



DECISION

Fair Work Act 2009

s.505 - Application to deal with a right of entry dispute

Mr Jeffrey Lavidos, Ms Amelia Tucker

v

Commonwealth of Australia represented by The Commissioner for

Taxation

(RE2023/599)

DEPUTY PRESIDENT GOSTENCNIK

MELBOURNE, 13 MAY 2024

Alleged dispute concerning the imposition by the Australian Taxation Office (ATO) of a new right of entry requirement.

[1] The applicants, Jeffrey Lavidos and Amelia Tucker, are officials of the Australian Municipal, Administrative, Clerical and Services Union (ASU) and the holders of right of entry permits issued under s 512 of the *Fair Work Act 2009* (Cth) (Act) (together, the “Permit Holders”). The Australian Taxation Office (ATO) is the occupier of various premises around the country, including premises at 747 Collins Street, Docklands in Victoria (Docklands Premises).

[2] When attending its premises to exercise entry rights, the ATO requires the Permit Holders to wear a visitors pass issued by the ATO, and to be escorted by an ATO employee or other person authorised by the ATO to and from (but not in) the room or area that the ATO and the relevant Permit Holder agreed should be the place where discussions are held with relevant employees or where interviews with relevant employees are conducted. The requirement to wear a visitors pass and to be escorted at all times by an ATO employee or other ATO authorised person is not confined to the Permit Holders nor to the Docklands Premises. It applies to all visitors to any ATO premises. The requirement has an obvious security purpose. But the ATO maintains that the requirement is also an occupational health and safety (OHS) requirement applying to all ATO premises.

[3] The Permit Holders appear to dispute that the requirement is an OHS requirement, but if it is, they contend the request that they comply with the requirement is not reasonable. The Permit Holders applied under s 505 of the Act for the Commission to deal with a dispute about the operation of Part 3-4. At the time the application was made, there had been two occasions on which the Permit Holders were separately requested to comply with the requirement - on 22 February 2022 and 6 June 2023. Both instances were during attempts to enter the ATO’s Docklands Premises. Efforts to resolve the dispute other than by arbitration have been unsuccessful.

[4] The Commission is empowered to deal with the dispute by arbitration, including by making one or more of the following orders:

- (a) an order imposing conditions on an entry permit;
- (b) an order suspending an entry permit;
- (c) an order revoking an entry permit;
- (d) an order about the future issue of entry permits to one or more persons;
- (e) any other order it considers appropriate.

And, in dealing with the dispute, the Commission must take into account fairness between the parties.

[5] The Permit Holders seek a determination that the entry requirement is not a “reasonable” request for the Permit Holders to comply with an OHS requirement applying to the ATO’s Docklands Premises. They also seek orders as follows:

1. The ATO specify the route the Permit Holders are required to follow:
 - 1.1. in moving from the ATO Docklands security and reception area to the agreed meeting room;
 - 1.2. between the agreed meeting room and the kitchen and bathroom facilities the Permit Holders may use; and
 - 1.3. from the agreed meeting room back to the security reception area.
2. The ATO desist from imposing the escort requirement whilst the Permit Holders are:
 - 2.1. in any agreed meeting room or in the absence of agreement, the place at which employees ordinarily take breaks;
 - 2.2. leaving or entering the building during the day for breaks whilst following the specified route identified above; and
 - 2.3. using kitchen or toilet facilities.
3. The ATO desist from imposing the requirement to wear an “unescorted” visitor badge.

[6] For its part, the ATO seeks orders that the Permit Holders, when exercising their right of entry under ss 481 or 484 of the Act, must, at all times when on ATO premises:

- (a) wear a visitors pass issued by the ATO, and
- (b) be escorted by an ATO employee or other person authorised by the ATO.

[7] The ATO also seeks that the following recommendations be made:

- (a) unless otherwise agreed between the Permit Holders and the ATO, the timing of any future entries by the Permit Holders under s 484 of the Act be aligned with the parameters for meal breaks in the *ATO Enterprise Agreement 2017* or any successor enterprise agreement. Currently, this would result in entries usually occurring between 12pm and 2pm (other than where a proposed entry is for discussions with ATO contact centre staff);

- (b) the Permit Holders, when providing an entry notice proposing to enter the ATO's premises under ss 481 or 484, notify the ATO of a proposed delegate escort, or alternatively, if the Permit Holders have been unable to arrange a proposed escort, notify the ATO of that fact; and
- (c) if notified that the Permit Holders have been unable to arrange a proposed escort, the ATO will arrange for an authorised person to perform the role of escort.

