HIGH COURT OF AUSTRALIA

NETTLE J

CONSTRUCTION FORESTRY MINING AND ENERGY UNION — PLAINTIFF

AND

DIRECTOR OF THE FAIR WORK BUILDING INDUSTRY INSPECTORATE & ANOR — DEFENDANTS

Construction Forestry Mining and Energy Union v Director of the Fair Work Building Industry Inspectorate
[2016] HCA 41
28 October 2016
A37/2016

ORDER

The plaintiff's application for an order to show cause, filed on 12 August 2016, be dismissed, pursuant to r 25.03.3(a) of the High Court Rules 2004 (Cth).

Representation

M L Abbott QC with R F Gray for the plaintiff (instructed by Lieschke & Weatherill Lawyers)

N J Williams SC with B K Lim for the first defendant (instructed by Australian Government Solicitor)

Submitting appearance for the second defendant

CATCHWORDS

Construction Forestry Mining and Energy Union v Director of the Fair Work Building Industry Inspectorate

Administrative law – Constitutional writs – Where plaintiff made admissions in proceedings in Federal Court of Australia that, because of operation of s 793 of *Fair Work Act* 2009 (Cth), it could be taken to have contravened s 500 of Act by conduct of its officers – Where, after judgment reserved in proceedings in Federal Court, plaintiff applied for leave to file application for leave to withdraw admissions and amend pleadings – Where leave refused – Whether decision to refuse leave amenable to appeal – Whether decision to refuse leave vitiated by jurisdictional error because of judge's failure to reach concluded view as to operation of s 793 – Whether final judgment imposing penalties for contraventions of s 500 on basis of admissions vitiated by jurisdictional error – Whether plaintiff denied procedural fairness.

Practice and procedure – High Court of Australia – Original jurisdiction – Constitutional writs – Where plaintiff applied for order to show cause why relief in the nature of prohibition, mandamus and certiorari should not be granted – Where first defendant moved on summons seeking order pursuant to r 25.03.3(a) of High Court Rules 2004 (Cth) that application be dismissed – Considerations relevant to exercise of discretion to dismiss application – Availability of constitutional writs where Court's original jurisdiction invoked before exhaustion of statutory rights of appeal.

Words and phrases – "administrative decision", "certiorari", "constitutional writs", "constructive failure to exercise jurisdiction", "error of law on the face of the record", "inappropriate invocation of jurisdiction", "jurisdictional error", "leave to file", "leave to withdraw admissions", "mandamus".

Constitution, s 75(v).
Fair Work Act 2009 (Cth), ss 500, 793.
Federal Court of Australia Act 1976 (Cth), s 24(1)(a), (1E).
High Court Rules 2004 (Cth), r 25.03.3.

1 NETTLE J. In this proceeding, the plaintiff ("the CFMEU") seeks an order to show cause why a writ of prohibition should not be granted to prohibit the first defendant ("the Director") giving effect to a decision made on 19 July 2016 by a judge of the Federal Court of Australia (Collier J)[1] that, by reason of the actions of five CFMEU officials (Messrs Bolton, Huddy, Pitt, Cartledge and McDermott), and perforce of s 793 of the *Fair Work Act* 2009 (Cth) ("the Act"), the CFMEU contravened s 500 of the Act. The CFMEU also seeks an order to show cause why a writ of mandamus should not be granted directing Collier J to hear and determine according to law an application by the CFMEU for leave to withdraw admissions that the CFMEU made in the proceedings that the actions of the five CFMEU officials were to be attributed to the CFMEU by reason of s 793 of the Act, such that the CFMEU was to be taken to have contravened s 500 of the Act. The Director seeks an order pursuant to r 25.03.3(a) of the High Court Rules 2004 (Cth) that the CFMEU's application for an order to show cause be dismissed.

Relevant statutory provisions

2 Section 500 of the Act provides:

"**Permit holder must not hinder or obstruct**

A permit holder exercising, or seeking to exercise, rights in accordance with this Part must not intentionally hinder or obstruct any person, or otherwise act in an improper manner.

Note 1: This section is a civil remedy provision (see Part 4-1).

Note 2: A permit holder, or the organisation to which the permit holder belongs, may also be subject to an order by the FWC [Fair Work Commission] under section 508 if rights under this Part are misused.

Note 3: A person must not intentionally hinder or obstruct a permit holder, exercising rights under this Part (see section 502)."

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1 *Director, Fair Work Building Industry Inspectorate v Bolton (No 2)* [2016] FCA 817.

