BORAL

CHAPTER 8.2

OVERVIEW AND SUMMARY

1. This chapter of the Final Submissions deals with Boral Limited and its related bodies corporate (together, **Boral**).

2. Boral supplies concrete and other products to persons within the construction industry throughout Australia and overseas. Boral Limited has four operating divisions: Boral Construction Materials and Cement, Boral Building Products, Boral Gypsum and Boral USA. It is a public company listed on the Australian Stock Exchange. In 2014 Boral's profit after tax was $171 million and it had earnings before interest and tax of $294 million.[1]

3. In Victoria, Boral operates a number of businesses through subsidiaries including:

   (a) Boral Resources (Vic) Pty Ltd (**Boral Concrete**), trading as Boral Concrete, which manufactures and supplies concrete for use in construction;

   (b) Alsafe Premix Concrete Pty Ltd, trading as Alsafe Pre-Mix Concrete (**Alsafe**), which manufactures and supplies concrete for use in construction;

   (c) Boral Bricks Pty Ltd, trading as Boral Bricks, which manufactures and supplies bricks for use in construction;

   (d) Boral Masonry Ltd, trading as Boral Masonry, which manufactures and supplies masonry for use in construction;

[1] Boral MFI-2, 24/10/14, Tab 1 (Boral Limited Annual Report to June 2014), p 4. This figure excludes significant items.

(e) Boral Australian Gypsum Ltd, trading as Boral Plasterboard, which manufactures and supplies plasterboard products for use in construction; and

(f) Boral Window Systems Ltd, trading as Boral Window Systems, which manufactures and supplies window products for use in construction.

4. The balance of this chapter is divided into four sections. The first section sets out a summary of the relevant evidence before the Commission. The second contains submissions concerning the findings which the Commission should make in respect of the evidence. The third contains submissions concerning the legal issues thrown up by the evidence. The final section discusses areas for reform.

5. In summary:

(a) Since February 2013, the Victorian Branch of the Construction and General Division of the Construction, Forestry, Mining and Energy Union (the CFMEU) has black banned Boral from CFMEU-controlled construction sites in greater metropolitan Melbourne, as part of an ongoing 'war' between the CFMEU and Grocon Pty Ltd and its related companies (Grocon).

(b) The CFMEU's black ban has continued notwithstanding injunctions obtained by Boral from the Supreme Court of Victoria in February, March and April 2013 restraining the CFMEU from carrying on the black ban.

(c) By engaging in the ban, the CFMEU contravened ss 45D and 45E of the Competition and Consumer Act 2010 (Cth) and ss 44ZZRF and 44ZZRJ of the Competition Policy Reform (Victoria) Act 1995 (Vic).

(d) On 23 April 2013, Mr John Setka, State Secretary of the CFMEU, and Mr Shaun Reardon, Assistant State Secretary of the CFMEU attended a meeting with Mr Paul Dalton and Mr Peter Head, officers of the Boral Group. During that meeting Mr Setka demanded that Boral cease supplying concrete to Grocon and threatened that if Boral did not stop supplying concrete to Grocon the CFMEU would continue to escalate its black ban, and ensure that Boral's overall market share was diminished.

(e) By making that demand, Mr Setka committed the criminal offence of blackmail contrary to s 87 of the Crimes Act 1958 (Vic). Mr Reardon also committed the offence of blackmail or, at the very least, aided and abetted Mr Setka and is liable as an accessory pursuant to s 323 of the Crimes Act 1958 (Vic).

SUMMARY OF EVIDENCE

6. This section provides a summary of the evidence before the Commission. That evidence principally consists of:

(a) the oral evidence given, and written statements provided, by officers of Boral (the **Boral witnesses**), and

(b) written statements provided by ten employees/officers of various of Boral's customers (the **Boral customer witnesses**).

7. Despite being provided with an opportunity to do so, the CFMEU chose not to cross-examine any of the Boral witnesses or the Boral customer witnesses or provide evidence to contradict those witnesses' evidence.

8. The extent to which the CFMEU's decision not to contradict the evidence before the Commission should have an impact upon the Commission's ultimate factual findings is addressed in Section C1 ([127] ff) below.

A1 Background

9. Boral is the exclusive supplier of wet concrete to Grocon.[2] Grocon is a privately owned corporate group which operates a large development, construction and funds management business throughout Australia.

10. As at early 2013, the CFMEU had been engaged in a bitter and long-running industrial dispute with Grocon.[3] From Grocon's perspective, the dispute appears to centre on

[2] Linda Maney, witness statement, 9/7/14, para 6.

Grocon's refusal to employ CFMEU union delegates (otherwise known as **shop stewards**) on its sites, and its decision to employ representatives chosen by Grocon management instead.[4] From the CFMEU's perspective, the dispute would appear to centre on its contention that Grocon will not recognise the right of the CFMEU to represent workers on industrial and safety matters.[5]

11. That dispute has given rise to separate proceedings in the Victorian Supreme Court and the Federal Court:

(a) In late August and early September 2012, Grocon alleged that misconduct by the CFMEU and some of its leaders took place at several Grocon building sites in Victoria, including the Myer Emporium site in Melbourne and the McNab Avenue site in Footscray.[6] On 17 August 2012, Grocon sought and was granted temporary injunctive relief in the Victorian Supreme Court against the CFMEU in relation to what was said to be an obstructive picket at the McNab Avenue site. That order was subsequently confirmed on 21 August 2012 and later extended on 22 August 2012 to prevent picketing of the Myer Emporium site.

(i) Subsequently Grocon filed in the Supreme Court Proceeding a number of summonses seeking orders that the CFMEU be punished for contempt. Grocon ultimately brought 30 charges of contempt against the CFMEU centring on allegations that the CFMEU disobeyed the Court's orders by picketing the Myer Emporium and McNab Avenue sites or procuring others to do so. On 24 May 2013, Cavanough J upheld each of the charges and made five findings of contempt.[7] In August 2013, his Honour made two further findings of contempt. On 31 March 2014, his Honour imposed penalties of $1.25

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[3] Paul Dalton, witness statement, 9/7/14, para 2; Linda Maney, witness statement, 9/7/14, para 6; *Grocon Constructors (Victoria) Pty Ltd v CFMEU* [2013] VSC 275, [100] (Cavanough J).

[4] See the findings in *Grocon Constructors (Victoria) Pty Ltd v CFMEU* [2013] VSC 275, [100] (Cavanough J).

[5] See the findings at *Grocon Constructors (Victoria) Pty Ltd v CFMEU* [2013] VSC 275, [100] (Cavanough J).

[6] See the summary recorded in *Grocon Constructors (Victoria) Pty Ltd v CFMEU* [2013] VSC 275 at [15] ff.

[7] *Grocon Constructors (Victoria) Pty Ltd v CFMEU* [2013] VSC 275.

million against the CFMEU.[8] The CFMEU appealed against his Honour's orders and an appeal was heard by the Victorian Court of Appeal on 25 and 28 July 2014. On 24 October 2014, the CFMEU's appeal was dismissed.[9]

(b) On 5 August 2012, following an investigation by Fair Work Building and Construction, the Director of Fair Work Building Industry Inspectorate commenced a proceeding in the Federal Court arising out of the CFMEU's conduct in relation to the picketing of the Myer Emporium and McNab Avenue sites. After a number of interlocutory applications,[10] that proceeding was heard by Tracey J in August 2014 and on 8 October 2014. Judgment is reserved.

12. The relevance of Boral to the dispute between Grocon and the CFMEU was explained in evidence before the Commission in this way:

> Grocon is a very large customer of Boral's. We supply Grocon's concrete exclusively and have done for some time. The CFMEU and Grocon were having a battle over control of Grocon's sites. Concrete is a critical path item for Grocon's builds and their business. It is a large component both structurally and dollar wise for their buildings. If the CFMEU was able to stop Grocon getting concrete from Boral this would have a significant impact on Grocon's business.
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> The reason this would be so damaging to Grocon is that a lot of the work we [i.e. Boral] do for Grocon is high strength concrete, which is very challenging. Not all suppliers can supply concrete at such a high level of technical specification. If Boral stopped supplying to Grocon, that would mean that Grocon would not be able to operate without a lot of difficulty.[11]

A2 Boral learns of the CFMEU's intention to implement black ban

13. In late 2012 Mr Paul Dalton, the Executive General Manager (Southern Region) for Boral Construction Materials & Cement, received a telephone call from Mr John Setka, State Secretary of the CFMEU. Mr Dalton's evidence was that Mr Setka said words to the effect: 'This is just a heads up that Boral's going to run into some trouble with this Grocon stuff. It's nothing personal'.[12]

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[8] *Grocon Constructors (Victoria) Pty Ltd v CFMEU (No 2)* [2014] VSC 134.

[9] *CFMEU v Grocon Contractors (Victoria) Pty Ltd* [2014] VSCA 261.

[10] See *CFMEU v Director of Fair Work Building Inspectorate* [2014] FCAFC 101.

[11] Linda Maney, witness statement, 9/7/14, paras 6–7.

[12] Paul Dalton, witness statement, 9/7/14, para 3; Paul Dalton, 9/7/14, T9.13–16.

14. Mr Dalton understood this to mean the high-profile dispute between Grocon and the CFMEU arising out of the Myer Emporium job in the Melbourne CBD.[13]

15. Mr Richard Lane, Senior Account Manager for Boral Concrete gave evidence that:

(a) On 14 February 2013 he received two phone calls from Boral customers advising that Boral Concrete had been black banned because of issues relating to Grocon.[14] These phone calls were from Mr Glen Kirkwood, manager at Drive Projects Pty Ltd (**Drive Projects**), and Mr Brett Young, General Manager at Anglo Italian Concrete (**Anglo Italian**). The occurrence of the latter call was corroborated by Mr Young in his statement to the Commission.[15]

(b) Later the same day, Mr Lane had a conversation with Mr Mark Milano, Sales Manager of Oceania Universal Paving Pty Ltd (**Oceania**) in which Mr Milano advised that Boral had been banned from a building project on the Cardinia Shire Offices at Officer.[16] The occurrence of that conversation was corroborated by Mr Milano in his statement to the Commission.[17]

(c) At 4 pm on the same day, Mr Lane had a conversation with Mr Wally Gorlin, the CFMEU shop steward at Meridian Construction Services Pty Ltd (**Meridian**). During that conversation, Mr Gorlin informed Mr Lane that the CFMEU had decided to ban Boral 'from all union controlled sites due to Boral's reluctance to support the union at the Grocon pour'.[18]

16. The evidence of Ms Linda Maney, General Manager Sales (Southern Region) for Boral Construction Materials and Cement was that on 14 February 2013 she advised Mr

[13] Paul Dalton, witness statement, 9/7/14, para 4.

[14] Richard Lane, witness statement, 9/7/14, paras 4–10.

[15] Brett Young, witness statement, 18/9/14, para 8.

[16] Richard Lane, witness statement, 9/7/14, paras 11–14;

[17] Mark Milano, witness statement, 18/9/14, paras 6–7.

[18] Richard Lane, witness statement, 9/7/14, para 21.

Dalton that a number of Boral sales employees had been told that the CFMEU had implemented a black ban on Boral supplying concrete to Melbourne construction sites.[19]

17. Mr Peter Head, General Manager, Boral Concrete Southern Region, gave evidence that a 'black ban' meant that Boral would not be permitted to supply concrete to any project where there was a CFMEU presence. This would be achieved by either stopping a truck carrying Boral concrete at the gate to the site, or if a truck had already gained entry to the site, by the CFMEU shop steward directing employees not to unload the concrete.[20]

18. On 15 February 2013 Mr Head received a telephone call at 10 am from Mr John Matthews, Production Manager of Boral Concrete in the Melbourne CBD. Mr Matthews told Mr Head that Boral was being banned from all construction sites because it was supplying concrete to Grocon.[21]

19. Mr Head immediately telephoned Mr Frank Tringali, one of the members of Boral's lorry owner drivers' committee, to find out if he had heard about the issue. Lorry owner drivers are individual drivers contracted by Boral to deliver concrete in trucks that are not owned by Boral.[22] During the call, Mr Tringali told Mr Head that his drivers were telling him that the CFMEU had banned Boral concrete deliveries from Monday (18 February 2013).[23]

20. Shortly thereafter at 11.30 am Mr Head received a telephone call from Mr Murray Billings, a fleet owner of approximately six agitator trucks, who contracts with Boral to provide transport services. Mr Billings said words to the effect:

> I have been told that we cannot deliver to the Oceania job in Officer, the Drive job at Swinburne Uni in Hawthorn, the Meridian job at Cragieburn shopping centre, or any of the Equiset jobs in the CBD. I can't understand what this has to do with us and it's not going to impact Grocon because they are going to get their concrete.[24]

[19] Paul Dalton, witness statement, 9/7/14, para 5.

[20] Peter Head, witness statement, 9/7/14, para 3.

[21] Peter Head, witness statement, 9/7/14, para 4.

[22] Peter Head, witness statement, 9/7/14, para 5.

[23] Peter Head, witness statement, 9/7/14, para 6.

[24] Peter Head, witness statement, 9/7/14, para 7.

21. Later that afternoon Mr Head spoke to Mr Ashley Martin, a lorry owner driver who contracts with Boral, in Errol Street, North Melbourne.[25] Mr Head's evidence was that Mr Martin asked him what was going on with the CFMEU ban on Boral concrete deliveries. Mr Martin stated, 'I spoke to the guys at Drive Projects today and they told me not to come back to site next week as no Boral trucks will be allowed on.'[26]

A3 CFMEU ban in operation

22. Mr Head gave evidence that on and from 18 February 2013 the following long-term customers of Boral ceased ordering concrete for ongoing major projects in the greater Melbourne metropolitan area:

    (a) Oceania;

    (b) Equiset Services Pty Ltd (**Equiset**);

    (c) Drive Projects; and

    (d) Meridian Construction Services Pty Ltd (**Meridian**).[27]

23. Mr Head's evidence was that in his experience with Boral he was unaware of any previous occasion where a customer had ceased ordering concrete from Boral mid-project and had switched to another supplier.[28]

24. Contemporaneous documents before the Commission also supported the existence of a CFMEU ban against Boral at this time:

    (a) An email from Ms Sheri Tarr, Regional HR Manager for Boral Construction Materials, copied to Mr Dalton on 14 February 2013 stated:

[25] Peter Head, witness statement, 9/7/14, para 8.

