DISTRICT COURT OF QUEENSLAND

CITATION:	*Commissioner of Police v Seiffert & Ors* [2020] QDC 50
PARTIES:	**In Appeal No 2205 of 2019** **COMMISSIONER OF POLICE** (appellant) **v** **SEIFFERT, Beau Richard** (respondent) **In Appeal No 2206 of 2019** **COMMISSIONER OF POLICE** (appellant) **v** **DAVIDSON, Craig Patrick** (respondent) **In Appeal No 2209 of 2019** **COMMISSIONER OF POLICE** (appellant) **v** **CUNDY, Kieron Daniel** (respondent) **In Appeal No 2210 of 2019** **COMMISSIONER OF POLICE** (appellant) **v** **MOLONEY, Wendel James** (respondent)
FILE NO/S:	BD 2205 of 2019 BD 2206 of 2019 BD 2209 of 2019 BD 2210 of 2019
PROCEEDING:	Appeals pursuant to s 222 *Justices Act 1886*
ORIGINATING COURT:	Magistrates Court at Brisbane
DELIVERED ON:	14 April 2020
DELIVERED AT:	Brisbane

HEARING DATE: 14 February 2020

JUDGE: Judge AJ Rafter SC

ORDERS: **In each matter:**

1. **Appeal allowed.**
2. **Set aside the order made by the Magistrates Court at Brisbane on 24 May 2019 that the charge be dismissed.**
3. **Set aside the order made by the Magistrates Court at Brisbane on 4 June 2019 that the complainant pay the respondent costs of $21,250 within two months.**
4. **Remit the proceeding to the Magistrates Court at Brisbane to proceed according to law.**

CATCHWORDS: CRIMINAL LAW – appeal against ruling that there was no case to answer – where the respondents were union officials – where the respondents entered a workplace as authorised industrial officers to inquire into suspected contraventions under ss 117 and 118 *Work Health and Safety Act* 2011 (Qld) – where the respondents remained on the premises after being asked to leave – where the respondents were charged with trespass contrary to s 11(2) *Summary Offences Act* 2005 (Qld) – where it was held the respondents were authorised to remain at the premises pursuant to s 11(3) *Summary Offences Act* 2005 (Qld) – whether the magistrate erred in ruling that there was no case to answer – whether the respondents were entitled to remain at the premises

CRIMINAL LAW – appeal against ruling that there was no case to answer – where the respondents asserted a right to be at the premises under *Work Health and Safety Act* 2011 (Qld) – where it was held the respondents had an honest claim of right to enter the premises pursuant to s 22(2) *Criminal Code* (Qld) – whether the magistrate erred in ruling that there was no case to answer – whether the magistrate erred by considering the respondents honest claim of right to enter the premises – whether the respondents had an honest claim of right to remain on the premises

CRIMINAL LAW – appeal against ruling that there was no case to answer – where it was held police officers breached s 634 *Police Powers and Responsibilities Act 2000* (Qld) – where it was held police officers lacked knowledge of relevant laws and could not reasonably believe the respondents were not entitled to the benefit of s 11(3) *Summary Offences Act* 2005 (Qld) – where it was held police officers failed to assist an industrial relations inspector – whether the magistrate erred in ruling that there was no case

to answer – whether it must proved beyond reasonable doubt that a police officer considers an explanation not to be reasonable – whether misapprehension as to the law affects whether a police officer can consider an explanation not to be reasonable – whether the respondents were given a reasonable opportunity to explain their presence and the explanation was considered to be reasonable – whether the police officers failed to assist public officials

COSTS – appeal against the magistrate exercising the discretion to award costs in an amount higher than scale allowed in accordance with s 158B(2) *Justices Act* 1886 (Qld) – where it was held that a higher award of costs was justified by the special difficulty, complexity or importance of the case – whether the magistrate erred in concluding that an amount for costs above the scale in the *Justices Regulation* 2014 (Qld) was just and reasonable

Acts Interpretation Act 1954 (Qld), s 14B
Criminal Code 1899 (Qld), s 22
Fair Work Act 2009 (Cth), s 26, s 27, s 494, s 501, s 502, s 513
Justices Act 1886 (Qld), s 146, s 158A, s 158B, s 222, s 225
Justices Regulation 2014 (Qld), s 19, schedule 2
Police Powers and Responsibilities Act 2000 (Qld), s 19, s 16, s 17, s 18, s 19, s 634
Summary Offences Act 2005 (Qld), s 11
Work Health and Safety Act 2011 (Qld), s 3, s 116, s 117, s 118, s 119, s 120, s 124, s 126, s 127, s 131, s 132, s 141, s 141A, s 142, s 151, s 165

Australian Building and Construction Commissioner v Powell [2017] FCAFC 89; (2017) 251 FCR 470, considered
Baker v The Queen [2004] HCA 45; (2004) 223 CLR 513, cited
Benning v Wong (1969) 122 CLR 249, cited
Bismark v Queensland Police Service [2014] QDC 152, cited
Blackwood v Hinder [2017] QDC 239, cited
Coco v The Queen [1994] HCA 15; (1994) 179 CLR 427, cited
Construction, Forestry, Mining and Energy Union (New South Wales Branch) v Acconia Infrastructure Australia Pty Ltd & Ors [2017] NSWIR Comm 1029, cited
Cullinan v McCahon [2014] QDC 120, cited
Darlaston v Parker [2010] FCA 771; (2010) 189 FCR 1, cited
Doney v The Queen [1990] HCA 51; (1990) 171 CLR 207, cited
Fawkes v Schadwell, *ex-parte Schadwell* [1966] Qd R 20, cited
Flori v Winter & Ors [2019] QCA 281, cited

Frost v Commissioner of Police [2014] QDC 294, followed
Goli v Blue 11 Pty Ltd [2018] QDC 108, cited
Kuru v New South Wales [2008] HCA 26; (2008) 236 CLR 1, considered
May v O'Sullivan [1955] HCA 38; (1955) 92 CLR 654, cited
McDonald v Queensland Police Service [2017] QCA 255; [2018] 2 Qd R 612, cited
Molina v Zaknich [2001] WASCA 337; (2001) 24 WAR 562, considered
Molina v Zaknich [2000] WASCA 390; (2000) 117 A Crim R 346, cited
Mule v The Queen [2005] HCA 49; (2005) 79 ALJR 1573, cited
Plenty v Dillon [1991] HCA 5; (1991) 171 CLR 635, considered
Preston v Parker [2010] QDC 264, followed
Ramsay and Anor v Menso and Anor [2018] FCAFC 55; (2018) 260 FCR 506, cited
Ramsay v Sunbuild Pty Ltd [2014] FCA 54; (2014) 221 FCR 315, cited
Robinson Helicopter Company Inc v McDermott [2016] HCA 22; (2016) 90 ALJR 679, cited
Rowe v Kemper [2008] QCA 175; [2009] 1 Qd R 247, cited
R v Bagley [2014] QCA 271, cited
R v Conway [2005] QCA 194; (2005) 157 A Crim R 474, cited
R v Goldsworthy, Goldsworthy & Hill [2016] QSC 220, cited
The Queen v A2 [2019] HCA 35; (2019) 93 ALJR 1106, cited
Shepherd v The Queen [1990] HCA 56; (1990) 170 CLR 573, cited
Strbak v The Queen [2020] HCA 10, cited
Veivers v Roberts; ex-parte Veivers [1980] Qd R 226, considered

COUNSEL: MD Nicolson for the appellant in each matter
TA Ryan for the respondent in each matter

SOLICITORS: Queensland Police Service legal unit for the appellant in each matter
Hall Payne Lawyers for the respondent in each matter

Introduction

[1] The respondents were each charged with trespass contrary to s 11(2) *Summary Offences Act* 2005 (Qld). Although the charges related to the same circumstances, the terms of the charges contained slight differences and a number of errors. The charges are set out exactly as they appear in the bench charge sheets. Mr Seiffert was charged that: on 17 December 2018 at Seventeen Mile Rocks he unlawfully remained in in (sic) a placed (sic) used as a yard for a business purpose situated at 73 Counihan Road, Seventeen Mile Rocks. Mr Davidson was charged that: on 17 December 2018 at Seventeen Mile Rocks he unlawfully remained in a place used as a yard for a business purpose situated at 73 Counihan Road, Seventeen Mile Rocks. Mr Cundy was charged that: on 17 December 2018 at Seventeen Mile Rocks he

unlawfully remained in a place used for a business business (sic) purpose situated at 73 Counihan Road, Seventeen Mile Rocks. Mr Moloney was charged that: on 17 December 2018 at Seventeen Mile Rocks he unlawfully remained in a place used as a yard for a business purpose situated at 73 Counihan Road, Seventeen Mile Rocks.

[2] The premises at 73 Counihan Road, Seventeen Mile Rocks were occupied by ENCO Precast. The respondents were officials of a registered trade union and were permit holders under the *Fair Work Act* 2009 (Cth) and the *Work Health and Safety Act* 2011 (Qld) (**"WHS Act"**). At about 7.40 am on 17 December 2018, the respondents attended the premises of ENCO Precast and provided entry notices for the purposes of conducting investigations under the WHS Act. The general manager of ENCO Precast, Steven James, asked the respondents to leave the premises. The police were contacted and attended the premises. At about 9am inspectors from the Office of Industrial Relations attended the premises at the request of the respondents in order to attempt to resolve the issues. However, Mr James told the inspectors to leave the premises. At about 11.15am the respondents were arrested. The facts outlined by the prosecutor at the commencement of the trial were not in dispute.[1]

[3] The matters were heard together in the Magistrates Court at Brisbane on 29 April 2019 and 15 May 2019. At the conclusion of the prosecution case, Mr Ryan of counsel who appeared for the respondents made a submission that they had no case to answer. Mr Ryan provided written submissions. The matter was adjourned to 24 May 2019 to enable the police prosecutor to respond to Mr Ryan's submissions.

[4] At the conclusion of submissions on 24 May 2019, the magistrate indicated that she had prepared a draft decision, and proposed to deliver a ruling later in the day. However, the magistrate stated that the no case submission would succeed.[2]

[5] Mr Ryan on behalf of the respondents then submitted that costs should be awarded above the scale in schedule 2 *Justices Regulation* 2014 (Qld). It was submitted that a higher award of costs was justified by the special difficulty, complexity or importance of the case.[3] The costs incurred by the respondents were set out in an affidavit.[4] Mr Ryan sought an award of costs of about $110,000.[5]

[6] The magistrate stated that a costs order would be made and that although the amount of $110,000 would be discounted, the figure would be "much closer up to the six figures". Her Honour indicated that a "significant costs order should be made". The matter was then adjourned to 4 June 2019 in order to give the parties an opportunity to agree on costs.

[7] The quantum of costs was agreed in each case at $21,250 and on 4 June 2019 orders were made accordingly.

Grounds of appeal

[8] By notices of appeal filed 24 June 2019, the Commissioner of Police has appealed against the orders made by the magistrate on identical grounds:

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1 Transcript of proceedings 29 April 2019 at p 6, l 10 – p 7, l 20.
2 Transcript of proceedings 24 May 2019 at p 12, l 10.
3 *Justices Act* 1886 (Qld), s 158B(2).
4 Affidavit of Kris-Anne Justine Birch affirmed 24 May 2019.
5 Transcript of proceedings 24 May 2019 at p 15 ll 5-10.

1. The magistrate erred in finding that there was no case to answer against each defendant.
2. The magistrate erred in the exercise of her discretion to award costs in an amount higher than scale allowed in accordance with s 158B(2) of the *Justices Act* 1886 (Qld).

