



DECISION

Fair Work Act 2009
s.418—Industrial action

Application by CPB Contractors Pty Limited T/A CPB Contractors (C2024/5457)

COMMISSIONER SCHNEIDER

PERTH, 22 OCTOBER 2024

Alleged industrial action at CPB Contractors Pty Limited Trading As CPB Contractors

[1] At 10:00am (AEST) on Friday, 9 August 2024, CPB Contractors Pty Ltd T/A CPB Contractors (the Applicant) filed an application pursuant to section 418(2)(b) of the *Fair Work Act 2009 (Cth)* (the Act) seeking that the Fair Work Commission (the Commission) issue an order to stop alleged unprotected industrial action.

Background

[2] The Respondents to this application are employees of the Applicant's contractors (the Employees). The Applicant alleges that numerous employees of the below listed contractors (the Contractors) are engaging in unprotected industrial action, by failing to attend work as rostered during periods in which the Applicant's direct hire workforce are engaging in protected industrial action.

[3] The Contractors of the Applicant are listed below:

CONTRACTORS
ABLE BUILDING COMPANY
ABS FACADE (QLD) PTY LTD
ALIMAK HEK PTY LTD
ALTUS TRAFFIC PTY LTD
ANOTHER LEVEL PATCHING PTY LTD
BEAVIS & BARTELS PTY LTD
BOOM LOGISTICS LTD
CALEDONIA QLD PTY LTD
COOKE & DOWSETT PTY LTD
CUTRITE CONCRETE CUTTING & CORE DRILLING
DMB ENGINEERING
DOWBURY PTY. LTD.
DOWELLS BUILDING SERVICES PTY LTD

DUNDRUM CIVIL PTY LTD
ELLIS AIR CONDITIONING (QLD) PTY LTD
ENDFIRE ENGINEERING PTY LTD
F.T.F PTY LTD
FIREMEX PTY. LTD.
FORMCON GROUP
FUGEN MASONRY CONTRACTORS (QLD) PTY LTD
G JAMES GLASS & ALUMINIUM PTY. LTD.
GABBA WATERPROOFING PTY LTD
HIGHFORCE PTY LTD
HITACHI RAIL STS AUSTRALIA PTY LTD
JBE SIGNALLING
KENNY CONSTRUCTIONS (AUST) PTY LTD
KLENNER MURPHY ELECTRICAL PTY LTD
LINDORES CONSTRUCTION LOGISTICS PTY LTD
KONE ELEVATORS QLD
MARR CONTRACTING
MULHERIN RIGGING AND CRANES (AUST) PTY LTD
NIEPE CONSTRUCTION PTY LTD
NORTH WEST COMMERCIAL INDUSTRIES (QLD) PTY LTD
Q ELECTRICAL SERVICES PTY LTD
RB SCAFFOLDING PTY LTD
RHOMBERG RAIL AUSTRALIA PTY LTD
RICARDO RAIL AUSTRALIA PTY LTD
ROBERTSON COATINGS (QLD) PTY LTD
ROCKTOWN PTY LTD
ROVERA SCAFFOLDING (QLD) PTY LIMITED
RSGX
SEDATECH PTY LTD
SIDE BY SIDE SCAFFOLDING AND RIGGING SERVICES (AUS) PTY LTD
SOUTHERN CROSS PROTECTION PTY LTD
SPECIALISED CONCRETE PUMPING.
STOWE AUSTRALIA PTY LIMITED.
TITAN CRANES AND RIGGING PTY LTD
TUTT BRYANT GROUP LIMITED
UPLIFT CRANES QLD PTY LTD
USHER & SON COMMERCIAL COATINGS (QLD) PTY LTD
VTS CONTRACTING QLD PTY LTD
WADSWORTH CONTRACTING PTY LTD
WIRED OVERHEAD SOLUTIONS PTY LTD
ZOOMWAVE CONSTRUCTIONS (QLD) PTY LTD

[4] The Applicant alleges that the Employees in question are engaging in the alleged conduct, either with the intention of supporting the Applicant's employees, or out of fear of retribution by crossing the picket line to attend work.

