SENATE EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE:
RESPONSE TO QUESTION ON NOTICE

Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019

Public hearing, Tuesday, 24 September 2019, Sydney

Senator O'NEILL: The argument we have heard from members of the government is that the bill just gives power to the court. You've made a few comments about the cost of litigation to the unions. The question that's put is: 'Don't you trust the court to exercise its discretion appropriately?' We've also heard evidence in these hearings about a two-stage test that protects unions and officers from having these proceedings brought against them for minor breaches. How do you respond to that claim…
…
Ms Palmer: Could I just finish—
CHAIR: We'll take that on notice. Sorry, we have to restrict time.

"We've also heard evidence in these hearings about a two-stage test that protects unions and officers from having these proceedings brought against them for minor breaches. How do you respond to that claim?"

The Attorney-General's Department gave evidence at the hearing in Canberra on 12 September 2019 which suggested that there is a kind of a two-stage process which effectively provides a safeguard against applications premised on minor or technical contraventions:

- First, there must be a proceeding, usually initiated by the relevant regulator, in which a court makes a designated finding against a union or union officer or makes a relevant finding in relation to a designated law; and

- Second, a subsequent separate court proceeding in which an application is initiated under the provisions of this bill. The Attorney-General's department said that a regulator is unlikely to take enforcement action for a minor or technical contravention.

This two-stage process does not reassure us because:

1. Not all of the grounds for an under order Schedules 1 or 2 of the bill require a prior judicial finding: see, e.g. proposed ss 223(5) and (6)(a)-(c) and (d) (finding "in any action against the person by an agency of the Commonwealth of a State or Territory") (disqualification of officer) and proposed ss 28C, 28F and 28G (cancellation of registration or alternative orders).

2. Many of the civil proceedings that provide a designated finding under the bill or that lead to a finding in relation to a designated law are likely to be initiated by an employer and not by the relevant regulator, such as proceedings in relation to right of entry or unprotected industrial action.[1] The purported reassurance that a regulator is unlikely to take enforcement action in respect of minor or technical contraventions does not apply to the industrial parties themselves, who will be incentivised by this bill to pursue such actions because of the increased leverage and power that it will accrue to them.

3. In any event, there are plenty of examples of a regulator bringing proceedings in relation to minor or technical (or non-deliberate) contraventions of industrial laws (see list of examples below).

4. Further, it is not uncommon that courts make findings in relation to minor or technical contraventions. Those grounds that do require a prior judicial finding capture all findings, regardless of how serious the finding is. Further, those grounds only require one or two such findings.

[1] See, e.g., *Fair Work Act 2009* (Cth), s 539.

"Don't you trust the court to exercise its discretion appropriately?"

The Attorney-General's Department also relied on a kind of two-stage 'test' whereby:

- First, the application must meet the statutory prerequisites (that is, an application which establishes a ground for an order to be made); and

- Second, the court must be satisfied that an order should be made and that it is not unjust in all the circumstances (that is, if a ground is established, the court then exercises a discretion as to whether to make the order).

That the court can exercise a discretion to refuse an application does not reassure us because:

1. The exercise of the court's discretion is guided by the legislation, including what matters constitute a ground. The Parliament indicates to the court what it thinks is an appropriate ground for an order to be made by the way that the legislation is drafted. Under the bill, the bar to establish a ground for an order to be made is very low. Each of the grounds require either no prior judicial finding of unlawful conduct or require only one or two such findings. None of the grounds require the conduct to be 'serious', 'deliberate', 'knowing', 'wilful', 'repeated', 'persistent' or 'systematic'.

2. The bill instructs the court that if a ground for cancellation of registration is established, the court *must* cancel registration unless the organisation itself (not the applicant) can satisfy the court that it would be unjust to do so (proposed s 28J(1)).

3. Even if you could safely assume that the court would exercise its discretion not to make the order in cases of minor or technical contraventions, the defendant union must still endure the process of litigation and in most instances will be unable to recover its costs.[2]

Combined with the extremely broad standing provisions, there is a real prospect that unions will have their resources tied up in litigation and diverted from their important job of protecting and advancing their members' interests.

Further, the protections against vexatious litigation are unlikely to be applied when an application is brought that prima facie establishes a ground or that establishes a ground but that is refused on a discretionary basis. The Fair Work jurisdiction is a 'no costs' jurisdiction,[3] which means that in most circumstances the parties bear their own legal costs, and there is no scope to recoup legal costs expended on failed applications. The union will have to spend the money defending the application even if it is defeated.

