



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT GOSTENCNIK

C2023/6590

s 137A RO Act - Orders about representation rights of organisations of employees

**Application by Green Light Contractors Pty Ltd
(C2023/6590)**

Melbourne

11.30 AM, THURSDAY, 30 NOVEMBER 2023

PN1

THE DEPUTY PRESIDENT: Yes, good morning. Mr Bennett, you're continuing your appearance for the applicant?

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MR G BENNETT: If it please the Commission.

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THE DEPUTY PRESIDENT: Yes, good morning. Mr Friend, I see you've come to join the party.

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MR W FRIEND: Yes, Deputy President, thank you.

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THE DEPUTY PRESIDENT: Yes, good morning. Is Mr Fagir on the line as well?

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MR FRIEND: Yes, I think so.

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THE DEPUTY PRESIDENT: He's hiding somewhere. Very well, thank you. Mr Duncalfe, you're continuing your appearance for the AWU?

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MR Z DUNCALFE: That's correct, Deputy President.

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THE DEPUTY PRESIDENT: Yes, all right. Well, I have, since the last occasion, received the foreshadowed interlocutory application for dismissal by the CEPU and I also have received draft orders proposed by the CFMEU to further its interlocutory application as well as proposed orders from the applicant in respect of its substantive application. So, presumably, there'll be a contest this morning about what order and which should go first so it might be appropriate, Mr Friend, if I hear from you first.

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MR FRIEND: Thank you, Deputy President. Our proposed orders deal with, in what we think is a fairly expeditious way, the interlocutory application. The interlocutory application, as you realise, has two strands. The first is a simple jurisdictional one; we say that the applicant is not a person entitled to bring this application. They don't employ anyone in the work crew, only an employer can bring the application. Properly understood, that can't mean an employer at large, there'd be no basis for having that distinction as opposed to anyone else. We can develop that further in due course, but that would deal with the application to finality and it's a fairly simple point.

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The second aspect of the interlocutory application is that, on the material that is in the application, there is no way it could succeed on the current authorities. The

only complaint is, really, of a few right of entry attempts and there is a debate about whether there is coverage and that is before the Federal Court, but we say that, at its highest, on the material that has been provided – and we assume that the applicant has put its best case in its application – they couldn't succeed, and we submit that, really, it's less than a days' hearing and it ought to dispose of the whole matter rather than the week or so that we'll need if it is all going to be heard at the same time.

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That's a convenient and sensible way, we suggest, to proceed with the matter and still have directions along the lines of those proposed by the applicant. They might have to be extended a little depending on how long it would take you, the Deputy President, to deal with the interlocutory application.

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THE DEPUTY PRESIDENT: Yes, all right. Mr Bennett?

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MR BENNETT: Yes, thank you, Mr Deputy President. The applicant presses the orders that it seeks. A conclusion that is sought by the applicant on the motion, for want of a better phrase, is that there is no reasonable prospect of success. They advance two limbs to that; the first limb is the no standing application. The difficulty with the no standing application that they've advanced is, simply, that they don't seem to have any evidence or any basis for it other than that they are not presently aware. Well, you know, that's not evidence, simply stating that they're not aware. So, unless they can come up with some more stringent evidence than that, that aspect of the case just falls apart immediately. And, by the way, that is disputed by the applicant, make no bones about that.

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Secondly, the proposal that, even if you take the applicant's case at its highest, it doesn't seem to meet the authorities; well, we would dispute that and we say, with respect to that the following: the applicant on the motion's supposition – and they summarise it in point 9 of the application, it's been summarised this morning; that it merely deals with some concerns over some right of entry issues - is just, simply, incorrect. The amended application, which the application was brought in respect to, refers to damages, both reputational and financial, and delay, and I don't need to remind the Commission that this is a piece of infrastructure that has been recognised by everybody, and I understood CEPU, as being a piece of critical infrastructure that is required to be completed in certain timeframes.

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So, we're dealing with a case of critical infrastructure in circumstances where, we say, the conduct of CEPU's organisers and others and the manner in which their conduct is being pursued on the site is causing delay and damage. In the application, we indicated that we would put evidence on as to the – I'll just track it down here, just find it. It's at paragraph 64, the last sentence:

PN17

Evidence of the nature, extent and effect of the delays will be provided in the proceedings.

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So, the application is, as it stands, not complete in the context of a major aspect of section 137 and that is the effect of not granting the application on the employer. There is presently, apart from the general observations made in the application which are to be supported by evidence, nothing before the Commission.

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Getting back to the test of no reasonable prospects of success, it's been said by full benches of this Commission that it is with extreme caution, only with extreme caution, that that sort of decision would be made and it must be supported, in circumstances where the application is manifestly untenable, groundless, and lacking in merit or substance as to not be reasonably arguable.

