FEDERAL COURT OF AUSTRALIA

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Elecnor Australia Pty Ltd [2025] FCA 156

File number(s):	NSD 437 of 2023
Judgment of:	**WIGNEY J**
Date of judgment:	6 March 2025
Catchwords:	**INDUSTRIAL LAW -** Alleged contraventions of s 501 of the Fair Work Act 2009 (Cth) — permit holder exercising or seeking to exercise rights of entry under s 484 – consideration of the proper construction of s 484 – whether the applicant was required to establish that persons with each of the characteristics to which s 484 refers were present on the site at the time the applicant was seeking to exercise the right – whether applicant needs to prove reasonable grounds for belief of entitlement to represent industrial interests of workers – whether union entitled to represent workers – applicable meaning of "linesmen" and "rigger" – entry to premises where workers were not performing "active work" on those premises, but where it was neither safe nor practical to seek to exercise right of entry in respect of the premises where such work was being carried out
Legislation:	*Fair Work Act 2009* (Cth) Pt 3.4, ss 12, 345, 478, 484, 487, 490, 492, 492A, 493, 500, 501, 512, 518, 539, 546 *Migration Act 1958* (Cth) ss 5, 245AC, 245AG *Workplace Relations Act 1996* (Cth) ss 760, 767 *Migration Regulations 1994* (Cth) Sch 2 *Electricity Safety Act 1998* (Vic)
Cases cited:	*Australian Building and Construction Commissioner v Powell* (2017) 251 FCR 470; [2017] FCAFC 89 *Australian Competition and Consumer Commission v The Construction, Forestry, Mining and Energy Union* (2007) ATPR 42-140; [2006] FCA 1730 *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia & Ors v Green Light Contractors Pty Ltd* [2023] FCA 536

Construction, Forestry, Maritime, Mining and Energy Union v Richard Crookes Constructions Pty Limited [2022] FCA 992

Construction, Forestry, Mining and Energy Union v CSBP Ltd [2012] FCAFC 48; (2012) 212 IR 206

Construction, Forestry, Mining and Entergy Union and Others v John Holland Pty Ltd (2010) 186 FCR 88; [2010] FCAFC 90

Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2015] FCA 1287

Director of the Fair Work Building Industry Inspectorate v McDermott [2016] FCA 1147

Electrical Trades Union of Australia v Waterside Workers Federation of Australia (No 2) (1982) 42 ALR 587

Forster v Jododex Australia Pty Limited (1972) 127 CLR 421

John Holland Pty Ltd v Construction, Forestry, Mining and Energy Union and Others (2011) 195 FCR 280; [2011] FCA 770

Joyce v Christoffersen (1990) 26 FCR 261

R v Gough; Ex parte Municipal Officers' Association Australia (1975) 133 CLR 59

Re Isaac & Ors; Ex parte Transport Workers' Union of Australia (1985) 159 CLR 323

Reg v Moore; Ex parte Federated Miscellaneous Workers' Union of Australia (1978) 140 CLR 470

Regional Express Holdings Limited v Australasian Federation of Air Pilots (2017) 262 CLR 456

Rural Press Ltd v Australian Competition and Consumer Commission (2003) 216 CLR 53; [2003] HCA 75

The Queen v Cohen and Others; Ex parte Motor Accidents Insurance Board (1979) 141 CLR 577

Division:	Fair Work
Registry:	New South Wales
National Practice Area:	Employment and Industrial Relations
Number of paragraphs:	200
Date of last submission/s:	24 July 2024
Date of hearing:	22 - 24 July 2024
Counsel for the Applicants:	Mr W Friend KC with Mr O Fagir

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Counsel for the Respondent:	Mr C Hatcher SC with Mr M Baroni
Solicitor for the Respondent:	Gilbert + Tobin

ORDERS

NSD 437 of 2023

BETWEEN:	**COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED SERVICES UNION OF AUSTRALIA** First Applicant
	MATTHEW MURPHY Second Applicant
	MATTHEW MCCANN (and others named in the Schedule) Third Applicant
AND:	**ELECNOR AUSTRALIA PTY LTD** Respondent

ORDER MADE BY:	**WIGNEY J**
DATE OF ORDER:	**6 MARCH 2025**

THE COURT ORDERS THAT:

1. The matter be listed for a further case management hearing at 9.30 am on 27 March 2025 at 9.30 am, or such other date that is agreed by the parties and suitable to the Court, for the purpose of making procedural orders in respect of a further hearing concerning relief.

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

REASONS FOR JUDGMENT

WIGNEY J:

1 **Elecnor** Australia Pty Ltd is a construction contractor. During 2023 it was engaged in a project which involved, among other things, the construction of an electrical transmission line between the power grids of South Australia, Victoria and New South Wales. It utilised the labour of about 47 workers who were employed as "linesmen" or "lineworkers" by **Catalpa** Energy Pty Ltd, a company the business of which included assembling and erecting power transmission towers. In May 2023, officials of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services **Union** of Australia sought to enter certain "premises" which Elecnor occupied during the project. The officials asserted that they had a right to enter the premises pursuant to s 484 of the ***Fair Work Act*** *2009* (Cth) because their purpose for entering them was to hold discussions with the workers supplied by Catalpa who worked on the premises and whose industrial interests the Union was entitled to represent. Officers or employees of Elecnor refused to permit the Union officials to enter the premises, mainly because they claimed that the Union was not entitled to represent the industrial interests of the relevant workers.

2 The Union and the officials commenced proceedings in this Court alleging that, by refusing to permit the officials to enter the premises, Elecnor contravened s 501 of the Fair Work Act and was therefore liable to pay a pecuniary penalty. They also sought other relief, including declaratory and injunctive relief. Elecnor denied that it contravened s 501 of the Fair Work Act. It maintained that the Union officials had no right of entry to the premises for various reasons, but mainly because the Union was not in fact entitled to represent the industrial interests of the relevant workers. It also claimed, in respect of the relevant premises to which entry was sought, that the Union officials were not entitled to enter those premises because the premises were used mainly for residential purposes and the workers were not performing any work there.

3 The dispute between the Union and its officials and Elecnor in this proceeding ultimately focussed mainly on whether the Union officials had a right to enter the premises that Elecnor claimed were residential premises. The question whether the Union officials had a right to enter those premises on the days in question raises three main issues.

4 The first issue concerns the proper construction of s 484 of the Fair Work Act, that being the provision which the Union claimed gave it the right to enter the premises in question. The issue, in summary, is whether the right of entry under s 484 is only enlivened where there are employees on the premises whose interests the relevant union is *in fact* entitled to represent, or whether it is only necessary for the officials to have the purpose of holding discussions with employees who they believe meet that description.

5 The second issue, which strictly need only be addressed if s 484 of the Fair Work Act is construed in such a way that the right of entry only arises where there are in fact employees on the premises whose interests the Union is entitled to represent, is whether the Union was in fact entitled to represent the interests of the Catalpa workers at the time the officials sought to enter the premises. That issue essentially hinges on whether, at the time that the officials sought to exercise their right of entry, the Catalpa workers were engaged, or usually engaged, as "linesmen", or were employees whose "callings [were] peculiar to the electrical industry", as provided in rule 2.1 of the Union's rules.

6 The third issue is whether the Union officials otherwise had a right to enter the premises in question on the days that they sought to exercise that right. Aside from the legal issue concerning the construction of s 484 of the Fair Work Act, this issue raises a number of subsidiary factual issues, including: whether the Union officials had the requisite permits under the Fair Work Act; whether the permit holders had given Elecnor the requisite notice that they intended to enter the premises; whether the officials sought to enter the premises for the purpose of holding discussions with workers who performed work on the premises and whose industrial interests the Union was entitled to, or believed it was entitled to, represent; whether the right to enter was exercised during working hours; and whether the officials only sought to enter premises which they were precluded from entering because they were used mainly for residential premises.

7 There is also a fourth issue, which is whether Elecnor, through the actions of its officers, employees or agents, refused to allow the Union officials to enter the premises in question on the relevant days that they attempted to exercise their rights, or alleged rights, of entry. There was, however, ultimately no real dispute that the Union officials were refused entry to those premises.

8 It should perhaps be noted that the Court (differently constituted) had previously granted an interlocutory injunction the effect of which was to restrain Elecnor from refusing to allow the

Union officials to enter the project premises in accordance with the entry notices that had been served: see *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia & Ors v Green Light Contractors Pty Ltd* [2023] FCA 536. The Union initially sought a permanent injunction in effectively the same terms, though that relief was ultimately not pressed by the Union at the final hearing. The Union also did not press some of the other relief which it sought in its amended originating application, including declarations that Elecnor had contravened s 345 of the Fair Work Act.

9 The parties agreed that the Court should first and separately determine whether the Union had established that Elecnor had contravened s 501 of the Fair Work Act. A further hearing would be conducted to determine the appropriate relief if the alleged contraventions were made out. I agreed to conduct the proceeding on that basis, though no order confirming that to be the case was sought or made.

ENTRY RIGHTS AND THEIR ENFORCEMENT UNDER THE FAIR WORK ACT

10 Part 3.4 of the Fair Work Act contains provisions "about the rights of officials of organisations who hold entry permits to enter premises for purposes related [to] their representative role" under, inter alia, the Fair Work Act: s 478 Fair Work Act. Division 2 of Pt 3.4 contains provisions about entry rights under the Fair Work Act. Subdivision B of Div 2 contains s 484 which provides as follows (as at May 2023):

> **484 Entry to hold discussions**
>
> A permit holder may enter premises for the purposes of holding discussions with one or more employees or TCF award workers:
>
> (a) who perform work on the premises; and
>
> (b) whose industrial interests the permit holder's organisation is entitled to represent; and
>
> (c) who wish to participate in those discussions.
>
> (notes omitted)

11 A "permit holder" is helpfully defined in s 12 of the Fair Work Act as "a person who holds an entry permit". An "entry permit" is even more helpfully defined is s 12 in the following terms: "see section 512". Section 512 of the Fair Work Act provides as follows:

> **512 FWC [Fair Work Commission] may issue entry permits**
>
> The FWC may, on application by an organisation, issue a permit (an *entry permit*) to an official of the organisation if the FWC is satisfied that the official is a fit and proper person to hold the entry permit.

12 Section 487(1)(b) of the Fair Work Act provides that, subject to an exception that is not presently relevant, a permit holder must, before entering premises under Subdivision B, give the occupier of the premises an entry notice for the entry. An "entry notice" for an entry is a notice that complies with s 518: s 487(2) of the Fair Work Act. Section 518(1) provides that an entry notice must specify: the premises that are proposed to be entered; the day of the entry; and the organisation of which the permit holder for the entry is an official. Section 518(3) of the Fair Work Act provides as follows:

> 518(3) An entry notice given for an entry under section 484 (which deals with entry to hold discussions) must:
>
> (a) specify that section as the provision that authorises the entry; and
>
> (b) contain a declaration by the permit holder for the entry that the permit holder's organisation is entitled to represent the industrial interests of an employee or TCF award worker who performs work on the premises; and
>
> (c) specify the provision of the organisation's rules that entitles the organisation to represent the employee or TCF award worker.
>
> (note omitted)

13 Section 490 of the Fair Work Act specifies when rights under, inter alia, Subdivision B may be exercised. It relevantly provides that: the permit holder may exercise a right only during working hours; the permit holder may hold discussions under s 484 only during mealtimes or other breaks; and the permit holder may only enter premises on a day specified in the entry notice.

14 Sections 492 and 492A of the Fair Work Act specify the location where interviews and discussions conducted by a permit holder must take place, as well as the route that must be taken to that location. They provide as follows (notes omitted):

> **492 Location of interviews and discussions**
>
> (1) The permit holder must conduct interviews or hold discussions in the rooms or areas of the premises agreed with the occupier of the premises.
>
> (2) Subsection (3) applies if the permit holder and the occupier cannot agree on the room or area of the premises in which the permit holder is to conduct an interview or hold discussions.
>
> (3) The permit holder may conduct the interview or hold the discussions in any room or area:
>
> (a) in which one or more of the persons who may be interviewed or participate in the discussions ordinarily take meal or other breaks; and
>
> (b) that is provided by the occupier for the purpose of taking meal or other breaks.

492A Route to location of interview and discussions

(1) The permit holder must comply with any reasonable request by the occupier of the premises to take a particular route to reach a room or area of the premises determined under section 492.

(2) A request under subsection (1) is not unreasonable only because the route is not that which the permit holder would have chosen.

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

15 Section 493 provides that the permit holder must not enter any part of premises that is used mainly for residential purposes.