[8] The right of entry scheme established by Part 3-4 of the Act gives a permit holder a statutory right to enter business premises of an occupier. This is an encroachment on the right an occupier would otherwise have to determine who is permitted to enter and who may be excluded from entering premises owned or controlled by the occupier. Accordingly, statutory provisions of this kind should be construed so that the encroachment is no greater than the statute allows, either expressly or by necessary implication.¹ Section 481 permits a permit holder to enter premises to investigate a suspected contravention of the Act or the terms of a fair work instrument that relates to, or affects, a member of the permit holder's organisation who the organisation is entitled to represent, and who performs work at the premises. Section 484 confers on a permit holder a right to enter premises for the purposes of holding discussions with one or more employees who have particular characteristics.

[9] Statutory entry rights conferred on permit holders by Part 3-4 of the Act are not rights unfettered - they are subject to express and implied constraints.² Relevantly, one such constraint is the obligation in s 491 that a permit holder comply with any reasonable request by the occupier of the premises for the permit holder to comply with an OHS requirement that applies to the premises.

[10] Whether an occupier's request that a permit holder comply with an OHS requirement that applies to the premises is "reasonable" is plainly objectively assessed having regard to the statutory context.

[11] Scott Keane is the Assistant Commissioner Workplace Relations for the ATO.³ Assistant Commissioner Keane gave evidence that all visitors to ATO premises are required to wear a visitors pass and to be escorted at all times and that these requirements are set out in the ATO's guideline titled "Visitors to the ATO".⁴ That document provides the following:

"Visitors to the ATO"

What you need to know

- All visitors, including school-age children, must wear a visitor pass and be escorted at all times
- Visitors must be supervised to ensure no unauthorised access to information occurs
- You must notify the Media Unit of any media representatives visiting the ATO.

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Visitors to the ATO

Visitors to the ATO must wear a visitor pass and be escorted at all times. Visitors can include:

- friends or family
- commercial visitors, such as the building owners and their representatives
- employees of other Australian Government agencies
- non-contracted service providers
- media representatives.

Where you have received management approval to bring a visitor onto ATO premises you must ensure the visitor:

- is escorted at all times whilst on the premises by yourself or another authorised person.
- abides by all applicable ATO security and safety policies, procedures and protocols relating to the premises.
- obtains and wears a visitor pass in a visible manner at all times whilst on ATO premises and returns the pass to the guard post on departure.
- has their details correctly registered in the electronic Visitor Management System (eVMS) at the guard post.
- has read and acknowledged the ATO visitor Safety Information and Induction
- does not have unauthorised access to any official information.
- does not take any photographs, video or sound recordings within ATO premises without appropriate authorisation and does not remove without appropriate authorisation any information in the possession of the ATO, any plant or equipment in the premises, or any Australian government property.

The Media Unit must be notified of any media representatives visiting the ATO.

Protectively marked information must be safeguarded.

Union visitors

The *Fair Work Act* and *Work Health Safety Act* set out legal procedures that must be followed whenever an external union official wishes to enter an employer's premises. Employees must not sign in a union official as a visitor to an ATO site without first confirming with Employee Relations that all legal obligations have been complied with.

Where visitors can go

We use a tiered system of designated areas within ATO buildings to help protect you and our assets.

Public areas

Public areas include ATO foyers and client contact areas, such as interview rooms and shopfronts, which have no specific visitor restrictions. Visitors can move freely in these areas. Conduct your interactions with clients at designated enquiry counters, desks or in

interview rooms. In limited situations where interview room facilities are either unavailable or unsuitable, meeting rooms in operational areas can be used subject to appropriate risk assessment procedures. Read more in keepingsafe with clients.

Operational areas

Operational areas include general work areas, desks, areas containing building utilities, basements, kitchens and amenities areas where visitor restrictions may apply. Your family and friends may visit operational areas with approval from your manager.

Corporate and commercial visits must be approved by the manager of the area being visited. Approvals will only be given on a strict need-to-enter basis. Visits for the purposes of direct selling, marketing or surveying ATO employees are not permitted.

Secure areas

Secure areas include computer rooms, evidence rooms and other internal access controlled areas where visitor restrictions apply. Visits to secure areas by family or friends is not permitted. Visits by corporate or commercial entities must be approved by the manager of the secure area or the Workplace Services site manager. Visits to evidence rooms must be approved by the evidence custodian. Approval for visits to any secure area can only be given where there is a definite need to enter.