[26] Peter Head, witness statement, 9/7/14, para 8.

[27] Peter Head, witness statement, 9/7/14, para 9. See also Peter Head, 9/7/14, T:31; Richard Lane, witness statement, 9/7/14, para 19 (Meridian and Oceania long terms customers of Boral).

[28] Peter Head, witness statement, 9/7/14, para 9.

(i) CFMEU had a meeting today of members (shop stewards) and organisers, they were told that as of Monday Boral will be turned away from all CFMEU sites due to Boral providing concrete to Grocon for a Sunday pour on 10/2/13. … This information came from Meridian Concrete.[29]

(ii) The email also listed a number of Boral's customers who had been advised by the CFMEU of its intended action, including Drive Projects, Meridian, Anglo Italian, Equiset and Oceania.

(b) An email from Mr John Biondo, Business Manager at Alsafe to Mr Dalton on 18 February 2013 stated that Alsafe had lost approximately 50 m^3 in concrete orders over the next four days due to the ban.[30] The email also refers to Meridian receiving concrete from Pronto at 'Craigieburn SC' in excess of 100 m^3. Mr Dalton's evidence was that Pronto was a competitor of Boral's and that the reference to Craigieburn was a shopping centre at which, until that point, Boral had been supplying concrete to Meridian. The project was already underway at the time.[31] By 21 February 2013, it was estimated that Boral had lost 500 m^3 of concrete at the Craigieburn site.[32]

(c) A customer questionnaire completed by Mr Biondo records that Mr Steve Richardson and Mr Bepi Murer at Equiset told him that the shop steward at 'Lyonsville [scil Lionsville] – Pascoe Vale Road' told him that the CFMEU had instructed 'all their steward[s] to ban deliveries by Boral concrete and anyone affiliated tp [scil to] them including Alsafe'.[33]

25. The existence of the CFMEU ban against Boral at this time was also supported by the evidence of the Boral customer witnesses.

[29] Paul Dalton, witness statement, 9/7/14, p 25.

[30] Paul Dalton, witness statement, 9/7/14, p 19.

[31] Paul Dalton, 9/7/14, T10.41–11.27.

[32] Paul Dalton, witness statement, 9/7/14, p 30 (Email from Keith Hunt to Peter Head dated 21 February 2013).

[33] Paul Dalton, witness statement, 9/7/14, p 27.

A3.1 Oceania

26. Mr Mark Milano, Sales Manager and Director of Oceania, provided an unchallenged statement to the Commission. Prior to 2013 Boral was Oceania's preferred concrete supplier and, with the exception of a small family concreting project, Oceania used Boral exclusively for its concrete in 2012.[34] In 2012 Mr Milano began to review Oceania's concrete supply arrangements as he no longer wanted to have an exclusive concrete supplier.

Cardinia Shire Offices[35]

27. Mr Milano's evidence was that in September and October 2012 Oceania started worked on the Cardinia Shire Offices at Officer. That project required environmental concrete and Boral was engaged to supply its 'greenstar' concrete.

28. The evidence given was that in mid-February 2013, Mr Milano was contacted by Mr Linus Humphrey, the site supervisor, who told Mr Milano that he had been advised by the 'health and safety representative that we cannot use Boral on site, we have to use someone else'. Mr Milano called Mr Lane to ask what the issue was.

29. Mr Milano then spoke with the construction manager from Watpac to discuss the difficulty which would arise if he could not use Boral. The next day, the manager advised that 'you can use Boral for the vertical slabs and I am seeking dispensation to use Boral for the suspended slabs'. A few days later, the construction manager from Watpac advised that Oceania could still use Boral on the project as there was no other supplier of 'greenstar' concrete in the region.

Ferntree Gully Road[36]

30. In February 2013 Oceania was engaged on an office building on Ferntree Gully Road in Nottinghill. The job was almost complete, but a final pour was scheduled for a Saturday to complete some stairs. The afternoon before the pour was scheduled, Mr Milano received a call from Mr Humphrey, the supervisor of the site. Mr Humphrey said that

[34] Mark Milano, witness statement, 18/9/14, para 3. See also Peter Head, 9/7/14, T31.8–15.

[35] Mark Milano, witness statement, 18/9/14, paras 5–9.

[36] Mark Milano, witness statement, 18/9/14, paras 11–13.

the builder, Hansen Yuncken, had said to him, 'I have been told by the union that there are issues using Boral on the site.' Mr Milano understood the union to be the CFMEU.

31. Mr Milano telephoned Mr Lane who suggested the solution of supplying concrete through Alsafe. Mr Milano then rang the builder, Hansen Yuncken, to ask whether he could use Alsafe. The builder advised him that it should be okay to use Alsafe. Alsafe then supplied the concrete for the stairs the following day.

Tarneit Shopping Centre[37]

32. Oceania started work on the Tarneit Shopping Centre in March 2013. It had engaged Boral as the concrete supplier on the project.

33. Around late March or early April 2013, Mr Damien Milano – Mr Mark Milano's brother – called him from the site and said: 'The issue is spreading further, the organiser from the CFMEU has told me that we cannot use Boral on the site.' After this incident, Mr Milano decided to change Oceania's concrete supplier. He engaged Holcim (Australia), one of Boral's competitors, as he thought continuing with Boral may cause delays and, as a result, impact on project productivity.

Church Street, Richmond[38]

34. In about March 2013 Oceania started work on a project in Church Street, Richmond. Mr Humphrey advised Mr Milano that the same rumours relating to using Boral applied to this site. To begin with, Mr Milano engaged Boral to supply concrete through either Hanson, another of Boral's competitors, or Holcim (Australia). However, this became too onerous for Oceania. As Mr Milano did not want delays to the project to be caused by using Boral, he changed to Holcim (Australia) for the supply of concrete for the rest of this Project.

[37] Mark Milano, witness statement, 18/9/14, paras 14–16.

[38] Mark Milano, witness statement, 18/9/14, paras 20–22.

A3.2 Equiset

35. Mr Steven Richardson, formerly of Equiset, provided an unchallenged statement to the Commission. Mr Head's evidence was that Equiset was made up of people who had been long-term customers of Boral.[39]

36. Mr Richardson's evidence in relation to the origin of black ban was as follows:

> In February 2013, there was a buzz in the construction industry and on site in relation to a threatened ban by the CFMEU of Boral on construction sites in Melbourne. The feedback coming from sites was that there had been a meeting that the CFMEU shop stewards had attended at which the CFMEU organisers had discussed Boral.[40]

37. At this time Equiset was engaged as the head contractor on six projects in Melbourne. Alsafe was supplying concrete to three of these projects: 82 Flinders Street, 27 Little Collins Street and Lionsville Retirement Village in Essendon.

38. Mr Richardson first heard of the CFMEU's intention to impose a ban on Boral Concrete when he received a call on 15 February 2013 from one of Equiset's site managers. He was advised that the CFMEU shop steward employed by Equiset had said words to the effect of 'the CFMEU would not allow Boral on site.' Mr Richardson was also advised that the ban would extend to Alsafe.[41]

39. Mr Richardson decided to delay a pour at 27 Little Collins Street until more information could be obtained regarding the CFMEU ban. On Tuesday 19 February 2012 Mr Richardson had a phone conversation with Mr Elias Spernovasilis, a CFMEU organiser. Mr Spernovasilis neither confirmed nor denied the rumours that the CFMEU did not want Boral or Alsafe on Equiset sites. When Mr Richardson stressed that he was using Alsafe on the projects, and that the concrete mix was critical to the projects, Mr Spernovasilis said words to the effect of: 'you will be right.'[42]

40. The next day, Mr Richardson attended a concrete pour at the 82 Flinders Street project. The CFMEU shop steward said to him, 'Alsafe are not allowed by the CFMEU on site.'

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[39] Peter Head, 9/7/14, T31.24–26.

[40] Steven Richardson, witness statement, 18/9/14, para 3.

[41] Steven Richardson, witness statement, 18/9/14, para 6.

[42] Steven Richardson, witness statement, 18/9/14, para 10.

Mr Richardson responded that he was going to go ahead with the pour.[43] Equiset continued to use Alsafe on the projects. Both projects at 27 Little Collins and 82 Flinders Street required the concrete mixes to be of a consistent colour and strength over the 12 month period.

A3.3 Drive Projects

41. Mr Anthony Simpson, Managing Director of Drive Projects, provided an unchallenged written statement to the Commission. Drive Projects was a long-term established customer of Boral, and was placing regular orders for concrete up until 15 February 2013.[44]

42. Mr Simpson's evidence was that in about July 2012 Drive Projects commenced work on a construction project at Swinburne University in Hawthorn. Boral was engaged to supply concrete for the project. The project involved spending of approximately $1.4 million on concrete.[45]

43. Mr Simpson's evidence was that in around February 2013 Mr Glen Kirkwood (a project manager with Drive Projects) stated to Mr Simpson that 'there are problems with Boral and the CFMEU.'[46] Similar evidence was contained in the statement provided by Mr Steven Richardson, who at the time was acting as a consultant to Drive Projects in relation to the Swinburne University site. Mr Richardson's evidence was that he had attended a meeting with Mr Simpson and Mr Kirkwood in relation to using Boral at the site, and at this meeting Mr Kirkwood said that he had been told by Mr Phil Filado, the CFMEU shop steward, 'Don't use Boral on site'.[47]

[43] Steven Richardson, witness statement, 18/9/14, para 12.

[44] Peter Head, witness statement, 9/7/14, para 9.

[45] Anthony Simpson, witness Statement, 18/9/14, para 4.

[46] Anthony Simpson, witness statement, 18/9/14, para 5.

[47] Steven Richardson, witness statement, 18/9/14, paras 13–15.

44. Mr Simpson's evidence to the Royal Commission was that: 'The project had been handed over late to Drive Projects and the project could not afford any additional delays due to the Boral issue.'[48] Further, he stated:

> We then switched to Alsafe concrete in the period immediately after we found out that there was an issue with Boral. However, the message that we received from site was that the issues in relation to Boral would not be resolved in the short term and that Alsafe was not a viable alternative to avoid the issues.[49]

45. Mr Simpson received feedback from site personnel that 'the CFMEU would make life difficult for us on the Project if we used Boral. For these reasons Drive Projects decided not to take the risk of using Boral and looked for an alternate concrete supplier and/or solution.'[50] This evidence was corroborated by Mr Richardson's statement.[51]

A3.4 Anglo Italian Concrete

46. Mr Brett Young, General Manager of Anglo Italian Concrete (**Anglo Italian**), and Mr Michael Newitt, a site supervisor for Anglo Italian, each provided unchallenged written statements to the Commission. Anglo Italian purchases concrete from various concrete suppliers in Victoria.

47. Around July 2012 Anglo Italian was engaged as a subcontractor on the construction of a data centre at Radnor Drive, Derrimut.[52] Anglo Italian engaged Boral to supply concrete on the project as they required 'envirocrete'. Envirocrete is Boral's speciality and they had been engaged to supply concrete for the project on this basis.

48. In February 2013 Mr Michael Newitt, the site supervisor for the project, had a conversation with the CFMEU delegate, known as 'Herbie'. Herbie approached Mr Newitt to say that the union did not want Boral to supply the concrete and to ask whether Anglo Italian could use someone else.[53]

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[48] Anthony Simpson, witness statement, 18/9/14, para 7.

[49] Anthony Simpson, witness statement, 18/9/14, para 8.

[50] Anthony Simpson, witness statement, 18/9/14, para 9.

[51] Steven Richardson, witness statement, 18/9/14, para 18.

[52] Brett Young, witness statement, 18/9/14, para 4.

[53] Michael Newitt, witness statement, 18/9/14, paras 5–6.

49. Mr Young's evidence was that Mr Newitt rang Mr Young to advise that 'Boral trucks would not be allowed on site.' Mr Young's evidence was that Mr Newitt advised that he had been told this by 'Herb' who was passing on the instructions from his superiors at the CFMEU.[54]

50. Mr Young telephoned Mr Lane, his contact at Boral, to confirm whether Boral trucks would be allowed onto the project. A significant pour for a roof slab was due to occur on 21 February 2013 and confirmation was needed before this could go ahead.[55] Mr Lane was unable to confirm whether the Boral trucks would be stopped at the site. Accordingly, Mr Young's evidence is that his company was not willing to risk the possibility of the pour being interrupted and/or stopped and so decided to use Hanson to provide the concrete instead.[56] Mr Lane's evidence was consistent with Mr Young's account.[57]

51. Around 4 or 5 March 2013, Mr Lane contacted Mr Young to advise that Boral could again supply concrete to the site. Boral supplied the fourth and final pour for the roof slab on 6 March 2013.[58]

52. Around 24 April 2013, Mr Newitt was advised that the CFMEU did not want Boral delivering to the site. Herbie said words to the effect, 'I have spoken to my office and they said they are still not happy for us to use Boral.'[59] Accordingly, Anglo Italian completed the project using Hanson as its concrete supplier.[60]

A3.5 Kosta Concreting

53. Mr Darren Dudley and Mr Jaromir Misztak, a manager and foreman for Kosta Concreting respectively, each provided an unchallenged written statement to the Commission.

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[54] Brett Young, witness statement, 18/9/14, para 7.

[55] Brett Young, witness statement, 18/9/14, para 8.

[56] Brett Young, witness statement, 18/9/14, para 10.

[57] Richard Lane, witness statement, 9/7/14, paras 7–10.

[58] Brett Young, witness statement, 18/9/14, para 11.

[59] Michael Newitt, witness statement, 18/9/14, para 10.

[60] Brett Young, witness statement, 18/9/14, para 12.

54. Their evidence was that in early 2013 Kosta Concreting was engaged on a job in Elizabeth Street, Melbourne which involved the construction of a nine storey apartment building. Kosta Concreting had engaged Boral to supply the concrete for the project.