16 Section 501 of the Fair Work Act provides as follows:

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 omitted)

17 Section 501 of the Fair Work Act is a civil remedy provisions: see item 25, column 1 of the table in s 539(2) of the Fair Work Act. Subsection 539(2) of the Fair Work Act provides that certain persons may apply to the Court for certain orders in relation to contraventions of the civil remedy provisions identified in the table in s 539(2). In the case of a contravention of s 501, a "person affected by the contravention" may apply to, relevantly, the Court "for orders … including the maximum penalty" of 60 "penalty units": see item 25, columns 2, 3 and 4 of the table in s 539(2) of the Fair Work Act.

18 Subsection 546(1) of the Fair Work Act relevantly provides that the Court "may, on application, order a person to pay a pecuniary penalty that the court considers is appropriate if the court is satisfied that the person has contravened a civil remedy provision". Subsection 546(2)(b) provides that, in the case of a body corporate, the pecuniary penalty must not be more than "5 times the maximum number of penalty units referred to in the relevant item in column 4 of the table in subsection 539(2)".

UNCONTENTIOUS OR INELUCTABLE FACTS

19 The parties tendered, or sought to tender, a large volume of documentary and affidavit evidence. Much of the evidence appeared to be irrelevant, or at least of at best tangential relevance, to the real issues in dispute. The admissibility of a good deal of the affidavit evidence also appeared to be at best doubtful. When pressed by the Court about the relevance

and admissibility of much of the evidence, the parties narrowed the tender and did not read many paragraphs of the affidavit evidence. Even so, much of the evidence that was tendered appeared to be of marginal relevance, or to be deserving of limited weight. That was reflected in the parties' submissions, which touched on only small parts of the evidence.

20 What follows is a short summary of what appeared to be the relevant and uncontentious or ineluctable facts established by the evidence.

The EnergyConnect project and Elecnor's and Catalpa's role in it

21 In June 2021, NSW Electricity Networks Operations Pty Limited (**TransGrid**) engaged Elecnor (formerly named Green Light Contractors Pty Ltd) and **Clough** Projects Pty Ltd to perform work in respect of a large infrastructure project, called the **EnergyConnect** project. Elecnor and Clough initially operated as a joint venture named **SecureEnergy**, however Clough went into administration in late 2022. After that time, Elecnor assumed sole responsibility for the work, though it continued to use the trading name SecureEnergy.

22 The EnergyConnect project involved the engineering, design, procurement, supply, construction, testing, commissioning and delivery of a 330 kilovolt (kV) transmission line between the power grids of South Australia, starting at Robertstown, to the Red Cliffs Substation in Victoria, and the Wagga Wagga substation in New South Wales. The work included the construction of transmission towers and poles, the installation of insulators on the towers and poles to isolate the conductors from the structures and the stringing of conductors (or power lines) between the towers and poles. Elecnor was only engaged to perform work in respect of the transmission lines in New South Wales and Victoria, not South Australia. Work on the project was carried out over a very large area in mostly remote regions. The work that Elecnor was engaged to provide also included the construction of a new substation at Buronga in New South Wales.

23 In late 2022, Elecnor engaged in contract negotiations with Catalpa in relation to the construction of transmission towers and poles on a section of the project. Ultimately, however, no construction contract was entered into between Elecnor and Catalpa – or at least no contract relevant to the dispute which is the subject of this matter. Rather, Elecnor issued a purchase order to Catalpa pursuant to which Catalpa was requested to provide labour to Elecnor for the erection of the towers at specified daily rates of pay. The labour to be provided by Catalpa pursuant to the purchase order included workers who were described in the purchase order as: Superintendent, Supervisor, Project Engineer and "Rigger Linesmen". It may readily be

inferred that Catalpa agreed to provide labour to Elecnor pursuant to the purchase order. Elecnor did not contend otherwise.

24 The scope of the work that the workers supplied by Catalpa were to perform mainly involved the assembly and erection of transmission towers and poles. It did not include stringing the conductors or power cables between the towers and poles. Specific aspects or features of the work carried out by the Catalpa Workers are addressed in more detail later.

Catalpa

25 There was little direct evidence concerning Catalpa. Elecnor did not adduce any evidence from any officer or employee of Catalpa.

26 It appeared to be common ground that Catalpa's business operations at the time included the assembly or erection of various types of towers, including electricity transmission towers. Documentary evidence tendered by the Union, which was not challenged or disputed by Elecnor, suggested that Catalpa was part of, or otherwise associated with, a corporate group referred to as the Catalpa Group. A "Linkedin" profile of the Catalpa Group suggested that it was a "well-known and respected civil, concrete and groundworks" company within the "resources, energy and infrastructure industries in Australia". The profile indicated that the Catalpa Group's "specialist fields" included "Energy" and included the following description of that field:

> Energy – With over 600 towers assembled and erected in some of the most remote regions in Australia in 2022 alone, **Catalpa Energy** has proven it has not only **the largest and most experienced team of Linesmen in the country**, but also the most efficient and safety conscious.
>
> (Emphasis added)

27 A "Capability Statement" published by the Catalpa Group in July 2022 described the Catalpa Group as an "experienced Civil Construction company" which provided services in several areas, including civil and construction earthworks, energy, communications and pipelines. The description of the services provided by Catalpa in the energy sector included the following:

> ENERGY
>
> Catalpa Energy is fast becoming one of the leading power transmission contracting companies in Australia and currently employs over 120 people throughout the country. Catalpa has invested significantly in recent years within the power infrastructure market to be able to serve the significant increase in transmission projects.
>
> - Site Preparation – vegetation clearing, access roads etc Foundation Construction – excavation, drilling, concrete footings, and pads

- Assembly and Erection of towers
- Stringing Operations
- Remedial and Repair works
- Ongoing Maintenance

28 There was evidence that in 2021, Catalpa had constructed high voltage transmission towers and strung electricity conductors on an unrelated project on the Eyre Peninsula in South Australia.

The Catalpa workers – contracts and visa conditions

29 Between 26 June 2020 and 3 May 2023, Catalpa entered into contracts with 47 workers in which the worker's position was described as "linesman" or, in some instances, "lineworker". Some of those workers worked on the EnergyConnect project at various times, including at the time of the events relevant to this proceeding. It is convenient to refer to those workers as the **Catalpa Workers**.

30 The contracts between Catalpa and the Catalpa Workers were in essentially identical terms, other than in respect of names and other personal details.

31 As already noted, the contracts all described the worker's position as either "linesman" or "lineworker".

32 Most of the contracts specified that the commencement date was "[w]ithin 4 [or 6] weeks of arrival in Australia after grant of 482 visa". More will be said shortly about the visa status of each of the Catalpa Workers.

33 The worker's supervisor was specified as the "Linesman Supervisor/Project Manager".

34 The worker's "Duties/expectations" were specified in a schedule and included:

- The specified "objectives" were "[i]nstalls or upgrades transmission and/or distribution lines".
- The "Operations" components of the "Key Responsibilities" included: "Steel erection & rigging"; "Installing conductors, aerial equipment and underground cables and equipment"; "[i]nstalling and maintaining poles and associated hardware"; and "[f]itting pole hardware and crossarms".

- The "Quality" component of the "Key Responsibilities" was specified as "Ensure poles, towers and conductors are constructed to network operator and Safe Work Method Statement standards efficiently".
- The specified qualifications relevantly included "Rigger / Linesman".

35 The terms of the contract included that the worker agreed to "abide by all visa conditions and work limitations as determined by the Australian Department of Immigration and Citizenship".

36 Each of the Catalpa Workers was a foreign national who had entered Australia pursuant to a Temporary Skill Shortage (subclass 482) visa (**482 visa**) issued by or on behalf of the Minister for Immigration. The nominated occupation in each of the 482 visas issued to the Catalpa Workers was "Electrical Linesworker – 342211". That nominated occupation description was apparently a reference to the occupation described in ANZCO – Australian and New Zealand Standard Classification of Occupations - in the following terms:

> Installs, maintains, repairs and patrols electrical sub-transmission and distribution systems. Registration or licensing may be required.

37 The ANZCO occupation "342211 Electrical Linesworker" falls within the ANZCO Unit Group "342 Electronics and Telecommunications Trades Workers" and the sub-group "3422 Electrical Distribution Trades Workers". Workers within that sub-group are described as workers who "prepare, install, repair, maintain and patrol electric power distribution networks". The tasks of such workers include "installing conductors and aerial equipment", "installing and maintaining equipment associated with electrical supply", "maintaining poles and associated hardware", and "fitting pole hardware and crossarms".

38 The requirements for the grant of the 482 visas issued to the Catalpa Workers included that the visa applicant: had "the skills, qualifications and employment background that the Minister considers necessary to perform the tasks of the nominated occupation"; had "worked in the nominated occupation or a related field for at least two years"; and "is employed to work in the nominated occupation": *Migration Regulations 1994* (Cth) (as at May 2023), Schedule 2, clauses 482.212, 482.221 and 482.233.

39 The terms of the 482 visas granted to the Catalpa Workers included that they must only work in the occupation for which the visa was approved. A person who employs a worker who holds a 482 visa commits an offence if the person allows the worker to work in breach of a "work-related [visa] condition", which includes a condition restricting the work that the visa-holder

may do in Australia: see s 245AC of the *Migration Act 1958* (Cth) and the definitions of "work-related condition" in s 5 and "work" in s 245AG.

Work carried out by the Catalpa Workers

40 The nature of the work that was actually carried out by the Catalpa Workers at the time of the events in question is of some potential relevance to the question whether they were engaged as linesmen for the purposes of the Union's eligibility rule. That, in turn, is of some relevance to the question whether the Catalpa Workers were workers whose industrial interests the Union was entitled to represent and, subject to the issue concerning the proper construction of s 484 of the Fair Work Act, of some potential relevance to the question whether the Union officials, as permit holders, had a right of entry to the premises in question.

41 In broad terms, the Union contended that there was some evidence that the Catalpa Workers were carrying out some work that was typically performed by linesmen. Elecnor, however, contended, or appeared to contend, that the Catalpa Workers were essentially carrying out the work of "riggers" because they were simply assembling or erecting steel towers that, at some point in the future, would carry electrical wires. A rigger, in this context, is generally understood to be a worker who erects steel framework.

42 There was, regrettably, little direct or cogent evidence concerning exactly what work was in fact being carried out by the Catalpa Workers at the relevant time. As noted earlier, the scope of work that was to be carried out by the Catalpa Workers, broadly speaking, involved the assembly and erection of transmission towers and poles. It was common ground that it did not involve the stringing of conductors or power lines and therefore did not involve any "live" electrical wires. There was, however, some evidence which suggested that the workers were engaged in work which involved an electrical element, or electrical skills, and extended beyond simply assembling or erecting the steel towers.

43 A document prepared by a construction manager employed by Elecnor, Mr Cale **Oldman**, which contained detailed instructions in respect of the assembly and erection of the steel poles to be erected as part of the project, indicated that the responsibilities of the Catalpa Workers may include the assembly and attachment of insulators. In cross-examination, Mr Oldman confirmed that the assembly and installation of insulators was work that was carried out by linesmen, though he maintained it was also work performed by riggers.

44 A work instruction prepared by Mr Oldman in respect of the assembly and erection of the self-supporting towers to be erected at part of the project indicated that the tower assembly methodology included the connection of "Earth peaks". In his oral evidence, Mr Oldman confirmed that earth peaks are fittings which are at the very top of the tower and upon which earthing wire is run from substation to substation, though the earth wire is not strung until the power lines are strung. The same work instruction referred to the requirement to earth cranes when new towers were being erected in the vicinity of existing overhead power lines, which was the case with some of the towers that were to be erected as part of the Project. It may be inferred that the work performed by Catalpa workers in respect of the assembly of the towers included the connection of earth peaks and the earthing of cranes.

45 The evidence of Eduardo Castro, an employee of Elecnor, was that the Catalpa Workers were engaged in work which included the earthing of the poles erected as part of the project.

46 The evidence of Mr Matthew **Murphy**, who was an official of the Union who had worked or been involved in the power distribution and transmission industry for many years, was that on several occasions he had observed the Catalpa Workers to "free climb" the transmission towers that had been or were being erected as part of the project. Mr Murphy's evidence was that free climbing was a feature of the power industry and a "mandatory skill for lineworkers". Mr Murphy also indicated that workers who are free climbing towers invariably require the towers to be earthed.

47 There was also evidence that the work engaged in by the Catalpa Workers was being carried out in the vicinity of existing in-service high voltage transmission lines. The work therefore involved additional risk, including the risk of electrical faults, induced voltage and electrical storms. Mr Murphy's evidence was that the Catalpa Workers were therefore required to "understand how electrical components work and when it is necessary for equipment … to be earthed".

