



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **VICTORIA INTERNATIONAL CONTAINER TERMINAL LIMITED**
Appellant

and

RICHARD SIMON LUNT
First Respondent

FAIR WORK COMMISSION
Second Respondent

AUSTRALIAN MARITIME OFFICERS UNION
Third Respondent

CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION
Fourth Respondent

APPELLANT’S OUTLINE OF ORAL ARGUMENT

Part I: Certification

This outline is in a form suitable for publication on the internet.

Part II: Outline of propositions the appellant intends to advance orally

1. Introduction

(a) To avoid a defence and scrutiny of its conduct, the union recruited a “front man”.

(b) Primary judge dismissed the proceeding as an abuse because, relevantly:

“...it would bring the administration of justice into disrepute if the CFMMEU were permitted, by using the device of having a “front man”, to bring the proceeding to challenge the approval of the Enterprise Agreement while avoiding scrutiny of its acquiescence to that approval.”¹

(c) Full Court overturned finding of abuse of process without properly identifying error in the primary judge’s conclusion.

¹ *Lunt v Victoria International Container Terminal Limited (No 2)* (2019) 165 ALD 542 [134] [Core Appeal Book (‘CAB’) 27].

(d) Full Court not asked to/did not overturn any factual findings.

2. Full Court's errors / proceeding is an abuse

(a) Full Court found primary judge acted on wrong principle by not finding that, because Mr Lunt's purpose was to obtain a result within the scope of the remedy, "[t]here was therefore 'no impropriety of purpose' and no abuse of process".²

(b) Full Court made two main errors:

(i) Focussed on one aspect of Mr Lunt's purpose, and thereby ignored purpose of the union and *the sham*.³

(ii) Examined abuse solely through prism of impropriety of purpose.⁴

10 (c) At no time did Full Court consider whether proceeding brought administration of justice into disrepute.⁵

(d) Once those errors are identified, it can be seen that there was no error in the primary judge's conclusion:

(i) Union supported, and acquiesced in, approval of enterprise agreement.⁶

(ii) Union did not challenge enterprise agreement's approval by appeal or otherwise.⁷

(iii) Application in union's name was susceptible to discretionary refusal.⁸

(iv) Union used Mr Lunt as secret "*front man*" to avoid prospect of discretionary refusal.⁹

20 (v) Mr Lunt would not otherwise have brought the proceeding.¹⁰

² *Lunt v Victoria International Container Terminal Limited* [2020] FCAFC 40 [18] [CAB 46]. See Appellant's submissions dated 30 October 2020 ('AS') AS [22]-[23]. Cf. *Williams v Spautz* (1992) 174 CLR 509, 535 (Brennan J) [5 JBA 172, 198].

³ See AS [26].

⁴ See AS [31].

⁵ See AS [31]-[33].

⁶ See AS [7(a)-(b)].

⁷ See AS [7(c)].

⁸ See AS [15].

⁹ See AS [6], [7(f)], [7(h)], [7(j)], [15] and [16].

¹⁰ See AS [7(g)] and [15].

3. VICT should have its costs

- (a) Given primary judge’s findings, Mr Lunt and the union acted unreasonably so as to step outside the costs protection afforded by s 570 of the *Fair Work Act 2009* (Cth).¹¹

4. Correction of three typographical errors in Appellant’s submissions

- (a) AS [6]: on line 8, delete the word “*avoiding*”.
- (b) AS [7(a)]: in footnote 5, delete “, 768BG”.
- (c) AS [15]: immediately prior to the end of footnote 38, add “, [87] (*Kirby J*) and [91] (*Hayne J*)”.

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Dated: 9 February 2021



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Stuart Wood AM QC



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Nico Burmeister

¹¹ See AS [34]-[40] and *Appellant’s reply to the First Respondent’s submissions* dated 18 December 2020 [20].