55. Mr Misztak's evidence was that in about February or March 2013 Lou, the CFMEU shop steward on the project, had said to him words to the effect of 'No Boral on site'.[61]

56. Mr Dudley's evidence was that in early April 2013 he was told by his boss Sam that Lou had told Sam words to the effect of 'You can't use Boral on site.'[62] Shortly after this, in a conversation Mr Dudley had with Lou, he discussed using Boral on site. Lou said to Mr Dudley words to the effect, 'use Boral if you like, but it will take you all day to unload one truck.'[63]

57. As Kosta Concreting was not willing to risk the possibility of trucks being turned away or stopped by the CFMEU or any delays to the Elizabeth Street Project, Kosta Concreting had to find an alternative concrete supplier.[64] This led Kosta Concreting to set up an account with HyTec, to whom they paid $8 more per cubic metre for concrete than they had paid to Boral.[65]

A3.6 Squadron Concrete

58. Mr Fabrizio Ubaldi, a manager for Squadron Concrete, provided an unchallenged written statement to the Commission. His evidence was that in early 2013 Squadron Concrete was engaged as a landscaping subcontractor on the Tower 8 Project at Lorrimer Street, Port Melbourne. The project was an apartment building being built by Mirvac. Alsafe was engaged by Squadron Concrete to supply concrete.[66]

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[61] Jaromir Misztak, witness statement, 18/9/14, paras 8–9.

[62] Darren Dudley, witness statement, 18/9/14, para 8.

[63] Darren Dudley, witness statement, 18/9/14, para 9.

[64] Darren Dudley, witness statement, 18/9/14, para 10; Jaromir Misztak, witness statement, 18/9/14, para 10.

[65] Darren Dudley, witness statement, 18/9/14, para 14.

[66] Fabrizio Ubaldi, witness statement, 18/9/14, para 3.

59. Towards the end of Squadron Concrete's work on the project, in around February 2013, the CFMEU shop steward on the project said to Mr Ubaldi 'there is an issue with companies associated with Boral Concrete and you shouldn't use them on site.' Mr Ubaldi's evidence was that:

> As I did not want any issues on site and did not want the CFMEU to cause any unnecessary delays to Squadron Concrete's works on site I decided to change to a different concrete supplier for [the] balance of Squadron Concrete's work on the Tower 8 Project. I did not want to take the risk that using Alsafe would cause issues with the CFMEU. I changed to Pronto for the following two orders of the remaining work of the Tower 8 Project.[67]

A3.7 S & A Paving

60. Mr Santi Mangano, Director of S & A Paving, gave an unchallenged statement to the Commission. Around 2013 S & A Paving engaged Alsafe to supply concrete on the Hawthorn Aquatic Centre Project. The CFMEU delegate said to Mr Mangano words to the effect: 'if you use Boral on site, we are going to check up on the trucks.'[68] Mr Mangano's evidence was that as he could not afford any delays on site, or to stop and start concrete pours, he changed suppliers for the remainder of the project.[69]

A4 CFMEU's ban expands beyond Boral Concrete

61. The evidence before the Commission indicates that in late March 2013 the CFMEU's black ban of Boral Concrete in Melbourne widened to Boral more generally.

62. Mr Iain Weinzierl, Account Manager for Boral Quarries and Boral Recycling in Melbourne, gave the following unchallenged evidence:[70]

(a) At approximately 7.50 am on 27 March 2013, Mr Weinzierl was informed by Mr Robert Gillespie (Sales Service Centre Manager, Boral Concrete and Quarries) that two truckloads of crushed rock had been turned away at the Costco shopping centre at Market Street, Ringwood (**Costco Project**) due to the CFMEU ban. Boral had been engaged by CDL Constructions Pty Ltd (**CDL**) to supply crushed rock to the project.

[67] Fabrizio Ubaldi, witness statement, 18/9/14, para 5.

[68] Santi Mangano, witness statement, 18/9/14, para 4.

[69] Santi Mangano, witness statement, 18/9/14, para 5.

[70] Ian Weinzierl, witness statement, 9/7/14, paras 3–8.

(b) Following this incident, Mr Weinzierl became concerned that there may have been similar incidents affecting other customers and so decided to contact Civi Works, a major customer of Boral Quarries and Boral Concrete.

(c) At approximately 9.30 am on 27 March 2013, Mr Weinzierl contacted Mr Jay Wilks, Senior Foreman at Civi Works to discuss what he had heard about the CFMEU bans of Boral. Mr Wilks advised that the CFMEU shop steward on a project which Civi Works was starting work on in Richmond for Kane Constructions had told Civi Works not to use Boral Asphalt or Boral Concrete. Mr Weinzierl was informed by Mr Wilks that the ban was a complete ban of Boral:

> It is a complete ban – the shop steward from Kane told me that the CFMEU will apply maximum force to black ban all Boral products on site – Boral Building Products, Quarries, Concrete and Asphalt. We have to use alternative suppliers.

(d) Mr Weinzierl was concerned about the exchange and arranged to meet Mr Wilks the next day. The conversation included the following exchange:

Wilks:	My understanding is that the CFMEU shop stewards have said to all the larger civil contractors in Melbourne and the major commercial builders in Melbourne to stay away from all Boral products on CFMEU sites and to cancel all supply agreements with Boral. Boral's name is mud with the CFMEU at the moment. It is all in relation to the Grocon saga.
Weinzierl:	What do you understand that to mean – we thought the issue was limited to Boral Concrete?
Wilks:	No, it relates to all of Boral – Boral Quarries, Concrete, Asphalt and Plasterboard. Anything that is delivered in a Boral truck and is identified as a Boral product.

63. Mr Weinzierl's evidence concerning the Costco Project was corroborated by the unchallenged witness statement of Mr Ben Cifali, a site engineer for CDL at the Costco Project. His evidence was that in late March 2013 CDL ordered two truckloads of crushed rock from Boral for delivery the following morning. That morning, Mr Cifali witnessed the Boral trucks being refused entry to the site by the CFMEU shop steward. He spoke to the shop steward who stated: 'No Boral trucks onsite.' From this point on, CDL Constructions ordered crushed rock from a different supplier.[71]

[71] Ben Cifali, witness statement, 18/9/14, paras 2–7.

A5 Boral commences legal proceedings[72]

64. On 26 February 2013, shortly after the ban came into effect, Boral Concrete and Alsafe commenced proceedings in the Supreme Court of Victoria against the CFMEU seeking damages and final injunctions (**Supreme Court Proceeding**).

65. By summons filed the same day, Boral sought interlocutory injunctions including an injunction, which in general terms would restrain the CFMEU from procuring or advising any person employed or engaged to perform concreting work at specified construction sites not to perform that work or to perform it otherwise than in the manner in which it would customarily be performed. The specified construction sites included:

(a) the Craigieburn Shopping project site being carried on by Meridian;

(b) the 27 Little Collins, 82 Flinders Lane and 'Lyonsville' [scil Lionsville] Retirement Village project sites being carried on by Equiset;

(c) the Tower 8 project site being carried on by Squadron Concrete;

(d) the Swinburne University project site being carried on by Drive Projects;

(e) the Radnor Drive, Derrimut project site being carried on by Anglo Italian; and

(f) the Cardinia Shire Offices and Ferntree Gully Road project sites being carried on by Oceania.

66. On 28 February 2013, Hollingworth J granted the interlocutory relief sought. Although the CFMEU had been served, it chose not to appear.

67. On 7 March 2013, Hollingworth J confirmed and extended the injunction beyond the specified construction sites to any location in Victoria. Again, the CMFEU did not appear.

[72] See generally Boral MFI-1, 18/9/14.

68. On 5 April 2013, Hollingworth J made orders joining a number of related Boral entities to the proceeding and grating Boral leave to amend its Statement of Claim. Her Honour also granted a further extension of the injunction by expanding its reach beyond concrete. The effect was to restrain the CFMEU from carrying on a black ban in Victoria of any of Boral products. Once again, the CFMEU did not appear.

69. Following the making of the injunctions, Mr Dalton sent a letter on 11 April 2013 to Boral's customers in the Victorian region informing customers of the court's orders.[73] Following that letter, Mr Dalton received a number of replies. One of the substantive replies from a Boral customer included the following:

> Unfortunately with the way the Union plays their game, we are still left in a crappy position regardless of court orders or decisions.
>
> We have specifically been told by Union Shop Stewards on two projects that we cannot use Boral.
>
> … We may have written protection from the courts but the final power still belongs to the Union.[74]

70. There was other evidence before the Commission to show that notwithstanding the court's order, the CFMEU continued its ban at this time. For example, an email from Ms Maney to Mr Dalton on 15 March 2013 recounted: 'We have had two instances today of Shop Stewards telling customers that "Boral are banned". In one case (Civiworks) 1 m^3 of concrete was cancelled on-route by the customer (the customers instructed us to dump the load and that we will pay for the concrete).'[75] See also the evidence provided by the Anglo Italian witnesses (see [51]–[52] above) and the Kosta Concreting witnesses (see [56]–[57] above).

A6 Boral's meeting with the CFMEU

71. In April 2013, Mr Head discussed with Mr Dalton the possibility of speaking to CFMEU officials to resolve the situation which had arisen.

[73] Paul Dalton, witness statement, 9/7/14, p 46.

[74] Paul Dalton, witness statement, 9/7/14, p 52.

[75] Paul Dalton, witness statement, 9/7/14, p 45.

72. On 22 April 2013 Mr Head had lunch with Mr Vin Sammartino, a director of Hacer Group Pty Ltd (**Hacer**), and a person with many contacts in the construction industry. Mr Head raised the black ban and the difficulties it was causing Boral.[76]

73. During the lunch, Mr Sammartino phoned Mr Reardon, Assistant State Secretary of the CFMEU. After the call ended, Mr Head stated that Mr Sammartino said:

> the CFMEU's issue is with Daniel Grollo and John Van Camp of Grocon…it's now personal between Grollo, Van Camp and Setka.[77]

74. Mr Sammartino suggested that Mr Head provide this information to Mr Dalton. He said that he would arrange for Mr Setka and Mr Dalton to have a discussion. Mr Sammartino phoned Mr Head later that day, advising that the CFMEU were keen to talk off the record.[78]

75. On 23 April 2013 Mr Dalton and Mr Head met Mr Reardon and Mr Setka to discuss these issues. Mr Dalton and Mr Head's respective recollections in relation to the 23 April 2013 meeting appear at paragraphs 22–46 (Mr Dalton) and 20–47 (Mr Head) of their respective statements. Their evidence is unchallenged. According to Mr Dalton's statement the meeting lasted for around 45 minutes.[79]

76. Mr Reardon and Mr Setka advised that the discussion was off the record. According to the statements of Mr Dalton and Mr Head, no one stated at any stage that the conversation was without prejudice.[80] However, Mr Head's evidence was that at one stage Mr Reardon said 'I would be happy if the legal stuff stopped but Setka does not give a stuff'.[81] Mr Setka also made an indirect reference to the proceedings by Boral against the CFMEU by saying that Boral's lawyers in the proceedings were 'no good'.[82]

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[76] Peter Head, witness statement, 9/7/14, para 21.

[77] Peter Head, witness statement, 9/7/14, para 25.

[78] Peter Head, witness statement, 9/7/14, paras 27–28.

[79] Paul Dalton, witness statement, 9/7/14, para 44.

[80] Paul Dalton, witness statement, 9/7/14, para 29; Peter Head, witness statement, 9/7/14, para 38.

[81] Peter Head, witness statement, 9/7/14, para 38.

[82] Paul Dalton, witness statement, 9/7/14, para 29.

77. According to Mr Dalton's statement to the Royal Commission, Mr Setka did most of the talking at the meeting. Mr Setka mentioned the CFMEU's planned day of action for 30 April, which was being held to protest about fatalities on Grocon sites.[83]

78. Mr Setka also stated that there was a deep feeling in the CFMEU against Mr Daniel Grollo, then Chief Executive of Grocon and Mr John Van Camp, then head of Grocon's Safety, Systems and Industrial Relations Divisions.[84]

79. Mr Dalton stated that Mr Setka said:

> Concrete supply is like an intravenous drug. Builders can't survive without it.
>
> We're at war with Grocon and in a war you cut the supply lines.
>
> Boral Concrete is a supply line to Grocon.[85]

80. Mr Head gave similar evidence: Mr Setka said words to the effect of 'the CFMEU is at war with Grocon' and 'if you want to starve the enemy you cut their supply lines … we have not started'.[86]

81. Mr Dalton also recalls Mr Setka stating:

> The CFMEU has limited resources so we will focus on 'the Green and Gold'.
>
> We will impact you more and more. Truck emissions testing will be the next phase of the action the CFMEU will take against Boral.
>
> We've been fighting with one arm behind our back and we're willing to significantly ramp up our campaign.[87]

82. Mr Dalton stated that he understood Mr Setka's reference to the 'Green and Gold' to refer to Boral, given that these are Boral's corporate colours and the company is commonly referred to in the industry by this name.[88]

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[83] Paul Dalton, witness statement, 9/7/14, para 31.

[84] Paul Dalton, witness statement, 9/7/14, para 33.

[85] Paul Dalton, witness statement, 9/7/14, para 35.

[86] Peter Head, witness statement, 9/7/14, para 42.

[87] Paul Dalton, witness statement, 9/7/14, para 36.

[88] Paul Dalton, witness statement, 9/7/14, para 37.

83. Mr Setka then said that, if Boral did not cooperate with the CFMEU, they would target membership of its concrete batchers. Concrete batchers are employed at Boral's plants and are responsible for mixing the raw materials for the various grades of concrete that Boral supplies. Boral's concrete batchers are generally covered by the Australian Workers' Union.[89]

84. Mr Head's evidence was that during the meeting Mr Setka said words to the following effect:

> Just stop supplying Grocon for two weeks and this will go away.
>
> How about we all have a bit of fun and just stop the Grocon trucks at the plant and let the other trucks through?

85. Mr Dalton's evidence was similar. He stated that, during the meeting, Mr Setka said words to the following effect:

> All you [Boral] have to do is stop supply to Grocon for a couple of weeks.
>
> We can facilitate this by blockading your concrete plants and stopping supplies for Grocon directly. No one would have to know that you have stopped supply.

86. Mr Dalton's evidence was that he advised Mr Setka that Boral would not be doing any deals with the CFMEU and would continue to support Grocon.[90] Mr Setka advised that:

> All wars end and, once peace is established, the CFMEU will be at the table to divide up the spoils. The CFMEU will decide who gets what, and what market share Boral will get.[91]

87. Mr Head's evidence about what Mr Setka said was similar: 'At the end we will be divvying up the spoils and we'll decide who supplies who. Grocon won't give a shit about Boral at that point.'[92]

88. Immediately after the meeting, both Mr Dalton and Mr Head took notes of the meeting which were in evidence before the Commission. Their accounts were also corroborated by the oral evidence of Mr Mike Kane, CEO of Boral Ltd:

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[89] Paul Dalton, witness statement, 9/7/14, para 39.

