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Details of Filing

Document Lodged:	Outline of Submissions
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: 29/03/2016 4:24:49 PM AEDT

Registrar

Important Information

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**FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: VICTORIA
DIVISION: FAIR WORK**

NO VID 333 OF 2015

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

Applicant

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

and others named in the Schedule

Respondents

APPLICANT'S OUTLINE OF SUBMISSIONS

Contraventions being pursued by the Applicant

1. By Originating Application filed 24 June 2015, the Applicant seeks relief in respect of contraventions of the *Fair Work Act 2009 (FW Act)*.
2. These submissions outline the Applicant's case based on the evidence he will call at trial.
3. The Applicant seeks the making of declarations and the imposition of pecuniary penalties for each of the following contraventions by the Second and Third Respondents (**Travers** and **Hall**, respectively):
 - 3.1. contraventions of section 500 of the FW Act by Travers comprising the conduct set out at 20 of the Amended Statement of Claim (**SOC**);
 - 3.2. a contravention of section 348 of the FW Act by Travers comprising the conduct set out at 21D of the SOC; and
 - 3.3. contraventions of section 500 of the FW Act by Hall comprising the conduct set out at 23 of the SOC.
4. The Applicant also seeks the making of declarations and the imposition of pecuniary penalties against the First Respondent (**CFMEU**), on the basis that each of the contraventions set out in paragraph 3 was also a contravention by the CFMEU, pursuant to sections 363 and 793 of the FW Act.

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5. Each of sections 348 and 500 of the FW Act is a civil penalty provision and liable to a maximum penalty of 60 penalty units for an individual and 300 penalty units for a body corporate.¹ The standard of proof is pursuant to section 140 of the *Evidence Act 1995* (Cth), i.e. on the balance of probabilities taking into account the nature of the cause of action, the nature of the subject-matter of the proceeding, and the gravity of the matters alleged.

Standing and Status of Parties

6. The Applicant was appointed Director of the Fair Work Building Industry Inspectorate by the Minister for Employment for a five-year term with effect from 21 October 2013, under s 15(1) of the *Fair Work (Building Industry) Act 2012* (Cth) (**FWBI Act**).²
7. By operation of section 59A of the FWBI Act, he is a Fair Work Building Industry Inspector. As such, pursuant to section 59C of the FWBI Act, he has standing to bring proceedings and apply for orders in respect of contraventions of civil remedy provisions under the FW Act in relation to building matters, being matters which relate to a building industry participant.
8. The CFMEU is an association of employees registered as an organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth) (**FWRO Act**). The FWRO Act is a workplace law for the purposes of the FW Act and the FWBI Act.³
9. The membership rules of the CFMEU allow membership by persons whose employment consists of or includes building work.⁴ The CFMEU is therefore a building industry participant.
10. Travers and Hall were officials of the CFMEU and therefore building industry participants.⁵
11. The Applicant therefore has standing to bring proceedings and apply for orders against each Respondent.

Factual Background

12. The Papa Uniform Golf Taxi Lane Replacement Project (the **Project**) was a project involving the demolition and replacement of the concrete pavement in the taxi lane⁶ at

¹ FW Act section 539 table item 11 and section 546(2)(b).

² Appointment dated 16 October 2013.

³ FW Act s 12; FWBI Act s 4.

⁴ Construction, Forestry, Energy and Mining Union Rules.

⁵ Paragraphs 3 and 4 of the Amended Defences dated 13 March 2015. While the Amended Defences deny that Travers and Hall was each “an officer of the CFMEU within the meaning of section 12 of the FW Act acting in that capacity”, they admit that each was an official of the CFMEU within the meaning of section 12 of the FW Act. Given the almost complete overlap between the definitions of “office” in each of the two Acts and the definition of “officer” in the FWBI Act and “official” in the FW Act, it is submitted that by virtue of being an official of the CFMEU within the meaning of the FW Act each is also an officer of the CFMEU within the meaning of the FWBI Act. In any event it is admitted in the Amended Defences that each is a building industry participant (at 3(e) and 4(e)).

⁶ That is, the lane on which aeroplanes taxi to and from the runways, not a lane for the use of taxi cabs.