[5] The Applicant is the principal contractor on the Cross River Rail (CRR) project (the CRR Project) which is currently the largest infrastructure project underway in Queensland. Relevantly, the following list of CRR Project construction sites were annexed to the application:

- The project site known as the Albert Street Precinct (Lot 1, Lot 2, Lot 3) bound by Mary, Edward, Elizabeth and George Street, Brisbane City;
- The project site known as the Roma Street Precinct, bound by Roma Street, Countess Street and Parkland Boulevard and the Queensland Rail Corridor, Brisbane City;
- The project site known as the Woolloongabba Precinct, bound by Stanley, Main, Leopard and Vulture Streets, Woolloongabba;
- The project site known as the Boggo Road Precinct, bound by Boggo Road, Peter Doherty Street and Boggo Road Busway/ Queensland Rail Corridor in Dutton Park;
- The project site known as the Southern Area work area, bound by Cornwall Street, Kent Street and Queensland Rail Corridor;
- The project site Known as the Northern Portal, bound by the Queensland Rail Corridor, Bowen Bridge Road, Gregory Terrace and Kalinga Avenue;
- Hamilton Yard at 222 MacArthur Avenue, Hamilton;
- BlueWater Yard at 2-6 Bishop Drive, Port of Brisbane;
- 271 Gilchrist Avenue, Herston;
- 33 Lanham Street, Bowen Hills;
- 48 O'Connell Terrace, Bowen Hills;
- 58 Chale Street, Yeerongpilly;
- Corner of Nobel Street and Annerley Road, Dutton Park;
- Corner of Brooke Street and Pegg Road, Rocklea;
- Corner of Wilkie Street and Green Street, Yeerongpilly; and
- 19 Orient Avenue, Pinkenba.

[6] The Applicant confirms that a portion of its own employees, those who are members of the Construction, Forestry and Mining Employee's Union (CFMEU), are currently engaging in

protected industrial action. The Applicant confirms that, from Tuesday, 16 July 2024 to the current moment, these employees have been picketing entrances of the CRR Project.

[7] The Applicant confirms that 152 of its employees (out of 195) are currently engaged in the protected industrial action. The Applicant outlines that the majority of employees on the CRR Project are employed by the Contractors.

[8] The Applicant confirms that, from 16 July 2024 to present, on average, around 711 employees, and up to 1104, have failed to attend rostered work at the CRR Project on any given day. The Applicant states that no Contractor is subject to a Protected Action Ballot Order (PABO) that would allow for industrial action. Accordingly, the Applicant is of the position that the conduct of the Employees is unprotected industrial action.

Procedural Background

[9] The parties attended an initial Conference before the Commission on Friday, 9 August 2024.

[10] Following the Conference, a Hearing was listed on Saturday, 10 August 2024.

[11] Following the Hearing, having been unable to determine the application within the time period imposed by the Act, and Interim Order was issued,¹ later that day, on Saturday, 10 August 2024.

[12] Subsequently, a further Conference was listed for Monday, 12 August 2024.

[13] The CFMEU, and later the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (the CEPU), joined the proceedings prior to the second Conference (collectively, the Unions).

[14] Following the second Conference, Directions for materials to be filed were issued the matter was listed for its final Hearing which occurred on Friday, 16 August 2024.

[15] At the Hearing, the Applicant relied upon the materials filed with the application and its submissions filed prior to the first Hearing. The Applicant provided a witness statement from Mr Terrence "Terry" Prior (Mr Prior).

[16] Several of the Contractors filed submissions.

[17] The Unions filed submissions and witness evidence prior to and during the Hearing.

[18] The Unions and the majority of the few Contractors who filed submissions oppose the application to at least some degree.

[19] One Contractor filed submissions supportive of the application.

[20] None of the Employees filed any substantive views nor did any seek to be heard or consent for their identity to be revealed.

Legislation

“418 FWC must order that industrial action by employees or employers stop etc.

(1) If it appears to the FWC that industrial action by one or more employees or employers that is not, or would not be, protected industrial action:

- (a) is happening; or
- (b) is threatened, impending or probable; or
- (c) is being organised;

the FWC must make an order that the industrial action stop, not occur or not be organised (as the case may be) for a period (the stop period) specified in the order.

Note: For interim orders, see section 420.

