

EMPLOYMENT
AND INDUSTRIAL
CASE NOTE

FEBRUARY 2007

Authorised by:
Christopher Campbell
Managing Partner
QUINLAN MILLER & TRESTON
GPO Box 2500
Brisbane QLD 4001
Telephone: 3223 6403
E-mail: ccampbell@qmtlaw.com.au

AUSTRALIAN TAXATION OFFICE [2007] AIRCFB 36

Right of Entry - Advantage Unions:

This decision was delivered on 17 January 2007 by the Full Bench comprised of:

- Justice Giudice, President;
- Senior Deputy President Kaufman;
- Commissioner Harrison.

The decision dealt with the right of entry provisions under the *Workplace Relations Act 1996* and in particular sections 120, 736, 747, 748, 751, 763, 771 and 772.

This was an Appeal by the Australian Tax Office and the Minister for Employment Workplace Relations on behalf of the Commonwealth as an intervener. The Appeal was from orders made by Senior Deputy President Lacy at Brisbane on 18 October 2006.

To quote from the decision of Senior Deputy President Lacy:

The order required the ATO to permit Mr Lapidos, an official of the Australian Municipal, Administrative, Clerical and Services Union (ASU) to enter the ATO's at Chermside on Wednesday 18 October 2006, or other date on 24 hours notice, to investigate suspected breached of the relevant Enterprise Agreement. The order purported to require the ATO to permit Mr Lapidos to approach individual employees at their place of work to invite them to meet with him to assist in his investigation of the suspected breached. Interviews were to be limited to 30 minutes and the ATO was to advise employees of Mr Lapidos' visit and that they had its permission to meet with him.

The Appeal itself resulted in no orders given undertakings made by the Australian Tax Office met the ASU's preference for an agreed procedure on such visits.

The Full Bench however did make comments about the process used by Senior Deputy President Lacy and what might be acceptable under the right of entry provisions given the factual matrix presented by the ASU's position.

Some of the relevant comments by the Full Bench:

It is fair to observe that on some occasions in the recent past the ATO had facilitated Mr Lapidos' visits to other locations by sending a notification to all staff and providing for a scheduled release of employees to meet with him in a designated interview room. The fact that the ATO was not prepared to do the same

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on this occasion seems to have been a significant factor.

Having regard to the object of Part 15 to establish a framework that balances Union rights of entry with the rights of employees to conduct their businesses without undue interference or harassment section 772(1) should neither be interpreted narrowly nor expansively. A section must be construed in a commonsense way to give effect to its purpose, recognising that any order made under section 772 creates rights that did not exist before. That purpose is to provide a means for the settlement of disputes about the operation of part 15. An order requiring an employer to notify employees of details of a permit holder's visit might be made in settlement of a dispute about the exercise of the right of entry and thus about the operation of part 15. To that extent such an order could, depending upon the circumstances, facilitate the exercise of the rights conferred by section 747. An order requiring an employer to notify employees or union members, or eligible to be so, that a permit holder will be attending the premises to investigate a suspected breach of an agreement and to conduct interviews does not confer a right on the permit holder that is "additional to, or inconsistent with, rights exercisable" under part 15. Equally a notification that employees have management's permission to attend an interview should they wish to do so does not confer additional or inconsistent rights either, in the circumstances of this case.

With respect to the Senior Deputy President we do not think that the finding that a roving inspection was necessary was available on the evidence and material before him.

The material was general in nature and suggested no more than a fishing expedition. We note also that section 747 requires a suspicion on reasonable grounds that a breach has occurred or is occurring as the basis for entry under that section. We seriously doubt whether the material advanced reaches that level.

... at all relevant times Mr Lapidos was prepared to comply with the request that the interviews be conducted away from the employees' work station in a room designated by the ATO.

We accept that in considering whether an employer's request is reasonable for the purposes of section 751(3) the Commission is required to take all of the circumstances into account and to consider the legitimate interests of the employer or the occupier of the premises as well as the interests of the employees and a permit holder. The public interest in the observance of industrial laws is also a relevant consideration. (Our emphasis added.)

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The Full Bench concluded with some comments about what orders it could make under section 772:

We could make an order under section 772 providing that Mr Lavidos might enter the ATO's Chermside premises on at least 24 hours notice for the purpose of investigating suspected breaches of the agreement and interview any call centre employee in the room designated by the ATO for that purpose for a maximum of 30 minutes. The order could also make provision for employees to be made aware of Mr Lavidos' presence on the premises and for the arrangement of the interviews in a manner consistent with the protection of the legitimate interests of the ATO.

Certainly the decision does provide explanatory comment on right of entry for Unions and clarifies particular aspects of that right of entry. It would appear the right of entry provisions have been bolstered by this decision with favourable interpretation against that desired by the Minister as intervener and this Federal Government Department.

If an application is to be brought to the Commission under the right of entry provisions, it is good practice to be well prepared and have supporting evidence for the position being taken on what is required. Given the Full Bench was pleased that the parties came to an agreement on process it would be mindful for the Unions and employers to have discussions about a proper practice before matters degenerate into Commission proceedings.

Should you require any further explanations about the right of entry provisions please do not hesitate to contact our Employment and Industrial team:

Christopher Campbell
Managing Partner
☎ 07 3223 6403
✉ ccampbell@qmtlaw.com.au

Shelley Clark
Solicitor
☎ 07 3223 6405
✉ sclark@qmtlaw.com.au

Rebecca Nichols
Solicitor
☎ 07 3223 6415
✉ rnichols@qmtlaw.com.au