

FEDERAL COURT OF AUSTRALIA

Australian Building and Construction Commissioner v Molina [2017] FCA 1501

File number: WAD 393 of 2017

Judge: **GILMOUR J**

Date of judgment: 22 December 2017

Catchwords: **PRACTICE AND PROCEDURE** – pleadings – application to strike out statement of claim – consideration of requirements of pleadings – whether pleading disclosed reasonable cause of action – whether pleading has the tendency to cause prejudice, embarrassment or delay in the proceedings

INDUSTRIAL LAW – adverse action – coercion – consideration of ‘lawful request’ for the purposes of whether a person engages in industrial activity pursuant to s 347 of the *Fair Work Act 2009* (Cth)

Legislation: *Building and Construction Industry (Improving Productivity) Act 2016* (Cth)
Fair Work Act 2009 (Cth) ss 343, 346(b), 347(b)(iv), 348, 570(2)(a)
Federal Court of Australia Act 1976 (Cth) ss 37M, 37N, 43(3)(g)
Federal Court Rules 2011 (Cth) rr 1.39, 16.02, 16.21(1)
Explanatory Memorandum, *Fair Work Bill 2008* (Cth)

Cases cited: *Australian Competition and Consumer Commission v Craftmatic Pty Ltd* [2009] FCA 972
Australian Competition and Consumer Commission v Pauls Ltd [1999] FCA 1750
Charlie Carter Pty Limited v Shop Distributive and Allied Employees Association of Western Australia [1987] FCA 135; (1987) 13 FCR 413
Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd [2016] FCA 987
Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd [2017] FCAFC 50
Dahler v Australian Capital Territory [2014] FCA 946
J & A Vaughan Super Pty Ltd (Trustee) v Becton Property Group Ltd [2014] FCA 581
Lion-Dairy & Drinks Pty Ltd v Sinclair Knight Merz Pty

Ltd [2013] FCA 869

Polar Aviation Pty Ltd v Civil Aviation Safety Authority
[2012] FCAFC 97; (2012) 203 FCR 325

Radisich v McDonald [2010] FCA 762

Date of hearing: 20 September 2017

Registry: Western Australia

Division: General Division

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Counsel for the Applicant: TJ Dixon

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Counsel for the Respondent: W Keane

Solicitor for the Respondent: Construction, Forestry, Mining and Energy Union

ORDERS

WAD 393 of 2017

BETWEEN: **AUSTRALIAN BUILDING AND CONSTRUCTION
COMMISSIONER**
Applicant

AND: **WALTER MOLINA**
First Respondent

**CONSTRUCTION, FORESTRY, MINING AND ENERGY
UNION**
Second Respondent

JUDGE: **GILMOUR J**

DATE OF ORDER: **22 DECEMBER 2017**

THE COURT ORDERS THAT:

1. The time for filing the respondents' defences under r 16.32 of the *Federal Court Rules 2011* (Cth) be extended until 12 January 2018.
2. Costs be reserved.
3. The Respondents' interlocutory application dated 7 September 2017 be otherwise dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

GILMOUR J:

- 1 The Respondents, Mr Walter Molina and the Construction, Forestry, Mining and Energy Union (CFMEU) seek orders pursuant to r 16.21(1) of the *Federal Court Rules 2011* (Cth) (Rules) that the whole of the Applicant's Statement of Claim (SOC) , filed 8 August 2017, be struck out or, alternatively, that [9] and [10] be struck out. The Respondents also seek orders extending the time for them to file their defence, per r 1.39 of the Rules, and for the costs of the application to be reserved. These last two orders are not opposed. The interlocutory application is supported by the affidavit of Kathryn Jane Wilson affirmed on 7 September 2017.
- 2 The proceeding is brought by the Applicant, the Australian Building and Construction Commissioner (ABCC), for declarations that both Mr Molina and the CFMEU contravened provisions of the *Fair Work Act 2009* (Cth) (FW Act) by engaging in adverse action (for the purposes of s 346(b) of the FW Act) and coercion (for the purposes of s 343 of the FW Act) against Civmec Construction and Engineering Pty Ltd (Civmec). At the relevant time, Civmec operated the Perth Stadium Project situated at Mackay Drive, Burswood, Western Australia (Site). The ABCC alleges that the Respondents threatened action against Civmec by arranging, promoting or otherwise facilitating a picket line at the Site on 5 August 2016 (5 August Meeting). The ABCC also seeks pecuniary penalties pursuant to the FW Act.
- 3 I will make an order that the time for filing the Respondents' defence be extended to 12 January 2018. Otherwise I will dismiss the Respondent's interlocutory application for the reasons that follow.
- 4 I will first address the Respondents' contentions as to [9] and [10], before considering the balance of their more general concerns. To that end it is instructive to set out paragraphs [7]-[19].