3 Section 793 of the Act provides:

"**Liability of bodies corporate**

Conduct of a body corporate

(1) Any conduct engaged in on behalf of a body corporate:

(a) by an officer, employee or agent (an ***official***) of the body within the scope of his or her actual or apparent authority; or

(b) by any other person at the direction or with the consent or agreement (whether express or implied) of an official of the body, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the official;

is taken, for the purposes of this Act and the procedural rules, to have been engaged in also by the body.

State of mind of a body corporate

(2) If, for the purposes of this Act or the procedural rules, it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is enough to show:

(a) that the conduct was engaged in by a person referred to in paragraph (1)(a) or (b); and

(b) that the person had that state of mind.

*Meaning of **state of mind***

(3) The ***state of mind*** of a person includes:

(a) the knowledge, intention, opinion, belief or purpose of the person; and

(b) the person's reasons for the intention, opinion, belief or purpose.

Disapplication of Part 2.5 of the Criminal Code

(4) Part 2.5 of Chapter 2 of the *Criminal Code* does not apply to an offence against this Act.

Note: Part 2.5 of the *Criminal Code* deals with corporate criminal responsibility.

(5) In this section, ***employee*** has its ordinary meaning."

The proceedings below

4 In brief substance, in 2015, the Director instituted proceedings in the Federal Court of Australia[2] seeking declarations that the five CFMEU officials had contravened s 500 of the Act, as permit holders within the meaning of that section, by acting improperly while exercising, or seeking to exercise, rights in accordance with Pt 3-4 of the Act[3], and that, by reason of s 793, the CFMEU was taken also to have contravened s 500.

5 By its defence in each of the proceedings, the CFMEU admitted that each of the five CFMEU officials had, by their actions, contravened s 500 of the Act, and that, by reason of s 793, the CFMEU was taken also to have contravened s 500 ("the s 793 admissions").

6 The s 793 admissions were based on an interpretation of that section which, until recently, was generally assumed to be correct. Other cases in which that assumption was made include *Darlaston v Parker*[4], *Director of Fair Work Building Industry Inspectorate v Stephenson*[5], *Director of the Fair Work Building Industry Inspectorate v Cartledge*[6], *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)*[7],

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2 Proceedings numbered SAD 59 of 2015, SAD 60 of 2015 and SAD 61 of 2015.

3 Part 3-4 of the Act provides the circumstances in which officials of organisations who hold entry permits may enter premises for purposes related to their representative role under the Act and other laws.

4 (2010) 189 FCR 1 at 48-52 [221]-[237], in the context of ss 767 and 826 of the *Workplace Relations Act* 1996 (Cth).

5 (2014) 146 ALD 75 at 77 [9], 79 [21], 80 [31], 82 [44], 85 [64], 87 [77].

6 [2014] FCA 1047 at [45]-[47].

7 [2015] FCA 199 at [114].

Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union[8], *Director of the Fair Work Building Industry Inspectorate v Bragdon*[9], *Director of the Fair Work Building Industry Inspectorate v Upton*[10] and *Director of the Fair Work Building Industry Inspectorate v O'Connor*[11].

7 As a result of the CFMEU's admissions, the parties agreed upon statements of facts[12], including the s 793 admissions, which were filed in the proceedings before Collier J for the determination of penalties. On 25 November 2015, Collier J heard submissions on the basis of those agreed facts. Following the conclusion of oral argument, and pursuant to orders made on 10 December 2015, the parties filed further written submissions on 29 February 2016 and 25 March 2016.

8 On 16 May 2016, while judgment stood reserved, Charlesworth J delivered judgment in an unrelated matter, *Director of the Fair Work Building Industry Inspectorate v Robinson*, in which her Honour held that s 793 does not, of itself, fix upon a body corporate liability for contraventions found to have been committed by its officers[13].

9 On learning of Charlesworth J's decision, on 31 May 2016 the CFMEU sought to file in the Adelaide Registry of the Federal Court an interlocutory application for leave to withdraw the s 793 admissions. On 2 June 2016, Collier J ordered that the interlocutory application not be filed without leave of the Court and made directions for the filing of submissions as to whether leave should be granted.

10 On 19 July 2016, Collier J ordered[14] that leave to file the interlocutory application be refused. In her reasons for judgment, her Honour stated that the principles to be applied where a court is asked to hear further submissions after

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8 [2015] FCA 1287 at [37]-[39].

9 (2015) 147 ALD 373 at 397 [113].

10 [2015] FCA 672 at [4], [50], [72], [75].

11 [2016] FCA 415 at [11]-[12], [87].