All visits to secure areas must be recorded in a separate visitor register held within the area. Visitors must be escorted at all times by someone who works in the area and has the appropriate level of security clearance.

The use of audio and photographic equipment

The use of audio or photographic recording equipment, including cameras or mobile phones with voice recording capabilities, can only take place:

- with the approval of the manager of the area concerned
- in consultation with the Workplace Services site manager.
- in consultation with the Media Unit, if appropriate.

The unauthorised use of audio or photographic recording equipment may be a breach of legislation or policy and could result in the start of legal or administrative proceedings.

Fraud prevention

There is a degree of risk associated with granting members of the public access to operational and secure areas of ATO buildings. It is essential that every effort be made to ensure sensitive information is not compromised as a result of the visit.”⁵ [Underlining and bold text in original]

[12] Assistant Commissioner Keane’s evidence was that he did not believe the visitor guide specifically deals with any OHS requirement.⁶

[13] The ATO has not always required the Permit Holders to wear a visitors pass or to be escorted at all times. Before April 2022, the Permit Holders were provided with “unescorted visitor passes”. However, on 8 April 2022, Jeremy Moore, Acting Deputy Commissioner, ATO People, sent an email to the Permit Holders in which he advised them that while planning for a ‘COVID Safe’ return to the workplace and as part of the ATO’s normal internal review processes, several inconsistencies had been identified in the ATO’s arrangements with the ASU. Mr Moore told the Permit Holders that, *inter alia*, the ATO would no longer provide unescorted visitor passes for union officials attending ATO premises and that when visiting ATO premises, the Permit Holders would be provided with a standard visitor pass which required them to be escorted at all times. Mr Moore set out the rationale for the ATO’s decision, including that the ATO ‘Security CEI’ and ‘Visitors to the ATO’ guidelines require all visitors to wear a visitor pass and be escorted at all times whilst on ATO premises to prevent unauthorised access to ATO information.⁷

[14] Apart from mentioning as part of the rationale for the decision that “[a]s part of [the ATO’s] site plans for the COVID Safe return to the workplace visitors need to follow on-site COVID-safe controls and are subject to the same entry requirements as staff”,⁸ Mr Moore does not in terms, mention in the rationale that the requirement being imposed on the Permit Holders was an OHS requirement.

[15] The dispute has evolved whereby the ATO appeared also to require as a starting point that the Permit Holders first attempt to arrange an ASU delegate or member to act as an escort⁹ and that is because the “ATO has operational work to undertake on behalf of the Australian community, that work is getting ever increasing and there's an expectation that [ATO] employees are undertaking it”¹⁰ and so the ATO cannot readily arrange an escort.

[16] As already noted, the ‘Visitors to the ATO’ guidelines require a visitor to be escorted at all times. The escort must be an ATO employee or another authorised person. The ‘Visitors to the ATO’ guidelines are directed to ATO staff and contractors, which is plain from the references to “you” in the document. ATO employees and contractors are required to comply with the ‘Visitors to the ATO’ guidelines.¹¹ Therefore, the ‘Visitors to the ATO’ guidelines proceed on the basis that the escort will be either the employee arranging or receiving the visitor or “another authorised person”. This underpinning does not sit comfortably with the exercise of a statutory right of entry, where an employee does not arrange or receive the Permit Holders as visitors, nor does an employee need to obtain management approval before entry rights by the Permit Holders are exercised. But the ATO’s position, since clarified, is that an appropriate starting point for nominating an escort for the Permit Holders exercising their right of entry is for the Permit Holders to arrange a delegate to be the escort as delegates will be provided with reasonable paid time to escort the Permit Holders, and this is the practice adopted by the Community and Public Sector Union permit holders when exercising right of entry to ATO premises under the Act.

[17] The ATO also maintains that if the Permit Holders are unable to arrange a delegate to escort them, the ATO will nominate an authorised person to do so, provided that the Permit Holders comply with the notice requirements under s 487 of the Act. This position is reflected in the recommendations sought by the ATO to which earlier reference has been made.

[18] Ms Tucker and Assistant Commissioner Keane variously gave evidence about attempted entries or attendances by the Permit Holders at the ATO's Docklands Premises in 2022 and 2023 and related correspondence.¹² Save that these interactions show the evolving dispute, they add little to the central issues requiring determination. These issues are whether the requirement that the Permit Holders wear a visitors pass and be escorted at all times is an OHS requirement applying to ATO Premises. If so, whether the ATO's request that the Permit Holders comply with this requirement is reasonable.