[7] On or about 4 August 2016, a fatality occurred on a Multiplex site in Canberra.

[8] On 5 August 2016, at about 7.10am, the workers engaged to perform building work on the Perth Stadium Project (the Workers) including employees of Civmec (Civmec Employees) attended a meeting at the Site (the Meeting). There were approximately 500 to 550 Workers in attendance at the Meeting.

[9] Molina, another CFMEU official, and Gerard McLaughlin (McLaughlin), the Senior Site Manager for Multiplex, each addressed the Workers throughout the Meeting.

[10] During this Meeting, Molina said words to the effect:

- (a) How are you going to show a mark of respect for your fallen colleague?
- (b) Everyone walked out at Capital and are not returning to work until Monday.
- (c) Let's have a show of hands to show a sign of respect for the fallen worker and the family by walking off the job.

[11] During this Meeting, McLaughlin said words to the effect "The Site is operational".

[12] The Meeting ended between about 7.35am and 7.45am when approximately 30 to 50 percent of the Workers left the Site including some of the Civmec Employees.

[13] Shortly after the Meeting, Civmec's Project Manager, Paul Buckie (Buckie), met with the employees of Civmec who had remained at the Site (Remaining Employees).

[14] Buckie instructed the Remaining Employees to stay on Site and wait for further direction.

[15] Molina then approached Buckie and said words to the effect of "Paul you need to send your guys home. Have some respect. You need to send your guys home."

[16] Buckie responded to Molina saying words to the effect of "Vinnie, you know I can't do that".

[17] Molina then said to Buckie words to the effect of "If you send your men back out to site expect a picket line on Monday".

[18] Buckie then went to the Multiplex office at the Site and met with McLaughlin, Bill McEvoy (McEvoy), Multiplex Project Director, and Carl Lemon (Lemon), Civmec Construction Manager. Buckie reported Molina's statement in paragraph 17, above, to McLaughlin, McEvoy and Lemon. Buckie, McLaughlin and McEvoy agreed that Buckie would not send Civmec Employees back to work on the Site.

[19] Molina's statement in paragraph 17, above, in the context of the matters pleaded at paragraphs 3 and 7 to 16 above, was a threat to arrange, promote or otherwise facilitate a picket line of the Site on Monday, 8 August 2016 (Threat) if Buckie did not send the Remaining Employees home.

5 The Respondents submit that the matters pleaded in respect of the meeting at [9]-[11] of the SOC do not form part of the elements of the cause of action. They submit that the pleadings in [9] and [10] set out evidence, not material facts.

6 Conversely, the ABCC submits that [9] and [10] form part of the relevant circumstances or contextual facts.

7 The Respondents submit that the allegations at [9]-[11] relating to the meeting appear at first to give rise to separate causes of action, that is, of organising or being involved in industrial action, or a tort of interference with contractual relations which is to be inferred as pleaded at [24] of the SOC. They further submit that in circumstances where it is conceded the

allegations in respect of the meeting do not involve material facts, the allegations give rise to certain delay and additional expense to be incurred in the proceedings, as the hearing will be transformed from one about what words were spoken by Mr Molina to the Civmec Project Manager, Mr Buckie, (to which there were apparently no other witnesses), into a hearing involving the workers giving evidence as to what was said, and by whom, and what motivated 30 to 50% of the workers to leave the site: r 16.21(1)(d).