Melbourne Airport. The project began in February 2013 with a budget of approximately \$49 million. McConnell Dowell Constructors Pty Ltd (**MacDow**) is the head contractor.

13. The site had two parts: a fenced-off, gated and signed compound incorporating site offices and amenities including a lunch room and a first aid room (the **Site Compound**), and, some distance away, the part of the taxi lane on which work was being done from time to time.
14. As at 17 June 2014, the following relevant persons were employed by MacDow:
 - (a) Rod Duggan was employed as a labourer and had been elected as a health and safety representative for a workgroup at the Project;
 - (b) Luke Naughton was employed as a Project Manager for the Project;
 - (c) Gavin Carter was employed as a Site Supervisor for the Project; and
 - (d) David White was employed as Operations Manager – Southern Region Australian Operations, with a sphere of responsibility which included the Project.

Undisputed Facts

15. The following matters are not in dispute:
 - 15.1. Travers and Hall entered the Project premises on 17 June 2014.
 - 15.2. Travers and Hall had not provided any notice to MacDow of their entry.
 - 15.3. Travers and Hall both spoke to Duggan while on the Project premises.
 - 15.4. Travers' purpose in entering the Project premises was to speak to Duggan.
 - 15.5. Naughton requested Travers and Hall to leave the Project premises on at least two occasions. On the second occasion he said he would have to call the police if they did not leave.
 - 15.6. Travers told Naughton that if Naughton called the police he and Hall would have to stay, as it was CFMEU policy to do so.
 - 15.7. Travers and Hall did not leave until, after a delay, the police attended.
16. While the Applicant relies on the further facts set out in the next section, he submits that the cause of action in relation to section 500 of the FW Act is made out on these facts alone.

Further Facts Relied on by the Applicant

17. The Applicant's witnesses will give evidence as follows:

18. On 17 June 2014 Carter walked past the lunch room on the Project premises and saw Duggan in there with another person. He told Naughton what he had seen.
19. On receiving this information, Naughton went to the lunch room and saw Duggan there speaking with Travers and Hall.
20. Naughton approached Travers and Hall and there was a conversation to this effect:

Naughton: Guys, I'm gonna have to ask you to leave the site, you haven't given me 24 hours' notice in accordance with the right of entry process.

Travers and Hall: No, we don't have to give 24 hours' notice.

Travers: I'm just catching up with my mate Rod.

Naughton: I understand but I still have to ask you to leave.

Travers: We are chatting to Rod about a safety issue, but go ahead and call the police or whoever you need to.
21. Naughton then left the lunch room and made a telephone call to White and told him what had occurred. White instructed Naughton to ask Travers and Hall to leave the Project premises, and if they refused to do so, to contact the police.
22. Naughton returned to the lunch room in the Site Compound and again requested Travers and Hall to leave the Project premises. The conversation was to the following effect:

Naughton: Guys, I'm gonna have to ask you to leave as you haven't given 24 hours' notice.

Hall: No, we are not leaving. Who is giving you directions?

Naughton: David White.

Travers: I will call David White.

Naughton: I am going to call the police.
23. Naughton called 000 and asked for the police.
24. Travers then called White. The conversation between White and Travers was to the following effect:

Travers: Luke has told me he wants me to leave or he will call the police.

White: You know the rules, we have to do this, you can't be here, if you don't want to leave then we have no choice but to call the police.

Travers: If he calls the police I won't leave, I'm just here to talk to Rod, another 5 minutes and we will be leaving.

White: It is out of our hands, Luke has to do what he has to do.

Travers: If you do that you are starting a war and it will be no different to what we have done with Kane.

25. White then phoned Ralph Edwards, President of the First Respondent's Victoria/Tasmania Branch. The conversation between White and Edwards was to the following effect:

White: Can you please ask Travers and Hall to leave without us having to call the police?

Edwards: I'm not going to do that. Organisers should be able to talk to delegates on site. Travers has been doing the rounds on other sites such as Leightons and had no problems. Why do McConnell Dowell want to push the barrow?

White: We can't turn a blind eye to this.

26. The police then attended the Project premises and took the details of Travers, Hall, Duggan and Naughton. Travers said words to the effect "we know our rights, if the authorities are called, we wait, it's our policy".

