

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMON LAW DIVISION  
EMPLOYMENT AND INDUSTRIAL LIST

Not Restricted

S CI 2017 04871

VICTORIA INTERNATIONAL CONTAINER TERMINAL LTD  
T/A VICT  
(ACN 164 915 655)

Plaintiff

v

CONSTRUCTION, FORESTRY, MARITIME, MINING AND  
ENERGY UNION

Defendant

JUDGE: McDonald J  
WHERE HELD: Melbourne  
DATE OF HEARING: 10 April 2018  
DATE OF JUDGMENT: 20 April 2018  
CASE MAY BE CITED AS: *VICT v CFMMEU*  
MEDIUM NEUTRAL CITATION: [2018] VSC 181

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PRACTICE AND PROCEDURE – Application for temporary stay – Amalgamation of Maritime Union of Australia and Construction, Forestry, Mining and Energy Union – Maritime Union of Australia deregistered – Amalgamation decision subject to appeal in Fair Work Commission – Potential for amalgamation to be set aside and Maritime Union of Australia to be reinstated as defendant in proceeding – Stay of proceedings inconsistent with overarching purpose of *Civil Procedure Act 2010* – Application refused – *Fair Work (Registered Organisations) Act 2009 (Cth)* ss 44, 73, 79 and 80 – *Civil Procedure Act 2010* ss 7, 9 and 43.  
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APPEARANCES:

	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr S J Wood QC with Mr N Burmeister	Seyfarth Shaw
For the Defendant	Mr S J Moore QC	Slater & Gordon Lawyers

HIS HONOUR:

### Introduction

- 1 By a generally indorsed writ filed on 1 December 2017 the plaintiff ('VICT') commenced proceedings against the Maritime Union of Australia ('MUA') and the Construction, Forestry, Mining and Energy Union ('CFMEU'). Those proceedings arose out of the continual presence between 27 November 2017 and 12 December 2017 of obstructive pickets at VICT's premises at 78 Webb Dock Drive, Port Melbourne ('Webb Dock site'). On 1 December 2017 the Court granted an injunction restraining the MUA from preventing access to the Webb Dock site. On 12 December 2017 the injunction was extended to include the CFMEU.<sup>1</sup>
  
- 2 The Court's judgment extending the injunction to the CFMEU included the following findings:
  8. On 1 December 2017 the Court heard and granted an application for injunctions restraining the MUA from preventing access to the site. The MUA made no submissions in opposition to the grant of the injunction, its only submissions were directed to the form of the order, and, in particular, opposing a 100 metre exclusion zone in the vicinity of the site.
  9. On the same day, the Court refused to grant an injunction against the CFMEU. I shall return to that matter in due course.
  10. In the aftermath of the orders made on 1 December, the obstructive picket has remained in place. The MUA contends that it has complied with the Court's orders, and has had no involvement in the obstruction which has continued post 1 December. It advances this contention notwithstanding the fact that it appears that the MUA and its industrial interests in opposing the termination of its member's employment, and its trenchant opposition to the Plaintiff's current enterprise agreement, mean that it is the primary beneficiary of the unlawful action taking place and the financial pressure which that action is bringing to bear upon the Plaintiff.
  11. Since 1 December, the Victorian Trades Hall Council and a number of unions have, via social media, called upon union members, and members of the public, to participate in a community protest/peaceful assembly at the Webb dock site. The fact that the label of 'community protest/peaceful assembly', is affixed to the conduct occurring at the Webb dock site, in no way detracts from the unlawfulness of that conduct which has been in place since 27 November 2017. There is no question that members of the public have the right to peaceful

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<sup>1</sup> *VICT v MUA & CFMEU; VICT v Hilakari* [2017] VSC 762.

assembly, and the right to voice their opposition to the management practices of the Plaintiff. What they do not have the right to do, and what has been occurring, constantly since 27 November 2017, is to prevent the Plaintiff going about its lawful business.

