL SERVICES PTY LTD **Second Defendant**

JUDGES:	**JESSUP, TRACEY AND FLICK JJ**
DATE:	**8 JUNE 2012**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

TRACEY J

29 I have had the benefit of reading in draft the reasons for judgment prepared by Jessup and Flick JJ. I agree that the application should be dismissed and that the ancillary order relating to costs, which is proposed by Flick J, should be made.

30 I agree with their Honours' reasons in relation to grounds 1, 3 and 4. In so far as ground 2 is concerned I agree that, if the reasons of the majority of the Full Bench of Fair Work Australia are properly to be understood as limiting the "discussions" contemplated by s 484 of the *Fair Work Act 2009* (Cth) to discussions between individuals or in small groups their Honours would have erred in their construction of the Act.

31 Their reasons are not, however, to be read zealously in pursuit of error: see *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272. Their Honours said that "… discussions with employees as contemplated by the Act *primarily* involved discussions individually or in small groups …". They were not, therefore, asserting

that the *only* discussions covered by s 484 were those with individuals or in small groups. The use of the adverb "primarily" makes it clear that they had in mind that the section could cover discussions with larger groups. A "discussion" will, normally, involve oral exchanges between the participants. In a case such as the present the participants will be the permit holder and members or potential members of the organisation which the permit holder represents. The larger the group becomes, the less likely it will be that such exchanges between the permit holder and all employees present will be possible. I agree with Flick J that a fair reading of their Honours' reasons in context supports the conclusion that they did not adopt an errant construction of s 484 of the Act.

I certify that the preceding three (3) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Tracey.

Associate:

Dated: 8 June 2012

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
FAIR WORK DIVISION **VID 694 of 2011**

BETWEEN:	**AUSTRALASIAN MEAT INDUSTRY EMPLOYEES' UNION** **Plaintiff**
AND:	**FAIR WORK AUSTRALIA** **First Defendant**
	SOMERVILLE RETAIL SERVICES PTY LTD **Second Defendant**

JUDGES:	**JESSUP, TRACEY AND FLICK JJ**
DATE:	**8 JUNE 2012**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

FLICK J

32 On 8 March 2011 an *Application for an Order to Show Cause* was filed in the High Court of Australia. The Plaintiff in that proceeding was the Australasian Meat Industry Employees' Union (the "AMIEU"). The First Defendant was Fair Work Australia and the Second Defendant was Somerville Retail Services Pty Ltd ("Somerville Retail").

33 The AMIEU sought a writ of certiorari quashing orders made by a Full Bench of Fair Work Australia on 10 January 2011. A writ of mandamus was also sought directing Fair Work Australia to determine an appeal according to law. The orders made on 10 January 2011 were directed to whether Somerville Retail's request that interviews with employees be conducted in a training room and not in its lunchroom was reasonable. At first instance, a Commissioner concluded that the interviews should be conducted in the lunchroom; on appeal, a majority of the Full Bench of Fair Work Australia disagreed.

34 On 24 June 2011 a Justice of the High Court made an order by consent remitting the proceeding to this Court. On 11 August 2011 the Chief Justice of this Court made an order

pursuant to s 20(1A) of the *Federal Court of Australia Act 1976* (Cth) that the original jurisdiction of this Court should be exercised by a Full Court of this Court.

35 Fair Work Australia had filed a submitting appearance when the proceeding was before the High Court of Australia.

36 The *Application* is to be dismissed.

THE DECISIONS OF FAIR WORK AUSTRALIA

37 The facts relevant to the present proceeding are within a narrow compass.

38 Mr Collin Ross, an official of the AMIEU, is a holder of an entry permit issued under s 512 of the *Fair Work Act 2009* (Cth). He sought access to the premises of Somerville Retail for the purpose of holding discussions pursuant to s 484 of the *Fair Work Act*. Somerville Retail requested that he hold those discussions in the training room at those premises. Mr Ross sought to use the lunchroom.

39 There is no suggestion in the present proceeding that Mr Ross was seeking to exercise his right of entry for any purpose other than one consistent with s 480.

40 The AMIEU made an application to Fair Work Australia for orders under s 505(1) on the basis that the requirement to hold discussions in the training room was "*unreasonable*".

41 Commissioner Roe resolved that application in favour of the AMIEU.

42 Somerville Retail sought permission to appeal that decision pursuant to s 604 of the *Fair Work Act*. Permission was granted and on 10 January 2011 a Full Bench of Fair Work Australia allowed the appeal and quashed the decision of Commissioner Roe: *Somerville Retail Services Pty Ltd v Australasian Meat Industry Employees' Union* [2011] FWAFB 120, 203 IR 258. Vice President Watson and Deputy President Sams formed the majority; Commissioner Deegan dissented.