8 This factual contest, the Respondents submit, cannot logically or rationally and therefore probatively be aided by proof of those matters pleaded in [9]-[11]: *Radisich v McDonald* [2010] FCA 762 (21 July 2010) at [32]-[34].

9 The ABCC submits that the only relevant aspect of the pleadings at [9]-[11] of the SOC is the fact that some workers left the site. The Respondents submit that the potential for a significant increase in costs, for both parties, in preparation for trial because of the issue of what occurred, as alleged in [9]-[11], does not conform with the overarching purpose of the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible: ss 37M and 37N of the *Federal Court of Australia Act 1976* (Cth).

General legal principles

10 Rule 16.02 of the Rules relevantly provides:

(1) A pleading must:

...

(d) state the material facts on which a party relies that are necessary to give the opposing party fair notice of the case to be made against that party at trial, but not the evidence by which the material facts are to be proved; and

...

11 In *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2017] FCAFC 50, the Full Court endorsed the following summary of ‘material facts’ but considered them against ‘particulars’, at [53]:

The “material facts” referred to in r 16.02(1)(d) of the Rules are those that are necessary for formulating a complete cause of action. In *Bruce v Odhams Press Ltd* [1936] 1 KB 697, Scott J said at 712713:

The cardinal provision in r 4 is that the statement of claim must state the material facts. The word “material” means necessary for the purpose of formulating a complete cause of action; and if any one “material” fact is omitted, the statement of claim is bad; it is “demurable” in the old phraseology, and in the new is liable to be out”...

The function of particulars under r 6 is quite different. They are not to be used in order to fill material gaps in a demurable statement of claim-gaps which ought to have been filled by appropriate statements of the various material facts which together constitute the plaintiff's cause of action. The use of particulars is intended to meet a further and quite separate requirement of pleading, imposed in fairness and justice to the defendant. Their function is to fill in the picture of the plaintiff's cause of action with information sufficiently detailed to put the defendant on his guard as to the case he had to meet and to enable him to prepare for trial. Consequently in strictness particulars cannot cure a bad statement of claim. But in practice it is often to distinguish between a "material fact" and a "particular" piece of information which it is reasonable to give the defendant in order to tell him the case he has to meet; hence in the nature of things there is often overlapping...

- 12 The observation made in that case that, in practice, it is often difficult to distinguish between a 'material fact' and a 'particular piece of information' which it is reasonable to give to a respondent in order to tell him the case he has to meet, was earlier made by French J (as he then was) in *Charlie Carter Pty Ltd v Shop Distributive and Allied Employees Association of Western Australia* [1987] FCA 135; (1987) 13 FCR 413 at 417:

In practice it may be difficult to distinguish between a "material fact" and a "particular". Antecedent to that distinction, however, is the definition of the level of generality at which the material facts should be pleaded.

In *Ratcliffe v Evans* [1892] 2 QB 524 the Court of Appeal comprising Lord Esher MR, Bowen and Fry UJ said at 532:

... it is an ancient and established rule of pleading that the question of generality of pleading must depend upon the general subject-matter.

Whatever level of generality is adopted in a statement of claim it must, in my opinion, be consistent with the purpose of pleadings, namely to define the issues and thereby inform the parties in advance of the case they have to meet and so enable them to take steps to deal with it – *Farrell (formerly McLaughlin) v Secretary of State for Defence* [1980] 1 WLR 172 at 179-180 per Lord Edmund-Davies.

There are certain levels of generality of pleading which, while they may bring in all facts necessary to establish a cause of action, are insufficient for the purpose of properly informing the defendant of the case it has to meet. In *Bruce v Odhams Press Ltd* [1936] 1 KB 697 it was said to be insufficient merely to allege in general terms a cause of action. The cause of action must be alleged with particularity.

- 13 It is not appropriate to adopt a pedantic approach in determining whether or not to strike out pleadings: *Australian Competition and Consumer Commission v Craftmatic Pty Ltd* [2009] FCA 972 at [14] adopting *Australian Competition and Consumer Commission v Pauls Ltd* [1999] FCA 1750 at [10].
- 14 Likewise, in *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2016] FCA 987, Collier J at [13] distilled the main purpose of pleadings from a consideration of key authorities as being to:

- (a) give notice to the other party of the case it has to meet;
- (b) avoid surprise to that party;
- (c) define the issues at trial, thereby allowing only relevant evidence to be admitted at trial and the trial to be conducted efficiently within permissible bounds.