[90] Paul Dalton, witness statement, 9/7/14, para 41.

[91] Paul Dalton, witness statement, 9/7/14, para 42.

[92] Peter Head, witness statement, 9/7/14, para 45.

> I was asked as to what would our position be, because we were being asked to stop supplying Grocon by this union, and I informed the management of the Victorian operations that we do not take orders from anyone as to who our customers are and that if we were going to have this union tell us who our customers were we should give them the keys of the operation and let them run the business. But we weren't doing that, so the answer was no, you supply your customers, you stick with your commitments and that was the way we proceeded.[93]

A7 Further steps taken by Boral in response to the ban[94]

A7.1 Supreme Court Proceeding

89. On 20 May 2013, Boral obtained default judgment on its Amended Statement of Claim with the CFMEU to pay damages to be assessed. The Amended Statement of Claim articulated causes of action for the torts of intimidation and conspiracy.

90. On 22 August 2013, Boral filed a summons in the Supreme Court Proceeding seeking orders that the CFMEU be punished for contempt. The statement of charges alleged that on 16 May 2013 Mr Joseph Myles had engaged in a blockade of a Regional Rail Link construction site at Joseph Street, Footscray, such conduct being said to be in contravention of the injunction granted on 5 April 2013. It was further alleged that the CFMEU was in contempt by failing to publish a statement on the CFMEU's webpage setting out certain matters required by Hollingworth J's orders.

91. On 9 September 2013, the CFMEU filed a Notice of Appearance in the Supreme Court Proceeding, more than 6 months after the proceeding was commenced.

92. On 14 October 2013, Boral filed a summons for assessment of damages (at that time, Boral was in a position to quantify its loss in relation to projects affected by the black bans in early to mid–2013).

93. On 8 November 2013, the CFMEU made an application to set aside the default judgment which had been entered on 20 May 2013. The CFMEU's application to set aside default judgment was heard by Derham AsJ in the Supreme Court of Victoria on

[93] Mike Kane, 9/7/14, T:57.15.

[94] See generally Boral MFI-1, 18/9/14.

30 January 2014. On 10 September 2014 the Court dismissed the CFMEU's application to set aside the default judgment.[95]

94. On 23 September 2014 the CFMEU filed a Notice of Appeal appealing Derham AsJ's decision to the Trial Division of the Supreme Court.[96] There are only two grounds of appeal. The first is a novel ground that, despite copious contrary authority, the tort of intimidation does not exist in Australian law. The second ground is that Derham AsJ, in refusing to set aside the default judgment, erred in the exercise of his discretion.

95. In relation to the summons seeking relief for contempt:

(a) On 4 September 2013, the Attorney-General for Victoria applied to be joined or to intervene in relation to the contempt summons. That application was heard by Digby J on 19 September 2013 and on 28 October 2013 Digby J granted leave to the Attorney-General to be joined as a party.[97] On 11 November 2013, the CFMEU sought leave to appeal from Digby J's order. On 13 December 2013, the Victorian Court of Appeal heard and dismissed the CFMEU's application for leave to appeal.[98]

(b) On 2 October 2013, the Boral parties applied for discovery against the CFMEU. On 23 October 2013, Daly AsJ refused orders for discovery. On 1 November 2013, the Boral parties appealed against Daly AsJ's decision. That appeal was heard by Digby J on 29 January 2014 and allowed on 25 March 2014.[99] On 8 April 2014, the CFMEU applied for leave to appeal Digby J's decision ordering discovery. On 24 October 2014, the Victorian Court of Appeal delivered judgment refusing the CFMEU leave to appeal.[100]

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[95] See *Boral Resources (Vic) Pty Ltd v Construction, Forestry, Mining and Energy Union* [2014] VSC 429.

[96] Boral MFI-2, 24/10/14, Tab 3.

[97] *Boral Resources (Vic) Pty Ltd v CFMEU* [2013] VSC 572.

[98] *CFMEU v Boral Resources (Vic) Pty Ltd* [2013] VSCA 378.

[99] *Boral Resources (Vic) Pty Ltd v Construction, Forestry, Mining and Energy Union* [2014] VSC 120.

[100] *CFMEU v Boral Resources (Vic) Pty Ltd* [2014] VSCA 261.

A7.2 Involvement of regulators

96. In April 2013 Boral brought the CFMEU's conduct to the attention of the Australian Competition and Consumer Commission (**ACCC**). Mr Kane's evidence to the Commission was that as at 7 July 2014 the ACCC was conducting a formal investigation into these issues.[101] It would appear that this investigation is continuing.

97. In connection with that investigation, on 27 June 2013 the ACCC issued the CFMEU with a notice under s 155(1)(c) of the *Competition and Consumer Act 2010* requiring it to produce certain documents in relation to possible contraventions of s 45D of that Act. The ACCC subsequently issued notices to the CFMEU and its proper officer, Yorick Piper, alleging that the CFMEU knowingly furnished false or misleading information to the ACCC.

98. In June 2013, Boral brought the CFMEU's conduct to Fair Work Building and Construction's attention. Mr Kane gave evidence that as at 7 July 2014 Fair Work Building and Construction was conducting a formal investigation into these issues.[102] It would appear that this investigation is continuing.

99. On 21 May 2014, the Director of the Fair Work Building Industry Inspectorate commenced a proceeding in the Federal Court against the CFMEU and Mr Joseph Myles for pecuniary penalties for alleged contraventions of the *Fair Work Act 2009* (Cth) (**Federal Court Proceeding**). The contraventions are said to arise from the alleged blockade of the Regional Rail Link construction site at Joseph Street, Footscray on 16 May 2013. The CFMEU and Mr Myles have applied to stay the Federal Court Proceeding.

A8 Continuation of the ban by the CFMEU

100. The evidence before the Commission is that, notwithstanding the injunctions obtained by Boral in the Supreme Court Proceeding, the CFMEU ban has largely continued.

[101] Mike Kane, Letter to Royal Commission, 9/7/14, p 6.

[102] Mike Kane, Letter to Royal Commission, 9/7/14, p 6.

A8.1 Oceania – Williams Landing

101. In early February 2014, Boral successfully quoted for a job to supply concrete to Oceania at the Williams Landing Shopping Centre Project. Hacer was the builder on the project.

102. Mr Lane gave evidence that at some stage after Boral was awarded the job, Mr Mark Milano spoke to him, saying:

> I have met with Guy, the CFMEU Shop Steward on the site. He said to me that Boral is banned from the job. I pushed back and told him that Boral gives me the best commercial outcomes as I have based my pricing for the job on your offer to me based on our long term trading arrangements. Guy said he'd check with the CFMEU organiser, Drew McDonald. He later came back to me and told me that McDonald said there is no way Boral is allowed on this site.[103]

Mr Lane gave an account of this conversation to Ms Maney, who sent an email to Mr Dalton on 5 March 2014 summarising Mr Lane's account at that time. The account in that email is consistent with Mr Lane's evidence.[104]

103. Boral decided to offer an incentive to Oceania of approximately $20,000 worth of building material if Oceania could convince Hacer to allow Boral to supply Oceania at the Williams Landing Shopping Centre.[105] Mr Sammartino of Hacer told Mr Milano that he needed to speak with Mr Shaun Reardon of the CFMEU.[106]

104. Ultimately, Mr Milano attended a meeting with Mr Reardon on 4 March 2014 at which Mr Milano put his position to Mr Reardon and Mr Reardon said words to the effect 'ok, let me think about it'. Mr Lane's evidence, which is supported by Ms Maney's email of 5 March 2014, is that Mr Milano reported that at that meeting Mr Reardon said words to the effect of:

> Boral will go down. By going legal, Boral has put the spotlight on the Union, costing us money. Boral will pay for this.

[103] Richard Lane, witness statement, 9/7/14, para 29.

[104] Linda Maney, witness statement, 9/7/14, p 12.

[105] Richard Lane, witness statement, 9/7/14, para 30.

[106] Richard Lane, witness statement, 9/7/14, para 31; Mark Milano, witness statement, 18/9/14, para 27.

Leave it with me. I'll be back to you before Thursday.[107]

105. Mr Reardon later confirmed that it was permissible for Oceania 'to use Boral on the Williams Landing job'.

A8.2 BRC Piling – Olympic Park

106. Mr Dalton gave evidence that on 1 April 2014 he was advised that BRC Piling (**BRC**) had cancelled an order of concrete at Olympic Park 'because of union issues.'[108] He instructed Mr Lane to initiate the same process that Boral had adopted for Williams Landing to try to avoid the CFMEU's black ban.[109] BRC had been a customer of Boral's for around 15 years and the relationship had developed over the period from around January 2013 to a point where BRC buys approximately 90% of its concrete from Boral.[110]

107. However, after further consideration, Boral calculated that it was not feasible to offer a discounted rate of $136 per cubic metre to BRC, given the low volume of the job.[111] BRC engaged Boral's competitor, Holcim, for the Olympic Park project.

A8.3 BRC Piling – Werribee Plaza

108. Around one week later, the same issue arose again with BRC on the Werribee Plaza project.[112] BRC had won the retention pile contract at the project.[113] Mr Dalton gave evidence that Mr Craig Boam, the Director of BRC, said to him: 'If you give us that special rate for the Werribee Plaza project, we'll do our best to keep Boral on site there.'[114] Given BRC's support, Boral decided to offer the discounted rate of $136 per cubic metre to BRC for this project in order to win the work.[115]

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[107] Richard Lane, witness statement, 9/7/14, para 32.

[108] Paul Dalton, witness statement, 9/7/14, para 56.

[109] Paul Dalton, witness statement, 9/7/14, para 57.

[110] Richard Lane, witness statement, 9/7/14, para 35.

[111] Paul Dalton, witness statement, 9/7/14, para 63.

[112] Paul Dalton, witness statement, 9/7/14, para 65.

[113] Richard Lane, witness statement, 9/7/14, para 36.

[114] Paul Dalton, witness statement, 9/7/14, para 65.

[115] Paul Dalton, witness statement, 9/7/14, para 66.

109. On 9 April 2014, BRC advised Boral that it had won the job to supply concrete for the project.[116]

110. However, Mr Lane and Ms Maney gave evidence of conversations they each had with Mr Boam on 15, 16 and 17 April 2014 to the effect that the CFMEU and Straightline Excavations (BRC's customer) had applied pressure on Mr Boam to discontinue Boral's services.[117]

111. On 17 April 2014 Mr Boam ordered six cubic metres of concrete to be delivered at 2 pm the same day. The concrete was delivered and poured apparently without incident.[118]

112. On 23 April 2014 Mr Lane and Ms Maney met with Mr Boam and asked about the issues on the Werribee Plaza site.[119] Mr Boam advised that Mr Tarkan Gulenc, a director of Straightline, had told him to source another supplier by Monday. Despite their requests that he push back against the CFMEU's demands, Mr Boam stated that his company could not afford the backlash or adverse effects from the CFMEU. During the meeting, Mr Boam said:

> Straightline is my client and they've told us to find another supplier straight after Easter because the union has put that much pressure on them. …
>
> [Drew] McDonald has been on site and has instructed us not to used Boral. He's one of the union organisers and the boss of the Probuild shop steward on the project.[120]
>
> As an alternative, the Boral representatives recommended that BRC consider using Alsafe as a substitute supplier.

113. Mr Boam telephoned Mr Lane later that day, advising that Straightline had agreed to allow Alsafe on site. He placed a to-be-confirmed order for 2 pm on Monday 28 April 2014.[121]

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[116] Paul Dalton, witness statement, 9/7/14, para 67.

[117] Linda Maney, witness statement, 9/7/14, paras 28–44; Richard Lane, witness statement, 9/7/14, paras 50–53. See also Linda Maney, witness statement, 9/7/14, p 16 (Email from Linda Maney to Paul Dalton).

[118] Linda Maney, witness statement, 9/7/14, para 46; Richard Lane, witness statement, 9/7/14, para 58.

[119] Linda Maney, witness statement, 9/7/14, paras 47–62; Richard Lane, witness statement, 9/7/14, paras 60–68.

[120] Richard Lane, witness statement, 9/7/14, paras 64 and 66.

[121] Linda Maney, witness statement, 9/7/14, para 63; Richard Lane, witness statement, 9/7/14, paras 68–69.

114. On 28 April 2014 Mr Lane phoned Mr Boam several times, attempting to confirm the job which was due to go ahead that afternoon.[122] At 2.10 pm, Mr David McKerrell from BRC Piling called Mr Lane and said words to the effect of:

> It's all off. They won't allow Alsafe here either and we've got to now find another supplier. You've given us an excellent rate here, it's going to be hard for us to get that rate anywhere else.[123]

A8.4 Town & Country – Werribee Plaza

115. Town & Country, a Ballarat-based concreting company, is a longstanding customer of Boral.[124] Town & Country had won the basement structural concrete contract for the Weribee Plaza project.

116. At the beginning of March 2014, Town & Country contacted Boral and requested a quote for 4000 m^3 of concrete for the Weribee Plaza project. On 14 April 2014, Mr Neil Phillips, Boral's sales representative for Town & Country, had a conversation with Mr Liam Kinniburgh, part owner of Town & Country, during which Mr Kinniburgh said:

> I have an issue with the Probuild shop steward on site. He asked me what concrete we would be using and when I said Boral he said 'no way will Boral be on this site, they are suing us. If you push ahead with Boral expect trouble and hold ups on site'. I told him we would be using Boral.

117. On 1 May 2014 Mr Kinniburgh had a phone conversation in which he told Mr Phillips that Town & Country would not be ordering from Boral at the Werribee Plaza site:

> Phillips: How is Werribee looking?
>
> Kinniburgh: How do I put this, I have to be very careful what I say here, well, good for me but not for your guys.
>
> Phillips: Why?
>
> Kinniburgh: Well the obvious, the same reason why the piling mob can't use you guys.[125]

118. The following day, they met for lunch to discuss the situation. A subsequent email sent from Mr Phillips to Ms Maney outlines the conversation. In it, Mr Phillips notes that

[122] Richard Lane, witness statement, 9/7/14, paras 73–74.

[123] Richard Lane, witness statement, 9/7/14, para 77.

[124] Paul Dalton, witness statement, 9/7/14, para 76.

[125] Neil Phillips, witness statement, 9/7/14, para 33 and p 34 (Email from Neil Phillips to Lind Maney dated 1 May 2014).