48 Mr Murphy's evidence was that the work of lineworkers in the power distribution and transmission industry included some "rigging type work", as well as other electrical work which was more specific to that industry. His evidence was that "every lineworker is a rigger, but not every rigger is a lineworker". He also suggested that there were differences between the rigging work typically done by a lineworker in the power distribution and transmission industry, and the rigging work done by a rigger in a typical construction environment. His evidence was that the work carried out by the Catalpa Workers on the EnergyConnect project

was a good example of those differences. He referred, in that context, to the fact that he had observed the Catalpa Workers to free climb the structures on the project on several occasions.

49 I accept Mr Murphy's evidence in that regard. I also accept that there was evidence which supported the proposition that, while much of the work carried out by the Catalpa Workers involved the assembly and erection of electrical transmission towers, their work also had distinct electrical components, including the assembly and attachment of insulators, the installation or connection of earth peaks, the earthing of poles and towers, the earthing of cranes and the freeclimbing of the transmission towers. The work also required training in, or an understanding of, electrical componentry and the risks associated with electrical faults.

The Union's attempts to enter Elecnor's premises to hold discussions with the Catalpa Workers

50 The Union's originating application and pleading lacked clarity and were confusing. That was particularly the case in respect of the identification of the premises that it was alleged that Union officials had attempted to enter and the dates upon which they alleged that Elecnor had refused to permit Union officials to enter those premises. The Union initially alleged that Elecnor refused to permit its officials to enter four different premises on 9, 10, 11 and 26 May 2023 and appeared to rely on entry notices that specified those dates. Ultimately, however, the Union narrowed its case. It only pressed its allegation that Elecnor refused to permit its officials to enter premises known as the **Buronga Camp** on 9 and 10 May 2023.

51 It should perhaps be noted in this context that Elecnor referred in its submissions to various pleading issues, including those to which reference has just been made. It was, however, tolerably clear that, at the end of the day, Elecnor was not taken by surprise or materially prejudiced by those pleading issues. The pleading issues were accordingly of no real moment.

52 The following summary of facts is confined to the facts that are relevant to the allegation that Elecnor refused to permit its officials to enter the Buronga Camp on 9 and 10 May 2023. The facts relevant to that allegation were largely uncontentious and not the subject of any real challenge.

53 Mr Murphy is an official of the Union. There was no dispute that he held an entry permit issued by the Fair Work Commission pursuant to s 512 of the Fair Work Act. That permit was in force as of May 2023.

54 Mr Murphy's evidence was that prior to May 2023 he conducted some enquiries and became aware that certain work was being carried out by workers on the EnergyConnect project in the vicinity of Buronga in New South Wales. That work involved the erection of high voltage towers along the route between, relevantly, Buronga and Red Cliffs in Victoria. Mr Murphy had read the project timeline and updates provided on various websites and had observed some of the work being carried out on the project. Following those enquiries he decided that he and his colleague, Mr Matthew **McCann**, "should visit and speak with the employees working at EnergyConnect who [were] eligible to join the Union, including the lineworkers working on the project".

55 On 5 May 2023, entry notices were sent on Mr Murphy's behalf to various entities, including Elecnor, which gave notice that Mr Murphy and his Union colleagues proposed to enter several premises, including (relevantly) the Buronga Camp "Off Arumpo Road, Wentworth NSW 2715", on (relevantly) 9 and 10 May 2023. The notices relating to the Buronga Camp stated that the proposed entry was authorised by s 484 of the Fair Work Act and included Mr Murphy's declaration (pursuant to s 518(3)(b) of the Fair Work Act) that the Union was, under rule 2 of its rules, "entitled to represent the industrial interests of an employee or TCF outworker who performs work on the premises". There did not appear to be any dispute that the relevant notices that were given to Elecnor complied with s 518 of the Fair Work Act.

The attempts to enter the Buronga Camp 9 May 2023

56 Mr Murphy's evidence was that early in the morning of 9 May 2023, he, Mr McCann and two other Union colleagues drove to the Buronga Camp.

57 Mr McCann and the other two Union officials were named as the second, third and fourth applicants. The Union ultimately did not adduce any evidence from any Union officials other than Mr Murphy. It is, in those circumstances, appropriate to focus primarily on the actions of Mr Murphy and Elecnor's conduct towards him, noting, however, that he was generally accompanied by Mr McCann and sometimes one or more of the other Union officials. The evidence also indicated that Mr McCann participated in the relevant discussions.

58 Mr Murphy's evidence in relation to his attempt to enter the Buronga Camp on 9 May 2023 was to the effect that he knew that the Catalpa Workers were not engaged in "active work" in the Buronga camp. The active work – the assembly and erection of the towers and poles and associated work – was being carried out by the Catalpa Workers in areas that Mr Murphy described as the "easement" or "site". Entry notices had also been sent to Elecnor in respect

of those areas. They were described in the notices as: the "Buronga Lay-down area"; the "Transgrid Buronga Substation" and the "site of the Buronga to Balranald Transmission Line Construction".

59 Mr Murphy's evidence was to the effect that he and his colleagues attended and sought to enter the Buronga Camp early in the morning so as to give Elecnor options to escort or transport them out to the easement or site – the areas where the assembly and erection of the towers and poles occurred - during one of the work breaks. He did not consider that he and his colleagues could simply drive out to where the workers were engaged in active work because he suspected that to do so they would have required a "mine spec vehicle" and they did not have such a vehicle.

60 Mr Murphy's evidence was that he and the other Union officials arrived at a security hut at the entry to the Buronga Camp at about 6.15 am and spoke with a security guard. They told the guard that they wanted to speak to union members during their break. The security guard went away and returned with two people: Mr Nigel **Wilkinson**, who Mr Murphy knew to be the camp manager, and Mr Mick **Easman**, who Mr Murphy believed to be the construction manager.

61 Before addressing the evidence concerning the conversation that ensured between Mr Murphy and Mr McCann and Mr Easman, it is helpful to refer to some evidence concerning the nature of the Buronga Camp.

62 Mr Easman was a Civil Superintendent employed by Elecnor at the time. His responsibilities included managing "specialist contractors" on various phases of the EnergyConnect project. He was predominantly based at the Buronga Camp where his office was located. His evidence was that the Buronga Camp was one of six residential facilities which housed workers who worked on the project. While the Buronga Camp may have been described as a residential camp, it did not only include residential buildings or accommodation. It occupied a relatively large site which also relevantly included two offices, one of which was apparently occupied by Transgrid, and the other of which was used for administrative and other non-construction work. Access to the camp was from Arumpo Road and a sealed road which ran from Wentworth Road to what Mr Easman described as a "security guard house [which was] occupied by two security guards and a security boom which was raised to access the premises". The main guard house was located approximately 150 metres from the accommodation facilities and offices.

63 The evidence included an aerial photograph of the camp. The photograph confirmed that the camp occupied a large area of land. It revealed that the structures on the land included accommodation blocks, two offices, a dining room, some other unidentified buildings, and a building or covered area which was labelled "Breakroom Area Indoor/Outdoor". The photograph also indicated that the security guard house was, as Mr Easman had indicated, some distance from the other structures.

64 It should also be noted in this context that Mr Easman's evidence was that, in May 2023, the Catalpa Workers were staying at the Buronga Camp. According to Mr Easman, a "pre-start meeting" was held every morning for workers on the project, including the Catalpa Workers. That meeting was held in the "wet area" either at Buronga Camp, or another camp that was apparently utilised by Elecnor. The pre-start meetings were generally held at 5.45 am and 6.30 am and lasted for about 20 minutes. Minutes of the pre-start meetings on 9 and 10 May 2023 indicate that pre-start meetings commenced at 6.30 am on those days and were attended by the Catalpa Workers. It follows that, when Mr Murphy and Mr McCann arrived at the camp at 6.15 am on the morning of 9 May 2023, a pre-start meeting attended by the Catalpa Workers was about to commence.

65 Mr Murphy's evidence was that the following conversation occurred between Mr Easman and Mr McCann on the morning of 9 May 2023 at the security guard's hut:

> Easman: Our instructions are that there's no one working on the transmission line within your coverage within the rules they are all non-trade.
>
> McCann: Anybody working on the powerline is clearly classified within our coverage. The rules state that we can cover anyone who does work peculiar to the electrical industry.

66 According to Mr Murphy, Mr Easman repeated at least three times that none of the workers working on the high voltage line came under the Union's rules, and that he and Mr McCann therefore could not have access to the premises. The exchange then continued:

> Easman: Come back at 10am or 1pm. We will facilitate access to electricians and those working with me on the substation.
>
> Murphy: We will come back for both breaks.
>
> Easman: Come back at 9.45am.

67 It is implicit in Mr Murphy's evidence that he and his colleagues were not permitted to proceed beyond the security guard's hut and left the area shortly after the conversation with Mr Easman. Mr Murphy's evidence was that he, Mr McCann and the two other Union officials returned at

9.45 am and were then escorted to a "crib room" where they met with an electrician, a welder and some trades assistants who were working on the substation. Those workers were not part of the Catalpa Workers cohort and the discussions that Mr Murphy and his colleagues were permitted to have with them were not held in the Buronga Camp.

68 The following points may be made concerning Mr Murphy's evidence about the events of 9 May 2023.

69 First, it is clear that Mr Murphy attempted to enter the Buronga Camp for the purpose of holding discussions with the Catalpa Workers. It is equally clear that Mr Easman understood that to be the case. The Catalpa Workers were the "workers who were working on the transmission lines" to which reference was made during the conversation between Mr Murphy and Mr Easman.

70 Second, it is equally clear that Mr Easman effectively refused to permit Mr Murphy and Mr McCann to enter the Buronga Camp. His reason for doing so was said to be, in effect, that the Union was not entitled to represent the workers on the transmission lines. On Mr Murphy's account, Mr Easman did not say that he was refusing entry because the Catalpa Workers were not at the camp, or that the Buronga Camp was exclusively used for residential purposes, or that Mr Murphy and his colleagues were attempting to exercise their right of entry outside working hours. While Mr Murphy and Mr Easman were told to return at 9.45 am and, when they did so, they were permitted to have discussions with some workers who were working at the nearby substation, it was common ground that those workers were not among the Catalpa Workers. It was also effectively common ground that the discussions with those workers occurred at the substation, not in the Buronga Camp.

71 Mr Murphy's evidence concerning the conversation on 9 May 2023 was not the subject of any cross-examination.

72 Mr Easman's evidence concerning the conversation differed somewhat from Mr Murphy's, though ultimately the relevant effect of what was said was much the same. That perhaps not only explains why Mr Murphy was not cross-examined about his version of the conversation, but also why Mr Easman was also not cross-examined. Mr Easman's evidence was that the following exchange occurred between him, Mr Murphy and Mr McCann at the security guard's hut at about 6.30 am on the morning of 9 May 2023:

Easman: What are you blokes doing here?

Murphy: We want to go into the Camp.

Easman:	You were told that 10:00am is morning tea and 1pm was lunch break. You can come back then to meet with the electrician at the substation.
Murphy:	We didn't receive any instructions about arriving at this time. Can't we just enter now?
Easman:	Darren Nelson reached out to you by email and told you what time to arrive. You cannot come in now as it would be disruptive. What is it exactly that you guys want to see?
McCann:	We want to see the workers in the easement and on the overhead powerlines.
Easman:	No. You haven't come at the right time. Workers on the powerlines or the easement do not form part of the electrical industry. You don't have entry rights to see these individuals.
McCann:	Anyone working on powerlines or easement is classified which means we have a right to meet with them.
Easman:	That's bullshit. The people who are eligible for membership are electricians, apprentice electricians and cert 3 linesman. Workers in the stores concreters and those on the drill rigs, don't fall under the ETU rules, so you can't see them".
McCann:	We cover anyone working on the project because there is a chance that workers could be performing electrical work as part of their normal duties.

73 Mr Easman's evidence was that Mr Murphy, Mr McCann and the other Union officials then left the security guards' hut at the Buronga Camp shortly after this conversation.

74 Several points should be made concerning Mr Easman's evidence about the conversation he had with Mr Murphy and Mr McCann on 9 May 2023.

75 First, it is again clear from Mr Easman's account of what Mr Murhpy said that Mr Murphy's purpose in seeking to enter the Buronga Camp was to hold discussions with the Catalpa Workers. His reference to the "workers in the easement and on the overhead power lines" was clearly a reference to those workers and Mr Easman clearly understood that to be the case.

76 Second, it is equally clear that Mr Easman's statements constituted a refusal to allow Mr Murphy and Mr McCann into the Buronga Camp beyond the security guard's hut.