15 As to the principles to be applied in an application under r 16.21 of the Rules, Collier J said at [14]:

Rule 16.21 of the Rules empowers the Court to exercise its discretion to strike out pleadings which do not meet the standards set by paras (a)-(e) of r 16.21(1), which are referable to the general rules of pleadings set out in r 16.02. In doing so however the Court is further guided by principles including that:

- The power to strike out is to be employed sparingly and only in a clear case: *Polar Aviation Pty Ltd v Civil Aviation Safety Authority* [2012] FCAFC 97; (2012) 203 FCR 325 at [43]; and
- In considering the adequacy of pleaded facts, the Court should adopt a sensible and robust approach. If the object of pleadings is sufficiently met, the striking out of the pleading will be unnecessary: *Guglielmand v Trascowthick* [2004] FCA 326 at [8]; *Forty Two International Pty Limited v Barnes* [2010] FCA 397 at [110].

16 A pleading will be embarrassing where, as set out in *Lion-Dairy & Drinks Pty Ltd v Sinclair Knight Merz Pty Ltd* [2013] FCA 869 at [10]:

it is unintelligible, ambiguous, vague or too general so as to embarrass the opposite party who does not know what is alleged against him, or if the pleading is susceptible to various meanings or contains inconsistent allegations or in which alternatives are confusingly intermixed or in which irrelevant allegations are made that tend to increase expenses.

17 Moreover, in relation to a failure to disclose a reasonable cause of action, as Pagone J adopted in *J & A Vaughan Super Pty Ltd (Trustee) v Becton Property Group Ltd* [2014] FCA 581 at [8]:

[t]he power to strike out a pleading on the basis of disclosing no reasonable cause of action is to be exercised only in a plain and obvious case and requires establishing that the statement of claim does not disclose a reasonable cause of action by showing that the applicant's case is so untenable that it cannot possibly succeed: *General Steel Inc v Commissioner for Railways (NSW)* (1969) 112 CLR 125 at 128–130.

Consideration

18 In my opinion the Respondents have adopted a pedantic approach to the pleading. The ABCC has eschewed any suggestion that it now, or later, is bringing, or will bring, separate proceedings for any other cause(s) of action premised on what is pleaded at [9]-[10].

19 The Threat pleaded at [17] and [19] of the SOC does not emerge in a vacuum. It would be artificial for the Court to be deprived of knowledge of the circumstances immediately surrounding the words alleged to have been spoken by Mr Molina to Mr Buckie. Those circumstances include what was alleged to have been said and what is alleged to have occurred at and immediately after the site meeting which occurred on the same day shortly before the alleged Threat was made: [8]-[14] of the SOC. These may be seen as inter-related events occurring in close proximity to each other to those pleaded at [15]-[19] of the SOC. Whilst pleaded as ‘context’, they are better characterised as particulars which it is appropriate to bring to the attention of the respondents as well as the Court. They are relevant, in my view to understanding the ABCC’s case as a whole, including not only the allegations of the making of the Threat and coercion, but also the question of penalties which might be imposed.

20 Mr Molina's alleged statements at the Site meeting, made for and on behalf of the CFMEU are, I accept, facts material to the coercive intention of the CFMEU in relation to the making of the alleged Threat. This inferred intention is expressly pleaded at [28] of the SOC. Particulars of that pleaded intention are that:

Molina's intention to coerce Civmec is inferred from the content of the Threat, in the context of the matters pleaded at paragraphs 7 to 16 above.

21 Mr Molina's alleged statements at the Site Meeting are also, I accept, facts material to the related allegation in [28(b)] that the views of the CFMEU were that employees at the Site should walk off the job as a sign of respect for the worker who died on the Canberra site.

22 There is therefore no substance to the Respondents’ criticisms of [9]-[10].

The Statement of Claim

23 The Respondents also submit that the facts pleaded in the SOC do not support claims in the Originating Application and therefore do not disclose a cause of action as well as being embarrassing. They assert deficiencies in [9] and [10] of the SOC infect the balance of the pleading such that it should be struck out in its entirety.