(2) The FWC may make the order:

- (a) on its own initiative; or
- (b) on application by either of the following:
 - (i) a person who is affected (whether directly or indirectly), or who is likely to be affected (whether directly or indirectly), by the industrial action;
 - (ii) an organisation of which a person referred to in subparagraph (i) is a member.

(3) In making the order, the FWC does not have to specify the particular industrial action.

(4) If the FWC is required to make an order under subsection (1) in relation to industrial action and a protected action ballot authorised the industrial action:

- (a) some or all of which has not been taken before the beginning of the stop period specified in the order; or
- (b) which has not ended before the beginning of that stop period; or
- (c) beyond that stop period;

the FWC may state in the order whether or not the industrial action may be engaged in after the end of that stop period without another protected action ballot.”

Submissions and Evidence

The Applicant

[21] The Applicant submits that the available evidence indicates the Employees who are failing to attend work as rostered are doing so either because they sympathise with the CFMEU picket or because they are simply refusing to cross the picket line.

[22] The Applicant submits that, as there are further notices of protected industrial action from the CFMEU, the Employees are failing or refusing to attend work, and these failures are ongoing and likely to continue.

[23] The Applicant submits that the failures or refusals to attend work as rostered are industrial in nature as they are linked to the protected industrial action of CFMEU members of the Applicant's employees at CRR Project sites.

[24] The Applicant submits that the failure or refusal to attend work as rostered is thereby industrial action.

[25] The Applicant submits that the industrial action is not authorised by a PABO, nor are the Employees in question covered by the expired agreements being negotiated.

[26] The Applicant submits that the Commission must issue the Orders accordingly.

[27] The Applicant has provided three primary authorities in support of its submissions.

[28] In relation to the definition of industrial action and conduct which may be construed as such, the Applicant references the decision of the Federal Court in *Adams v Director, Fair Work Building Industry Inspectorate (Adams)*.²

[29] In *Adams*, the Court concluded that the nature of the relationship between the parties, being employee and employer, was industrial in itself and a narrow construction of "industrial" with added requirements is not necessary.³

[30] In *Adams*, the Court found that there was an available inference that the employees had not attended work and that this conduct was industrial action.⁴

[31] The Applicant drew reference to the *Decision in HWL Ebsworth Lawyers v Persons Unknown* and the increasing trend of orders being made against persons unknown in hacking cases.⁵

[32] The Applicant noted that orders had been issued against three unions and the subcontractors, the employees of subcontractors by the Commission in *Abigroup Contractors Pty Ltd v CFMEU & Ors*,⁶ the Unions highlight that a Full Bench of the Commission later granted permission to appeal as the appeal raised issues concerning the procedure to be adopted in relation such applications.⁷

Witness Evidence – Mr Terence Prior

[33] Mr Prior is employed by the Applicant as the Industrial Relations Manager on the CRR Project.

[34] Mr Prior provides background information to the CRR Project and the history of bargaining between the Applicant and the CFMEU regarding a replacement agreement to cover the Applicant's direct hire employees.

[35] Mr Prior provides information about the protected industrial action that has been taken by the Applicant's employees who are members of the CFMEU.

[36] Mr Prior also provides evidence obtained from speaking to employees of the Applicant and the Employees subject to this application.

[37] Mr Prior was available for examination at the Hearing of the matter. However, Mr Prior was not questioned at length in opposition to his evidence with the notable exception of the Unions' objection to a document attached to his statement. The attachment "*TPP-12*" contains data regarding employee attendance on site. The Unions' objection to the evidence in question is detailed later in this decision.

[38] Mr Prior's evidence, in summary, is that there are employees of the Contractors who did not wish to cross the various picket lines at the project sites and commence work out of fear of retribution from the Applicant's employees who are engaged in protected industrial action. In the alternative, the evidence purports to infer there were employees of the Contractors who were not crossing the picket line as they were sympathetic to the employees of the Applicant taking protected industrial action.

The Contractors

[39] Several of the Contractors listed in the application provided materials to the Commission prior to the Hearing, their positions are outlined as follows.