12 See *Bolton (No 2)* [2016] FCA 817 at [5]-[7].

13 [2016] FCA 525 at [48]-[50].

14 *Director, Fair Work Building Industry Inspectorate v Bolton (No 1)* [2016] FCA 816.

judgment has been reserved are as stated by this Court in *Autodesk Inc v Dyason [No 2]*[15] and *Eastman v Director of Public Prosecutions (ACT)*[16] and, more recently, by Gilmour J in *Featherby v Commissioner of Taxation*[17]. Accordingly, leave to advance further submissions once judgment has been reserved should not be granted except in "very exceptional circumstances"[18]. Her Honour was further satisfied that such very exceptional circumstances did not exist in this case because the CFMEU had made the s 793 admissions on the basis of legal advice and, although the CFMEU might now consider that Charlesworth J's observations in *Robinson* provided a basis for a new argument to the contrary[19]:

> "no reason has been advanced by the CFMEU why it did not rely upon such principles in its dealings with the Director or before this Court, other than the apparent remissness of its lawyers in considering the CFMEU's position".

11 Collier J also observed[20] that it had become apparent that the CFMEU sought by its application not only to withdraw the s 793 admissions, but also to:

> "'go back to square one' so far as concerns the Director's case against it in respect of s 500, and both amend its pleadings and require a separate trial in respect of its own position under s 500 of [the Act]".

12 That being so, her Honour stated in effect that the observations of this Court regarding the significance of case management principles in *Aon Risk Services Australia Ltd v Australian National University*[21] and *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd*[22]; the imperatives of s 37M of the *Federal Court of Australia Act* 1976 (Cth)

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15 (1993) 176 CLR 300 at 303 per Mason CJ; [1993] HCA 6.

16 (2003) 214 CLR 318 at 330 [29]-[31] per McHugh J (Gummow J agreeing at 330 [32]); [2003] HCA 28.

17 [2016] FCA 454 at [8]-[13].

18 *Eastman* (2003) 214 CLR 318 at 330 [29] per McHugh J (Gummow J agreeing at 330 [32]).

19 *Bolton (No 1)* [2016] FCA 816 at [16].

20 *Bolton (No 1)* [2016] FCA 816 at [18].

21 (2009) 239 CLR 175 at 191-192 [29]-[30] per French CJ, 211 [92], 212 [94]-[95] per Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2009] HCA 27.

22 (2013) 250 CLR 303 at 321 [51]-[52]; [2013] HCA 46.

as to the timely and efficient disposition of court business; and the impact on the Court's resources if leave were granted and the Court were required to reopen the proceedings, all militated against the grant of leave.

13 Collier J also expressly rejected submissions made on behalf of the CFMEU that to refuse the CFMEU leave to file its interlocutory application would be productive of substantial injustice because it would bind the CFMEU to the s 793 admissions contrary to the true operation of the provision, and therefore contrary to law. Her Honour stated that, although she did not consider it appropriate to undertake a detailed examination of s 793 at such a late stage of the proceedings, it was nonetheless relevant to note the following points[23]:

> "• Section 793 of [the Act], in substance, statutorily attributes to the corporation the conduct of the individuals referred to in the section: *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 100 FCR 530 at [58]; *Australian Workers' Union v Leighton Contractors Pty Limited* [2013] FCAFC 4 at [86]; *Australian Nursing and Midwifery Federation v Kaizen Hospitals (Essendon) Pty Ltd* [2015] FCAFC 23 at [121].
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> • Section 793 is of broad application: Katzmann J in *Australian Workers Union v Leighton Contractors Pty Ltd* at [87].
>
> • Section 793 provides that the relevant conduct *is taken*, for the purposes of this Act and the procedural rules, to have been engaged in also by the body corporate. There is no distinction in s 793 between attribution of knowledge of contraventions by 'permit holders', and other contraventions of [the Act].
>
> • There is existing authority of this Court to the effect that a union can be liable for contraventions by a permit holder in respect of unlawful entry pursuant to s 500 of [the Act]: for example *Darlaston v Parker* [2010] FCA 771; *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 199.
>
> In light of these principles I do not consider that an evident mistake of law was made by the lawyers of the CFMEU". (emphasis in original)

14 Collier J concluded that the interests of justice did not require that the CFMEU be given leave to withdraw the s 793 admissions or that the CFMEU be

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23 *Bolton (No 1)* [2016] FCA 816 at [33]-[34].

permitted to advance the alternative statutory construction of s 793 set out in its written submissions[24].

