

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 2/12/2016 2:25:02 PM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Defence - Form 33 - Rule 16.32
File Number: VID333/2015
File Title: Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union & Ors
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads 'Warwick Soden'.

Dated: 2/12/2016 2:25:10 PM AEDT

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



**IN THE FEDERAL COURT
OF AUSTRALIA
AT MELBOURNE**

FILE NO: VID333/2015

**DIRECTOR OF THE FAIR WORK BUILDING
INDUSTRY INSPECTORATE
APPLICANT**

**CONSTRUCTION, FORESTRY, MINING AND
ENERGY UNION
FIRST RESPONDENT**

**MARK TRAVERS
SECOND RESPONDENT**

**ADAM HALL
THIRD RESPONDENT**

**SECOND AMENDED DEFENCES OF THE
FIRST, SECOND & THIRD RESPONDENTS**

(filed pursuant to an Order of North J made on [])

The Second and Third Respondents claim, and reserve their right to claim, the privilege against exposure to civil penalties and say further that if by the making of any admission in this Defence any of the respondents waive the privilege, such waiver is intended to operate only in respect of the specific allegation in response to which the admission is made and is not intended to operate as a general waiver of privilege in this proceeding or at all.

To the Amended Statement of Claim dated 30 September 2015 ~~24 June 2015~~ the respondents say:

1. The Respondents admit the allegations contained in paragraph 1.

Filed on behalf of the Respondents

Prepared by:
Slater & Gordon
Solicitors
485 Latrobe Street
MELBOURNE VIC 3000

Telephone: (03) 9602 6888
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DX: 229
Reference:

2. The Respondents admit the allegations contained in paragraph 2.
3. The Respondents admit the allegations contained in paragraph 3, save for the allegations contained in 3(b) which the Respondents deny.
4. The Respondents admit the allegations contained in paragraph 4, save for the allegations contained in 4(b) which the Respondents deny.
5. The Respondents ~~do not~~ admit the allegations contained in paragraph 5, ~~as they are not within the knowledge of the Respondents and cannot be either admitted or denied.~~
6. The Respondents ~~do not~~ admit the allegations contained in paragraph 6, ~~as they are not within the knowledge of the Respondents and cannot be either admitted or denied.~~
7. ~~Save for that t~~The Respondents ~~do not~~ admit Duggan's formal employment status ~~as it is not within their knowledge, the Respondents otherwise admit the allegations contained in paragraph 7~~ and further say that Duggan was a friend of the Second Respondent.
8. The First Respondent is ~~unable (as it does not know) to plead to the allegations contained in paragraph 8 as the Second and Third Respondents claim privilege with respect to these allegations.~~ The Respondents admit the allegations contained in paragraph 8.
9. ~~Save for the fact that the Respondents deny that the particulars alleged allow for either a finding or inference that any alleged entry was for the purpose of holding discussions in accordance with section 484 of the FW Act, the First Respondent is unable (as it does not know) to plead to the allegations contained in paragraph 9 as the Second and Third Respondents claim privilege with respect to these allegations.~~ The Respondents deny the allegations contained in paragraph 9 and further say that the Second Respondent entered for the purpose of a social visit with Duggan while the Second Respondent waited for the Third Respondent to finish a discussion at the nearby compound of Fulton Hogan Pty Ltd and that the Third Respondent entered for the purpose of saying hello to Duggan and collecting the Second Respondent.