Findings in relation to minor or technical contraventions or non-deliberate contraventions

Below is a sample of cases in which the court has made a finding of a contravention of the *Fair Work Act 2009* (Cth) (**Fair Work Act**) or the *Fair Work (Registered Organisations) Act 2009* (Cth) in relation to minor or technical contraventions or non-deliberate contraventions.

It must be noted that:

1. Many of these proceedings were brought by the relevant regulator (the Fair Work Ombudsman, the Registered Organisations Commissioner or the Australian Building and Construction Commissioner), which undermines the claim by the Attorney-General's Department that a regulator is unlikely to bring enforcement action in relation to minor or technical contraventions.

2. Those proceedings that were not brought by a regulator were brought by one of the industrial parties, which underscores our concern about the bill incentivising parties to bring proceedings about relatively trivial conduct.

3. Each of the findings in these cases are a "designated finding" or a finding in relation to a "designated law", as defined in proposed s 9C of the bill, with the exception that some of these proceedings relate to findings against companies and their directors. Of course, the bill does not apply to

[2] *Fair Work (Registered Organisations) Act 2009* (Cth), s 329.
[3] *Fair Work Act 2009* (Cth), s 570.

companies generally or to employers, so these findings do not have the same consequences for the company or the company director as they have for a union or union officer under the bill.

Examples

- In *Construction, Forestry, Maritime, Mining and Energy Union v BGC POS Pty Ltd & Anor* [2018] FCCA 1270, Judge Kendall found that the employer and its representative contravened the Fair Work Act by intentionally hindering and obstructing two CFMMEU officials seeking to exercise their right of entry to a worksite, delaying their entry by 20 minutes. Justice Colvin dismissed an appeal by the employer, despite acknowledging in the judgement that "One may wonder why the events in this case were considered significant enough to warrant the commencement of court proceedings" (*BGC POS Pty Ltd v Construction, Forestry, Maritime, Mining & Energy Union* [2019] FCA 74, at [67]).

- The Federal Court was highly critical of the Australian Building and Construction Commissioner for pursuing proceedings against the CFMEU in "The Cup of Tea Case" and awarded costs in favour of the union.[4] Justice North described the case as "excitare fluctus in simpulo" (a 'storm in a teacup') (*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Cup of Tea Case)* [2018] FCA 402, at [82]). His Honour's criticism of the regulator during the hearing was scathing.[5]

- In *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining And Energy Union (No 2)* [2018] FCA 1968, Justice O'Callaghan found that the CFMEU official in question "had an honest, but mistaken, belief that the Victorian legislation gave him a statutory right to enter the Site" and accordingly agreed "that a penalty at the lower end of the range is appropriate" (at [65]-[66]).

- In *Registered Organisations Commissioner v Mijatov* [2018] FCA 939, the Registered Organisations Commission brought proceedings against a union officer for paying himself an entitlement that the court agreed he was not in fact entitled. Justice Bromwich found that the officer "genuinely believed that he was doing no more than obtaining what he was entitled to" and that "It was, in that limited sense, an innocent contravention" (at [50]).

- Similarly, in *Registered Organisations Commissioner v Transport Workers' Union of Australia* [2018] FCA 32, the Full Court of the Federal Court agreed with Justice Perram below that the offending conduct (which related to record-keeping obligations) was deliberate in the sense that the conduct was deliberate, but the contravention was not deliberate because it was done in ignorance of the law or by human error (see, e.g., at [47]-[49] and [132]).

- In two related cases, an employer pursued proceedings against a union for minor contraventions of an order that applied to the union in relation to industrial action or a matter that arose during bargaining for an enterprise agreement, incentivised by the fact that a finding to that effect would preclude the union from organising or engaging in any protected industrial action in support of that bargaining.

  In the first case, the union contravened a *consent* bargaining order by providing documents between one and four days late. This case was pursued to the Full Federal Court.[6] The case was brought and jointly funded by an unregistered employer organisation and four employers.

