

# FEDERAL COURT OF AUSTRALIA

## United Group Resources Pty Ltd v Calabro (No 5) [2011] FCA 1408

Citation: United Group Resources Pty Ltd v Calabro (No 5) [2011] FCA 1408

Parties: **UNITED GROUP RESOURCES PTY LTD ABN 17 114 888 201, AGC INDUSTRIES PTY LTD ABN 57 079 939 898, MODERN ACCESS SERVICES PTY LTD ABN 87 129 312 590, DOWNER EDI ENGINEERING POWER PTY LTD ABN 53 000 983 700, MONADELPHOUS ENGINEERING ASSOCIATES PTY LTD ABN 52 008 861 836, CBI CONSTRUCTORS PTY LTD ABN 90 000 612 411, DECMIL AUSTRALIA PTY LTD ABN 58 116 776 991, FREO GROUP LIMITED ABN 64 009 325 124, MAMMOET AUSTRALIA PTY LTD ABN 77 075 483 644, PCH GROUP LTD ABN 41 009 120 021, RCR CONSTRUCTION & MAINTENANCE PTY LTD ABN 97 063 053 814, RCR POSITRON PTY LTD ABN 38 106 084 879 and JOHN HOLLAND PTY LTD ABN 11 004 282 268 v BRAEDEN CALABRO AND OTHERS LISTED IN THE RESPONDENTS' SCHEDULE A AS AMENDED and THE AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER**

File number: WAD 14 of 2010

Judge: **MCKERRACHER J**

Date of judgment: 8 December 2011

Catchwords: **INDUSTRIAL LAW** – unlawful industrial action by more than 1300 respondents - some represented - some not – breach of *Fair Work Act 2009* (Cth) (**FW Act**) and *Building and Construction Industry Improvement Act 2005* (Cth) (**BCII Act**) – purpose of industrial action – motivation of respondents – industrial motivation – liability – liability admitted by represented respondents – agreement on remedy and penalty – appropriate penalty to be determined by the Court – whether it is appropriate to make declarations – analysis of transitional provisions of the FW Act – differences between an agreement-based transitional instructions, Workplace Relations Act instruments and transitional instruments – meaning of industrially-motivated in the BCII Act – definition of ‘industrially-motivated’ in the BCII Act – operation and

construction of para (a) of the definition of ‘industrially-motivated’ in the BCII Act – operation and construction of para (d) of the definition of ‘industrially-motivated’ in the BCII Act – meaning of motivation – disruption to the performance of work for the purpose of industrial action

**PRACTICE AND PROCEDURE** – respondents who have not entered an appearance – former *Federal Court Rules* O 32 r 2(1)(d) – Court required to consider merits of case and make determination on balance of probabilities – Court entitled to assume correctness of matters upon which the applicant bears the onus – *Federal Court Rules 2011* r 1.04 – whether proof of service on absent respondents required before affidavits can be read – where service was not effected personally – leave required to read affidavits without service – where respondents had notice of proceedings and consequences

**EVIDENCE** - reliance on inference – proof of any fact on the balance of probabilities from which the Court infers a further fact – inferences from primary or intermediate fact – circumstances to be taken into account when drawing an inference – failure to deny or explain facts – admissions made by agents of the unrepresented respondents – establishing liability against unrepresented respondents – unrepresented respondents aware of proceeding and consequences - liability established

Legislation:

*Building and Construction Industry Improvement Act 2005* (Cth) ss 36, 37(a), 38, 42  
*Evidence Act 1995* (Cth) ss 81, 87  
*Fair Work Act 2009* (Cth) ss 19, 417(1), 421(1)  
*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* Item 4 of Sch 13  
*Federal Court Rules* O 32 r 2(1)(d)  
*Workplace Relations Act 1996* (Cth) ss 4, 170MN(1), 327, 330

Cases cited:

*AA Shi Pty Ltd v Avbar Pty Ltd (No 5)* [2010] FCA 971  
*Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) 160 FCR 321  
*A184 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 210 ALR 543  
*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2010) 187 FCR 293  
*Australian Industry Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2003) 130 FCR 524  
*Australian Securities and Investments Commission v*

*FUELbanc Australia Ltd* (2007) 162 FCR 174  
*Belhaven and Stenton Peerage* [1875] 1 App Cas 278  
*Black v Tung* [1953] VLR 629  
*Blatch v Archer* (1774) 98 ER 969  
*Boyle v Wiseman* (1855) 156 ER 598  
*Bradshaw v McEwans* (1951) 217 ALR 1  
*Bufalo v Official Trustee in Bankruptcy* [2011] FCAFC 111  
*CBI Construction Pty Ltd v Abbott* (2008) 177 IR 134  
*Chamberlain v The Queen (No 2)* (1984) 153 CLR 521  
*Clay v Clay* (1999) 20 WAR 427  
*De Gioia v Darling Island Stevedoring & Lighterage Co Ltd* (1941) 42 SR (NSW) 1  
*Essington Investments Pty Ltd v Regency Property Pty Ltd* [2004] NSWCA 375  
*Fair Work Ombudsman v Kentwood Industries Pty Ltd (No 2)* (2010) 201 IR 234  
*Finance Facilities Pty Ltd v Federal Commissioner of Taxation* (1971) 127 CLR 106  
*Hadgkiss v Aldin (No 2)* (2007) 169 IR 76  
*The Insurance Commissioner v Joyce* (1948) 77 CLR 39  
*JN Taylor Holdings Ltd (In Liq) v Bond* (1993) 59 SASR 432  
*John Holland Pty Ltd v Construction, Forestry, Mining and Energy Union (No 4)* [2011] FCA 618  
*John Holland Pty Ltd v Construction, Forestry, Mining and Energy Union (No 5)* [2011] FCA 1023  
*Jones v Dunkel* (1959) 101 CLR 298  
*May v O'Sullivan* (1955) 92 CLR 654  
*Hyam v DPP* [1975] AC 55  
*Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451  
*Parker v Paton* (1941) 41 SR (NSW) 237  
*Qantas Airways Ltd v TWU* [2011] FCA 470  
*Scoway Pty Ltd v Faxon Pty Ltd* [2004] FCA 249  
*Seltsam Pty Ltd v McGuinness* (2000) 49 NSWLR 262  
*Shepherd v The Queen* (1990) 170 CLR 573  
*Stuart-Mahoney v Construction, Forestry, Mining and Energy Union* (2008) 177 IR 61  
*Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125  
*TVBO Production Ltd v Australia Sky Net Pty Ltd* (2009) 82 IPR 502  
*United Group Resources Pty Ltd v Calabro* (2010) 192 IR 153  
*United Group Resources Pty Ltd ABN 17 114 888 201 v Calabro (No 2)* (2010) 192 IR 160  
*United Group Resources Pty Ltd ABN 17 114 888 201 v Calabro (No 3)* (2010) 192 IR 170  
*United Group Resources Pty Ltd v Calabro (No 4)* [2010] FCA 791  
*Warramunda Village Inc v Pryde* (2001) 105 FCR 437

*Williams v Automotive, Food, Metals, Engineering,  
Printing and Kindred Industries Union (2010) 196 IR 365*

Dates of hearing:	6-9 September 2011, 15-16 September 2011, 20 September 2011
Date of last submissions:	30 September 2011
Place:	Perth
Division:	FAIR WORK DIVISION
Category:	Catchwords
Number of paragraphs:	144
Counsel for the Applicants:	S Wood (later S Wood SC) with T Saunders
Solicitor for the Applicants:	Freehills
Counsel for the CEPU Respondents:	DH Schapper until 8 September 2011 then J Fiocco
Counsel for the AMWU Respondents:	RL Hooker
Counsel for the CFMEU Respondents:	J Fiocco
Solicitor for the Respondents:	As listed in the attached Respondents' schedule 'A' as amended
Counsel for the Intervener:	IM Neil SC
Solicitor for the Intervener:	Clayton Utz

**IN THE FEDERAL COURT OF AUSTRALIA  
WESTERN AUSTRALIA DISTRICT REGISTRY  
FAIR WORK DIVISION**

**WAD 14 of 2010**

**BETWEEN: UNITED GROUP RESOURCES PTY LTD ABN 17 114 888 201  
First Applicant**

**AGC INDUSTRIES PTY LTD ABN 57 079 939 898  
Second Applicant**

**MODERN ACCESS SERVICES PTY LTD ABN 87 129 312 590  
Third Applicant**

**DOWNER EDI ENGINEERING POWER PTY LTD ABN 53  
000 983 700  
Fourth Applicant**

**MONADELPHOUS ENGINEERING ASSOCIATES PTY LTD  
ABN 52 008 861 836  
Fifth Applicant**

**CBI CONSTRUCTORS PTY LTD ABN 90 000 612 411  
Sixth Applicant**

**DECMIL AUSTRALIA PTY LTD ABN 58 116 776 991  
Seventh Applicant**

**FREO GROUP LIMITED ABN 64 009 325 124  
Eighth Applicant**

**MAMMOET AUSTRALIA PTY LTD ABN 77 075 483 644  
Ninth Applicant**

**PCH GROUP LTD ABN 41 009 120 021  
Tenth Applicant**

**RCR CONSTRUCTION & MAINTENANCE PTY LTD ABN  
97 063 053 814  
Eleventh Applicant**

**RCR POSITRON PTY LTD ABN 38 106 084 879  
Twelfth Applicant**

**JOHN HOLLAND PTY LTD ABN 11 004 282 268  
Thirteenth Applicant**

**AND: BRAEDEN CALABRO AND OTHERS LISTED IN THE  
RESPONDENTS' SCHEDULE A AS AMENDED  
Respondents**

**AND: THE AUSTRALIAN BUILDING AND CONSTRUCTION  
COMMISSIONER  
Intervener**

**JUDGE: MCKERRACHER J**

**DATE OF ORDER: 30 SEPTEMBER 2011**

**WHERE MADE: PERTH**

**THE COURT ORDERS THAT:**

1. There be judgment on liability in favour of the applicants as against all respondents.
2. The intervener's case against the appearing respondents is adjourned to 10:15 am on 9 December 2011 for the intervener to apply, should it elect to do so, to adduce evidence on one additional aspect only (concerning paragraph 51A of a draft agreed statement); to adduce that evidence if permitted to do so and for the appearing respondents to adduce evidence in response on that issue only, should they elect to do so.

**THE COURT DECLARES THAT:**

3. The respondents engaged in:
  - (a) industrial action within the meaning of s 19 of the *Fair Work Act (Cth) 2009 (FW Act)*; and
  - (b) building industrial action within the meaning of s 36(1) of the *Building and Construction Industry Improvement Act 2005 (Cth) (BCII Act)*,  
on 22, 23, 25, 27, 28, 29 and 30 January 2010 by failing to attend for work on one or more days on which they were rostered to work, for either the whole or part of their rostered shift, as specified in the table annexed to the original orders made herewith, having been attached to the Applicants' and Intervener's Minute of Proposed Orders in relation to Liability and Directions in Relation to the Hearing on Remedy dated 20 September 2011 entitled 'Final summary of respondent numbers and representation'.
4. Each respondent employed by:
  - (a) United Group Resources Pty Ltd (first applicant);

- (b) AGC Industries Pty Ltd (second applicant);
- (c) MAS Australasia Pty Ltd (third applicant);
- (d) Downer EDI Engineering Power Pty Ltd (fourth applicant);
- (e) Monadelphous Engineering Associates Pty Ltd (fifth applicant);
- (f) Decmil Australia Pty Ltd (seventh applicant);
- (g) PCH Group Ltd (tenth applicant); and
- (h) RCR Power Pty Ltd (twelfth applicant)

contravened s 417(1) of the FW Act in respect of each day on which they took industrial action on 22, 23, 25, 27, 28, 29 and 30 January 2010, as specified in the table annexed to the original orders made herewith, having been attached to the Applicants' and Intervener's Minute of Proposed Orders in relation to Liability and Directions in Relation to the Hearing on Remedy dated 20 September 2011 entitled 'Final summary of respondent numbers and representation'.

5. Respondents 865 and 871 (who were employed by the sixth applicant) contravened s 417 of the FW Act in respect of each day on which they took industrial action on 22, 23, 25, 27, 28, 29 and 30 January 2010, as specified in the table annexed to the original orders made herewith, having been attached to the Applicants' and Intervener's Minute of Proposed Orders in relation to Liability and Directions in Relation to the Hearing on Remedy dated 20 September 2011 entitled 'Final summary of respondent numbers and representation'.
6. The respondents who were members of the Construction Forestry Mining & Energy Union (**CFMEU**), Communications Electrical & Plumbing Union (**CEPU**) or the Australian Manufacturing Workers Union (**AMWU**) (other than respondents employed by the thirteenth applicant) as at 23 January 2010 and during the term of the order made by Commissioner Cloghan of Fair Work Australia on 23 January 2010 contravened s 421(1) of the FW Act in respect of each day on which they took industrial action on 25, 27, 28, 29 and 30 January 2010, as specified in the table annexed to the original orders made herewith, having been attached to the Applicants' and Intervener's Minute of Proposed Orders in relation to Liability and Directions in Relation to the Hearing on Remedy dated 20 September 2011 entitled 'Final summary of respondent numbers and representation'.

7. All of the respondents contravened s 38 of the BCII Act (except for Respondents 817 and 825) in respect of each day on which they took industrial action on 22, 23, 25, 27, 28, 29 and 30 January 2010, as specified in the table annexed to the original orders made herewith, having been attached to the Applicants' and Intervener's Minute of Proposed Orders in relation to Liability and Directions in Relation to the Hearing on Remedy dated 20 September 2011 entitled 'Final summary of respondent numbers and representation'.

**THE COURT FURTHER ORDERS THAT:**

**Directions as to hearing on remedy**

8. The matter be listed for further hearing in relation to remedy on 13-16 December 2011, commencing at 10:15am on 13 December 2011.
9. The intervener to:
  - (a) give notice of its intention to rely upon any parts of any affidavits which have already been filed; and
  - (b) file and serve any additional affidavits on which it intends to relyat the hearing on remedy together with an outline of contentions on remedy, by 4:00 pm on 25 October 2011.
10. The non-appearing respondents to file and serve any affidavits on which they intend to rely at the hearing on remedy, together with any outline of contentions on remedy, by 4:00 pm on 8 November 2011.
11. The represented respondents and the applicants to:
  - (a) give notice of their intention to rely upon any parts of any affidavits which have already been filed; and
  - (b) file and serve any additional affidavits on which they intend to relyat the hearing on remedy, together with an outline of contentions on remedy, by 4:00 pm on 22 November 2011.
12. Each party to give notice of its intention to cross examine the deponent of any affidavit to be relied upon by another party at the hearing on remedy by 4:00 pm on 28 November 2011.

13. The parties to file any agreed statement of facts in relation to remedy by 4:00 pm on 28 November 2011.
14. The matter be listed for directions at 10:00 am on 29 November 2011.
15. Liberty to apply on 3 days' notice.