Mr Kinniburgh said to him words to the effect: 'there are witnesses to the Union telling me that Boral is not to be on the site, but I do not want to be involved in any way with this matter.'[126]

A9 Effect of the ban on Boral

119. Mr Kane's evidence was that since the start of the secondary boycott, Boral estimates it has suffered a loss in earnings (before interest and tax) and in legal costs totalling approximately $8 million to $10 million to the end of June 2014.[127] His evidence was that as at 30 June 2014, there were 80 CFMEU controlled construction projects underway in Melbourne, Boral was only supplying concrete to five projects.

120. Further, in relation to construction projects in Melbourne exceeding $50 million in value, Boral had seen a decline in its market share from around 35–40% in the 2011–2013 financial years to 9% in the 2014 financial year, and a decline in requests for quotes from around 70–80% in the 2011–2013 financial years to 27% in the 2014 financial year.[128]

121. In addition, Boral's Melbourne concrete plant had experienced a 35% reduction in capacity over the period of the ban and Boral's lorry owner drivers had experienced an average 18.4% reduction in earnings for the three half year periods between 1 January 2013 and 30 June 2014 compared to the preceding half year period.[129]

122. None of this evidence was challenged.

123. In his evidence at the public hearing, Mr Kane summarised the impact of the CFMEU's black ban on Boral. He said, they had:

> the ability to stop us, not only from delivering immediately onto many of these sites, an unheard of thing in the concrete world, that you could stop mid project and switch out concrete suppliers. But then, once they were able to effect that result, they were able to intimidate our

[126] Neil Phillips, witness statement, 9/7/14, p 34.

[127] Mike Kane, Letter to Royal Commission, 9/7/14, p 3.

[128] Mike Kane, Letter to Royal Commission, 9/7/14, p 15.

[129] Mike Kane, Letter to Royal Commission, 9/7/14, pp 4–5.

> customer base to the point where we were no longer being solicited to bid on projects in this CBD context and high rise crane construction projects.[130]

124. In addition, he stated that in his 41 or 42 years' experience in the construction markets and building products and materials industry:

> I've never seen a situation where you win work, you book it, you plan for it, you're ready to proceed, and then you're told by your supplier that they can't use you, not because there's a quality issue or anything with our work or our products, it's because a third party has told them that they're no longer allowed to use us. It's unheard of.[131]

125. In early June 2014 Ms Maney and the sales team prepared a spreadsheet noting the status of each of Boral's key customers.[132]

126. The sales team made phone calls to each of the customers with whom they had a regular relationship. The spreadsheet records a number of comments regarding customers' reluctance to use Boral due to the CFMEU situation. These include: 'Will use Boral on Non Union sites. Will try on Union jobs'; 'Will not use Boral as Pronto do not have the Union checking their trucks'; 'Nervous about the Union issue and will not use Boral on Union sites.'[133]

SUBMISSIONS ON EVIDENCE

B RELEVANCE OF EVIDENCE BEING UNCONTRADICTED

127. As adverted to in [8] above, the decision by the CFMEU not to cross-examine the Boral witnesses or the Boral customer witnesses, or to supply contradictory evidence to counsel assisting with a view to his tendering it means that the evidence of all of the witnesses is uncontradicted.

128. In civil proceedings, the unexplained failure by a party to call witnesses, give evidence or tender documents may properly allow a Court more easily to accept, and draw inferences from, the evidence before the Court insofar as that evidence would be

[130] Mike Kane, 9/7/14, T:58.32.

[131] Mike Kane, 9/7/14, T:60.38.

[132] Paul Dalton, witness statement, 9/7/14, para 86.

[133] Paul Dalton, witness statement, 9/7/14, para 87.

expected to have been challenged by the party.[134] The justification is that the unexplained failure suggests that the party feared to adduce the evidence and this fear suggests that had the evidence been brought forward it would not have assisted. It is 'plain commonsense'.[135]

129. Although the proceedings of the Commission are not adversarial, analogous principles apply. An unexplained failure by a person who would be expected to proffer testimony or documents contradicting other evidence before the Commission so that it might be tendered by counsel assisting may properly allow the Commission more easily to accept, and draw inferences from, the evidence before the Commission.

130. As outlined in [146] ff, the evidence before the Commission squarely raises the possibility of contraventions of various laws by the CFMEU and certain of its officers. The evidence would be expected to be controverted by the CFMEU and its officers.

131. The only explanation advanced by senior counsel appearing for the CFMEU (who also appeared for Mr Setka and Mr Reardon) was the statement that he:

> would not propose to cross-examine the Boral witnesses on the basis of the outstanding litigation where we and some of our members are defendants, and for that reason we have not put on statements from those members and we have not sought to deal with Boral in these proceedings, reserving our position in the curial proceedings.[136]

132. The reference to 'the outstanding litigation' would appear to be to the Supreme Court Proceeding and the Federal Court Proceeding. They are, so far as the Commission is aware, the only proceedings involving Boral and the CFMEU.

133. For a number of reasons, the Commission would not regard this as a cogent explanation.

134. *First*, insofar as the Federal Court Proceeding and the charges of contempt in the Supreme Court Proceeding are concerned, those proceedings centre on specific allegations of conduct by Mr Joseph Myles on 16 May 2013. The Commission has no evidence before it in relation to those matters. Accordingly, the existence of those

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[134] *Jones v Dunkel* (1959) 101 CLR 298; *O'Donnell v Reichard* [1975] VR 916 (FC); *Kuhl v Zuirch Financial Services* (2011) 243 CLR 361.

[135] *Jones v Dunkel* (1959) 101 CLR 298 at 321 per Windeyer J.

[136] Counsel for the CFMEU, 18/9/2014, T:76..44-77.3.

proceedings can provide no explanation for the CFMEU not seeking to controvert the evidence before the Commission which concerns other matters. That only leaves the tort claims brought by Boral against the CFMEU in the Supreme Court Proceeding.

135. *Secondly*, insofar as those claims are concerned, it is difficult to see how the giving of oral evidence by relevant officers and members of the CFMEU to the Commission would affect that proceeding, and cause prejudice to the CMFEU by giving Boral an unfair advantage:

(a) At present, Boral has been completely successful, at least in a formal sense. It has obtained judgment by default. Unless and until that judgment is set aside on appeal, there is no prospect of evidence being given in the Supreme Court Proceeding.

(b) The CFMEU's principal argument for seeking to set the default judgment aside is that Boral's Amended Statement of Claim discloses no cause of action. In the event that this argument is successful on appeal – which is, with respect to both the CFMEU and the courts, highly unlikely – it is difficult to see how the Supreme Court Proceeding could continue. If the proceedings are dismissed, no evidence will be given in the Supreme Court Proceeding.

(c) If the default judgment is set aside, and yet the proceeding continues, the CFMEU would need to adduce evidence in response to the evidence adduced by Boral in the Supreme Court Proceeding which could reasonably be expected to be similar to that presented to the Commission, unless the CFMEU were willing to take the risk of not adducing evidence at all. If the CFMEU chose not to adduce evidence, the Court would almost certainly draw 'a *Jones v Dunkel* inference' against the CFMEU.

(d) What prejudice would the CFMEU suffer in the Supreme Court Proceeding if certain of its members and officers had given evidence to the Commission? Their evidence to the Commission could not be admitted as evidence in the Supreme Court Proceeding: *Royal Commissions Act 1902* (Cth), s 6DD(1). Nor could it sensibly be said to give Boral an unfair advantage by opening up otherwise undiscovered lines of inquiry. The availability of orders for

> discovery and interrogatories, subpoenas, notices to produce and the preparation of affidavits or outlines of evidence all serve to ensure that both parties will be aware of the case to be met before trial in the Supreme Court.

136. *Thirdly*, insofar as the CFMEU has documentary evidence which is capable of controverting the evidence before the Commission, there is no explanation why that evidence could not have been adduced.

137. *Fourthly*, at the first day of public hearings concerning the CFMEU on 7 July 2014, in response to certain press reports and a media release by Senator Abetz, which referred, among other things, to the CFMEU's conduct regarding Boral, senior counsel for the CFMEU applied for the Commission to 'make it plain' that no conclusions adverse to the interests of the CFMEU should be drawn until the CFMEU or those adversely affected have had an opportunity to test and contradict the evidence adverse to them.[137] Senior counsel for the CFMEU eloquently declared:

> the CFMEU, and in particular those individuals who may be adversely affected by the evidence, have a concern that their reputations will be trashed and that the press and the media will not reflect the fact that no adverse conclusions will be drawn until the union and/or those adversely concerned have had an opportunity to meet that evidence.[138]

138. The application and declaration made by senior counsel appear to suggest that the CFMEU was very keen to bring forward any evidence which would explain or contradict evidence adverse to its interests and those of its officials and members. The fact that they have not done so in the case of Boral suggests either that (a) their protestations to the Commission on 7 July 2014 were confected – a view one would reach only with extreme reluctance – and the CFMEU did not really want an opportunity to contradict the evidence, presumably because there was nothing exculpatory that could be said in response or (b) although their general protestations were genuine there is no exculpatory evidence which could be brought forward in respect of Boral. Whichever is the correct conclusion, it does not assist the CFMEU.

139. The only response which the CFMEU has made to the Boral evidence has been in the form of publicity. Mr Setka published the following material on the CFMEU website:

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[137] Mr Agius, 7/7/2014, T:6.27–.34.

[138] Mr Agius, 7/7/2014, T:7.10–.16

US citizen Kane

Mike Kane, an American citizen who is paid $36,400 a week in his role as Boral CEO was allowed to deliver a political speech where he lectured everyone on how Australian laws need to be more like those in the US. He complained that industry was suffering as a result of the union's power. What suffering? Last time I looked, the major construction companies were making massive profits.[139]

140. The only rational argument this contains is an assertion that the industry in general (and presumably Boral in particular) had not suffered from union power: yet Boral has suffered, up to 30 June 2014, to the extent of $8–10 million. Mr Setka's other points are merely ad hominem attacks.

141. For these reasons, when assessing the evidence of the Boral witnesses and the Boral customer witnesses, the Commission may properly have regard, in circumstances where it would be expected that evidence would be adduced to contradict the evidence of those witnesses, to the fact that the evidence was uncontradicted by any other evidence.

B1 Evidence of the Boral customer witnesses

142. In any event and irrespective of the considerations identified in Section B above, the Commission should accept the evidence of the Boral customer witnesses as truthful and generally reliable:

(a) None of the Boral customer witnesses have any motive falsely to implicate the CFMEU, its members or officers. To the contrary, they have a great material and financial interest in exculpating the CFMEU. Their evidence against the CFMEU is strongly against the industrial and financial interests of the businesses they work for, and they know that the CFMEU has a long memory and an instinct for punishment.

(b) To a very large extent the evidence of the witnesses is direct evidence of what they saw at relevant construction sites, what they were told by CFMEU shop stewards at those construction sites, or evidence corroborating the evidence of other witnesses who attest to what they were told by CFMEU shop stewards.

[139] Boral MFI-3, 31/10/14, Tab 1.

(c) The reliability of the evidence given by the Boral customer witnesses in relation to the CFMEU's ban of Boral is reinforced by the striking similarity of the CFMEU conduct reported at the various constructions sites.

B2 Evidence of the Boral witnesses

143. Again, irrespective of the considerations identified in Section B above, the Commission should accept the evidence of the Boral witnesses as truthful and reliable: the individuals in question have no apparent motive to lie, where relevant contemporaneous documents exist their evidence is consistent with those documents, their evidence is consistent with the general pattern of evidence given by the Boral customer witnesses and in some cases directly corroborated by evidence of the Boral customer witnesses. Those of them who gave oral evidence were entirely satisfactory in demeanour. They gave the strong impression of being very competent professional concerned only to ensure that their employer could carry on its business with customers who never complained about the quality of Boral products or service. They showed no spite or animus against the CFMEU.

144. For obvious reasons, a good deal of the evidence given by the Boral witnesses is hearsay, consisting of reports made to them (or others) by Boral customers about what was said to them by the CFMEU on site. Although the Commission is not bound by the rules of evidence, it may of course have regard to those rules when assessing the reliability of evidence. Even under the rules of evidence, and ignoring the many exceptions to the hearsay rule as now applying under the *Evidence Act 2008* (Vic), the evidence of the Boral witnesses about what customers reported to them is admissible to prove the fact of the report of a CFMEU ban by the customer. The existence of numerous reports of a CFMEU ban from a variety of sources over an extended period is relevant to demonstrating, and is in fact very good evidence of, the fact of the CFMEU ban.

145. In relation to the evidence of Mr Dalton and Mr Head concerning what occurred and was said at the 23 April 2013 meeting specifically, the Commission should accept their evidence as truthful and reliable. Both men hold senior positions in Boral. Their accounts are consistent, and to that extent corroborate each other. Mr Kane's evidence plainly shows that the evidence was not of recent invention. Their accounts are also

corroborated by independently made contemporaneous notes of the meeting. There is nothing inherently improbable or implausible in their evidence. Their accounts should be accepted in their entirety.

SUBMISSIONS ON LEGAL ISSUES

146. The evidence gives rise to the potential contravention of a number of legislative provisions. Those provisions are analysed below.

C SECONDARY BOYCOTT PROVISIONS: *COMPETITION AND CONSUMER ACT 2010*, SECTION 45D

C1 Relevant legislation

147. Section 45D of the *Competition and Consumer Act 2010* (referred to in the balance of these submissions as **the Act**) prohibits secondary boycotts. The section provides:

> In the circumstances specified in subsection (3) or (4), a person must not, in concert with a second person, engage in conduct:
>
> (a) that hinders or prevents:
>
> (i) a third person supplying goods or services to a fourth person (who is not an employer of the first person or the second person); or
>
> (ii) a third person acquiring goods or services from a fourth person (who is not an employer of the first person or the second person); and
>
> (iii) that is engaged in for the purpose, and would have or be likely to have the effect, of causing substantial loss or damage to the business of the fourth person.
>
> (1) A person is taken to engage in conduct for a purpose mentioned in subsection (1) if the person engages in the conduct for purposes that include that purpose.
>
> (2) Subsection (1) applies if the fourth person is a corporation.
>
> (3) Subsection (1) also applies if:
>
> (a) The third person is a corporation and the fourth person is not a corporation; and
>
> (b) The conduct would have or be likely to have the effect of causing substantial loss or damage to the business of the third person.

