

NOTICE OF FILING

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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: 15/04/2016 2:38:16 PM AEST

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.

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No. VID3... of 2015

Federal Court of Australia
District Registry: Victoria
Division: Fair Work Division

DIRECTOR OF THE FAIR WORK BUILDING INDUSTRY INSPECTORATE

Applicant

**CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION
and others named in the Schedule**

Respondents

**OUTLINE OF SUBMISSIONS OF THE FIRST, SECOND AND THIRD
RESPONDENTS**

Contraventions pursued by the Applicant

1. The First, Second and Third Respondents (together, **the Respondents**) submit that the contraventions alleged by the Applicant cannot be made out. The behaviour of the Second and Third Respondents does not constitute breaches of ss348 or 500 of the *Fair Work Act 2009 (Cth) (FW Act)*.
2. As acknowledged by the Applicant at paragraph [5] of its Outline of Submissions, the Applicant must prove its case to “*the standard set forth in Briginshaw v Briginshaw (1938) 60 CLR 336 at 361 to 363 per Dixon J and as now embraced by s140(2)*”¹ of the *Evidence Act 1995 (Cth) (the Evidence Act)*.

¹ See for example *Director of Fair Work Building Industry Inspectorate v Bragdon (No 2)* [2015] FCA 998 at [13] (Flick J) (*Bragdon*)

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Standing and Status of Parties

3. The Respondents do not take issue with the standing and status of the Applicant to commence proceedings, as set out in paragraphs [6] – [11] of the Applicant’s Outline of Submissions.

Factual Background

4. The Respondents do not take issue with the factual background set out in paragraphs [12] – [14] of the Applicant’s Outline of Submissions.

Undisputed Facts

5. The Respondents do not take issue with the undisputed facts set out in paragraph [15] of the Applicant’s Outline of Submissions.
6. However, for the reasons set out below, the Respondents contend that these facts alone *do not* permit the court to find the Respondents have contravened s500 of the FW Act. In fact, when taken with the further evidence to be adduced on behalf of the Respondents, the Respondents submit that no contraventions can be found proven at all.

Section 500 of the FW Act

7. Section 500 of the FW Act relevantly provides that:

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.
8. As observed by the Applicant at paragraph [29] of its Outline of Submissions, in order for the Applicant to establish contraventions of s500 with respect to the Second and Third Respondents, it must prove that they each:
 - a. were permit holders for the purposes of the FW Act;
 - b. were “*exercising or seeking to exercise*” rights in accordance with Part 3-4 of the FW Act at the relevant time; and

- c. intentionally hindered or obstructed a person or otherwise acted in an improper manner.
9. For the purposes of this proceeding, the Respondents accept that:
- a. a permit holder in s500 is a person to whom a permit has been granted by the Fair Work Commission (FWC) pursuant to s512 of the FW Act; and
 - b. at all relevant times the Second and Third Respondents were persons to whom such permits have been granted by the FWC.
10. The question is whether the Second and/or Third Respondents were “*exercising or seeking to exercise*” rights under Part 3-4 at the relevant times alleged by the Applicant. That is a question of statutory construction.

When is a permit holder “exercising or seeking to exercise” rights under Part 3-4 of the FW Act?

General principles of construction

11. Any question of statutory construction relevantly begins with an examination of the words of the provision being construed.²
12. The words of s500 should be given a “*strict construction*”.³ The fact that s500 is a civil penalty provision forms part of the context in which that provision is to be interpreted – it is relevant to the question of construction.⁴
13. A majority of the High Court have also observed:
- An appreciation of the heavy hand that may be brought down by the criminal law suggests the need for caution in accepting any loose, albeit “practical” construction of the [relevant provision].⁵
14. The principles of construction applicable to the interpretation of penal provisions are equally applicable to the consideration of civil penalty provisions.⁶

² *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at [47].

³ *R v Adams* (1935) 53 CLR 563 at 567-8.

⁴ *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at 49.

⁵ *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193 at 210-11.

⁶ See for example *Trade Practices Commn v TNT Management Pty Ltd* (1985) 6 FCR 1 at 47-8, *Rich v Australian Securities and Investment Commn* (2004) 220 CLR 129 and *Trade Practices Commn v CSR Ltd* (1991) ATPR 41-076 at 52, 152-3 (French J); as referred to in Pearce, D and Geddes, R, *Statutory Interpretation in Australia* (7th Edition), p. 302.