The Court notes that the applicants will notify the non-appearing respondents of (a) the Court's decision as to liability, (b) the fact that the matter is set down for a hearing in relation to remedy on 13-16 December 2011, and (c) the directions made in relation to the hearing on remedy, by (i) sending a notice in the form annexed and marked 'A' to these orders to the last known address of each of the non-appearing respondents, and (ii) affixing a copy of the notice to the noticeboard(s) usually used for the purpose of communication with the respondents at the workplace on the Pluto LNG Project.

**Annexure A**

**FEDERAL COURT OF AUSTRALIA**

**WAD 14 of 2010**

**Important Notice to Respondents**

**Name and Address of Respondent**

**Findings made as to liability**

1. The Federal Court of Australia has determined that you have contravened s 417 of the *Fair Work Act 2009* (Cth) and/or s 38 of the *Building and Construction Industry Improvement Act 2005* (Cth) in relation to industrial action taken in the period from 22 to 30 January 2010 on the Pluto LNG Project.
2. The Court has listed the matter for hearing on 13 - 16 December 2011 (commencing at 10:15 am on 13 December 2011) in relation to any remedy it may impose in respect of your contraventions of the *Fair Work Act 2009* and/or the *Building and Construction Industry Improvement Act 2005*.
3. Directions have been made in relation to the hearing on 13 - 16 December 2011 in accordance with paragraphs 8 - 15 of the attached document.
4. If you would like to participate in the hearing on 13 - 16 December 2011 in relation to remedy, you must file a notice of appearance in the Federal Court of Australia and comply with the directions set out in paragraphs 8 - 15 of the attached document.
5. If you enter an appearance in these proceedings, you are entitled to be sent by post a copy of the Court's decision on liability without charge upon written request being made for the same to the applicants' solicitors, Freehills, by any one of the following means:  
  
Postal Address: Freehills DX 361 Sydney (Attention: Emma Krasenstein)  
Facsimile: Freehills 02 9322 4000 (Attention: Emma Krasenstein)  
E-mail: emma.krasenstein@freehills.com
6. If you do not enter an appearance in these proceedings and take steps to participate in the hearing on remedy on 13 - 16 December 2011, the Federal Court of Australia may

order that you pay a penalty and that a permanent injunction be imposed upon you to prevent you taking any unlawful industrial action.

Freehills

Solicitors for the Applicants

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

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**AND: BRAEDEN CALABRO AND OTHERS LISTED IN THE  
RESPONDENTS' SCHEDULE A AS AMENDED  
Respondents**

**AND:** THE AUSTRALIAN BUILDING AND CONSTRUCTION  
COMMISSIONER  
Intervener

**JUDGE:** MCKERRACHER J

**DATE:** 8 DECEMBER 2011

**PLACE:** PERTH

**REASONS FOR JUDGMENT**

<b>OVERVIEW .....</b>	[1]
<b>EARLIER EVENTS .....</b>	[13]
<b>APPLICABLE STATUTORY PROVISIONS .....</b>	[23]
<b>THE REPRESENTED RESPONDENTS .....</b>	[24]
<b>Admissions made by represented respondents.....</b>	[24]
<b>Agreement reached with applicants on liability and remedy by represented respondents.....</b>	[26]
<b>Conclusion in relation to liability of the represented respondents.....</b>	[35]
<b>THE UNREPRESENTED RESPONDENTS .....</b>	[36]
<b>Non-appearance by unrepresented respondents.....</b>	[36]
<i>Proof of service affidavits .....</i>	[36]
<i>The approach taken in relation to proving the case against the unrepresented respondents.....</i>	[41]
<b>The evidentiary case against the unrepresented respondents.....</b>	[48]
<i>Section 417 claim .....</i>	[50]
<i>Transitional provisions .....</i>	[53]
<i>The applicants' in-term agreements .....</i>	[56]
<b>Consideration of liability of the unrepresented respondents.....</b>	[64]
<i>Reliance on inference – the principles .....</i>	[70]
<i>The primary facts .....</i>	[77]
<b>21 JANUARY 2010 .....</b>	[90]
<b>22 JANUARY 2010 .....</b>	[91]
<b>24 JANUARY 2010 .....</b>	[102]

<b>27 JANUARY 2010 .....</b>	<b>[103]</b>
<b>THE CLAIMS MADE ON 27 JANUARY 2010.....</b>	<b>[104]</b>
<i>The inferences available from the primary facts .....</i>	<i>[106]</i>
<i>Admissions made by the agents of some of the unrepresented respondents.....</i>	<i>[108]</i>
<i>The operation of para (a) of the IM definition .....</i>	<i>[116]</i>
<i>The operation of para (d) of the IM definition .....</i>	<i>[123]</i>
<b>DECLARATORY RELIEF .....</b>	<b>[139]</b>
<b>REMEDIES AND PENALTY FOR ALL RESPONDENTS .....</b>	<b>[143]</b>
<b>CONCLUSION .....</b>	<b>[144]</b>

## OVERVIEW

1           These are reasons for judgment given on 30 September 2011 as to liability of a large number of respondents (1338) in respect of industrial action. 722 of the respondents were represented by counsel at trial. I have addressed the position of those represented respondents first. I have then dealt with the other respondents (616) who have not entered an appearance and have not been represented in any respect or taken any active part in the proceedings as at 30 September 2011 (**unrepresented respondents**).

2           It is desirable first to set the scene for the events considered in these reasons.

3           Woodside Burrup Pty Ltd (**WBPL**) has been constructing a liquefied natural gas (**LNG**) processing plant since about July 2007 at the Burrup Peninsula, Western Australia (**the Project**). It is one of many projects of great value in that general region where many people are employed. On completion of the Project, gas will be processed from the Pluto and Xena gas fields which were discovered in 2005. Those gas fields are located in the Carnarvon Basin about 190 kilometres north-west of the large coastal town of Karratha in Western Australia. In order to facilitate that major Project, WBPL engaged a number of contractors. Several of those contractors are the applicants to these proceedings. The respondents were employed by various applicants to work on the Project in the period from 22 to 30 January 2010 (as well as other times).

4           The performance of the construction work on the Project, at the relevant period, was supervised by another company, Foster Wheeler WorleyParsons (**FWWP**).

5           In the period from 22 to 30 January 2010, the applicants contend that all respondents engaged in ‘unprotected industrial action’ as that technical expression is used in the manner discussed below.

6           The intervener is the Australian Building and Construction Commissioner (**ABCC**).

7           Together, the applicants and the ABCC contend that there have been three types of contraventions. First, they argue that the respondents who were covered by an interim enterprise agreement at the time of the industrial action contravened s 417(1) of the *Fair Work Act 2009* (Cth) (**FW Act**) (this has been described as **the s 417 claim**).

8           The applicants and the ABCC also contend the respondents who are members of three unions, the Construction Forestry Mining & Energy Union (**CFMEU**), Communications Electrical & Plumbing Union (**CEPU**) or the Australian Manufacturing Workers Union (**AMWU**), during the term of the order made by Commissioner Cloghan of Fair Work Australia (**FWA**) on 23 January 2010 contravened s 421(1) of the FW Act (this has been described as **the s 421 claim**).

9           Further, it is argued that all respondents contravened s 38 of the *Building and Construction Industry Improvement Act 2005* (Cth) (**BCII Act**) (this has been described as **the BCII Act claim**).

10          In order to determine the questions of liability only, (rather than remedy), the trial in this proceeding was listed for hearing over several weeks commencing in September 2011. On the first day of the hearing, liability was admitted by a significant group of represented respondents. Later, but also on the first day of the hearing, liability was admitted by another group of represented respondents. At the end of the first week of the hearing, liability was admitted by the remaining group of represented respondents. The details of those groupings and the terms of admission of liability and penalty are discussed below.

11 Following agreement by those groups of respondents, it was necessary for the applicants to prove their case against the unrepresented respondents. For reasons discussed below, I was satisfied that the trial should proceed against the unrepresented respondents. The trial continued therefore, after the first week. As a result, I was also satisfied that liability of the unrepresented respondents was also established.

12 Judgment was given and the unrepresented respondents were to be directly informed as to establishment of liability against them and that they had the opportunity, should they choose to exercise it, to make any submissions concerning remedy, including penalty. Those respondents were also informed of the agreement as to penalty made between the applicants and the represented respondents.

### **EARLIER EVENTS**

13 The nature and root of the dispute has been recounted in a number of previous decisions including *United Group Resources Pty Ltd v Calabro* (2010) 192 IR 153 (**United No 1**), *United Group Resources Pty Ltd ABN 17 114 888 201 v Calabro (No 2)* (2010) 192 IR 160 (**United No 2**), *United Group Resources Pty Ltd ABN 17 114 888 201 v Calabro (No 3)* (2010) 192 IR 170 (**United No 3**) and *United Group Resources Pty Ltd v Calabro (No 4)* [2010] FCA 791 (**United No 4**). For convenience I will recapitulate part of the narrative found in those decisions.

14 On about 27 November 2009, employees at the Project were advised that effective from 4 January 2010 all accommodation at Gap Ridge Village would be managed on a 'Motelling' basis (**the Accommodation Changes**). The substance of this change was that while each employee would continue to be offered the same nature and quality of accommodation, while employed, there could be no guarantee that each employee would be able to return to the same unit previously occupied after taking and returning from regular fly in, fly out leave. The Accommodation Changes resulted from an acute shortage of accommodation on the Project. The changes were made at Project level, that is, the decision affected all of the contractors who used the Gap Ridge Village accommodation.

15 On 1 December 2009 and 2 December 2009, almost all of the employees on the Project who were rostered to work failed to present for work in apparent protest against the Accommodation Changes (**the December 2009 industrial action**). On 2 December 2009,

orders were made in respect of the December 2009 industrial action by Deputy President McCarthy of FWA that the employees of the first applicant were to return to work. Those orders remained in force until 18 January 2010.

16           On 21 January 2010, further information was provided to the workers by FWWP on the Accommodation Changes. On 22 January 2010 as well as 23 January 2010, almost all of the employees in the Project who were rostered to work failed to present for work in protest over the Accommodation Changes (**the January 2010 industrial action**).

17           Orders were made on 23 January 2010 (effective from midnight on 24 January 2010) in respect of the January 2010 industrial action by Commissioner Cloghan of FWA. The employees of the applicants (other than the thirteenth applicant) who were union members were ordered to return to work. Those orders were to remain in force until 28 February 2010.

18           Once again, on 25 January 2010, almost all of the employees on the Project who were rostered to work failed to present for work in protest over the Accommodation Changes. On 26 January 2010 there was scheduled work to be performed even though it was a public holiday. Once again, most employees who were required to work failed to present for work. On that day the local union organisers for the Project were contacted and advised of an urgent application brought to this Court. The unions were also requested to inform their members of the applicants' intention to seek urgent injunctive relief. The unions requested that they be kept informed but did not wish to be heard on the application.

19           On the following day, 27 January 2010, employees on the Project held a meeting in the car park at the Project site at 6.30 am and resolved to continue to take industrial action until, at least, 30 January 2010. On 27 January 2010, almost all of the employees who were rostered to work failed to present for work.

20           The Project is very substantial. At the time of giving evidence in support of an application for urgent injunctive relief, on 27 January 2010, Mr Colin Raymond Milne, an industrial relations consultant, estimated that the total daily losses to the applicants, FWWP and WBPL to be in the excess of \$500,000. The source and nature of the damage was described in detail in United No 1.

21 As might be expected, as at 27 January 2010, the situation in and around the Project environs was inflammatory. In particular, representatives of the applicants believed that the situation in and around the accommodation camps, particularly at Gap Ridge Village, was volatile and could easily become violent. They believed that threats had been made against employees who were not participating in the industrial action. This led to FWWP significantly increasing the level of security personnel on site and around the accommodation.

22 There were over 1500 employees involved in the industrial action. Many of them have been joined as respondents to this proceeding. Some have been deleted, having been incorrectly joined. As will be discussed in more detail below, injunctive relief requiring the respondents to return to work was granted on 27 January 2010.

### **APPLICABLE STATUTORY PROVISIONS**

23 The primary sections of the relevant industrial legislation have been identified above and, in the context of this dispute, discussed briefly in the earlier judgments. For convenience, however, the relevant parts of the key sections (and related sections) are now set out once again, (I note that the discussion of the legislation below extends beyond these central provisions):

FW Act:

**417 Industrial action must not be organised or engaged in before nominal expiry date of enterprise agreement etc.**

*No industrial action*

- (1) A person referred to in subsection (2) must not organise or engage in industrial action from the day on which:
  - (a) an enterprise agreement is approved by FWA until its nominal expiry date has passed; or
  - (b) a workplace determination comes into operation until its nominal expiry date has passed;whether or not the industrial action relates to a matter dealt with in the agreement or determination.
- (2) The persons are:
  - (a) an employer, employee, or employee organisation, who is covered by the agreement or determination; or
  - (b) an officer of an employee organisation that is covered by the agreement or determination, acting in that capacity.

*Injunctions and other orders*

- (3) If a person contravenes subsection (1), the Federal Court or Federal Magistrates Court may do either or both of the following:
- (a) grant an injunction under this subsection;
  - (b) make any other order under subsection 545(1);
- that the court considers necessary to stop, or remedy the effects of, the contravention.

...

**418 FWA must order that industrial action by employees or employers stop etc.**

- (1) If it appears to FWA that industrial action by one or more employees or employers that is not, or would not be, protected industrial action:
- (a) is happening; or
  - (b) is threatened, impending or probable; or
  - (c) is being organised;

FWA must make an order that the industrial action stop, not occur or not be organised (as the case may be) for a period (the *stop period*) specified in the order.

...

**421 Contravening an order etc.**

*Contravening orders*

- (1) A person to whom an order under section 418, 419 or 420 applies must not contravene a term of the order.
- (2) However, a person is not required to comply with an order if:
- (a) the order is an order under section 418, or an order under section 420 that relates to an application for an order under section 418; and
  - (b) the industrial action to which the order relates is, or would be, protected industrial action.

*Injunctions*

- (3) The Federal Court or Federal Magistrates Court may grant an injunction, under this subsection, on such terms as the court considers appropriate if:
- (a) a person referred to in column 2 of item 15 of the table in subsection 539(2) has applied for the injunction; and
  - (b) the court is satisfied that another person to whom the order applies has contravened, or proposes to contravene, a term of the order.

...