ROCKTOWN

[40] Rocktown Pty Ltd (Rocktown) submits as follows:

- Rocktown has been contracted to carry out various works on the CCR project since last quarter of 2022.
- Rocktown has been constantly subjected to unprotected industrial action carried out by some employees on the CCR project during this time.
- All the unprotected industrial action has either been organised, aided, or threatened by the CFMEU, its officials, or delegates whilst working on the CCR project.
- This year alone, Rocktown has filed two section 418 applications in the Commission,⁸ seeking orders to stop such unprotected industrial action.

- Rocktown continues to be vicariously subjected to unprotected industrial action by the existence of CFMEU picket lines on the entry points to the CCR project.

[41] Rocktown confirms that it has reviewed the Applicant's submissions and supports the position of the Applicant in relation to the dispute at hand and further supports the granting of the orders sought.

ELLIS AIR CONDITIONING

[42] Ellis Air Conditioning [QLD] Pty Ltd (Ellis Air Conditioning) filed submissions opposing the application.

[43] Ellis Air Conditioning confirms that its employees are attending site as rostered and therefore any orders arising from the application should not apply in respect of its employees.

[44] Ellis Air Conditioning further submit that the Applicant is not doing all things *possible and reasonable* to affect a return to work, noting:

- No capacity to drive into site
- No local bus to enter site.
- No special service police to keep the peace at each gate.
- No police event planning for a restricted area or return to work.
- No application to the FCA to increase the 15m keep back distance to 150m.
- No toolbox training on safety risks.
- No toolbox training on psychosocial risks.
- No pre-start check list on psychosocial risks.
- No EAP support service for employees.
- No personal safety awareness training.
- No personal safety training.
- No off-site safe parking.
- No transportation of tools etc into site.
- No education on these industrial orders.

[45] Ellis Air Conditioning made the following submissions regarding deficiencies in the application:

- No list of Employees that are missing.
- No list of Employees directed to attend work.
- No list of Employees that are lawfully redirected to other sites.
- No evidence of each Contractor directing their employees.
- No evidence of each Contractor's employees not following directions.
- No identification of what industrial instruments apply to the Contractors.
- No notification to the Employees.
- No public notice in the paper or reasonable substituted notice for a weekend.

KLENNER MURPHY ELECTRICAL

[46] Klenner Murphy Electrical Pty Ltd (Klenner Murphy Electrical) filed submissions opposing the application.

[47] Klenner Murphy Electrical confirms that it is a smaller subject matter expert Contractor without in house legal counsel to respond to such an application on short notice.

[48] Klenner Murphy Electrical confirms that it is unable to contact many of its employees at the time of the application due to rostered days off or Show Holidays.

[49] Klenner Murphy Electrical made the following submissions against the application being granted:

- The matter of the Employees nonattendance on the sites is a matter relating to work health and safety concerns and is not a matter of industrial action.
- From conversations with its employees, Klenner Murphy Electrical state its employees are in no way sympathetic with the CFMEU. Klenner Murphy Electrical employees want to go to work but are intimidated by the presence of CFMEU on the picket line.
- Klenner Murphy Electrical have spoken to several of apprentices in relation to talk on site about being issued notices to cross the picket line and this is causing anxiety amongst young and vulnerable employees.
- Klenner Murphy Electrical believes that there is an imminent risk to their employees' psychosocial wellbeing.
- Klenner Murphy Electrical, as a Person Conducting a Business or Undertaking (PCBU), has obligations under work health and safety laws to keep its employees safe.

This includes providing access to work free of risk of intimidation, bullying, harassment, and physical harm to manage their physical and psychological wellbeing. The serious nature of work-related violence and aggression means that even if the likelihood of the behaviours is low, the severity of harm that can result is high.

- Klenner Murphy Electrical submits that its employees have born witness, by way of being present or within the media, to: physical violence at a picket line on the Dutton Park CRR site; damaging social media posts against parties that have crossed the picket line; report of an alleged retaliation attack on a worker who crossed the picket line at his own home in the early hours of the morning; and, more broadly, understanding of the alleged links to organised crime reported by the mainstream media to the CFMEU.
- In assessing the risk, it is Klenner Murphy Electrical's view that a risk assessment of crossing the picket line results in a high risk, only reduced to low with the removal of the picket line.
- Klenner Murphy Electrical views that issuing a section 418 order, in effect, creates a situation forcing the Employees to cross the picket lines and would force workers to choose between complying with a legal instrument or prioritising their current and future mental and physical wellbeing.