77 Third, while Mr Easman's evidence was that he told Mr Murphy and Mr McCann that they had come at the wrong time, that statement appears to have been related to the time at which the Union officials could meet with an electrician, who was not one of the Catalpa Workers, at a different location. That is apparent from the terms of the letter to which reference will be made

shortly. As noted earlier, Mr Murphy and Mr McCann were later permitted to speak with that electrician at the Buronga substation, which was not part of the Buronga Camp.

78 Fourth, consistently with Mr Murphy's evidence, it is clear that the main reason given by Mr Easman for refusing to permit Mr Murphy and the other Union officials to enter the camp to speak with the Catalpa Workers was, in effect, that Elecnor contended that the Union was not entitled to represent the industrial interests of those workers. Mr Easman did not suggest that entry was refused because the Catalpa Workers were not at the camp, or because it was outside working hours. As noted earlier, by the time of the conversation between Mr Easman and Mr Murphy, the Catalpa Workers were likely to have been at a pre-start meeting.

79 Fifth, Mr Easman's reference to Darren Nelson having "reached out" to Mr Murphy or the Union by email was plainly a reference to a letter that Mr Darren **Nelson**, who was Elecnor's industrial relations manager in respect of the project, had supposedly sent to the Union. That letter concerned the Union's entry notices, including the notices relating to the Buronga Camp. It is apparent from the evidence of Mr Murphy that he had not seen the letter at the time he arrived at the Buronga Camp on the morning of 9 May 2023. That is not surprising given that, while letter was dated 8 May 2023, Mr Nelson's evidence was that he did not email it to the Union until 9 May 2023, presumably sometime after 6.30 am. Mr Easman, however, appears to have been aware of the content of the letter.

80 The letter from Mr Nelson, on behalf of Elecnor, to the Union concerning the entry notices is significant. The body of the letter stated as follows:

> I refer to the Entry Notices of Mr. Murphy, Mr. McCann and Mr. Max Mawby dated 5 May 2023 in respect of various locations under the control of Secure Energy Pty Ltd.Please be advised as follows:
>
> 1. Neither Secure Energy nor its subcontractors have any employees engaged at the
>
> following locations:
>
> - Buronga Lay Down area, or
> - Buronga to Balranald Transmission Line Construction between Buronga Substation, off Arumpo Road, Wentworth NSW 2648, or
> - Balranald Substation, off Yanga Way, Yanga 2715,
>
> who are eligible to be members of your union.
>
> 2. There is one employee of a Secure Energy subcontractor engaged at the Transgrid Buronga Substation. At that location breaks and mealtimes occur at 10.00 a.m. and 1.00 p.m. Secure Energy will inform the subcontractor and the subcontractor's employee of the location of a nominated meeting place. If the employee elects to attend

they will be able to meet with the officers of the union.

3. The Buronga Camp is a residential facility.For these reasons, your officers will not be permitted to access the locations nominated in the Entry Notice other than the nominated area at the Transgrid Buronga Substation at the times nominated above.

Should any officer of your union attempt to enter any Secure Energy controlled location other than in strict accordance with the provisions of Part 3 - 4 of the Fair Work Act, we intend to: (a) Seek the assistance of law enforcement authorities to prevent unlawful access to our sites, and (b) Make applications under Sections 503 and 507 of the Fair Work Act to have the relevant Permits revoked.

Should you have any questions in regard to these matters, please contact me.

81 It is tolerably clear from this letter that, as at 9 May 2023, Elecnor had determined that it would not permit Union officials to enter *any* premises associated with the project that were identified in the entry notices, including the Buronga Camp, because it maintained that, save for one employee engaged at the Buronga substation, none of its or its subcontractors' employees (including the Catalpa Workers) were eligible to be members of the Union. It would also appear that Elecnor had determined that it would not permit Union officials to enter the Buronga Camp for the additional reason that it was said to be a residential facility. It was no doubt for those reasons that Mr Easman, who appears to have been aware of the content of the letter, refused to permit Mr Murphy and Mr McCann to enter the Buronga Camp on 9 May 2023.

82 Seventh, as had already been adverted to, Mr Murphy and Mr McCann were, later that morning, permitted to enter the Buronga substation, which was not part of the Buronga Camp, to speak with workers who were working at the substation. Those workers were not within the cohort of Catalpa Workers.

83 Mr Easman's evidence was that before Mr Murphy and Mr McCann spoke with the workers at the substation, he had another discussion with Mr Murphy and Mr McCann, the relevant parts of which were to the following effect:

> McCann: We want to see the workers who are working in the easement. You have received our notices.
>
> Easman: No, they do not perform electrical work which means they are not covered by your rules. I also don't have authority to grant you access to the camp because its residential. You can visit the workers on the TransGrid substation if you want.

84 According to Mr Easman, he had yet another conversation with Mr Murphy and Mr McCann after they had spoken to the workers at the substation, the relevant parts of which were:

Easman:	You guys have finished what you came here to do. You can leave now.
McCann:	If you won't let us meet with the other workers on the easement now, why don't we come back at a later time when their shift finishes and meet them at the camp or TransGrid Substation?"
Easman:	The only people you're eligible to meet are the electricians working on the substation we're building.

85 The substance and effect of what Mr Easman said to Mr Murphy and Mr McCann on those occasions was that they would not be permitted to enter the Buronga Camp, or any other premises occupied by Elecnor, for the purposes of holding discussions with the Catalpa Workers.

Factual findings in relation to the events of 9 May 2023

86 The evidence in relation to the events of 9 May 2023 supports the following factual findings.

87 First, Mr Murphy was a permit holder on 9 May 2023.

88 Second, Mr Murphy sought and attempted to enter premises occupied by Elecnor, namely the Buronga Camp, for the purpose of holding discussions with one or more employees who performed work on the project (the Catalpa Workers), whose industrial interests his organisation (the Union) was entitled to represent and who wished to participate in those discussions. Mr Murphy's evidence was, in substance and effect, that that was his purpose in attempting to enter the premises. It was not put to him in cross-examination that he had no such purpose, or that he had some other collateral purpose for seeking to enter the premises.

89 Third, Mr Murphy, or at least the Union on his behalf, had given Elecnor an entry notice in respect of entry to the Buronga Camp on 9 May 2023. There was no suggestion, nor any basis to suggest, that the notice did not comply with s 518 of the Fair Work Act.

90 Fourth, Mr Murphy sought to exercise his right to enter the premises during working hours. The available inference was that the Catalpa Workers were having, or had already attended, a pre-work meeting at the time Mr Murphy was refused entry. The effect of Mr Easman's evidence was that the main reason that he refused to allow Mr Murphy and his colleagues to enter the Buronga Camp because of Elecnor's view that the Union was not entitled to represent the industrial interests of the Catalpa Workers, not because the Union officials were seeking entry outside work hours.

91 Fifth, while Mr Easman told Mr Murphy, in one of their conversations, that he did not have authority to grant Mr Murphy access to the Buronga camp because it was "residential", there

was no evidence to suggest that Mr Murphy sought to enter that part of the Buronga Camp that was used mainly for residential purposes. While part of the Buronga Camp may have been used mainly for residential purposes, there were also offices and other areas that were not used mainly for residential purposes. Mr Murphy's effectively unchallenged evidence was that it was the "technical or project offices" in the Buronga Camp that he and Mr McCann sought to enter for the purpose of having discussions with the Catalpa Workers, not the residential area. In any event, they got no further than the security guard hut.

92 Sixth, as already noted, it is readily apparent that the predominant, if not sole, reason that Mr Murphy was refused entry to the Buronga Camp was because Elecnor disputed that the Union was entitled to represent the industrial interests of the Catalpa Workers. They were later permitted to enter and hold discussions with other workers, who were not among the cohort of Catalpa Workers, at the nearby substation. There was no evidence to suggest that Mr Murphy and Mr McCann were refused entry because the Catalpa Workers were not at the Buronga Camp at the time they sought entry.

The attempt to enter the Buronga Camp on 10 May 2023

93 At about 10.55 am on 10 May 2023, Mr Murphy, Mr McCann and two other Union officials returned to the Buronga Camp. Mr Murphy's evidence was again to the effect that they had decided to arrive at the camp at that time to give Elecnor time to organise transport so they could meet the lineworkers on the "easement" during the crib break. When they arrived at the security guard hut, Mr Murphy, or one of the other Union officials, asked a security guard to contact Mr Easman and tell him that the Union officials wanted to visit. Mr Wilkinson subsequently arrived and the following conversation took place:

Murphy:	We are seeking access to the trade and non-trade workers on the easement of the high voltage transmission line construction.
Wilkinson:	You can't have access to workers on the high voltage transmission line.
Murphy:	We cover trade and non-trade workers under our rules in high voltage transmission line construction. Our rules state callings peculiar to the electrical industry.
Wilkinson:	You should return to site shortly before 1 pm and I will arrange access to people you are entitled to represent at 1 pm in the crib shed vicinity of the substation area as we did yesterday.
Murphy:	We are seeking access to trade and non-trade workers on the high voltage transmission line easement and construction. We are here at 11am in order to give Secure Energy the time and opportunity to arrange access, escort, and transport four ETU/CEPU officials to the

worksite on the high voltage transmission line easement and construction. We cover those trade and non-trade workers.

Wilkinson: You can't have access to those workers.

94 It is again clear that Mr Murphy's reference to the "workers on the easement of the high voltage transmission line construction" was a reference to the Catalpa Workers. It is also tolerably clear that, when Mr Wilkinson said "[y]ou can't have access to those workers", he was effectively refusing Mr Murphy's entrance onto *any* Elecnor premises, including the Buronga Camp, for the purpose of holding discussions with one or more of those workers. While Mr Wilkinson said that Mr Murphy and Mr McCann could return later and speak to people that, according to Mr Wilkinson, the Union was entitled to represent, it was common ground that those workers worked at the substation and were not among the Catalpa Workers cohort. The evidence also indicated that the "crib room" was, as Mr Wilkinson indicated, in the vicinity of the substation area and was not part of the Buronga Camp.

95 Mr Murphy and his colleagues left the Buronga camp at about 11.16 am.

96 Mr Murphy was not cross-examined about his evidence concerning the events of 10 May 2023. Elecnor did not adduce evidence from Mr Wilkinson.

Factual findings in relation to the events of 10 May 2023

97 Mr Murphy's evidence concerning the events of 10 May 2023 supports the following factual findings.

98 First, Mr Murphy was a permit holder on 10 May 2023.

99 Second, Mr Murphy sought to enter the Buronga Camp for the purpose of arranging the holding of discussions with one or more employees who performed work on the project, whose industrial interests his organisation (the Union) was entitled to represent and who wished to participate in those discussions. The substance and effect of Mr Murphy's evidence was that he attended the Buronga Camp so Elecnor could arrange access, escort and transport for him and his Union colleagues onto the easement so they could hold discussions with those workers who wanted to participate in those discussions during their crib break.

100 Third, Mr Murphy and Mr McCann had given Elecnor an entry notice in respect of entry to the Buronga Camp for 10 May 2023. There was no suggestion, nor any basis to suggest, that the notice did not comply with s 518 of the Fair Work Act.

101 Fourth, Mr Murphy and Mr McCann sought to exercise their right to enter during working hours.

102 Fifth, Mr Murphy and Mr McCann did not seek to enter that part of the Buronga Camp that was used mainly for residential purposes.

103 Sixth, Mr Murphy and Mr McCann were refused entry to the Buronga Camp. They were effectively told by Mr Wilkinson that they were not permitted to "access" any of the Catalpa Workers at any premises occupied by Elecnor at any time.

THE PROPER CONSTRUCTION OF s 484 OF THE FAIR WORK ACT

104 The parties initially proceeded on the basis that a permit holder may only enter premises pursuant to s 484 of the Fair Work Act if there are *in fact* employees who perform work on those premises, whose industrial interests the permit holder's organisation is entitled to represent, and who wish to participate in those discussions. In other words, before a permit holder can be said to have a right to enter premises under s 484, the permit holder must establish, as objective facts, each of the matters in paragraphs (a) to (c) of s 484.

105 Consideration of the text and relevant context of s 484, however, indicates that that is not the correct way to construe s 484. The proper construction of s 484 is that a permit holder may enter premises pursuant to s 484 if he or she seeks to do so for the *purpose* of holding discussions with employees who have each of the characteristics referred to in paragraphs (a) to (c) of s 484. It is not necessary to establish that there are in fact employees on the premises who have those characteristics. That is how the provision has been construed in previous cases that have considered the proper construction of s 484, albeit mainly in the context of alleged contraventions of s 500 of the Fair Work Act. The Union ultimately embraced that construction of s 484, though Elecnor maintained that it was incumbent on the Union to prove that there were in fact employees on the relevant premises who had the characteristics identified in paragraphs (a) to (c).