12. Since 27 November and in particular, subsequent to the Court's orders of 1 December, the conduct of the picket has been characterised by a high degree of organisation, not only in the calls by way of social media for individuals to attend the site, but in the provision of infrastructure necessary to maintain an around the clock obstructive picket. The unchallenged evidence is that the picket now has features of permanence; chairs, marquees, port-a-loos, a caravan, windbreaks, a trailer, a three tent structure with an annexe, a generator, and even a post box. Picketers have used bollards, chairs, numerous oBikes and cars, to obstruct entrance to the site.
13. In the immediate vicinity of the site, there have been flags of the Electrical Trades Union, the Australian Services Union, a large orange flag bearing the words, 'We Are Union', an Australian Manufacturing Workers' Union flag, a dark coloured flag with an AMWU logo on it, and a red trailer with the words, 'Construction Union, No Unauthorised Use by Order of Secretary'.
14. In the period post 1 December 2017, the CFMEU via its national office, Victorian Tasmania Branch, and Mr John Setka, have been active on social media, posting pejorative remarks, or endorsing pejorative remarks made by others, which denounce the Plaintiff's parent company, International Container Terminal Services Inc ('ICTSI'), as a 'scourge that was not needed in Australia', denouncing the Plaintiff's Director of Human Resources and Industrial Relations, Mr Michael O'Leary, as a rat, and accusing him of betraying Australian workers and Australian jobs, calling for worker solidarity against the Plaintiff, and calling upon people to attend the Webb dock 'peaceful assembly', and the rally at Webb dock on 8 December 2017 at 10.00 am.
- ...
30. On 1 December 2017, I dismissed the application for interlocutory relief against the CFMEU. As at that day, the only direct evidence of CFMEU involvement in the picket, was evidence of the presence of the Branch President, Mr Ralph Edwards, at the picket for a brief period of time. I was not satisfied on that evidence, that Mr Edwards attended the site in his capacity as an official of the union such as to visit liability upon the union.
31. In contrast, there is now a substantial body of evidence which raises a serious question to be tried in the principal proceeding, that CFMEU has been joint tortfeasor with the MUA.
32. Mr Setka, acting in an official capacity, called upon members of his union to attend the rally on 8 December 2017. The persons who attended the rally included CFMEU members as is apparent from several CFMEU flags visible amongst those attending the rally.

33. As is clear from the photos taken from the CCTV footage on the morning of 8 December many persons about to attend the rally blocked the truck gate to the site. In addition, part of the paraphernalia at the truck gate includes a CFMEU trailer not to be used without the authority of Mr Setka. I infer that he did authorise its use thereby lending practical support to the obstruction of the gate. It is seriously arguable that the statements made by Mr Setka on 8 December constitute evidence of him inciting others to maintain the unlawful blockade of the Webb Dock site. The balance of convenience is overwhelmingly in favour of the grant of relief sought.

3 Since the grant of injunctive relief VICT has filed a statement of claim. Save for the issuing of a number of subpoenas, no other interlocutory steps have been completed.

### **The amalgamation of the CFMEU and MUA**

4 On 20 June 2017 the CFMEU, the MUA and the Textile, Clothing and Footwear Union of Australia ('TCFUA') jointly made an application under s 44(1) of the *Fair Work (Registered Organisations) Act 2009 (Cth)* ('RO Act') for approval for submission to ballot a proposed amalgamation. The scheme of the amalgamation filed with the application proposed that upon the amalgamation taking effect the MUA and the TCFUA would be deregistered and the CFMEU would remain registered. On 31 August 2017 the submission of the proposed amalgamation to ballot members of the MUA and the TCFUA was approved. The members of each of the unions approved the amalgamation. On 6 March 2018 pursuant to s 73(2) of the *RO Act*, Gostencnik DP of the Fair Work Commission ('FWC') fixed 27 March 2018 as the day on which the amalgamation would take effect ('the Amalgamation Decision'). On 27 March 2018 Gostencnik DP signed instruments of deregistration in respect of the MUA and the TCFUA.<sup>2</sup>

5 Subsequent to the amalgamation the CFMEU continued to be a registered organisation. However, its name was changed. It is now the Construction, Forestry, Maritime, Mining and Energy Union ('CFMMEU'). The MUA has ceased to exist as a separate legal entity. However, there is now a Maritime Division within the

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<sup>2</sup> See *The Maritime Union of Australia* [2018] FWC 1797 and *Textile, Clothing and Footwear Union of Australia* [2018] FWC 1794.

