



Menu

"Spent" bargaining order a green light for industrial action

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In an important ruling, the Federal Court has found that an interim bargaining order that the MUA didn't comply with was "spent" and didn't stop it proceeding with protected industrial action.

Justice Michael Barker refused to issue declarations sought by AMMA on behalf of four suppliers to the offshore oil and gas industry that by failing to comply with orders 1 and 8 of Fair Work Commissioner Danny Cloghan's interim orders (see [Related Article](#)), the union's action was unprotected.

Order 1 required the union by the close of business on July 21 last year to list claims against Swire, Tidewater Marine, Skilled Offshore and Mermaid Marine that had been agreed, those not agreed and to rank its claims as high, medium or low importance.

Under order 8, the union was obliged to provide written undertakings that it wouldn't pursue certain terms in its claim, such as contractor clauses.

The MUA accepted that it didn't comply with the timeline for order 1, but it and AMMA differed on whether it supplied the information on July 22 or 25.

Justice Barker said the MUA arguably complied with item 8 on July 22 when it provided an undertaking but noted it was still seeking legal advice to ensure it didn't contain non-permitted or unlawful content.

But on July 25 it provided the final undertaking.

"The proper judgement to be made, therefore, is that there was no purported compliance with either order 1 or order 8 until 25 July 2014, four days after the required compliance time, which was the close of business on 21 July 2014", Justice Barker said.

The judge said the "apparent significance" of the union's non-compliance is that industrial action isn't protected under [s413\(5\)](#) if the union has not obeyed orders "that apply" to them on industrial action or a matter that arose during bargaining.

"The real point is that the expression 'orders that apply to them', in the context of a definition dealing with protected industrial action, necessarily has to do with orders that apply at the time the industrial action is proposed.

"If the Parliament had intended that any contravention — whenever it occurred — in respect of a bargaining order made, and that related to a matter that arose during bargaining for the agreement, should disqualify the proposed industrial action from being protected industrial action, then a different form of words would have been used in s 413(5).

"The appropriate words, for example, might have been: 'The following persons must not have contravened any orders that apply *or applied* to them'".

He found the interim orders did not "currently apply" to the MUA and were "spent".

Justice Barker said Commissioner Cloghan made the "suite of orders" to facilitate good faith bargaining, which had "broken down at a certain point in time".

By providing the information required by the orders, "the MUA, albeit after the close of business on 21 July 2014, has facilitated the continuation of the good faith bargaining process generally in accordance with the requirements of the bargaining orders made to the present time."

Background

The union on July 18, just ahead of the July 21 deadline for complying with the interim order, notified industrial action for July 25 and 26 against Swire.

AMMA sought a s418 order to halt the action, arguing that the non-compliance with the interim orders rendered it unprotected.

The MUA withdrew its notice of industrial action and the FWC dismissed the s418 application.

After the union provided the final undertakings to AMMA on July 25, it applied to the FWC for a retrospective variation to the deadline for complying with the orders.

[Australian Mines and Metals Association Inc v The Maritime Union of Australia \[2015\] FCA 677 \(3 July 2015\)](#)

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