BCII Act:

**36 Definitions**

- (1) In this Chapter, unless the contrary intention appears:

*building industrial action* means:

- (a) the performance of building work in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to building work, the result of which is a restriction or limitation on, or a delay in, the performance of the work, where:
    - (i) the terms and conditions of the work are prescribed, wholly or partly, by an industrial instrument or an order of an industrial body; or
    - (ii) the work is performed, or the practice is adopted, in connection with an industrial dispute (within the meaning of subsection (4)); or
  - (b) a ban, limitation or restriction on the performance of building work, or on acceptance of or offering for building work, in accordance with the terms and conditions prescribed by an industrial instrument or by an order of an industrial body; or
  - (c) a ban, limitation or restriction on the performance of building work, or on acceptance of or offering for building work, that is adopted in connection with an industrial dispute (within the meaning of subsection (4)); or
  - (d) a failure or refusal by persons to attend for building work or a failure or refusal to perform any work at all by persons who attend for building work;
- but does not include:
- (e) action by employees that is authorised or agreed to, in advance and in writing, by the employer of the employees; or
  - (f) action by an employer that is authorised or agreed to, in advance and in writing, by or on behalf of employees of the employer; or
  - (g) action by an employee if:
    - (i) the action was based on a reasonable concern by the employee about an imminent risk to his or her health or safety; and
    - (ii) the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe for the employee to perform.

***constitutionally-connected action*** means building industrial action that satisfies at least one of the following conditions:

- (a) the action is taken by an organisation;
- (b) the action is taken by a constitutional corporation, or adversely affects a constitutional corporation in its capacity as a building industry participant;
- (d) the action relates to work that is regulated by a Commonwealth industrial instrument;
- (e) the action relates to the bargaining or proposed bargaining for, or the making or proposed making of, an enterprise agreement;
- (f) the action occurs in a Territory or Commonwealth place.

***excluded action*** means building industrial action that is protected industrial action (as affected by Part 3 of this Chapter).

***industrially-motivated*** means motivated by one or more of the following purposes, or by purposes that include one or more of the following purposes:

- (a) supporting or advancing claims against an employer in respect of the employment of employees of that employer;
- (b) supporting or advancing claims by an employer in respect of the employment of employees of that employer;
- (c) advancing industrial objectives of an industrial association;
- (d) disrupting the performance of work.

The employer referred to in paragraphs (a) and (b) need not be the employer whose employees do the work to which the action relates.

(2) Whenever a person seeks to rely on paragraph (g) of the definition of ***building industrial action*** in subsection (1), that person has the burden of proving that paragraph (g) applies.

(3) For the purposes of this Chapter:

- (a) conduct is capable of constituting building industrial action even if the conduct relates to part only of the duties that persons are required to perform in the course of their employment; and
- (b) a reference to building industrial action includes a reference to a course of conduct consisting of a series of building industrial actions.

(4) In the definition of ***building industrial action*** in subsection (1):

***industrial dispute*** means:

- (a) an industrial dispute (including a threatened, impending or probable industrial dispute) that is about matters pertaining to the relationship between employers and employees; or
- (b) a situation that is likely to give rise to an industrial dispute of the kind referred to in paragraph (a); or
- (c) a dispute arising between 2 or more industrial associations, or within an industrial association, as to the rights, status or functions of members of the associations or association in relation to the employment of those members; or
- (d) a dispute arising between employers and employees, or between members of different industrial associations, as to the demarcation of functions of employees or classes of employees; or
- (e) a dispute about the representation of the industrial interests of employees by an industrial association of employees.

### **37 Definition of *unlawful industrial action***

Building industrial action is *unlawful industrial action* if:

- (a) the action is industrially-motivated; and
- (b) the action is constitutionally-connected action; and
- (c) the action is not excluded action.

### **38 Unlawful industrial action prohibited**

A person must not engage in unlawful industrial action.

## 71 ABC Commissioner intervention in court proceedings

- (1) The ABC Commissioner may intervene in the public interest in a civil proceeding before a court in a matter that:
  - (a) arises under this Act; or
  - (b) arises under the *Independent Contractors Act 2006*, the FW Act or the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* and involves:
    - (i) a building industry participant; or
    - (ii) building work.
- (2) If the ABC Commissioner intervenes in a proceeding under subsection (1), the ABC Commissioner is taken to be a party to the proceeding and has all the rights, duties and liabilities of such a party.

## THE REPRESENTED RESPONDENTS

### Admissions made by represented respondents

24 As outlined, various comprehensive admissions of fact and law were made after commencement of the trial. (Some of the facts had been agreed prior to trial).

25 The agreement between those parties (with defined terms applicable only to the agreement), was in the following terms:

...

The applicants and the CFMEU Respondents [defined in para 6 of this statement of agreed facts], CEPU Respondents [defined in para 7 of this statement of agreed facts] and AMWU Respondents [defined in para 8 of this statement of agreed facts] (together, the **Respondents**) ... agree as follows:

### Parties

#### Applicants

- 1 During the period 22 to 30 January 2010, each applicant was:
  - (a) a corporation incorporated under the *Corporations Act 2001* (Cth) and to which paragraph 51(xx) of the Australian Constitution applied;
  - (b) the employer of some of the Respondents;
  - (c) a “building employer” which employed “building employees” within the meaning of the [BCII Act];
  - (d) a building sub-contractor engaged by [WBPL] to carry out “building work” within the meaning of the BCII Act, on the project known as the “Pluto LNG Project” or “Pluto LNG Development Project” for the development, production and processing of petroleum, including the construction of a single gas processing train and ancillary facilities between Onslow and the Burrup Peninsula in Western Australia (Project); and
  - (e) a “building industry participant” within the meaning of the BCII Act.

### Respondents

- 2 During the period 22 to 30 January 2010, each Respondent was:
- (a) a “building employee” whose employment consisted of or included “building work” within the meaning of the BCII Act;
  - (b) employed by one of the applicants to undertake “building work” on the Project;
  - (c) employed under a Commonwealth industrial instrument, which is or was a workplace agreement pursuant to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (**Transitional Act**); [The applicable industrial instruments are set out in para 4 of this statement of agreed facts] and
  - (d) a “building industry participant” within the meaning of the BCII Act.

### Intervener

- 3 The intervener is the [ABCC] appointed under s.15 of the BCII Act who intervenes in the proceeding pursuant to section 71 of that Act.

### **Industrial context**

- 4 During the period 22 to 30 January 2010, the industrial instruments which covered and applied to the applicants and Respondents employed by them were:
- (a) United Group Resources Pty Ltd Employee Collective Pluto Project Agreement 2009;
  - (b) AGC Industries Pty Ltd Employee Collective Pluto Project Agreement 2009;
  - (c) Modern Access Services Pty Ltd Employee Collective Pluto Project Agreement 2009;
  - (d) Downer EDI Engineering Power Pty Ltd Employee Collective Pluto Project Agreement 2009;
  - (e) Monadelphous Engineering Associates Pty Ltd Employee Collective Pluto Project Agreement 2009;
  - (f) CBI Constructors Pty Ltd Interim Transitional Employment Agreements;
  - (g) Decmil Australia Pty Ltd Employee Collective Pluto Project Agreement 2009;
  - (h) Freo Machinery Pluto Project Greenfields Agreement 2008;
  - (i) Mammoet Australia Pty Ltd Greenfields Agreement 2008;
  - (j) PCH Group Limited Employee Collective Pluto Project Agreement 2009;
  - (k) RCR Construction & Maintenance Pluto Project Greenfields Agreement 2008;
  - (l) Positron Trident Pty Ltd Pluto Project Greenfields Agreement 2009,
- (together, the **Industrial Instruments**).
- 5 During the period 22 to 30 January 2010, each Respondent employed by:
- (a) United Group Resources Pty Ltd (first applicant);
  - (b) AGC Industries Pty Ltd (second applicant);
  - (c) MAS Australasia Pty Ltd (third applicant);
  - (d) Downer EDI Engineering Power Pty Ltd (fourth applicant);
  - (e) Monadelphous Engineering Associates Pty Ltd (fifth applicant);
  - (f) Decmil Australia Pty Ltd (seventh applicant);

- (g) PCH Group Ltd (tenth applicant); or
- (h) RCR Power Pty Ltd (twelfth applicant),

was covered by an “enterprise agreement” for the purposes of section 417 of the [FW Act], each of which is a workplace agreement pursuant to the Transitional Act, and was within its nominal term.

### **Union membership**

- 6 Each Respondent listed in:
  - (a) Attachment 1 was a member of the CFMEU during the whole period 23 to 30 January 2010;
  - (b) Attachment 2 was not a member of the CFMEU during the whole period 23 to 30 January 2010,

(together, the **CFMEU Respondents**).
- 7 Each Respondent listed in Attachment 3 was a member of the CEPU during the period 27 November 2009 to 28 February 2010 (together, the **CEPU Respondents**).
- 8 Each Respondent listed in:
  - (a) Attachment 4 was a member of the AMWU during the period 27 November 2009 to 28 February 2010; and
  - (b) Attachment 5 was not a member of the AMWU during the period 27 November 2009 to 28 February 2010,

(together, the **AMWU Respondents**).

### **The Project**

- 9 The events relevant to the proceeding happened on and in relation to the on-shore component of the Project, which is situated approximately 26 km from Karratha. Exhibits A2 to A5 are photographs which show the location of relevant places within and nearby the Project site.
- 10 The majority owner, operator and manager of the Project is Woodside Burrup, a subsidiary of Woodside Energy Ltd.
- 11 The Project involves, amongst other things, the construction of a single gas processing train and ancillary facilities to process gas from the Pluto and Xena gas fields located in the Carnarvon Basin about 190km north-west of Karratha, Western Australia.
- 12 Work on the Project commenced in around July 2007.
- 13 Since the commencement of work on the Project, Foster Wheeler (WA) Pty Ltd in joint venture with WorleyParsons Pty Ltd, [FWWP], has been the engineering, procurement and construction manager (**EPCM**) of the Project.
- 14 The overall performance of the building work on the Project is, and since the commencement of the building work on the Project has been, supervised by [FWWP].
- 15 Approximately 3800 workers were employed to work on the Project during

the period 22 to 30 January 2010. The 3800 workers referred to in this paragraph included construction and non-construction (staff) employees of the applicants and employees of contractors who are not parties to this proceeding.

### **Rostering on the Project**

- 16 Whilst engaged to work on the Project, the Respondents were required to work pursuant to roster cycles of one of the following configurations:
- (a) 4 weeks on, 1 week off;
  - (b) 5 weeks on, 1 week off; or
  - (c) 6 [weeks] on, 1 week off.
- 17 During their rostered “on-time”, the Respondents’ ordinary hours of work on the Project were usually worked Monday to Saturday on rostered shifts of 10 hours duration, either on a day shift usually commencing at either 6.00am or 6.30am and finishing at 4.30pm or 5.00pm respectively, or on a night shift usually commencing at 6.30pm and finishing at 4.30am.

### **Accommodation at the Project**

- 18 Many Respondents who perform work on the Project do so on a fly in/fly out basis.
- 19 Whilst each Respondent was engaged to work on the Project, they were accommodated in one of two accommodation villages (Gap Ridge Village and Searipple Village), or in their own local accommodation near the Project.
- 20 Gap Ridge Village is located about 20km from the project site and Searipple Village is located about 30km from the project site.
- 21 Gap Ridge Village contains 2,100 rooms. It is owned by Woodside Burrup and is operated for Woodside Burrup by Sodexo under the management of [FWWP]. Searipple Village is privately owned and operated not by Woodside Burrup.
- 22 Each of the Industrial Instruments contains terms to the following effect (in clause 42 and Appendix 7, clause 6):
- “42. *Distant Workers*
- Employees classified as Distant Workers as defined and International Distant Workers as defined shall be entitled to the conditions contained at Appendix 7 – Distant Work Provisions of this Agreement.”*
- “APPENDIX 7: DISTANT WORK PROVISIONS
- (6) *The Company shall have the choice of providing each Distant Worker with either suitable board and lodging or paying the Living Away from Home Allowance set out in this Appendix.”*
- 23 During the period from 22 to 30 January 2010, many of the Respondents were Distant Workers within the meaning of the Industrial Instruments.
- 24 The Respondents who were accommodated at Gap Ridge Village in the period from 22 to 30 January 2010 did so on terms and conditions of

occupancy which were effective from 17 June 2009 and which applied throughout the period 22 January 2010 to 30 January 2010.

- 25 During the period from 22 to 30 January 2010 the Applicants paid the owner or operator of the Gap Ridge Village and the Searipple Village a daily fee for the accommodation of each of their employees in those villages.

### **Motelling**

- 26 Until February 2010, Gap Ridge Village accommodated construction workers in single occupancy en-suite accommodation units. These accommodation units were occupied by construction workers, including some of the Respondents, on a 'dedicated' basis i.e. over the course of their work on the Project for a particular applicant, the Respondent would occupy the same particular accommodation unit during their rostered periods of work.
- 27 At pre-start meetings on 27 November 2009, the applicants' representatives informed their employees (who were in attendance at those meetings), including many of the Respondents, that, with effect from 4 January 2010, Woodside intended to introduce new accommodation arrangements for employees residing at Gap Ridge Village.
- 28 Under these new arrangements, construction workers who resided at Gap Ridge Village would no longer have use of the same accommodation unit for each period that they were rostered to work. Instead, they would be assigned a new accommodation unit each time they returned to Gap Ridge Village for a rostered period of work ("**Accommodation Changes**").

### **December 2009 dispute**

- 29 On 1 and 2 December 2010 many of the then employees including some of the Respondents who were rostered to work failed to present for work. The absence was not authorised or agreed to by the applicants who were their relevant employers.
- 30 On 2 December 2009, Deputy President McCarthy of [FWA] made an order under section 418 of the FW Act requiring employees of the first applicant to return to work. The order was to remain in force until 18 January 2010.
- 31 All construction workers on the Project returned to work on 3 December 2009.
- 32 During the period 3 December 2009 to 21 January 2010, the Respondents attended work as rostered.
- 33 On 21 January 2010, [FWWP] delivered a letter entitled '*Subject: Acknowledgement Forms and availability of accommodation at Gap Ridge Village*' ([FWWP] **Letter**) to between 150 and 400 Respondents on the Project who resided at Gap Ridge Village. The [FWWP] Letter concerned the introduction of the Accommodation Changes.

### **January 2010 dispute**

- 34 On 22, 23, 25, 27, 28, 29 and 30 January 2010, each Respondent failed to attend for work on one or more days on which they were rostered to work,

for either the whole or part of their rostered shift.

- 35 [The schedule to the orders now made by the Court] set out the days on which each Respondent was rostered to work and whether he or she was absent for the whole or part of their shift. Where a Respondent was absent for up to 4 hours of their rostered shift, he or she has been designated as being absent for half a day. Where a Respondent was absent for 4 hours or more of their rostered shift, he or she has been designated as being absent for a full day.
- 36 In each case, the absence specified in [the schedule to the orders now made by the Court] was not authorised or agreed to by any of the applicants.
- 37 Between 22 January 2010 and 30 January 2010 inclusive, there was no protected action ballot and no notice of intention to take protected industrial action by the Respondents or any relevant union in relation to the work at the Project.
- 38 Each Respondent engaged in:
- (a) industrial action within the meaning of s.19 of the FW Act; and
  - (b) building industrial action within the meaning of s.36(1) of the BCII Act

in respect of each day (or part thereof) on which they were absent from work as specified in [the schedule to the orders now made by the Court].