[19] To recap, the 'Visitors to the ATO' guidelines relevantly require that visitors obtain and always wear a visitors pass in a visible manner and are always escorted while on ATO premises. These guidelines also require, the escorting employee to ensure that the visitor abides by all applicable ATO security and safety policies, procedures and protocols relating to the premises and has read and acknowledged the ATO visitor "Safety information and Induction".

[20] The ATO has certain duties under the *Work Health and Safety Act 2011* (Cth) (WHS Act), including its primary duty to ensure, so far as reasonably practicable, the health and safety of workers it engages and those whose activities in carrying out work are influenced or directed by the ATO, while the workers are at work.¹³

[21] Although, as I earlier noted, the 'Visitors to the ATO' guidelines appear to have an obvious security purpose, that does not mean that the guidelines cannot also have an OHS purpose, notwithstanding Assistant Commissioner Keane's evidence. The security purpose is not confined to the security of information held by the ATO. It serves also to give effect to an OHS purpose – the security of persons who work at the various ATO premises. The application of the 'Visitors to the ATO' guidelines means that a visitor is not permitted to access the premises unescorted. This plainly operates as a safety measure for ATO staff and contractors. Its aim is to secure the physical safety of ATO staff and contractors. Under the 'Visitors to the ATO' guidelines, the visitor agrees to abide by all applicable ATO security and safety policies, procedures and protocols relating to the premises and has read and acknowledged the ATO visitor 'Safety information and Induction' before entering an ATO premises.

[22] The 'Visitors to the ATO' guidelines' requirement that visitors wear a visitor pass allows ATO staff to readily identify persons who must be escorted. This is important because ATO staff are required to question people on ATO premises who are not wearing an authorised building pass.¹⁴ This also serves as an OHS measure.

[23] The 'Visitors to the ATO' guidelines also reflect the ATO's obligations under the Protective Security Policy Framework (PSPF) about which Christopher Nascimento, the ATO's Manager – Physical Security Operations Centre gave evidence.¹⁵

[24] The Commissioner of Taxation is the ATO's accountable authority for the purposes of the *Public Governance, Performance and Accountability Act 2013*. In that capacity, the Commissioner is expected to meet the four security outcomes set out in the PSPF.¹⁶ The four security outcomes concern the following:

“Governance

Each entity manages security risks and supports a positive security culture in an appropriately mature manner ensuring: clear lines of accountability, sound planning investigation and response, assurance and review processes and proportionate reporting.

Information

Each entity maintains confidentiality, integrity and availability of all official information.

Personnel

Each entity ensures its employees and contractors are suitable to access Australian Government resources, and meet an appropriate standard of integrity and honesty.

Physical

Each entity provides a safe and secure physical environment for their people, information and assets.¹⁷ [Underlining added]

[25] Each of the four outcomes in the PSPF is supported by policies.¹⁸ The ‘physical’ outcome in the PSPF is supported by Policy 15 ‘Physical security for entity resources’ and Policy 16 ‘Entity Facilities’.¹⁹ Part A of Policy 15 deals with its purpose, providing that the policy “describes the physical protections required to safeguard people (consistent with the requirements of the [WHS Act], information and assets (including ICT equipment) to minimise or remove security risk”.²⁰

[26] Part B of the policy deals with “Requirements” and sets out the core requirement of the policy as follows:

“Each entity must implement physical security measures that minimise or remove the risk of:

- a. harm to people, and*
- b. information and physical asset resources being made inoperable or inaccessible, or being accessed, used or removed without appropriate authorisation.*²¹ [Underlining added; Italicised text in original]

[27] Part A of Policy 16 sets out its purpose as providing “the consistent and structured approach to be applied to building construction, security zoning and physical security control measures of entity facilities. This ensures the protection of Australian Government people, information and physical assets secured by those facilities”.²² [Underlining added]

[28] The core requirements of Policy 16 are found in Part B and are as follows:

“Each entity must:

- a. ensure it fully integrates protective security in the process of planning, selecting, designing and modifying its facilities for the protection of people, information and physical assets*

- b. *in areas where sensitive or security classified information and assets are used, transmitted, stored or discussed, certify its facility's physical security zones in accordance with the applicable ASIO Technical Notes, and*
- c. *accredit its security zones.*²³ [Underlining added; italicised text in original]

[29] As noted above, Policy 16 requires that the ATO certify and accredit its premises according to 'zones'. Part B also sets out the zoning classifications as follows:

Zone name	Zone definition
Zone One	Public access.
Zone Two	Restricted public access. Unrestricted access for authorised personnel. May use single factor authentication for access control.
Zone Three	No public access. Visitor access only for visitors with a need to know and with close escort. Restricted access for authorised personnel. Single factor authentication for access control.
Zone Four	No public access. Visitor access only for visitors with a need to know and with close escort. Restricted access for authorised personnel with appropriate security clearance. Single factor authentication for access control.
Zone Five	No public access. Visitor access only for visitors with a need to know and with close escort. Restricted access for authorised personnel with appropriate security clearance. Dual factor authentication for access control. ²⁴ [Bold text in original]

[30] Entities are required to control access to Zones Two to Five within the entity's facilities by only allowing access for authorised personnel, visitors, vehicles and equipment and applying certain controls.²⁵ There are supporting requirements in Policy 16 including that, for Zone 3 areas, as shown above, visitor access is with a close escort.²⁶ A further requirement is that entities must control access to the area by only allowing access for authorised personnel, visitors, vehicles and equipment and using identity cards with personal identity verification.²⁷ Part C of Policy 16 sets out some guidance and includes:

"C.5.6.5 Visitor control

72. A visitor is anyone who is not authorised to have ongoing access to all or part of an entity's facilities. Visitor control is normally an administrative process; however, this can be supported by use of electronic access control systems.
73. For management of foreign delegations associated with international agreements and arrangements to which Australia is a party, see the PSPF policy: Security governance for international sharing.
74. **Requirement 5** mandates entities control access to Zones Three to Five. Controlling access can include recording visitor details and issuing visitor passes.

Visitor registers are used for this purpose and record the visitor name, entity or organisation, purpose of visit, date and time of arrival and departure. The Department of Home Affairs recommends entities also issue visitor passes for access to Zone Two when other controls to limit access are not in place.

75. The Department of Home Affairs recommends visitor passes are:
 - a. visible at all times
 - b. collected and disabled at the end of the visit
 - c. audited at the end of the day.
76. Where entities manage the control of access to specific areas, the Department of Home Affairs recommends those areas have their own visitor register at the entry.
77. **Requirement 1** mandates entity personnel escort all visitors in Zones Three to Five. The Department of Home Affairs recommends entities escort visitors in Zone Two unless unescorted access is approved. Entities dealing with members of the public are encouraged to use procedures for dealing with unacceptable behaviour on entity premises or unauthorised access to restricted areas.
78. Visitors can be issued with electronic access control system cards specifically enabled for the areas they may access. In more advanced electronic access control systems, it is possible to require validation at all electronic access control system access points from the escorting officer.
79. Regardless of the entry control method used, the Department of Home Affairs recommends entities only allow visitors to have unescorted access if they:
 - a. have a legitimate need for unescorted entry to the area
 - b. have the appropriate security clearance
 - c. are able to show a suitable form of identification.”²⁸ [Underlining added; bold text in original]

[31] Having regard to the above, it appears to me that the ‘Visitors to the ATO’ guidelines align with the purpose and core requirements in Policies 15 and 16 insofar as those requirements concern the removal of risks of harm to, and the protection of, people employed or engaged by the Commonwealth. Plainly, the control of visitor access reduces the risk of harm to ATO staff and is protective of their physical security, which is a core requirement of Policies 15 and 16. The roll out and enforcement of the ‘Visitors to the ATO’ guidelines is one of the reasonably practicable steps taken by the ATO to discharge its primary duty under the WHS Act.

[32] For these reasons, the ‘Visitors to the ATO’ guidelines and the requirements it imposes on visitor access to ATO premises is an OHS requirement for the purpose of s 491 of the Act.

[33] There is no real controversy that the requirement imposed on visitors to the ATO by the ‘Visitors to the ATO’ guidelines – which is an OHS requirement – applies to the ATO’s premises, including at the Docklands Premises. The issue that next arises is whether the request by the ATO that the Permit Holders comply with the requirement is a reasonable request.

[34] The request made by the ATO of the Permit Holders, consistent with the ‘Visitors to the ATO’ guidelines, is that when the Permit Holders are exercising a right of entry under the Act, the Permit Holders are, at all times when on ATO premises, to wear a visitors pass issued by the ATO and be escorted by an ATO employee or other person authorised by the ATO.