43 Detailed reasons for decision were provided by both Commissioner Roe and by the Full Bench.

THE ERRORS RELIED UPON

44 The *Application for an Order to Show Cause* as filed in the High Court sought writs of certiorari and mandamus.

45 The *Grounds* upon which that relief was claimed were set forth in the *Application* as follows:

> 1. The decision of the majority of the full bench of the First Defendant involved jurisdictional error because they disregarded relevant material or failed to take into account relevant considerations, namely:
>
> (a) that the requirement imposed by the Second Defendant upon the holder of an entry permit issued under s.512 of the *Fair Work Act* 2009 (Cth) that he could not hold discussions with employees in the lunch room at the Second Defendant's premises would have the effect that the holder and the Plaintiff would be deprived of direct access to the Second Defendant's employees;
>
> (b) the rights of the Second Defendant's employees under s.480 of the *Fair Work Act* to receive information from the Plaintiff;
>
> (c) the length of the meal and other breaks during which the holder of the entry permit could hold discussions with the Second Defendant's employees under s.484 of the *Fair Work Act*.
>
> 2. The decision of the majority involved jurisdictional error because they misconstrued the *Fair Work Act* by holding that a permit holder's discussions with employees as contemplated by that Act primarily involves discussions individually or in small groups.
>
> 3. The decision of the majority involved jurisdictional error because they found that there were employees of the Second Defendant who did not wish to participate in discussions with the Plaintiff, when there was no evidence to support that finding.

With respect to the final Ground, the AMIEU sought to further contend that there was no evidence to support a finding that "*the inconvenience to employees who did not wish to participate in discussions with the [AMIEU] affected [SOMERVILLE]*".

46 This Court has power to permit an amendment to the *Grounds* previously relied upon in the *Application* when it was before the High Court.

47 The order made by the High Court of Australia on 24 June 2011 was made pursuant to s 44(1) of the *Judiciary Act 1903* (Cth). The power to remit is a power "*intended to facilitate the course of litigation*": *Robinson v Shirley* (1982) 149 CLR 132 at 136 per Brennan J; *Scott v Bowden* [2002] HCA 60 at [12], 194 ALR 593 at 596 per McHugh J. The "*purpose of a remitter under s.44 is simply to relieve [the High Court] of the necessity to hear cases that might more conveniently be heard elsewhere, particularly where the litigation involves the*

trial of issues of fact": *State Bank of New South Wales v Commonwealth Savings Bank of Australia* (1984) 154 CLR 579 at 586 per Gibbs CJ. See also: *Gardner v Wallace* (1995) 184 CLR 95 at 100 to 101 per Dawson J. And once a matter has been remitted to this Court "*it becomes a proceeding in this Court to be determined, in all respects, in accordance with this Court's procedures and in accordance with any relevant statute law impinging upon those procedures*": *Dinnison v Commonwealth of Australia* (1997) 74 FCR 184 at 188 to 189 per Foster J. See also: *Cam v Minister for Immigration and Multicultural Affairs* (1998) 84 FCR 14 at 38 to 39 per Mansfield J.

48 The power to amend the *Grounds* set forth in the *Application* as remitted to this Court is thus to be found in r 8.21(1)(g)(i) of the *Federal Court Rules 2011*. The power to permit an amendment was previously found in Order 13 r 2 of the now-repealed *Federal Court Rules*. Order 13 r 2 previously referred to the amendment of a "*document*" and O 13 r 3 dealt with an amendment of a "*pleading*". Under both the current *Rules*, and the now-repealed *Rule*s, a "*pleading*" did not include an "*application*". There was no express counterpart in the now-repealed *Federal Court Rules* to the current r 8.21.

49 Leave should be given to amend the *Application* by adding the following *Ground 4* (without alteration):

> The decision of the majority involved jurisdictional error because it found that the inconvenience to employees who did not wish to participate in discussions with the Plaintiff affected the Second Defendant, when there was no evidence to support that finding.
>
> Alternatively, the majority failed to take into account a relevant consideration, namely whether the employer would be caused inconvenience if its request or requirement as to the location for the discussions were not made.
>
> Alternatively, the decision was unreasonable because the evidence was that the Plaintiff would be inconvenienced and there was no evidence that Second Defendant or any of its employees would be inconvenienced if discussions were held in the lunchroom.

The amendment is but essentially a variant of the existing *Ground 3* and, like *Ground 3*, is founded entirely upon the reasons for decision of the majority of the Full Bench of Fair Work Australia. Senior Counsel on behalf of Somerville Retail did not wish to be heard in opposition to the amendment proposed.