CFMMEU.

6 Section 79 of the *RO Act* provides:

Where, immediately before the amalgamation day, a proceeding to which this Part applies was pending in a court or before the FWC:

- (a) the amalgamated organisation is, on that day, substituted for each de-registered organisation as a party; and
- (b) the proceeding is to continue as if the amalgamated organisation were, and had always been, the de-registered organisation.

7 Section 80(1)(a) of the *RO Act* provides that s 79 must be given effect to despite anything in the *Fair Work Act 2009 (Cth)* ('Fair Work Act'), or any other Commonwealth, State or Territory law.

8 As at 27 March 2018 the MUA ceased to be a party to the current proceeding. The CFMEU continued to be a party to the proceeding albeit in the capacity of the amalgamated organisation, the CFMMEU.

9 As at 27 March 2018 the sole defendant in the current proceeding is the CFMMEU. Orders were made by the Court on 10 April 2018 to give effect to this position.

10 On 8 March 2018 the Australian Mines and Metals Association ('AMMA') and Master Builders Association Limited ('MBA') applied to the FWC for permission to appeal the Amalgamation Decision pursuant to s 604 of the *Fair Work Act*. VICT is not a party to the appeal. At a hearing on 14 March 2018, the AMMA and MBA applied for a stay of the Amalgamation Decision pending the hearing and determination of their appeal. That application was opposed by the CFMEU, the MUA and the TCFUA. The application for a stay was dismissed by Hatcher VP on 16 March 2018.<sup>3</sup>

11 The appeal from the Amalgamation Decision was heard by a full bench of the FWC on 9 April 2018. The Full Bench reserved its decision.

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<sup>3</sup> *Australian Mines and Metals Association; Master Builders Australia Limited v Construction, Forestry, Mining and Energy Union; Maritime Union of Australia; Textile, Clothing and Footwear Union of Australia* [2018] FWC 1500.

## The Stay Application

- 12 On 6 April 2018 the CFMMEU filed a summons seeking orders, inter alia, that the proceeding be stayed until 30 June 2018. Mr Moore QC, who appeared for the CFMMEU, advanced the following arguments in support of the grant of a stay. First, he submitted that the appeal of the Amalgamation Decision had 'cast a shadow' over the identity of the defendants in the current proceedings. He accepted that as a result of the amalgamation of the MUA and the CFMEU there is only one defendant, the CFMMEU. However, he submitted that if the challenge to the Amalgamation Decision is successful, the MUA and the CFMEU will have to be reinstated as separate defendants. He submitted that interests of efficiency and cost effectiveness favour the grant of a stay in circumstances where the amalgamation is under challenge. He submitted that if the CFMMEU files a defence to the statement of claim the defence will be rendered nugatory if the Amalgamation Decision is set aside. He submitted that any defence filed by the CFMMEU would need to be replaced by further defences filed by the (reinstated) defendants, the MUA and the CFMEU. He further submitted that the status of any admissions or positive facts pleaded by the CFMMEU would be unclear, particularly in respect of the MUA, if it were to be reinstated as a defendant.
- 13 Mr Moore submitted that by reason of the specific allegations in the statement of claim in respect of the MUA, the CFMMEU will have to obtain instructions in relation to those allegations. He submitted that if the amalgamation is undone, and the CFMEU is required to file a defence in its own right, it will be fixed with knowledge in respect of the allegations against the MUA. He submitted:
- At the moment it would be open to the CFMEU to plead in relation to allegations, proper pleadings of material facts, or such as paragraph 8, well we don't know if the MUA did those things well and we can't plead to it, but that position will inevitably be altered and the availability of that defence denied if we go through the process of collecting instructions prior to the preparation of a defence and that is deeply prejudicial we say to the CFMEU's interests in the just disposition of the matter.<sup>4</sup>
- 14 Mr Moore also submitted that the grant of a temporary stay would facilitate the just resolution of the real issues in dispute; and facilitate the efficient and cost effective

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<sup>4</sup> Transcript of Proceedings (10 April 2018) 26.17-26.26.

resolution of the real issues in dispute. He submitted that the granting of a temporary stay would facilitate the objectives prescribed in ss 9(1)(a), (c), (d), (e)(i), (f) and 47(3)(a) of the *Civil Procedure Act 2010* ('Civil Procedure Act').