#### **Fair Work Proceedings**

- 39 On 23 January 2010, all applicants and others except the thirteenth applicant applied to [FWA] under section 418 of the FW Act for orders that the Respondents return to work (**Application**).
- 40 A copy of the Application was served on the CFMEU, the CEPU and the AMWU by email.
- 41 A hearing was held before Commissioner Cloghan of [FWA] on 23 January 2010. The hearing was attended by representatives of the applicants, the intervener, the CFMEU, the CEPU and the AMWU.
- 42 At the conclusion of the hearing on 23 January 2010, Commissioner Cloghan made an interim order under section 420 of the FW Act, known as the Woodside Pluto LNG Project 2009 No. 2 Order (**Interim Order**).
- 43 The Interim Order was validly made, and was published on the [FWA] website on Monday 25 January 2010 at 1.40pm AWST in accordance with s.601 of the FW Act. Service of the Interim Order was effected in accordance with the requirements of the Interim Order and the FW Act.
- 44 Following the making of the Interim Order, certain Respondents continued to fail to attend for work on one or more days on which they were rostered to work, for either the whole or part of their rostered shift as set out in paragraph 35 of this statement of agreed facts.

#### **Federal Court proceedings**

- 45 The applicants commenced this proceeding on 27 January 2010.
- 46 On 27 January 2010, Justice McKerracher granted an interim injunction which was expressed to operate until 5.00 pm on 5 February 2010.
- 47 On 5 February 2010, Justice McKerracher extended the interim injunction until 5.00 pm on 18 February 2010.
- 48 On 18 February 2010, Justice McKerracher further extended the interim injunction until final hearing and determination of the proceeding or further order.

**Section 417 FW Act contravention**

- 49 Each Respondent employed by:
- (a) United Group Resources Pty Ltd (first applicant);
  - (b) AGC Industries Pty Ltd (second applicant);
  - (c) MAS Australasia Pty Ltd (third applicant);
  - (d) Downer EDI Engineering Power Pty Ltd (fourth applicant);
  - (e) Monadelphous Engineering Associates Pty Ltd (fifth applicant);
  - (f) Decmil Australia Pty Ltd (seventh applicant);
  - (g) PCH Group Ltd (tenth applicant); or
  - (h) RCR Power Pty Ltd (twelfth applicant)

contravened s.417 of the FW Act in respect of each day on which they took industrial action on 22, 23, 25, 27, 28, 29 and 30 January 2010.

**Section 421 FW Act contravention**

- 50 Each Respondent (other than those Respondents referred to in Attachments 2 and 5) contravened s.421 of the FW Act in respect of each day on which they took industrial action on 22, 23, 25, 27, 28, 29 and 30 January 2010.

**BCII Act contravention**

- 51 Each Respondent was motivated by one or more of the following purposes in respect of each day of industrial action taken by them on 22, 23, 25, 27, 28, 29 and 30 January 2010:
- (a) supporting or advancing a claim against the applicants, alternatively against the applicant which was the Respondent's employer at the time, that motelling not be introduced; or
  - (b) disrupting the performance of work on the Project.

52 Accordingly, the industrial action taken by each Respondent on 22, 23, 25, 27, 28, 29 and 30 January 2010 was industrially-motivated action within the meaning of s.37(a) of the BCII Act.

- 53 The industrial action taken by each Respondent on 22, 23, 25, 27, 28, 29 and 30 January 2010:
- (a) related to work that was regulated by a Commonwealth industrial instrument; and
  - (b) adversely affected each of the applicants in their capacity as building industry participants.

54 Accordingly, the industrial action taken by each Respondent on 22, 23, 25,

27, 28, 29 and 30 January 2010 was constitutionally-connected action within the meaning of s.36(1) of the BCII Act.

55 By reason of the facts and matters set out in paragraph 37 above, the industrial action taken by each Respondent on 22, 23, 25, 27, 28, 29 and 30 January 2010 was not excluded action within the meaning of s.36(1) of the BCII Act.

56 Each Respondent contravened s.38 of the BCII Act in respect of each day on which they took industrial action on 22, 23, 25, 27, 28, 29 and 30 January 2010.

57 Paragraphs 1 – 37, 39 – 48 and 51 of this statement are tendered pursuant to s.191 of the *Evidence Act* (Cth).

58 Paragraphs 38, 49 – 50 and 52 – 56 of this statement contain admissions by the Respondents, which admissions should be treated as though they were made in a points of defence filed on behalf of the relevant Respondents.

### **Agreement reached with applicants on liability and remedy by represented respondents**

26 The preceding section sets out matters of agreed fact and agreed legal consequence of those facts. Additionally the represented respondents, at trial, formally admitted liability in relation to the pleaded contraventions and also reached agreement as to penalty and other remedies.

27 As to remedy, the represented respondents agreed to the Court imposing a permanent injunction, in essentially the same terms as the interlocutory injunction granted on 27 January 2010, operating for 7 years from the date the final injunction is made by the Court. The injunction would apply to any respondent employed or otherwise engaged in or involved in the building work on the Project, the North West Shelf Project or the Browse LNG Project, including construction and operations and any future expansions of those projects. Any such injunction would not prohibit protected industrial action within the meaning of Pt 3-3, Div 2 of the FW Act.

28 The represented respondents also agreed to submit to the Court for approval a penalty of \$1,000 per day of industrial action for BCII Act breaches and \$300 per day for FW Act breaches, fully suspended for a period of 7 years.

29 It was a term of the agreement between the applicants and the represented respondents that the applicants release the represented respondents for their claim in damages.

30 The CFMEU itself or the AMWU itself or the CEPU itself, without admission of liability, offered an undertaking to the applicants to not be involved in or engaged in industrial action for a period of 7 years on the North West Shelf or Browse LNG Projects. Again, such undertaking would not prohibit protected industrial action within the meaning of Pt 3-3, Div 2 of the FW Act.

31 The applicants also agreed to release the CFMEU, AMWU and the CEPU in their own right with respect to any actions or cross-claims pursuant to the BCII Act and the FW Act with respect to the industrial action which occurred on the following days (inclusive):

- 1 and 2 December 2009; and
- 22-30 January 2010.

32 The parties were to each bear their own costs.

33 As indicated, that agreement was between the applicants and the represented respondents. It was not an agreement between the intervener and those respondents but as the intervener points out, insofar as the admissions are concerned, the admissions made publically in court constitute admissions for all purposes.

34 The parties, through counsel, have all expressly acknowledged, and I will say more on this, that the remedy and, in particular, the terms of any penalty is a matter for the Court to determine. However, the agreement is intended to be indicative as to the appropriate penalty as agreed between the applicants and the represented respondents.

### **Conclusion in relation to liability of the represented respondents**

35 There is little more to say given the comprehensive ultimate acceptance of liability by the represented respondents. There will remain questions as to whether it is presently appropriate to make a declaration and there will be future questions as to whether or not the agreed remedy and penalty, as between the applicants and the represented respondents, should be, in effect, endorsed and sanctioned by the Court. That is a matter on which there will be future evidence and argument. I will deal below, jointly, in connection with both the represented respondents and the unrepresented respondents, the question of whether it is appropriate now to make declarations.

## **THE UNREPRESENTED RESPONDENTS**

### **Non-appearance by unrepresented respondents**

#### *Proof of service affidavits*

36 On 26 October 2010, an order was made for substituted service of:

- (a) the application filed by the applicants;
- (b) the affidavits filed in support of the application;
- (c) the interlocutory injunction granted on 18 February 2010; and
- (d) the notice of the mediation to be held before Chief Commissioner Beech on 24 and 25 November 2010,  
on the unrepresented respondents.

37 In order to prove that the unrepresented respondents were served in accordance with the order for substituted service, the applicants read the following affidavits, which were included in the agreed trial bundle:

- (a) affidavit of M/s Sandy Kathryn Palmer made on 2 November 2010;
- (b) affidavit of M/s Nicola Celenza made on 5 November 2010;
- (c) affidavit of M/s Rachel Ann Boybay made on 5 November 2010;
- (d) affidavit of M/s Leanne Marie Williams made on 8 November 2010;
- (e) affidavit of M/s Kyra Leigh Hall made on 9 November 2010;
- (f) affidavit of Mr Daniel Michael Flight made on 9 November 2010;
- (g) affidavit of Mr Tyler Matthew Counsel made on 11 November 2010;
- (h) affidavit of M/s Keira Kathleen Boskoff made on 13 November 2010;
- (i) affidavit of M/s Jessica Lauren Mahony made on 16 November 2010;
- (j) affidavit of Ani Rowell made on 30 November 2010;
- (k) affidavit of Mr Nigel Edward Baston made on 30 November 2010;
- (l) affidavit of M/s Penny Arnold made on 2 December 2010;
- (m) affidavit of M/s Carly Patricia Faulkner made on 2 December 2010;

- (n) affidavit of M/s Laura Jane Gregson made on 2 December 2010;
- (o) affidavit of M/s Daniela Jayne Chalker made on 2 December 2010; and
- (p) affidavit of Mr Dennis Somas Nicholas made on 8 December 2010.

38 The service affidavits set out above established that all the unrepresented respondents were served with a notice, a copy of which was annexed to the order made on 26 October 2010. The notice informed the unrepresented respondents of the following matters:

- (a) the fact that they were a respondent to Federal Court proceedings brought by, amongst others, their employer;
- (b) the nature of the claims being made by the applicants;
- (c) if they did not enter an appearance in the proceedings and take steps to defend them, the Court could order that they pay the applicants a penalty and that a permanent injunction may be imposed on them to prevent them from taking any unlawful industrial action;
- (d) if they entered an appearance in the proceedings, they would be entitled to be sent by post a disk containing the affidavits filed by the applicants;
- (e) the terms of the interlocutory injunction made by the Court on 18 February 2010 and the consequences of failing to comply with it (specifically, in this regard, the possible consequences were described as: 'imprisonment, sequestration of property or other punishment');
- (f) the fact that a mediation was scheduled to take place before Chief Commissioner Beech on 24 and 25 November 2010 at the Western Australian Industrial Relations Commission, Level 18, 111 St Georges Terrace, Perth; and
- (g) they were invited to be involved in the mediation and procedural steps to enable them to be so involved.

39 None of the unrepresented respondents filed a notice of appearance, attended the mediation or attended any directions hearing. As at 30 September 2011, none had taken any step in the proceeding at any time.

40 The applicants also read the affidavit of M/s Emma Krasenstein affirmed on 14 September 2011 in relation to communications with the unrepresented respondents concerning the proceedings and the claims made against them.

***The approach taken in relation to proving the case against the unrepresented respondents***

41 I was satisfied at the commencement of the trial that it was appropriate to make an order pursuant to r 1.04(3) of the *Federal Court Rules 2011 (FCR 2011)* that the former *Federal Court Rules (the former Rules)* should apply. I made that order as the parties who had pursued an active interest in the proceeding all favoured doing so, the proceeding had been fashioned with some caution under the provisions of the former Rules and as no prejudice to any party, including the unrepresented respondents, would be occasioned by the application of the former Rules.

42 As the unrepresented respondents were absent, the applicants applied to the Court for an order pursuant to O 32 r 2(1)(d) of the former Rules that the hearing proceed generally.

43 In my view, an order for the hearing to proceed generally was appropriate in circumstances where the unrepresented respondents had been on notice since October or November 2010 of the proceedings against them, and the consequence of failing to take any step in the proceedings had been explained to them. The unrepresented respondents, in effect, should be regarded as having waived their rights (*Hadgkiss v Aldin (No 2)* (2007) 169 IR 76 (at [13])).

44 In circumstances where the Court determines to proceed with the trial generally pursuant to O 32 r 2(1)(d) of the former Rules, the authorities suggest that:

- (a) the Court must investigate the merits of the matter (*A184 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 210 ALR 543 (at [89]));
- (b) the applicants must prove their case on the balance of probabilities in the usual way (*TVBO Production Ltd v Australia Sky Net Pty Ltd* (2009) 82 IPR 502 (at [15]));
- (c) the Court should generally restrict the relief to that claimed (*AA Shi Pty Ltd v Avbar Pty Ltd (No 5)* [2010] FCA 971 (at [12]));

- (d) the Court may allow evidence to be tendered and affidavits to be read on behalf of the party which is present (*Scoway Pty Ltd v Faxon Pty Ltd* [2004] FCA 249 (at [7]-[9]); and *AA Shi Pty Ltd* (at [12])); and
- (e) the Court is entitled to assume the correctness of the facts claimed by the applicants in their submissions, where there is uncontroverted evidence tendered by the applicants in support of those submissions (*AA Shi Pty Ltd* (at [13])).

45 Recently the authorities were reviewed in *Bufalo v Official Trustee in Bankruptcy* [2011] FCAFC 111, where the Full Court (Mansfield, Besanko and Flick JJ) said (at [25]-[29] and [51]):

25 The former *Federal Court Rules* provided in Order 32 r 2 for those circumstances in which a “*party is absent*”. That rule provided as follows:

Absence of party

- (1) If, when a proceeding is called on for trial, any party is absent, the Court may:
  - (a) order that the trial be not had unless the proceeding is again set down for trial, or unless such other steps are taken as the Court may direct;
  - (b) adjourn the trial;
  - (c) if the party absent is an applicant or cross-claimant dismiss the action or the cross-claim; or
  - (d) proceed with the trial generally or so far as concerns any claim for relief in the proceeding.
- (2) Where the Court proceeds with a trial in the absence of a party, and at or at the conclusion of the trial an order is made, the Court may set aside or vary the order, and may give directions for the further conduct of the proceeding.
- (3) Subrule (2) does not enable the Court to vary the verdict, finding or assessment of a jury at a trial except with the consent of each interested party present at the trial.

These *Rules* also contained in Order 52 r 38A a comparable power where a “*party is absent when an appeal is called on for hearing ...*”. The comparable provisions are now to be found in Rule 30.21 and Rule 36.75 of the *Federal Court Rules 2011*. Those *Rules* came into force on 1 August 2011.

26. The power conferred by Order 32 r 2(1)(d) to “*proceed with the trial generally*” requires the Court to investigate the merits of the matter before it: *Applicant A184 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1076 at [89] per Lander J; *AA Shi Pty Ltd v Avbar Pty Ltd (No 5)* [2010] FCA 971 at [12] per Collier J.

27 There is no question that the primary Judge, when proceeding pursuant to Order 32 r 2(1)(d), could permit an amendment to the *Amended Application* then before him. Power to grant leave to amend was previously to be found in Order 13 r 2 of the now repealed *Federal Court Rules*. The power conferred upon the primary Judge to “*proceed with the trial generally*” included an ability to exercise all of the

powers conferred by the *Rules* then in force. Order 13 r 2 did not impose any constraint upon the powers that could be exercised in the absence of a party or any express constraint upon the manner in which those discretionary powers were to be exercised.