50 Some reservation is nevertheless expressed as to whether or not the Applicant's approach to the formulation of the *Grounds* upon which it sought to challenge the decision of Fair Work Australia was necessarily correct. If review was sought of an exercise of a

statutory discretion, the traditional approach would be to identify those considerations which the repository of the discretion was "*bound*" to take into account: e.g., *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39 to 40 per Mason J. That would involve a construction of the statutory provision in question and determining whether particular considerations were expressly or impliedly required to be taken into account. This was the manner in which the Applicant (at least in part) sought to frame its challenge to the decision of Fair Work Australia. But it may be queried whether a challenge to the decision of Fair Work Australia as to whether the request of Somerville Retail was a "*reasonable request*" necessarily involves the same analysis. Whether a request of an occupier constitutes a "*reasonable request*" may well involve a discretionary judgment initially to be made by an occupier taking into account all of the circumstances. A discretionary judgment may not be susceptible to being set aside merely because others, also taking into account all of the circumstances, may not have reached the same conclusion. Such an analysis may not necessarily be the same task as that set forth by Mason J in *Peko-Wallsend* or that undertaken when judicial review is sought of an administrative decision pursuant to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) or s 39B of the *Judiciary Act 1903* (Cth). But Senior Counsel for Somerville Retail did not contend that any different approach should now be pursued. Nor did he take issue (perhaps not surprisingly) with the task undertaken by the AMIEU to establish jurisdictional error in order to obtain certiorari. In the absence of any submission to the contrary, the approach advanced on behalf of the AMIEU is the basis upon which the *Application* is now to be resolved.

THE RIGHT OF ENTRY *v* THE RIGHTS OF AN OCCUPIER

51 The question as to where interviews were to be held arose because an official of AMIEU, Mr Ross, exercised the right of entry conferred on him by s 484 of the *Fair Work Act* and was subject to a "*request*" made by Somerville Retail that he hold discussions with employees in the training room. The question emerged as to whether that "*request*" was a "*reasonable request*" within the meaning of and for the purposes of s 492(1) of the *Fair Work Act*.

52 The relevant statutory provisions which address the rights of entry conferred upon "*permit holders*" such as Mr Ross are to be found within Part 3-4 of the *Fair Work Act*.

53 The "*object*" of Part 3-4 is set forth as follows in s 480:

> The object of this Part is to establish a framework for officials of organisations to enter premises that balances:
>
> (a) the right of organisations to represent their members in the workplace, hold discussions with potential members and investigate suspected contraventions of:
>
> (i) this Act and fair work instruments; and
>
> (ii) State or Territory OHS laws; and
>
> (b) the right of employees and TCF outworkers to receive, at work, information and representation from officials of organisations; and
>
> (c) the right of occupiers of premises and employers to go about their business without undue inconvenience.

54 Within Part 3-4, Division 2, Subdivision B deals with rights that are conferred on "*permit holders*" to hold discussions. Within that Subdivision, s 484 provides as follows:

> **Entry to hold discussions**
>
> A permit holder may enter premises for the purposes of holding discussions with one or more employees or TCF outworkers:
>
> (a) who perform work on the premises; and
>
> (b) whose industrial interests the permit holder's organisation is entitled to represent; and
>
> (c) who wish to participate in those discussions.

Section 490(2) further provides that a permit holder "*may hold discussions under section 484 only during mealtimes or other breaks*".

55 Section 492 thereafter provides as follows:

> **Conduct of interviews in particular room etc.**
>
> (1) The permit holder must comply with any reasonable request by the occupier of the premises to:
>
> (a) conduct interviews or hold discussions in a particular room or area of the premises; or
>
> (b) take a particular route to reach a particular room or area of the premises.
>
> Note: FWA may deal with a dispute about whether the request is reasonable (see subsection 505(1)).
>
> (2) Without limiting when a request under subsection (1) might otherwise be unreasonable, a request under paragraph (1)(a) is unreasonable if:
>
> (a) the room or area is not fit for the purpose of conducting the interviews or holding the discussions; or
>
> (b) the request is made with the intention of:
>
> (i) intimidating persons who might participate in the interviews or discussions; or
>
> (ii) discouraging persons from participating in the interviews or discussions; or
>
> (iii) making it difficult for persons to participate in the interviews or discussions, whether because the room or area is not easily accessible during mealtimes or other breaks, or for some other reason.
>
> (3) However, a request under subsection (1) is not unreasonable only because the room, area or route is not that which the permit holder would have chosen.
>
> (4) The regulations may prescribe circumstances in which a request under subsection (1) is

> or is not reasonable.

56 The right of entry conferred by s 484 is thus not an untrammelled right. It is a right subject to both express and implied constraints. One express constraint is that the right of a permit holder is one that must be exercised for one or other of the "*purposes*" set forth in s 484. Another express constraint is that the right of entry is subject to any "*reasonable request*" that may be made by the occupier of the premises that the permit holder seeks to enter. A further express constraint is that contained within s 490(2) limiting discussion to meal and lunch breaks. An implied constraint is that the right must be exercised so as to promote the object of Part 3-4 as set forth in s 480.

57 Like other rights of entry conferred by the *Fair Work Act* (cf. *Darlaston v Parker* [2010] FCA 771 at [36] to [38], 189 FCR 1 at 11), s 484 is a statutory right which diminishes the common law rights of an occupier.

