

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

Not Restricted

S CI 2017 04871

**BETWEEN**

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

v

MARITIME UNION OF AUSTRALIA First Defendant

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION Second Defendant

S CI 2017 04998

**AND BETWEEN**

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

v

MR LUKE HILAKARI Defendant

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JUDGE: McDonald J  
WHERE HELD: Melbourne  
DATE OF HEARING: 11, 12 December 2017  
DATE OF JUDGMENT: 12 December 2017 (*ex tempore*)  
CASE MAY BE CITED AS: *VICT v MUA & CFMEU; VICT v Hilakari*  
MEDIUM NEUTRAL CITATION: [2017] VSC 762

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INJUNCTION – Representative Order – Whether Defendant (Mr Hilakari) had the same interest as individuals engaging in picketing activities – Representative Order made – *Supreme Court (General Civil Procedure) Rules 2015* rr 18.03, 18.04.

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APPEARANCES:

Counsel

Solicitors

For the Plaintiff

Mr S Wood QC with Mr J  
Snaden and Mr N Burmeister

Seyfarth Shaw

For the First Defendant

Mr H Borenstein QC and  
Mr Y Bakri

Maurice Blackburn

For the Second Defendant

Mr P Morrissey SC and  
Mr D Guidolin

Slater & Gordon

For the Defendant in the  
second proceeding

Ms R Doyle SC and  
Mr M Harding

Gordon Legal

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HIS HONOUR:

- 1 There are three applications before the Court; an application to extend orders made on 1 December 2017 which provided for an exclusion zone of 100 metres from the entrance to the Plaintiff's site; an application for an interlocutory injunction against the CFMEU, and; an application for a representative injunction against Mr Luke Hilakari, the Secretary of the Victorian Trades Hall Council.
- 2 The background of the applications is not particularly contentious. On the one hand the Plaintiff has filed a substantial body of evidence in respect of the picketing activities in place of the Webb site dock since 27 November 2017, and the adverse impact of those pickets on its business.
- 3 On the other hand, the defendants have filed very little evidence, and, certainly, none which challenges the substance of the evidence relied upon by the Plaintiff.
- 4 Since 27 November there have been continuous obstructive pickets in place at the Webb dock site. As a consequence, not a single truck has been able to enter or exit the site. The normal commercial operations of the Plaintiff have ground to a complete halt. Normally, there would be 150 to 200 truck movements per day.
- 5 This state of affairs is the direct consequence of a dispute between the Plaintiff and the MUA. The immediate cause of the dispute is the termination of an employee who is also an MUA member. The company contends that the termination was because of the individual's failure to hold mandatory security clearance. The union contends that the individual has been victimised by reason of his MUA membership.
- 6 It is clear from the evidence that there is a more fundamental dispute between the Plaintiff and the MUA, relating to the terms and conditions of employment of those employees engaged by the Plaintiff.
- 7 The Plaintiff is a recent entrant to the stevedoring industry in Victoria. The union contends that the Plaintiff has entered into an enterprise agreement with its employees which significantly reduces the terms and conditions provided for in enterprise agreements of other stevedoring companies.

- 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 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.
- 15 On 5 December 2017, Joe Italia, Secretary of the Victorian branch of the MUA, was interviewed on ABC News Radio, during which he denounced the Plaintiff as a foreign-owned company that trades as ICTSI overseas with an: 'appalling track record back in terms of industrial relations and health and safety, but choose to come to this country and bring that type of belligerence with them'.
- 16 He did not deny, when it was specifically put to him, that there were much needed

medical supplies in the lead-up to Christmas that were in the containers currently stranded on the dock site. He admitted that he had taken steps to set up a meeting to negotiate a compromise or resolution with the Plaintiff, that would permit the containers to be removed from the facility; that admission is consistent with the MUA exercising control over the picket.

17 He stated, when asked how long the protest would last: 'It will last as long as the community assembly need it to last until we get justice', again, consistent with the MUA control over the picket.

18 On the morning of 8 December 2017, a rally took place within the vicinity of the Plaintiff's site. A solicitor's affidavit filed on behalf of the MUA deposes that the scaffold stage was erected 120 metres from the entrance to the site. The significance of that is that it would place the stage outside of the 100 metre exclusion zone ordered on 1 December 2017.

19 During the hearing yesterday, 11 December, the Court viewed a video of the rally. An affidavit of Georgia Simmonds affirmed 10 December 2017 filed on behalf of the Plaintiff, annexes stills of CCTV footage taken near the truck gate at 78 Webb Dock Drive, immediately prior to the commencement of the rally. Exhibits GLS3 to 5 annexed to Ms Simmonds' affidavit, are pictures taken from CCTV footage at about 10 am. Those pictures show a large number of individuals blocking the entrance to the site. Members of the crowd are shown to be carrying union flags.