15 Mr Moore's submissions regarding potential prejudice to the CFMEU and the MUA is premised on the assumption that the Amalgamation Decision will be overturned on appeal. No submission was made to the Court which permits any assessment of the merits of the appeal. In Hatcher VP's decision rejecting an application for a stay of the Amalgamation Decision, he stated that the appeal was 'arguable with some prospects of success.'<sup>5</sup> The absence of any material before the Court which permits an assessment of the prospects of success of the appeal is significant. The Court is asked to take the serious step of staying the current proceedings without being in a position to make any meaningful assessment of the likelihood that the Amalgamation Decision will be overturned.

16 Mr Moore points to potential expense and delay if the Amalgamation Decision is overturned and it then becomes necessary for the MUA and the CFMEU, as reinstated defendants, to take steps in the litigation. The CFMEU and the MUA could have consented to a stay of the Amalgamation Decision pending the hearing and determination of the appeal. As was their right, they opposed the application for a stay. They must have done so in the full knowledge that, absent a stay, the CFMMEU would be the sole defendant in the current proceedings. Equally, the CFMEU and the MUA must have been aware that, absent the Court granting a stay, there was a risk of some expense and inconvenience if the Amalgamation Decision is subsequently overturned.

17 I have set out above a submission advanced by Mr Moore to the effect that the CFMEU, as a consequence of the CFMMEU obtaining instructions from the MUA for the purpose of filing a defence, may be fixed with knowledge of facts alleged against it

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<sup>5</sup> *Australian Mines and Metals Association; Master Builders Australia Limited v Construction, Forestry, Mining and Energy Union; Maritime Union of Australia; Textile, Clothing and Footwear Union of Australia* [2018] FWC 1500 [17].

which it does not currently have. There are significant flaws in this argument, both from a legal and practical perspective. The amalgamated organisation, the CFMMEU, is a body corporate.<sup>6</sup> It acts through its office holders. The office holders of the amalgamated organisation include individuals who were previously office holders of the MUA and the CFMEU immediately prior to the amalgamation taking effect on 27 March 2018. The knowledge of those office holders, including in respect of the allegations of unlawful conduct by the CFMEU and the MUA in the statement of claim, was imputed to the CFMMEU immediately upon the amalgamation taking effect.<sup>7</sup> Further, Mr Moore's submissions assume that prior to the CFMMEU's solicitors taking instructions for the purposes of preparing a defence there had not already been an exchange of information between officials of the CFMEU and the MUA in respect of the matters which underpin the allegations of unlawful conduct against the respective unions in the statement of claim. There is no evidence before the Court which lends credence to this assumption. Mr Moore candidly acknowledged that he had no instructions as to the extent to which prior to the making of the stay application there had been an exchange of information between MUA and CFMEU office holders in respect of the allegations of unlawful conduct in the statement of claim.

18 Mr Moore submits that 'the nature of the wrongful conduct alleged against the [CFMEU] is materially different to that alleged against the [MUA]. So much is manifest from the dismissal by the Court of the plaintiff's application for interlocutory relief against the [CFMEU] on 1 December 2017.'<sup>8</sup> This submission must be rejected. As recorded in the Court's judgment of 12 December 2017, the Court dismissed an application for interlocutory relief against the CFMEU on 1 December 2017 because as at that time the only direct evidence of CFMEU involvement in the picket was the presence at the picket for a brief period of time of Mr Ralph Edwards, the CFMEU

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<sup>6</sup> See *RO Act* s 27.

<sup>7</sup> *Australasian Annuities Pty Ltd (in liq) v Rowley Super Fund Pty Ltd* (2015) 318 ALR 302, 358 [264]-359 [266].

<sup>8</sup> Defendant, 'Submissions of the Second Defendant', 9 April 2018, [15].