10. ~~The First Respondent is unable (as it does not know) to plead to the allegations contained in paragraph 10 as the Second and Third Respondents claim privilege with respect to these allegations.~~ The Respondents admit the allegations contained in paragraph 10.
11. ~~The First Respondent is unable (as it does not know) to plead to the allegations contained in paragraph 11 as the Second and Third Respondents claim privilege with respect to these allegations.~~ The Respondents admit the allegations contained in paragraph 11.
12. ~~The First Respondent is unable (as it does not know) to plead to the allegations contained in paragraph 12 as the Second and Third Respondents claim privilege with respect to these allegations.~~ The Respondents admit that Naughton approached the lunch room in the Site Compound and requested the Second and Third Respondents leave. The Respondents do not admit that there was a reference to safety but do admit that the Second Respondent told Naughton he was “catching up with my mate Rod”.
13. ~~The First Respondent is unable (as it does not know) to plead to the allegations contained in paragraph 13 as the Second and Third Respondents claim privilege with respect to these allegations.~~ The Respondents are unable (as they do not know) to plead to the allegations contained in paragraph 13.
14. ~~The First Respondent is unable (as it does not know) to plead to the allegations contained in paragraph 14 as the Second and Third Respondents claim privilege with respect to these allegations.~~ The Respondents admit that Naughton returned to the lunch room in the Site Compound and again requested the Second and Third Respondents leave.
15. ~~The First Respondent is unable (as it does not know) to plead to the allegations contained in paragraph 15 as the Second and Third Respondents claim privilege with respect to these allegations.~~ The Respondents are unable (as they do not know) to plead to the allegations contained in paragraph 15.
16. ~~The First Respondent is unable (as it does not know) to plead to the allegations contained in paragraph 16 as the Second and Third Respondents claim privilege with respect to these allegations.~~ The Respondents admit that at or about 1pm, the Second Respondent spoke to White on the phone. The First and Second Respondent deny that White told the Second Respondent “you know the rules” and deny that the Second Respondent said “if you do that you are starting a war and it will be no different to what we have done with Kane”. The Third

Respondent did not hear White's side of the conversation. The Third Respondent did not hear the Second Respondent make any reference to "war" or "Kane".

17. The First Respondent is unable (as it does not know) to plead to the allegations contained in paragraph 17 as the Second and Third Respondents claim privilege with respect to these allegations. The Respondents admit that at approximately 1.15pm, the police arrived and spoke to the Second and Third Respondents, who were standing outside the lunch rooms.
18. The First Respondent is unable (as it does not know) to plead to the allegations contained in paragraph 18 as the Second and Third Respondents claim privilege with respect to these allegations. The Respondents admit that after a short conversation with police, who did not arrest either the Second or Third Respondent, the two returned to their vehicle which was parked in the Fulton Hogan car park.
19. Insofar as paragraph 19 makes allegations of fact, the Respondents refer to and rely on paragraphs 7–9 above. Insofar as paragraph 19 makes allegations of law, the Respondents deny those allegations and further deny ~~The Respondents deny~~ that the allegations contained in paragraphs 7–9 allow for a finding that the Second Respondent was exercising or seeking to exercise rights in accordance with Part 3–4 of the FW Act.
20. Insofar as paragraph 20 makes allegations of fact, the Respondents refer to and rely on paragraphs 7–18 above. Insofar as paragraph 20 makes allegations of law, the Respondents deny those allegations and further ~~The Respondents:~~
 - (i) deny that entering the Site Compound as alleged is capable of constituting “acting in an improper manner” contrary to section 500 of the FW Act as it is denied that such entry requires the provision of written notice of entry pursuant to section 487 of the FW Act in circumstances where a person in the position of the Second Respondent has an actual or implied invitation to attend in that area;
 - (ii) deny that remaining in the Site Compound (or failing to comply with a request to leave) as alleged is capable of constituting “acting in an improper manner” contrary to section 500 of the FW Act as it is denied that remaining requires the provision of written notice of entry pursuant to section 487 of the FW Act in circumstances where a person in the position of the Second Respondent has an actual or implied invitation to attend in that area and that invitation has yet to be revoked by a person with authority to do so;

(iii) deny that any of the allegations contained in paragraphs 20(a)-(e) are capable of constituting “acting in an improper manner” for the purposes of section 500;

(iv) deny that Duggan was not on a break.

~~Insofar as paragraph 20 otherwise contains a conclusion of law, the Respondents do not plead as they are not required to do so.~~

21. The Respondents refer to and rely on paragraphs 19–20 above.

21A. The First and Second Respondents deny the allegations contained in paragraph 21A and refer to and rely on paragraph 16 above. The Third Respondent did not hear the Second Respondent make any such request and refers to and relies on paragraph 16 above.

21B. The Respondents refer to and rely on paragraph 21A above.

21C. The Respondents deny the alleged request (which is denied) is capable of falling within section 347(b)(iv) of the FW Act.

21D. The Respondents refer to and rely on paragraph 16 above and further deny the alleged threat (which is denied) is capable of constituting coercion for the purposes of s.348 of the FW Act.

21E. The Respondents refer to and rely on paragraph 21D above.

22. Insofar as paragraph 22 makes allegations of fact, the Respondents refer to and rely on paragraphs 7–9 above. Insofar as paragraph 19 makes allegations of law, the Respondents deny those allegations and further deny ~~The Respondents deny~~ that the allegations contained in paragraphs 7–9 allow for a finding that the Third Respondent was exercising or seeking to exercise rights in accordance with Part 3–4 of the FW Act.