28 Nor can any question arise as to the power of the primary Judge to dispense with compliance with Order 14 r 7(1) of the now repealed *Rules*. That rule required a “party intending to use an affidavit [to] serve it on each other interested party not later than a reasonable time before the occasion for using it arises”. “Reasonableness”, it has been said, “is something that needs to be determined in the context of the factual matrix in which the affidavit comes to be filed”: *Different Solutions Pty Ltd v Commissioner, Australian Federal Police* [2008] FCA 1571 at [3] per Graham J. The obvious purpose of the rule was to ensure that an opposing party was given a “reasonable” opportunity to form a view as to how to respond. When determining the amount of time that is “reasonable”, consideration would have to be given to such factors as the novelty of the factual issues sought to be raised by the new affidavit; the amount of time necessary to gather such facts as may be necessary to respond to the new affidavit; and the amount of time that would be necessary to prepare such cross-examination as may be appropriate to test the new factual issues being raised. Rule 29.08 of the new *Federal Court Rules 2011*, it may be noted, substitutes for the previous reference to “a reasonable time” a requirement that an affidavit be served “at least 3 days before the occasion for using it arises”.

29 But Order 1 r 8 of the now repealed *Federal Court Rules* conferred a general power upon the Court to dispense with compliance with any of the *Rules*. In *Scoway Pty Ltd v Faxon Pty Ltd* [2004] FCA 249, Hely J was there also dealing with a proceeding pursuant to Order 32 r 2(1)(d) and in doing so observed:

[7] It is not entirely clear whether an applicant who seeks to proceed with the trial against absent respondents under Order 32 r 2(1)(d) of the Federal Court Rules is required to provide proof of service of the affidavits on the absent respondents. Order 14 r 7 suggests that this may be so. I gave leave, pursuant to O 1 r 8 to the applicant to rely upon the affidavits which it has read against the first and second respondents, even though those affidavits may not have been served upon those respondents.

[8] A factor which influenced me in granting that leave is that all respondents were notified by the prescribed form of application that if they or their legal representatives did not attend Court on the relevant date (3 February 2003) the application could be dealt with and judgment could be given, or an order made in their absence. On that date I gave directions for the filing of a defence by the respondents with which neither the first nor the second respondent has complied.

In *Different Solutions*, Graham J allowed parts of an affidavit that was filed on the morning of the hearing to be read. See also: *Australian Competition and Consumer Commission v DM Faulkner Pty Limited* [2004] FCA 1666 at [327] per Bennett J. The power to dispense “with compliance with any of these Rules” is now to be found in Rule 1.34 of the *Federal Court Rules 2011*. When determining whether to dispense with compliance with the requirement now imposed by Rule 29.08 to serve an affidavit “at least 3 days before the occasion for using it arises”, presumably consideration will now have to be given to why there should be dispensation from not complying with a period of time now fixed by the *Rules* and itself considered to be a “reasonable” period of advance notice, together with such other factors as were

previously considered relevant to the exercise of the like discretion to dispense with the prior requirement imposed by Order 14 r 7.

...

51 That which is required by the rules of natural justice or procedural fairness is that a party be given an opportunity to be heard; the rules do not impose any obligation to ensure that a party takes the best advantage of that opportunity: *Sullivan v Department of Transport* (1978) 20 ALR 323. Albeit in the context of addressing s 39 of the *Administrative Appeals Tribunal Act 1975* (Cth), Deane J (when a member of this Court) said:

The failure of a tribunal which is under a duty to act judicially to adjourn a matter may, conceivably, constitute a failure to allow a party the opportunity of properly presenting his case even though the party in question has not expressly sought an adjournment (see *Priddle v Fisher & Sons* [1968] 1 WLR 1478; [1968] 3 All ER 506). In this regard, however, it is important to remember that the relevant duty of the Tribunal is to ensure that a party is given a reasonable *opportunity* to present his case. Neither the Act nor the common law imposes upon the Tribunal the impossible task of ensuring that a party takes the best advantage of the opportunity to which he is entitled.

Smithers and Fisher JJ agreed. Similar observations have also been made in *Secretary, Department of Family and Community Services v Verney* [2000] FCA 570 at [45], 60 ALD 737 at 748 per Cooper J; *Goodricke v Comcare* [2011] FCA 694 at [60]; *Kenso Marketing (M) SDN BHD v Chief Executive Officer of Customs* [2011] FCAFC 26 at [45] per Keane CJ, Downes and Gordon JJ. See also: *Re Association of Architects of Australia; Ex parte Municipal Officers of Australia* (1989) 63 ALJR 298 at 305 per Gaudron J.

46 The applicants have not served the affidavits on which they intend to rely at the trial on the unrepresented respondents. Pursuant to O 7 r 11(1)(a) of the former Rules, the filing of affidavits by the applicants had the effect of service of those affidavits on the unrepresented respondents because:

- (a) personal service of an affidavit was not required (O 7 r 11(1), O 14 r 7 and O 7 r 3); and
- (b) the unrepresented respondents were in default of appearance (O 7 r 11(1)(a)(i)).

47 In any event, in similar circumstances in *Scoway Pty Ltd* (at [7]-[9]), Hely J resolved to dispense with compliance with the requirement under O 14 r 7(1) of the former Rules for service of an affidavit prior to its use. It was appropriate to do so in light of the notice the 'absent' respondents had of the proceedings and the consequences of any decision by them not to take part in the proceedings. Accordingly, on this alternative basis, I dispensed with the service requirement in light of the detailed information the unrepresented respondents had received concerning the proceeding.

### **The evidentiary case against the unrepresented respondents**

48           The applicants' case against the 616 unrepresented respondents who have taken no active part in the proceedings as at 30 September 2011 was made up of:

- (a) an affidavit of Mr Colin Raymond Milne sworn 31 May 2011 and his oral evidence;
- (b) the photographs identified by Mr Milne in examination-in-chief;
- (c) service affidavits, proving that the unrepresented respondents were served in accordance with the order for substituted service made on 26 October 2010;
- (d) documents from the trial bundle;
- (e) the remainder of the applicants' substantive affidavits; and
- (f) time and wages affidavits, which prove that the unrepresented respondents were rostered to work, but failed to work without authorisation, on each of the days specified in a summary which was provided to the Court on 15 September 2011.

49           After discussing the relevant statutory provisions to which that evidence is directed, I will recount what the evidence relevantly establishes.

### ***Section 417 claim***

50           As noted, s 417 of the FW Act relevantly provides:

- (1) A person referred to in subsection (2) must not organise or engage in industrial action from the day on which:
  - (a) an enterprise agreement is approved by FWA until its nominal expiry date has passed; or
  - (b) a workplace determination comes into operation until its nominal expiry date has passed;

whether or not the industrial action relates to a matter dealt with in the agreement or determination.

- (2) The persons are:
  - (a) an employer, employee, or employee organisation, who is covered by the agreement or determination; or
  - (b) an officer of an employee organisation that is covered by the agreement or determination, acting in that capacity.

51           In *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2003) 130 FCR 524 (**Emwest**), the Full Court (French, von Doussa and Marshall JJ) held that under s 170MN(1) of the *Workplace Relations Act*

1996 (Cth) (**the WR Act**) (the predecessor to s 417 of the FW Act) protected industrial action could be taken, prior to a certified agreement passing its nominal expiry date, provided the protected industrial action was taken in relation to claims not already covered by the agreement.

52 Section 170MN(1) of the WR Act was amended in 2005 following the decision of the Full Court in *Emwest*. The effect of those amendments (replicated in s 417 of the FW Act) is to prohibit all industrial action, irrespective of its purpose, until the nominal expiry date of an agreement.

### ***Transitional provisions***

53 There is a particular legislative significance attaching to the timing of these events due to a changeover to some of the governing statutory provisions. Item 4 of Sch 13 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (**Transitional Act**) relevantly provides:

- (1) The following provisions of the FW Act:
  - (a) section 417 (which prohibits industrial action before the nominal expiry date of enterprise agreements etc.);
  - (b) item 14 of the table in subsection 539(2) of the FW Act (which deals with civil remedies);

apply, on and after the WR Act repeal day, in relation to an agreement-based transitional instrument or a Division 2B State employment agreement, in a corresponding way to the way that those provisions apply in relation to an enterprise agreement.

...

- (3) For the purposes of subitem (1), the reference in subsection 417(1) of the FW Act to the day on which an enterprise agreement was approved by FWA is taken to be a reference to the day on which the agreement-based transitional instrument or the Division 2B State employment agreement became such an instrument or agreement.

54 When read together, the effect of s 417 of the FW Act and Item 4 in Sch 13 of the Transitional Act is that employees, who are covered by an agreement-based transitional instrument, must not organise or engage in industrial action during the period between:

- (i) the day on which the agreement-based transitional instrument became such an instrument; and
- (ii) the nominal expiry date of the agreement-based transitional instrument.

55 The Transitional Act differentiates between agreement-based transitional instruments, WR Act instruments and transitional instruments as follows:

- (a) a WR Act instrument is defined to include an employee collective agreement and a greenfields agreement (sch 3, item 2(2) of the Transitional Act and ss 4, 327 and 330 (Pt 8 Div 2) of the WR Act);
- (b) a WR Act instrument that was in operation immediately before the WR Act repeal day (1 July 2009) became a transitional instrument on the WR Act repeal day (sch 3, item 2(3) of the Transitional Act);
- (c) each WR Act instrument that becomes a transitional instrument continues in existence in accordance with sch 3 of the Transitional Act from when it becomes a transitional instrument, despite the WR Act repeal (sch 3, item 2(1) of the Transitional Act); and
- (d) all transitional instruments that are not award-based transitional instruments are agreement-based transitional instruments (sch 3, item 2(5) of the Transitional Act).

***The applicants' in-term agreements***

56 A number of the applicants had in-term agreement-based transitional instruments in the period from 22 to 30 January 2010, being either employee collective agreements or greenfields agreements made in accordance with the WR Act. The following table summarises those agreements:

<b>Applicant</b>	<b>Agreement name</b>	<b>Commencement date of Agreement</b>	<b>Nominal expiry date of Agreement</b>	<b>Reference</b>
First Applicant	United Group Resources Pty Ltd Employee Collective Pluto Project Agreement 2009	25 May 2009	26 May 2014	Exhibit A60 Affidavit of Leanne Marie Williams made on 16 June 2011 – annexure “LMW1” Trial Book item 31, pages 1368-1480
Second Applicant	AGC Industries Pty Ltd Employee Collective Pluto Project Agreement 2009	3 September 2009	7 May 2014	Exhibit A39 Affidavit of Timothy Charles Webster made on 30 May 2011 –

				Annexure "TCW1" Trial Book item 10, pages 140-214
Third Applicant	Modern Access Services Pty Ltd Employee Collective Pluto Project Agreement 2009	14 April 2009	20 March 2012	Exhibit A43 Affidavit of Simon MacLeod made on 28 May 2011 – Annexure "SM1" Trial Book item 14, pages 408-520
Fourth Applicant	Downer EDI Engineering Power Pty Ltd Employee Collective Pluto Project Agreement 2009	27 July 2009	27 July 2012	Exhibit A45 Affidavit of Daniel Michael Flight made on 31 May 2011 – Annexure "DMF1" Trial Book item 16, pages 534-612
Fifth Applicant	Monadelphous Engineering Associates Pty Ltd Employee Collective Pluto Project Agreement 2009	16 September 2009	3 June 2014	Exhibit A59 Affidavit of Brenton George Grantham made on 8 June 2011 – Annexure "BGG1" Trial Book item 30, pages 1283-1367
Sixth Applicant	CBI Constructors Pty Ltd Agreement 2009	23 April 2009	15 April 2014	Exhibit A47 Affidavit of Dennis Somas Nicholas made on 31 May 2011 – Annexure "DSN2" Trial Book item 18, pages 714-824  Affidavit of Dennis Somas Nicholas made on 14 September 2011

Seventh Applicant	Decmil Australia Pty Ltd Employee Collective Pluto Project Agreement 2009	31 July 2009	September 2014	Exhibit A48 Affidavit of Christopher Mark Ashton made on 31 May 2011 – Annexure “CMA1” Trial Book item 19, pages 825-921
Tenth Applicant	PCH Group Limited Employee Collective Pluto Project Agreement 2009	3 September 2009	14 May 2014	Exhibit A49 Affidavit of Kelly Joyce Luskan made on 31 May 2011 – Annexure “KJL1” Trial Book item 20, pages 922-990
Twelfth Applicant	Positron Trident Pty Ltd Pluto Project Greenfields Agreement 2009	31 June 2009	19 March 2010	Exhibit A61 Affidavit of Nigel Peter Upton made on 30 June 2011 – Annexure “NPU1” Trial Book item 32, pages 1481-1531

57 The unrepresented respondents employed by the first, second, third, fourth, fifth, seventh, tenth and twelfth applicants were each, during period from 22 to 30 January 2010, employed pursuant to an agreement-based transitional instrument which was expressed to apply to ‘Employees of the Company employed in the classifications set out in Appendix 2 - Classification Structure of this Agreement and performing work falling within the Application of this Agreement’.

58 In addition, two of the unrepresented respondents employed by the sixth applicant (being respondents 865 and 871) were each, during the period from 22 to 30 January 2010, employed pursuant to an agreement-based transitional instrument which was expressed to apply to ‘the employees of the Company working in any of the positions/classifications set out in Appendix A performing work in Australia’.

59 The unrepresented respondents were engaged to work in one or more of the classifications listed in Appendix 2 or Appendix A of the relevant agreement-based transitional instrument.

60 It follows that each unrepresented respondent in respect of whom the letter 'Y' is marked in the column entitled 's.417' in the summary attached to the Applicants' and Intervener's Minute of Proposed Orders dated 20 September 2011 entitled 'Final summary of respondent numbers and representation' (**the URR Summary**) was, at the relevant time, 'covered' by an agreement-based transitional instrument. The URR Summary has been adopted and replicated in the original orders of the Court made on 30 September 2011.

61 During the period from 22 to 30 January 2010, each of the relevant agreement-based transitional instruments was within its nominal term, that is, each had become an agreement-based transitional instrument and had not passed its nominal expiry date.

62 As at 22 January 2010, there was no protected action ballot and no notice of intention to take protected industrial action by the employees of the first, second, third, fourth, fifth, sixth, seventh, tenth and twelfth applicants, or any relevant union, in relation to work at the Pluto LNG Project.

63 It follows that each unrepresented respondent in the URR Summary who has a 'Y' marked in the column entitled 's.417' contravened s 417 of the FW Act on the days specified in that table by engaging in industrial action during the nominal term of an enterprise agreement.

### **Consideration of liability of the unrepresented respondents**

64 In s 36(1) of the BCII Act 'industrially-motivated' is defined as follows (the **IM definition**):

*Industrially-motivated* means motivated by one or more of the following purposes, or by purposes that include one or more of the following purposes:

- (a) supporting or advancing claims against an employer in respect of the employment of employees of that employer;
- (b) supporting or advancing claims by an employer in respect of the employment of employees of that employer;
- (c) advancing industrial objectives of an industrial association;
- (d) disrupting the performance of work.