[35] The Permit Holders advance several bases by which they contend the request is not reasonable. First, they contend that the ATO’s policy position about escorts and visitor passes should give way to the statutory entry rights being exercised by the Permit Holders and the rights of workers to receive information and representation from the Permit Holders at the workplace. The request with which the Permit Holders are to comply does not interfere with the capacity of an ATO employee to receive information or to be represented and no cogent reason was advanced why that would be so. That the requirement the subject of the request is a policy does not mean that it must give way to entry rights under the Act. Most OHS requirements with which employees and visitors to an employer’s premises are required to comply are set out in employer policies. As s 491 of the Act makes clear, OHS requirements, even those in policies, can condition the exercise of entry rights. Far from the OHS policies that apply to a premises giving way to the statutory rights, the scheme of Part 3-4 means that statutory entry rights will give way to a reasonable request for a permit holder to comply with an OHS requirement applying to the premises.

[36] Second, it is said that the requirement constrains the Permit Holders in their ability to access ATO premises. That is the effect of a reasonable request to which s 491 of the Act speaks. It is circular reasoning to suggest that a reasonable request within s 491 of the Act stops being reasonable because it constrains access to the premises. Access will only be constrained if the permit holder refuses to comply with the reasonable request. There is no evidence that the requirement will otherwise have this effect.

[37] Third, the Permit Holders contend that the provision of an escort to always monitor the Permit Holders, as well as the requirement to wear a visitor badge, will deter staff from meeting with their union. No evidence was adduced to support this contention. Although I accept that in some circumstances this might be the result for a few employees, I am not persuaded that this will be the result overall. But if it is, whether just one or several employees are constrained to hold discussions with or be interviewed by the Permit Holders because of the escort requirement, then the mechanisms under the Act for resolving right of entry disputes can be activated. Without some probative evidence of the likelihood of the subject of the concern eventuating, the mere possibility that it might eventuate does not lend weight to a conclusion that the request is unreasonable.

[38] Fourth, the Permit Holders’ reliance on historical entry arrangements before April 2022 as demonstrating that the request since made is unreasonable is misplaced. The ATO accepted that previous arrangements with the Permit Holders did not fully comply with ‘Visitors to the ATO’ guidelines.²⁹ However, that different and less restrictive arrangements existed and the ‘Visitors to the ATO’ guidelines were not applied to the Permit Holders does not mean the

request currently made is unreasonable. Recently, in *Construction, Forestry, Maritime, Mining and Energy Union v Fair Work Ombudsman (Cross River Rail Appeal)*,³⁰ a Full Court of the Federal Court of Australia held that a sign-in and induction practice that was not insisted upon with respect to all contractors and visitors to a construction site did not deprive the requirement of its character as an OHS requirement applying to the premises within the meaning of s 491 of the Act.³¹ Nevertheless, a requirement that applies or is applied only selectively might more easily be impugned as one that is not genuinely calculated to reduce exposure to health or safety risks and so a request to comply might be said to be unreasonable.³² But here, there is no evidence to establish that the ‘Visitors to the ATO’ guidelines were not genuinely designed to reduce health and safety risks to the extent that it was not uniformly applied. Indeed, apart from Assistant Commissioner Keane’s lack of appreciation that the guidelines had an OHS purpose,³³ there is no evidence from which it might be concluded or inferred that the ‘Visitors to the ATO’ guidelines were not genuinely designed to reduce OHS risks to the extent that the guidelines were not uniformly applied to all visitors to the ATO premises in the past.

[39] However, there are other issues associated with the request, which make aspects of the request unreasonable. This is evident in the cross-examination of Assistant Commissioner Keane.³⁴ Although not specified in the request as earlier set out, it appears the case that the ATO expects the Permit Holders to arrange an escort to access the ATO premises, in part because the ATO provides union delegates with paid time for these activities.³⁵ The escort could be an ASU member and it is “expected [by the ATO] that given the [Permit Holders] are meeting with an ATO employee they may act as [the] escort for that period”.³⁶

[40] Further, it appears that if the Permit Holders have not “arranged an escort [the Permit Holders] won’t be provided access to the building”.³⁷ Once on the ATO premises and having been escorted to the agreed room in which discussions or interviews may be conducted, the Permit Holders cannot leave the meeting room unless escorted but whilst in the room an escort will not be required.³⁸ Thus, an escort will be required if one of the Permit Holders needs to use the bathroom.³⁹

[41] When these conditions are attached to the request, the request becomes unreasonable. The OHS requirement, the object of the compliance request, should be self-executing. By this, I mean that apart from the Permit Holders wearing the visitors passes and accompanying the escort to and from the agreed or default discussion/interview room or area of the ATO’s premises, no other action on the part of the Permit Holders should be required. That the Permit Holders should arrange for an escort, else be denied entry is plainly unreasonable.