20 The following individuals addressed the rally on 8 December: John Setka; Will Tracey, Deputy National Secretary of the MUA; Chris Cain, Secretary of the Western Australian Branch of the MUA; Joe Italia, Secretary of the Victorian Branch of the MUA; Troy Gray, Secretary of the Victorian Branch of the ETU; Michelle O'Neill, Secretary of the Textile Clothing and Footwear Union of Australia; Luke Hilakari, Secretary of the Trades Hall Council; Sally McManus, Secretary of the Australian Council of Trade Unions, and; Father Bob McGuire.

21 In the video of the rally, Mr Setka is recorded at 10 minutes 40 seconds into the video

as saying the following:

Thank you for attending, I mean, you look at the array of unions here, I almost feel sorry for VICT, the union busting company. You know what? Youse are in big trouble. We fundamentally don't have the right to take strike action, which effectively makes us slaves. That's the way the laws in this country are going. Now, for a number of years we've decided to take from these bad laws, you know, they are shit laws, they are designed to never let you win. Why would you play by them? So, we have chosen not to play by them. We have been fined millions of dollars by some of these judges, you know, who sit there, they probably never done a day's work in their life, and they pass all these comments on us. They call us all sorts of names, you get some employer that breaks every law under the sun, and you get total silence from these judges.

22 At 12 minutes 10 seconds, Mr Setka stated:

They're trying to criminalise unionism. MUA members have turned up here today, will all (inaudible) the sack. You are to be congratulated for defying these fuckers and coming down here. Everything we have today, every single thing we have here today was won by breaking the law and taking industrial action. They call us criminals, they call us all sorts of things, but we will win and we will continue to win. They might fine us millions of dollars, they might call us all sorts of names, but, you know what, as far as I'm concerned, I'd rather be here any day of the week.

23 At 14 minutes 58 seconds, Mr Setka states:

As workers and as unionists, we have no rights, that's how hypocritical this government is. They try to give some rights in some places, but if you're a unionist you get no rights. We're all treated as common criminals. When it comes to unionists, we have no rights. That's what they're trying to do. If we follow their laws and abide by their laws, we will never ever win. Never. Remember that. They might fine us a few hundred thousand dollars and all the rest of it, but that's what they're there for. We build up these big pots of gold to fight the good fight, that's what it's there for, so strong. We get threatened every time we go, have a rally. We get all these messages. You're all going to be sacked, prosecuted, the ABCC [Australian Building and Construction Commission] is going to come after youse, you know that. We still get 20,000 to a rally, because everyone defies it. That's why we keep winning. That's why the MUA is going to win, you're going to defy them. All the MUA members under the threat of being sacked, you're to be congratulated, keep up the good fight.

24 During the course of the video of the rally, Mr Hilakari is recorded as stating, among other things: 'This is the front line', and 'Get down here and continue to support them'. Mr Troy Gray, the Victorian Branch Secretary of the ETU, is recorded as stating, amongst other things: 'Shut this place down'. Immediately thereafter, Mr Hilakari addressed the crowd, stating: 'How good was that, comrades'.

25 Mr Will Tracey is recorded as stating that Mr Mick O'Leary had orchestrated an

enterprise agreement at the facility that undercut the wages and conditions established by the MUA in the maritime industry by about 40 per cent. He also stated that automation of stevedoring operations is, 'a cancer in our industry in terms of jobs that it destroys'.

26 Mr Chris Cain is recorded as stating:

All around Melbourne today the docks have closed down [and that] even though this dispute has only gone a week or two, union solidarity, they depend on the men and women that's been there right through the night 24 hours a day right around the clock. Wherever you are in this room or wherever you are here, we thank you enormously for the way you've fought.

27 Mr Italia is recorded as saying:

By this crowd, we're going to send a really strong message to the architect of the crimes that are occurring inside this gate. [He also states] This blue isn't going away. We're doing it on behalf of everybody, please show your support, we'll be back here, O'Leary. We're going to make sure that you and your mob do the right thing and fuck off.

28 Save for the attendance and participation at the rally of Father Bob Maguire, there is little, if any evidence, of actual community involvement in the rally on 8 December, save for the participation of members of the various unions who were in attendance on that day.

29 I turn now to the relief sought against the MUA and the CFMEU. In its indorsement of its writ, the Plaintiff pleads causes of action in nuisance, trespass and interference in trade or business. The MUA's submissions are confined to the application for an extension of the exclusion zone which expired on 8 December 2017. The CFMEU opposes the application for an injunction against it. It contends that as was the case on 1 December, there is insufficient evidence to establish the serious question to be tried.

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.

34 As to the extension of the exclusion zone orders until trial I consider that the extension is justified, particularly where there is evidence on 8 December that there was a large gathering of individuals which prior to the commencement of the rally blocked the entrance within that zone. The exclusion zone will continue until trial, however, it will continue to be 100 metres as per the order made on 1 December.

