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No delay for damages case "shadowed" by union merger appeal

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The Victorian Supreme Court has rejected an application by the CFMMEU to delay civil damages proceedings brought by the operator of Port of Melbourne's new "robo" terminal until its merger with the MUA and TCFU is bedded down.

The merged union had asked the court to stay the proceedings brought by Victoria International Container Terminal Ltd (VICT) until June 30, after an employer appeal against approval of the merger is delivered by the Fair Work Commission.

A Commission full bench heard the appeal by the Australian Mines and Metals Association and the MBA on April 9 and reserved its decision (see [Related Article](#)).

In a Supreme Court [decision](#) last week, Judge Michael McDonald rejected the union's application for a stay, ruling that it would be inconsistent with overarching purpose of the [Civil Procedure Act 2010](#).

Judge McDonald said the MUA ceased to be a party to the VICT proceedings on March 27, but the CFMEU continued to be a party in the capacity of the amalgamated organisation, the CFMMEU.

The judge said the sole defendant in the VICT proceedings was now the merged entity, the CFMMEU.

Counsel for the CFMMEU, Steven Moore QC, submitted that the appeal of the amalgamation decision had "cast a shadow" over the identity of the defendants in the VICT proceedings.

Moore accepted that as a result of the amalgamation there was only one defendant, the CFMMEU.

However, Moore argued that if the challenge to the amalgamation decision was successful, the MUA and the CFMEU would have to be reinstated as separate defendants and a stay should be granted in interests of efficiency and cost effectiveness until the Commission's decision on the merger was made.

CFMMEU has to plead to "all allegations"

The court was told that – if the merger was overturned – the MUA and CFMEU would have to file separate defences and the allegations of wrongful behaviour against the two previously separate unions was "materially different".

Judge McDonald said the union's submissions regarding potential prejudice to the CFMEU and the MUA were "premised on the assumption that the Amalgamation Decision will be overturned on appeal".

The judge said no evidence had been presented which allowed him to assess the merits of the employer appeal in the Commission, although Vice President Adam Hatcher had stated the case was "arguable with some prospects of success".

"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."

Contrary to the merged union's claim, the wrongful conduct against the two unions was not materially different, with both 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."

Claim heard in timely fashion

The judge said he dismissed an application for interlocutory relief against the CFMEU last December – before the merger took effect – because he was not satisfied there was enough evidence of the construction union's role in the picket.

This evidence included Victorian CFMEU secretary John Setka calling on members of his union to attend a rally at the picket in December 8.

The judge said the CFMEU had made or endorsed pejorative remarks denouncing VICT's parent company, International Container Terminal Services Inc (ICTSI), as a "scourge that was not needed in Australia", and described VICT's Director of Human Resources and Industrial Relations, Michael O'Leary, as a rat who was betraying Australian workers.

O'Leary is a former senior official of the MUA.

"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," Judge McDonald said.

The judge said the CFMMEU had emphasised that it was only seeking a short stay, but there was no indication when the Commission's decision on the merger would be handed down and this ruling could itself be appealed to the federal court.

He said that VICT had a legitimate interest in having its claim for damages heard and determined in a timely fashion.

VICT was represented by Stuart Wood QC.

[VICT v CFMMEU \[2018\] VSC 181 \(20 April 2018\)](#)

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