ABS FAÇADE

[50] ABS Façade submits that no industrial action, within the meaning of the Act, is taking place.

[51] ABS Façade submits that its employees have continued to attend work and are willing to engage in work.

[52] ABS Façade notes that, on occasion, its employees have been prevented from entering worksites. When attempting to access worksites, ABS Façade submits that its employees have been subjected to threats and intimidation.

[53] Further, ABS Façade notes that its employees have encountered physical barriers to entering work sites. ABS Façade submits that its employees have made efforts to locate other entries into worksites. Despite these attempts, ABS Façade notes that its employees continue to be prevented from entering work sites to complete work and, in the event they are able to access a work site, continually face disruptions in work due to equipment and materials being physically prevented from entering the site.

[54] Accordingly, ABS Façade submits that any failure to access a worksite to complete tasks is a result of physical barriers or threats and intimidation and does not satisfy the definition of industrial action.

[55] ABS Façade highlights the duty it has to employees to ensure safe working conditions and manage risks associated with the type of conduct the Employees are encountering when

attempting to access work sites. Finally, ABS Façade notes the Applicant's obligations in respect of work health safety concerns currently under question in the present circumstances.

HIGHFORCE

[56] Highforce made the following submissions in response to the application:

- Highforce employees have continued to attend work every day and have taken no industrial action.
- Highforce employees have reported incidents of being intimidated or threatened when attempting to cross the picket line by various persons. As a result, Highforce submit that there is no industrial action as the employees have a reasonable concern about an imminent risk to their health and safety and are not crossing the picket line.

FIREMEX

[57] Firemex provided the following in relation to the application:

“Firemex employees have still been working at the sites, so the orders don't concern us. All the information CPB (the Applicant) require is on Damstra the tracking system that they make us use to track out attendance, so this employee list is irrelevant”

The Unions

[58] The CFMEU and CEPU have intervened in this matter on behalf of the Employees engaged by the Contractors who are also members of the Unions.

[59] Hall Payne Lawyers filed submissions, prepared by Counsel, on behalf of the Unions on Thursday, 15 August 2024.

[60] This submission was accompanied by the Statement of Ms Madeleine Patricie O'Brien (Ms O'Brien), a Solicitor at Hall Payne Lawyers. Ms O'Brien's statement attached several news articles and documents related to the Federal Court Proceedings concerning industrial action at the CRR Project.

[61] Shortly before the Hearing, on 16 August 2024, the Statement of Mr Sunil Kemppi (Mr Kemppi), a Solicitor at Hall Payne Lawyers, was filed on behalf of the Unions. Mr Kemppi's statement attached copies of correspondence issued by the Contractors to the Employees.

[62] During the Hearing on Friday, 16 August 2024, a further outline of submissions prepared by Counsel was filed by Hall Payne Lawyers on behalf of the CFMEU.

[63] The Unions submit that the apparent factual foundation for the application is evidence that some unidentified employees of some unidentified subcontractors have not been presenting for work. The basis for the application appears to the Unions to be that some unidentified employees of some unidentified subcontractors have not worked on project sites when expected to by the Applicant.

[64] The Unions submit that precise times of non-attendance have not been provided, and that the evidence lead in support is incomprehensible. The Unions acknowledge some limited evidence which suggests some of the Employees have not attended project sites due to safety concerns and with the support or acquiescence of the relevant employing Contractor.

[65] The Unions note the Applicant's submission that there has been intimidation and undesirable conduct on the picket line.

[66] The Unions submit the Applicant's evidence is unreliable and that its submissions are primarily concerned with procedural issues; simply asserting, without explanation, that the alleged absences are industrial action.

[67] The Unions submit that the Applicant invites the Commission to infer from allegation that over 1000 employees of over 50 subcontractors are currently engaged in industrial action and/or are organising industrial action that is likely, impending, or probable to be in engaged in. The Unions submit there is no evidentiary basis on which the Commission could conclude such inference.