35 I now turn to the relief sought in respect of Mr Hilakari. The Plaintiff seeks an order in the following terms, that the Defendant is appointed pursuant to *Supreme Court (General Civil Procedure) Rules 2015* r 18.03(1) as representing all persons who were at any time since 5.00 am on 27 November 2017 until 12.00 pm on 8 December 2017 present at any picket line how so ever described at the Plaintiff's International Container Terminal located at 78 Webb Dock Drive, Port Melbourne in the State of

Victoria which site is identified in the map attached as an annexure A to this order (each a Hilakari representee). At paragraph 6 of the proposed orders until the trial of this proceeding, or further order, the Defendant and each Hilakari representee be restrained from:

- i. Preventing hindering of interfering with free passage by persons and/or vehicles to and from the site known as Victorian International Container Terminal with the street address of 78 Webb Dock Drive, Port Melbourne in the State of Victoria, which site is identified in the map attached an annexure A to this order; and
  - ii. Advising, causing inducing, procuring or inciting any person to do, or attempt to do any of those things restrained in paragraph 6A of this order.
7. Until the trial of this proceeding or further order the defendant and each Hilakari representee be restrained from:
- i. Being present within the area marked X on the map that forms Annexure B to this order, safe space otherwise and to the extent that such presence is necessary for of:
    1. Undertaking work for the persons being engaged performed by and on behalf of the Plaintiff.
    2. Entering the site where the entry is authorised by law.
    3. Using a public road for reasons under annexure of the site.
    4. Compliance with these orders.
  - ii. Advising, causing, inducing, procuring or inciting any person to be, or attempt to be present within the safe space otherwise than to the extent that such presence is necessary for:
    1. Undertaking work for the persons being engaged performed by and on behalf of the Plaintiff.
    2. Entering the site where the entry is authorised by law.
    3. Using a public road for reasons under annexure of the site.
    4. Compliance with these orders.

36 The Plaintiff's indorsement of claim pleads a cause of action in conspiracy to injure and nuisance:

2. The Defendant is and was at all material times:

- a. an elected officer of the Victorian Trades Hall Council (VTHC); and
  - b. the Secretary of the VTHC (Hilakari).
3. The VTHC is affiliated with various union, including:
- a. The Construction, Forestry, Mining and Energy Union;
  - b. The Maritime Union of Australia;
  - c. The Electrical Trades Union;
  - d. The Australian Services Union; and
  - e. The Rail Tram and Bus Union.
4. During the period from 5.00am, 27 November 2017 until 12.00pm 8 December 2017 (the Relevant Period), Hilakari and all persons who were present at any picket line (howsoever described) at the Plaintiff's international container terminal located at 78 Webb Dock Drive, Port Melbourne, in the state of Victoria (the Picket) (the Picketers), wrongly and maliciously agreed to conspire and combine amongst themselves to injure VICT in its Business by unlawful means.
5. In pursuance and furtherance of the said conspiracy, during the Relevant Period;
- a. Hilakari, and numerous Picketers, many of whom are unknown to VICT, at various times, have been present at a picket that has been continuously maintained at and around the three points of access to and egress from the Site (the Picket) (the Picketers);
  - b. wrongly obstructed and interfered with the passage of vehicles and persons proceeding to and from the Site;
  - c. watched and beset the entrances to the Site; and
  - d. placed physical obstructions at or near the three entrances to the Site; and
  - e. wrongly interfered with VICT's use and enjoyment of the VICT Land, including by erecting structures on VICT Land; and
  - f. Hilakari has:
    - (i) directed, procured, encouraged, advised, counselled and/or authorised others to engage and participate in the Picket; and
    - (ii) otherwise acted in concert with, and as a leader of, the Picketers.
6. Each of the acts alleged in paragraph 5 above has been done by the

Picketers (including Hilakari and those unknown to VICT) on behalf of themselves and their co-conspirators in furtherance of the said conspiracy.

7. The Picket commenced on 27 November 2017 on a small scale, but has since escalated.
8. By reason of the foregoing, Hilakari and the Picketers have:
  - a. engaged in a conspiracy by unlawful means (in the form of nuisance) to intentionally injure the Plaintiff in its Business;
  - b. engaged in a conspiracy by unlawful means (in the form of trespass upon the VICT Land) to intentionally injure the Plaintiff in its Business;
  - c. induced breaches of, or have otherwise unlawfully interfered with the performance of, the Stevedoring Contracts; and/or
  - d. committed nuisance.

37 Mr Hilakari is a secretary of the Victorian Trades Hall Council which holds itself out to be an organiser of industrial campaigns with, and on behalf of 40 affiliated unions. There is evidence of him attending the site in a leadership capacity in the days before the pickets commenced, and there is also evidence placing him at the picket. That presence coincides with the appearance of 'we are union' flags at and around the picket.