The employer referred to in paragraphs (a) and (b) need not be the employer whose employees do the work to which the action relates.

65 Proof of industrial motivation (as defined above) against the 616 unrepresented respondents raised particular considerations which may not always be encountered.

66 In relation to the unrepresented respondents, the applicants argued a case in relation to para (a) of the IM definition and did not, unlike the ABCC, argue in relation to para (d).

67 The applicants and the ABCC submit that the building industrial action undertaken by each of the unrepresented respondents in January 2010 was unlawful pursuant to s 37(a) of the BCII Act. It was unlawful as it was industrially-motivated, in that it was motivated by a purpose, or by purposes which included the purpose, of:

- (a) supporting or advancing claims against an employer in respect of employees of that employer (para (a) of the IM definition), or
- (b) disrupting the performance of work (para (d) of the IM definition).

68 In order to prove the unrepresented respondents' industrial motivation, the applicants and the ABCC rely on inference, and additionally, in the case of some of the unrepresented respondents, admissions made by their agents.

69 I am satisfied that the applicants and the ABCC have, in respect of the unrepresented respondents, presented evidence and argument fairly, albeit favourably to their case. No other evidence or argument at all was adduced. As such, I have adopted substantial portions of the submissions of the applicants and the ABCC on this topic without repeated attribution.

***Reliance on inference – the principles***

70 It is necessary, first to consider the inferential case.

71 Proof of any fact on the balance of probabilities can be established by circumstantial evidence (*Seltsam Pty Ltd v McGuinness* (2000) 49 NSWLR 262 (at [90])); that is, by proof of primary, or intermediate, facts from which the court infers a further fact (*Shepherd v The Queen* (1990) 170 CLR 573 (at 579)). The primary facts can themselves be the product of inference from other facts.

72

The applicants and the ABCC submit that in this case, in which the civil standard applies, ‘you need only circumstances raising a more probable inference in favour of what is alleged’ (*Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 (at 5)). A fact may be proved by inference if according to common experience the fact is the more probable inference from the unexplained primary facts (*Bradshaw* (at 6)). Certainty is never possible, and is not required (*Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125 (at 141)); all that is necessary is that ‘circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought’ (*Bradshaw* (at 5)). For the purpose of considering whether this test is met the Court must ‘consider the accumulation of the evidence’ (*Chamberlain v The Queen (No 2)* (1984) 153 CLR 521 (at 535)). It is appropriate ‘not only to evaluate each of the factual contentions separately but also to form an appreciation of the overall effect of the whole of the evidence’ (*Clay v Clay* (1999) 20 WAR 427 (at [55])), by considering ‘the weight which is to be given to the united force of all the circumstances put together’ (*Belhaven and Stenton Peerage* [1875] 1 App Cas 278 (at 279)). The Court may draw an inference from a combination of intermediate facts, even if none of them in isolation would support the inference (*Chamberlain* (at 536)). It also means that:

[a] true picture is to be derived from an accumulation of detail. The overall effect of the detailed picture can sometimes be best appreciated by standing back and viewing it from a distance, making an informed, considered, qualitative appreciation of the whole. The overall effect of the detail is not necessarily the same as the sum total of the individual details.

(*Longmuir* (at 141)).

The overall effect can be a product of primary facts that are combined like ‘strands in a cable’ (*Seltsam* (at [90])).

73

The applicants and the ABCC submit that one circumstance that requires particular attention in this case is the product of the combination of the following facts:

- (a) The motivation of the unrepresented respondents is within their knowledge.
- (b) There is no evidence that any of the unrepresented respondents ever asserted before these proceedings commenced that they had an innocent motivation for their failure to work in accordance with their rosters in January 2010. This is so notwithstanding that, if their motivation was not industrial, they had a strong incentive to bring it to their employer’s attention. Their silence on this point inevitably condemned them to

lose any right to be paid for the period when they failed to work (see Div 9 of Pt 3.3 of the FW Act and s 42 of the BCII Act).

- (c) In the nature of things, it is impossible for the applicants and the ABCC to produce evidence of a ‘non-inferential nature’ of what motivated the unrepresented respondents, other than by admission.
- (d) In these proceedings, each of the unrepresented respondents has had an opportunity to deny that they had an industrial motivation, and to give evidence to explain that their motivation was not industrial.
- (e) However, none of the unrepresented respondents chose to take that opportunity (as at 20 September 2011). No reason has been given, or otherwise appears in the evidence, why they did not do so.

74 The applicants and the ABCC contend that this circumstance ‘is properly to be taken into account as a circumstance in favour of drawing the inference’ that the unrepresented respondents had an industrial motivation (*Jones v Dunkel* (1959) 101 CLR 298 (at 312) and *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* (1971) 127 CLR 106 (at 119)). The significance of this circumstance lies in the principle that evidence is to be weighed ‘according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted’ (*Blatch v Archer* (1774) 98 ER 969 (at 970)).

75 I accept, as submitted, that the failure of the unrepresented respondents to deny an industrial motivation, or to give an explanation of an alternative innocent motivation, operates in three related ways:

- (a) It confirms any inferences that may properly be drawn against the unrepresented respondents (*The Insurance Commissioner v Joyce* (1948) 77 CLR 39 (at 61)), rendering more probable the inferences against them that are open on the evidence (*Jones v Dunkel* (at 312), *Black v Tung* [1953] VLR 629 (at 634)) and makes ‘the inference ... less unsafe than it could otherwise possibly appear’ (*May v O’Sullivan* (1955) 92 CLR 654 (at 658-659))
- (b) The fact that the unrepresented respondents have not denied that they were industrially motivated, or given evidence in support of such a denial, may more

readily enable a court to be satisfied that they were so motivated. This may be so even if the weight of the evidence in support of industrial motivation is ‘not great’, and even if only ‘slight evidence explanatory of the circumstances might displace the inferences which may be drawn from it’ (*Bradshaw* (at 5)). In *Parker v Paton* (1941) 41 SR (NSW) 237 (at 243) reference was made to ‘comparatively slight evidence’ and in *De Gioia v Darling Island Stevedoring & Lighterage Co Ltd* (1941) 42 SR (NSW) 1 (at 4) to ‘very slight evidence’.

76 The failure of the unrepresented respondents to deny or explain facts when to do so was in their exclusive power, ‘gives a colour to the other evidence against [them]’ (*Boyle v Wiseman* (1855) 156 ER 598 (at 600)), ‘allows increased strength or weight to be given to primary facts favourable to [the applicants and the ABCC] and allows inferences favourable to [the applicants and the ABCC] to be more confidently drawn’ (*Longmuir* (at 143)).

### *The primary facts*

77 With these principles in mind, it is necessary to consider both the primary and inferential evidence.

78 Employees were first told of the introduction of Accommodation Changes on 27 November 2009. Later that day, Mr Peter Hammond, an erection manager with the third applicant (**MAS**), became aware of disaffection among employees of MAS. Later that day, there was a mass meeting outside Gap Ridge Village, attended by about 600 employees. Nothing is known about the proceedings of this mass meeting, but a reasonable inference is that it was occasioned by the announcement earlier that day in relation to the introduction of the Accommodation Changes.

79 It has been established to my satisfaction that the Accommodation Changes was an intrinsically ‘emotive issue’, and as such was capable of arousing strong feelings among employees on the Project. Contractors were apprehensive that the Accommodation Changes ‘would not go down well with workers on the site’.

80 On 30 November 2009, Mr Colin Gibson, an industrial relations consultant engaged by FWWP, met with officials of the CFMEU, AMWU and CEPU. A business record of FWWP notes that, after the officials were advised of the information about the

Accommodation Changes that had been given to employees on 27 November 2009, the officials stated: 'All the unions stressed that the Project workforce was extremely frustrated by this approach and vehemently opposed to it'.

81           The officials' statement was not, on its face, confined to members of their unions. Rather, it expressed the position taken generally by the workforce as a whole. That would not be surprising. There is no logical reason why the frustration and vehement opposition that the officials described should be felt only by union members and not by at least some of the unrepresented respondents.

82           The officials were qualified by experience and well placed by position to ascertain the general position of the whole workforce, including unrepresented respondents.

83           There is ample support for that inference. For example, at about this time:

- (a) unidentified employees of the second applicant (**AGC**) and the eleventh and twelfth applicants (**RCR**) told their employer that they were 'pissed off' about the Accommodation Changes and the way in which it was to be introduced; and
- (b) M/s Nicola Celenza, a warehouse manager with the eighth applicant (**Freo**), formed the view, on the basis of discussions with employees of Freo, that those employees were 'very upset' and 'disgruntled' about the prospect of the Accommodation Changes.

84           A second mass meeting was held outside Gap Ridge Village later on 30 November 2009. The estimates of numbers attending vary between 'several hundred', 'approximately 1000' and 1200.

85           A person addressing the meeting was heard to complain that the Accommodation Changes were 'a breach of [employees'] employment contracts', and to say '[t]hey can't do this to us.' He then suggested that 'a motion to take industrial action' be proposed and put to the vote. When the motion 'out the gate for 48' was proposed and seconded, the speaker said: '[T]hen it is done, we are out the gate for 48'.

86           While the size of the meeting suggests that unrepresented respondents attended it, there is, unsurprisingly, no evidence of precisely who did so, or what part they took in the

meeting. However, none of the unrepresented respondents deny that they attended this meeting or voted in favour of the motion for a two day strike.

87           What is significant is the timing of events with many employees immediately thereafter undertaking industrial action by failing or refusing to work in accordance with their rosters on 1 and 2 December 2009.

88           Although the number of strikers, both absolutely and relatively, suggests that it is likely that at least some of the unrepresented respondents participated in the industrial action undertaken in December 2009, there is no evidence as to which of them did so.

89           Contemporaneous statements made by some of the strikers indicate that the Accommodation Changes were the cause of the industrial action undertaken in December 2009.

#### **21 JANUARY 2010**

90           On 21 January 2010, FWWP delivered letters to between 150 and 400 employees accommodated in Gap Ridge Village indicating that, unless they completed the papers by which they would commit to participating in the Accommodation Changes by 24 January 2010, they would thereafter cease to be accommodated in Gap Ridge Village.

#### **22 JANUARY 2010**

91           At about 6:30 am, by which time work should have commenced, the first of two mass meetings of employees that would be held that day was convened at a union 'humpy', a meeting place at which union officials commonly met with members, on the site of the Project. The meeting was attended by unidentified employees of AGC and the fifth applicant (**Monadelphous**). Unidentified employees of MAS were seen leaving the meeting at its conclusion.

92           After the meeting, Mr Robert Daw, one of the unrepresented respondents, told Mr Brenton Grantham, then Monadelphous' Employee Relations Manager, that:

- (a) '[t]he employees are very angry and upset about the letter from [FWWP] ... threatening to evict them if they did not sign a motelling form';

- (b) ‘... the workforce are very upset and angry about the motelling proposals’; and
- (c) he believed that it was likely that ‘the workforce will take industrial action in response to the notice issued in the village’.

93           These statements were made in the presence of ‘a large number of Monadelphous [e]mployees’, without apparent demur or qualification. Mr Grantham later completed a business record which included the statement that ‘employees were extremely angry and upset over [‘FWWP’s] letter’. While it is certainly more likely, than not, that Mr Daw was not the only unrepresented respondent to attend the first mass meeting, again, the identity of the other unrepresented respondents is unknown as is the part they took in the meeting. However, none of the unrepresented respondents deny that they attended this meeting.

94           Mr Alexander Henry, who was then employed by the first applicant (**UGL**) as a construction manager, conducted a meeting with about 500 employees of UGL after the first mass meeting where it became clear that the Accommodation Changes had been the subject of the first mass meeting.

95           FWWP conducted a meeting of contractors at about 9:00 am. A business record of FWWP notes that ‘the receipt of [FWWP’s letter of 21 January 2010] by a number of the workforce had caused them to be disgruntled’, and that Monadelphous’ employees had ‘reacted’ to the letter. A further contemporaneous business record of FWWP records that ‘yesterday’s communication to the residents of Gap Ridge Village [w]as the cause of the action’.

96           At about 10:00 am, a second mass meeting was held. It finished at about 11:15 am. The second mass meeting was attended by unidentified employees of MAS, AGC, Downer, UGL and Monadelphous.

97           After that second mass meeting,

- (a) Mr Daw told Mr Grantham that ‘a vote had been taken by Project employees ... to withdraw their labour’.
- (b) Mr Daniel Flight, who was then an employee relations superintendent for the fourth applicant (**Downer**), was told that Downer’s employees were ‘not happy’ about

FWWP's letter. As a result of talking with employees of Downer who had attended the second mass meeting, Mr Flight formed the view that the Accommodation Changes, and the way in which FWWP had managed its introduction, were the source of the discontent that had led to the meeting.

- (c) Mr Simon MacLeod, a project manager for MAS, was told by the recognised 'representative and spokesman for MAS' employees' that they were 'taking action to support [their] brothers at Gap Ridge', and that the Accommodation Changes was the issue that needed to be resolved in order to get MAS' employees back to work.

98 Again, while it is likely that Mr Daw was not the only unrepresented respondent to attend the second mass meeting, again, the identity of the other unrepresented respondents is unknown as is the part they took in the meeting. However, none of the unrepresented respondents deny that they attended this meeting, or that they voted in favour of taking industrial action.

99 Mr Milne said that immediately after the second mass meeting 'the majority of employees of all [a]pplicant contractors across the site left the site and started their strike'.

100 A contemporaneous business record of the thirteenth applicant (**John Holland**) created at 11:35 am indicates that the industrial action appeared to be 'due to the Motelling issue'.

101 Similarly, a contemporaneous business record of UGL stated that the letter issued by FWWP on 21 January 2010 to residents of Gap Ridge Village 'ultimately resulted in a mass walkout of the majority of Contractor's [UGL's] employees'.

## **24 JANUARY 2010**

102 Mr Malcolm Robinson, the project manager for the ninth applicant (**Mammoet**), was told by a spokesman for Mammoet's employees that they were on strike 'as a result of the introduction of the motelling accommodation.' He also said that, while other contractors would be receiving claims about other matters from their employees, Mammoet's employees would not make such claims because they were 'already in the process of bargaining for a new agreement'.

**27 JANUARY 2010**

103 At about 6.30 am on 27 January 2011, another meeting of employees was convened in the top car park at the Project site. Mr Milne overheard the following being said at this meeting, by persons unknown:

- 'What's three days to allow representatives to negotiate?'
- 'We want each company to have representatives'.
- 'Stay out until Saturday morning'.
- 'The motion will be put to a vote'.
- 'We resolve to stay out'.
- 'We need to elect representatives'.

