



# RECOMMENDATION

*Fair Work Act 2009*

s.739 - Application to deal with a dispute

**Watpac Construction Pty Ltd**

**v**

**Mr Denis McNamara; Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU); and others**

(C2018/1763)

COMMISSIONER RIORDAN

SYDNEY, 30 MAY 2018

*s.739 application to deal with a dispute.*

[1] The parties have asked the Fair Work Commission (FWC) to provide a “without prejudice” recommendation in relation to the meaning of section 13 of the “Code for the Tendering and Performance of Building Work 2016” (the Code), which states:

“(1) A code covered entity must protect freedom of association in respect to building work by adopting and implementing policies and practices that:

(a) Ensure that persons are:

- (i) free to become, or not become, members of building associations; and
- (ii) free to be represented, or not represented, by building associations; and
- (iii) free to participate, or not participate, in lawful industrial activities; and
- (iv) not discriminated against in respect of benefits in the workplace because they are, or are not members of a building association.

...

(2) Without limiting subsection (1), the code covered entity must ensure that:

...

- (j) building association logos, mottos or indicia are not applied to clothing, property or equipment supplied by, or which provision is made for by, the

employer or any other conduct which implies that membership of a building association is anything other than an individual choice for each employee...”

[2] The fundamental principle in relation to statutory interpretation is that words must be given their plain and ordinary meaning.

[3] I have taken into account the submissions of the parties in relation to this question. The issue is whether Watpac (as a code covered entity) has been engaged in conduct which breaches the right of every employee to choose whether or not to join a union.

[4] Section 336 of the *Fair Work Act, 2009* (the Act) states:

**Objects of this Part**

(1) The objects of this Part are as follows:

(a) to protect workplace rights;

**(b) to protect freedom of association by ensuring that persons are:**

**(i) free to become, or not become, members of industrial associations; and**

(ii) free to be represented, or not represented, by industrial associations; and

(iii) free to participate, or not participate, in lawful industrial activities;

(c) to provide protection from workplace discrimination;

(d) to provide effective relief for persons who have been discriminated against, victimised or otherwise adversely affected as a result of contraventions of this Part.

(my emphasis)

[5] The Code replicates the freedom of association provisions of the Act at clause 13(1)(a). Clause 13(2)(j), of the Code prohibits any conduct whatsoever which would imply that joining a building union is anything but an individual choice, once again re-affirming the freedom of association provisions of the Act. The question to be determined then requires an examination of whether the identified conduct, (in this instance, the flying of the CFMMEU and Eureka flags on the sites’ cranes) implies to an employee working on these Watpac sites that joining the CFMMEU is anything but voluntary.

[6] I fail to see how the flying of a Eureka flag on a building site crane would convey the view to any employee that membership of the CFMMEU was anything but voluntary. The display of a Eureka flag over the course of Australia’s history has been associated with a variety of causes and campaigns. I am not aware of the CFMMEU having an intellectual property right over its use or meaning. According to Wikipedia, the Eureka flag has been used as a symbol by bikie gangs, the right wing Australia First Party, the neo Nazi movement and sporting clubs such as Melbourne Victory. It was also used extensively in the 1975 federal election campaign following the dismissal of the Whitlam Government.

[7] I also fail to see how flying a CFMMEU flag on a crane a few hundred feet above a worksite, which would only be viewed by the small percentage of site employees who are

working on the upper deck, would cause any employee to form the view that there was some sort of compulsion to join the CFMMEU in order to work on that site. Also, from my experience, the overwhelming majority of workers on the deck work looking down, not up, performing tasks such as fixing steel, running conduit and pouring concrete. Therefore, their exposure to the flag would be minimal.

[8] Based on my conclusions above, I make the following recommendation:

(a) Watpac refrain from issuing directions to its employees to remove the Eureka and CFMMEU flags from its cranes; and

(b) Watpac refrain from taking disciplinary action against any employee who had previously been requested to remove the Eureka and CFMMEU flags from its cranes.

[9] I so recommend.



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