Nature of the appeal

[9] An appeal to the District Court pursuant to s 222 *Justices Act* 1886 (Qld) is by way of rehearing on the evidence before the Magistrates Court unless leave is given to adduce fresh, additional or substituted evidence.

[10] An appeal by way of rehearing involves the appellate court conducting a "real review" of the evidence given at the trial. In *Robinson Helicopter Company Inc v McDermott*[6] the High Court said:

> "A court of appeal conducting an appeal by way of rehearing is bound to conduct a 'real review' of the evidence given at first instance and of the judges reasons for judgment to determine whether the judge has erred in fact or law. If the court of appeal concludes that the judge has erred in fact, it is required to make its own findings of fact and to formulate its own reasoning based on those findings."

[11] In *McDonald v Queensland Police Service*[7] Bowskill J said that:

> "It is well established that, on an appeal under s 222 by way of rehearing, the District Court is required to conduct a real review of the trial, and the Magistrate's reasons, and make its own determination of relevant facts in issue from the evidence, giving due deference and attaching a good deal of weight to the Magistrate's view. Nevertheless, in order to succeed on such an appeal, the appellant must establish some legal, factual or discretionary error."

The relevant facts

[12] The main facts were not in dispute. At the time of entry onto the premises the respondents each presented a notice of entry in accordance with s 119 WHS Act. Shortly after entering the premises the respondents were asked by Mr James to leave. The respondents referred Mr James to their notices of entry which outlined the rights they were seeking to exercise in accordance with s 118 WHS Act. The respondents refused to leave the premises.

[13] Mr James said that he would be calling the police. Mr Seiffert contacted Ms Burgess at the Office of Industrial Relations and requested assistance in relation to entering the work site.

[14] Senior Constable Easton was the first police officer to arrive at the site followed by Senior Constable Mackay and Constable Cooper. Senior Constable Mackay and Constable Cooper spoke to the respondents in a small office at the work site. The respondents stated that they were union officials and were at the work site for the purpose of conducting a workplace health and safety inspection. The respondents

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6 [2016] HCA 22 at 43; (2016) 90 ALJR 679, 686-687 [43]. (Footnote references omitted)

7 [2017] QCA 255 at [47]; [2018] 2 Qd R 612 at 627.

said that they were remaining in order to exercise their rights under ss 117 and 118 WHS Act.

[15] At about 9.00 am the industrial inspectors, Ms Burgess and Mr Azcune[8] arrived at the site and spoke to the respondents. The respondents told them that they had entered the premises in accordance with s 117 WHS Act and were seeking to exercise their functions pursuant to s 118 WHS Act.

[16] The industrial inspectors requested that Mr James provide them with documentation and access to the workplace in order to assist them to resolve the dispute between the respondents and ENCO. Mr James refused to provide the requested documentation or provide access to the industrial inspectors. Ms Burgess eventually told the respondents that she was unable to assist with their entry.

[17] The industrial inspectors left the premises without issuing any direction or making any determination in relation to the matter. After the departure of the industrial inspectors the respondents informed the police officers that they intended to remain on the premises in order to exercise their rights under the WHS Act.

[18] At about 11.15am the respondents were arrested for the offence of trespass by remaining on the premises. There were video recordings made of the conversation principally between Sergeant Lewis and some of the respondents leading up to and including the time of arrest.

The grounds on which the magistrate's no case ruling is challenged

[19] The appellant contends that, in concluding that the respondents had no case to answer, the magistrate erred in three respects in finding that:

(a) the conduct of the respondents in remaining on the premises was authorised;
(b) the respondents were entitled to the defence under s 22 *Criminal Code* 1899 (Qld);
(c) the police breached the provisions of s 634 *Police Powers and Responsibilities Act* 2000 (Qld) (**"PPR Act"**).[9]

The correct approach in determining a no case submission

[20] The determination of a no case submission requires the prosecution case to be taken at its highest: *R v Goldsworthy, Goldsworthy & Hill*.[10] In the context of a trial by jury, a directed verdict of not guilty can only be given if the prosecution case taken at its highest cannot support a verdict of guilty: *Doney v The Queen*.[11]

[21] In *Goli v Blue 11 Pty Ltd*[12] Porter QC DCJ held that the same approach should be adopted by magistrates hearing summary trials.

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8 The transcript records the name of the witness as John Escuna. However, his surname is spelt Azcune in the written submissions.
9 Appellant's outline of submissions filed 2 August 2019 at para 18.
10 [2016] QSC 220 at [7].
11 [1990] HCA 51 at [17]; (1990) 171 CLR 207 at 215.
12 [2018] QDC 108 at [46].

[22] In *Fawkes v Schadwell*, *ex-parte Schadwell*[13] the Full Court held that at a summary trial a defendant may submit that there is no case to answer at the close of the prosecution case, and the court was required to rule on that submission without the defendant being asked to elect whether or not to call evidence.[14] Lucas J made the following comments:

> "I only wish to add for myself that the decision given by the Court in this case does not, of course, in any way affect the authority of the remarks made by Philp J in this court in *Cumming v Cumming* with the agreement of the other members of the court. His Honour said this:
>
> > 'I think a magistrate should be very slow to determine the question of sufficiency of evidence upon the application of counsel for the defendant at the end of the complainant's case.
> >
> > There is no law which obliges him to make the determination at that stage. Except in the very clearest cases it is wiser for him to hear the evidence (if any) adduced by the defendant before making his final determination. Of course, if counsel for the defence intimates that he will call no evidence the question of sufficiency of evidence calls for immediate determination.'"[15]

[23] The outcome in *Goli v Blue 11 Pty Ltd*[16] illustrates why a cautious approach to a no case submission may have merit in particular circumstances. In that case the magistrate was found to have erred in ruling that the respondents had no case to answer. The magistrate had expressed views on the merits of the case, the credibility of a prosecution witness and the weight to be accorded to inferences that arose on the evidence.[17] Porter QC DCJ held that it would be unfair to the prosecution to direct that the hearing continue before the same magistrate.[18] Accordingly the matter was remitted to the Magistrates Court for rehearing by a different magistrate.

[24] As was explained by the High Court in *May v O'Sullivan*:[19]

> "When, at the close of the case for the prosecution, a submission is made that there is 'no case to answer', the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he *could* lawfully be convicted. This is really a question of law. Unless there is some special statutory provision on the subject, a ruling that there *is* a 'case to answer' has no effect whatever on the onus of proof, which rests on the prosecution from beginning to end. After the prosecution has adduced evidence sufficient to support proof of the issue, the defendant may or may not call evidence. Whether he does

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13 [1966] Qd R 20.
14 Gibbs J at 21, Hart J at 22, Lucas J at 23.
15 [1966] Qd R 20 at 23 (footnote reference omitted).
16 [2018] QDC 108.
17 [2018] QDC 108 at [95].
18 [2018] QDC 108 at [96].
19 [1955] HCA 38; (1955) 92 CLR 654.

or not, the question to be decided in the end by the tribunal is whether, on the whole of the evidence before it, it is satisfied beyond reasonable doubt that the defendant is guilty."[20]

The relevant statutory provisions

[25] The respondents were charged with trespass contrary to s 11(2) *Summary Offences Act* which provides:

"**11 Trespass**

…

(2) A person must not unlawfully enter, or remain in, a place used as a yard for, or a place used for, a business purpose.
Maximum penalty—20 penalty units or 1 year's imprisonment.
Note—
See the *Police Powers and Responsibilities Act 2000*, section 634 for safeguards applying to starting proceedings for particular offences in this division.

(3) This section does not prevent an authorised industrial officer entering a workplace in accordance with the terms of the person's appointment as an authorised industrial officer."[21]

[26] The safeguards in s 634 PPR Act applied to the offence. Section 634 relevantly provides:

"**634 Safeguards for declared offences under Summary Offences Act 2005**

(1) This section applies to an offence under the *Summary Offences Act 2005* that is a declared offence for this Act.

(2) A police officer who suspects a person has committed a declared offence must, if reasonably practicable, give the person a reasonable opportunity to explain—
(a) if the offence involves the person's presence at a place—why the person was at the place; or
(b) if the offence involves entering a place—why the person entered the place; or

….

(3) If—
(a) the person fails to give an explanation; or
(b) the police officer considers the explanation given is not a reasonable explanation; or
(c) because of the person's conduct, it is not reasonably practicable to give the person a reasonable opportunity to give an explanation;
Example for paragraph (c)—
It may not be reasonably practicable to give the person a reasonable opportunity to give an explanation because of the

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20 [1955] HCA 38 at [7]; (1955) 92 CLR 654 at 658.

21 The term "authorised industrial officer" is defined in schedule 2 *Summary Offences Act* to mean—
(a) an authorised industrial officer appointed under the Industrial Relations Act 2016, section 337; or
(b) a permit holder under the Fair Work Act 2009 (Cwlth).
It was not in issue that the respondents were authorised industrial officers.

person's conduct, for example, the person may be struggling or speaking loudly without stopping.

the police officer may start a proceeding against the person for the declared offence.

(4) In this section—

declared offence means an offence against section 11, 12, 13(1), 14, 15, 16 or 17 of the *Summary Offences Act 2005*."

[27] The respondents' right to enter the premises of ENCO Precast is governed by s 117 WHS Act which provides:

"**117 Entry to inquire into suspected contraventions**

(1) A WHS entry permit holder may enter a workplace for the purpose of inquiring into a suspected contravention of this Act that relates to, or affects, a relevant worker.

(2) The WHS entry permit holder must reasonably suspect before entering the workplace that the contravention has occurred or is occurring."

[28] The respondents' rights while at the premises are set out in s 118 WHS Act which provides:

"**118 Rights that may be exercised while at workplace**

(1) While at the workplace under this division, the WHS entry permit holder may do all or any of the following in relation to the suspected contravention of this Act—

(a) inspect any work system, plant, substance, structure or other thing relevant to the suspected contravention;

(b) consult with the relevant workers in relation to the suspected contravention;

(c) consult with the relevant person conducting a business or undertaking about the suspected contravention;

(d) require the relevant person conducting a business or undertaking to allow the WHS entry permit holder to inspect, and make copies of, any document that is directly relevant to the suspected contravention and that—

(i) is kept at the workplace; or

(ii) is accessible from a computer that is kept at the workplace;

(e) warn any person whom the WHS entry permit holder reasonably believes to be exposed to a serious risk to his or her health or safety, emanating from an immediate or imminent exposure to a hazard, of that risk.

(2) However, the relevant person conducting the business or undertaking is not required under subsection (1)(d) to allow the WHS entry permit holder to inspect or make copies of a document if to do so would contravene a law of the Commonwealth or a law of a State.

(3) A relevant person conducting a business or undertaking must not, without reasonable excuse, refuse or fail to comply with a requirement under subsection (1)(d).

WHS civil penalty provision.

Maximum penalty—100 penalty units.

(4) Subsection (3) places an evidential burden on the defendant to show a reasonable excuse.

Notes—

1 At least 24 hours notice is required for an entry to a workplace to inspect employee records or other documents held by someone other than a person conducting a business or undertaking. See section 120.

2 The use or disclosure of personal information obtained under this section is regulated under the *Privacy Act 1988* of the Commonwealth."