24 The Respondents submit that the ABCC has not alleged in the SOC either what the ‘lawful request’ was or what the “views” of the industrial association (the CFMEU) were.

25 The ABCC does not allege, in terms, in the SOC, which words are said to be a 'lawful request' for the purposes of s 347(b)(iv) of the FW Act and paragraphs 1(a), 2(a) and 3(a) of the Originating Application.

26 Section 346 provides as follows:

Protection

A person must not take adverse action against another person because the other person:

- (a) is or is not, or was or was not, an officer or member of an industrial association; or
- (b) engages, or has at any time engaged or proposed to engage, in industrial activity within the meaning of paragraph 347(a) or (b); or
- (c) does not engage, or has at any time not engaged or proposed to not engage, in industrial activity within the meaning of paragraphs 347(c) to (g).

27 Section 347 relevantly provides:

Meaning of engages in industrial activity

A person *engages in industrial activity* if the person:

- (a) becomes or does not become, or remains or ceases to be, an officer or member of an industrial association; or
- (b) does, or does not:
 - (i) become involved in establishing an industrial association; or
 - (ii) organise or promote a lawful activity for, or on behalf of, an industrial association; or
 - (iii) encourage, or participate in, a lawful activity organised or promoted by an industrial association; or
 - (iv) comply with a lawful request made by, or requirement of, an industrial association; or
 - (v) represent or advance the views, claims or interests of an industrial association; or
 - (vi) pay a fee (however described) to an industrial association, or to someone in lieu of an industrial association; or
 - (vii) seek to be represented by an industrial association; or
- (c) organises or promotes an unlawful activity for, or on behalf of, an industrial association; or
- (d) encourages, or participates in,, an unlawful activity organised or promoted by an industrial association; or
- (e) complies with an unlawful request made by, or requirement of, an

industrial association; or

(f) takes part in industrial action; or

(g) makes a payment:

(i) that, because of Division 9 of Part 3-3 (which deals with payments relating to periods of industrial action), an employer must not pay;
or

(ii) to which an employee is not entitled because of that Division.

(emphasis in original)

28 The ABCC has not identified in terms what the lawful request is, although it is clear from the context and usage in the SOC that it is the request set out at [15] even if the word 'request' is not employed. 'Lawful request' is not defined in the FW Act. However, its meaning can be discerned from the Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) introducing s 347(b)(iv) including [1338] in which it is stated that industrial activities covers 'the freedom... to participate in lawful activities, including those of an industrial association'.

29 Thus viewed, what is alleged at [15] of the SOC to have been said by Mr Molina, was arguably a lawful request made by or on half of the CFMEU, an industrial association.

30 It is alleged at [15] of the SOC that Mr Molina said words to the effect of directing Mr Buckie to 'send your guys home'. At [16], it is alleged that Mr Buckie stated that he 'can't do that'. That is when the threat or 'Picket Line Statement' is alleged to have been made. The Respondents submit that if the 'lawful request' alleged in the SOC is the request at [15], then [9] and [10] cannot be context to support an unlawful intention to coerce.

31 However, these material facts are not limited to the 'lawful request' relied upon. Instead, as the ABCC submits, Mr Molina's statements at the Site meeting are material facts that establish the Respondents' views and intentions and also contribute to the threatening and coercive meaning of the words used in the Picket Line Statement.

32 The Respondents submit that, to make sense of the Originating Application, the lawful request should have occurred before the Threat, as it is claimed that the Threat was made because Civmec did not comply with the lawful request.

33 They submit that the threat pleaded in [17] of the SOC was one contingent on the Civmec employees being sent back to work on the Site but that Mr Buckie did not refuse this request despite what is claimed in the Originating Application at [1(a)] and [3(a)].

34 Thus, they submit, the statement in [17] was not dependant on anything spoken previously. Rather, they assert the words constituted a stand-alone statement which related to a concern about sending employees back to work, as opposed to a request to send employees home (as in [15]).