[68] In its subsequent submission, the CFMEU notes that the Applicant has persuaded the Federal Court that there is a reasonably arguable case that conduct of the picket has involved coercion in the sense of illegitimate, unconscionable, or unlawful pressure preventing workers from crossing.

[69] The CFMEU makes reference to the current media narrative to the same effect. The CFMEU highlights that the Applicant, in the current proceedings, submits that the workforce is fearful due to the febrile environment and therefore the identity of the Employees should be kept confidential.

[70] Relevantly, the CFMEU notes that the application is lodged against these unidentified Employees of the Contractors and that it is unclear whether they have been served the application.

[71] The CFMEU submits that the earlier stated factual foundation for the application is sought to be proven by reference to variances between the number of workers which the Applicant had planned to be at site and the actual attendance numbers.

[72] The CFMEU submits that there is no evidence suggesting that service through the means requested by the Applicant is likely to bring the orders to the attention of any of the Employees.

[73] The CFMEU summarises the conduct alleged to be unprotected industrial action, being the alleged conduct of the, just over 1000, Employees:

- failing or refusing to enter a CRR Construction Site at which the Employees have been rostered for the performance of work;
- failing or refusing to attend for work at a workplace located within a CRR Construction Site where the Employees have been rostered for work; and

- engaging in the conduct in paragraph (a) or (b) above at a CRR Construction Site because of: the existence of a picket at that site, or crossing a picket at that site.

[74] In turn, the CFMEU submits the following must be considered by the Commission:

- Is a failure by an employee of a Contractor to enter a CRR Construction Site at which an employee has been rostered to work, for any reason including but not limited to the existence of a picket, industrial action?
- Are the group of 1,100 Employees which comprise the “*employees of subcontractors engaged on CRR worksites*” all currently engaged in such industrial action?
- Are the group of 1,100 workers which comprise the “*employees of subcontractors engaged on CRR worksites*” organising such industrial action?
- Is it impending, probable or threatened that the 1,100 Employees, which comprise the “*employees of subcontractors engaged on CRR worksites*” will engage in such industrial action?

[75] The CFMEU is of the position that each of the above must be answered with no.

[76] The CFMEU notes that section 19 of the Act is to be consulted in determining whether the alleged conduct is industrial action with, specifically, in the circumstances of this matter, the conduct of type described at sections 19(1)(c)-(d) of the Act being most factually relevant, alongside consideration of the preclusions under section 19(2) of the Act pertaining to authorisation or agreeance by the employer and safety related concerns.

[77] The CFMEU submits that the Applicant has not adduced evidence to prove that the Contractors named in its application are its subcontractors and, therefore, as the whole of its case proceeds on a mere assumption the application fails.

[78] Further, the CFMEU notes that the only evidence in support of the Applicant’s allegations of industrial action is the spreadsheet attached to the statement of Mr Prior which purports to compare the number of planned and actual worksite numbers (the Document).

[79] The CFMEU objected to the acceptance of the spreadsheet into evidence, calling into question its creation, underlying source of data, and lack of explanation as to the conclusions drawn from it.

[80] The CFMEU asserts that the conclusion of the spreadsheet is mere hearsay and submits that there is no basis upon which the Commission could determine the reliability of the Document.

[81] The Document was accepted into evidence by the Commission at the Hearing and, accordingly, the CFMEU submits there is no basis on which the Commission could assume the Applicant’s number of “*planned*” attendances is a proxy for the rostering of the Contractor’s employees as there is no evidence to support such a finding.

[82] The CFMEU highlights the lack of appropriate evidence that *could have been* adduced to support the document and invites the Commission to assume that this omission infers such evidence was not supportive. For example, evidence that the Applicant's calculation of "planned" attendances is based on advice from the Contractors as to their intended number of workers attendant on each day. Further, the CFMEU notes that the Applicant has not attempted to obtain such evidence which it could have done so through an application for orders requiring the production of rosters.

[83] The CFMEU submits that for non-attendance to constitute industrial action, the relevant employee(s) must have been rostered for attendance and again references the lack of evidence clarifying such circumstances. In the event that employees who have been rostered have not attended work, industrial action can only be found in the event that the conduct does not fall within that which is contemplated in section 19(2) of the Act.

