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Ruling imminent on CFMEU-MUA-TCFU merger

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The Fair Work Commission plans to deliver its decision on Tuesday as to whether the planned amalgamation between the CFMEU, MUA and TCFU can proceed.

Deputy President Val Gostencnik today reserved his decision on the merger after hearing renewed objections from two employer groups; the Australian Mines and Metals Association and the Master Builders Association.

The deputy president said he hoped to deliver his ruling and reasons on Tuesday, although it was not an "absolute promise".

The three unions have asked for the merger to take effect 21 days after it is approved.

The employers have previously argued that s73(2) of the Registered Organisations Act bars the merger, because the CFMEU and MUA have pecuniary penalty proceedings pending against them (see [Related Article](#)).

Under that provision, a merger can be approved only if "there are no proceedings (other than civil proceedings) pending against any of the existing organisations concerned in the amalgamation" that relate to breaches of workplace laws, modern awards, enterprise agreements or awards.

The unions contend that outstanding criminal proceedings are a barrier to approving amalgamations, while the CFMEU and the MUA only face civil penalty proceedings.

Contempt proceedings in a class of their own: Employers

In their latest objection, the employers claim that the Commission should take into account the contempt proceedings launched against the MUA in the Victorian Supreme Court over a dispute at the VICT container terminal in Melbourne (see [Related Article](#)).

Their [further submissions](#), lodged last week, argue that contempt proceedings are *sui generis* – that is, in a class of their own – because they have characteristics of both criminal and civil proceedings

They argue that while contempt proceedings occur under a court's civil jurisdiction and are summary proceedings without a jury, they have to be proven beyond reasonable doubt and can result in a criminal conviction.

The barrister for the employer groups, Stuart Wood QC, told the Commission today that High Court cases in the 1980s and 1990s referred to the "quasi-criminal" nature of contempt proceedings.

Wood said such proceedings could not be "divided into black and white, strictly criminal and strictly civil" and they depended very much on their context.

He argued that the VICT contempt action before the Victorian Supreme Court was the "common law equivalent" of a secondary boycott brought under [s45D](#) of the Competition and Consumer Act in the Federal Court.

"It is very unlikely that the legislature decided to exclude proceedings which could result in criminal convictions," Wood said.

Boral ruling the last word on criminal question, say unions

The unions argue that the 2015 High Court decision in [CFMEU v Boral Resources \(Vic\) Pty Ltd](#) made it "abundantly clear that contempt proceedings are civil proceedings".

In their [further outline of submissions](#), the unions say the Boral decision is "additionally significant because it arose in relation to contempt of the same kind that has now been issued against the MUA, namely, for breach of an injunction in a civil proceeding for an industrial tort in the Supreme Court of Victoria".

Union barrister Herman Borenstein QC told the Commission today that the Boral decision was the "last word on this topic."

He said the Commission should consider the particulars of the contempt claim against the MUA, which alleged that officials should not come within 100 metres of the port terminal gates.

"That's the sum total of the contempt."

He said that arguments about potential secondary boycott claims or alleging coercion under [s343](#) of the Fair Work Act were "very tenuous" and insufficient material had been presented for the commission to form a reasonable inference.

The bid to block the merger isn't the employers' only shot in the locker; the Turnbull Government has legislation before the Senate that would require a public interest test for such amalgamations.

Employer groups hoped the [Fair Work \(Registered Organisations\) Amendment \(Ensuring Integrity\) Bill](#) would pass last year, but it is yet to be put to a vote.

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