15 On the same day, Collier J gave final judgment in the three substantive proceedings[25]. Based on the CFMEU's admissions, including the s 793 admissions, her Honour held that the CFMEU had contravened s 500 of the Act and her Honour made orders imposing penalties for each such contravention.

The application to show cause

16 By its application for an order to show cause, the CFMEU seeks, in substance:

(a) a writ of prohibition to prohibit the Director from relying upon the final judgment and orders of Collier J of 19 July 2016; and

(b) a writ of mandamus to compel Collier J to hear and determine according to law the CFMEU's application for leave to withdraw the s 793 admissions.

17 The grounds upon which that relief is sought are, in substance, that:

(1) Collier J's interlocutory decision to refuse the CFMEU leave to file its application for leave to withdraw the s 793 admissions is vitiated by jurisdictional error constituted of Collier J's misconception of the jurisdiction of the Federal Court to refuse leave to file such an application and by reason of her Honour's failure authoritatively to determine the CFMEU's objection to jurisdiction.

(2) Collier J's interlocutory decision is vitiated by jurisdictional error constituted of Collier J's failure to undertake a detailed examination of the operation of s 793 and thereby her Honour's failure to consider the mandatory requirement of the "interests of justice" in the exercise of discretion to refuse leave to file.

(3) Collier J's penalty decision is vitiated by jurisdictional error constituted of Collier J proceeding on the basis that, as a result of the s 793 admissions, the Court had jurisdiction.

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24 *Bolton (No 1)* [2016] FCA 816 at [34].

25 *Bolton (No 2)* [2016] FCA 817.

(4) Collier J's penalty decision is vitiated by jurisdictional error constituted of Collier J's holding that, by reason of s 793, the CFMEU was to be taken to have contravened s 500.

(5) Collier J denied the CFMEU procedural fairness by failing to entertain the CFMEU's application for leave to withdraw the s 793 admissions and thereby failing authoritatively to determine the CFMEU's objection to jurisdiction and the application for leave to withdraw the admissions.

18 It is to be noted that the application for an order to show cause does not specifically seek certiorari to quash Collier J's interlocutory decision or final judgment, although, strictly speaking, that would not be required if the impugned decisions were shown to be nullities[26]. It was accepted in argument, however, that the application for an order to show cause should be read as also including a claim for certiorari in respect of error of law on the face of the record.

The parties' contentions

19 The Director contends that the application for an order to show cause should be dismissed in the exercise of discretion under r 25.03.3(a) because the application inappropriately invokes the original jurisdiction of this Court in circumstances where it was open to the CFMEU to appeal to the Full Court of the Federal Court, and, further or alternatively, because the CFMEU has not identified any arguable jurisdictional error on the part of Collier J that would found relief by way of constitutional writ.

20 The CFMEU answers that the Director's application should be rejected and that the application for an order to show cause should be referred for further hearing by a Full Court of this Court pursuant to r 25.03.3(b). It submits that its failure to take an appeal to the Full Court of the Federal Court is not a basis for discretionary dismissal of the present application because, when the matter was before Collier J, the Director contended that a decision to refuse the CFMEU leave to file its application for leave to withdraw the s 793 admissions was an administrative decision not subject to appeal. In any event, in the CFMEU's submission, this Court's constitutional writ jurisdiction exists independently of any rights of appeal against an impugned decision.

21 The CFMEU further contends that the suggestion that it has not identified any jurisdictional error on the part of Collier J is misplaced. It submits that the

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26 *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)* (2012) 249 CLR 398 at 420 [57] per Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2012] HCA 25; Aronson and Groves, *Judicial Review of Administrative Action*, 5th ed (2013) at [13.190].

imposition of a penalty on the CFMEU for a contravention of s 500 of the Act, where that contravention is unknown to the law and the CFMEU was incapable therefore of committing it, in circumstances where the CFMEU sought to withdraw the s 793 admissions, constituted jurisdictional error. Further or alternatively, in the CFMEU's submission, Collier J's failure to reach a concluded view as to the operation of s 793 was a failure to exercise jurisdiction or amounted to a constructive jurisdictional error. Finally, in the further alternative, the CFMEU argues that, whether or not Collier J fell into jurisdictional error, the identified errors are errors of law on the face of the record for which certiorari will go.