58 These rights of an occupier of property have long been cherished. Thus, in *Semayne's Case* (1604) 5 Co Rep 91a, 77 ER 194 at 194 it was said that:

> The house of every one is his castle …

The Earl of Chatham is reported as saying:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail – its roof may shake – the wind may blow through it – the storm may enter – the rain may enter – but the King of England cannot enter – all his forces dare not cross the threshold of the ruined tenement.

Comparatively (much more) recently, in *Entick v Carrington* (1765) 19 St Trials 1029 at 1066 Lord Camden LCJ observed that:

> By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing … If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him …

This basic principle has been carried forward in time: e.g., *Southam v Smout* [1964] 1 QB 308 at 320 per Lord Denning MR. And it is not a principle confined to the history of England – it is a principle which continues to apply with equal force in Australia today: e.g., *Plenty v Dillon* (1991) 171 CLR 635 at 639 per Mason CJ, Brennan and Toohey JJ.

59 Sections 484 and 492 of the *Fair Work Act* thus presumably reflect the balance sought to be struck by the Legislature between the common law rights of an occupier and the rights of entry necessary to promote the objects of Part 3-4. Attempts to strike a balance between potentially competing rights have frequently arisen in an industrial law context. Thus, when construing a provision of an award and s 42A of the *Conciliation and Arbitration Act 1904* (Cth), in *Meneling Station Pty Ltd v Australasian Meat Industry Employees' Union* (1987) 18 FCR 51 at 61 to 62, Keely, Gray and Ryan JJ observed:

> The right of entry contemplated by s 42A of the Act is available at any time during working hours, and for other purposes than the inspection of roster, time and wages records. It is also subject to conditions. Clause 23 has been framed, in our view, to strike a balance between the interest of a union party to an award in monitoring its observance and detecting breaches of it by an employer, and the interest, on the other hand, of an employer in carrying on business without interruption or harassment. A construction of the clause which favours one of those interests to a point where the other can be given scarcely any recognition is, therefore, to be avoided unless the language of the clause compels its adoption. Accordingly, since cl 23 of the Award provides a right to inspect records, it is reasonable to construe it as incidentally conferring a specific, preliminary, right to enter premises for that purpose.

See also: *Lane v Arrowcrest Group Pty Limited* (1990) 27 FCR 427 at 439 to 440 per von Doussa J.

60 The interests which must be taken into account when forming a view as to whether a "*request*" made by an "*occupier*" is "*reasonable*", however, are not self-evident. Questions arise as to whether the reasonableness of a "*request*" of an occupier:

- can be dictated exclusively by the proprietary self-interests of the occupier;

or whether an occupier must only make a "*request*" which:

- attempts to "*balance*" the matters set forth in s 480.

It may for present purposes be accepted that a "*request*" which hinders or impedes or frustrates the statutory right of entry conferred by s 484 could well be considered to be a "*request*" which was not "*reasonable*". The Legislature has addressed, at least in part, this question when it provides in s 492(2)(b) that a request is "*unreasonable*" if made with one or other of the "*intentions*" there set forth. Presumably it matters not whether the occupier achieves the intended purpose of (for example) "*intimidating persons who might participate in the interviews or discussions*".

61 But a "*request*" which falls short of hindering or impeding or frustrating the right of entry or which is not rendered "*unreasonable*" by reason of s 492(2) may be "*reasonable*" from the occupier's perspective and "*unreasonable*" from the perspective of the permit holder.

62 An occupier may, for example, have a number of rooms which are "*fit for the purpose of conducting ... interviews*" within the meaning of s 492(2)(a). Some may be more suitable than others – some may have better facilities than others. And an occupier may not have any extant reason for reserving for its own purposes any one of those rooms but may wish to do so in case an occasion for their use arises unexpectedly in the future. The permit holder seeking entry may well accept that the best equipped rooms should be retained for the purposes of the occupier. But the permit holder may be displeased if the "*particular room*" allocated is by far the worst of those available. From the perspective of the permit holder, the allocation of an alternative and better room may be seen as more "*reasonable*". Similarly, an occupier may have a number of available rooms, none of which are presently being used by the occupier – or intended to be used. Section 492(1)(a), it will be noted, does not require that a permit holder be allocated a "*room*"; he may be requested to use an "*area of the premises*". An occupier acting in its own self-interest may decide to retain all of its available rooms for any such future occasion that may arise. The occupier may "*request*" that the permit holder "*conduct interviews or hold discussions*" in an "*area*" of its premises, such as an "*area*" otherwise located within an expansive assembly plant. Much may depend upon whether or not an occupier has any alternative use of its available rooms in mind at the time the request is made. Where an occupier only has one room available in which employees can meet, and where that room is already being used (for example) as a boardroom or by employees as a lunchroom, there may well be circumstances where an occupier can make a "*reasonable request*" that those seeking entry meet with employees in an "*area*" which is not a room but an open part of the premises. It may well not be unreasonable to refuse to make available a room if it is otherwise being used for an existing purpose.