106 In my view, the text of s 484 of the Fair Work Act is clear and unequivocal in respect of the circumstance which must exist for a permit holder to have a right to enter premises pursuant to s 484. That circumstance is that the permit holder has the specified or prescribed purpose, that purpose being to hold discussions with one or more employees (or TCF award workers) who have the characteristics identified in paragraphs (a) to (c). It is not necessary for a permit holder to demonstrate to the occupier of the premises, or anyone else, before entering the premises,

that there are in fact employees on the premises who have those characteristics. Nor is it necessary for the permit holder, or his or her organisation, to prove that fact in order to prove that an occupier of premises breached s 501 of the Fair Work Act because they refused to allow the permit holder to enter the premises pursuant to s 484. All that need be proved is that the permit holder in fact had the prescribed purpose when he or she sought to enter the premises.

107 The statutory context of s 484 of the Fair Work Act supports that construction of the provision. As noted earlier, s 484 of the Fair Work Act is in Pt 3-4 of the Fair Work Act. Section 478 of the Fair Work Act, which provides a guide to Pt 3-4, states that Pt 3-4 "is about the rights of officials of organisations who hold entry permits to enter premises *for purposes related to their representative role* under this Act and under State and Territory OHS laws" (emphasis added). In other words, Pt 3-4 contains provisions which provide union officials with rights of entry for proper purposes, those proper purposes being the purposes identified in, inter alia, s 481(1) ("the purpose of investigating a suspected contravention of this Act") and s 484 ("the purpose of holding discussions") of employees who the union is entitled to represent.

108 Construing s 484 in a way which required a permit holder, before entering premises, to demonstrate to the occupier of the premises that there are, in fact, employees on the premises who have the characteristics in paragraphs (a) to (c) of s 484, would also be impractical and would deprive the provision of much of its beneficial effect. For example, how would a permit holder be able to demonstrate to the occupier of the premises, before entering the premises, that there are in fact employees on the premises who wish to participate in discussions. That could realistically only be demonstrated once the permit holder is on the premises and invites employees to participate in discussions. As the Full Court observed in *Australian Building and Construction Commissioner v* ***Powell*** (2017) 251 FCR 470; [2017] FCAFC 89 at [15]:

> … 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.

109 It may perhaps be accepted that, before exercising a right of entry under s 484, a permit holder must have a genuine belief that there might be employees on the premises that have the characteristics in paragraphs (a) to (c). That is because the permit holder could scarcely be said to have the specified purpose if they did not believe that employees who have those

characteristics might be on the premises. A more difficult question is whether the permit holder must have reasonable grounds for having such a belief. My inclination would be that it is not necessary for the permit holder to prove that they had reasonable grounds. It is, however, unnecessary and perhaps undesirable to express any concluded view in respect of that issue. It was not put to Mr Murphy, or submitted by Elecnor, that he did not have the specified purpose, or that he did not have reasonable grounds for believing that there were employees on the relevant premises who had the characteristics in paragraphs (a) to (c) of s 484. I would also, in any event, have readily concluded from the evidence that Mr Murphy not only believed, but had reasonable grounds to believe, that there were employees on the premises who had the characteristics in paragraphs (a) to (c) of s 484 of the Fair Work Act.

110 As noted earlier, the relevant authorities also support a construction of s 484 which focuses on the purpose for which the permit holder seeks to enter premises and does not require proof that there were employees on the premises who had the characteristics identified in paragraphs (a) to (c).

111 In *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1287 (***DFWBII v CFMEU***), the applicant alleged that various union officials, who had entered premises pursuant to s 484 of the Fair Work Act, had contravened s 500 of the Fair Work Act, which provides that a permit holder exercising, or seeking to exercise, rights in accordance with Pt 3-4 of the Fair Work Act, must not intentionally hinder or obstruct any person, or otherwise act in an improper manner. Some of the union officials argued, in their defence, that the applicant had not proved that they were exercising rights under s 484 because the applicant had not proved that there were employees on the premises in question which had all the characteristics in s 484(a) to (c). White J rejected that argument. His Honour reasoned as follows (at [156]-[157]):

> The respondents submitted that proof of a contravention of s 500 required the Director to establish that the permit holder was exercising, or seeking to exercise, rights in accordance with Pt 3-4. This meant that, when the Director alleged, as in this case, that the right sought to be exercised was that granted by s 484, he had to establish that employees with each of the characteristics to which s 484 refers were on the site at the time of the entry. That is to say, the submission was that it is necessary for the Director to establish that, at the time of the proposed entry, there were employees performing work on the premises; that those employees were persons whose industrial interests the permit holder's union was entitled to represent; and that those employees wished to participate in the proposed discussions with the permit holder.
>
> In my opinion, this submission overlooked that what is to be established, is relevantly, the permit holder's purpose in entering. The permit holder may have that purpose even

> if it is, as a matter of fact, incapable of being fulfilled. **A permit holder may wish to enter for the s 484 purpose even though there may not, as a matter of fact, be employees on the site, or there be no employees whose industrial interests the permit holder's union is entitled to represent, or there be no employees who wish to hold discussions with the permit holder. Permit holders may, for example, be mistaken in their belief that there are employees on the site answering the relevant description. The existence of their mistake would not mean, of itself, that the permit holder could not have the relevant purpose.**
>
> (Emphasis added)

112 The reasoning of White J in *DFWBII v CFMEU* appears to have been approved and followed by Charlesworth J in *Director of the Fair Work Building Industry Inspectorate v* ***McDermott*** [2016] FCA 1147. That case again concerned an alleged contravention of s 500 of the Fair Work Act by a union official. It appears to have been argued by the union official or his union that it could not be found that he contravened s 500 because he was not exercising rights under s 484 of the Fair Work Act because he did not enter the premises for the purposes of holding discussions with employees who had the characteristics in s 484(a) to (c). Charlesworth J rejected that argument. Her Honour's reasons included (at [110]):

> I proceed on the basis that the word "purpose" in s 484 of the FW Act is a reference to the subjective purpose of the permit holder and that the enquiry to be undertaken is one involving an assessment of the permit holder's state of mind. **Although it is not necessary for the Director to prove, as an element of a contravention of s 500 of the FW Act, that the workers at the Site objectively had the characteristics prescribed in s 484 of the FW Act**, the characteristics of the workers, as understood by the alleged contravenor, will be relevant in determining whether the contravenor exercised or was seeking to exercise a right of entry to premises for the subjective purpose of holding discussions with them: *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1287, [156] – [158] (White J).
>
> (Emphasis added)

113 Elecnor submitted that *DFWBII v CFMEU* and *McDermott* were distinguishable from this case and that I should not follow or accept the reasoning of White J and Charlesworth J in those cases, because they were construing s 484 of the Fair Work Act in the context of alleged contraventions of s 500 of the Fair Work Act, not s 501. I reject that submission. I fail to see how or why s 484 should be construed differently in the context of an alleged contravention of s 500, as opposed to s 501 of the Fair Work Act. Elecnor also submitted, or at least intimated, that I should not follow the decisions or reasoning in those cases because they were wrong. I reject that submission. I am not persuaded that White J and Charlesworth J were wrong in construing s 484 of the Fair Work Act in the way they did, let alone plainly wrong. Indeed, for the reasons I have given, I consider that their Honours' construction of s 484 is correct.

114 I should finally note that the construction of s 484 which I favour, which focusses on the permit holder's purpose for entering the premises and does not involve establishing that there were in fact employees on the premises who had the characteristics in paragraphs (a) to (c) of s 484, is consistent with the construction of the equivalent predecessor provision in s 760 of the ***Workplace Relations Act*** *1996* (Cth). While there are some minor differences between the wording of that provision and s 484 of the Fair Work Act, they are in relevantly similar terms.

115 In *Construction, Forestry, Mining and Entergy Union and Others v John Holland Pty Ltd and Others* (2010) 186 FCR 88; [2010] FCAFC 90, the Full Court construed s 760 of the Workplace Relations Act in the context of an allegation that union officials had contravened a provision of the Workplace Relations Act (s 767) which was in similar terms to s 500 of the Fair Work Act. The alleged contravention occurred in circumstances where the officials had entered premises in the mistaken belief that there were "eligible employees" (persons who were members, or were eligible to be members, of the relevant union) on the premises. The trial judge found that the contraventions had been made out without determining whether the officials were authorised to enter the premises, despite their mistake, because they had the requisite purpose for entering the premises. The trial judge had essentially proceeded on the basis that the officials were not authorised to enter the premises if there were in fact no eligible employees on the premises and that the union officials did not have reasonable grounds for believing that there were. The Full Court allowed the appeal and remitted the matter to the trial judge. The reasons of Dowsett J (with whom Spender J relevantly agreed), included the following (at [39]):

> Section 760 authorizes entry by:
>
> - a permit holder;
> - who enters the premises "for the purposes of holding discussions with any eligible employees who wish to participate in those discussions".
>
> The term "eligible employee" is defined. **However authorization of entry pursuant to s 760 is not dependent upon satisfying that definition. The permit holder must rather satisfy the requirement that he or she have the required purpose.** Establishment of, or challenge to the existence of such purpose may involve examination of whether there was an adequate factual basis for having the prescribed purpose. If, for example, the permit holder did not have some basis for a belief that there were eligible employees on the premises, then it may be difficult to conclude that he or she had the purpose of entering into discussions with people fitting that description. His or her purpose may rather have been to discover whether there were such people on the premises. Of course, a person may have more than one purpose. Authorization pursuant to s 760 is not dependent upon the permit holder having reasonable grounds for a particular belief.

(Emphasis added)

116 In my view, the same reasoning applies to s 484 of the Fair Work Act, despite the minor differences in the wording of s 760 of the Workplace Relations Act. It should also be noted that, upon remittal, the trial judge found that the officials had the prescribed purpose and genuinely acted upon that purpose in entering the premises. It followed that the officials had entered the premises under the authority of s 760: *John Holland Pty Ltd v Construction, Forestry, Mining and Energy Union and Others* (2011) 195 FCR 280; [2011] FCA 770 at [130]-[132].

DID THE OFFICIALS HAVE A RIGHT OF ENTRY?

117 On a proper construction of s 484 of the Fair Work Act, Mr Murphy had a right to enter the Buronga Camp pursuant to that provision if his purpose in entering the premises was to hold discussions with one or more employees who had three characteristics: first, they performed work on the premises; second, the Union was entitled to represent their industrial interests; and third, they wished to participate in those discussions. I am satisfied from the evidence that Mr Murphy had that purpose.

118 For the reasons that have already been given, I am satisfied that Mr Murphy's purpose in seeking to enter the Buronga Camp on 9 and 10 May 2023 was to hold discussions with workers (the Catalpa Workers) who performed work on the premises, whose industrial interests the Union was entitled to represent, and who wished to participate in those discussions. That was the effect of Mr Murphy's evidence and it was not put to him in cross-examination that he had any other purpose in seeking to enter the Buronga Camp. Nor did Elecnor submit that there was any evidence to suggest that Mr Murphy had some other purpose.

119 My only slight hesitation arises from the fact that Mr Murphy appears to have been aware on 9 and 10 May 2023 that the Catalpa workers did not engage in any "active work" in or on the Buronga Camp. As has been discussed, it was necessary for Mr Murphy to have had the purpose of holding discussions with one or more employees who, among other things, "perform work on the premises". The relevant premises, on the case ultimately pressed by the Union, was the Buronga Camp. Mr Murphy plainly believed that the Catalpa Workers performed active work on premises occupied by Elecnor, primarily on what he referred to as the easement or site. But did he believe, or have a basis for believing, that the Catalpa Workers performed work on or in the Buronga Camp, which were the premises that he sought to enter on 9 and 10 May 2023?

120 In my view it is necessary and appropriate to take a sensible, practical and not overly technical approach to the operation of s 484 of the Fair Work Act: cf *Powell* at [15]. While the active work that the Catalpa Workers were performing at the time – the assembly and erection of towers and poles and associate work – was being performed on the easement or worksite where the towers and poles were being erected, it was, it may be inferred, neither safe nor practical for Mr Murphy and the other Union officials to seek to exercise their right of entry under s 484 in respect of those premises, or to seek to hold the discussions with the workers at those premises, at least without the prior permission, assistance and cooperation of Elecnor. It was essentially for that reason that Mr Murphy sought to exercise his right of entry at the Buronga Camp.