23. Insofar as paragraph 23 makes allegations of fact, the Respondents refer to and rely on paragraphs 7–18 above. Insofar as paragraph 20 makes allegations of law, the Respondents deny those allegations and further ~~The Respondents:~~

(i) deny that entering the Site Compound as alleged is capable of constituting “acting in an improper manner” contrary to section 500 of the FW Act as it is denied that such entry requires the provision of written notice of entry pursuant to section 487 of

the FW Act in circumstances where a person in the position of the Third Respondent has an actual or implied invitation to attend in that area;

(ii) deny that remaining in the Site Compound (or failing to comply with a request to leave) as alleged is capable of constituting “acting in an improper manner” contrary to section 500 of the FW Act as it is denied that remaining requires the provision of written notice of entry pursuant to section 487 of the FW Act in circumstances where a person in the position of the Third Respondent has an actual or implied invitation to attend in that area and that invitation has yet to be revoked by a person with authority to do so;

(iii) deny that any of the allegations contained in paragraphs 20(a)-(d) are capable of constituting “acting in an improper manner” for the purposes of section 500;

(iv) deny that Duggan was not on a break.

~~Insofar as paragraph 23 otherwise contains a conclusion of law, the Respondents do not plead as they are not required to do so.~~

24. The Respondents refer to and rely on paragraphs 22–23 above.
25. ~~Insofar as the allegations contained in paragraph 25 are based on the alleged conduct of the Second and Third Respondents on 17 June 2014, the First Respondent is unable (as it does not know) to plead to the allegations as the Second and Third Respondents claim privilege with respect to those allegations. The First Respondent denies that engaging in a social visit constitutes acting within the scope of the actual or apparent authority as officers of the CFMEU. The First Respondent otherwise refers to and relies upon paragraphs 8-18 above.~~
26. ~~The First Respondent admits that if it were proved that the Second and Third Respondent were acting within the scope of their actual or apparent authority as alleged in paragraph 25 then, by operation of section 793 of the FW Act, that conduct would be the conduct of the First Respondent. The Second and Third Respondents claim privilege with respect to these allegations. The First Respondent denies that it is taken to have engaged in the conduct by the Second and Third Respondents contained in the Amended Statement of Claim insofar as it is alleged that the Second and Third Respondents have breached s 500 of the FW Act. As the First Respondent is neither a permit holder nor capable of being a permit holder it cannot be taken to have contravened s 500 of the FW Act.~~

26A The First Respondent admits that if it were proved that the Second Respondent was acting within the scope of his actual or apparent authority as alleged in paragraph 26A in respect of the alleged contravention of s 348 then, by operation of section 793 of the FW Act, that conduct would be the conduct of the First Respondent.

27. The First Respondent admits that if the allegations against the Second and Third Respondents alleged in paragraphs 25 and 26 are proven (which is denied) and if they occurred on behalf of the First Respondent, that the First Respondent has contravened the provisions. The Second and Third Respondents claim privilege with respect to these allegations. The First Respondent denies that it is taken to have engaged in the conduct by the Second and Third Respondents contained in the Statement of Claim insofar as it is alleged that the Second and Third Respondents have breached s 500 of the FW Act. As the First Respondent is neither a permit holder nor capable of being a permit holder it therefore cannot be taken to have contravened s 500 of the FW Act.

28. The First Respondent repeats and relies upon its pleading in paragraph 27 herein.

29. The First Respondent repeats and relies upon its pleading in paragraph 27 herein.

30. The First Respondent repeats and relies upon its pleading in paragraph 27 herein.



Slater & Gordon

Solicitors for the respondents

R. Shann

Gorman Chambers

Dr Gideon Boas

21 August 2015

13 November 2015

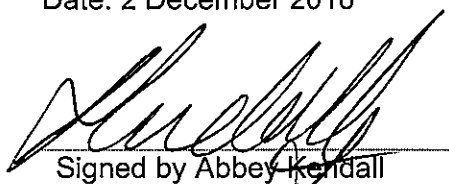
30 November 2016

Certificate of lawyer

I Abbey Kendall certify to the Court that, in relation to the defence filed on behalf of the Respondent, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: 2 December 2016



Signed by Abbey Kendall
Lawyer for the Respondents

Filed on behalf of (name & role of party)	Respondents		
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