63 Such hypothetical instances serve to emphasise that there may be a divergence between what an occupier regards as a "*reasonable request*" as opposed to the perception of those seeking to enforce a right of entry. There is much to be said for the view that the statutory right of entry conferred on a permit holder by s 484 should not be construed as

conferring any greater right than is necessary to achieve the statutory objective. The common law rights of an occupier, on this approach, are only to be diminished to the extent absolutely necessary to give effect to the right conferred. Subject only to the requirement that an occupier make a "*reasonable request*", the balance that the Legislature has sought to achieve between granting a statutory right of access and the consequent diminution of the common law rights of an occupier is thereby struck. An occupier, on this approach, need not be further involved itself in promoting or accommodating the interests of those seeking entry.

64 Unless the perimeter within which a conclusion is to be reached as to whether a request of an occupier is a "*reasonable request*" are identified, it may be difficult to determine whether a permit holder is being subjected to a constraint which cannot lawfully be imposed.

65 The same phrase employed in s 492, namely "*any reasonable request by the occupier*", it should be noted, appears elsewhere in Part 3-4 (ss 491 and 499). Subject to the specific statutory requirements applicable to each of these provisions, that phrase should be construed in the same manner in each of these sections.

66 Section 505(1), within Division 5 to Part 3-4, provides that "*FWA may deal with a dispute about the operation of this Part (including a dispute about whether a request under section 491, 492 or 499 is reasonable)*".

67 Fair Work Australia, it should finally be observed, is a statutory authority established by s 575 of the *Fair Work Act*. In performing the functions entrusted to it under the Act, s 578 mandates (*inter alia*) that it must take into account "*the objects of this Act, and any objects of the part of this Act*" and also "*equity, good conscience and the merits of the matter*".

68 It is s 484 which assumes primary importance in the present proceeding.

A FAILURE TO CONSIDER RELEVANT CONSIDERATIONS

69 The first *Ground* of the *Application for an Order to Show Cause* asserts jurisdictional error because the majority of the Full Bench "… *disregarded relevant material or failed to take into account relevant considerations* ...". Given the common approach of the parties as

to the manner in which the *Application* is to be resolved, this *Ground* mirrors the comparable ground of review set forth in *Peko-Wallsend*.

70 It may be accepted, on this approach, that a failure to take into account relevant considerations may constitute "*jurisdictional error*" attracting relief in the nature of certiorari: *Craig v State of South Australia* (1995) 184 CLR 163. Brennan, Deane, Toohey, Gaudron and McHugh JJ there said in respect to jurisdictional error committed by an administrative tribunal:

> If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it: (1995) 184 CLR at 179.

This list, however, is not exhaustive: *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323. McHugh, Gummow and Hayne JJ there observed:

> [82] …"Jurisdictional error" can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from *Craig*, is not exhaustive. Those different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it. Nothing in the Act suggests that the Tribunal is given authority to authoritatively determine questions of law or to make a decision otherwise than in accordance with the law.

See also: *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 at [59], 280 ALR 18 at 42, 122 ALD 237 at 261 per French CJ.

71 This first way in which the AMIEU argued that there had been a failure to take into account a relevant consideration is not made out.

72 The written *Outline of Submissions* filed on behalf of the AMIEU maintained that "*the effect of [Somerville's] requirement that Mr Ross may not see employees in the lunch room is that it prevents him from directly approaching employees at the premises to hold discussions with them, or to ascertain whether they wish to hold discussions with him*". Properly construed, it is then submitted that the entry provisions conferred by the *Fair Work*

Act "*contemplate that if the rights of the permit holders are diminished or limited in this way by the employer's requirement, that is a consideration that the Fair Work Australia is bound to take into account in deciding whether the requirement is reasonable*".

73 Whether or not this was a consideration that must be taken into account, a fair reading of the reasons for decision of the majority of the Full Bench record that it was in fact taken into account. In that part of the reasoning of the majority where consideration was being given to whether the request was "*reasonable*", the majority stated in part as follows:

> [52] In our view, access during meal times to the training room does not involve any intimidation, discouragement or difficulty for persons to participate in discussions with permit holders. Nor do we believe that the request to use the training room is made with such intention. We note that the AMIEU has not argued that such intention exists.
>
> [53] We note that the AMIEU prefers to utilise the canteen. It appears that its reasons for doing so relate to enhancing its ability to approach employees to request them to participate in discussions and to hold meetings with a greater number of employees than can be accommodated within the training room. We can understand why the AMIEU would have such a preference.
>
> [54] We also note that the reason given by Somerville for not permitting access to the lunch room relates to concerns of inconvenience to employees who do not wish to participate in discussions. In our view, Somerville is entitled to consider such a matter.
>
> [55] The preference of the AMIEU is not sufficient to make Somerville's request unreasonable. Somerville's concerns are not sufficient to make its request unreasonable. The practices regarding access during meal times and the size and location of the room do not make Somerville's request unreasonable. In all of the circumstances, we conclude that the AMIEU has not established that Somerville's request to use the training room is unreasonable.