The statutory framework in relation to rights of entry pursuant to the *Fair Work Act* 2009 (Cth) and *Work Health and Safety Act* 2011 (Qld)

[29] The *Fair Work Act* 2009 (Cth) provides in s 26 that:

> "**26 Act excludes State or Territory industrial laws**
>
> (1) This Act is intended to apply to the exclusion of all State or Territory industrial laws so far as they would otherwise apply in relation to a national system employee or a national system employer."

[30] However, by s 27(1)(d)(iii), the *Fair Work Act* does not apply to any non-excluded matters. The non-excluded matters include occupational health and safety.[22] The WHS Act deals with occupational health and safety, and is therefore intended to operate interactively with the *Fair Work Act*.[23]

[31] Part 3-4 *Fair Work Act* deals with the rights of the officials of organisations who hold entry permits to enter premises for purposes related to their representative role under the *Fair Work Act* and under State or Territory OHS laws. Division 3 sets out the requirements for exercising rights under State or Territory OHS laws. Section 494(3) provides that a State or Territory OHS law is a law of a State or a Territory prescribed by the regulations. The WHS Act is a State OHS law prescribed by the regulations.[24]

[32] By s 494(1) *Fair Work Act*, an official of an organisation must not exercise a State or Territory OHS right unless the official is a permit holder.[25]

[33] The *Fair Work Act* contains the following civil remedy provisions:

> "**501 Person must not refuse or delay entry**
>
> A person must not refuse or unduly delay entry onto premises by a permit holder who is entitled to enter the premises in accordance with this Part.
>
> Note: This section is a civil remedy provision (see Part 4-1)."
>
> "**502 Person must not hinder or obstruct permit holder**
>
> (1) A person must not intentionally hinder or obstruct a permit holder exercising rights in accordance with this Part.

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22 *Fair Work Act*, s 27(2)(c).

23 *Ramsay v Sunbuild Pty Ltd* [2014] FCA 54 at [33]; (2014) 221 FCR 315 at 327 [33].

24 *Fair Work Regulations* 2009 (Cth), reg 3.25.

25 A permit holder is defined in s 12 *Fair Work Act* as a person who holds an entry permit. The Fair Work Commission may issue entry permits pursuant to s 512.

> Note: This subsection is a civil remedy provision (see Part 4-1).
>
> …"

[34] The WHS Act provides in s 124 that a WHS entry permit holder must not enter a workplace unless he or she also holds an entry permit under the *Fair Work Act* or an industrial officer authority.[26]

[35] A union may apply to the industrial registrar for the issue of a WHS entry permit to a person who is an official of the union: s 131(1) WHS Act.

[36] Section 132 WHS Act provides:

> "**132 Consideration of application**
> In considering whether to issue a WHS entry permit, the industrial registrar must take into account—
> (a) the object of this Act; and
> (b) the object of allowing union right of entry to workplaces for work health and safety purposes.

[37] Part 7 WHS Act deals with workplace entry by WHS entry permit holders. There are three grounds of entry. Division 2 (which includes ss 117 and 118) relates to entry to inquire into suspected contraventions. Division 2 also includes s 120 which relates to entry for the purpose of inspecting, or making copies of employee records, and other documents that are directly relevant to a suspected contravention. Division 3 deals with entry to consult and advise workers who wish to participate in discussions on work health and safety matters.

The issue of whether the respondents were authorised to remain on the premises

The magistrate's reasons

[38] The magistrate considered that a narrow construction of s 11(3) *Summary Offences Act*, "so that it applied only to entry to premises, would defeat the purposes of the legislation and would be contrary to construction principles in the *Acts Interpretation Act,* s 14B."[27] The magistrate accepted the submissions made by Mr Ryan on behalf of the respondents.[28]

[39] The magistrate concluded:

> "The Prosecution say because there was no written direction by IR officers, pursuant to s 141A of the *Workplace Health and Safety Act*, the defendants' continuing presence was unlawful. This occurred because the employer would not give the information required. I do not accept that that has the effect the lawful entry became unlawful."[29]

The submissions for the appellant

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26 A **workplace** is defined in s 8 as a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work.

27 Magistrate's decision, 24 May 2019, p 4, l 20.

28 Outline of submissions for the defendants dated 15 May 2009 at paras 27-32.

29 Magistrate's decision, 24 May 2019, p 4, ll 30-35.

[40] Mr Nicolson submitted that the prosecution case was based on the respondents remaining on the premises after having been asked to leave.[30] He pointed out that s 141 WHS Act provides that where a dispute arises about the exercise or purported exercise of a right of entry, any party to the dispute may ask the regulator to appoint an inspector to attend the workplace to assist in resolving the dispute. If the inspector is reasonably satisfied that the permit holder has a right of entry, a written direction can be given to the person conducting the business to immediately allow entry: s 141A(2)(b) WHS Act.

[41] Mr Nicolson submitted that in circumstances where the permit holder's authority was challenged by a person conducting the business, the appropriate course is to seek referral of the matter to the Industrial Commission for directions.

[42] Mr Nicolson submitted that the refusal by the industrial inspector to issue written directions pursuant to s 141A(2)(b) WHS Act "gives rise to a necessary inference that the inspector could not be satisfied that the respondents (the entry permit holders) had the standing to be provided the material requested."[31] He submitted that any right of the respondents to remain on the premises had therefore been extinguished.[32]

The submissions for the respondents

[43] Mr Ryan submitted that the magistrate was correct in determining that upon a proper construction of s 11(3) *Summary Offences Act*, an immunity from liability is conferred upon authorised industrial officers who remain at a workplace in order to exercise their rights under s 118 WHS Act.[33] He submitted that the magistrate was correct in deciding that a narrow interpretation of s 11(3) would defeat the purpose of the legislative provision and be contrary to principles of statutory construction.[34]

[44] Mr Ryan submitted that the respondents were entitled to exercise a right of entry under s 117 WHS Act, as well as the concomitant right to exercise the powers in s 118(1).[35] He submitted that there was an inextricable link between the right of entry and the right to enquire into suspected contraventions of the WHS Act, as explained by Reeves J in *Ramsay v Sunbuild Pty Ltd*.[36]

[45] Mr Ryan referred to the explanatory notes to the *Summary Offences Bill* 2004 which state that s 11(3) was added to ensure that there was no conflict with the provisions of the *Industrial Relations Act* 1999 (Qld) and the *Workplace Relations Act* 1966 (Cth). The explanatory notes state that:

> "The latter Acts provide lawful authority for an authorised industrial officer to enter a workplace to carry out a function the officer may perform under those Acts. Clause 11 of the Bill relates to trespass. Although the clause requires that an entry must be unlawful before it constitutes a trespass, the amendment removes any doubt that there could be a conflict between the Bill and the Acts."

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30 Appellant's outline of submissions filed 2 August 2019 at para 19.
31 Appellant's outline of submissions filed 2 August 2019 at para 28.
32 Appellant's outline of submissions filed 2 August 2019 at para 29.
33 Respondents' outline of submissions filed 6 September 2019 at para 18.
34 Respondents' outline of submissions filed 6 September 2019 at para 21.
35 Respondents' outline of submissions filed 6 September 2019 at para 31.
36 [2014] FCA 54; (2014) 221 FCR 315 at [87]-[88].

[46] Mr Ryan submitted that an interpretation of s 11(3) *Summary Offences Act* that establishes an immunity from prosecution when an authorised industrial officer has acted in conformity with the legislative requirements to enter a workplace pursuant to s 117 WHS Act, and then remain on the premises to exercise rights under s 118, is to be preferred over an interpretation that would render the industrial officer liable to conviction for trespass.[37]

[47] Mr Ryan submitted that the right of the respondents to remain on the premises was not extinguished by the fact that the inspector declined to issue a written direction.[38] He submitted that it was doubtful whether s 141A WHS Act has any application in the resolution of disputes concerning permit holders remaining on premises as opposed to disputes in relation to the right of entry.[39]

Consideration

[48] In *Flori v Winter & Ors*[40] Fraser JA summarised the approach to statutory construction discussed by the High Court in *The Queen v A2*:[41]

> "The task is to ascertain the intended meaning of the statutory text. The construction exercise must focus upon a consideration of the statutory words in their context. The context includes surrounding statutory provisions, other aspects of the statute and the statute as a whole, any mischief in the pre-existing state of law the statute was designed to address, and an evident purpose of the statute. Under the *Acts Interpretation Act* 1954 (Qld) an interpretation of a provision of an Act that will best achieve its purpose is to be preferred to any other interpretation, and consideration may be given to extrinsic material, including a report of a Royal Commission, Law Reform Commission or similar body that was laid before the Legislative Assembly, an explanatory note or memorandum relating to the Bill, and the speech made to the Legislative Assembly by the member when introducing the Bill. The extrinsic material may be considered to provide an interpretation of an ambiguous or obscure provision, to provide an interpretation that avoids a manifestly absurd or unreasonable result of the ordinary meaning of the provision, or in any other case to confirm the interpretation conveyed by the ordinary meaning of the provision."[42]

[49] Mr Ryan characterised s 11(3) *Summary Offences Act* as "representing an immunity from liability for what might otherwise be an offence of trespass".[43]

[50] An important aspect of statutory construction requires that an intention to interfere with common law rights should be expressed clearly. In *Coco v The Queen*[44] the plurality of Mason CJ, Brennan, Gaudron and McHugh JJ said:

> "Every unauthorized entry upon private property is a trespass, the right of a person in possession or entitled to possession of premises

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37 Respondents' outline of submissions filed 6 September 2019 at para 5.
38 Respondents' outline of submissions filed 6 September 2019 at para 92.
39 Respondents' outline of submissions filed 6 September 2019 at para 95.
40 [2019] QCA 281.
41 [2019] HCA 35 at [31]-[37], [148]; (2019) 93 ALJR 1106, at 1116-1118, 1136.
42 [2019] QCA 281 at [22] (footnote references omitted).
43 Respondents' outline of submissions filed 6 September 2019 at para 27.
44 [1994] HCA 15 at [8]; (1994) 179 CLR 427 at 435-436 (footnote references omitted).

> to exclude others from those premises being a fundamental common law right. In accordance with that principle, a police officer who enters or remains on private property without the leave or licence of the person in possession or entitled to possession commits a trespass unless the entry or presence on the premises is authorized or excused by law. Statutory authority to engage in what otherwise would be tortious conduct must be clearly expressed in unmistakable and unambiguous language. Indeed, it has been said that the presumption is that, in the absence of express provision to the contrary, the legislature did not intend to authorize what would otherwise have been tortious conduct. But the presumption is rebuttable and will be displaced if there is a clear implication that authority to enter or remain upon private property was intended. Such an implication may be made, in some circumstances, if it is necessary to prevent the statutory provisions from becoming inoperative or meaningless. However, as Gaudron and McHugh JJ observed in *Plenty v. Dillon*:
>
> > '(I)nconvenience in carrying out an object authorized by legislation is not a ground for eroding fundamental common law rights'."

[51] In the context of the present case the comments by the Full Court of the Federal Court of Australia in *Australian Building and Construction Commissioner v Powell*[45] are worth noting:

> "… notwithstanding the closely regulated environment of industrial and employment legislation, provisions as to entry on to work sites and the regulation thereof should be construed conformably with the language used by Parliament practically and with an eye to commonsense so that they can be implemented in a clear way on a day-to-day basis at work sites. The legislation needs to work in a practical way at the work site, and if at all possible not be productive of fine distinctions concerning the characterisation of entry on to a site."[46]

[52] Section 14B(1) *Acts Interpretation Act* 1954 (Qld) allows consideration to be given to extrinsic materials if the statutory provision is ambiguous or obscure, or if the ordinary meaning would lead to a result that is manifestly absurd or unreasonable, or to confirm the interpretation conveyed by the ordinary meaning of the provision. However, s 14B(2)(a) provides that in deciding whether consideration should be given to extrinsic material, regard is to be had to the desirability of a provision being interpreted as having its ordinary meaning.