**THE CLAIMS MADE ON 27 JANUARY 2010**

104 Six of the applicants received claims on behalf of their employees on 27 January 2011:

- (a) A 'list of issues' was presented to UGL by three of its employees. The list of issues is endorsed 'UGL Employees'. The three employees who presented the list are described in a business record of UGL as 'employee representatives'. The list includes 'No Motelling', and five other demands relating to conditions of employment, including for the negotiation of a 'site wide EBA'.
- (b) M/s Celenza was given a list of issues by two of Freo's employees, who told her that they had been elected by a meeting of unidentified employees of Freo for that purpose. They stated that the issues had been identified by employees of Freo 'for resolution', and that Freo's employees 'will not return to work until Freo Group agrees to the items set out in the list of issues.' The issues were 'no moteling' (sic), travel time to be negotiated, meal breaks on weekends negotiated, no victimisation of delegates or people involved, and 'speedy resolution to EBA negotiations'.
- (c) Mr Grantham was given a list of claims by several Monadelphous' employees, including one of the unrepresented respondents, Mr Robert Minner. They told him that they had been elected by Monadelphous' employees 'to represent them'. The claims were substantially the same as those that had been advanced on behalf of the

employees of UGL and Freo, and also that there be 'no victimisation of any employees over this action'.

- (d) Mr Flight was given a list of claims by two employees. They had earlier told him that, in response to a request from Downer, they had been 'appointed as the employee representatives for the Downer [e]mployees'. One of the employee representatives, Mr Matthew Cake, had signed the Downer collective agreement on behalf of its employees when the agreement was made and had in the past spoken on behalf of Downer employees at toolbox meetings. The claims were substantially the same as those advanced on behalf of Monadelphous' employees. However, a business record of Downer records that the employee representatives had a 'general feeling' that Downer's employees did not 'necessarily agree with the additional Log of Claims and that motelling is the issue that needs to be addressed'; they 'believe that a resolution to the motelling issue will/may be sufficient to get [Downer's] employees back to work'.
- (e) Mr MacLeod was given an oral list of claims by an employee who had earlier told him that he was the representative and spokesman for MAS' employees. The claims were substantially the same as those advanced on behalf of Monadelphous' employees.
- (f) Mr Webster, who was a project manager for AGC, was given an oral list of claims by an employee who was the recognised representative of AGC's employees. The claims were substantially the same as those advanced on behalf of Freo's employees.

105 After the second round of industrial action came to end on 30 January 2010, officials of the CFMEU, the AMWU, the CEPU and the AWU met with Deputy President McCarthy of FWA on 1 February 2010 'to discuss motelling' and other issues, including issues that had been identified in the claims set out in the previous paragraph. These discussions continued on 4, 8 and 9 February 2010. Deputy President McCarthy met with employee representatives and contractors on 12 February 2010 in a 'data ... gathering visit to Karratha'. He told a meeting of contractors that the 'feedback he had received was that the dispute was not just about motelling – motelling had been used as a vehicle to raise other issues'. At the conclusion of this process, Deputy President McCarthy issued a statement in which he identified and discussed the issues that had been raised with him, and recorded his observation that 'it appears to be a common and strongly held view' that the introduction of the Accommodation Changes 'could have been done better'.

*The inferences available from the primary facts*

106           There is a proper foundation, in my view, from which to conclude that each of the unrepresented respondents engaged in industrial action in January 2010. When the primary facts are examined as a whole, as the principles discussed in the [70] to [72] require, the most probable inference is that in doing so they were each motivated by the purpose, or by purposes which included the purpose, of supporting or advancing claims against their employer that the Accommodation Changes should not be introduced.

107           I accept the submission of the applicants and the ABCC that the basis of the inference is the combined effect of the following, each of which is drawn from the primary facts, strengthened by the considerations set out in [73]-[76]:

- (a)     A strong and enduring opposition to the Accommodation Changes was general among employees on the project from December 2009 until at least February 2010.
- (b)     In the absence of evidence from any of the unrepresented respondents, there is no reason to dissociate any of them from the general opposition to the Accommodation Changes.
- (c)     The close coincidence between FWWP's letter of 21 January 2010, the two mass meetings that took place on the morning of 22 January 2010, and the start of the industrial action later than a day apart are a strong indication of a connection between them in that the first of those events provided the motivation for the second and third events.
- (d)     Again, in the absence of evidence from any of the unrepresented respondents, there is no basis on which to find that any alternative explanation for the coincidence was more probable.
- (e)     Some employees who took industrial action between 22 and 30 January 2010 (including unrepresented respondents 449, 560, 792, 795 and 1077) stated that they did so to support or advance claims in respect of the Accommodation Changes. No motivation exclusive of this purpose was ever identified by any person who engaged in the industrial action. For the balance of the unrepresented respondents, there is no evidence that any of them ever stated that they were motivated by the purpose of supporting or advancing claims in respect of the Accommodation Changes. However, they engaged in the same conduct as the employees who identified that as the purpose

of the industrial action, and never did or said anything, before or during these proceedings, to suggest that they did not share the motivation of those employees or to disassociate themselves from their stated purpose. I find that the unrepresented respondents who said nothing about their motivation had the same motivation as the 'strikers' who identified the motivation for the industrial action, that is, they all conducted themselves in the same way, at the same time, motivated by the same purpose.

- (f) The unexplained failure of any of the unrepresented respondents to seek to excuse their failure to attend for work by identifying an innocent motivation, whether at the time or in these proceedings, so as to avoid the serious consequences of having engaged in industrial action, is an indication that none of them had an innocent motivation.

***Admissions made by the agents of some of the unrepresented respondents***

108 This element of the case for the applicants and the ABCC turns on the content of the claims made on 27 January 2010 to UGL, AGC, MAS, Downer, Monadelphous and Freo.

109 Accordingly, it applies only to those of the unrepresented respondents who were employed by those applicants.

110 The enterprise agreements to which each such unrepresented respondent was a party established a structure whereby an employee who had a grievance with his/her employer was required to discuss that grievance through representatives nominated for that purpose.

111 Section 81 and s 87 of the *Evidence Act 1995* (Cth) relevantly provide:

**81 Hearsay and opinion rules: exception for admissions and related representations**

- (1) The hearsay rule and the opinion rule do not apply to evidence of an admission.
- (2) The hearsay rule and the opinion rule do not apply to evidence of a previous representation:
  - (a) that was made in relation to an admission at the time the admission was made, or shortly before or after that time; and
  - (b) to which it is reasonably necessary to refer in order to understand the admission.

**87 Admissions made with authority**

- (1) For the purpose of determining whether a previous representation made by a person is also taken to be an admission by a party, the court is to admit the representation if it is reasonably open to find that:
  - (a) when the representation was made, the person had authority to make statements on behalf of the party in relation to the matter with respect to which the representation was made; or
  - (b) when the representation was made, the person was an employee of the party, or had authority otherwise to act for the party, and the representation related to a matter within the scope of the person's employment or authority; or
  - (c) the representation was made by the person in furtherance of a common purpose (whether lawful or not) that the person had with the party or one or more persons including the party.
  
- (2) For the purposes of this section, the hearsay rule does not apply to a previous representation made by a person that tends to prove:
  - (a) that the person had authority to make statements on behalf of another person in relation to a matter; or
  - (b) that the person was an employee of another person or had authority otherwise to act for another person; or
  - (c) the scope of the person's employment or authority.

112 The applicants and the ABCC submit and I accept that the structure 'present[ed] to outsiders a complex of appearances as to authority' (*Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 (at [36])). As such it provided a basis on which to conclude that:

- (a) the persons who identified themselves to their employer as representatives of the employees of that applicant for the purpose of communicating the employees' claims were in fact authorised to do so by all of those employees, including by each unrepresented respondent employed by that applicant, as to which see s 87(2)(a) and (c) of the *Evidence Act* and see also *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) 160 FCR 321 (at [53]), where Gray J held that s 87(2) 'makes provision for the prerequisites to admissibility under s 87(1)(a) and (b) to be proved by a representation by the same person who made the representation that is tendered as an admission. The prerequisite representation may, and often will, be contained in the same statement that is sought to be tendered as an admission against the party who made it'; and
  
- (b) the claims that the representatives accurately communicated to their employer the position of all the employees they represented, including each unrepresented respondent employed by that applicant, as to which see s 87(1)(a) of the *Evidence Act*.

113 The conclusions identified in the previous paragraph are strengthened by the fact that it does not appear that any of the unrepresented respondents in question have at any time ever disassociated themselves from the representatives or anything they said (*Essington Investments Pty Ltd v Regency Property Pty Ltd* [2004] NSWCA 375 (at [45])), and do not do so now.

114 The claims made by the representatives are taken, therefore, by the operation of s 87(1) of the *Evidence Act*, to be admissions by the unrepresented respondents in question, and thereby excluded from the operation of the hearsay rule by s 81 of the *Evidence Act*.

115 That being so, the claims made (the admissions) are direct evidence that, on and from at least 27 January 2010, the industrial action in which the unrepresented respondents employed by UGL, AGC, MAS, Downer, Monadelphous and Freo engaged was motivated by purposes which included opposition to the Accommodation Changes, together with the additional claims identified by their representatives.

***The operation of para (a) of the IM definition***

116 It is convenient to repeat the IM definition:

***Industrially-motivated*** means motivated by one or more of the following purposes, or by purposes that include one or more of the following purposes:

- (a) supporting or advancing claims against an employer in respect of the employment of employees of that employer;
- (b) supporting or advancing claims by an employer in respect of the employment of employees of that employer;
- (c) advancing industrial objectives of an industrial association;
- (d) disrupting the performance of work.

The employer referred to in paragraphs (a) and (b) need not be the employer whose employees do the work to which the action relates.

117 In my view, the actions taken by all respondents also falls within para (a) of the IM definition.

118 It may be thought that two factors suggest otherwise. They are that:

- (a) the accommodation in question was provided by FWWP (as agent of their employers);  
and

- (b) it was FWWP that made the decision to introduce the Accommodation Changes, rather than the unrepresented respondents' employers.

119           However, these factors do not detract from establishing a purpose of opposing the Accommodation Changes within the meaning of para (a) of the IM definition, because:

- (a) the introduction of the Accommodation Changes involved questions about the employment of each of the respondents by their employer; and
- (b) the unrepresented respondents' claims for the Accommodation Changes to be abandoned were claims made against their employer, rather than FWWP.

120           None of the unrepresented respondents had any relationship with FWWP, whether contractual or otherwise, or any rights as against FWWP. Instead, each of the applicants had an obligation under the industrial instrument to which they were a party to provide 'reasonable lodging' to each of their employees, including the unrepresented respondents. The provision of accommodation by FWWP was the means by which each applicant met that obligation. If there was to be a change in the accommodation provided by FWWP, then that change affected the applicants' discharge of their obligation to provide lodging to their employees, including the unrepresented respondents. A grievance occasioned by changes made by FWWP to the accommodation it provided was therefore, both legally and for every practical purpose, a grievance that related to a term of employment offered by the applicants to their employees. That is the explanation of the fact that employees were heard to complain that the Accommodation Changes involved a change to their terms of employment by the applicants.

121           Of necessity, it was to the applicants that the unrepresented respondents looked, at least in the first instance, to have that grievance addressed. That is why their claims were addressed to the applicants, and not FWWP.

122           The case of the applicants and the ABCC under para (a) of the IM definition, both insofar as it relates to the Accommodation Changes as much as to the other claims made by the unrepresented respondents, is that the unrepresented respondents' building industrial action was motivated, at least in part, by a purpose of supporting or advancing claims against their employers in respect of their employment. That case is established.

***The operation of para (d) of the IM definition***

123           The ABCC (but not the applicants) also contends that one of the motivations of the  
unrepresented respondents' industrial action was the purpose of disrupting the performance  
of work.

124           Disruption to the performance of work was the inevitable consequence of this  
considerable building industrial action.

125           The ABCC submits that, logically, it is the consequential disruption to the  
performance of work, rather than the building industrial action itself, that is the instrument of  
persuasion.

126           In *Australian Building and Construction Commissioner v Construction, Forestry,  
Mining and Energy Union* (2010) 187 FCR 293 (**the City Square Case**) Barker J held that:

- (a) para (d) of the IM definition distinguishes between the immediate purpose and the  
ultimate motivation of building industrial action; and
- (b) the ultimate motivation is to be construed as being limited to the 'ultimate objective'  
(at [117]), or the 'object or goal' (at [121]),

with the result that para (d) of the IM definition applies only if the disruption of work is the  
ultimate motivation, that is, the goal or object of the building industrial action (it may be that  
a similar approach was also taken in *John Holland Pty Ltd v Construction, Forestry, Mining  
and Energy Union (No 4)* [2011] FCA 618 (at [68]-[81]) and *John Holland Pty Ltd v  
Construction, Forestry, Mining and Energy Union (No 5)* [2011] FCA 1023 (at [185]) but the  
issue there was related to an absence of any relevant evidence).

127           ABCC submit that on such a construction, a conclusion that para (d) of the relevant  
IM definition was contravened in this case would not be open as there is no evidence that  
could support a conclusion that any of the unrepresented respondents had the ultimate goal of  
disruption to the performance of work.

128           In the City Square Case, Barker J recognised, after very detailed consideration, that  
'motive' or 'motivation' have two senses (the City Square Case at [114]). In the first sense,  
they refer to an emotion, or ambition, prompting an act; that is, they denote a causal

connection. In the second sense, they are equated with the ultimate end of the act. The two senses are discussed in *Hyam v DPP* [1975] AC 55 (at 73), where the point is made that they are ‘distinct but related’ and ‘not the same’.

129           The ABCC submits that the second sense is not the exclusive meaning of ‘motivation’ as it is used in para (d) of the IM definition (the City Square Case (at [115])), as:

- (a)    there is no textual, syntactic or contextual warrant in the BCII Act for the second sense to be the exclusive meaning; and
- (b)    its use as the exclusive meaning has the consequence that para (d) of the IM definition does not fulfil its part in the policy of the BCII Act as a whole, and s 36 and s 37 in particular.

130           In that regard, the policy of the BCII Act is to restore the rule of law to the building and construction industry by holding participants in the industry accountable for their unlawful conduct (the City Square Case (at [118])). However, this policy is liable to be frustrated if an unnecessarily narrow and restrictive definition is given to the concept of unlawful industrial action under s 36 and s 37.

131           ABCC argue that to confine the meaning of ‘motivation’ to its first sense gives para (d) of the IM definition an ‘impossibly narrow and restrictive definition that misses the mischief it was patently intended to remedy’. It confines para (d) to the obviously rare circumstance in which disruption to the performance of work is the ultimate goal or object of the industrial action; that is, disruption for its own sake and for no other end. However, ‘it was manifestly designed to catch industrial action that does not fall within [paras (a), (b) or (c) of the IM definition]’.