Victorian Branch President. The Court was not satisfied on that evidence that Mr Edwards had attended the site in his capacity as a CFMEU official such as to visit liability on the union.<sup>9</sup> Immediately thereafter the judgment records a finding: '[i]n contrast, there is now a substantial body of evidence which raises a serious question to be tried in the principal proceeding, that CFMEU has been a joint tortfeasor with the MUA.'<sup>10</sup>

19 Contrary to Mr Moore's submission the nature of the wrongful conduct alleged against the CFMEU is not materially different from that alleged against the MUA. Both unions are alleged to have participated in unlawful picketing of VICT's premises. It is correct that discrete allegations of unlawful conduct are made in respect of the MUA and the CFMEU. But for the amalgamation each of the MUA and the CFMEU would have to plead to those allegations in their own right. As a result of the amalgamation the CFMMEU will have to plead to all allegations of unlawful conduct whether in respect of the CFMEU or the MUA. This is simply a consequence of the amalgamation of the two unions.

20 Mr Moore placed particular weight upon the relatively short duration of the period of stay which is sought. He submitted that 30 June 2018 had been identified because it was anticipated that by this time the FWC will have delivered its decision in respect of the appeal from the Amalgamation Decision. Mr Moore acknowledged that no indication had been given by the Full Bench as to when it will be in a position to deliver its decision.

21 If a stay is granted on the basis that proceedings in this Court should await the outcome of the FWC's determination of the appeal, the stay would have to remain in place for however long it takes the FWC to deliver its appeal decision. Further, there is the potential for either party to the appeal proceedings to initiate further judicial review proceedings in the Federal Court of Australia in respect of any decision of the FWC. Such proceedings may extend the 'shadow of uncertainty' relied upon by Mr

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<sup>9</sup> *VICT v MUA & CFMEU; VICT v Hilakari* [2017] VSC 762 [30].

<sup>10</sup> *Ibid* [31].

Moore in support of the application for a stay.

- 22 If proceedings are stayed by reason of uncertainty flowing from the FWC appeal challenging the Amalgamation Decision, any further challenges to the amalgamation by way of judicial review proceedings would continue the uncertainty. Although the current application is for a stay until 30 June 2018 the basis upon which the stay is sought would, if accepted, warrant a continuation of the stay while there are any judicial review proceedings on foot challenging the Amalgamation Decision.
- 23 Section 7(1) of the *Civil Procedure Act* provides that the overarching purpose of the Act and the rules of court in relation to civil proceedings is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute. This overarching purpose will not be facilitated by the granting of a stay. This is so even if the FWC delivers a decision by 30 June 2018 and there are no further proceedings challenging the Amalgamation Decision.
- 24 The plaintiff has a legitimate interest in having its claim for damages heard and determined in a timely fashion. This interest will be undermined if proceedings are stayed until 30 June 2018. Considerations of efficiency and timeliness will also be undermined by delay of 2 ½ months. I reject Mr Moore's submission that the granting of the stay will facilitate the cost effective resolution of the dispute. There is currently no uncertainty as to the identity of the defendant in the proceedings, namely, the CFMMEU. The real issue in dispute in the proceeding is the plaintiff's claim against the CFMMEU. Mr Moore's submission that the overarching purpose of the *Civil Procedure Act* will be facilitated by staying the proceeding is underpinned by the hypothesis that the Amalgamation Decision may be overturned. It is not consistent with the facilitation of the overarching purpose of the *Civil Procedure Act* for proceedings in the Supreme Court of Victoria to be stayed by reason of the potential for the Amalgamation Decision to be set aside. This is particularly so in circumstances where:

- (i) the time frame for delivery of the FWC appeal decision is indeterminate;

and

- (ii) the Court is in no position to make any assessment of the likelihood that the Amalgamation Decision will be overturned.

25 The granting of a stay until 30 June 2018 would be inconsistent with the following objects prescribed by s 9(1) of the *Civil Procedure Act*:

- (a) the just determination of the proceeding;
- (c) the efficient conduct of the business of the court;
- (d) the efficient use of judicial resources; and
- (f) the timely determination of the proceeding.

26 The defendant's application for a stay is dismissed. I shall provide the parties with an opportunity to make submissions on costs.

### CERTIFICATE

I certify that this and the 9 preceding pages are a true copy of the reasons for Judgment of McDonald J of the Supreme Court of Victoria delivered on 20 April 2018.

DATED this 20<sup>th</sup> day of April 2018.