148. Contravention of s 45D is not a criminal offence. Instead, a person who contravenes s 45D is liable to a pecuniary penalty: the Act, s 76(1). The maximum penalty payable is

$750,000 in respect of a body corporate and $500,000 in respect of a person who is not a body corporate: the Act, ss 76(1A)(a), (1B)(b). In addition, a person who suffers loss or damage by reason of conduct in contravention of s 45D may recover the amount of the loss or damage: the Act, s 82. Section 87 also grants a power to order monetary relief. And s 80 creates a power to grant injunctive relief.

149. The scope of s 45D is affected by s 45DC. That section provides that where two or more persons, each of whom is a member or officer of the same 'organisation of employees', engage in conduct in concert with each other then, unless the organisation can prove otherwise, the organisation is taken to have engaged in concert with those persons and for the same purposes. 'Organisation of employees' means an organisation that exists or is carried on for the purpose, or for purposes that include the purpose, of furthering the interests of its members in relation to their employment eg a trade union. In summary, the section creates a rebuttable presumption that a trade union has engaged in conduct proscribed by s 45D if two or more of the participants in the conduct are members or officers of the union.[140]

150. Section 45DD creates a number of defences to s 45D. Most relevantly, s 45DD(2) provides that if an employee, or two or more employees employed by the same employer, engage in conduct in concert with an organisation of employees and the dominant purpose for which the conduct is engaged in is substantially related to the remuneration, conditions of employment, hours of work or working conditions of the employee, or any of the employees engaging in the conduct, then relevantly the organisation of employees does not contravene s 45D.

C2 Application to facts

151. For the reasons which follow, the Commission should conclude that the CFMEU's conduct from 14 February 2013 onwards was conduct, which in concert with a number of CFMEU shop stewards and senior officers:

(a) hindered or prevented a number of customers of Boral from acquiring goods from Boral, with the purpose and effect, or likely effect, of causing substantial loss or damage to Boral's business; and

[140] *ANL Container Line Pty Ltd v Maritime Union of Australia* (2000) ATPR 41-769, 41,079–41,080 (Lee J).

(b) hindered Boral from suppling goods to Grocon with the purpose and likely effect of causing substantial loss or damage to Grocon's business;

thereby resulting in contraventions of s 45D of the Act by the CFMEU.

C3 Conduct in concert

152. Although it is possible to parse the phrase 'acting in concert' finely, at its core that phrase involves 'knowing conduct, the result of communications between the parties and not simply simultaneous actions occurring spontaneously'.[141] Acting in concert can be inferred from the conduct of the parties, as where there is such a concurrence of time, character, direction and result as to lead to the inference that apparently separate acts were the outcome of pre-concert.[142]

153. In the present case, although there is no direct evidence of communication between the various CFMEU stop stewards who implemented the black ban at the various construction sites in Melbourne, the irresistible inference from the evidence is that their actions against Boral were part of a deliberate and orchestrated course of conduct originating from the CFMEU. The deliberate and orchestrated nature of the conduct is evident from the widespread operation of the ban involving a number of Boral customers at numerous construction sites over a lengthy period. It is confirmed by the evidence as to what was said by Mr Setka at the 23 April 2013 meeting, in particular his reference to the CFMEU being 'willing to significantly ramp up our campaign' (see Paul Dalton, witness statement, [36]). The evidence from all of the Boral witnesses and Boral customer witnesses is strikingly similar and is to the effect that the CFMEU, as an organisation, black banned Boral. The concept of an organisation-wide ban, being carried on as a campaign, is the very essence of conduct in concert.

C4 Hindering or preventing

154. 'Hinder' in s 45D 'has received a broad construction, as in any way affecting to an appreciable extent the ease of the usual way of supplying or acquiring goods or

[141] *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 27 ALR 367, 373 (Bowen CJ) (FC).

[142] *R v The Associated Northern Collieries* (1912) 14 CLR 387, 400 (Isaacs J).

services'.[143] The conduct preventing or hindering supply or acquisition need not be physical interference but can consist of threat and intimidation.[144]

155. In some cases, the CFMEU's conduct actually prevented the acquisition of goods by Boral's customers: see [62(a)], [63] above. In other cases, the implicit or explicit threat was made by CFMEU shop stewards that if the customer acquired concrete or other products from Boral, the trucks would be stopped and the customer would experience delays in unloading the goods, with consequent delays in construction: see, eg, [45], [56], [59], [60], [110], [116] above. The threatening and intimidatory conduct in question made it more difficult for Boral's customers to acquire goods from Boral, thereby hindering the acquisition of goods from Boral.

156. Further, the ban also had the effect of making it more difficult for Boral to supply concrete to Grocon. By targeting Boral's customers, the effect of the ban was to cause substantial economic loss to Boral: see [119]–[126] above. The suffering of that loss hindered, in the sense of restricted and impaired, Boral's ability to supply Grocon.

C5 Purpose of the ban

157. Section 45D(2) contemplates that a secondary boycott may be engaged in for a number of purposes. It is sufficient if one of the purposes of engaging in the relevant conduct is a proscribed purpose: s 45D(2).

158. In the present case, the CFMEU's purpose in engaging in the ban of Boral was twofold: (1) to cause substantial damage to Boral so as to intimidate it into stopping supply to Grocon and (2) by intimidating Boral into ceasing supply to Grocon, to cause substantial damage to Grocon. The existence of those purposes is evidenced by Mr Dalton and Mr Head's account of the 23 April 2013 meeting: see [78]–[87] above. The existence of the first purpose is supported by the fact of the ban against Boral, its prolonged nature and the fact that it was not limited to Boral Concrete but the whole of Boral's products. Additional evidence of the second purpose includes Mr Setka's initial call to Mr Dalton in late 2012 (see [13] above).

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[143] *Australian Wool Innovation v Newkirk* [2005] ATPR 42-053; [2005] FCA 290, [34] (Hely J).

[144] *Australian Broadcasting Commission v Parish* (1980) 27 ALR 367, 373 (Deane J, the other members of the Court agreeing on this point); *Australian Builders' Labourers' Federated Union of Workers – Western Australian Branch v J-Corp Pty Ltd* (1993) 42 FCR 452, 459–460 (Lockhart and Gummow JJ).

159. The proscribed purposes must be to cause *substantial* loss or damage to the target corporation. To satisfy this requirement it is not necessary to establish that the loss or damage would be a major blow to the target's business. It is sufficient to show that the loss or damage would be 'real or of substance and not insubstantial or nominal'.[145] Being prevented from carrying out a contract for reward is 'substantial' in the requisite sense.[146]

160. Plainly, the actual loss suffered by Boral form the CFMEU's conduct is substantial. Boral estimates it has suffered loss of between $8–$10 million to the end of June 2014: see [119] above. It has clearly lost many orders of concrete. One can readily infer a purpose to cause substantial damage from the damage cause alone. In any event, the entire purpose of the CFMEU's ban was to inflict a substantial loss so as to intimidate Boral into ceasing supply to Grocon. Anything less than a substantial loss to Boral would be ineffective in achieving the CFMEU's ultimate goal of damaging Grocon.

161. Similarly in relation to Grocon, there can be no doubt that the purpose of the CFMEU's ban was to cause *substantial* damage to Grocon. Adapting Mr Setka's words, the CFMEU's war against Grocon was to be won by cutting Grocon's major supply which was concrete, because without it Grocon 'could not survive': see [79] above. Ms Maney's evidence was that without concrete supplied by Boral, Grocon would not be able to operate 'without a lot of difficulty': see [12] above.

C6 Effect or likely effect of the conduct

162. In addition to the proscribed purpose, the conduct must be conduct which 'would have or be likely to have the effect, of causing substantial loss or damage' to the target. The language of the section is clearly 'forward looking': the enquiry is not whether substantial loss or damage is actually suffered.[147] Accordingly, if the phrase 'be likely to have' is to be given any work to do, it must mean something other than on the balance of probabilities. The better view is that conduct will 'be likely to have the effect of causing substantial loss or damage' to the target if there is having regard to the circumstances 'a real chance or possibility that [the conduct] will, if pursued, cause such

[145] *Building Workers' Industrial Union of Australia v ODCO Pty Ltd* (1991) 29 FCR 104, 140 (the Court).

[146] *A&L Silvestri Pty Ltd v CFMEU* (2007) 165 IR 94; [2007] FCA 1047, [78] (Gyles J).

[147] *Building Workers' Industrial Union of Australia v ODCO Pty Ltd* (1991) 29 FCR 104, 139 (the Court).

loss or damage'.[148] Whether conduct is likely in that sense 'is a question to be determined by reference to well-established standards of what could reasonably be expected to be the consequence of the relevant conduct in the circumstances', relevant to which is the purpose for which the conduct was engaged in.[149]

163. In relation to the effect or likely effect on Boral, the submission in [160] above supports a finding that the CMFEU's conduct satisfies this requirement of the section.

164. In relation to the effect or likely effect on Grocon, because Boral did not succumb to the CFMEU's pressure and intimidation and continued to supply Grocon, there is no evidence before the Commission of any specific loss suffered by Grocon as a result of the CMFEU's conduct. But that does not matter. The CFMEU's purpose was to cause loss. It could reasonably have been expected that Boral would succumb to the CFMEU's intimidation and pressure, as Boral's customers did. Plainly the CFMEU thought that Boral would succumb, since that is why they started the ban in the first place. In that event, there would inevitably have been substantial loss to Grocon: see [12] above.

C7 Defence under s 45DD

165. The defendant has the onus of establishing any defence under s 45DD.[150]

166. Given that none of the CFMEU shop stewards was employed by Boral and the CFMEU has no coverage of Boral Southern Region employees (see Paul Dalton, witness statement, para 2), there is no prospect of any of the defences in s 45DD applying to the secondary boycott of Boral.

167. In relation to the secondary boycott of Grocon, the persons who implemented the black ban of Boral were CFMEU shop stewards employed at sites other than Grocon. Accordingly, even if (as might be asserted) the dominant purpose of the secondary

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[148] *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 27 ALR 367, 381–382 (Deane J) (FC).

[149] *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 27 ALR 367, 382 (Deane J).

[150] *Mudginberri Station Pty Ltd v Australasian Meat Industry Employees' Union* [1985] ATPR 40-598, 46,841; *Rural Export & Trading (WA) Pty Ltd v Hahnheuser* (2008) 169 FCR 583, [40]–[42] (FC).

boycott related to safety on Grocon sites, the defence in s 45DD(2) could not apply as that defence only relates to the working conditions of employees engaged in the conduct constituting the secondary boycott.

C8 Summary

168. Each of the CFMEU, and the various CFMEU shop stewards, organisers and officers who implemented the ban (including Messrs Setka and Reardon) contravened s 45D.

D ARRANGEMENTS AFFECTING THE SUPPLY OR ACQUISITION OF GOODS: *COMPETITION AND CONSUMER ACT 2010*, SECTION 45E

D1 Relevant legislation

169. Section 45E of the Act deals with conduct that indirectly leads to a secondary boycott. There are two situations which are relevant to the present case: the prohibition in a supply situation (s 45E(2)) and the prohibition in an acquisition situation (s 45E(3)). In summary, those subsections relevantly provide that:

(a) a person (the first person) who has been accustomed, or is under an obligation, to supply goods or services to, or acquire goods or services from, another person (the second person),

(b) must not, provided at least one of the first and second persons is a corporation,

(c) make a contract or arrangement, or arrive at an understanding, with an organisation of employees (eg the CFMEU),

(d) if the proposed contract arrangement or understanding contains a provision included for the purpose (or for purposes including the purpose) of preventing or hindering the first person from supplying or continuing to supply such goods or services to, or acquiring or continuing to acquire such goods or services from, the second person.

170. The relevant legal principles are uncontroversial and were conveniently summarised by Finn J in *ACCC v CFMEU* as follows (omitting reference to the authorities):

> First, for an 'arrangement or understanding' to be found, there must a 'meeting of the minds' of the parties under which one or both of them committed to a particular course of action … Secondly, a mere expectation, as a matter of fact, or a hope that something might be done or happen or that a party will act in a particular way, is not of itself sufficient to found an arrangement or understanding … Thirdly, the necessary consensus or meeting of minds need not involve, though it commonly will in fact embody, a reciprocity of obligation … Fourthly, as to the requirement that the provision be included in the arrangement or understanding for the proscribed purpose or for purposes which include that purpose, the test of purpose is a subjective one and the proscribed subjective purpose is to be had by each party to the arrangement or understanding … Fifthly, the purpose of conduct for present purposes is the end sought to be accomplished by the conduct and is to be distinguished from the motive for such conduct which is the reason for seeking that end … Sixthly, the term 'hindering' in s 45E(3) has been given a broad construction and encompasses conduct which in any way affects to an appreciable extent the ease of the usual way of suppling or acquiring an article or service.[151]

171. Like s 45D, s 45E is a penalty provision: the Act, s 76(1). Monetary remedies lie under s 82 and s 87. Injunctive relief is available under s 80. The primary liability for a contravention of s 45E rests with the person who has made the contract, arrangement or understanding with the organisation of employees.

172. However, ss 76(1)(c)–(f) of the Act create accessorial liability in a trade union.[152] In particular, a trade union that:

(a) attempts to induce (whether by threats or promises or otherwise),

(b) is knowingly concerned, or

(c) party to,

(i) a contravention of s 45E by another person is liable to a pecuniary penalty. The maximum penalty is $750,000: the Act, 76(1A)(a).

173. Where it is said that a person has attempted to induce a contravention it is necessary to prove an intention to bring about the conduct which constitutes the relevant contravention.[153] Where it is said that a person is knowingly concerned or party to a contravention it must be shown that that person had knowledge of the essential elements

[151] *ACCC v CFMEU* [2008] FCA 678, [10].

[152] *CEPU v ACCC* (2007) 162 FCR 466, [188], [191] (the Court). Section 76(2) prevents an officer of a trade union being an accessory to a contravention of s 45E.

[153] *Trade Practices Commission v Service Station Association Ltd* (1992) 109 ALR 465, 487–488 (Heerey J).

making up the primary contravention, although that person need not know that the conduct was a contravention.[154]

D2 Application to facts

174. The application of the law to the evidence before the Commission supports the following conclusions:

(a) The CFMEU, through Mr Setka and Mr Reardon, attempted to induce Boral (the first person) to enter into an agreement or understanding with the CFMEU which would contain a provision the purpose of which was to hinder or prevent Boral from supplying concrete to Grocon (the second person). Accordingly, the CFMEU was liable pursuant to s 76(1)(d) of the Act.