Inappropriate invocation of jurisdiction

22 Generally speaking, a litigant must exhaust its statutory rights of appeal before this Court will contemplate an application for mandamus or prohibition directed to achieving a result that in substance may be obtained on appeal[27]. As Gageler J recently observed in *Waters v The Federal Court of Australia and the Judges Thereof*[28], it is inappropriate for the original jurisdiction of this Court to be invoked to challenge a decision amenable to appeal, whether or not that appeal is subject to leave. The high constitutional purpose of s 75(v) of the Constitution is to make it constitutionally certain that there is a jurisdiction capable of restraining officers of the Commonwealth from exceeding Commonwealth power[29]. It is not to provide an alternative means of remedying judgments of superior courts from which there are adequate rights of appeal[30]. Where such rights of appeal are not pursued, this Court is deprived of the signal benefit of the lower courts' consideration of the issues raised between the parties[31].

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27 See, for example, *R v Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113 at 126-127 per Mason J; [1978] HCA 60; *R v Ross-Jones; Ex parte Beaumont* (1979) 141 CLR 504 at 514, 517-518 per Jacobs J, 522 per Aickin J; [1979] HCA 5; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 375-376 per Mason J; [1985] HCA 67.

28 [2015] HCATrans 347 at lines 619-621.

29 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 363 per Dixon J; [1948] HCA 7.

30 See *Ravenor Overseas Inc v Readhead* (1998) 72 ALJR 671 at 672 [5]-[6]; 152 ALR 416 at 417; [1998] HCA 17; *Burge v Commonwealth Bank of Australia* [2016] HCATrans 224 at lines 1540-1541.

31 *Australian National Car Parks Pty Ltd v New South Wales* [2013] HCATrans 228 at lines 237-239; *McGlade v Registrar Native Title Tribunal* [2016] HCATrans 040 at lines 713-724.

Consequently, where a litigant fails to exhaust its rights of appeal against a decision of a superior court before approaching this Court for relief by way of mandamus or prohibition, the application for relief is liable to be dismissed in the exercise of discretion, at least unless the application involves a constitutional issue that must be determined in order to establish an entitlement to relief[32].

23 Of course, there are exceptions, as was recognised in *R v Cook; Ex parte Twigg*[33]. But they involve exceptional circumstances. *Twigg* concerned an unsustainable finding of contempt by the Family Court of Australia against a solicitor of that Court where it was not contended by any party to the proceeding that it was inappropriate in those circumstances for this Court to intervene. The fact that the Court intervened in that case does not imply that it is appropriate to do so in every case in federal jurisdiction in which a plaintiff argues that he has been convicted of an offence which is unknown to law. Where a party is convicted on the basis of a plea of an offence which is unknown to law, the consequent injustice may be corrected on an appeal against conviction[34]. *Mutatis mutandis*, the same applies in the case of a civil penalty provision.

24 *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia*[35] demonstrates another exception. But, as the Director submitted, in *TCL* the plaintiff was seeking prohibition to prohibit a judge exercising a jurisdiction which it was contended the judge did not have, not to quash an order in the same way as might be done on appeal.

25 In this case, the CFMEU had a right to seek leave to appeal to the Full Court of the Federal Court against Collier J's interlocutory decision to refuse leave to file the application for leave to withdraw the s 793 admissions[36]. The suggestion by the Director that the decision was administrative was a

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32 *R v Cook; Ex parte Twigg* (1980) 147 CLR 15 at 30 per Murphy J, 34 per Wilson J (Mason J agreeing at 29); [1980] HCA 36. Cf *Australian National Car Parks* [2013] HCATrans 228 at lines 226-235.

33 (1980) 147 CLR 15.

34 *Meissner v The Queen* (1995) 184 CLR 132 at 157 per Dawson J (dissenting but not in point of principle); [1995] HCA 41, citing *R v Forde* [1923] 2 KB 400 at 403; *R v Murphy* [1965] VR 187 at 188; *R v Chiron* [1980] 1 NSWLR 218 at 235; *Liberti* (1991) 55 A Crim R 120 at 121-122; *Ferrer-Esis* (1991) 55 A Crim R 231 at 232-233. See also *Maxwell v The Queen* (1996) 184 CLR 501 at 510-511 per Dawson and McHugh JJ; [1996] HCA 46.

35 (2013) 251 CLR 533; [2013] HCA 5.

36 *Federal Court of Australia Act* 1976 (Cth), s 24(1), (1A).

misconception of what was said in *Manolakis v District Registrar, South Australia District Registry, Federal Court of Australia*[37]. It was held in that case that a judge's direction to a registrar not to accept a document for filing is an administrative decision not subject to appeal[38]. Collier J's direction of 2 June 2016 that the CFMEU's application for leave to withdraw the s 793 admissions not be accepted for filing without leave of the Court might be regarded as such an administrative decision. But, in contradistinction to such a direction, a determination by a judge of the Federal Court to refuse an application for leave to file a document is a judicial determination – an interlocutory judgment made in exercise of the original jurisdiction of the Federal Court – which is subject to appeal by leave[39].