121 In my view, where it is not safe or practical for a permit holder to enter the premises on which workers perform their active work, or to hold discussions with the workers on those premises, it is open to a permit holder, pursuant to s 484 of the Fair Work Act, to enter other premises that the relevant workers attend for the purposes of their work, such as crib rooms, or lunch rooms, or break rooms. That is so even though, strictly speaking, the workers may not perform any active work in those premises and even when, strictly speaking, those premises may be separate to, or not part of, the premises where the workers perform their active work. Were it otherwise, s 484 would essentially be unworkable or impractical in cases where workers perform work in remote or dangerous premises. This is a case in point. It was neither safe, nor practical, for Mr Murphy and Mr McCann to simply drive out to and enter the easement and sites where the towers and poles were being erected for the purpose of holding discussions with the workers. It was entirely sensible and practical in the circumstances for them to exercise their right of entry at the Buronga Camp and to seek Elecnor's assistance and cooperation in arranging a location at which the discussions can safely be held.

122 Putting that practical consideration to one side, in my view the evidence in any event established, or at least supported the inference, that Mr Murphy believed, and had a reasonable basis for believing, that the Catalpa Workers performed some relevant work at the Buronga Camp, even if it was not "active work". He appears, for example, to have been aware that the workers had work related meetings, such as pre-start meetings, at the Buronga Camp. I am, in those circumstances, satisfied that his purpose in seeking to enter the Buronga Camp was to hold discussions with one or more workers who performed work at those premises, whose industrial interests the Union was eligible to represent and who wished to participate in those discussions.

123 It follows that I am satisfied that Mr Murphy (and Mr McCann) had a right, pursuant to s 484 of the Fair Work Act, to ender the Buronga Camp on 9 and 10 May 2023.

WAS THE UNION ENTITLED TO REPRESENT THE CATALPA WORKERS?

124 It is strictly unnecessary for me to consider the question whether the Union was in fact entitled to represent the Catalpa Workers given the construction of s 484 of the Fair Work Act that I have accepted. That is because, for the reasons I have given, Mr Murphy had the requisite or prescribed purpose and therefore had a right to enter the Buronga Camp on 9 and 10 May 2023, irrespective of whether the Union was in fact entitled to represent the Catalpa Workers. I note in that context that the Union sought a declaration that "lineworkers employed by Catalpa Energy Pty Ltd on the EnergyConnect project are eligible to be members of [the Union]". I will address whether it is appropriate to make that, or any similar, declaration later in these reasons. It suffices at this point to record that I do not consider that it is necessary for me to make a finding about whether the Union was entitled to represent the Catalpa Workers simply because the Union has sought a declaration to that effect.

125 While I may not be strictly required to make a finding as to whether the Union was entitled to represent the industrial interests of the Catalpa Workers at the time Mr Murphy attempted to enter the Buronga Camp on 9 and 10 May 2023, I consider that it would nevertheless be prudent for me to address this issue. That is because the issue was fully argued before me and the Full Court might find, on appeal, that my construction of s 484 of the Fair Work Act is incorrect.

126 The parties adduced a good deal of evidence that was said to be relevant to the question whether the Union was entitled to represent the industrial interests of the Catalpa Workers. I found that much of that evidence was of very little assistance in deciding the issue. The parties also advanced many and varied submissions in respect of the issue. Regrettably, I found that some of the submissions, particularly those advanced on behalf of Elecnor, to be somewhat arcane and difficult to grasp.

127 The Union contended, in simple terms, that: first, the Catalpa Workers had been contractually engaged by Catalpa to work as linesmen or lineworkers; second, the terms of the Catalpa Workers' visas (and the basis upon which they are permitted to remain in Australia) effectively included that they were only permitted to work as lineworkers; third, a "rigger" is not an occupation eligible for the grant of such a visa; fourth, while the term or occupation description "linesmen" may have various meanings in different industries, in the industry in which the Catalpa Workers were working, the meaning includes people who erect or construct electrical

and distribution systems; fifth, Catalpa was a power transmission contracting company which, among other things, assembled and erected electricity transmission towers and employed linesmen; sixth, the Union's rules provide that employees who are "engaged or usually engaged" as, inter alia, "linesmen", as well as "all employees whose callings are peculiar to the electrical industry" are eligible to be members of the Union; seventh, the fact that the Catalpa Workers may have been eligible to join another Union (as was contended by Elecnor) did not bear on the construction of the Union's rules and did not mean that those workers were not eligible to become members of the Union; eighth, it followed from each of the previous points that the Catalpa Workers were eligible to be members of the Union; and nineth, the Union was therefore entitled to represent the industrial interests of the Catalpa Workers even though they may not have been enrolled as members of the Union.

128 Elecnor's contentions in respect of this issue were not so straightforward. Indeed, as already indicated, I had some difficulty comprehending the precise nature or import of some of its arguments. As best I can gather, the key elements in Elecnor's argument that the Union was not entitled to represent the industrial interests of the Catalpa Workers were: first, the Catalpa Workers are only eligible to be members of the Union if their employer, Catalpa, was in the electrical industry; second, Catalpa was not in the electrical industry because it just supplied labour to Elecnor and in any event was, or mainly was, a civil contractor; third, the work performed by the Catalpa Workers on the project, and the primary purpose of their employment, was not work peculiar to the electrical industry, but was rather construction work typically performed by riggers; fourth, provisions in various awards, including the Australian Workers' Union Construction and Maintenance Award 2002, indicated that the work engaged in by the Catalpa Workers was construction work and that the workers were therefore eligible to be members of the Australian Workers Union (**AWU**); fifth, the reference to "linesmen" in the Union's rules is a reference to linesmen in the "trades" or "tradesmen" category who perform work on live wires, not unskilled linesmen who perform the work of riggers; and sixth, the work that the Catalpa Workers performed on the EnergyConnect project was essentially the work of riggers.

129 For the reasons that follow, I reject Elecnor's contentions and largely accept the Union's contentions. In short, the Catalpa Workers were employed and performed work as linesmen in the electricity industry and therefore fell within Union's eligibility rule, which provided that employees who are engaged or usually engaged in various occupations, including linesmen,

were eligible to be members of the Union. The Union was therefore entitled to represent the industrial interests of the Catalpa Workers.

130 The starting point is the Union's eligibility rule and how it should be construed.

The proper construction of r 2.01 of the Union's rules

131 Rule 2.1 of the Union's rules is in the following terms:

> Without limiting or in any way being limited by any of sub-rules 2.3 to 2.21 inclusive, the Union shall consist of an unlimited number of employees who have been admitted as members in accordance with the Rules of the Union and **who are engaged or usually engaged as** electrical fitters, armature winders, electrical mechanics, battery fitters, railway electricians, telephone fitters, radio workers, cable jointers, **linesmen**, arc lamp trimmers, electrical labourers, electric crane attendants, rail welders and their assistants, electric welders whose work is associated with the work of an electrician and electricians engaged or usually engaged or employed in running and maintaining electric plants, dynamo, motor and switchboard attendants, **and all employees whose callings are peculiar to the electrical industry**. Also all other persons whether employees in the industry or not as have been appointed officers of the Union and admitted as members thereof.
>
> (Emphasis added)

132 The eligibility rules of a union should be construed liberally and broadly, not narrowly or technically: *Electrical Trades Union of Australia v* ***Waterside Workers*** *Federation of Australia (No 2)* (1982) 42 ALR 587 at 595; *Construction, Forestry, Mining and Energy Union v* ***CSBP*** *Ltd* [2012] FCAFC 48; (2012) 212 IR 206 at [48]. It is, however, legitimate to eschew a construction which is so "extremely wide or indefinite as to be unlikely to have been intended": *CSBP* at [52] citing *R v Gough; Ex parte Municipal Officers' Association Australia* (1975) 133 CLR 59 at 68-69.

133 Expressions used in an eligibility clause are generally intended to have a wide meaning and "should be interpreted and applied in accordance with [their] ordinary and popular detonation rather than with some narrow or formal construction": *The Queen v* ***Cohen*** *and Others; Ex parte Motor Accidents Insurance Board* (1979) 141 CLR 577 at 587 (Mason J). It is also necessary to consider that "the employee himself must know whether or not he is qualified to join a particular industrial organization" which "underlines the necessity to give the words of the eligibility clause their ordinary significance as they would be understood by the employee": *Cohen* at 580 (Barwick CJ). The meaning of words or expressions in ineligibility rules "will largely turn upon the common understanding among people concerned with relevant industries and particularly with industrial matters, of the manner in which the words are ordinarily applied": *Waterside Workers* at 590.

134 An eligibility clause should not be read down by reference to the membership clauses of other industrial organisations, and it is not relevant to the construction of eligibility rules that there may be another industrial organisation that might be a more natural representative of a given employee: *CSBP* at [48]; *Waterside Workers* at 595.

135 The question whether a particular description fits an occupation or calling involves matters of degree and the answer may depend on the "substantial character" of the activities carried on: ***Re Isaac*** *& Ors; Ex parte Transport Workers' Union of Australia* (1985) 159 CLR 323, citing *Reg v Moore; Ex parte Federated Miscellaneous Workers' Union of Australia* (1978) 140 CLR 470 at 483-485. An occupation or calling may "accurately be described in a number of ways, and the fact that it comes within one description does not mean that it cannot also come within another": *Re Isaac* at 333; *CSBP* at [19].

136 Where the focus of the relevant eligibility rule is the occupation of the employees covered by it, as opposed to the industry in which their employers are engaged, it is appropriate to consider the primary purpose of the employment, which test does not focus upon one aspect of an employee's work in isolation from the totality of his or her duties: *CSBP* at [44]. The "primary function of an employee must be determined by looking at what he or she does in the context of the employer's organisation of work": *Joyce v Christoffersen* (1990) 26 FCR 261 at 279; *CSBP* at [45].

137 Applying those principles to rule 2.1 of the Union's rules, the question is whether, approaching the construction of the rule liberally and not narrowly or technically, the Catalpa Workers were, at the relevant time, "engaged or usually engaged" as, relevantly, "linesmen". In answering that question, the word "linesman" should be given its ordinary and popular detonation, and consideration should be given to the common understanding of people in relevant industries, including the power transmission and distribution industry, in respect of the meaning of linesmen and the way that word is ordinarily applied. It is also necessary to have regard to the primary purpose or primary function of the Catalpa Workers having regard to Catalpa's organisation of work.

138 Elecnor submitted that rule 2.1 of the Union's rules was an "industry limited eligibility rule", which meant that an employee could not fall within the rule unless he or she was employed in, relevantly, the electrical industry. Elecnor relied, in support of that submission, on the concluding words of the rule: "and all employees whose callings are peculiar to the electrical industry". I reject that submission. Read fairly and in context, those concluding words of the

rule expand the scope of the rule, beyond the previously listed occupations, to include all employees whose "callings", while not within the listed callings, can nevertheless be said to be callings peculiar to the electrical industry. The words do not, as Elecnor effectively submitted, limit the scope of the rule.

The meaning of "linesmen"

139 The word linesmen (or linesworker) is not defined in the Union's rules. The first step in determining the ordinary or popular meaning of the word is to consult the dictionary, though as has been noted, the primary focus is on how the word is understood in relevant industries. Fortunately, in the case of the word "linesmen", the relevant dictionary definition broadly aligns with the industry understandings of the meaning of the word.

140 The online edition of the *Macquarie Dictionary* relevantly defines "linesman" as "a man who erects or repairs telephone, electric power, or other overhead wires".

141 As for the understanding or usage of the word "linesman" in the electrical industry, as noted earlier, ANZCO defines an "Electrical Linesworker" as someone who "[i]nstalls, maintains, repairs and patrols electrical sub-transmission and distribution systems".

142 Mr Murphy's unchallenged evidence was that he understood or believed that "the term lineworker is commonly used in the energy industry to describe a worker engaged in the construction, installation and maintenance of low and high voltage poles, towers and conductors". The word "lineworker" may be taken to be a gender-neutral version of the word "linesman" and to bear the same meaning.

143 Some of the witnesses called by Elecnor also appeared to accept that the expression "linesman" is generally understood in the electrical or energy industry to mean a worker who constructs or works on electrical transmission lines. Mr Stephen **Sasse**, who was engaged as a consultant to Elecnor, claimed that the term "Linie" (an apparent abbreviation of linesman) "[i]s used across the industry to describe a worker engaged in the construction of transmission l[i]nes, including the erection and stringing, regardless of what their actual classification might be". His evidence, however, appeared to be that the word linesman or lineworker has a different meaning in the construction industry to the meaning of the word in the electrical industry. He also expressed the view, based mainly on his reading of various vocational standards, that to be considered to be a linesman in the electrical industry, a worker must be qualified to, and be

involved in, the stringing of overhead transmission conductors, being lines that will or have been energised.