[42] The notion that a union delegate is provided with time release to act as an escort as suggested by Assistant Commissioner Keane is frankly quite ridiculous. A delegate is entitled to reasonable paid time during their normal working hours to perform their union delegate role.⁴⁰ On no view could it be said that a delegate acting as an escort pursuant to the ‘Visitors to the ATO’ guidelines for a permit holder is performing their union delegate duties. A delegate is performing escort duties pursuant to the ATO’s policy. Any requirement or suggestion that to give effect to the ATO’s OHS requirement the escort should be a delegate arranged by the Permit Holders for that purpose is also unreasonable.

[43] Similarly, the notion that an ASU member should act as an escort is unreasonable. Discussions may only occur during the employee’s meal or other breaks. Consequently, for an

employee as well as a permit holder, time is of the essence, and so time which might be devoted to discussions is taken up with escort duties.

[44] Moreover, I consider that requiring the Permit Holders to be escorted to and from the bathroom or to and from a staff kitchen or meals area to make a cup of tea or coffee, is also unreasonable. This is because the ATO could simply dictate the route the Permit Holders must take to a room or area of the premises determined under s 492 of the Act, which deals with determining the location of discussions and interviews by a permit holder with relevant employees.

[45] As disclosed in the evidence recorded in the transcript extracted below,⁴¹ this approach is something that the ATO was prepared to trial.

“PN273 So I want to ask you about the trial that there were discussions between the ATO and the ASU about how right of entry might be exercised during the trial?---The trial - during the conciliation for this matter?

PN274 Yes, it's been - the ATO then agreed that Ms Tucker or I could be - would be able to go from a meeting room to the bathroom or kitchen unescorted?---Yes.

PN275 Why was the office - the ATO prepared to do that?---We're trying to find agreement on this matter, Jeff, and we would (indistinct) during conciliation.

PN276 Is it a breach of anything for the ATO to allow that to occur?---I understand that the proposal was for you and Ms Tucker to enter the bathroom and the lunch facilities using the primary corridors and not approaching work stations.

PN277 Yes, that's right. So from the ATOs perspective, it would - it was specifying the route we would have to follow to go from the meeting room to the bathroom or the kitchen, correct?---Yes.

PN278 And the route we were to follow was the corridors between the meeting room and the bathroom or the kitchen?---That's my understanding. I wasn't individually involved in those discussions.

PN279 Yes. And there was - it was also made clear that we, when doing that, we were not to walk into the area where the people are working at their desks?---That's my understanding, yes.”⁴²

[46] In the circumstances discussed above, I consider that the ATO’s request that when exercising a right of entry under the Act, the Permit Holders are, at all times while on ATO premises, to wear a visitors pass issued by the ATO and be escorted by an ATO employee or other person authorised by the ATO would be reasonable if the unreasonable aspects of (or more relevantly associated with) the request are removed or ameliorated as follows:

- if the Permit Holders exercise entry rights at the ATO’s premises, the ATO is to organise an escort in a manner that does not hinder, delay or obstruct the exercise of the Permit Holders’ entry rights; and

- once in an agreed or default room or area in which discussions or interviews with relevant employees are to take place, the ATO will not require the Permit Holders to be escorted to attend the bathroom, staff kitchen or meals area to make a cup of tea or coffee or get a glass of water. Instead, the ATO should specify the route that the Permit Holders are to take to and from the room or area and the relevant amenity. Any concern relating to the Permit Holders and arising from the requirement that ATO staff question people on ATO premises who are not wearing an authorised building pass or who are unescorted while wearing an escorted visitor's pass can be address by correspondence from the ATO to the Permit Holders explaining the exception and which may be produced by the Permit Holders if challenged.

[47] Once that is done, a request to comply with the OHS requirement is reasonable for the following reasons.

[48] *First*, because the requirement is consistent with the ATO's obligations under the WHS Act and the PSPF.

[49] *Second*, the key aspects apply to all visitors to ATO premises, including officials of other registered organisations exercising right of entry under Part 3-4 of the Act.⁴³ The CPSU is subject to the same requirements, and its permit holders appear to have exercised rights of entry while complying with the requirements on numerous occasions in 2023.⁴⁴

[50] *Third*, the Permit Holders are in substance seeking to be treated differently from all other visitors to ATO premises and provided no cogent reason why they ought to be exempt from an OHS requirement that applies to the premises.

[51] *Fourth*, save for the matters I have identified above as requiring removal or amelioration, the Permit Holders provide no evidence that their compliance with the OHS requirement would impede their capacity to hold discussions or interview relevant employees or would otherwise impede the exercise of their rights under Part 3-4 of the Act.