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Further, the only material before the Commission at the moment is the material of the applicant. There is another interested party in this case, the Australian Worker's Union, who are here this morning and will no doubt speak for themselves but I would anticipate that they would be putting on evidence to deal with those matters going to those matters that need to be considered by the Commission under section 137(b) when determining applications of this nature.

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They haven't even got the material on. In other words, any application to hear an interlocutory application of the nature sought at the moment is just completely premature. We're not saying, at the end of the day, CEPU can't bring an application, but bringing it now is not the appropriate time to do it and it's a matter for them if and when - - -

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THE DEPUTY PRESIDENT: Mr Bennett, do you suggest that, at least in respect – put the standing application to one side – do you suggest that the appropriate time to deal with an application that your application has no reasonable prospects of success is after you file your materials?

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MR BENNETT: That's correct, Deputy President. And that would be, no doubt, a decision made by CEPU after they've looked at the materials and made a determination whether they think it's appropriate to make the application.

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THE DEPUTY PRESIDENT: Yes, all right.

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MR BENNETT: But certainly not now. The other complication, of course, which no consideration, I think, has been directed to is that the application of section 138 of the Registered Organisations Act which requires powers to be exercised by a Full Bench of the Commission and, of course, ultimately, a dismissal would be a

dismissal of the application which, in our submission, could only be exercised by a Full Bench of the Commission.

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Just on the point of prejudice, if I may, Deputy President. The applicant on the motion suffers no prejudice at the moment. The orders proposed by the applicant in the substantive proceedings places the obligations on the parties pressing for the orders.

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THE DEPUTY PRESIDENT: Yes, all right. Mr Duncalfe, what do you want to say?

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MR DUNCALFE: Thanks, Deputy President. For the AWU, really the only issue that we wanted to raise was that it is the applicant's application and there is no prejudice if it is run on the basis of the orders proposed by the applicant. The only thing the AWU would probably add on the topic of the proposed orders put forth by the applicant would be that, not only would witness statements be filed but also submissions by all parties on those same dates, not just the witness statements. But otherwise, the dates and the timeframe, the AWU has no opposition to that.

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THE DEPUTY PRESIDENT: Yes, all right. Mr Friend?

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MR FRIEND: Thank you, Deputy President. In relation to the first limb of the application, all we get from Mr Bennett is it's contested but it wasn't clear that he was saying that the factual allegations are contested. It's a construction point, it's a pretty important one, and it's the foundation of the Commission's jurisdiction. We submit it's appropriate to deal with that first. There is prejudice in not dealing with it first because we will have to engage, potentially, in a hearing of several days which may be unnecessary because the applicant doesn't have standing.

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In regard to the second point, we're taking the material as filed and obviously, we have to make the argument on the basis of taking what has been filed at its highest point and we submit that we would be able to make out the argument that they can't succeed consistently with the current authorities, and nothing that Mr Bennett has said, we submit, really detracts from that argument. It's the conduct of the CEPU officials which is allegedly causing the problem and the conduct has been specified in the application, that's what relied upon.

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Mr Bennett pointed to, unspecifically, damages and delay. We're not sure how that could possibly be made out but we can have that argument and, we submit, the appropriate course is to deal with both of those things first.

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THE DEPUTY PRESIDENT: Yes, and, as to the manner of dealing with them, do you accept that the dismissal application, at least in relation to standing, needs to be dealt with by a Full Bench?

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MR FRIEND: Yes, I think that's right, Deputy President.

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THE DEPUTY PRESIDENT: Yes, okay. All right. Is there anything else the parties want to say?

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MR DUNCALFE: No, thank you.

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MR BENNETT: No, Deputy President.

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THE DEPUTY PRESIDENT: Yes, all right. Well, I will simply reserve for present purposes. I'll need to, obviously, have a discussion with the President about constituting a Full Bench and, once that's constituted, I will consult the members of the Full Bench, provide them with a copy of the transcript of today and we'll make a decision about the manner in which this matter is to proceed.

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MR BENNETT: Apologies, Mr Deputy President, there is one matter that I overlooked and I should have raised and that is the timetable – if there was some decision or some process to go against our submissions in the matter, the timetable advanced by the applicant on the motion, we would not be able to comply with that and put the necessary material on. We're not even – we don't even know the evidence and it - - -

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THE DEPUTY PRESIDENT: Well, I understand that. In any event, my view on it is that, if we're inclined to deal with at least one of the matters on an interlocutory basis, we'll need to fix a date and we'll work back from there as to the timetable. I can indicate, at this stage, that the earliest in my diary, at least, that's clear – not knowing the position of other Full Bench members – is 1 February is the earliest I could give a date, so we'll work back from there. So, take it from me that, if we deal with the interlocutory application, it's not likely to be listed before 1 February.

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All right, well thank you all, I'll adjourn on that basis and we'll be in contact with the parties as soon as practicable. Thank you, have a good day.

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MR BENNETT: Thank you, Mr Deputy President.

ADJOURNED TO A DATE TO BE FIXED

[11.46 AM]