35 I do not accept these submissions. The substance of the allegation is that, immediately following what was said at the site meeting, Mr Molina twice in effect requested Mr Buckie to 'send your guys home' at ([15]). It is pleaded in effect at [16] that Mr Buckie declined to comply with this request. Then the Threat was allegedly made by Mr Molina.

36 It is plain enough that what is alleged is that the Threat was made because of the refusal of the request. The Threat alleged was made immediately following the refusal.

37 The Respondents submit that the cause of action is subverted by reason that the particulars under SOC [28(b)] 'suggest' that Molina's intentions to coerce Civmec is to be inferred, from the context of the matters pleaded at [7]-[16] of the SOC which include what was said at the meeting.

38 What the particulars in fact state, primarily, is that the relevant intention is to be inferred from the content of the Threat. There is no substance to the Respondents' submission.

39 I will now set out [20]-[28] of the SOC:

[20] The Threat was a threat by Molina to take action, being to arrange, promote or otherwise facilitate a picket line of the Site on Monday, 8 August 2016.

[21] Because of the Threat and the absence of workers from the Site after the Meeting, Civmec and Multiplex managers decided not to send Civmec Employees back to work on the Site after 7.45am on 5 August 2016.

[22] Civmec sent Multiplex a notice of delay to site activities on 5 August 2016.

[23] Had Molina taken the threatened action:

(a) the Civmec Employees would have been restricted or prevented from entering the Site to perform work on Monday, 8 August 2016; and

(b) Civmec would have been restricted or prevented from performing work under the Multiplex Contract at the Site on Monday, 8 August 2016.

[24] By reason of the matters pleaded in paragraphs 20 and 21, the Threat was adverse action under s 342(2) and item 7(c) of s 342(1) of the FW Act. The Threat prejudiced Civmec in the Multiplex Contract, and the threatened action would have directly or indirectly prejudiced Civmec in the Multiplex Contract by:

(a) interfering with Civmec's schedule for the work it was contracted to perform pursuant to the Multiplex Contract; and

(b) causing Civmec additional costs in completing the work under the Multiplex Contract.

[25] Molina made the Threat because Civmec, “engaged in industrial activity” within the meaning given to that phrase in s 347(b)(iv) and (v) of the FW Act respectively, that is, it did not:

(a) comply with a lawful request made by the CFMEU to send the Remaining Employees home for the day; or

(b) advance the views of the CFMEU that employees at the Site (including the Remaining Employees) should walk off the job.

[26] By reason of the matters pleaded in paragraphs 20 to 25, Molina, by making the Threat contravened s 346(b) of the FW Act.

Section 348 contravention

[27] The Threat constituted a threat by Molina to take action against Civmec, namely, to arrange, promote or otherwise facilitate a picket line of the site on Monday, 8 August 2016.

[28] The Threat was made with the intent to coerce Civmec to “engage in industrial activity” within the meaning given to that phrase in s 347(b)(iv) and (v) of the FW Act respectively, that is, to:

(a) comply with a lawful request made by the CFMEU to send the Remaining Employees home for the day; or

(b) advance the views of the CFMEU that employees at the Site (including the Remaining Employees) should walk off the job as a sign of respect for the worker who died on the Canberra site.

40 The Respondents submit that the agreement pleaded at [18] (where it is claimed that Messrs Buckie, McLaughlin and McEvoy ‘agreed’) is a conclusion. Indeed, it is a conclusion. However, this is not a case in contract where the existence of an agreement or particular terms in it, are in dispute. If the Respondents want to know the substance of words spoken which underpin the pleading they can seek particulars.

41 The decision not to send the Civmec employees back on site but rather to send workers home is material to the allegation that Mr Molina threatened a picket line if workers were not sent home and to the relevant prejudice alleged to have been occasioned.

42 The Respondents submit that there is no separate pleading of the views of the CFMEU; and that paragraphs [25(b)] and [28(b)] do not attribute the views of Mr Molina to the CFMEU.

43 I do not accept this.

44 The views of the CFMEU are pleaded expressly at [28(b)] and the basis of the inferred intention is set out under the particulars. Likewise, the views of Mr Molina are attributed to the CFMEU in [2] and [30].