The submission advanced by AMIEU that these reasons do not evidence a consideration of whether the room allocated would "*prevent the union from approaching employees*" is rejected.

74 It was separately submitted that there had also been a failure to take into account the right of employees under s 480 of the *Fair Work Act* to receive information. Section 480(b), it was noted, included as an "*object*" of Part 3-4 "*the right of employees … to receive at work, information and representation from officials of organisations*". The submission, as set forth in the AMIEU's written *Outline of Submissions*, was that the rights conferred by s 480 had been "*ignored*".

75 In the present proceeding, the notice that was in fact given to the employees of Somerville Retail was in the following terms (without alteration):

> "Please be advised that we have received a request from **Mr Collin Ross**, organiser of the Australasian Meat Industry Employees' Union (AMIEU), to visit the SRS site on **Tuesday 20th July 2010** to talk to SRS employees who wish to participate.
>
> As we do not object to this request, the union will again be informed that they may meet with any one interested. If you wish to see Collin on this day he will be available to meet you in the SRS training room.
>
> As previously advised you are not under any obligation to meet with Collin if you choose not to. Remember that you have the Freedom of Choice as to whether you become a union member or not.
>
> Those wishing to see Collin may do so between 8:00 am to 12:00 pm, during which there will be unrestricted access to the Administration area. As a matter of courtesy you should let your supervisor know if you wish to see Collin."

76 Reliance is placed by the AMIEU upon the following conclusions of Commissioner Roe:

> [41] The right of entry for the purpose of discussions with those who wish to participate is a *right of the AMIEU permit holder*. It cannot be reduced to *a right of employees* to be able to request to hold discussions with the permit holder. …

The argument of the AMIEU is that the majority of the Full Bench could well have taken into account the rights recognised by s 480 but that the one thing the majority could not do was to "*ignore that consideration*". The reasons of the majority, the AMIEU contends, expose that that is what the majority in fact did.

77 It may readily be accepted that a permit holder may seek to exercise the right of entry conferred by s 484 to hold discussions for the purpose of communicating to employees (for example) "*information"* as contemplated by s 480(b). It may further be accepted that an occupier, when making a "*request*" of a permit holder that he occupy a particular room, could not specify a particular room with the intention of frustrating or negating the right of employees to receive "*information"*.

78 But there was no suggestion that the interview room was not a "*fit and proper*" room in which the "*information*" that Mr Ross wanted to impart could be communicated to and received by those in attendance.

79 It was no part of the case for the AMIEU, however, that Somerville Retail requested Mr Ross to use the interview room "*with the intention of*" doing any of those things proscribed by s 492(2)(b). In particular, the AMIEU did not submit that Somerville Retail did so with the intention of "*making it difficult for persons to participate in the interviews or discussions*" (within the meaning of s 492(2)(b)(iii)) or for the purpose of frustrating the communication of information by Mr Ross to those who wished to attend. Nor was there any evidence to suggest that the training room was not a room fit for the purpose of communicating information.

80 The case for the AMIEU came tantalisingly close to a submission that Mr Ross could unilaterally dictate the allocation of the lunchroom as that was the only forum in which he could address all the employees. Any other decision, on this approach, was necessarily "*unreasonable*". In the present proceeding there were two possible rooms in which meetings of this nature could be held – one which was already being used as a lunchroom and the other was the training room allocated to the AMIEU. But the decision as to which room was to be used was not a decision to be made by Mr Ross. The room to be made available was within the control of the occupier, so long as the request was a "*reasonable request*".

81 The final limb to the *Ground* that there has been a failure to have regard to a relevant consideration is the reliance placed by the AMIEU upon a failure to have regard to "*the length of the meal and other breaks …*". Again, it is difficult to construe the reasons for decision as not having taking this consideration into account. Thus, for example, the reasons of the majority when setting forth the "*[b]ackground and the decision under appeal*" state in part as follows (without alteration):

> [9] The Commissioner made the following findings of fact based on undisputed evidence of the parties:
>
> "• The Employer operates in the meat industry and employs some 350 workers at the Tottenham site to produce "case ready" or "retail ready" meat for supermarkets.
> • About 300 of the employees are production employees eligible to be members of the AMIEU.
> • The production employees are organised on two shifts and after allowing for those on leave there are approximately 100 employees on each shift each day.
> • Employees take a 30 minute meal break on each shift and also appropriate rest breaks. The meal breaks are staggered in two adjacent 30 minute periods. The breaks are taken in the lunch or meal room which is reasonably large and which also has a small covered and enclosed outside smoking area. There would be up to 50 employees in the meal room during a 30 minute meal break.
>
> …"