  In the second case, the union contravened an order that it stop industrial action because the union mistakenly believed that the industrial action was protected and therefore not subject to the order. This second case was pursued to the High Court.[7] The majority noted that the circumstances illustrated that "determining whether a contravention of a stop order has or has not occurred can involve questions of fact concerning whether industrial action that is taken falls within the precise scope of the industrial action specified in the order and that those questions of fact can be of a technical nature" and that a

[4] *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (the costs of the Cup of Tea Case)* [2019] FCAFC 36, *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union* [2018] FCA 1239, *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Cup of Tea Case)* [2018] FCA 4.
[5] Anna Patty, 'Judge blasts building cop for wasting public money on 'tea cup' case', *The Sydney Morning Herald*, 8 August 2018; David Marin-Guzman, 'Judge turns on ABCC for wasting time over 'cup of tea' CFMEU incident', *Financial Review*, 13 March 2017.
[6] *Australian Mines and Metals Association Inc v Maritime Union of Australia* [2016] FCAFC 71.
[7] *Esso Australia Pty Ltd v The Australian Workers' Union; The Australian Workers' Union v Esso Australia Pty Ltd* [2017] HCA 54.

"contravention of a particular stop order might be short-lived" (Kiefel CJ, Keane, Nettle and Edelman JJ, at [90]).

- In *Independent Education Union v Trustees of Edmund Rice Education* [2017] FCCA 1811, Judge Vasta ordered that the employer pay a penalty of only $1,000 for what His Honour described as "a very technical breach" and not a deliberate breach of the Fair Work Act (at [34] and [37]).

- In *Fair Work Ombudsman v Glasshouse Mountains Tavern Pty Ltd & Anor* [2016] FCCA 1899, Judge Baumann imposed a penalty of 10 per cent of the maximum for what His Honour described as "a very technical breach" of the Fair Work Act by an employer (at [32]).

- In *Fair Work Ombudsman v Openica Logistics Pty Ltd & Anor* [2016] FCCA 159, Judge Riethmuller found that an employer's failure to provide copies of pay slips was "really a technical contravention" and in those circumstances ordered a penalty of only $1,500 for the first respondent (the employing company) and $500 for the second respondent (the company director and secretary) (at [27]).

- In *Ingersole v Castle Hill Country Club Limited* [2015] FCCA 1055, Judge Varnes found that an employer contravened the Fair Work Act but ordered that no penalty be imposed. His Honour found that the contravention "was an isolated incident of a technical breach", that it "was relatively insignificant" and "was not part of and does not reveal any systematic or deliberate corporate strategy to interfere in the rights of … employees", that the employer thought that it had complied with, and intended to comply with, its legal obligations, and that the only contravention established represented a breach caused by a misunderstanding on the part of the employer as to what was technically required of it under the Fair Work Act (at [13]-[18]).

- In *Fair Work Ombudsman v Rainbow Paradise Preschool & Anor* [2015] FCCA 1652, Judge Lloyd-Jones made declarations and ordered penalties against an employing company and its director despite the Fair Work Ombudsman acknowledging that its case hinged on technical breaches of the Fair Work Act, that the respondent had sought prior assistance from the Fair Work Infoline and received conflicting and confusing advice, and that there was no evidence that the breaches were deliberate or intentional (at [111]-[112]).

- Although ultimately finding that the employer's failure to comply with a clause of the enterprise agreement was a serious contravention, Justice Gray in *National Tertiary Education Union v Royal Melbourne Institute of Technology* [2013] FCA 451 acknowledged that it was "difficult to assess whether this contravention was a mere technical contravention, or a contravention of substance" (at [138]).

- In *Fair Work Ombudsman v W.K.O. Pty Ltd* [2012] FCA 1129, the Fair Work Ombudsman and the respondent employing company and company director, all submitted to the court that an admitted contravention of a clause of the award was a "technical contravention" and should not attract a penalty. Despite issuing a declaration that the respondents contravened the clause and thereby contravened Fair Work Act, Justice Barker agreed that the contravention was "a technical contravention in respect of which no separate penalty need be considered" (at [97]).

- In *Gregor v CFMEU & Anor* [2011] FMCA 562, Federal Magistrate Riethmuller found that a right of entry contravention "was a relatively minor contravention" and imposed a penalty of only 15 per cent of the maximum (at [20]).

- In *Fair Work Ombudsman v No.1 Riverside Quay Pty Ltd* [2011] FMCA 31, the Fair Work Ombudsman and the respondents both submitted that the contraventions were "of a technical and procedural nature". Federal Magistrate Simpson took this into account in deciding the penalties to be imposed (at [6]), but made declarations and ordered penalties nonetheless.