45 The Respondents submit that there is confusion in the pleadings over what the words in [17] are alleged to mean. I do not accept this submission. Paragraph 19 of the SOC pleads, were it otherwise in doubt, what is the meaning of the words used in [17].

46 Then, the Respondents submit that the pleadings are inconsistent in clarifying which Civmec workers the subject of the Threat because:

- (1) [19] alleges that the Threat was made in respect of the 'Remaining Employees' as defined in [13] of the SOC; however
- (2) [18] and [21] proceed on the basis that the Threat related to all of the Civmec Employees as defined in [8].

47 I do not accept these submissions. It is clear from [12] and [13] of the SOC that some Civmec employees left the site and some remained. It is disingenuous to think other than that the ABCC's case is that the request to 'send your guys home', as well as the content of the Threat, referred to the Civmec employees who remained on site. Paragraph 19 pleads this in terms. Paragraph 18 does not contradict this. Neither does the content of [21].

48 The Respondents submit that the CFMEU's views are insufficiently pleaded. I do not agree. [28], read with other paragraphs including [9] and [10], clearly pleads the views alleged to be those of the CFMEU. The Respondent then submits that it is not apparent why the allegation at [6] concerning 'building work' is made as it does not form part of the causes of action pleaded. They submit that if the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) applied to the Site, then the involvement of the respondents in the meeting is likely to give rise to contravention, with the consequence inter alia that there was no 'lawful request' made as alleged. Accordingly they submit this is embarrassing.

49 I do not accept these submissions. Two observations may be made. First, as pleaded in SOC [1(c) and (d)], the ABCC's standing and authority to bring this proceeding is premised in part, on the matter involving 'building work'. This alone renders the pleading at SOC [6] not only relevant but necessary. Second, the submission as to some putative contravention was not developed.

50 The Respondents submit it is not pleaded that the Threat was to create a picket line to obstruct access to the Site, as opposed to a peaceful picket line. They then submit that [17] does not disclose that this was the intended consequence of the words spoken. There is of course no requirement that such a pleading must specify what kind of picket line was threatened. Nonetheless [23] pleads that the Civmec employees would have been ‘restricted’ or ‘prevented’ from entering the site. Such a conclusion, were the Threat established at trial, would be an inference open to the Court amounting to relevant prejudice for the purposes of s 346(b).

51 As to the pleaded s 348 contravention, again there is no requirement to plead what type of picket line was intended. The relevant intention for the purpose of s 348, I accept, is the intention to coerce. The particular kind of picket line the subject of the alleged threat it is not a material fact to be pleaded. However, the ABCC's case as to this alleged fact is as I have mentioned, set out under [23]. Even a “peaceful” picket line would be capable of restricting or preventing access to the site by Civmec employees.

52 I do not accept the submission that [18], [21], [22] and [23] are irrelevant to any cause of action pleaded. These paragraphs which plead the actions of Mr Buckie and the Multiplex managers immediately following the Picket Line Statement are material to the prejudice allegation in [24].

Conclusion and orders

53 I am mindful that authority dictates that the Court’s power to strike out is to be employed sparingly and only in a plain and obvious case where it is clear that no reasonable amendment can cure the alleged defect and there is no reasonable question to be tried: *Polar Aviation Pty Ltd v Civil Aviation Safety Authority* [2012] FCAFC 97; (2012) 203 FCR 325 at [43]. This is far from being such a case. Pleadings are not to be understood with a pedantic eye: *Craftmatic* at [14]. Much of the respondents contentions suffer from this vice. Rather, I have adopted a sensible approach in considering the adequacy of the pleaded facts. I am satisfied that the ABCC has adequately pleaded its causes of action and has put the respondents clearly on notice as to the case they have to meet. The pleadings are not, in any respect, embarrassing.

54 Accordingly, I will make orders extending the time for the respondents to file their defence to 12 January 2018 as well as reserving the question of costs. The Respondents’ interlocutory application dated 7 September 2017 will otherwise be dismissed.

I certify that the preceding fifty-four (54) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gilmour.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, likely representing the name of the Associate.

Associate:

Dated: 22 December 2017