[53] The provisions in s 117 and s 118 WHS Act are clear and unambiguous. By s 117(1) a WHS permit holder has a right to **enter** a workplace for the purpose of inquiring into a suspected contravention relating to a **relevant worker**.[47] The WHS entry permit holder must reasonably suspect, before entering the workplace, that the

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45 [2017] FCAFC 89; (2017) 251 FCR 470.

46 [2017] FCAFC 89 at [15]; (2017) 251 FCR 470 at 474-475.

47 The term **relevant worker** is defined in s 116 WHS Act to mean a worker:

(a) who is a member, or eligible to be a member, of a relevant union; and
(b) whose industrial interests the relevant union is entitled to represent; and
(c) who works at the workplace.

contravention has occurred or is occurring.[48] The right of entry conferred by s 117 clearly allows an entry permit holder to remain at a workplace for the purpose of conducting the inquiries provided for in s 118.

[54] The WHS Act contains some limitations on the right of entry. A WHS entry permit holder may only exercise a right of entry during the usual working hours at the workplace.[49] The right of entry may only be exercised in relation to the area of the workplace where the relevant workers work, or any other work area that directly affects the health or safety of those workers.[50]

[55] The broad interpretation of s 11(3) *Summary Offences Act* which was adopted by the magistrate would have the surprising consequence that in circumstances where a dispute arose in relation to the right of an entry permit holder to remain at a workplace, the person would nevertheless be entitled to remain at least until the close of business.

[56] The WHS Act contains a mechanism for the resolution of disputes in relation to a right of entry by the appointment of an industrial inspector at the request of any party. Sections 141 and 141A provide:

> "**141 Application for assistance of inspector to resolve dispute**
> If a dispute arises about the exercise or purported exercise by a WHS entry permit holder of a right of entry under this Act, any party to the dispute may ask the regulator to appoint an inspector to attend the workplace to assist in resolving the dispute."
>
> "**141A Powers of inspector asked to assist in resolving dispute**
> (1) This section applies if—
> (a) an inspector is appointed by the regulator under section 141 to assist in resolving a dispute; and
> (b) the dispute is about—
> (i) whether the WHS entry permit holder has a right to enter the workplace under division 2 or 3; or
> (ii) whether section 119 or 122 has been complied with in relation to notice of the entry or purported entry.
> *Note—*
> This section does not apply if the dispute is about rights the WHS entry permit holder may exercise while at the workplace under division 2 or 3.
> (2) The inspector may—
> (a) decide the matter mentioned in subsection (1)(b)(i) or (ii); and
> (b) if the inspector is reasonably satisfied the WHS entry permit holder has a right of entry under division 2 or 3—give the person conducting the business or undertaking a direction, in writing, to immediately

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48 WHS Act, s 117(2).
49 WHS Act, s 126.
50 WHS Act, s 127.

allow the WHS entry permit holder to enter the workplace under a stated provision of division 2 or 3.

Note—

The commission may review a decision made under subsection (2) in dealing with a dispute under subdivision 2—see section 142A.

(3) A direction under subsection (2)(b) must state—

(a) that the inspector is reasonably satisfied the WHS entry permit holder has a right to enter the workplace under division 2 or 3; and

(b) the reasons the inspector is reasonably satisfied about the right to enter.

(4) A person given a direction under subsection (2)(b) must comply with it.

WHS civil penalty provision.

Maximum penalty—100 penalty units.

(5) This section does not limit the powers of the inspector under this Act.

Example of powers of the inspector—

the inspector's power to issue a notice under part 10

[57] The inspector may decide whether the WHS entry permit holder has a right to enter the workplace.[51] If the inspector is reasonably satisfied that the WHS entry permit holder has a right of entry, a written direction can be given to the person conducting the business to immediately allow the WHS entry permit holder to enter the workplace.[52] The power of the inspector does not extend to disputes about the rights an entry permit holder may exercise while at the workplace.[53] A person given a direction by the inspector must comply with it.[54]

[58] A very clear legislative intent would be required to confer upon entry permit holders a right to remain at a workplace notwithstanding the existence of a dispute in relation to the purported exercise of the right to enter. The immunity created by s 11(3) applies where an authorised industrial officer enters a workplace in accordance with the terms of the person's appointment. In *Benning v Wong*[55] Barwick CJ said:

> "… a statute only authorizes those acts which it expressly nominates and those acts and matters which are necessarily incidental to the acts so expressly authorized or to their execution."[56]

[59] The argument for the respondents, which was adopted by the magistrate, ignores the rights of the occupier. In *Kuru v New South Wales*[57] the High Court considered provisions in the *Crimes Act* 1900 (NSW) which permitted a police officer who believed on reasonable grounds that a domestic violence offence has recently been, or was being, committed, or was imminent or likely to be committed, to enter and

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51 WHS Act, s 141A(2)(a).
52 WHS Act, s 141A(2)(b).
53 See Note after WHS Act, s 141A(1).
54 WHS Act, s 141A(4).
55 (1969) 122 CLR 249.
56 (1969) 122 CLR 249 at 256.
57 [2008] HCA 26 at [43]-[44]; (2008) 236 CLR 1 at 14-15.

remain in any dwelling-house, if invited to do so by a person who apparently resided there. A police officer could not enter or remain by reason of invitation only if the authority to enter or remain was apparently refused. The following statements by the plurality of Gleeson CJ, Gummow, Kirby and Hayne JJ are relevant:

> "As was pointed out in this Court's decision in *Plenty v Dillon*, it is necessary to approach questions of the kind now under consideration by recognising the importance of two related propositions. First, a person who enters the land of another must justify that entry by showing either that the entry was with the consent of the occupier or that the entrant had lawful authority to enter. Secondly, except in cases provided for by the common law and by statute, police officers have no special rights to enter land. And in the circumstances of this case it is also important to recognise a third proposition: that an authority to enter land may be revoked and that, if the authority is revoked, the entrant no longer has authority to remain on the land but must leave as soon as is reasonably practicable.
>
> In the case of a police officer's entry upon land, this is not necessarily a great burden. As has already been pointed out, the police officer may then (or earlier) seek a warrant which may be granted in large terms (s 357G(3)). Such a warrant may be sought by telephone (s 359G(4)). It is granted by a Magistrate. Although the grant of a warrant is an administrative act, it is performed by an office-holder who is also a judicial officer enjoying independence from the Executive Government and hence from the police. This facility is thus an important protection, intended by Parliament, to safeguard the ordinary rights of the individual to the quiet enjoyment of residential premises. Where a case for entry can be made out to a Magistrate, the occupier's refusal or withdrawal of permission to enter or remain maybe overridden. However, this is done by an officer who is not immediately involved in the circumstances of the case and who may thus be able to approach those circumstances with appropriate dispassion and attention to the competing principles at stake."

[60] In *R v Conway*[58] the Court of Appeal considered the general power of a police officer to enter premises pursuant to s 19 PPR Act. As McMurdo P, with whom Atkinson and Mullins JJ agreed, said:

> "Nothing in the Act diminishes the long-established common law principle that every unauthorised entry upon private property is a trespass and a person in possession or entitled to possession of premises has the right to exclude others from those premises. A police officer who enters or remains on private property without leave or licence of the person in possession or entitled to possession commits a trespass unless the entry or presence on the premises is authorised or excused by law."

[61] The Industrial Commission has power to deal with a dispute about the exercise or purported exercise of a right of entry.[59] The respondents have the right to make an application to the Industrial Commission to deal with the dispute.[60]

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58 [2005] QCA 194 at [16]; (2005) 157 A Crim R 474 at 479.
59 WHS Act, s 142(1).
60 WHS Act, s 142(4)(b)(i).

[62] The right of an entry permit holder to enter a workplace is somewhat different to entry of premises by a police officer pursuant to a search warrant. The object of the WHS Act is to protect workers against harm to their health and safety by eliminating or minimising risks. The objects specified in s 3 include:

> "**3 Objects**
>
> (1) The main object of this Act is to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces by—
>
> (a) protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work or from particular types of substances or plant; and
>
> …
>
> (2) In furthering subsection (1)(a), regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work or from particular types of substances or plant as is reasonably practicable."

[63] The right of entry pursuant to s 117 WHS Act is "… free standing where the criteria prescribed by ss 117 and 119 are satisfied": *Ramsay and Anor v Menso and Anor.*[61]

[64] In *Darlaston v Parker*[62] Flick J said:

> "It must be constantly recalled that any conferral of a statutory right to enter premises, be they private premises or business premises, is a serious encroachment upon liberty and all such statutory provisions must be construed so that 'the encroachment is no greater than the statute allows, expressly or by necessary implication': *Citibank Ltd v Federal Commissioner of Taxation* per Lockhart J. On appeal, see: *Federal Commission of Taxation v Citibank Ltd*."

[65] It was an agreed fact that the respondents were "…exercising authority to enter under the *Fair Work Act* and the *Work Health and Safety Act*…"[63] However, Mr James' evidence, which disputed the basis of the entry, was not challenged.

[66] The respondents' rights are enforceable, as explained by Reeves J in *Ramsay v Sunbuild Pty Ltd*.[64] Proceedings for a contravention of the WHS civil penalty provisions in ss 144 and 145 WHS Act may only be commenced by the regulator or an inspector with the written authority of the inspector: s 260 WHS Act. However, the respondents, as persons who may have been affected by contraventions of ss 501 and 502(1) *Fair Work Act*, could commence proceedings in the Federal Court or Federal Circuit Court seeking appropriate declarations, injunctions and penalties.[65]

[67] The fact that the respondents may be inconvenienced by having to take steps to enforce their rights pursuant to s 142 WHS Act is not a reason for extending the

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61 [2018] FCAFC 55 at [43]; (2018) 260 FCR 506 at 516 [43].

62 [2010] FCA 771 at [44]; (2010) 189 FCR 1 at 13 [44] (citations omitted).

63 Transcript of proceedings 29 April 2019, p 4, 11 9-10.

64 [2014] FCA 54; (2014) 22 FCR 315.