38 There is evidence that 'we are union' is a self-styled group of 'hard' campaigning 'activists coordinated by Victorian Trades Hall Council'. There is CCTV and photographic evidence of Mr Hilakari's presence at the picket. While present he wears the Trades Hall Council union branded clothing. His presence at the pickets coincides with the proliferation of 'we are union' paraphernalia including permanent flags and clothing of a picket. There is evidence that the Trades Hall Council has an active campaign against the Plaintiff including its promotion of attendance at the pickets. On 5 December 2017 it did so explicitly via its Facebook page.

39 The evidence shows Mr Hilakari acting as MC of the picket before the large crowd gathered on 8 December 2017. During the rally Mr Hilakari directed personal insults

to the Plaintiff's director of Human Resources and roused the crowd generally. The evidence raises a serious issue to be tried that Mr Hilakari has been acting in concert with, and is the leader of individuals who have been blockading the site.

40 I am satisfied there is a serious issue to be tried that he has participated in conduct which constitutes a nuisance. I am also satisfied that the Plaintiff has established a serious issue to be tried that Mr Hilakari is party to a conspiracy to injure the Plaintiff by unlawful means, namely, picketing activity which constitutes a nuisance.

41 The evidence establishes a serious question to be tried that there has been a combination, or agreement between two or more persons including Mr Hilakari. I infer from the evidence that those present at the pickets are sufficiently aware of the surrounding circumstances and share the same objective. Put simply, there is no other reason for them to be there. Those circumstances include knowledge of the unlawfulness of the blockade.

42 There has been an intention to injure the Plaintiff and a combination to do unlawful acts which necessarily causes injury, which satisfies one of the elements of the cause of action of unlawful means conspiracy. The agreement has been carried out, and the Plaintiff has suffered loss of damage.

43 I accept that the making of a representative order is a very serious step. However, based on what has occurred since the Court made its orders on 1 December 2017 I have no doubt that absent a representative order being made the unlawful conduct on the docks will continue. The inference is compelling that since 1 December 2017 the MUA has outsourced to other unions coordinated by the Victorian Trades Hall Council the task of maintaining an illegal picket.

44 Absent a representative order fixing potential liability under the individuals engaging in that unlawful conduct that conduct will continue. The Court has previously made representative orders in the context of pickets.<sup>1</sup> In *Super A-Mart v*

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<sup>1</sup> See *Super A-Mart Pty Ltd v National Union of Workers* [2014] VSC 130; *Viva Energy Refining Pty Ltd v Australian Workers Union* [2016] VSC 619.

*National Union of Workers* [2014] VSC 130 Bongornio JA stated:

The purpose of [Supreme Court Rule Order 18] is to facilitate the administration of justice by enabling a party to obtain a binding determination on behalf of, or against a number of people in a single action rather than to have to undertake separate actions: *Carnie v Esanda Finance Corporation*.

The only determinative of the appropriateness of a representative order are that there are numerous persons that they have the same interest in the proceeding. It is a simple rule capable of many situations: *Carnie*.

Mr Fetter, of counsel for the union, argued strongly that the difficulties in the way of identifying the parties to be represented in this case meant that the jurisdiction of the court to make the order was lacking. I disagree. It is not identification that is vital, it is commonality of interest. Here the union lent its authority to the activities of the picketers by permitting its banners, gazebos, paraphernalia to be associated with the picket. Indeed it admitted as much in the letter to which I have referred. That it had a common purpose with them is the only inference open from its failure to dispute any of the evidence put forward by the plaintiff. It could have denied that it sanctioned the picket. It could have denied that the picket has used its paraphernalia with its approval and consent. It did neither.

I am satisfied that the first defendant has a common interest with those persons now described in the draft order proffered by the plaintiff this morning.<sup>2</sup>

45 Those observations are equally applicable in the present case, apropos Mr Hilakari. I am satisfied that Mr Hilakari has a common interest with all of those who participated in the unlawful blockade of the site. That common interest is to inflict economic harm on the Plaintiff by blockading the site. As with the relief sought against the CFMEU, the balance of convenience overwhelmingly supports the grant of the relief sought.

46 As to the form of orders which are sought in respect of Mr Hilakari, paragraph 5 will be deleted. In paragraph 6 (b) (ii) there's a typographical error in the second line; it should refer to 'attempt to do any of the things restrained by paragraph 6(a)', which will become paragraph 5(a), because of the deletion of paragraph 5. In paragraph 7, the restricted zone will be 100 metres from the site, as per the orders which were made on 1 December.

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<sup>2</sup> *Super A-Mart v National Union of Workers* [2014] VSC 130 [15]-[18] (citations omitted).