132           A classic example, well known in the building and construction industry, is industrial action that is undertaken with the purpose of using the consequent disruption to the performance of work to achieve a political object. Industrial action of that kind would not fall within paras (a), (b) or (c) of the IM definition but is nevertheless industrial action as it is commonly understood. It would fall within para (d) of the IM definition if ‘motivation’ is construed as constituting or, at least, including its first sense. Provided that the industrial action is prompted by a purpose of disrupting the performance of work, in the sense that the

disruption is an intentional consequence of the industrial action, then para (d) is satisfied, notwithstanding that there may be other motivations or purposes.

133 I consider that the meaning and purpose of para (d) of the IM definition is described in the explanatory memorandum to the BCII Bill 2005. This particular passage may not, as it does not appear in the judgment, have been referred to by the ABCC in the City Square Case:

6.8 This term is used to distinguish conduct that is generally recognised as industrial action from conduct that, while technically falling into the broad definition of building industrial action, would not be considered to be industrial action as that term is commonly understood. For example, **a mere failure to attend for work may occur for a number of reasons and will not necessarily be considered to be industrial action unless the failure to attend is for one of the reasons, or for reasons including one of the reasons, listed in this definition.**

6.9 In order for action to be industrially-motivated, it is **not** necessary that it be taken **solely** for one of the reasons listed in the definition, **nor must a reason listed in the definition be the dominant purpose** for the action. It must merely be one of the purposes for which the action is taken. **Where, for example, the purpose is to disrupt the performance of work in order to attain a particular goal, the action will be industrially motivated.**  
(emphasis added)

134 It is important to recognise, as was emphasised by Barker J in the City Square Case, that the facts of every case differ and application of the statutory criteria to the evidence in one case may give a different outcome from the facts in another. The decision in the City Square Case on this point turned on the facts there found although it may be accepted that his Honour took an approach to the definition that was more focussed than the highlighted passages above in the explanatory memorandum suggest. In the present instance, the industrial action engaged in by the unrepresented respondents meets the test in the explanatory memorandum. Disruption to the performance of work was a substantial purpose of their industrial action, even though that purpose was pursued in order to attain the goals of opposing the Accommodation Changes and achieving their other claims. In my view, a legitimate construction of the section aided by the explanatory memorandum would be to focus on whether the ‘purpose’ was a substantial purpose rather than, for example, an incidental means to another ultimate end.

135 This approach appears to me to conform (albeit without any obvious argument having informed the conclusion) with that taken in *Stuart-Mahoney v Construction, Forestry, Mining and Energy Union* (2008) 177 IR 61 (at [12]) by Tracey J who said:

The overtime ban was also clearly unlawful industrial action within the meaning of s 37 (see paragraph [8] above): a clear purpose of the ban was to disrupt the performance of work (see paragraph (d) of the definition of "industrially-motivated" in s 36(1)) and the ban adversely affected Hooker Cockram in that it jeopardised its ability to meet its contractual commitments on the project and led to it having to pay certain contractors despite them being unable to perform work because of the bans (see paragraph (b) of the definition of "constitutionally-connected" in s 36(1)). It was not suggested that the ban fell within the definition of "excluded action", being protected action within the meaning of the [the WR Act].

136 In *CBI Construction Pty Ltd v Abbott* (2008) 177 IR 134 (at [27]) Gilmour J said:

The action engaged in by the respondents has been motivated by the Demand and, it may be inferred, to disrupt the performance of work. It therefore falls within paragraphs (a) and (d) of the definition.

137 In *Williams v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2010) 196 IR 365 (at [169]) Jessup J said:

The same considerations do not apply when one comes to the following day, 6 February 2009. There is no suggestion that the Civil Pacific employees would not have been paid for any work which they carried out on that day. For them, it was an ordinary working day, much like the others which had passed since Civil Pacific commenced work on the project. However, as I have said earlier in these reasons, there is no evidence that any of the Civil Pacific employees made an attempt to attend for work on this day. Indeed, some of them were on the picket line, the obvious purpose of which was to disrupt the performance of work at the site facility. In the light of all the evidence to which I have referred above, including the meeting held on the morning of 5 February and the establishment of picketing infrastructure by the respondent unions, I consider that the most obvious inferential explanation for the absence of the Civil Pacific employees is that they chose to participate in a ban on work on the project imposed by the respondent unions. In the absence of any suggestion that the employees were at odds with those unions, for those employees to have attended for work on 6 February would have been inconsistent with the steps taken by the unions on that day to prevent access to the site facility. I am persuaded that the failure of the employees to attend for work on 6 February 2009 was motivated by the purpose of supporting or advancing the respondent unions' claims against Civil Pacific and John Holland for the making of an industrial agreement to cover work on the project (incorporating rates more advantageous to the Civil Pacific employees than those they then enjoyed); for the purpose of advancing those industrial objectives of the respondent unions; and also for the purpose of disrupting the performance of work at the site facility, self-evidently as a means of achieving those objectives. Thus I would hold that the failure of the employees of Civil Pacific to attend for building work on 6 February 2009 was industrially motivated.

138 It therefore follows that contravention of para (d) of the IM definition is also established.

## **DECLARATORY RELIEF**

139 The represented respondents did not oppose the making of declarations.

140 A declaration should not be made lightly. Although, in itself, it may not give rise to an immediate financial or other consequence, like all judicial power, it should be exercised only when there is a proper purpose in doing so. As noted by King CJ in *JN Taylor Holdings Ltd (In Liq) v Bond* (1993) 59 SASR 432 (at 436-437) (citations omitted):

The proposition that there is no limit to the jurisdiction of the court to grant declaratory relief would be an incomplete and misleading statement of the true position unless there be added the further proposition that there are circumstances which are so contra-indicative to the exercise of the discretion in favour of the grant of declaratory relief that the existence of those circumstances would lead almost inevitably to the exercise of the discretion against the making of a declaration. Examples of such decisively contra-indicative circumstances can be found in the cases. A declaration will not be made except in matters "which have a real legal context, and to the determination of which the Court's procedure is apt". There must be some person who has a true interest in opposing the declaration. The question raised must not be purely theoretical. There must not only be a party with a true interest in opposing the declaration, but the plaintiff must have a real interest in having the question determined. That interest may exist although the apprehended impact on the plaintiff may be no more than a future possibility. If, however, the determination of the question could not affect the plaintiff's legal rights or commercial or personal interests now or in the future, that is to say would "produce no foreseeable consequences for the parties", the declaration would almost certainly be refused.

141 In this case the considerations in the following paragraph underlie that purpose.

142 In *Fair Work Ombudsman v Kentwood Industries Pty Ltd (No 2)* (2010) 201 IR 234 (**Kentwood No 2**) (at [210]), I observed that there may be a public interest in the granting of declaratory relief in regulatory proceedings to record a contravention's seriousness and to explain the basis for the imposition of pecuniary penalties and other relief (see the analysis by Heerey J in *Australian Securities and Investments Commission v FUELbanc Australia Ltd* (2007) 162 FCR 174 (at [46]-[66]) and *Warramunda Village Inc v Pryde* (2001) 105 FCR 437 (per Gray, Branson and North JJ) (at [12])). A declaration may indicate the importance of compliance with statutory standards. Those considerations also apply to this case. I will make the declarations sought.

## **REMEDIES AND PENALTY FOR ALL RESPONDENTS**

143 Although the parties have agreed on penalty, there is to be a separate penalty hearing where evidence will be adduced and submissions made as to the appropriate remedy and penalty.

## CONCLUSION

144 For the foregoing reasons, the following orders were made in open court on 30 September 2011, with these reasons to follow:

### THE COURT ORDERS THAT:

1. There be judgment on liability in favour of the applicants as against all respondents.
2. The intervener's case against the appearing respondents is adjourned to 10:15 am on 9 December 2011 for the intervener to apply, should it elect to do so, to adduce evidence on one additional aspect only (concerning paragraph 51A of a draft agreed statement); to adduce that evidence if permitted to do so and for the appearing respondents to adduce evidence in response on that issue only, should they elect to do so.

### THE COURT DECLARES THAT:

3. The respondents engaged in:
  - (a) industrial action within the meaning of s 19 of the *Fair Work Act (Cth) 2009 (FW Act)*; and
  - (b) building industrial action within the meaning of s 36(1) of the *Building and Construction Industry Improvement Act 2005 (Cth) (BCII Act)*,  
on 22, 23, 25, 27, 28, 29 and 30 January 2010 by failing to attend for work on one or more days on which they were rostered to work, for either the whole or part of their rostered shift, as specified in the table annexed to the original orders made herewith, having been attached to the Applicants' and Intervener's Minute of Proposed Orders in relation to Liability and Directions in Relation to the Hearing on Remedy dated 20 September 2011 entitled 'Final summary of respondent numbers and representation'.
4. Each respondent employed by:
  - (a) United Group Resources Pty Ltd (first applicant);
  - (b) AGC Industries Pty Ltd (second applicant);
  - (c) MAS Australasia Pty Ltd (third applicant);
  - (d) Downer EDI Engineering Power Pty Ltd (fourth applicant);

- (e) Monadelphous Engineering Associates Pty Ltd (fifth applicant);
- (f) Decmil Australia Pty Ltd (seventh applicant);
- (g) PCH Group Ltd (tenth applicant); and
- (h) RCR Power Pty Ltd (twelfth applicant)

contravened s 417(1) of the FW Act in respect of each day on which they took industrial action on 22, 23, 25, 27, 28, 29 and 30 January 2010, as specified in the table annexed to the original orders made herewith, having been attached to the Applicants' and Intervener's Minute of Proposed Orders in relation to Liability and Directions in Relation to the Hearing on Remedy dated 20 September 2011 entitled 'Final summary of respondent numbers and representation'.

5. Respondents 865 and 871 (who were employed by the sixth applicant) contravened s 417 of the FW Act in respect of each day on which they took industrial action on 22, 23, 25, 27, 28, 29 and 30 January 2010, as specified in the table annexed to the original orders made herewith, having been attached to the Applicants' and Intervener's Minute of Proposed Orders in relation to Liability and Directions in Relation to the Hearing on Remedy dated 20 September 2011 entitled 'Final summary of respondent numbers and representation'.
6. The respondents who were members of the Construction Forestry Mining & Energy Union (**CFMEU**), Communications Electrical & Plumbing Union (**CEPU**) or the Australian Manufacturing Workers Union (**AMWU**) (other than respondents employed by the thirteenth applicant) as at 23 January 2010 and during the term of the order made by Commissioner Cloghan of Fair Work Australia on 23 January 2010 contravened s 421(1) of the FW Act in respect of each day on which they took industrial action on 25, 27, 28, 29 and 30 January 2010, as specified in the table annexed to the original orders made herewith, having been attached to the Applicants' and Intervener's Minute of Proposed Orders in relation to Liability and Directions in Relation to the Hearing on Remedy dated 20 September 2011 entitled 'Final summary of respondent numbers and representation'.
7. All of the respondents contravened s 38 of the BCII Act (except for Respondents 817 and 825) in respect of each day on which they took industrial action on 22, 23, 25, 27, 28, 29 and 30 January 2010, as specified in the table annexed to the original orders made herewith, having been attached to the Applicants' and Intervener's Minute of

Proposed Orders in relation to Liability and Directions in Relation to the Hearing on Remedy dated 20 September 2011 entitled 'Final summary of respondent numbers and representation'.

**THE COURT FURTHER ORDERS THAT:**

**Directions as to hearing on remedy**

8. The matter be listed for further hearing in relation to remedy on 13-16 December 2011, commencing at 10:15am on 13 December 2011.
9. The intervener to:
  - (a) give notice of its intention to rely upon any parts of any affidavits which have already been filed; and
  - (b) file and serve any additional affidavits on which it intends to rely at the hearing on remedy together with an outline of contentions on remedy, by 4:00 pm on 25 October 2011.
10. The non-appearing respondents to file and serve any affidavits on which they intend to rely at the hearing on remedy, together with any outline of contentions on remedy, by 4:00 pm on 8 November 2011.
11. The represented respondents and the applicants to:
  - (a) give notice of their intention to rely upon any parts of any affidavits which have already been filed; and
  - (b) file and serve any additional affidavits on which they intend to rely at the hearing on remedy, together with an outline of contentions on remedy, by 4:00 pm on 22 November 2011.
12. Each party to give notice of its intention to cross examine the deponent of any affidavit to be relied upon by another party at the hearing on remedy by 4:00 pm on 28 November 2011.
13. The parties to file any agreed statement of facts in relation to remedy by 4:00 pm on 28 November 2011.
14. The matter be listed for directions at 10:00 am on 29 November 2011.
15. Liberty to apply on 3 days' notice.

The Court notes that the applicants will notify the non-appearing respondents of (a) the Court's decision as to liability, (b) the fact that the matter is set down for a hearing in relation to remedy on 13-16 December 2011, and (c) the directions made in relation to the hearing on remedy, by (i) sending a notice in the form annexed and marked 'A' to these orders to the last known address of each of the non-appearing respondents, and (ii) affixing a copy of the notice to the noticeboard(s) usually used for the purpose of communication with the respondents at the workplace on the Pluto LNG Project.

**Annexure A**

**FEDERAL COURT OF AUSTRALIA**

**WAD 14 of 2010**

**Important Notice to Respondents**

**Name and Address of Respondent**

**Findings made as to liability**

1. The Federal Court of Australia has determined that you have contravened s 417 of the *Fair Work Act 2009* (Cth) and/or s 38 of the *Building and Construction Industry Improvement Act 2005* (Cth) in relation to industrial action taken in the period from 22 to 30 January 2010 on the Pluto LNG Project.
2. The Court has listed the matter for hearing on 13 - 16 December 2011 (commencing at 10:15 am on 13 December 2011) in relation to any remedy it may impose in respect of your contraventions of the *Fair Work Act 2009* and/or the *Building and Construction Industry Improvement Act 2005*.
3. Directions have been made in relation to the hearing on 13 - 16 December 2011 in accordance with paragraphs 8 - 15 of the attached document.
4. If you would like to participate in the hearing on 13 - 16 December 2011 in relation to remedy, you must file a notice of appearance in the Federal Court of Australia and comply with the directions set out in paragraphs 8 - 15 of the attached document.
5. If you enter an appearance in these proceedings, you are entitled to be sent by post a copy of the Court's decision on liability without charge upon written request being made for the same to the applicants' solicitors, Freehills, by any one of the following means:  
  
Postal Address: Freehills DX 361 Sydney (Attention: Emma Krasenstein)  
Facsimile: Freehills 02 9322 4000 (Attention: Emma Krasenstein)  
E-mail: emma.krasenstein@freehills.com
6. If you do not enter an appearance in these proceedings and take steps to participate in the hearing on remedy on 13 - 16 December 2011, the Federal Court of Australia may

order that you pay a penalty and that a permanent injunction be imposed upon you to prevent you taking any unlawful industrial action.

Freehills

Solicitors for the Applicants

I certify that the preceding one hundred-forty four (144) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice McKerracher.

Associate:

Dated: 8 December 2011