65 *Ramsay v Sunbuild Pty Ltd* [2014] FCA 54 at [84]; (2014) 22 FCR 315 at 338 [84]. See also *Ramsay and Anor v Menso and Anor* [2018] FCAFC 55; (2018) 260 FCR 506.

scope of operation of the right of entry. In *Plenty v Dillon*[66] police officers had entered the appellant's farm for the purpose of serving a summons on his daughter pursuant to the *Juvenile Courts Act* 1971 (SA). The relevant provision of the *Justices Act* 1921 to 1975 (SA) provided that a summons could be served personally or by leaving it at the person's last or most usual place of abode. The police officers had no express or implied consent to go on to the appellant's property. The appellant sued for trespass to land. Gaudron and McHugh JJ said:

> "A person who enters or remains on property after the withdrawal of the licence is a trespasser. In *Davis v Lisle*, police officers who had lawfully entered a garage for the purpose of making inquiries were held to have become trespassers by remaining in the garage after they were told by the proprietor to 'get outside'."[67]
>
> ….
>
> "A number of statutes also confer power to enter land or premises without the consent of the occupier. But the presumption is that, in the absence of express provision to the contrary, the legislature did not intend to authorize what would otherwise be tortious conduct.[68]
>
> …
>
> "Of course, inability to enter private property for the purpose of serving a summons may result in considerable inconvenience to a constable wishing to serve the defendant. But inconvenience in carrying out an object authorized by legislation is not a ground for eroding fundamental common law rights.[69]

[68] Mr James said that he denied further entry to the respondents because he believed there were no "relevant" workers on the site and that the entry notices "were very general in their nature".[70] He said that he discussed with the respondents that the matter had "… been through the commission previously, there was no evidence that there was (sic) relevant workers on site and that we had – they had – we didn't believe that they had coverage of our site".[71] An entry permit holder is required by s 119(1) WHS Act to give notice of the entry and the suspected contravention, as prescribed by regulation, to the relevant person conducting the business or undertaking and the person with management or control of the workplace.[72] However, the requirement to give notice of entry does not apply if to do so would defeat the purpose of entry, or unreasonably delay the WHS entry permit holder in an urgent case.[73]

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66 [1991] HCA 5; (1991) 171 CLR 635.
67 [1991] HCA 5 at [4]; (1991) 171 CLR 635 at 647.
68 [1991] HCA 5 at [6]; (1991) 171 CLR 635 at 648.
69 [1991] HCA 5 at [21]; (1991) 171 CLR 635 at 654.
70 Transcript of proceedings 29 April 2019, p 54, ll 15-25.
71 Transcript of proceedings 29 April 2019, p 55, l 20.
72 The *Work Health and Safety Regulation* 2011 provides in s 28(a) that a notice of entry under s 119 of the WHS Act must include, so far as is practicable, the particulars of the suspected contravention to which the notice relates.
73 WHS Act, s 119(2).

[69] Ms Burgess attempted to ascertain whether any relevant workers were in the workforce and asked Mr James to provide the names, contact details and job descriptions of all employees. She also asked to observe and take photographs of new plant.[74] Ms Burgess attempted to explain to Mr James that her request for information was for the purpose of establishing the validity of entry, rather than in relation to the alleged suspected contraventions.[75] Ms Burgess advised Mr James that s 165 of the WHS Act allowed an inspector to make inquiries and require information. She was provided with documents relating to a Queensland Industrial Relations Commission matter from the middle of 2018 but considered that to be a separate matter and therefore the documents were not relevant.[76]

[70] Ms Burgess said that Mr James continued to be uncooperative and she warned him that hindering and obstructing an inspector may constitute an offence.[77] At one stage a legal representative for ENCO provided a document that was said to contain job descriptions of the employees. However, the document did not contain the names or contact details of employees and Ms Burgess considered it to be inadequate.[78]

[71] Ms Burgess said that she then spoke to the respondents and "… told them that we were unable to assist with their entry, and that we may have been hindered and obstructed in undertaking our duties. And as a result of that, we were unable to determine the likelihood of the potential eligibility of people in the workplace, and that we needed to leave…".[79]

[72] The respondents remained on the premises for in excess of three hours before being arrested. They entered at about 7.40 am.[80] The police officers arrived at about 8.50 am.[81]

[73] Ms Burgess arrived at about 9.00 am.[82] The respondents were arrested at about 11.15 am.[83]

[74] During the time the respondents remained at the premises, they were not actually engaged in inspections or consultations provided for in s 118 WHS Act. The broad interpretation of the immunity in s 11(3) *Summary Offences Act* would have the result that the respondents would have been able to remain on the premises, at least until the close of business. The fact that Mr James may have hindered or obstructed the respondents[84] did not entitle them to remain on the premises in circumstances where a dispute arose in relation to the exercise of rights under s 118 WHS Act, and they were asked to leave.

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74 Transcript of proceedings 29 April 2019, p 15, ll 25-35.
75 Transcript of proceedings 29 April 2019, p 15, ll 35-45.
76 Transcript of proceedings 29 April 2019, p 16, ll 5-19.
77 Transcript of proceedings 29 April 2019, p 16, ll 25-37.
78 Transcript of proceedings 29 April 2019, p 17, ll 8-19.
79 Transcript of proceedings 29 April 2019, p 17, ll 30-35.
80 Transcript of proceedings 29 April 2019, p 4, l 14.
81 Transcript of proceedings 15 May 2019, p 7, l 26, p 38, l 17, 135, l 2.
82 Transcript of proceedings 15 May 2019, p 12, l 18.
83 Transcript of proceedings 29 April 2019, p 4, l 19.
84 Section 145 WHS Act provides that a person must not intentionally and unreasonably hinder or obstruct a WHS entry permit holder in entering a workplace or in exercising any rights at a workplace.

[75] Although Mr Ryan contended that it was doubtful that s 142 WHS Act applied to a dispute about the right to remain on premises, I consider that the provision does enable the Industrial Commission to deal with such matters. The fact that s 142(5) WHS Act provides that in dealing with a dispute the Industrial Commission must not confer any rights on the WHS entry permit holder that are additional to, or inconsistent with, rights exercisable by the entry permit holder, is an indication of the broad role of the Commission: see for example *Construction, Forestry, Mining and Energy Union (New South Wales Branch) v Acconia Infrastructure Australia Pty Ltd & Ors*.[85] The WHS entry permit holder must **reasonably suspect** that a contravention has occurred or is occurring before entering the workplace.[86] Where that is disputed, the Industrial Commission can deal with the issue under s 142 WHS Act.

Honest claim of right

The magistrate's reasons

[76] The magistrate said:

> "With respect to submissions regarding *Criminal Code* section 22, the Defence have an honest claim of right. Of course, in this situation, the defendants have not given evidence. However there is nothing in the Prosecution case that suggests the defendants did not hold a belief they had a right to **enter** the premises."[87] (emphasis added).

The submissions for the appellant

[77] Mr Nicolson submitted that there was no evidence in the prosecution case that the respondents were purporting to exercise rights under s 118 WHS Act in remaining on the premises.[88] It was submitted that the magistrate's conclusion lacked sufficient reasoning.[89] Mr Nicolson accepted that the defence of honest claim of right in s 22 *Criminal Code* (Qld) was capable of applying to an offence of trespass.[90]

The submissions for the respondents

[78] Mr Ryan for the respondents placed considerable reliance on the decision of the Full Court of Western Australia in *Molina v Zaknich*[91] where, based on what he submitted were almost identical facts to the present case, the equivalent provision was available as a defence to a charge of remaining on premises after being warned to leave, contrary to s 82B *Police Act* 1892 (WA).[92] He submitted that there was substantial evidence that each of the respondents held a belief as to their right to remain on the premises as entry permit holders.[93]

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85 [2017] NSWIR Comm 1029.
86 WHS Act, s 117(2).
87 Transcript of proceedings, 24 May 2019, p 4, ll 36-40.
88 Appellant's outline of submissions filed 2 August 2019 at para 95.
89 Appellant's outline of submissions filed 2 August 2019 at para 104.
90 Transcript of proceedings, District Court at Brisbane, 14 February 2020, at p 15, l 45.
91 [2001] WASCA 337; (2001) 24 WAR 562.
92 Respondents' outline of submissions filed 6 September 2019 at para 96.
93 Respondents' outline of submissions filed 6 September 2019 at para 105.

Consideration

[79] The judgment in *Molina v Zaknich*,[94] upon which Mr Ryan relies, does no more than establish that an honest claim of right defence is capable of application in a case where a union official remains on premises after being asked to leave. The case involved a different statutory provision[95] and was based upon the particular facts. The appellant gave evidence at the trial before a stipendiary magistrate in the Court of Petty Sessions at Perth. He explained that he attended the worksite because of a complaint by a worker about conditions. The magistrate did not deal with the honest claim of right issue.

[80] The appellant appealed to a single judge of the Supreme Court. Hasluck J held that the honest claim of right defence was not available because the appellant was seeking to exercise a power of entry, rather than asserting a civil right in relation to property.[96] However, his Honour concluded that even if the defence was available, upon reviewing the evidence, the appellant's claim of right was not honestly held.[97]

[81] The appellant's appeal to the Full Court was allowed. McKechnie J, with whom Malcolm CJ and Templeman J agreed, said that the honest claim of right defence was capable of application in the circumstances.[98] His Honour said:

> "Once there was evidence of the claim, the facts could not be resolved by the appellate judge in the manner attempted. Honest claim of right had never been considered by the magistrate (although he had been invited to do so). Section 22 was capable of application. There was therefore a miscarriage of justice and the proviso in the *Justices Act 1902* (WA), s 199(1)(b) was, in the factual circumstances, incapable of application. The correct course would have been to remit the matter for retrial.
>
> However, in view of my judgment as to the lawful authority of Mr Molina to be on the premises notwithstanding the warning he had been given, such a course is unnecessary."[99]

[82] Section 22(2) *Criminal Code* provides:

> "**22 Ignorance of the law—bona fide claim of right**
>
> …
>
> (2) … [A] person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by the person with respect to any property in the exercise of an honest claim of right and without intention to defraud."

[83] The excuse of honest claim of right in s 22(2) *Criminal Code* is capable of applying to an offence of trespass: *Preston v Parker.*[100]

[84] The assertions made by the respondents regarding their entitlement to be at the premises formed part of the evidence for consideration. However, any exculpatory

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94 [2001] WASCA 337; (2001) 24 WAR 562.
95 *Police Act* 1892 (WA), s 82B.
96 *Molina v Zaknich* [2000] WASCA 390 at [79]; (2000) 117 A Crim R 346 at 360.
97 [2000] WASCA 390 at [86]; (2000) 117 A Crim R at 361.
98 [2001] WASCA 337 at [78]; (2001) 24 WAR 562 at 575.
99 [2001] WASCA 337 at [104]-[105]; (2001) 24 WAR 562 at 579-580.
100 [2010] QDC 264 at [195].

statements were not made on oath and were not tested by cross-examination: *Mule v The Queen;* [101] *R v Bagley.*[102] An unsworn statement that is not tested by cross-examination can be given less weight.[103]

[85] The respondents' assertions were to be considered in the context of the whole of the evidence, including that the inspector had been unable to determine whether there were relevant workers on the site. Further, the respondents were told by Sergeant Lewis that: "To remain on the premises may very well be criminal trespass for which you're liable to arrest. I don't want to go there."[104] Sergeant Lewis told the respondents that "… the owners of the premises say you're not allowed to be here, so you've got to go".[105] Mr Davidson replied "We're not going anywhere".[106]

[86] In considering the honest claim of right issue, the magistrate said that there was nothing in the prosecution case to suggest that the respondents did not hold a belief that "they had a right to **enter** the premises" (emphasis added). The real issue in the present case was whether the respondents had an honest belief that they were entitled to **remain** on the premises.

[87] Mr Ryan submitted that one reason why the magistrate may have made only brief reference to the issue raised by s 22(2) *Criminal Code* was because of her Honour's conclusions in relation to s 11(3) *Summary Offences Act*.[107]

[88] In my view the magistrate did not consider the correct issue. It was not in dispute that the respondents exercised a right of entry to the ENCO premises. The question was whether the prosecution could establish that they did not have an honest claim of right to **remain** on the premises. The magistrate did not analyse the evidence in relation to this question.

[89] I therefore conclude that the magistrate erred in this respect.