144 I will discuss the distinction that Mr Sasse drew between linesmen who are qualified to work on live wires, and those who are not, in more detail later. It suffices at this point to note that, having observed Mr Sasse give evidence, I considered him to be an unimpressive witness who tended to act as an advocate for Elecnor. His views as to the meaning of the words linesman in the electrical industry were in my view tailored to serve Elecnor's interests and were deserving of little weight.

145 The evidence of Mr Oldman, who was referred to earlier, was that the term "liney" or "linesman" in the electrical industry essentially referred to someone who "works on power lines", though, like Mr Sasse, he appeared to distinguish between "Certificate III" linesmen, who were trained and certified to work on "live assets", and less qualified linesmen who are not.

146 Mr Oldman's view that a linesman in the electrical industry was understood to be a worker who had a Certificate III qualification also appeared to be shared by Mr Nelson, who as previously noted, was Elecnor's industrial relations consultant. Mr Nelson appeared to suggest that the meaning of the word linesman differed between the electrical and construction industries and that workers who were involved in the erection and assembly of electrical transmission towers and poles were generally referred to as riggers, not linesmen. As was the case with Mr Sasse, however, I considered Mr Nelson to be a generally unimpressive witness whose views were tailored around views he had expressed as Elecnor's industrial relations adviser, being the views which appear to have resulted in the decision to refuse entry to Mr Murphy and his colleagues in the first place.

147 Another witness called by Elecnor, Mr Christopher Jones, a training manager employed by Elecnor, also appeared to initially suggest that a linesman in the electrical industry had to be qualified to work on live wires, or hold Category III certification. When pressed during cross-examined, however, he appeared to resile from that view. In any event, I found his evidence to be somewhat difficult to follow and unpersuasive.

148 The question whether the meaning of "linesman" in the Unions rules is limited to workers who have Category III qualifications, or linesmen who work on live wires, or "trades category" linesmen, is discussed in more detail later.

149 The Union relied on the definition of "linesman" or "linesperson" in several awards. I do not propose to refer to all of those awards. It suffices to note that most of the award definitions referred, in one way or another, to workers or employees who engaged in work which included erecting overhead conductors, electrical apparatus and poles for electric wires. Various federal on-site construction and metal trades awards, for example, defined "linesman" as meaning an "employee engaged in erecting, fixing, maintaining, or repairing overhead conductors or electrical apparatus …": *National Metal and Engineering On-Site Construction Industry Award 1989*; *The National Metal and Engineering On-Site Construction Industry Award 2002*; *Metal Trades Award 1935; Metal Industry Award 1984*. Various State awards in the electrical and electrical contracting industries likewise included, from time to time, definitions of "linesperson" which included an employee "engaged in preparing and/or maintaining poles for electric wires …" (*Electrical, Electronic and Communications Contracting Industry (State) Award*) or an "employee engaged (with or without assistance) in erecting poles for electric wires, cables or other conductors …": *The Western Australian Electrical Contracting Industry Award*.

150 In my view, the definitions of linesman or lineworker in those awards broadly corresponds with the dictionary definition and the evidence in relation to the understanding or usage of those terms in relevant industries.

151 For its part, Elecnor relied on various awards in the construction industry which, so it was said, covered the construction of electrical towers. The current award in that regard was said to be the *Building and Construction General On-site Award 2020* (the **Building and Construction Award**). Elecnor relied on the fact that that award included a "lineworker" classification within the CW/ECW 1 (construction worker/engineering construction worker level 1) category, whereas riggers and doggers were included in the higher CW/ECW 3 category. The award did not contain a definition of "lineworker". Nevertheless, Elecnor submitted that, having regard to those classifications or categorisations, an employer would not be permitted to employ the Catalpa Workers as linesmen. That was said to be the case because, if Elecnor required the Caltapla Workers to perform rigging work, it would be obliged to employ them at the higher CW/ECW 3 category as riggers. Elecnor also relied on the fact that the AWU had exclusive coverage of the workers under that award.

152 I am not persuaded that the terms of the Building and Construction Award, or Elecnor's submissions based on that award, greatly assists in either determining the meaning of

"linesman" or "linesperson", or in determining whether the Catalpa Workers were engaged as linesmen. I am also not persuaded that the fact that the AWU may cover employees who are said to be lineworkers in the construction industry greatly assists in gleaning the usage and understanding of the word linesman in the relevant industrial context.

153 The Union relied on a number of statutory definitions. I again do not propose to refer to all those statutory definitions, particularly as the assistance to be gleaned from them is somewhat debateable given that close consideration must be given to the different contexts in which the word is used in different legislation. It can, however, be seen that the statutory definitions again broadly align with the dictionary definition and the evidence of usage in the industry. For example, the *Electricity Safety Act 1998* (Vic) defines an electrical lineworker as a "person who carries out electrical linework" and defines "electrical linework" as meaning "construction, alternation, repair, maintenance, or disassembly of a part of a supply network".

154 Finally, the Union relied on Mr Murphy's evidence that the Union was a party to several enterprise agreements that cover lineworkers engaged in the construction of transmission lines. Some of those enterprise agreements were tendered. I do not propose to refer to the contents of those enterprise agreements, mainly because I do not consider that they greatly assist in determining the meaning and general industry usage of the word lineworker or linesman.

155 I would conclude from the dictionary definition, the evidence concerning usage in the power transmission and electrical industry, and the definitions in various awards, that the ordinary and popular detonation of the word linesman (or lineworker), and the common understanding of people in relevant industries, is a worker who is engaged in work which includes the erection, construction, installation and maintenance of overhead electrical poles, towers, conductors and electrical apparatus.

156 As noted earlier, Elecnor appeared to accept that the expression "linesman" or "lineworker" was used or understood in the power transmission and electrical industry generally to include workers who erected or constructed power lines, though it submitted that there was a relevant distinction between "trades" or Category III linesmen, and less skilled linemen who did not work on live wires and essentially performed the work of riggers. Elecnor submitted, in effect, that the word "linesmen" in rule 2.1 of the Union's rules should be construed or interpreted as referring only to Category III linesmen. It also appeared to submit that the less skilled linesmen are more accurately called riggers or doggers.

157 The reference to Category III appears to be a reference to various Commonwealth Government publications concerning training and qualifications in the Transmission, Distribution and Rail Sector. Those publications relevantly included a publication entitled "UET30521 Certificate III in ESI – Transmission Overhead". That publication described the relevant qualification which "provides the skills and knowledge to work in the electricity supply industry (ESI) as an Overhead Transmission Lineworker". That qualification was said to cover "work on transmission overhead powerlines, including the installation, inspection and maintenance of towers, poles, structures, conductors and hardware". In contrast, another publication entitled "UET20422 Certificate II in Transmission Line Construction", described the qualification which "provides the skills and knowledge to work in the electricity supply industry (ESI) as a Transmission Line Construction Worker". That qualification was said to cover "assembling transmission structures and installing hardware" and to also include "stringing transmission overhead conductors prior to being tensioned and terminated". It also included units of competency such as licences to perform rigging and dogging.

158 I am not persuaded that the word "linesmen" in rule 2.1 of the Union's rules should be construed as referring or including only Category III linesmen – that is, those linesmen who have achieved a Category III qualification. Nor am I persuaded that the word "linesmen" in rule 2.1 should be construed, more generally, as only covering linesmen who are qualified to, or in fact work on, live wires, or who are tradesmen who do not engage in or perform any unskilled rigging work. I am also not persuaded that the meaning of the word "linesmen" (or linesman, or lineworker) in the power transmission and electrical industry, is limited to Category III linesmen, or linemen who are qualified to, and in fact work on, live wires, or linesmen who do not perform any rigging work.

159 Mr Murphy's evidence, which I accept, was that the work, skills and training of a linesman or lineworker "involves both construction elements and electrical elements". He illustrated that proposition by referring to the Category II and Category III qualification documents to which reference has just been made. His evidence, based on his observation of the work of lineworkers over the years, was that the work of a linesman is "a combination of construction or rigging type work and other work which is more specific to the electrical transmission and distribution industry". As noted earlier, in Mr Murphy's view "every lineworker is a rigger but not every rigger is a lineworker". I interpret that evidence as meaning that workers in the power transmission and electrical industries who met the Category II qualifications, or engaged in

some of the Category II work, could still properly be regarded as lineworkers, despite the fact that that they also performed some rigging work.

Were the Catalpa Workers "engaged or usually engaged as …linesmen"?

160 I am satisfied from the evidence that, at the time Mr Murphy and his colleagues sought to enter the Buronga Camp for the purpose of holding discussions with the Catalpa Workers, the Catalpa Workers were engaged or usually engaged as linesmen as that word or occupation is commonly understood to mean or encompass. The following facts and circumstances support that conclusion.

161 First, the Catalpa Workers' employment contracts described their positions as linesman or lineworker.

162 Second, the duties, expectations and objectives that were set out in the Catalpa Workers' employment contracts were entirely consistent with the duties, expectations and objectives of a worker who was engaged, or usually engaged, as a linesman or lineworker. They included: installing transmission and distribution lines; installing conductors and aerial equipment; installing and maintaining poles and associated hardware; fitting pole hardware and crossarms; and ensuring that poles, towers and conductors were constructed to network operator standards.

163 Third, the conditions of the grant of the visas pursuant to which the Catalpa Workers were permitted to enter and remain in Australia included that they had the skills, qualifications and employment background that the Minister considered necessary to perform the tasks of a lineworker (which was the "nominated occupation") and were employed to work in that occupation. The workers' employment contracts required them to abide by those visa conditions. Catalpa was also effectively required by law to ensure that the workers worked in their nominated occupations as lineworkers.

164 Fourth, the evidence indicated that at least some of the work performed by the Catalpa Workers in respect of the project at the time could fairly be said to be the work of linesmen. That work included: the erection and assembly of steel poles and towers to which power lines were in due course to be affixed; the assembly and installation of insulators; the installation and connection of earth peaks; and the earthing of poles and cranes. The work also required and included the freeclimbing of the poles and towers. Contrary to Elecnor's submissions, the fact that the Catalpa Workers also engaged in some rigging work does not compel the conclusion that they were not engaged, or usually engaged, as linesmen. It is sufficient that the workers' duties,

and the work that they were required to, and did, perform included work typically performed by linemen in the power transmission and electrical industries.

165 Sixth, even if a linesman or lineworker in the power transmission and electrical industry was limited to workers who had Category III qualifications, I would in any event infer from the terms of the Catalpa Workers' employment contracts and visa conditions that they most likely possessed those qualifications and were qualified to work on live wires.

166 Fifth, the Catalpa Workers were relevantly engaged in the power transmission and electrical industry and the work carried out by them was carried out in that industry. I reject Elecnor's submission to the effect that the Catalpa Workers were not working in the electrical industry because their direct employer, Catalpa, was just supplying labour to Elecnor. I also reject the apparent submission that the Catalpa Workers were only engaged in the broader building and construction industry. Catalpa plainly operated in the power transmission and electrical industry. Its business included the assembly and erection of electrical towers and for that purpose employed, in its own words, the "largest and most experienced team of Linesmen in the country".

167 I am, in all the circumstances, satisfied that the primary purpose or primary function of the Catalpa Workers having regard to Catalpa's and Elecnor's organisation of work was to perform work, or usually perform work, as linesmen.

168 It follows that I am satisfied that the Catalpa Workers were engaged or usually engaged as linesmen for the purposes of rule 2.1 of the Unions Rules. The Catalpa Workers were therefore eligible to become members of the Union and the Union was entitled to enrol them as members.

The Union was entitled to represent the industrial interests of the Catalpa Workers

169 The fact that an employee is eligible for membership of an industrial association in accordance with its eligibility rules is sufficient to confer on the industrial association an entitlement to represent the industrial interests of that employee: *Regional Express Holdings Limited v Australasian Federation of Air Pilots* (2017) 262 CLR 456. It follows, given my finding that the Catalpa Workers were eligible to become members of the Union, that the Union was entitled to represent the industrial interests of the Catalpa Workers.

DID ELECNOR CONTRAVENE s 501 OF THE FAIR WORK ACT?

170 Earlier in these reasons I discussed entry rights under s 484 of the Fair Work Act and the enforcement of those rights pursuant to s 501 of the Fair Work Act. I also discussed the evidence and made factual findings relevant to the alleged contraventions by Elecnor of s 501 of the Fair Work Act. In this section of my reasons I consider whether the facts as found make out the elements of the alleged contraventions.

171 Before doing so, it is important to reiterate that the Union's case that Elecnor contravened s 501 of the Fair Work Act was ultimately limited to attempts by Mr Murphy to enter the Buronga Camp on 9 and 10 May 2023. While Mr Murphy was accompanied by Mr McCann and two other colleagues from the Union on those two days, the Union ultimately did not adduce evidence from Mr McCann or those other colleagues. It is accordingly appropriate to focus on Elecnor's alleged refusal to permit Mr Murphy to enter the Buronga Camp.

