

Union Fined

In *Heyman v CFMEU & Ors [2011] FMCA 145*, CFMEU & others were fined for unlawful conduct on a building site.

THE FACTS

- The applicant was an inspector appointed pursuant to s57 of the Building and Construction Industry Improvement Act 2005 (the "Act") and brought proceedings against the respondents on 1 April 2010.
- The applicant alleged a breach of the Act in regards to the Royal Children's Hospital in Melbourne on 21 May 2008.
- In 2008 Bovis Lend Lease Pty Ltd ("BLL") was the head contractor for the site and work was being carried out involving the operation of a tower crane.
- BLL had a labour hire agreement with regards to employees who operated the tower crane.
- Representatives of the first respondent were of the belief that the tower crane drivers would be employees of Caelli Constructions however when the second respondent asked the crane driver who his employer was, he advised that it was Direct Skills.
- When the crane was unattended the second and third respondent blocked access to the crane and the third respondent informed the site foreman that they had taken possession of the crane and that they would not come down until they spoke to the operations manager of BLL.
- Their issue was that the crane crew was not employed directly by BLL or Caelli Constructions and that the CFMEU wanted four crew members not three.
- As a result of discussions, Caelli Constructions hired the crane crew directly.
- The crane was inoperative for three hours as a direct result of the conduct of the respondents.
- The respondents admit that the second and third respondent breached s38 of the Act and engaged in building industrial action that was an unlawful industrial action under the Act. Therefore, the first respondent has also breached the Act, as per s69.

FACTORS RELEVANT TO PENALTY

The factors relevant to a penalty for a contravention of the Act have been set out in a number of decisions of the Federal Court such that the factors which are to be considered in relation to penalty are now well established.

The relevant considerations include:

- The nature and extent of the conduct which led to the breaches.
- The circumstances in which that relevant conduct took place.
- Whether or not the breaches were deliberate.
- The nature and extent of any loss or damage sustained as a result of the breaches.
- Whether there had been similar previous conduct by the respondent/s.
- Whether the breaches were properly distinct or arose out of the one course of conduct.
- Whether the party committing the breach had exhibited contrition.
- Whether the party committing the breach had cooperated with the enforcement authorities.
- Whether the party committing the breach had taken corrective action.
- The need for specific and general deterrence.

Decisions of the Full Court of the Federal Court make clear the task is for the Court to fix a penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations.

In *Stuart-Mahoney Tracey J* said, "...the principle object of the BCII Act is to provide an improved workplace relations framework for building work to ensure that building work is carried out fairly, efficiently and productively for the benefit of all building industry participants and for the benefit of the Australian economy as a whole...the BCII Act aims to achieve this object through various means, including, relevantly, for present purposes:

- promoting respect for the rule of law;
- ensuring respect for the rights of building industry participants; and
- ensuring that building industry participants are accountable for their unlawful conduct.”

THE ORDERS

1. A penalty of \$6,000.00 be imposed on the second respondent for his contravention of s38 of the Act constituted by his conduct on 21 May 2008 when he banned work on a tower crane at the Royal Children’s Hospital site at Parkville, Victoria.
2. A penalty of \$5,000.00 be imposed on the third respondent for his contravention of s38 of the Act constituted by his conduct on 21 May 2008 when he banned work on a tower crane at the Royal Children’s Hospital site at Parkville, Victoria.
3. A penalty of \$30,000.00 be imposed on the first respondent for its contravention of s38 of the Act arising from its vicarious liability for the contravening conduct of its officials, the second and third respondents.
4. The penalties be paid to the Consolidated Revenue Fund within 28 days of the date of this Order.
5. The proceedings otherwise be dismissed with no order as to costs.

If you own or operate a building and construction business, and think you have issues that require attention to protect your business, have a dispute over unpaid works, or a problem with workplace policies or contracts, or you need assistance performing a due diligence for your business, contact our professional team at our Gold Coast or Brisbane office.



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