[84] The CFMEU concedes that there is no prohibition, in principle, with inferential factual finding in cases such as the present.

[85] However, the CFMEU highlights that a finding may be made inferentially only if the evidence give rises to a "reasonable and definite inference" and notes that it is not sufficient that the evidence simply "give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture".⁹

[86] The CFMEU notes the submissions from several Contractors with statements asserting that any non-attendance falls within the exceptions at section 19(2) of the Act.

[87] The CFMEU highlights that the Applicant's evidence seems to support the aforementioned submissions of the Contractors, noting several references to intimidation and physical barriers in entering the worksite as well as the Applicant being unaware of what portion of the Contractor workforce are union members.

[88] The CFMEU submits that the Applicant's case leaves open the suggestion that the conduct is not a product of Union sympathy, but instead perceived risk or threats, all the while explicitly submitting that the Commission should conclude the conduct is not the result of safety concerns.

Consideration

[89] The Document provided by Mr Prior,¹⁰ is a high-level snapshot of the rostered numbers of employees who are expected to be working on the CRR Project across several worksites in the Brisbane metropolitan region.

[90] The Document in question confirms there was an increase in absences from the scheduled number of employees rostered to be working on site from the various Contractors during the specified period.

[91] I accept that the Document indicates that there was an increased trend in absenteeism during the period in question.

[92] However, I note that the data provided does not confirm which employees are absent or any data as to why there was an increase in absenteeism. Rather, as the Unions noted, the Applicant is drawing an inference, and invites the Commission to follow suit, on a lack of direct evidence.

[93] The Applicant is drawing a conclusion that the absenteeism must be a result of the protected industrial action occurring at the project sites and the Employees who are not attending work are doing so either in support of employees taking part in protected industrial action or out of fear of crossing the picket line to attend the project sites and that this is unprotected industrial action giving rise to an order.

[94] The Applicant has not been able to quantify or identify which of the Employees are being directed to attend work by any of the Contractors and are refusing to do so. Instead, the Applicant has adopted a *catch all* approach in drawing the inference there is industrial action. Such an approach raises serious concerns regarding procedural fairness to the Employees and to the Contractors.

[95] From a review of the evidence provided by Mr Prior, it is evident that there was an increase in absenteeism from the project sites during the period in question.

[96] However, there is little evidence directly supporting the conclusion that industrial action within the definition of the Act is occurring, and such a conclusion is strongly refuted by several of the Contractors.

[97] From a review of the materials provided by several of the Contractors, it is apparent that the Employees who are engaged by these Contractors, and possibly others, are not being directed to cross the picket line. Further, these Contractors have confirmed that when there are no picket lines the Employees are attending work as rostered.

[98] When there is a picket line, and the Employees feel unsafe to cross the picket the line, several of the employing Contractors are not directing the Employees to attend. Relevantly, section 19 of the Act states that industrial action is not unprotected when an employer authorises the action.

[99] It appears that the Employees are not refusing to attend work by failing to cross picket lines, and instead they are unable to attend work as a result of the picket line causing either mental or physical risk to their safety. Such concerns the Employees have raised with the Contractors who have then, in several cases, authorised the Employees not to attend out of concern for health and safety.

[100] I note the submissions of Klenner Murphy Electrical, Highforce, and ABS Façade who oppose the orders being granted. These Contractors have highlighted instances of intimidation or similarly concerning conduct present at picket lines. These Contractors have cited such incidents as reasons for the Employees failing to attend work as they submit these pose legitimate imminent risk to health and safety.

[101] Contrary to the position taken by the majority of Contractors who have provided submissions, I note that Rocktown support the application and believe that the orders to stop unprotected industrial action occurring should be made.

[102] From the evidence before the Commission there is not a clear indication as to which Employees are potentially not attending work for a legitimate reason (e.g. personal leave or similar) or which Employees are not being directed to attend work for a legitimate reason (e.g. not being directed to attend work by a Contractor due to health and safety risks), to which an order could not cover.

[103] The parties have relevantly and correctly highlighted previous cases in which it has been established a conclusion that unprotected industrial action is occurring can be made on inferential factual findings.