26 Of course, as both the interlocutory and the final judgment were delivered on the same day, the CFMEU was prevented from seeking leave to appeal against Collier J's refusal of leave to file the application for leave to withdraw the s 793 admissions before final judgment was delivered in each proceeding. But that did not foreclose the CFMEU's ability to appeal against the final judgment on the basis that the CFMEU had been found to have committed a contravention of s 500 which is unknown to law. Under s 24(1)(a) of the *Federal Court of Australia Act*, the CFMEU was entitled to appeal as of right to the Full Court against the final judgment and, perforce of s 24(1E), the Full Court would have been entitled to take into account Collier J's refusal of leave to file the application for leave to withdraw the admissions[40]. There was nothing to prevent the CFMEU appealing against the declaration that it contravened s 500 of the Act, and against the penalty imposed, on the basis that, upon what is said to be the proper construction of s 793, the CFMEU could not have contravened s 500. Nor, in the event of such an appeal, would there have been anything to prevent the Full Court considering whether, in light of the CFMEU's argument as to the proper construction of s 793, Collier J's refusal to grant leave to the CFMEU to file its application for leave to withdraw the admissions was productive of substantial injustice.

27 The fact that the Director wrongly contended before Collier J that an interlocutory decision to refuse the CFMEU leave to file its application for leave

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37 (2008) 170 FCR 426.

38 *Manolakis* (2008) 170 FCR 426 at 432 [20].

39 *Bizuneh v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 128 FCR 353 at 357 [15]-[19].

40 *Jackson v Health Services Union* [2015] FCAFC 188 at [54]; *Shannon v Commonwealth Bank of Australia* (2014) 318 ALR 420 at 423-424 [17]-[19] per Logan J.

to withdraw the s 793 admissions was an administrative decision not subject to appeal is, to say the least, unfortunate. But, for present purposes, it is insignificant. The CFMEU submitted before Collier J that "the question of leave to file [the application for leave to withdraw the admissions] involves an exercise of judicial rather than administrative power"[41]. It is nowhere deposed that the CFMEU was thereafter persuaded by the Director's contrary submission to adopt a different view of the matter. Nor is it suggested that the CFMEU was otherwise influenced by the Director not to exercise its rights of appeal against Collier J's final judgment or to conclude that, on such an appeal, the Full Court might not take into account that Collier J had found the contraventions of s 500 to be established on the basis of admissions that the CFMEU had sought, and been refused, leave to withdraw. Of course, if the Director's submission as to the administrative nature of the decision had led the CFMEU to conclude that it was bound to come here rather than timeously exercising its rights of appeal in the Federal Court, one might suppose that fact would warrant an appropriate extension of time in which to appeal. But that would be a matter for the Full Court of the Federal Court. Suffice it to say for present purposes, it has not been shown that anything said or done by the Director in the proceedings before Collier J caused the CFMEU to conclude that it had no rights of appeal.

28 For those reasons alone, I am disposed to dismiss the application in the exercise of discretion.

Jurisdictional error

29 Mandamus may go to compel a defendant to perform a public duty[42]. In this case, the CFMEU alleges in effect that Collier J failed to perform her judicial duty to determine its application for leave to withdraw the s 793 admissions because her Honour failed to reach a concluded view as to the true effect of that provision.

30 In my judgment, that contention is untenable. As has been explained, Collier J decided the application for leave to file the application for leave to withdraw the s 793 admissions on the basis that it had not been established that there were present the very exceptional circumstances necessary to render it appropriate to allow a party to advance further arguments once a matter has been reserved for judgment; that case management principles and court resource considerations militated against the grant of leave (and, in effect, the opening up of the proceedings for wholesale re-litigation); and that her Honour was not

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41 Exhibit MA6 ("CFMEU Supplementary Submissions on Leave to File"), Affidavit of Michael Anderson Ats affirmed 12 August 2016 at 102-103 [15].

42 *Randall v Northcote Corporation* (1910) 11 CLR 100 at 105 per Griffith CJ, 109-111 per O'Connor J, 114-115 per Isaacs J; [1910] HCA 25.

satisfied that a refusal of leave would be productive of substantial injustice because it was not apparent that the CFMEU had necessarily erred in making the s 793 admissions. Plainly, Collier J did not fail to consider and determine the CFMEU's application for leave to file the application for leave to withdraw the s 793 admissions. Nor did her Honour deny the CFMEU procedural fairness. Beyond peradventure, her Honour decided the matter on the multiple bases stated in her reasons, as summarised above, after devoting detailed express consideration to each of the submissions advanced by the CFMEU in support of its application.