27. Shortly afterwards Travers and Hall left the Project premises.

FW Act Section 500

28. Section 500 of the FW Act provides:

A permit holder exercising, or seeking to exercise, rights in accordance with this Part must not intentionally hinder or obstruct any person, or otherwise act in an improper manner.

29. Therefore, in order to prove a breach of section 500 of the FW Act the Applicant must show that

29.1. the person was a permit holder;

29.2. exercising, or seeking to exercise, rights in accordance with Part 3-4 of the FW Act; and

29.3. intentionally hindered or obstructed a person **or** otherwise acted in an improper manner.

Permit Holder

30. The term “permit holder” is defined in the FW Act as a “person who holds an entry permit”. An “entry permit” is a permit issued by the Fair Work Commission to an official of an organisation under section 512 of the FW Act.
31. It is not in issue that each of Travers and Hall was a permit holder on 17 June 2014.⁷

Exercising Rights in Accordance with Part 3-4

32. Part 3-4 of the FW Act is headed “Rights of entry”.⁸ It contains a number of sections which either provide that a “permit holder may enter” premises, regulate the exercise by permit holders of entry powers under State and Territory occupational health and safety legislation, and regulate what permit holders may do while on premises pursuant to those powers of entry.
33. Despite the use of the word “right” in the heading to Part 3-4 and in the headings to Division 2 and to sections 482, and 483B, none of the sections themselves expressly provide for something labelled a “right”. Rather, they provide that a “permit holder may enter” premises, or that a “permit holder may do” certain things.⁹
34. Similarly, while section 494 of the FW Act speaks of “State and Territory OHS rights”, none of the sections in the relevant State or Territory legislation uses the term “right” in the provisions which provide for union representatives to enter workplaces.
35. Further, the term “right” is used in sections 483A and 490 with reference to entry powers granted by other sections which do not themselves use the term “right”.
36. The modern approach to statutory construction requires that a provision of a statute be construed in a manner which applies the text of the provision, interpreted in context and with a view to the mischief which the statute was intended to remedy; in other words, the purpose of the provision.¹⁰
37. Sections 484, 487 and 500 are contained in Part 3-4 of the *Fair Work Act*. The object of Part 3-4 is stated in s 480 –

480 Object of this Part

The object of this Part is to establish a framework for officials of organisations to enter premises that balances:

⁷ See 3(f) and 4(f) of the SOC and of the Amended Defence.

⁸ Heading to Parts form part of the FW Act: *Acts Interpretation Act (1901)*(Cth) section 13(a) as in force on 25 June 2009; see FW Act s 40A.

⁹ See sections 481, 482, 483, 483A-484.

¹⁰ *Acts Interpretation Act 1901* (Cth), s 15AA; *Thiess v Collector of Customs* (2014) 250 CLR 664 at 671-2 [22]-[23]; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at 46-7 [47]; *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 591-3 [43]-[45]; *Project Blue Sky Inc. v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69].

- (a) *the right of organisations to represent their members in the workplace, hold discussions with potential members and investigate suspected contraventions of:*
 - (i) *this Act and fair work instruments; and*
 - (ii) *State or Territory OHS laws; and*
- (b) *the right of employees and TCF award workers to receive, at work, information and representation from officials of organisations; and*
- (c) *the right of occupiers of premises and employers to go about their business without undue inconvenience.*

38. It follows that it was Parliament's intention to regulate entry by officials of organisations to workplaces when representing their members, holding discussions or investigating contraventions of State and Territory OHS Laws. The phrase "exercising, or seeking to exercise, rights in accordance with this Part" in s 500 should be read in that light. Parliament evidently intended to regulate "entry of officials of organisations" to workplaces. A purposive and contextual reading of the term "exercising rights in accordance with this Part" must therefore be undertaken, and cover any right, entitlement or ability to enter a workplace arising under Part 3-4 or regulated by Part 3-4.

39. Accordingly, no narrow meaning of the term "right" can be attributed to its use in section 500. In context, it must be taken to refer to all the powers of permit holders which are either provided for or regulated by provisions of Part 3-4. That plainly would include section 484, notwithstanding the absence of explicit reference to a "right" in that section.

