YOU SHALL HAVE A PASS! *FW ACT* PERMITS REQUIRED

AUTHOR // MURRAY PROCTER AND BEN KEENAN

DECEMBER 2017

It has been confirmed that an employer may require a union official to possess an entry p ermit under the *Fair Work Act 2009* (Cth) (**FW Act**) even when the official has purportedly been invited on site by a safety representative. On 17 November 2017, the High Court refused an application for special leave to appeal the decision of the Full Federal Court in *Australian Building and Construction Commissioner v Powell*[1] (***Powell***).

The issue in the proceedings was whether a union official must have an entry permit granted under the FW Act when invited onto site by a health and safety representative who has been elected pursuant to State occupational health and safety (**OHS**) laws, purportedly to assist in the performance of the health and safety representative's functions.

THE FACTS OF *POWELL*

On four occasions between May and July 2014, Mr Powell, an official with the Construction Forestry Mining and Energy Union (**CFMEU**) was invited by Mr Curnow, a health and safety representative elected under the *Occupational Health and Safety Act 2004* (Vic) (**OHS Act**) for a construction project, to attend site to assist Mr Curnow in dealing with various OHS issues arising on the site.

When Mr Powell was asked by Mr Curnow's employer on the occasion of the first entry to produce his entry permit under the FW Act, Mr Powell refused, asserting that as he was entering site at the invitation of a health and safety representative pursuant to section 58(1)(f) of the OHS Act, he was not obliged to possess an entry permit under the FW Act and that, pursuant to section 70 of the OHS Act, the employer was obliged to permit his entry to the site. Mr Powell refused to comply with a direction from the employer to leave the site.

The employer called the police, who refused to remove Mr Powell from the site, on the basis that they agreed with Mr Powell's assertion that he was entitled to enter and remain on the premises without having to possess an entry permit under the FW Act so long as he entered and remained on site at the invitation of the health and safety representative to assist the representative with the exercise of his functions under the OHS Act. Police were called again on two of the three further occasions that Mr Powell entered the site.

After conducting an investigation into the entries, the Director of the Fair Work Building Inspectorate commenced penalty proceedings against Mr Powell for alleged contraventions of section 494(1) of the FW Act (which requires that a union official "must not exercise a State of Territory OHS right" unless the official holds an entry permit under the FW Act).

HISTORY OF THE LEGAL PROCEEDINGS

Justice Bromberg of the Federal Court ruled that Mr Powell had not contravened section 494(1) of the FW Act

[1] [2017] FCAFC 89.

when entering the site, on the basis that sections 58(1)(f) and 70 of the OHS Act did not constitute a "State or Territory OHS right" that could be exercised by Mr Powell and accordingly, he was not required to possess a valid entry permit under section 494(1) of the FW Act[2]. Justice Bromberg concluded that the only rights conferred via sections 58(1)(f) and 70 of the OHS Act were in fact conferred on Mr Curnow as the health and safety representative, not the union official requested to assist him.

The Director appealed, resulting in the earlier decision being overturned. The Full Federal Court upheld the appeal, finding there was "no reason of policy or commonsense" to support a distinction between differently worded provisions in a State or Territory OHS law that have the same effect of providing a union official with a right to enter premises. The Full Court also noted that the imposition of such a distinction was likely to lead to practical confusion at site level, which could in turn result in allegations of trespass and the involvement of the police, as was the case in *Powell*[3].

Mr Powell's representatives and the Victorian WorkCover Authority sought special leave to appeal to the High Court. The High Court rejected the application, agreeing with the reasoning of the Full Federal Court.

SIGNIFICANCE FOR EMPLOYERS NATIONALLY

The decision of the High Court to refuse special leave to appeal the *Powell* decision is significant for employers in all jurisdictions. The State safety laws that were the subject of the litigation are relevantly the same in all States and Territories other than Western Australia. The various checks and balances on the exercise of rights of entry differ as between State safety laws and the FW Act and it is important to know what they are and how they might be used (and when) in order to maintain order on site.

Employers in unionised industries should train staff on right of entry laws so staff know where they stand on refusing entry to an official, and to otherwise monitor and manage an official's behavior when a right is properly exercised. Safety, unfortunately, is used all too often as an industrial lever, and equipping staff with appropriate knowledge of the legal position goes some way to preserving the integrity of work health and safety systems and ultimately safety for all on site.

[2] See *Director of the Fair Work Building Industry Inspectorate v Powell* [2016] FCA 1287.
[3] *Powell* at [57] – [58].

FOR MORE INFORMATION, PLEASE CONTACT:

MURRAY PROCTER //
Partner

T 61 7 3001 9225

E M.Procter@clarkekann.com.au

BEN KEENAN //
Senior Associate

T 61 7 3001 9268

E B.Keenan@clarkekann.com.au