31 Moreover, even if it be assumed for the sake of argument that Collier J was in error in concluding that the circumstances were not sufficiently exceptional to justify the grant of leave to file the application for leave to withdraw the s 793 admissions, it does not follow that her Honour would thereby have fallen into jurisdictional error. It would mean no more than that Collier J erred in law in the exercise of her jurisdiction to determine whether or not leave should be granted. That would not be a jurisdictional error, but an error in the exercise of jurisdiction for which mandamus will not go[43].

32 Counsel for the CFMEU submitted that it was at least "arguable"[44] that Collier J could not rationally determine the application for leave to file the application for leave to withdraw the s 793 admissions without first determining whether the basis on which the CFMEU sought to withdraw the admissions was sound, and thus without first coming to a concluded view as to whether s 793 has the meaning for which the CFMEU now contends. To do less, it was submitted, would result in a failure to determine the matters in issue between the parties and, as such, would constitute a constructive failure to exercise jurisdiction. In counsel's submission, that raises a question as to the dimensions of the functions and powers of a Ch III court which only this Court can determine in the exercise of its constitutional writ jurisdiction. Asked how that could be so if the function being exercised by Collier J resulted in an administrative decision as opposed to a judicial determination (as counsel had contended was also arguable), counsel replied that, because the administrative decision prevented the CFMEU from withdrawing its admissions, it resulted in the CFMEU being found to have committed the relevant contraventions, and thus resulted in Collier J committing what was arguably a jurisdictional error in determining liability according to an

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43 See and compare *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 141 [163] per Hayne J; [2000] HCA 57; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 571-573 [66]-[70] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2010] HCA 1.

44 See and compare *AUK15 v Minister for Immigration and Border Protection* [2016] HCATrans 036 at line 1643.

administrative decision rather than according to law. In counsel's submission, that squarely raises issues of the kind considered by this Court in *Kirk v Industrial Court (NSW)*[45] concerning the functions and powers of a Ch III court.

33 I reject the argument. As Collier J identified correctly, the question of whether the CFMEU should be granted leave to file its application for leave to withdraw the s 793 admissions after judgment was reserved depended on whether the circumstances were sufficiently exceptional to allow the CFMEU to advance a new argument as to the operation of s 793. Plainly enough, that involved making an assessment of the likelihood of success of the new argument, just as the determination of any application to amend pleadings or advance a further submission involves a preliminary assessment of the efficacy of the proposed amendment or submission. But, axiomatically, such an assessment can never be more than a preliminary and tentative assessment falling short of a final determination of the issue. The purpose of the assessment is to aid in the determination of whether or not to grant the application, and a final determination of the issue cannot be undertaken until and unless the application is granted. To suggest otherwise confounds the plain and necessary distinction between the discretionary determination of an interlocutory application for leave to advance further submissions, to amend a pleading or to withdraw an admission – all of which are established matters of interlocutory practice and procedure – and the final determination of a matter after such an interlocutory application has been determined. That distinction has nothing to do with issues of the kind dealt with in *Kirk* as to the elements of a contravention of a provision of an Act or as to whether legislative or executive constraints on the matters which a Ch III court may take into account in the determination of an issue are inconsistent with the functions of that court as provided in Ch III of the Constitution.

34 Finally on this aspect of the matter, the CFMEU argued that the categories of jurisdictional error are not closed. No doubt that is true in the sense that *Kirk* does not provide a "rigid taxonomy"[46] of jurisdictional error. But, apart from contending that Collier J was bound to reach a concluded view as to the true effect of s 793, the CFMEU did not identify any established or yet to be recognised category of jurisdictional error that Collier J may have committed.

Certiorari

35 There is some controversy as to whether this Court may grant certiorari to quash a decision of a federal superior court for error of law on the face of the

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45 (2010) 239 CLR 531.

46 *Kirk* (2010) 239 CLR 531 at 574 [73] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

record falling short of jurisdictional error[47]. But even assuming, without deciding, that certiorari is available for non-jurisdictional error of law on the face of the record, and that Collier J made an error of law which was apparent on the face of the record[48] of either or both of the interlocutory and the final decision, there is no reason why an application for certiorari in respect of either decision should be entertained in circumstances where the CFMEU is yet to exercise its rights of appeal[49].