Were Travers and Hall exercising the right provided for by section 484?

40. Section 484 provides:

A permit holder may enter premises for the purposes of holding discussions with one or more employees or TCF award workers:

- (a) *who perform work on the premises; and*
- (b) *whose industrial interest the permit holder's organisation is entitled to represent; and*
- (c) *who wish to participate in those discussions.*

41. It is not in issue that Travers and Hall entered the premises. It is not in issue that they intended to speak to Duggan. It is not in issue that Duggan was an employee who performed work on the premises and whose industrial interest the CFMEU was entitled to represent. Given that the Respondents' position is that Duggan had indicated a preparedness to speak to Travers and Hall before they entered the premises, it is not

in issue that Travers and Hall understood that he would wish to participate in that discussion. It is not in issue that Travers and Hall did in fact speak with Duggan.

42. Each aspect of section 484 is therefore applicable to these circumstances. It is irrelevant whether or not the subject matter of the discussions was safety, other industrial matters, or social matters.
43. The Applicant therefore submits that the evidence establishes that each of Hall and Travers was exercising or seeking to exercise a right in accordance with Part 3-4.

Act in an improper manner

44. The Applicant does not allege that Travers or Hall was intentionally hindering or obstructing any person. Rather, he relies on the second branch of section 500, acting in an improper manner. As pointed out in the Explanatory Memorandum to the Fair Work Bill at [1993], acting in an improper manner is intended to cover a wider range of conduct than hindering, and in particular is directed at actions inconsistent with the right of entry provisions, such as deliberately engaging in conduct that the permit holder knows is not permitted.
45. In *R v Byrnes and Hopwood* (a criminal case but in a passage that has been repeatedly applied in the industrial context¹¹), the High Court said that improper conduct “may consist in the doing of an act which a director or officer knows or ought to know that he has no authority to do”.
46. The following propositions are established by authority in relation to the meaning of “improper conduct”:
 - 46.1. Impropriety consists in a breach of the standards of conduct that would be expected of a person in the position of the alleged defendant by reasonable persons with knowledge of the duties, powers and authority of the position and circumstances of the case¹²
 - 46.2. It is not necessary for an official to have intended to act in an improper manner.¹³
47. The improper conduct was as follows.
48. *First*, Travers and Hall exercised their right of entry under section 484 without having complied with the requirement under section 487 to provide 24 hours’ written notice. Their entry was therefore unlawful, and improper. In *Director of the Fair Work Building Inspectorate v Stephenson*¹⁴ (**Stephenson**), entering premises for the purposes of

¹¹ See *Director of the Fair Work Building Industry Inspectorate v Cartledge* [2015] FCA 453, *Gregor v Setka* [2010] FMCA 690; *Director of the Fair Work Building Industry Inspectorate v Myles* [2014] FCCA 1429.

¹² *R v Byrnes & Hopwood* (1995) 183 CLR 501, quoted by Burchardt FM in *Gregor v Setka* [2010] FMCA 690 at [70], which was implicitly endorsed by the Full Court in *Setka v Gregor (No 2)* [2011] FCAFC 90 at [31].

¹³ *Setka v Gregor (No 2)* [2011] FCAFC 90 at [35]-[36] and the cases there cited.

¹⁴ *Director of the Fair Work Building Industry Inspectorate v Stephenson* [2014] FCA 1432.

discussions without providing notice under section 487 was held (in circumstances of agreement by the parties) to be a breach of section 500.¹⁵

49. *Second*, they met with Duggan at a time that was not his rostered lunch break. Section 490(2) of the FW Act provides that a permit holder may hold discussions under section 484 only during mealtimes or other breaks.
50. *Third*, Travers and Hall refused to leave when asked to do so by the representative of the occupier. Their refusal to leave was a breach of the general law of trespass and a breach of section 9(6) of the *Summary Offences Act 1966* (Vic). It was an act which they knew or ought to have known they had no right to do. Again, in Stephenson, refusing to leave in similar circumstances was held to be a breach of section 500.¹⁶
51. *Fourth*, Travers and Hall's purpose in remaining was no longer to hold discussions or any other purpose authorised by Part 3-4 of the FW Act. Rather, it was in furtherance of an alleged CFMEU policy that officials were not to leave once the police had been called.
52. *Fifth*, Travers threatened retaliatory action by the CFMEU, as outlined at [24] above. This conduct was plainly a breach of the standards of conduct that would be expected of a union official exercising a right of entry to premises.
53. The Court ought to find that Travers breached s 500 in each of the five aspects listed, and Hall in the first four.