Safeguards in s 634 *Police Powers and Responsibilities Act* 2000

Magistrate's decision

[90] The magistrate's reasons were:

> "As to the PPRA s 634 point, the prosecutor relies on *Frost v Commissioner of Police* [2014] QDC 294. That was a different set of facts. His Honour Judge McGill said 'on the hypothesis that she was then trespassing, it was clear from her attitude that she was intending to continue to do so.' In that case the offender was on university property, that is private property, in effect by invitation, but the invitation was withdrawn. She did not rely on a statutory right to be present. His Honour said 'I do not consider that the section obliges the officer to do more than what it in terms requires, that is, to give the person an opportunity to explain why the person

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101 [2005] HCA 49 at [20]-[22]; (2005) 79 ALJR 1573 at 1578-1579.
102 [2014] QCA 271 at [41].
103 *Strbak v The Queen* [2020] HCA 10 at [35]-[36].
104 Transcript of exhibit 5 at p 4.
105 Transcript of exhibit 5 at p 7.
106 Transcript of exhibit 5 at p 7.
107 Transcript of proceedings 14 February 2020, p 63, l 35 to p 64, l 5.

> was at the place.' He was of the view that the officer's belief that it was necessary to arrest Frost was reasonable.
>
> In this case, regardless of grainy video footage, both McKay and Senior Constable Easton acknowledge that the person for whom they identified themselves as arresting officer was not in fact that person. In that case, it is impossible that they gave the defendant charged the reasonable opportunity required by section 634(2). The admitted lack of knowledge of relevant industrial law and the operation of *Summary Offences Act* section 11(3) (already discussed in summarising evidence of Cooper and Lewis) is such that they could not reasonably have formed the belief that the defendants were not entitled to the benefit of s 11(3) of the *Summary Offences Act* as authorised industrial officers. The defendants were not offered an interview before being charged. This would have given police an opportunity to look at the relevant legislation.
>
> Clearly the role of police is to assist IR inspectors. This is a three cornered triangle, with competing interests of business owner and union officials, and IR as the entity responsible for overseeing relevant laws. The police then have the role of assisting IR. In this case, the police have taken the side of the business owner from the outset, instead of assisting IR inspectors, in particular by requiring the business owner to provide documents requested."[108]

The submissions for the appellant

[91] Mr Nicolson submitted that the magistrate misconstrued the requirements of s 634 PPR Act in concluding that the police officers "… could not reasonably have formed the belief that the defendants were not entitled to the benefit of s 11(3) of the *Summary Offences Act*…" He pointed out that s 634(2)(a) PPR Act requires a police officer to give the person a reasonable opportunity to explain why the person is at the place. The police officer may commence a proceeding against a person where the person fails to give an explanation or the police officer considers that the explanation is not a reasonable explanation.[109] He submitted that the video footage[110]showed that the police officers gave the respondents a reasonable opportunity to explain their presence and their reason for entry on the site. Mr Nicolson submitted that the footage showed that the police officers spoke to the respondents collectively and they were all given an opportunity to state their case and their reasons for remaining on the premises.[111]

[92] Mr Nicolson submitted that there was no requirement for each individual police officer who made an arrest to separately give the person arrested an opportunity to explain their presence at the site. He submitted that this had occurred "in a group environment and was redundant in this matter".[112]

The submissions for the respondents

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108 Transcript of proceedings 24 May 2019, p 5, ll 5-45.
109 PPR Act, s 634(3)(a)(b).
110 Exhibit 5.
111 Appellant's outline of submissions filed 2 August 2019 at para 68.
112 Appellant's outline of submissions filed 2 August 2019 at para 85.

[93] Mr Ryan for the respondents, in reliance on the decision of Irwin DCJ in *Preston v Parker*,[113] submitted that the prosecution was required to prove beyond reasonable doubt that each police officer, who arrested each respondent, had personally formed the view that the explanation given by the particular person arrested for remaining on the premises was unreasonable.[114]

[94] Mr Ryan submitted that in order to comply with the requirements of s 634(3)(b) PPR Act the prosecution was required to adduce evidence from each police officer who had arrested each respondent that:

(a) the officer knew the explanation for remaining on the premises by the person who had been arrested; and

(b) the officer gave consideration to the explanation and considered whether or not it was reasonable.[115]

[95] Mr Ryan submitted that there was no direct evidence given by Senior Constable Easton, Constable Cooper, Senior Constable McKay or Sergeant Lewis that satisfied those requirements.

[96] Mr Ryan pointed out that Senior Constable Easton initially said that she had arrested Mr Moloney but after being shown a video recording of the respondents being removed from the premises and the watchhouse photograph of Mr Cundy, agreed that she had actually arrested Mr Cundy. Senior Constable Cooper said that he had arrested Mr Cundy, which having regard to Senior Constable Easton's evidence, was plainly incorrect.

[97] Mr Ryan pointed out that Senior Constable Easton had said that she did not know the elements of the offence of trespass and was not aware of the existence of s 11(3) *Summary Offences Act*. She said that in the circumstances she relied on Sergeant Lewis or Sergeant Lavin when told to make an arrest.[116]

[98] Mr Ryan submitted that: "The fact that different police officers spoke to the respondents over a series of hours, and knowledge of their explanations was collectively acquired by police officers, did not mean that the knowledge of each respondent's explanation could simply then be attributed to the police officer who arrested each respondent. Evidence needed to be adduced from each arresting officer that they were aware of the respective respondent's explanation."[117]

[99] Mr Ryan submitted that in order for an arresting officer to have considered whether an explanation was reasonable, the officer needed to have some knowledge of the relevant procedures in the Queensland Police Service Operational Procedures Manual relating to alleged trespass during industrial disputes.[118]

Consideration

[100] The issues for consideration are:

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113 [2010] QDC 264.
114 Respondents' outline of submissions filed 6 September 2019 at para 117.
115 Respondents' outline of submissions filed 6 September 2019 at para 120.
116 Respondents' outline of submissions filed 6 September 2019 at para 126.
117 Respondents' outline of submissions filed 6 September 2019 at para 132.
118 Respondents' outline of submissions filed 6 September 2019 at para 140.

(a) Whether the prosecution is required to prove **beyond reasonable doubt** that the police officer considered the explanation given by the person was not a reasonable explanation;
(b) Whether a misapprehension as to the law affects whether a police officer can consider an explanation given not to be reasonable;
(c) The opportunity to explain a person's presence and consideration of the explanation;
(d) The role of police officers in assisting public officials.

[101] The observance of the safeguard in s 634(3)(b) PPR Act is regarded as a prerequisite to the commission of the offence of trespass.[119]

[102] In *Preston v Parker*[120] Irwin DCJ said that it was consistent with the notion of rights protection "… that an individual who is given a reasonable opportunity to explain why he is at a place should not be regarded as committing an offence by remaining at that place until the safeguard requirements of s 634(3)(b) have been observed."[121]

(a) Whether the safeguard must be established beyond reasonable doubt

[103] At the trial, Mr Ryan submitted that the prosecution was required to prove beyond reasonable doubt that the police officers had complied with s 634(3)(b) PPR Act.[122] The submission was based upon the judgment of Irwin DCJ in *Preston v Parker*.[123] In that case the appellant was convicted of trespass. On the hearing of the appeal, Irwin DCJ found that the magistrate had erred on the question of the onus of proof in relation to a defence raised by the evidence. Accordingly, his Honour proceeded to decide the case himself based on the evidence that had been admitted at the trial.[124] One of the arguments advanced on the appeal was that the prosecution had failed to establish beyond reasonable doubt that the police had formed the view required by s 634(3)(b) PPR Act.[125] It was submitted that this requirement was in effect an element of the offence which therefore required that it be proved beyond reasonable doubt.[126]

[104] Irwin DCJ said:

> "… I do not consider that observance of the requirement under s 634(3)(b) is an ingredient of the offence of trespass contrary to s 11(2) of the *Summary Offences Act*. Unlike the situation in *Cox v Robinson* this was not an offence of non-compliance with a requirement, an essential part of which was the taking of a step, in that case the giving of a warning, for that requirement to be valid. The statements in *Rowe v Kemper* by McMurdo P that it was necessary to prove beyond reasonable doubt that Constable Kemper subjectively suspected Mr Rowe's behaviour was disorderly to him and his police colleagues, and that his suspicion was objectively

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119 *Preston v Parker* [2010] QDC 264 at [138]; *Bismark v Queensland Police Service* [2014] QDC 152 at [19].
120 [2010] QDC 264.
121 *Preston v Parker* [2010] QDC 264 at [143].
122 Outline of submissions for the defendants dated 15 May 2019 at para 81.
123 [2010] QDC 264.
124 *Preston v Parker* [2010] QDC 264 at [74].
125 *Preston v Parker* [2010] QDC 264 at [75].
126 *Preston v Parker* [2010] QDC 264 at [80].

> reasonable, were made in the context of the purported exercise of what is now the s 48 power under s 46 and the consequent charge of contravening a direction under the *Police Powers and Responsibilities Act*.
>
> Although I do not accept (Counsel's) argument in this regard, **because it makes no difference to my decision**, I will proceed on the basis that the prosecution must establish the observance of the s 634(3)(b) requirement beyond reasonable doubt, i.e. the prosecution must prove to this standard that Constable Parker held the requisite state of mind." (emphasis added).[127]

[105] The argument for the appellant in *Preston v Parker*[128] was based upon the reasoning of McMurdo P in *Rowe v Kemper*[129] dealing with offences of contravening a police direction and obstructing a police officer. The safeguards in relation to police directions required the police officer to warn the person that it was an offence to fail to comply with the direction unless the person had a reasonable excuse and that the person may be arrested for the offence. The police officer was required to give the person a reasonable opportunity to comply with the direction. The safeguard provision considered by the Court of Appeal in *Rowe v Kemper*[130] was therefore of a very different character to the safeguard in s 634(3)(b) PPR Act. In that case, proof of compliance with the relevant safeguards went directly to the lawfulness of the direction or requirement.

[106] The decision in *Preston v Parker* does not establish that the safeguard requirement must be proved beyond reasonable doubt. As I have said, Irwin DCJ specifically referred to the different provisions under consideration by the Court of Appeal in *Rowe v Kemper*. His Honour rejected the appellant's argument that the safeguard was in effect an element of the offence, and while proceeding on the basis that observance of s 634(3)(b) was to be established beyond reasonable doubt, specifically said that he was doing so because it made no difference to the decision.

[107] Generally, only the elements of an offence and any facts that are an indispensable step in the process of reasoning to guilt, must be proved beyond reasonable doubt.[131]

[108] There is no principle that requires the safeguards in s 634 of the PPR Act to be established beyond reasonable doubt.

(b) Whether a police officer's lack of knowledge of industrial law is relevant

[109] The magistrate concluded that a lack of knowledge of relevant industrial law was such that the police officers "… could not reasonably have formed the belief that the defendants were not entitled to the benefit of s 11(3) of the *Summary Offences Act* as authorised industrial officers".