The words “exercising, or seeking to exercise, rights...”

15. The Applicant contends that the Second and Third Respondents were ‘exercising or seeking to exercise’ their rights under Part 3-4 of the FW Act, by the simple *doing* of something that is described as a right in Part 3-4.⁷ The Respondents submit that this is an incorrect interpretation of s500. The Respondent submits that there is an important distinction to be drawn between simply *doing* something that is set out in Part 3-4, and ‘*exercising or seeking to exercise*’ a right to do something that is set out in Part 3-4.
16. The verb ‘do’ is relevantly defined in the Australian Oxford English Dictionary 2nd Edition as follows:
1. perform, carry out, achieve, complete (work etc.)
 - ...
17. The Applicant’s construction asks the Court to essentially read s500 as ‘a permit holder *that performs or carries out an action* described as a right in Part 3-4...’ However, that is not what the section says.
18. Section 500 uses the words ‘exercising’ or ‘seeking to exercise’. The verb ‘exercise’ is relevantly defined in the Australian Oxford English Dictionary 2nd Edition as follows:
1. use or apply (a faculty, right, influence, restraint, etc.)
 - ...
19. The verb ‘use’ is relevantly defined as:
- “cause to act or serve for a purpose, bring into use or service; avail oneself of”.*
20. Therefore, a person is ‘exercising’ a right under Part 3-4 of the FW Act when they “*bring [a right] into use or service*” or “*avail themselves of*” a statutory right that exists in Part 3-4. Simply because a right *exists* at any relevant time, does not mean that a permit holder is *using or exercising* that right, or seeking to use or exercise that right. There is an active mental element implicit in the word ‘exercising’; that is, a permit holder must actively decide to ‘avail him or herself of’, or ‘bring into use’ a Part 3-4 right. In essence, the permit holder must *rely* on the permit to do something provided for in Part 3-4 to be

⁷ See paragraphs [16], [41] – [43] of the Applicant’s submissions.

offered the protections contained within that Part, as well as be made subject to its sanctions.

21. If a permit holder does not wish to ‘avail him or herself’ of a right in Part 3-4, then that person cannot enter a workplace under the protection of their permit and Part 3-4 of the FW Act - they must enter a workplace by some means other than their statutory entitlement to do so. For example, they might enter the worksite by invitation.
22. The Respondent submits that this construction of s500 is entirely consistent with the context and purpose of Part 3-4 of the FW Act, in which the section appears.

Context in which s500 of the FW Act appears

23. Part 3-4 of the FW Act is concerned with the “*rights of officials of organisations who hold entry permits to enter premises for purposes related to their representative role under this Act and under State and territory OHS laws*”.⁸
24. There is no evidence that the Second or Third Respondents entered the premises “*for purposes related to their representative role*”.
25. Division 2 of Part 3-4 is concerned with “entry rights” of permit holders. That is, Division 2 sets out what a permit holder may do *by reason* of his or her permit. It is the existence of the permit that gives a person the power to do the things set out in Division 2, without fear of reprisals at common law.⁹
26. Importantly with respect to Division 2 of Part 3-4, the Explanatory Memorandum to the Fair Work Bill 2009 (**the Explanatory Memorandum**) at [1919] provides as follows:

It is not intended [for Division 2 of Part 3-4] to codify all of the ways in which entry can occur or provide an exhaustive list of the powers exercisable on the premises. The Division does not affect the ability of an occupier of premises to invite any person onto that premises, e.g., to meet with the employer about a particular matter.
27. Paragraph [1919] of the Explanatory Memorandum implicitly recognises that a permit holder may enter a premises by means, other than in accordance with his or her entry

⁸ Section 478 of the FW Act.

⁹ See *Maritime Union of Australia v Fair Work Commission* [2015] FCAFC 56 at [13] – [15] (North, Flick and Bromberg JJ).

rights set out in Division 2. So much is recognised by the example provided; that is, where a person is invited onto a premises.