[104] I am not satisfied the materials currently before the Commission give rise to a reasonable and definite inference that unprotected industrial action, as defined within the Act, is occurring.

[105] There are conflicting inferences at play in this matter, and I am not satisfied the materials before me support the inference being drawn that there is conduct being engaged in by the Employees not falling within the exceptions to the definition of industrial action.

[106] I make reference to the Decision of Commissioner Hunt in *Lendlease Building Pty Ltd T/A Lendlease Building v Construction, Forestry, Mining and Energy Union (Lendlease)*.¹¹ In that matter, not unlike the present dispute, the Commission made orders to stop unprotected industrial action being engaged in by 450 employees of the applicant's contractors in circumstances where the applicant's employees were engaging in protected industrial action.

[107] The totality, content, and reliability of the evidence currently before the Commission on which inferential findings are invited to be drawn is notably weaker than the evidence before the Commission in *Lendlease*.

[108] Further, the competing inference in this matter (that the Employees' conduct satisfies the exceptions to the definition of industrial action in the Act), alongside the notable health and safety concerns, holds weight and poses issue for the alternative inference sought to be drawn by the Applicant.

[109] The mere existence of the proceedings concerning the same project work sites, in which the Federal Court has issued orders against the CFMEU, lends support for the inference to be drawn that employees are not presenting to work as a result of behaviour on the picket line that poses a risk to health and safety.

[110] It is not an effective or appropriate use of the Commission's powers to issue an order for industrial action to stop in circumstances where an applicant has not been able to confirm, with any degree of certainty, what group of employees are engaging in said action. Especially so where the Commission has indication that several of the employees allegedly engaging in the conduct at issue are doing so out of safety concerns, upon authorisation of their employer, or that some may not even be employed on the relevant work site.

[111] In putting forward an application that comes with the significant consequence of the Commission granting orders requiring the Employees return to work in the current circumstances, it is incumbent on the Applicant to ensure that the data or evidence relied upon for its conclusion is reliable and has utility for the purposes of the Commission's consideration.

[112] I also hold concerns over the lists of the Employees provided to the Commission and the general issues regarding service and procedural fairness posed by the application as a whole.

[113] I note that Chambers received emails from previous employees of the Contractors engaged on the project confirming that they were no longer working on the Applicant's project or were no longer employed by the relevant Contractor. Further, several email addresses provided were not valid or would not accept correspondence for a variety of reasons.

[114] Having considered the procedural issues, competing submissions, and issue of the inference sought to be drawn from the evidence provided, I am not satisfied that unprotected industrial action as defined within the Act is occurring. And, even if I were satisfied, it remains that the application is problematic in its current form leading to serious concerns as to the identification of which Employees, if any, should be bound by the orders sought.

[115] The Applicant is seeking an all-encompassing approach to address alleged unprotected industrial action it has inferred is being engaged in by some individuals within a workforce of well over 1000 employees who are engaged by 50 separate contractors on the basis of increased absenteeism by headcount, in spite of the live issue of health and safety risks resulting from existing picket lines.

[116] I am not satisfied that there is unprotected industrial action occurring due to the significant indication of a risk to health and safety and cannot be satisfied that an inferential finding that such conduct is occurring should be made on the materials currently before me.

Conclusion

[117] Accordingly, the application is dismissed and the interim order previously issued in this matter is revoked. An Order reflecting the dismissal and revocation has been issued concurrently.¹²



COMMISSIONER

Appearances:

J Ford, Counsel for the Applicant.

O Fagir, Counsel for the Unions.

Hearing details:

2024.

Perth (by video):

August 16.

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¹ [\[PR778204\]](#).

² [2017] FCAFC 228.

³ *Ibid*, 59.

⁴ *Ibid*, 138-189.

⁵ [2024] NSWSC 7.

⁶ [\[2012\] FWA 7654](#).

⁷ [\[2013\] FWCFB 453](#).

⁸ Matters C2024/391 & C2024/1421.

⁹ [\[2013\] FWCFB 7736](#); 237 IR 1, [21].

¹⁰ Annexure “TPP 12” to the Statement of T. Prior.

¹¹ [\[2016\] FWC 7198](#).

¹² [\[PR780476\]](#).