The reasons thereafter also state in part as follows:

> [10] Mr Simmons gave evidence that the training room is made available for four hours per visit and that the AMIEU organiser generally attends at 8am to meet the day shift employees and again at 7pm to meet with night shift employees. …

Any submission that the majority of the Full Bench did not take into account either the length of the meal breaks or the times in fact available to employees to consult with Mr Ross – if they saw fit – necessarily has to contend that this recital of the evidence was not properly considered. That submission becomes ever harder to maintain when the following reasons of the majority are also taken into account:

> **Is Somerville's request reasonable?**
>
> [49] We have set out the approach to exercising the discretion above and apply that approach. In this case, it is accepted that there is only one room in which employees can practically undertake their lunch break, and that is the canteen or lunch room. There are only two rooms where the union can be granted right of access for the purposes of discussions with employees — the training room or the lunch room. The lunch room is the larger of the two rooms and is used by AMIEU members and non-members, including supervisory employees, during meal breaks.
>
> [50] Somerville has requested for many years that the training room be utilised for right of entry visits. Somerville allows access for a longer period than during meal times. However, the dispute concerns the right of entry for discussions with employees which, under the Act must be during meal times or other breaks. That must be the context in which the matter is considered. The AMIEU contends that Somerville's request is unreasonable. That is the question that falls for determination.
> [51] In our view the training room is fit for purpose. It can hold up to 25 people at a time. It is 30 metres from the canteen — accessible through a corridor from near the canteen. Employees do not walk past management when they access the training room from the production area. Blinds can be drawn to ensure privacy. Private discussions can be held with employees in that room, individually or in small groups. We do not consider that the inability to hold a mass meeting of all employees in the training room renders it unfit for the purposes of interviewing employees or holding discussions with employees.

82 The first *Ground* relied upon in the *Application for an Order to Show Cause* is rejected. None of the various ways in which the argument was advanced have been made out. The majority of the Full Bench resolved the submissions that were advanced before it and made findings of fact. No jurisdictional error is exposed by the manner in which the majority approached its task and in making its findings of fact.

A MISCONSTRUCTION OF THE ACT – INDIVIDUAL CONSULTATIONS?

83 The second *Ground* of the *Application for an Order to Show Cause* relies upon an asserted error arising by reason of a misconstruction of the *Fair Work Act*.

84 The starting point for this submission is s 484 and reliance upon the phrase "… *for the purpose of holding discussions with one or more employees …*".

85 The alleged error is said to be exposed primarily by paragraph [36] of the reasons for decision of the majority of Fair Work Australia. Paragraph [36] is set forth in that part of the majority's reasoning which deals with the manner in which the Commissioner approached his task. That paragraph is as follows:

> **The approach of the Commissioner**
> [36] Subject to one qualification, the Commissioner considered the training room at Somerville fit for purpose. The qualification was that because it only holds 20-25 people it was possibly too small for access during meal times. In our view, this conclusion is questionable on two grounds. First, the entire issue concerns a room for discussions with employees pursuant to the rights of entry under the Act and the Act requires that these rights arise only at meal times. Second, discussions with employees as contemplated by the Act primarily involve discussions individually or in small groups. In our view, a room is fit for the purpose of conducting interviews or holding discussions even though it may not accommodate all employees on their meal break at the same time.

Emphasis is placed by Senior Counsel for AMIEU upon the reference to the statement that "… *discussions with employees as contemplated by the Act primarily involve discussions individually or in small groups …*".

86 This paragraph, however, also has to be read in context. Part of that context is paragraph [51] where the majority of Fair Work Australia returned to the question of the number of persons who may wish to consult with Mr Ross.

87 The error said to be exposed by these paragraphs is the assumption made by the majority that s 484 contemplates the holding of meetings with individuals or small groups of employees as opposed to the right to hold discussions "… *with one or more employees …*". The written submissions filed on behalf of the AMIEU contended that there may be "… *discussions with individual workers or small groups or large groups of workers*"; a permit holder, it was contended, may wish "… *to discuss an issue relevant to the whole of the workforce, not just an individual employee …*".

88 Contrary to the submission of the AMIEU, however, it is not considered that the majority construed s 484 as only permitting discussions to be held with either individual employees or with small groups of employees as opposed to discussions "*with one or more employees*". The reasons of the majority, particularly those set forth in paragraph [51], have

to be read in context. The broader context was that there were two shifts of employees – each shift comprising approximately 100 employees. Meal breaks were staggered such that there would be up to 50 employees in the meal room during any 30 minute meal break.