Public interest

36 Finally, it was submitted on behalf of the CFMEU that there are a very large number of cases awaiting determination in the Federal Court in which the meaning of s 793 is in issue, and consequently that the meaning of the section is a matter of such public importance that this application for an order to show cause should be referred to a Full Court of this Court to allow for an authoritative determination of the proper construction of the section.

37 I do not accept that argument either. As Collier J observed[50], the CFMEU seeks not only to withdraw the s 793 admissions, but also to "'go back to square one' so far as concerns the Director's case against it". Consequently, were this Court to construe s 793 favourably to the CFMEU, it would not necessarily be determinative of whether Collier J's final judgment should be set aside. That determination might involve other discretionary considerations with which the Full Court of the Federal Court is better placed to deal. Furthermore, as counsel for the Director informed me without objection, there are now a large number of matters likely to be listed for hearing in the February 2017 sittings of the Full Court of the Federal Court which turn on the correct construction of s 793. In those circumstances, it would be preferable that the proper construction of the section be determined by the Full Court in one of those matters, so that when and

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47 *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 377 per Mason J, 388-389 per Deane J; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 416 [95] per McHugh J (Callinan J agreeing at 475 [293]), 436-448 [161]-[202] per Kirby J, 466-472 [265]-[280] per Hayne J; [2002] HCA 16; *AUK15* [2016] HCATrans 036 at lines 1545-1615. See also Lindell, *Cowen and Zines's Federal Jurisdiction in Australia*, 4th ed (2016) at 85-87.

48 See, generally, *Kirk* (2010) 239 CLR 531 at 577 [83]-[85] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ. Cf *AUK15* [2016] HCATrans 036 at lines 1583-1595.

49 See and compare *Re McBain* (2002) 209 CLR 372 at 472-473 [281]-[285] per Hayne J (Gaudron and Gummow JJ agreeing at 403 [56], 410 [80]).

50 *Bolton (No 1)* [2016] FCA 816 at [18].

if it becomes necessary for this Court to consider the meaning of the section, we will have the benefit of the Full Court's reasons.

Costs

38 The CFMEU argued that, if I were to dismiss its application for an order to show cause, I should nevertheless refrain from ordering that the CFMEU pay the costs of the Director. Counsel for the CFMEU submitted that, since the Director had maintained before Collier J that the determination of the application for leave to file an application for leave to withdraw the s 793 admissions was an administrative decision not subject to appeal, the CFMEU's decision to make an application to this Court for an order to show cause, rather than to pursue its rights of appeal to the Full Court, was not without reasonable cause. That being so, counsel submitted, it would be an appropriate exercise of discretion not to order the CFMEU to pay the Director's costs.

39 Counsel also pointed to s 570 of the Act, which relevantly provides in substance that a party to proceedings in a court in relation to a matter arising under the Act may not be ordered by the court to pay costs incurred by another party to the proceedings unless the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause. Counsel conceded that there might be some doubt as to whether s 570 applies directly to a proceeding of this kind[51], but he submitted that, regardless of its direct application, the provision could be regarded as an expression of legislative intent and thus as a relevant consideration in the exercise of discretion[52].

40 I accept those submissions. Before Collier J and until the Director filed his written submissions in this Court on 5 October 2016 in support of his application that the CFMEU's application for an order to show cause be dismissed, the Director maintained that Collier J's decision to refuse leave to file was an administrative decision not subject to appeal to the Full Court. As I have said[53], that contention was not directed towards the CFMEU's right of appeal against Collier J's final judgment or the Full Court's ability to take the interlocutory decision into account upon such an appeal. But I accept that, in the manner in which it was put and maintained, the Director's contention as to the administrative nature of the decision might be thought to have put in issue the

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51 Australia, House of Representatives, Fair Work Bill 2008, Explanatory Memorandum at [2228]-[2229].

52 See and compare *De L v Director-General, NSW Department of Community Services [No 2]* (1997) 190 CLR 207 at 222 per Toohey, Gaudron, McHugh, Gummow and Kirby JJ; [1997] HCA 14.

53 See [26] above.

CFMEU's ability to rely on the interlocutory decision as a ground of appeal against the final judgment. In those circumstances, it appears that the CFMEU's decision to pursue the present application for an order to show cause was not altogether unreasonable.

41 For the reasons earlier given, I consider that the CFMEU's complaint of jurisdictional error is untenable. The Director did not suggest, however, that the CFMEU's application for certiorari for error of law on the face of the record is unarguable. That being so, I consider that the most appropriate order to make in the exercise of discretion is that there be no order as to costs.

Conclusion

42 In the result, the application for an order to show cause is dismissed with no order as to costs.