[52] I do not accept, as the Permit Holders contend that the ATO's requirements do not properly take into account fairness between the parties at least not as modified by me in [46] above. The modified requirement is reasonable for the reasons stated, it gives effect to the Permit Holders' obligation under s 491 of the Act without constraining the exercise of entry rights and allows the ATO to continue to meet its primary duty under the WHS Act. In the result, there is no unfairness visited on either party.

[53] It seems to me unnecessary to make any orders as I would expect the ATO and the Permit Holders will abide by the arrangements I describe at [46] above. I also do not propose to make any recommendations of the kind sought by the ATO. If there is an actual dispute about the operation of Part 3-4 of the Act relating to times of entry for the purposes of holding discussions, that should be properly articulated in an application the ATO brings under s 505. I also do not propose to make a recommendation sought by Ms Tucker, which concerned the destruction of certain of Ms Tucker's personal information held by the ATO. That subject matter is beyond the scope of disputes that may be brought under s 505 and it is therefore not appropriate to make a recommendation of the kind sought.

[54] The dispute is determined accordingly.



DEPUTY PRESIDENT

Appearances:

J. Lapidos, self-represented

A. Tucker, self-represented

C. Rawson, employee solicitor (Australian Government Solicitor's office) for the respondent

Hearing details:

2024

Melbourne

5 April

Final written submissions:

Applicants, 12 December 2023 and 5 March 2024

Respondent, 19 January 2024

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¹ See *Citibank Ltd v Federal Commissioner of Taxation* (1988) 16 ALD 486, (1988) 83 ALR 144 at 152; *Federal Commissioner of Taxation v Citibank Ltd* (1989) 20 FCR 403, (1989) 85 ALR 588 and *Darlaston v Parker and Others* [2010] FCA 771, (2010) 189 FCR 1 at 13-14 [44]

² *Australasian Meat Industry Employees Union v Fair Work Australia and Anor* [2012] FCAFC 85, (2012) 203 FCR 389 at 405 [56]

³ Exhibit 7 (witness statement of Scott Keane) at [1]; Transcript PN169

⁴ Exhibit 7 at [4]; see also Exhibit 6 (witness statement of Christopher Nascimento) at [3]

⁵ Exhibit 7, Annexure A; See also Exhibit 6, Annexure A

⁶ Transcript PN367

⁷ Exhibit 7 at [23]-[24], Annexure I

⁸ Exhibit 7, Annexure I

⁹ Transcript PN387-PN413

¹⁰ Transcript PN403

¹¹ Exhibit 7 at [5], Annexure B

¹² Exhibit 1 (witness statement of Amelia Tucker) at [23]-[26], Annexures F and G; Exhibit 2 (supplementary witness statement of Amelia Tucker), Attachment A; Exhibit 7 at [18]-[46], Annexures H-U

¹³ *Work Health and Safety Act 2011* (Cth), s 19

¹⁴ Exhibit 6, Annexure B

¹⁵ Exhibit 6 at [5]-[11]

¹⁶ Exhibit 4 (attachments A to C of the respondent's outline)

¹⁷ Protective Security Policy Framework

¹⁸ Exhibit 6 at [5]

¹⁹ Exhibit 6 at [5]-[6] and Annexures C and D

²⁰ Exhibit 6, Annexure C

²¹ Ibid

²² Exhibit 6, Annexure D

²³ Ibid

²⁴ Ibid

²⁵ Ibid

²⁶ Ibid

²⁷ Ibid

²⁸ Ibid

²⁹ Exhibit 7 at [20]

³⁰ [2024] FCAFC 1

³¹ Ibid at [31]

³² See *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Monash Freeway Widening Case)* [2020] FCA 1727 at [105]

³³ Transcript PN367

³⁴ Transcript PN220-PN272

³⁵ Transcript PN222

³⁶ Transcript PN224; see also PN246

³⁷ Transcript PN238

³⁸ Transcript PN253

³⁹ Transcript PN262-PN267

⁴⁰ *Australian Taxation Office (ATO) Enterprise Agreement 2024*, clause 13.7

⁴¹ There was no objection by the ATO to the receipt of evidence disclosing the content of discussions during conciliation

⁴² Transcript PN273-PN279

⁴³ *United Workers' Union v Woolworths Group Limited T/A Primary Connect* [\[2023\] FWC 602](#) at [71] and [85]

⁴⁴ Exhibit 7 at [18]