28. There may be a number of other reasons why a person who holds a permit enters a particular workplace. Another example might be where a permit holder arrives at or enters a workplace to collect their son, daughter or friend who is finishing a shift; or arrives at or enters a workplace to meet their spouse for lunch. A person entering onto premises in that capacity could not be said to be exercising or purporting to exercise their entry rights under Division 2, Part 3-4 of the FW Act.
29. If it is accepted that Division 2 of Part 3-4 of the FW Act was not intended to cover every circumstance in which a permit holder can enter a workplace, then how does a permit holder 'exercise or seek to exercise' the entry rights set out in Division 2?
30. The Respondents submit that, as described above, for a permit holder to exercise or seek to exercise their entry rights in Division 2, the permit holder must avail themselves of their entry rights *by reason of their permit*. That is, they must rely upon their permit and have an intention to rely upon it.
31. If a permit holder is not relying on their permit, then they are not exercising or seeking to exercise a Division 2 entry right. So were the Second and Third Respondent exercising or seeking to exercise a right under Part 3-4 of the FW Act?

Evidence of the Second and Third Respondents 'exercising or seeking to exercise' a Part 3-4 right

32. The right that the Applicant alleges the Second and Third Respondents exercised was their right pursuant to s484 of the FW Act to enter premises.
33. The Applicant has not produced any evidence that the Second and Third Respondents relied on their permits to gain access to the premises.
34. The Applicant has not produced any evidence that the Second and Third Respondents relied on their status as permit holders at any stage.
35. There is no other evidence that the Second and Third Respondents sought to avail themselves of the rights granted to them under Part 3-4 in any other way.
36. The Second and Third Respondents' evidence will be that they both entered the premises upon receiving an invitation from Mr Duggan to come over to the site for a social visit.

Their evidence will also be that, upon arrival, the Second and Third Respondents sat down in the lunchroom shed for 10-15 minutes, had a cup of tea, and spoke to Mr Duggan socially. Mr Duggan will corroborate this evidence.

37. It was never the Second or Third Respondent's intention to enter the premises relying on their right to do so pursuant to their permits.

Conclusion: were the Second and Third Respondents 'exercising or seeking to exercise' their s484 rights?

38. For the reasons set out herein, the Respondents submit that for a permit holder to 'exercise or seek to exercise' their entry rights in Division 2, the permit holder must avail themselves of their entry rights *by reason of their permit*. That is, they must rely upon their permit to do or carry out an action specified in Division 2 of Part 3-4 of the FW Act. The Respondents submit that this also requires the Applicant to demonstrate evidence of an intention by the Second and Third Respondents to do so.
39. The Respondents submit that there is no evidence of the Second or Third Respondent's intention to avail themselves of their Part 3-4 rights. Therefore, the Second and Third Respondents were not, at any relevant time, 'exercising or seeking to exercise' rights under Part 3-4 of the FW Act. The only reason they entered the site was for a social visit after receiving an invite from Mr Duggan.
40. The Respondent submits that the alleged contraventions of s500 should be dismissed.

Allegations of Improper Behaviour

41. If the Respondents' construction of s500 is accepted, it does not matter how the Respondents behaved for the purposes of this proceeding, as they were not 'exercising or seeking to exercise' a Part 3-4 right.

Section 348 of the FW Act: was there a threat to organise or take action?

42. The Second and Third Respondents deny that:
- a. Travers made any mention of "starting a war";
 - b. Travers made any mention of Kane;

- c. Travers suggested that the CFMEU would be involved in creating any industrial difficulties for MacDow;
 - d. they made any other threats or behaved in an intimidating way towards employees of MacDow.
43. Mr Duggan will corroborate this evidence. If the court accepts the Second and Third Respondent's version of events, no contravention of s348 can be made out.

Liability of the CFMEU

44. The Respondents submit that by reason of the matters set out herein, no contraventions of s500 or s348 of the FW Act can be made out, therefore the First Respondent cannot be found liable for contraventions pursuant to:
- a. s793 of the FW Act; and/or
 - b. s363(1)(b) of the FW Act.

Date: 15 April 2016

Dr Gideon Boas
William Crockett Chambers



Signed by
Slater & Gordon Solicitors
Solicitors for the First, Second and Third
Respondents