[110] Constable Easton said that she was not aware of s 11(3) *Summary Offences Act*. When challenged about her lack of awareness of the existence of a police

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127 [2010] QDC 264 at [145]-[146].
128 [2010] QDC 264.
129 [2008] QCA 175; [2009] 1 Qd R 247.
130 [2008] QCA 175; [2009] 1 Qd R 247.
131 *Shepherd v The Queen* [1990] HCA 56 per Dawson J at [14]; (1990) 170 CLR 573 at 585.

operational procedure, she explained that that was why a senior officer was called.[132] In cross-examination, Mr Ryan asked Constable Cooper "… you've never actually read the federal industrial laws or the state industrial laws before this day, I take it".[133] Constable Cooper sought clarification on whether the question related to whether he had read the industrial laws before the date of the alleged offences and Mr Ryan confirmed that was the case. Constable Cooper then answered "No, I hadn't read it, but I had some knowledge of."[134]

[111] Sergeant Lewis had an awareness of a memorandum of understanding between the Queensland Police Service and the Office of Industrial Relations, although he said that it related specifically to an incident at Logan.[135] Mr Ryan asked him whether he had "… read the provisions of the state industrial laws before this day", and he said that he had not.[136]

[112] Senior Sergeant Lavin said that he had not looked at federal industrial laws, state industrial laws or s 11(3) *Summary Offences Act*.[137]

[113] Mr Ryan emphasised the lack of understanding of industrial laws on the part of police officers, and the magistrate held that this meant they could not reasonably have formed the belief that the respondents were not entitled to the immunity provision in s 11(3) *Summary Offences Act*. In reaching that conclusion the magistrate erroneously applied an objective test of reasonableness to the explanation given. The requirement in s 634(3)(b) is that **the police officer considers the explanation given is not a reasonable explanation**.

[114] In *Preston v Parker*[138] Irwin DCJ referred to the decision of the Full Court in *Veivers v Roberts; ex-parte Veivers*[139] where DM Campbell J, with whom WB Campbell and Andrews JJ agreed, said that a police constable may have reasonable grounds for believing that an offence has been committed even though the officer is under a misapprehension as to the law. Irwin DCJ said that:

> "By analogy I consider that a police officer may still consider that an explanation is not reasonable although he is under a misapprehension of the law. This is particularly so when s 634(3)(b) simply requires the police officer to consider whether or not the explanation given is reasonable, and does not require the police officer to have reasonable grounds for considering it is not reasonable before being able to start a proceeding against the person for an offence against s 11(2) of the *SOA*. Once the police officer has met the requirements under s 634(3)(b) of having considered the explanation and having concluded it is not reasonable, it is then for the court to consider that explanation in determining whether the prosecution has established beyond reasonable doubt that not only did the person remain in the place used for a business purpose but also that the person did so 'unlawfully'."[140]

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132 Transcript of proceedings, 15 May 2019, p 140, ll 30-35.
133 Transcript of proceedings, 15 May 2019, p 55, l 45.
134 Transcript of proceedings, 15 May 2019, p 56, l 1.
135 Transcript of proceedings, 15 May 2019, p 99, l 40 to p 100, l 40.
136 Transcript of proceedings, 15 May 2019, p 106, l 35.
137 Transcript of proceedings, 15 May 2019, p 129, ll 10-40.
138 [2010] QDC 264 at [178].
139 [1980] Qd R 226.
140 [2010] QDC 264 at [180]

[115] In *Frost v Commissioner of Police*,[141] McGill SC DCJ referred to the same passage in the judgment of DM Campbell J in *Veivers v Robert; ex-parte Veivers*.

[116] I conclude that the police officers were entitled to consider that the explanations given by the respondents for remaining on the premises were not reasonable explanations, notwithstanding any lack of knowledge or misapprehension of industrial laws.

(c) The requirement to give a reasonable opportunity to explain the person's presence and consideration by a police officer of the explanation

[117] The requirement in s 634(2)(a) PPR Act is that a police officer who suspects a person has committed an offence of trespass must, if reasonably practicable, give the person a reasonable opportunity to explain why the person was at the place. In *Frost v Commissioner of Police*[142] McGill SC DCJ explained that the provision does not impose an obligation on the arresting officer to debate the issue prior to making an arrest. His Honour said:

> "I do not consider that the section obliges the officer to do more than what it in terms requires, that is, to give the person an opportunity to explain why the person was at the place."

[118] Section 634(3)(b) PPR Act provides that the police officer may start a proceeding against the person if the police officer considers the explanation given is not a reasonable explanation. As was explained by Irwin DCJ in *Preston v Parker*[143], s 634(3)(b) does not require that the police officer's view be based on reasonable grounds.

[119] The evidence, including the video recording[144], shows that the respondents were given an opportunity to explain their presence at the premises. Senior Constable Mackay said that he and Constable Cooper spoke to the respondents and, after obtaining their details, asked what the purpose of their attendance was. Senior Constable Mackay said that the respondents "… stated that they were union officials and they were there for the purpose of a Workplace Health and Safety inspection. We asked to see what their purpose was and they couldn't actually formulate what their reason for being there was."[145]

[120] Mr Seiffert explained to Constable Cooper that the respondents were permit holders under workplace health and safety legislation and had a right to be at the premises. Constable Cooper said that he appreciated that the respondents had a right to enter but that, having been told to leave the premises, the right of entry ceased.[146]

[121] Sergeant Lewis said that all respondents were spoken to and when asked whether each respondent acted independently or whether they presented as a "united front", he said, "I would suggest, probably, at times both. There was interaction from a number of them to the conversation."[147] Sergeant Lewis was told by Ms Burgess

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141 [2014] QDC 294 at [10].
142 [2014] QDC 294 at [28].
143 [2010] QDC 264 at [151].
144 Exhibit 5.
145 Transcript of proceedings 15 May 2019, p 4, ll 31-35.
146 Transcript of proceedings 15 May 2019, p 60, ll 1-10.
147 Transcript of proceedings 15 May 2019, p 93, ll 34.36.

that she had not been able to determine whether the respondents were at the premises lawfully.[148]

[122] Senior Sergeant Lavin said that he enquired of Ms Burgess as to the lawfulness of the presence of the respondents on the premises. He said that Ms Burgess and Mr Azcune spoke to the respondents and then left the premises. Senior Sergeant Lavin then spoke to the respondents and told them that their reason for being on the premises no longer existed and that they should leave. The respondent said that they had every right to be there and would be remaining.[149]

[123] Constable Easton said that the respondents "basically said 'if you want us to leave that you'll have to arrest us'".[150] Sergeant Lewis said that the respondents were warned on several occasions that they would be considered as trespassers if they did not leave the site, and they would have to be arrested.[151] He said that he encouraged Mr Seiffert to leave the premises because he would have preferred not to make an arrest. He said he would have preferred to find a way to mediate the issue. He said that he arrested Mr Seiffert only after he effectively dared him to do so four times.[152] Sergeant Lewis said that the respondents were warned on a number of occasions that they would be arrested if they did not leave. He said that he was trying to avoid that option.[153] Sergeant Lewis enquired as to what the respondents wanted to inspect and Mr Davidson told him "well I'm not going to run that up with you. No disrespect, but it's a workplace health and safety thing, I'm not going to take it up with you guys."[154]

[124] Mr Seiffert was arrested by Sergeant Lewis. Mr Davidson was arrested by Senior Constable Mackay. Mr Cundy was arrested by Constable Easton. The fact that Constable Easton initially said that she had arrested Mr Moloney is of no real significance. As she explained, she did not know the name of the person she arrested at the time. She asked the person she arrested whether he was going to leave and that person said he would not.[155] Mr Moloney was arrested by Senior Constable Mackay.

[125] The evidence establishes that all respondents were given a reasonable opportunity to explain their presence at the premises. The police officers clearly considered that the explanations given were not reasonable explanations. The police officers were therefore entitled to commence proceedings by arresting the respondents. I consider that the safeguard requirements in s 634 PPR Act were satisfied.

(d) The role of police officers in assisting public officials

[126] The magistrate was somewhat critical of the police officers, expressing the view that: "The police then have the role of assisting IR. In this case, the police have taken the side of the business owner from the outset, instead of assisting IR inspectors, in particular, by requiring the business owner to provide documents requested."

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148 Transcript of proceedings 15 May 2019, p 103, ll 15-30.
149 Transcript of proceedings 15 May 2019, p 123, ll 26-45.
150 Transcript of proceedings 15 May 2019, p 134, l 43.
151 Transcript of proceedings 15 May 2019, p 93, l 25.
152 Transcript of proceedings 15 May 2019, p 93, ll 17-23.
153 Transcript of proceedings 15 May 2019, p 94, ll 26-30.
154 Transcript of Exhibit 5, p 1.
155 Transcript of proceedings 15 May 2019, p 137, ll 10-15.

[127] The assistance that the police officers were able to provide is governed by ss 16, 17 and 18 of the PPR Act. Section 16 provides:

> "**16 Helping public officials exercise powers under other Acts**
>
> (1) This section applies if an Act (authorising law) authorises a public official to perform functions in relation to a person or thing.
>
> (2) However, this section only applies to a police officer who is not a public official for the authorising law.
>
> (3) If a public official asks, a police officer may help the public official perform the public official's functions under the authorising law.
>
> (4) Before the police officer helps the public official, the public official must explain to the police officer the powers the public official has under the authorising law.
>
> (5) If the public official is not present or will not be present when the help is to be given, the police officer may give the help only if the police officer is satisfied giving the help in the public official's absence is reasonably necessary in the particular circumstances.
>
> (6) The police officer has, while helping a public official, the same powers and protection under the authorising law as the public official has.
>
> (7) Subsection (6) is in addition to, and does not limit, the powers and protection a police officer has under this or any other Act"

[128] Section 18 PPR Act provides:

> "**18 Steps police officer may take for obstruction of public official**
>
> (1) This section applies if a public official claims to have been obstructed by a person in the exercise of the public official's powers and a police officer reasonably suspects the obstruction has happened.
>
> (2) The police officer may ask the person whether the person has a reasonable excuse for the conduct and, if the person gives an excuse, ask for details or further details of the excuse.
>
> (3) If the person does not answer the question or gives an excuse the police officer reasonably suspects is not a reasonable excuse, the police officer may require the person to stop, or not repeat, the conduct.
>
> (4) This section does not apply if the public official is a police officer."

[129] Ms Burgess was the director of Construction, Compliance and Field Services with the Office of Industrial Relations. She was an inspector appointed under the WHS Act. She was therefore a public official.[156]

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156 A public official is defined in the PPR Act, schedule 6 as including, for a government entity—a person who is appointed or authorised under an authorising law to perform inspection, investigation or other enforcement functions under the authorising law for the entity.

[130] Section 16(4) PPR Act states that before the police officer provides help to the public official, the public official **must** explain the powers the public official has under the authorising law (emphasis added). The evidence is by no means clear that Ms Burgess explained her powers under the WHS Act. Her evidence was that after becoming aware that Senior Sergeant Lavin was on the site she "… went to him and said that the Police Powers and Responsibilities Act has a section in it that provides for the police to provide assistance to another public official who is being hindered and obstructed in their duties. I said, 'as a public official, I'm asking you to assist me because I believe I'm being hindered and obstructed.'"