The elements of s 501 of the Fair Work Act in summary

172 Having regard to what in my view is the proper construction of s 484 of the Fair Work Act, to establish that Elecnor contravened s 501 of the Fair Work Act, the Union must establish the following facts or elements.

173 First, it is necessary to establish that Mr Murphy was entitled to enter the premises – relevantly the Buronga Camp – in accordance with Pt 3.4 of the Fair Work Act.

174 To establish that element, it is necessary for the Union to establish that: Mr Murphy was a permit holder; that Mr Murphy (or the Union) had relevantly given Elecnor an entry notice, as required by s 487(1)(b), which notice satisfied s 518 of the Fair Work Act; and, critically, that Mr Murphy sought to enter the premises for the purpose of holding discussions with workers who performed work on the premises, whose industrial interests the Union was entitled to represent, and who wished to participate in those discussions. It is not necessary for the Union to prove that there were in fact workers who performed work on the premises whose industrial interests the Union was entitled to represent. For practical purposes, however, in order to prove that Mr Murphy had the requisite purpose, it is essentially necessary to prove that he believed that there were workers who performed work on the premises, whose industrial interests the Union was entitled to represent, and who might wish to participate in the discussions.

175 Other factual issues that arise in respect of this element include whether the right to enter was exercised during working hours (s 490 of the Fair Work Act) and whether Mr Murphy and Mr McCann sought to enter part of the premises that were used mainly for residential purposes.

176 Second, it is necessary to establish that Elecnor refused entry onto the premises by Mr Murphy and Mr McCann.

Was Mr Murphy entitled to enter the Buronga Camp on 9 and 10 May 2023?

177 I have discussed this issue at length earlier in these reasons, though it is useful to reiterate and summarise my key findings.

178 There was no dispute that Mr Murphy held an entry permit issued by the Fair Work Commission pursuant to s 512 of the Fair Work Act. That permit was valid on 9 and 10 May 2023. Elecnor did not contend otherwise.

179 There was also essentially no dispute that entry notices in respect of the Buronga Camp were sent to Elecnor on Mr Murphy's behalf in accordance with s 487(1)(b) of the Fair Work Act. Those notices complied with s 518 of the Fair Work Act. Elecnor did not contend, or appear to contend, otherwise.

180 Mr Murphy sought to enter the Buronga Camp on both 9 and 10 May 2023. I am satisfied from the evidence that Mr Murphy's purpose in seeking to enter the Buronga Camp on both those days was to hold discussions with workers – specifically the Catalpa Workers – who performed work on those premises, whose industrial interests the Union was entitled to represent, and who wished to participate in those discussions. That was the overall effect of Mr Murphy's evidence. It was not put to him in cross-examination that he did not have that purpose, or that he had some other collateral purpose for attempting to enter the premises.

181 I am also satisfied from the evidence that Mr Murphy genuinely believed that the Union was entitled to represent the industrial interests of the Catalpa Workers. I doubt that it was necessary for the Union or Mr Murphy to prove that Mr Murphy had reasonable grounds for entertaining that belief. If, however, that was necessary, I am satisfied from the evidence that Mr Murphy did have reasonable grounds for entertaining that belief. Indeed, for the reasons given earlier, I am satisfied that the Union was in fact entitled to represent the industrial interests of the Catalpa Workers.

182 I am also satisfied from the evidence that, while Mr Murphy was apparently aware that the Catalpa Workers did not engage in any "active work" at the Buronga Camp, he nevertheless genuinely believed that the workers attended those premises for the purposes of their work, including to attend work-related meetings. He accordingly genuinely believed that the Catalpa Workers could relevantly be said to perform some work on those premises. It is also abundantly clear that Mr Murphy's purpose in seeking to enter the Buronga Camp to hold discussions with the workers, rather than attempting to enter the premises where the workers performed active work, was so appropriate arrangements could be made with Elecnor concerning the time and place of those discussions. It would have been difficult and potentially dangerous for Mr Murphy to attempt to enter the active work sites without discussing and reaching agreement with Elecnor concerning the appropriate and safe time and place to hold the discussions. I have no doubt that Mr Murphy acted reasonably and that his purpose in seeking entry to the Buronga Camp was at all times entirely legitimate.

183 I am equally satisfied that Mr Murphy genuinely believed that some of the Catalpa workers may have wished to participate in discussions with him.

184 I should also add, in this context, that the evidence was somewhat unclear and equivocal as to whether the Catalpa Workers were present at the Buronga Camp when Mr Murphy attempted to gain entry to the camp on 9 and 10 May 2023. It may well have been that they were not. If that was the case, it does not follow that Mr Murphy did not attempt to enter the camp for the purpose of holding discussions with the workers. I am satisfied from the evidence, as a whole, that Mr Murphy genuinely believed that the workers were either at the camp, or would in due course return to the camp, and that an appropriate time and place to conduct those discussions would then be arranged. Nothing in s 484 of the Fair Work Act appears to require the relevant workers to be physically present at the premises at the time entry is sought. It is only necessary that the permit holder has, at the time entry is sought, the requisite purpose of holding discussions with the relevant employees. I am satisfied that Mr Murphy had that purpose.

185 Mr Murphy sought to enter the Buronga Camp on 9 May 2023 between about 6.15 am and 6.30 am. While that was early, I am satisfied that it was during the Catalpa Workers' work hours. The evidence indicated that the Catalpa Workers participated in pre-start meetings at either 5.45 am or 6.30 am each morning. In those circumstances, 6.30 am could fairly be characterised as being within the workers' working hours. In any event, the evidence clearly indicated that Elecnor officers, employees or agents told Mr Murphy that he would not be

permitted to enter the Buronga Camp for the purpose of holding discussions with the Catalpa Workers at any time.

186 As for Mr Murphy's attempt to enter the Buronga Camp on 10 May 2023, Mr Murphy sought to exercise his right to enter the Buronga Camp at 10.55 am. That was plainly within working hours.

187 Finally, Elecnor contended that Mr Murphy was not entitled to enter the Buronga Camp because it was used mainly for residential purposes. I reject that contention. Section 493 of the Fair Work Act provides that the "permit holder must not enter any part of premises that is used mainly for residential purposes". There could be no doubt that part of the Buronga Camp was used for residential purposes. There was, however, no evidence to suggest that Mr Murphy sought to enter that part of the premises. The Buronga Camp also had offices and other meeting areas. On both occasions, Mr Murphy sought to enter the camp generally, via the security guard's hut. No doubt if he had been permitted to enter the premises he would have gone to one of the offices. He did not seek to enter that part of the camp that was used mainly for residential purposes. Why would he?

188 It follows that I am satisfied that Mr Murphy was entitled to enter the Buronga Camp on both 9 and 10 May 2023.

Did Elecnor refuse entry to the premises by Mr Murphy?

189 There could be no doubt that Elecnor, through its officer or employees, refused to permit Mr Murphy to enter the Buronga Camp on both 9 and 10 May 2023.

190 The reason or reasons that the occupier of the premises had, or may have had, for refusing a permit holder entry to premises is essentially irrelevant to the question whether the occupier contravened s 501 of the Fair Work Act. An occupier of premises may contravene s 501 as a result of refusing a permit holder entry to premises even if the occupier genuinely, but mistakenly, believed that the permit holder was not entitled to enter the premises.

191 The evidence indicated that the main reason that Elecnor officers or employees refused to allow Mr Murphy to enter the Buronga Camp – or any other premises relevantly occupied by Elecnor for that matter – was that Elecnor believed that the Union was not entitled to represent the industrial interests of the Catalpa Workers. It is in my view somewhat questionable whether that belief was a genuine belief, mainly because it is difficult to accept that Elecnor had reasonable grounds, or a reasonable basis, upon which to base or arrive at the belief. It is, in

any event, essentially immaterial what Elecnor's reason for refusing entry was, or whether that reason was genuine and based on reasonable grounds.

192 It should finally be noted that it is tolerably clear from the evidence that Elecnor had resolved not to permit Union representatives to enter any of the premises it occupied at any time for the purpose of holding discussions with the Catalpa Workers. It is clear that Elecnor had no intention of cooperating with the Union or its officials in any way when it came to meeting with the Catalpa Workers. In those circumstances, Elecnor's various claims about working hours, residential premises and the absence of workers on particular premises at particular times, might reasonably be seen as being somewhat specious, if not disingenuous.

Conclusion

193 I am satisfied, on the balance of probabilities, that Elecnor contravened s 501 of the Fair Work Act on 9 May and 10 May 2023 by refusing entry onto premises, namely the Buronga Camp, by a permit holder, namely Mr Murphy, who was entitled to enter those premises in accordance with Pt 3.4 of the Fair Work Act.

RELIEF

194 As noted at the outset, the parties agreed that the issues of liability and relief should be determined separately and that I should first determine liability. I accordingly do not propose to make any substantive orders in relation to the appropriate relief at this stage.

195 That said, subject to hearing further from the parties, given the findings that I have made in respect of Elecnor's contraventions of s 501 of the Fair Work Act, my present inclination would be to make declarations concerning those contraventions. That is because declarations relating to contraventions of legislative provisions are likely to be appropriate where they serve to record the Court's disapproval of the contravening conduct, vindicate an industrial association's claim that a respondent contravened the Fair Work Act, and may operate to deter the respondent and others from engaging in similar contravening conduct in the future: *Construction, Forestry, Maritime, Mining and Energy Union v Richard Crookes Constructions Pty Limited* [2022] FCA 992 at [213], citing *Australian Competition and Consumer Commission v The Construction, Forestry, Mining and Energy Union* (2007) ATPR 42-140; [2006] FCA 1730 at [6]; *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53; [2003] HCA 75 at [95]. The terms of the declaration sought by the Union in its amended originating application and pleading would, however, to be somewhat defective

and deficient. The Union should give further consideration to the appropriate form of the declarations of contravention.

196 I am also presently unable to see any reason why it would not be appropriate for the Court to make pecuniary penalty orders pursuant to s 546(1) of the Fair Work Act in respect of the contraventions by Elecnor of s 501 of the Fair Work Act. I will no doubt hear further submissions from the parties in respect of that issue, and the appropriate amount of the pecuniary penalties, if made, at the hearing in respect of relief.

197 The Union sought a declaration that "lineworkers employed by Catalpa Energy Pty Ltd on the EnergyConnect project are eligible to be members of the [Union]". My present view, subject to hearing further from the parties, is that it would not be appropriate to make that, or any similar, declaration. That is primarily because a declaration in those or similar terms is not required to quell any existing controversy between the parties.

198 As a result of the interlocutory injunction previously granted, Union officials were able to enter Elecnor's premises and hold discussions with those of the Catalpa Workers who were interested in participating in those discussions. The Union does not now seek any permanent injunction. The existing controversy between the parties in respect of Elecnor's past refusal to permit Union officials to enter premises for the purpose of holding discussions with the Catalpa Workers will effectively be quelled by the making of the proposed declarations of contravention and pecuniary penalty orders. There is no evidence to suggest that if, following this judgment, the Union sought to enter Elecnor's premises for the purposes of holding discussions with the Catalpa Workers, Elecnor would, or would be likely to, refuse entry to Union officials on the basis that the Union is not entitled to represent the industrial interests of those workers. The declaration sought by the Union would, in those circumstances, appear to be hypothetical or theoretical: cf *Forster v Jododex Australia Pty Limited* (1972) 127 CLR 421 at 437-438. There are also potential difficulties arising from the fact that the situation and circumstances in respect of the Catalpa Workers may have changed since May 2023, and may change in the future. Even putting those substantive difficulties to one side, the terms of the declaration presently sought by the Union would also appear to be defective.

199 Those are my provisional views concerning the proposed declaration concerning the eligibility of the Catalpa Workers to be members of the Union. I will, however, hear further submissions in respect of that issue if the Union presses for the making of any such declaration at the hearing in respect of relief.

CONCLUSION AND DISPOSITION

200 I have found that Elecnor contravened s 501 of the Fair Work Act on 9 and 10 May 2023 when its officers or employees refused entry to Mr Murphy, who was entitled to enter the premises pursuant to s 484 of the Fair Work Act. I will list the matter for a case management hearing at 9.30 am on 27 March 2025, or such other date which is suitable to the Court and agreed by the parties, for the purpose of making procedural orders in respect of the further hearing concerning relief.

I certify that the preceding two hundred (200) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Wigney.

Associate:

Dated: 6 March 2025

SCHEDULE OF PARTIES

NSD 437 of 2023

Fourth Applicant	MAX MAWBY
Fifth Applicant	BEN SCHMIDT