Section 348

54. Section 348 reads:

A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to engage in industrial activity.

55. The Applicant alleges that Travers threatened to organise or take action, rather than that he did organise or take action.¹⁷
56. The Applicant therefore must prove that Travers:
 - 56.1. threatened to organise or take action;
 - 56.2. against another person;
 - 56.3. with intent to coerce the other person;
 - 56.4. to engage in industrial activity.

¹⁵ At [19], [20], [30(d)], [42(d)], [59(c)], [61(c)], [62(e)] and [63(c)].

¹⁶ At [30(b)], [42(c)], [59(a)], [61(a)], [62(b)] and [63(a)].

¹⁷ SOC at 21D.

57. Travers by his statement “if you do that you are starting a war and it will be no different to what we have done with Kane” was a threat to take action. The precise nature of the action may not be obvious, but it is apparent that it is in the nature of creating industrial strife.
58. The threat was to take action against MacDow. It is clearly apparent that the nature of the threat is industrial, and the reference to Kane (another construction company) makes it clear that the “you” is MacDow rather than White. That interpretation is also supported by the fact that the threat is spoken to White but it is Naughton who has said he will call the police.
59. The phrase “intent to coerce” has been held to comprise two elements:
 - 59.1. an intention that pressure be exerted which in a practical sense will negate choice; and
 - 59.2. conduct that is unlawful, illegitimate or unconscionable.¹⁸
60. The use of the phrase “you are starting a war” implies that MacDow would be subject to action which would, if not include actual violence, at least involve the full force of the resources of the CFMEU being applied against it. In that context, the reference to “what we have done with Kane” underlines that the purpose of the threat is to exert the maximum pressure possible.
61. In any event, pursuant to section 361 of the FW Act, the onus lies on Travers to establish that he did not intend to coerce.
62. By this point in time, regardless of his initial purpose in coming on site, Travers is clearly speaking on behalf of the CFMEU. Both the nature of the threat he is making and the use of “we” in “what we have done with Kane” imply that. His request that MacDow refrain from calling the police is therefore the request of the CFMEU. As such, it is a “lawful request made by...an industrial association. To comply with that request would therefore be “industrial activity” for the purpose of section 348.¹⁹
63. The Court should therefore find that Travers breached section 348 of the FW Act by making that threat.

Liability of the CFMEU

64. Each of Travers and Hall was acting on behalf of the CFMEU when on the Project site on 17 June 2014. That follows from:
 - 64.1. their status as union officials;
 - 64.2. their status as permit holders present on work premises;

¹⁸ *State of Victoria v Construction, Forestry, Mining and Energy Union* (2013) 218 FCR 172 at [71], citing *Seven Network (Operations) Pty Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia* [2001] FCA 456 at [41].

¹⁹ FW Act s 347(1)(b)(iv).

- 64.3. the assertion that they were discussing safety matters, which can only have been union business rather than personal matters;
 - 64.4. their refusal to leave, citing union policy;
 - 64.5. Travers' reference to "we" and "starting a war...no different to what we have done with Kane" in his conversation with White; and
 - 64.6. Edwards' endorsement of their conduct.
65. Accordingly, pursuant to section 793 of the FW Act their conduct is taken to be that of the CFMEU, their states of mind are attributable to the CFMEU, and the CFMEU is liable for the contraventions.
66. Further and alternatively, Travers' conduct in making the threat to White was action taken by an officer of the CFMEU acting in that capacity, and therefore the action of the CFMEU pursuant to section 363 (1)(b) of the FW Act.

Robert O'Neill

Joan Rosanove Chambers

Schedule

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: VICTORIA
Division: Fair Work

No VID 333 of 2015

Respondents

Second Respondent Mark Travers

Third Respondent Adam Hall