[131] Ms Burgess said Senior Sergeant Lavin didn't understand what she was referring to and indicated that he would need to seek advice before he could provide assistance. She said that he made a phone call and then advised her that he wouldn't be able to provide the assistance that she had requested. She said that Senior Sergeant Lavin told her that he would have a conversation with ENCO to see if he could get them to cooperate. She said that "… that didn't go so well. And we still didn't get any of the documents that we were asking for."[157]

[132] Ms Burgess was cross-examined about the contents of a memorandum of understanding between the Office of Industrial Relations and the Queensland Police Service dated 12 July 2018.[158] Mr Ryan read out part of the memorandum of understanding that stated "and the public officer explains the powers that the public official has under the authorising law", and asked Ms Burgess "did you do that as well?" And she replied "yes".[159] It was not made clear exactly what powers Ms Burgess was referring to. Senior Sergeant Lavin was asked whether he received any request to exercise powers under the WHS Act. He said: "Yes. Yes, I did. We were requested to provide assistance and … I explained to Ms Burgess that we are here providing assistance, mainly keeping the peace and also providing any assistance we can under the provisions of the *Workplace Health and Safety Act*. I did require myself to become familiar with ss 16, 17 and 18 of the Act, which I did via my Queensland Police iPad, just so I was familiar with my requirements under the Act, which essentially was to provide assistance as to the provisions of the *Workplace Health and Safety Act* as would be available to the Inspectors."[160]

[133] Senior Sergeant Lavin was asked whether he was requested to invoke any specific powers such as searching the premises and he said "not specifically. I did have – during my conversations with Ms Burgess, I did indicate to Ms Burgess that we are here to give provisions to their Act as if we were Workplace, Health and Safety officers. I said, 'we will not be kicking down doors or pulling open drawers' and to which she – she agreed to that, as well."[161]

[134] Sergeant Lewis explained that while he understood that Ms Burgess had made a request for assistance pursuant to s 16 PPR Act, "there had been no elaboration as to what powers were sought to be exercised, nor the extent of those powers, which is

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A government entity is defined in schedule 6 as meaning a government entity under the *Public Service Act* 2008, s 24, other than subsection (1)(d), (e) and (f).

157 Transcript of proceedings 29 April 2019, p 16 l 40 to p 17 l 5.

158 Transcript of proceedings 29 April 2019, p 30 ll 30-35.

159 Transcript of proceedings 29 April 2019, p 34 l45 to p 35 l 1.

160 Transcript of proceedings 15 May 2019, p 124 ll 15-25.

161 Transcript of proceedings 15 May 2019, p 124 ll 25-30.

what I relayed to the defendant's later on in the morning, that I can't help if I don't get asked…"[162]

[135] Sergeant Lewis explained that it was necessary for Ms Burgess to explain the powers that she had under the WHS Act and the powers that she expected the police to exercise.[163] It was suggested to Sergeant Lewis by Mr Ryan that he had been asked to exercise powers pursuant to s 16 of the PPR Act. Sergeant Lewis said "I can't point to any powers that I: "(1) was asked to, nor (2) that I am entitled to exercise, and until somebody in the position of a public officer tells me what they want me to do and how they extend my power to theirs, I can't do it."[164]

[136] I consider that the magistrate's criticism of the police officers for having taken sides was not only misplaced but quite unfair. The police officers gave the respondents ample opportunity to state their reasons for being at the premises and displayed considerable patience.

[137] Sergeant Lewis was asked why he believed the respondents were trespassing and said: "Well, they entered a (sic) premises without permission of the owners, and the entry permit from my perspective, was little more than a restatement of the common law applied (sic; implied) right to enter. So I couldn't find any authority and received no advice from WHS to the contrary. So in my opinion, having been told by the owners to leave, they should have left."[165]

[138] Sergeant Lewis told the respondents: "You know full well that if we don't get any further here today, you've got further steps that you can take. There are appeal processes. There are appeal processes, you know that." Mr Seiffert replied "yeah".[166]

[139] Sergeant Lewis denied that the police had simply taken sides.[167] The respondents were given ample opportunity to leave the premises of their own accord in order to avoid being arrested for trespass.[168]

Disposition of the appeals

Appeals against ruling that the respondents had no case to answer

[140] The magistrate erred in ruling that the respondents had no case to answer. The appeals must therefore be allowed and the order that the magistrate made dismissing the charges set aside. As the charges were dismissed after the close of the prosecution case, the respondents have not had the opportunity to give or call evidence.[169] The matters should therefore be remitted to the Magistrates Court to proceed according to law.[170]

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162 Transcript of proceedings 15 May 2019, p 102 ll 30-35.
163 Transcript of proceedings 15 May 2019, p 104 ll 25-35.
164 Transcript of proceedings 15 May 2019, p 107 ll 15-20.
165 Transcript of proceedings 15 May 2019, p 94 ll 30-35.
166 Transcript of exhibit 5 at p 4.
167 Transcript of proceedings 15 May 2019, p 105 ll 8-10.
168 Transcript of exhibit 5 at p 5.
169 *Justices Act,* s 146(1)(a).
170 *Justices Act,* s 225(2).

[141] In the event that the appeal was allowed, the parties indicated that they had no objection to the hearing continuing before the same magistrate.[171] As the trial was heard by an acting magistrate, there may be practical difficulties in the matter continuing before the same magistrate. I have concluded that the magistrate was unfairly critical of the police officers, and in my view there may have been grounds to direct that the trial be heard by another magistrate. In *Goli v Blue 11 Pty Ltd*[172] Porter QC DCJ considered that where the magistrate had expressed views on the merits of the case, the creditability of a witness and the weight to be given to inferences which arose on the evidence, it would be unfair to the prosecution to remit the matter to the same magistrate.

[142] As the parties raised no objection to the trial continuing before the same magistrate, the matter should proceed before her Honour if it is possible to do so.

The costs orders made by the magistrate

[143] It follows from my conclusion that the respondents did have a case to answer that the costs orders must also be set aside.

[144] On 4 June 2019 the magistrate made orders in each case that the complainant pay each respondent costs of $21,250 within two months. I would have set those orders aside in any event.

[145] Upon dismissal of a complaint, an order for costs in favour of a defendant against a complainant who is a police officer may only be made if the magistrate is satisfied that it is proper that the order for costs should be made.[173] In deciding whether it is proper to make an order the magistrate must take into account all relevant circumstances including the matters listed in s 158A(2) *Justices Act*:

> "(a) whether the proceeding was brought and continued in good faith; and
>
> (b) whether there was a failure to take appropriate steps to investigate a matter coming to, or within, the knowledge of a person responsible for bringing or continuing the proceeding; and
>
> (c) whether the investigation into the offence was conducted in an appropriate way; and
>
> (d) whether the order of dismissal was made on technical grounds and not on a finding that there was insufficient evidence to convict or make an order against the defendant; and
>
> (e) whether the defendant brought suspicion on himself or herself by conduct engaged in after the events constituting the commission of the offence; and
>
> (f) whether the defendant unreasonably declined an opportunity before a charge was laid—
>
> (i) to explain the defendant's version of the events; or
>
> (ii) to produce evidence likely to exonerate the defendant;

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171 Transcript of proceedings, District Court at Brisbane 14 February 2020, p 74, l 45 – p 75, l 15; p 76, l 25.

172 [2018] QDC 108 at [95].

173 *Justices Act,* s 158A(1).

and the explanation or evidence could have avoided a prosecution; and

(g) whether there was a failure to comply with a direction given under section 83A; and

(h) whether the defendant conducted the defence in a way that prolonged the proceeding unreasonably; and

(i) whether the defendant was acquitted on a charge, but convicted on another."

[146] The amount of costs is governed by s 158B *Justices Act* which provides:

"**158B Costs for division**

(1) In deciding the costs that are just and reasonable for this division, the justices may award costs only—

(a) for an item allowed for this division under a scale of costs prescribed under a regulation; and

(b) up to the amount allowed for the item under the scale.

(2) However, the justices may allow a higher amount for costs if the justices are satisfied that the higher amount is just and reasonable having regard to the special difficulty, complexity or importance of the case."

[147] The *Justices Regulation* provides in s 19 that the scale of costs is in schedule 2.

[148] The appeals challenge only the exercise of discretion by the magistrate to award costs above the scale in schedule 2 *Justices Regulation*.

[149] The magistrate's reasons for allowing a higher amount for costs were that "the matter was of significance for the defendants individually because of their role as union officials" and that it was "an important matter because of [the] interaction between police, government body, complainant and defendants, and it is a complicated matter as had been demonstrated today".[174]

[150] The present case certainly involved more significant issues than most cases of trespass but that does not necessarily mean that it involved special difficulty, complexity or importance.[175]

[151] Mr Ryan submitted that the case involved special importance because it was the first case of alleged trespass by entry permit holders remaining on premises. He also submitted that the case was of special importance to the respondents because a conviction for trespass could impact on their prospects of retaining permits.

[152] Mr Ryan submitted that the case involved special difficulty and complexity because of the necessity to undertake a careful analysis of the relevant industrial laws and their interaction with s 11(3) *Summary Offences Act*.

[153] In *Baker v The Queen*[176] Gleeson CJ, referring to the phrase "special reasons" in a legislative context, said:

> "There is nothing unusual about legislation that requires courts to find 'special reasons' or 'special circumstances' as a condition of the exercise of

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174 Transcript of proceedings 24 May 2019, p 7, ll 30-40.

175 *Blackwood v Hinder* [2017] QDC 239 at [176].

176 [2004] HCA 45 at [13]; (2004) 223 CLR 513 at 523 [13] (footnote reference omitted).

> a power. This is a verbal formula that is commonly used where it is intended that judicial discretion should not be confined by precise definition, or where the circumstances of potential relevance are so various as to defy precise definition. That which makes reasons or circumstances special in a particular case might flow from their weight as well as their quality, and from a combination of factors."

[154] In *Cullinan v McCahon*[177] Farr SC DCJ rejected the proposition that a case could be regarded as involving special difficulty or complexity simply because the applicable legislation was complex.

[155] A conviction for an offence of trespass may be relevant to whether the Fair Work Commission could be satisfied that the respondents are fit and proper persons to hold entry permits.[178] However, that is simply one of the factors to be considered by the Fair Work Commission and in any event does not mean that the case was one of special difficulty, complexity or importance.

[156] The respondents were each charged with a single offence of trespass. There were eight prosecution witnesses. Of those, five were police witnesses giving evidence about the incident: Senior Constable Mackay, Constable Cooper, Senior Constable Easton, Sergeant Lewis and Senior Sergeant Lavin. There was also the general manager of ENCO Precast, Mr James. The other witnesses were the industrial inspectors, Ms Burgess and Mr Azcune.

[157] The case was not factually complex. The legislative framework certainly made the case somewhat more difficult than other cases of trespass, but I do not consider that it involved special difficulty, complexity or importance.

[158] In my view, the magistrate erred in concluding that an amount for costs above the scale in the *Justices Regulation* was just and reasonable. The cases did not involve special difficulty, complexity or importance.

[159] In cases where a higher amount of costs is justified on the grounds of special difficulty, complexity or importance, that does not mean that costs are to be assessed on an indemnity basis. In *Cramp Pty Ltd as Trustee for the Cramp Family Trust v Jongkind*[179] Butler SC DCJ explained that such an approach does not give sufficient regard to the statutory provisions.

[160] The magistrate did not make an assessment of costs, leaving it to the parties to agree on the amount. However, her Honour expressed the view that "If I was reaching for a figure from the sky I would say that I would be discounting the ($110,000), but it would (be) much closer up to the six figures…" Her Honour said that "a significant costs order should be made".

[161] In cases where a higher amount of costs is being awarded, the scale in schedule 2 *Justices Regulation* can still provide a guide to the appropriate assessment.[180]

Orders

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177 [2014] QDC 120 at [25].
178 *Fair Work Act* 2009 (Cth), s 513(1)(c)(i).
179 [2018] QDC 144 at [61]-[63].
180 *Whitby v Stockair Pty Ltd & ors* [2015] QDC 79 at [77].

[162] I therefore make the following orders in each matter:

1. Appeal allowed.
2. Set aside the order made by the Magistrates Court at Brisbane on 24 May 2019 that the charge be dismissed.
3. Set aside the order made by the Magistrates Court at Brisbane on 4 June 2019 that the complainant pay the respondent costs of $21,250 within two months.
4. Remit the proceeding to the Magistrates Court at Brisbane to proceed according to law.