89 Error may perhaps be exposed if the majority construed s 484 in the manner contended by the AMIEU, namely if it construed s 484 as merely conferring a right to speak to individual employees or employees in small numbers. But that is not what they did. The reference to 25 people that could be accommodated in the training room was merely part of an assessment as to the number of persons who may wish to discuss issues with Mr Ross at any one time and whether the training room could accommodate those employees. It was part of the reasoning against which the request was judged to be "*reasonable*". Paragraph [51] is not to be construed as an attempt to limit the number of employees who could discuss issues with Mr Ross but rather an assessment being made as to what size room could most probably accommodate those employees who did wish to discuss issues and would in fact be available to at any given time.

90 The second *Ground* is rejected.

NO EVIDENCE

91 The final *Grounds* (as amended) upon which it is submitted that jurisdictional error is established are that there was no evidence to support either:

- an asserted finding "… *that there were employees of [Somerville] who did not wish to participate in discussions with the [AMIEU]*"; or
- an asserted finding "*that the inconvenience to employees who did not wish to participate in discussions with the [AMIEU] affected [Somerville]*".

The first of these two asserted findings is challenged in *Ground 3*; the latter asserted finding is challenged in the new *Ground* for which leave was granted at the outset of the hearing, *Ground 4*.

92 Considerable caution needs to be exercised before concluding that an absence of evidence to support a particular factual finding necessarily constitutes jurisdictional error. The starting point is to acknowledge that a mere factual error will ordinarily fall short of

jurisdictional error: *Re Minister for Immigration and Multicultural Affairs; Ex parte Cohen* [2001] HCA 10 at [36], 177 ALR 473 at 482 per McHugh J. But where a fact is a critical step in a conclusion which has been reached – and where there is no evidence to support that finding – there may be jurisdictional error: *SFGB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 231 at [19], 77 ALD 402 at 407 per Mansfield, Selway and Bennet JJ. See also: *Minister for Immigration and Multicultural and Indigenous Affairs v VOAO* [2005] FCAFC 50 at [5] and [13] per Wilcox, French and Finkelstein JJ; *SZMWQ v Minister for Immigration and Citizenship* [2010] FCAFC 97 at [121] to [123], 187 FCR 109 at 142 to 143 per Flick J (Besanko J agreeing); *Minister for Immigration and Citizenship v SZOCT* [2010] FCAFC 159 at [22] to [26] per Jacobson J and [80] to [82] per Nicholas J, 274 ALR 487 at 507 per Jacobson J and 110 per Nicholas J. In *Sagar v O'Sullivan* [2011] FCA 182 at [60], 193 FCR 311 at 322 Tracey J observed that it "*is well-established that a statutory decision-maker may make a jurisdictional error by failing to base a decision on probative evidence*".

93 The difficulty with *Ground 3* is that Fair Work Australia did not make any such finding. Paragraph [54] of its reasons for decision clearly recount "*the reason given by Somerville for not permitting access to the lunch room* …". That was but part of the reasoning process employed in forming a view as to whether the request to meet in the lunch room was or was not reasonable. There was no finding of fact made that the employees of Somerville did not wish to participate in discussions with the AMIEU and no such fact formed part of the conclusion ultimately reached. That which did form part of the reasoning process of Fair Work Australia was not the fact that employees did not wish to participate in discussions but rather the concern of Somerville that there were such employees. There was no suggestion that the concern of Somerville was not genuinely held; nor was there any suggestion that reliance upon a genuinely held concern evidenced any irrationality in the manner in which Fair Work Australia proceeded.

94 The same comments can be made in relation to the second of the two asserted findings now sought to be relied upon by the AMIEU: *Ground 4*.

95 Moreover, it would not be correct to say that there was "*no evidence*" to support a finding that there would be "*inconvenience to employees who did not wish to participate in*

discussions"; nor would it be correct to say that any concern expressed by Somerville was irrational or illusory. For example, there was evidence that it was not practicable for employees who did not wish to be exposed to such discussions to have their lunch elsewhere.

96 *Grounds 3* and *4* of the *Application* are rejected.

CONCLUSIONS

97 The *Application* should be dismissed.

98 The *Grounds* sought to be advanced are either an impermissible attempt to revisit the factual conclusions reached by the majority of Fair Work Australia or a misreading of the findings of facts and reasons provided by the majority.

99 The question of the appropriate order as to costs was raised at the conclusion of the hearing of the appeal. Thereafter the Second Respondent communicated its desire to be separately heard as to costs in the event that the *Application* was unsuccessful. Written submissions as to costs should be exchanged between the parties and thereafter filed with the Court. In the absence of any reason being shown to the contrary, those submissions will be considered by the Court in Chambers.

ORDERS

100 The Order of the Court should be:

1. The parties are to file and serve within fourteen days a draft short minute of orders to give effect to these reasons together with brief submissions on the question of any proposed orders as to costs.

I certify that the preceding sixty-nine (69) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Flick.

Associate:

Dated: 8 June 2012