(b) Further, the Commission should conclude that:

(i) Boral's customers (the first persons), arrived at an agreement or understanding with the CFMEU which contained a provision the purpose of which was to hinder or prevent the customer from acquiring concrete from Boral or its relevant subsidiary (the second person). That conclusion would support a finding of contravention of s 45E by the relevant Boral customers; and

(ii) The CFMEU was knowingly concerned in, and party to, the contraventions of each of the relevant Boral customers, thereby rendering the CFMEU liable pursuant to s 76(1)(f) of the Act in relation to each of the contraventions.

D3 Attempt by the CFMEU to induce contravention by Boral

175. On the evidence of the 23 April meeting, Mr Setka and Mr Reardon, on behalf of the CFMEU, plainly attempted to induce Mr Dalton and Mr Head, on behalf of Boral, to enter into an arrangement or understanding with the CFMEU whereby Boral would cease supplying concrete to Grocon. The inducement for Boral to enter into the

[154] *Yorke v Lucas* (1985) 158 CLR 661.

arrangement or understanding were threats that if Boral did not agree (1) the CFMEU would continue its existing ban, (2) the CFMEU would intensify its campaign and (3) the CFMEU would ensure that Boral's market share was diminished. The sole purpose of the proposed arrangement or understanding was to prevent Boral's supply of concrete to Grocon. Further, as a key supplier, Boral was plainly a person 'accustomed, or under an obligation' to supply to Grocon.

176. For the purposes of s 76(1)(d) the fact that Boral did not agree to enter into the arrangement or understanding, and thereby did not itself contravene s 45E, is irrelevant. The person who attempts to induce is like the inciter at common law. Given the attempt by the State Secretary and Assistant State Secretary to induce Boral's entry into a contract with the CFMEU, there is no difficulty in concluding that the CFMEU had the relevant intention so as to render it liable under s 76(1)(d) of the Act.

D4 Contraventions by Boral customers

D4.1 Persons accustomed to acquire from Boral

177. The reference to a 'person who has been accustomed to acquire' goods or services from a second person includes:

(a) a regular acquirer of such goods or services;

(b) a person who, when last acquiring goods or services, acquired them from the second person; and

(c) a person who at any time during the immediately preceding 3 months, acquired such goods or services from the second person: the Act, s 45E(7).

178. The evidence before the Commission supports the conclusion that Boral or one of its subsidiaries was a regular supplier to each of Meridian, Oceania, Drive Projects, BRC and Town and Country: see [22], [26], [35], [41], [106] and [115] above. In relation to Equiset, Anglo Italian, Kosta Concreting, Squadron and S & A Paving, the evidence supports the conclusion that they had each acquired goods from Boral within the immediately preceding three months (see [35], [47], [54], [58] and [60] above) and were hence within the definition of a person who has been accustomed to acquire goods.

D4.2 Contract, arrangement or understanding for the proscribed purpose

179. In the present case there is no direct evidence of an express contract, arrangement or understanding having been made. However, an inference of such an express arrangement may be drawn where the parties' conduct exhibits 'a concurrence of time, character, direction and result'.[155]

180. As a result of the threats and pressure from officers and shop stewards of the CFMEU described in these submissions (see [155] above), the Boral customers agreed to the demand/request made by the CFMEU (through its officers and shop stewards) not to acquire goods from Boral without first obtaining the CFMEU's permission. That at least satisfies the requirements of 'an arrangement or understanding' set out in [170] above. The Boral customers may not have been happy with the arrangement or understanding reached but they arrived at it nonetheless. The fact that the customers succumbed to the union's pressure and intimidation is not a reason to conclude that there was no arrangement or understanding.[156] (In the event that the Commission rejects the submission at [155] that the CFMEU threatened and pressured the Boral customers, the conclusion that there was an arrangement or understanding contrary to s 45E is even stronger.)

181. In summary, the CFMEU and each of the Boral customers had an arrangement or understanding pursuant to which the customer would not acquire goods from Boral for use at a CFMEU-controlled site unless the CFMEU gave its permission, and in return the CFMEU would allow and not delay construction at the construction site. For the reasons developed in Section E, the relevant arrangement or understanding was not a series of separate understandings between the CFMEU and the Boral customers, but a single understanding to which the CFMEU and each of the Boral customers was a party, containing a separate provision in relation to each Boral customer.

182. In relation to the existence of a provision included for the proscribed purpose there is little difficulty. In the case of each Boral customer, the subjective purpose of the

[155] *Trade Practices Commission v David Jones (Australia) Pty Ltd* (1986) 13 FCR 446, 468 (Fisher J). See also *Norcast v Bradken Limited (No 2)* (2013) 219 FCR 14, [263] (Gordon J).

[156] *Gibbins v Australasian Meat Industry Employees' Union* (1986) 12 FCR 450, 470 (Smithers J).

provision concerning the Boral customer was to prevent the Boral customer acquiring goods from Boral.

D5 CFMEU knowingly concerned or party to the contraventions

183. Again, there can be little doubt that if there were contraventions of s 45E by the Boral customers as a result of entry into an arrangement or understanding with the CFMEU, then the CFMEU was a party to the contravention. The CFMEU was a party to the making of the arrangement or understanding and plainly had knowledge of the essential facts making up the contravention.

E CARTEL PROVISIONS OF COMPETITION AND CONSUMER ACT 2010

E1 Criminal offences

184. Sections 44ZZRF and 44ZZRG of the Act respectively make it an offence for a corporation to make, or give effect to, a contract, arrangement or understanding which contains a cartel provision within the meaning of s 44ZZRD.

185. Both offences are punishable on conviction by a fine not exceeding the greater of: (a) $10 million, (b) three times the value of any benefits obtained which are reasonably attributable to the commission of the offence (where those benefits can be determined) or (c) where the value of the benefits obtained cannot be determined, 10% of the corporation's annual turnover during the preceding 12 month period: ss 44ZZRF(3), 44ZZRG(3).

186. It is sufficient to establish that a contract, arrangement or understanding contains a cartel provision if:

(a) the provision has the purpose of directly or indirectly allocating between any or all of the parties to the contract, arrangement or understanding the persons or classes of persons who have supplied, or are likely to supply goods or services to any or all of the parties to the contract, arrangement or understanding (s 44ZZRD(3)(b)(ii)); and

(b) at least two of the parties to the contract, arrangement or understanding are, or are likely to be, in competition which each other in relation to the supply of those goods or services (by the supplier) (s 44ZZRD(4)(c)).

187. Sections 44ZZRF and 44ZZRG only apply to a 'corporation' (relevantly defined in s 4 of the Act to be bodies corporate which are foreign, trading or financial corporations). However, the Act contains, as Schedule 1, what is known as the 'Schedule version of Part IV' which contains versions of ss 44ZZRF and 44ZZRG that apply more broadly to 'persons'. Section 5 of the *Competition Policy Reform (Victoria) Act 1995* (Vic), read with ss 3(3) and 4 of that Act and also s 17 of the *Interpretation of Legislation Act 1984* (Vic), applies the 'Schedule version of Part IV' as a law of Victoria. The provisions apply to and in relation to persons with a connection with Victoria: *Competition Policy Reform (Victoria) Act 1995*, s 5.

188. The Schedule versions of ss 44ZZRF and 44ZZRG are relevantly identical to ss 44ZZRF and 44ZZRG except that the reference to a 'corporation' is replaced with a reference to a 'person'. A body corporate which commits an offence against those sections is subject to the same maximum penalty as a corporation which commits an offence against the non-Schedule versions of the sections. An offence committed against those provisions by a person who is not a body corporate is punishable by 10 years' imprisonment or a maximum fine of $340,000 or both: ss 44ZZRF(4), 44ZZRG(4).

189. Section 79 of the Act also imposes criminal liability on persons who are accessories to a contravention of ss 44ZZRF or 44ZZRG. The maximum penalty for a person who is not a body corporate is 10 years' imprisonment or a maximum fine of $340,000 or both: s 79(1)(e). Where the person is a body corporate, the penalty is the same as for a corporation.

190. The provisions of the *Criminal Code* (Cth) apply to the offences under ss 44ZZRF and 44ZZRG, and also to the offences created by the *Competition Policy Reform (Victoria) Act 1995* (see s 25 of that Act). Under the *Criminal Code*, Commonwealth offences consist of physical elements and fault elements: *Criminal Code*, s 3.1(1). For each physical element it is necessary to prove the existence of a fault element.

191. Section 44ZZRF has two physical elements: (a) the making of the contract or arrangement or the arriving at an understanding and (b) the circumstance that the contract, arrangement or understanding contains a cartel provision. The fault element for the first physical element is intention: *Criminal Code*, s 5.6(1). The fault element for the second physical element is knowledge or belief: s 44ZZRF(2). Thus to establish a contravention of s 44ZZRF it must be shown that the alleged offender intended to make the contract etc, and had knowledge or belief that the contract etc contained a provision which is a cartel provision. A similar analysis applies in relation to s 44ZZRG.

E2 Pecuniary penalty provisions

192. Sections 44ZZRJ and 44ZZRK of the *CCA* create pecuniary penalty provisions which mirror ss 44ZRF and 44ZRG respectively. There are also Schedule versions of those sections which apply to persons.

193. The ACCC may apply under s 77 for pecuniary penalties under s 76. The maximum penalty for contravention of those sections by a body corporate is the same as for a corporation under ss 44ZRF or 44ZRG: s 76(1A)(aa). The maximum penalty for a contravention by a person who is not a body corporate is $500,000: s 76(1B)(b).

E3 Application to facts

194. In summary, to establish a contravention of the pecuniary penalty cartel provisions in the present case three elements must be established:

(a) The existence of a contract, arrangement or understanding between the CFMEU and Boral customers;

(b) The contract, arrangement or understanding must contain a provision which has a purpose of directly or indirectly allocating between the Boral customers the class of CFMEU approved concrete suppliers; and

(c) Two or more parties to the contract, arrangement or understanding must be in competition.

195. In addition, to establish criminal liability under the *Criminal Code*, it must be shown that the alleged contravenor intended to make the contract, arrangement or understanding and must have known or believed that the contract, arrangement or understanding contained a cartel provision.

E4 Contract, arrangement or understanding

196. There is little law concerning the operation of the cartel provisions. In *Norcast v Bradken Ltd* (2013) 219 FCR 14, Gordon J stated that the first three of Finn J's propositions quoted in [170] above applied also to the requirement of an arrangement or understanding under ss 44ZZRJ and 44ZZRK. In particular, her Honour stated that for an arrangement or understanding to exist it was necessary for there to be 'evidence of a consensus or meeting of the minds of the parties under which one party or both of them must assume an obligation or give an assurance or undertaking that it will act in a certain way which may not be enforceable at law' (at [263]).

197. Her Honour did not address whether in establishing the necessary consensus in the case of a multi-party arrangement or understanding it is necessary that all of the parties to the arrangement or understanding communicated to each other or whether it is sufficient to establish that (a) each party communicated to at least one other party to the arrangement or understanding and (b) through those communications each of the parties arrived at a common understanding (ie a consensus). In the context of provisions designed to stop cartel activity, there is no reason why it should be necessary to establish communication between all of the parties to the cartel, provided the necessary consensus can be established. This was accepted by Gray J in *Australasian Meat Industry Employees Union v Meat & Allied Trade Federation of Australia* (1991) 32 FCR 318 (at 330) in the context of s 45E:

> It is clearly possible for an arrangement or understanding to be constituted when the only communication between the various parties is via a single intermediary. If that intermediary communicates to various persons an intention that each of them should act in a particular way with respect to a particular transaction or situation, and each thereafter acts in that particular way in the hope or belief that the other persons will act similarly, an arrangement or understanding will exist. It is necessary to be careful, however, in distinguishing that situation from one in which the intermediary enters into separate arrangements or understandings which each of the persons.

198. In the present case, each of the Boral customers came to a common understanding with the CFMEU that they would cease to acquire Boral's products. Although there is no

evidence of communication between the customers, the whole concept of a ban depends on collective action. The natural inference to be drawn from the circumstances is that each of the Boral customers came to an understanding with the CFMEU in the belief that their competitors had a similar understanding with the CFMEU. In the context this is sufficient to establish the existence of an understanding between the CFMEU and the Boral customers by which each customer undertook not to acquire goods from Boral on CFMEU-controlled construction sites.

E5 Provision with the proscribed purpose

199. In relation to the second element identified in [194] above, the understanding identified in the previous paragraph, by seeking to exclude non-CFMEU approved concrete suppliers (eg Boral) from the market, can be seen as having the purpose of allocating between the Boral customers the class of CFMEU approved concrete suppliers.

200. There is a question whether the required purpose must be subjective or objective. *Dicta* in relation to the now-repealed s 45A, which concerned price-fixing arrangements, and therefore has some similarity with the cartel provisions, suggested that the required purpose of price-fixing in relation to s 45A was a subjective one.[157] However, s 44ZZRD(3) is not directed at price-fixing and the words 'has the purpose of *directly or indirectly*' suggest that an objective purpose is sufficient. Further, having regard to the mischief to which the cartel provisions are directed there is no reason why the requirement of purpose should be construed as limited to 'subjective purpose'.

E6 Other elements

201. In relation to the third element, the Boral customers are in competition for the supply of concrete laying services and would appear to be in competition for the acquisition of concrete from concrete suppliers, such as Boral.

202. In relation to the mental elements required under the *Criminal Code*, there is insufficient evidence before the Commission to determine whether the Boral customers had a sufficient intention to enter into the relevant understanding with the CFMEU. However, the evidence of the 23 April 2013 meeting supports a conclusion that the CFMEU had

[157] *ACCC v Australian Medical Association Western Australian Branch Inc* (2003) 199 ALR 423, [243]-[247].

the relevant intention and knowledge to render it criminally liable under s 44ZZRF of the *Competition Policy Reform (Victoria) Act 1995* (Vic).

203. Accordingly, the Commission should be satisfied that the CFMEU (assuming that it is a body corporate which is not a corporation) contravened s 44ZZRF of the *Competition Policy Reform (Victoria) Act 1995* (Vic), and each of the Boral customers contravened s 44ZZRJ of the Act.

204. The Commission should recommend that the State of Victoria seek advice from the Director of Public Prosecutions in relation to the prosecution of the CFMEU.

F BLACKMAIL: *CRIMES ACT 1958* (VIC), SECTION 87

F1 Legislation

205. The evidence also raises allegations of a potential breach of s 87 of the *Crimes Act 1958* (Vic). Section 87 of the *Crimes Act 1958* makes it an offence for a person to blackmail another person. The maximum penalty is 15 years' imprisonment. The provision relevantly provides:

> (1) A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces; and for this purpose a demand with menaces is unwarranted unless the person making it does so in the belief—
>
> (a) that he has reasonable grounds for making the demand; and
>
> (b) that the use of the menaces is proper means of reinforcing the demand.
>
> (2) The nature of the act or omission demanded is immaterial, and it is also immaterial whether the menaces relate to action to be taken by the person making the demand.

206. There are relevantly four elements to the offence. There must be (1) a demand (2) made with intent to cause loss to another (3) with menaces (4) which is unwarranted.

207. Section 323 of the *Crimes Act 1958* provides that a person who aids, abets, counsels or procures the commission of an indictable offence may be tried or indicted and punished as a principal offender.

F2 Application to the facts

208. For the reasons which follow, the evidence before the Commission supports a conclusion that Mr Setka, by making a demand with menaces at the 23 April 2013 meeting with the intention of causing loss to Grocon, committed the offence of blackmail. In addition, Mr Reardon either committed the offence of blackmail, or at the very least is liable as an accessory pursuant to s 323 of the *Crimes Act 1958*. The Commission should recommend that the State of Victoria seek advice from the Director of Public Prosecutions in relation to the prosecution of Messrs Setka and Reardon.

F3 Blackmail by Mr Setka

F3.1 A demand

209. On Mr Head's account of the 23 April meeting, Mr Reardon said in relation to the CFMEU's targeting of Boral trucks 'this is easy. Just stop supplying Grocon for two weeks' (Peter Head, witness statement, para 41). His evidence was that Mr Setka made a similar statement: 'Just stop supplying Grocon for two weeks and this will go away' (Peter Head, witness statement, para 43). Mr Dalton's evidence of what Mr Setka said was similar: 'All you [Boral] have to do is stop supply to Grocon for a couple of weeks' (Paul Dalton, witness statement, para 40).

210. This evidence supports a conclusion of an express demand by Mr Setka and Mr Reardon for Boral to stop supply of concrete to Grocon. However, even if it were concluded that the language was not an express demand, it is relatively easy to conclude that in the context a demand was being made to Mr Dalton and Mr Head for Boral to cease supply to Grocon. As a matter of law it is well established that for the purposes of the section a demand need not be express, but can be implicit from the circumstances.[158]

F3.2 A demand made with intent to cause loss

211. The evidence strongly supports the view that the demand by Mr Setka for Boral to cease supply to Grocon was made with an intention to cause loss to Grocon: 'the CFMEU is at war with Grocon and that if you want to starve the enemy you cut off their supply lines'

[158] *R v Collister* (1955) 39 Cr App R 100, 105 (Hilbery J); *R v Clear* [1968] 1 QB 670 (CA), 675; *R v Lambert* [2010] 1 Cr App R 21 (CA), [8].

(Peter Head, witness statement, para 40); 'We're at war with Grocon and in a war you cut the supply lines. Boral Concrete is a supply line to Grocon.' (Paul Dalton, witness statement, para 35). That is consistent with the other evidence concerning the ongoing dispute between the CFMEU and Grocon: see [11]–[12] above. Although there is no evidence of Mr Reardon's intention in making the statements he did, the plain inference is that he had the same intention as his superior at the CFMEU.

F3.3 A demand made with menaces

212. The word 'menaces' is to be 'liberally construed and not as limited to threats of violence but as including threats of any action detrimental to or unpleasant to the person addresses. It may also include a warning that in certain events such action is intended.'[159] Menaces may be established by a threat to property[160] or to take action adversely affecting a company's share price.[161]

213. The evidence from Mr Dalton and Mr Head (see Paul Dalton, witness statement, paras 35–39, 42–43; Peter Head, witness statement, paras 42, 44–45) supports a conclusion that Mr Setka's demand was coupled with three threats: (1) a threat that the CFMEU black ban of Boral would continue (2) a threat that there would be intensification of the CFMEU's campaign against Boral, and (3) a threat that the CFMEU would ensure that Boral's market share was diminished. Each of these threats constitutes menaces within the meaning of the section.

F3.4 Unwarrranted demand

214. As provided by the section, every demand with menaces is unwarranted unless the person making the demand 'does so in the belief — (a) that he has reasonable grounds for making the demand; and (b) that the use of the menaces is a proper means of reinforcing the demand.' The accused has the evidentiary onus of raising one or both of these matters. Once that onus is discharged, the prosecution must negative at least one of the requirements.

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[159] *Thorne v Motor Trade Association* [1937] AC 797, 817 (Lord Wright). See *R v Jessen* [1997] 2 Qd R 213, 219 (Thomas J, White J agreeing).

[160] *Director of Public Prosecutions v Kuo* (1999) 49 NSWLR 226; *DPP v Curby* [2000] NSWSC 745, [5].

[161] *R v Boyle* [1914] 3 KB 339, 343.

215. It is not clear on the evidence how Mr Setka could have believed that he had reasonable grounds for making the demand to Boral. It may be Mr Setka had concerns about the safety of workers at the Grocon site and believed that demanding Boral cease supply to Grocon was a reasonable way of ensuring that Grocon addressed those concerns. However, the connection between the two is remote.

216. In any event, Mr Setka could not have believed the menaces (ie the threats made) were a 'proper means of reinforcing the demand.' Proper means must, at a minimum, be lawful.[162]

217. As at 23 April 2013, the Supreme Court of Victoria had issued injunctions restraining the CFMEU from any interference with the supply or possible supply of goods or services by Boral at any construction site in Victoria. Plainly then, Mr Setka's threats to continue his black ban and to intensify it were unlawful. The strong inference from the evidence is that Mr Setka was aware of the injunctions, and therefore aware of the illegality of his threats:

(a) Mr Setka referred to Boral's lawyers in proceedings: Paul Dalton, witness statement, para [29]. Mr Reardon referred to Mr Setka not giving 'a stuff' about 'the legal stuff': Peter Head, witness statement, para [38]. Those proceedings could only have been the proceedings in which Boral was seeking an injunction.

(b) As State Secretary of the CFMEU it would be expected that he would be aware of those orders which had been served on the CFMEU.[163]

218. Further, it is not possible to see how the threat to ensure the Boral's market share was diminished could possibly be regarded as a proper means of reinforcing the demand. The evidence supports a conclusion that Mr Setka believed his threats to be unlawful, or at the least not 'proper means of reinforcing the demand.'

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[162] *R v Harvey* (1981) 72 Cr App R 139, 142.

[163] Before Derham AsJ, the CFMEU conceded the effective service of the Supreme Court's orders: see *Boral Resources (Vic) Pty Ltd v Construction, Forestry, Mining and Energy Union* [2014] VSC 429, [15]. See also Boral MFI-2, 24/10/14, Tabs 4 and 5, Plaintiff's Outline of Submissions dated 23 December 2013, [58]–[59] and Defendant's Outline of Submissions in Reply dated 23 January 2014, [41].

F4 Mr Reardon

219. On the evidence before the Commission Mr Reardon also made a demand, the only inference to be drawn is that it was made with the same intention as Mr Setka ie to cause loss to Grocon, and he threatened that the CFMEU 'will target Boral trucks' (Peter Head, witness statement, para [41]). The analysis above in relation to Mr Setka would support a finding of blackmail by Mr Reardon also. In the alternative, Mr Reardon aided and abetted Mr Setka: he was present at the commission of the offence and intentionally participated and assisted Mr Setka in his threats. Accordingly, if not himself separately liable for blackmail he is liable as an accessory under s 323 of the *Crimes Act 1958*.

G POSSIBLE CONTEMPTS OF COURT

220. The evidence concerning the conduct of the CFMEU shop stewards in April 2013 at the Anglo Italian project site at Radnor Drive, Derrimut (see [52] above) and at the Kosta Concreting project site at Elizabeth Street, Melbourne (see [56]–[57]) and the CFMEU's later conduct in 2014 (see Section A8 above) suggests a continuing and flagrant contempt of Hollingworth J's orders by an organisation which treats itself as above the law. Plainly court orders count for little or nothing so far as the CFMEU is concerned.

221. In his letter to the Commission, Mr Kane made this (unchallenged) statement:

> Mr Setka has been quoted acknowledging openly that the CFMEU's tactics involve breaking the law. Following the finding against the CFMEU for breaching court orders in relation to the blockage of the Myer Emporium site in 2013, Setka is reported to have said "*Its not the first time or the last time a union is found guilty of contempt", "We don't set out deliberately to break the law, but unfortunately sometimes its going to happen … Our members have been seasoned to expect that. They want us to maintain a militant union".*[164]

222. The CFMEU's approach raises important questions about the enforceability of court orders.

[164] Mike Kane, Letter to Royal Commission, 9/7/14, p 7.

RECOMMENDATIONS FOR REFORM

223. Given the extension of the Commission's final reporting deadline, it is premature to make recommendations for reform without first having a complete understanding of the relevant facts and issues.

224. However, the CFMEU's conduct in relation to Boral suggests that there may be a number of deficiencies with the existing legal and regulatory framework in relation to secondary boycotts, the enforcement of court orders, the regulation of trade unions generally and the regulation of, and the duties owed by, trade union officers.

225. In particular, the conduct suggests the existence of the following problems:

(a) The ineffectiveness of the current secondary boycott provisions in ss 45D and 45E of the *Competition and Consumer Act 2010* to deter illegal secondary boycotts by trade unions.

(b) The absence of specific provisions making it unlawful for the competitors of the target of a secondary boycott knowingly to supply a product or service in substitute for a supply by the target.

(c) An inability or unwillingness by the regulatory authorities to investigate and prosecute breaches of the secondary boycott provisions by trade unions. There may be a number of root causes for this problem: difficulties in obtaining documentary evidence, lack of co-operation of witnesses who may fear repercussions from giving evidence, the potential overlap between the roles of a number of regulators and difficulties in ensuring compliance with court orders made in relation to secondary boycott conduct.[165]

(d) The absence of any speedy and effective method by which injunctions granted by a court restraining a trade union from engaging in an illegal secondary boycott can be enforced. The Byzantine complexity of the law of contempt,

[165] See the public submission by the ACCC, *Supplementary submission to the Competition Policy Review*, 15 August 2014 (http://competitionpolicyreview.gov.au/files/2014/08/ACCC_3.pdf) at pp 6–7.

and its ineffectiveness to deter secondary boycott conduct by a trade union, is amply demonstrated by the contempt proceedings commenced by Grocon and Boral in the Victorian Supreme Court.[166]

(e) The absence of a single statutory regulator dedicated to the regulation of trade unions with sufficient legal power to investigate and prosecute breaches of the secondary boycott provisions.

(f) The absence of appropriate legal duties owed by the officers of trade unions to their members, and the absence of appropriate mechanisms by which such officers can be held accountable to their members.

226. In conducting its further inquiries, the Commission should have these potential problems squarely in mind.

227. It is also necessary to consider possible improvements in relation to the administration of the law by both regulators and courts.

228. The summary of the course of the Supreme Court Proceedings set out in sections A5 and A7.1 above demonstrates rather extraordinary delay after the initial orders made by Hollingworth J in February to April 2013. Both the parties and the Court have a duty to seek to facilitate the just, efficient, timely and cost-effective resolution of the issues in dispute: *Civil Procedure Act 2010* (Vic), ss 7, 10. One would expect that having regard to the conduct alleged by Boral, and the alleged contempts by the CFMEU, that the proceedings would have been resolved very speedily.

229. Yet, the CFMEU has in numerous respects engaged in conduct which has had the effect of delaying the proceedings. In relation to the contempt application, it opposed the joinder of the Attorney-General and sought leave to appeal Digby J's order joining the Attorney-General as a party. It sought leave to appeal Digby J's order ordering discovery of documents which could have been obtained by subpoena. Both applications for leave were unsurprisingly refused. In relation to the main part of the proceeding, the CFMEU did not appear until 9 September 2013, more than 6 months

[166] See, eg, *CFMEU v Grocon Contractors (Victoria) Pty Ltd* [2014] VSCA 261.

after it was on notice that proceedings had been commenced. Even then, it did not seek to set aside the default judgment entered against it on 20 May 2013 until 8 November 2013. Its principal contention before Derham AsJ for seeking to set the default judgment aside was an argument that a tort recognised by numerous courts in Australia, by the House of Lords, by leading academic writers, with a history tracing back to the early 17th century, should be held not to exist. The argument rested on the illogical proposition that because Australian courts have *not yet* accepted the broader tort of interference with trade by unlawful means which has been recognised in England, of which it has been said that intimidation is a species, the Australian cases actually recognising the tort of intimidation must not be followed. *Why* the tort should not exist was not explained. The CFMEU has now appealed Derham AsJ's unsurprising decision rejecting that argument.

230. Apart from the delays by the CFMEU, the time taken by Derham AsJ to deliver judgment refusing to set the default judgment aside was more than 8 months. It may be that there is some reason why judgment was not delivered on the day of the CFMEU's application or shortly thereafter. However, in the ordinary course it might be expected that an application to set aside default judgment would be dealt with speedily.

231. More recently things have speeded up, over the opposition of the CFMEU. Forrest J, who has carriage of the CFMEU appeal against Derham AsJ's refusal to set aside the default judgment, has expressed concern about the delays. He indicated on 23 October 2014, over the CFMEU's opposition, that there would be a hearing in November and that the whole process in the Supreme Court (including any appeal to the Court of Appeal) would be completed by Easter 2015.

232. In relation to the activities of the ACCC and Fair Work Building and Construction, there is little material before the Commission apart from that summarised in section A7.2 above to explain what has been occurring. It is worth noting that nearly two years have passed since the black ban began. However, it is clear that public regulators are likely to have grave difficulties in obtaining evidence where witnesses are reluctant to speak against parties to illegal conduct in view of the risk of retaliation.

233. A legal system which does not provide swift protection for the type of conduct which Boral has suffered at the hands of the CFMEU, and which does not have a mechanism

for the swift enforcement of court orders, risks losing public confidence and bringing the administration of justice into disrepute. At least so far as the courts are concerned, it may be appropriate for consideration to be given to procedures which ensure the swift determination of contempt applications, complemented where necessary by appropriate court rules and legislation.