

# FOLEY'S | LIST

## BRIDGING THE JURISPRUDENTIAL GAP

Author: Glen Pauline

Date: 1 July, 2011

### © Copyright 2011

This work is copyright. Apart from any permitted use under the *Copyright Act 1968*, no part may be reproduced or copied in any form without the permission of the Author.

This paper was published in the *Law Institute Journal* (July, 2011)

Requests and inquiries concerning reproduction and rights should be addressed to the author c/- [annabolger@foleys.com.au](mailto:annabolger@foleys.com.au) or T 613-9225 6387.



# BRIDGING THE JURISPRUDENTIAL GAP

Judgments in the West Gate Bridge dispute proceedings shed light on what conduct at a union picket conveys an intent to coerce or apply undue pressure. **By Glen Pauline**

**O**n 28 July 2010 Jessup J imposed the highest total penalties yet imposed by the Federal Court for contraventions of the *Building and Construction Industry Improvement Act* 2005 (Cth) (*BCII Act*).<sup>1</sup>

Penalties totalling \$298,000 were imposed on the Australian Manufacturing Workers Union (AMWU) and \$858,000 on the Construction, Forestry, Mining and Energy Union (CFMEU) for their unlawful industrial action and coercive conduct during the West Gate Bridge dispute between John Holland Pty Ltd (John Holland) and the AMWU and CFMEU in early 2009. In addition, Jessup J imposed penalties on an AMWU organiser totalling \$27,000 and two CFMEU organisers totalling \$71,000 each.

In February, March and April 2009 the Australian Building and Construction Commissioner (ABCC) and John Holland obtained injunctions against the two unions and some of their organisers. Jessup J's reasons for granting injunctions in *Williams v AMWU, CFMEU & ors*<sup>2</sup> and *John Holland Pty Ltd v AMWU, CFMEU & ors*,<sup>3</sup> and his reasons for imposing the penalties,<sup>4</sup> provide insight into the types of industrial conduct that the Federal Court may consider to be coercive, or the application of undue pressure, in the context of collective agreement making and the employment or engagement of particular

persons or independent contractors. The case is likely to be cited in future proceedings relating to industrial disputes under the *BCII Act* and the *Fair Work Act* 2009 (*FWA*).

## BACKGROUND

The West Gate Bridge dispute arose in the early stage of the \$240 million project. John Holland had engaged a labour hire company, Civil Pacific Services (Vic) Pty Ltd (Civil Pacific), to provide the labour necessary to perform the "enabling works" on the bridge. John Holland intended to directly employ a larger workforce to undertake the necessary works as the project progressed. It had a certified agreement with the Australian Workers Union (AWU), and took the view that it would cover the kinds of labour to be engaged on the bridge. Civil Pacific also had a certified agreement with the AWU that covered its employees for work performed on the bridge.

The CFMEU and AMWU became concerned that they would have no role in the industrial representation of the workers on the project. They sought an agreement with John Holland that covered their members working on the project. John Holland had certain terms and conditions it wanted that were different to those usually agreed to by those unions. No agreement was reached. The unions sought entry to the site, which was denied. The unions

then met with their Civil Pacific members outside the site facility. The Civil Pacific members wanted John Holland to have discussions with the CFMEU and AMWU about an agreement in relation to the project and rejected the notion that the AWU had any rights of representation on the project.

## 6 FEBRUARY PICKET AT PROJECT SITE

Section 44 of the *BCII Act* at the time prohibited a person from taking action with intent to coerce another person to agree to make a building agreement under Part 8 of the *Workplace Relations Act* 1996 (*WR Act*).<sup>5</sup> The leading authority on coercion provides that to prove an intent to coerce, it needs to be shown that it was intended that pressure be exerted which, in a practical sense, would negate choice, and the exertion of the pressure must involve conduct that is unlawful, illegitimate or unconscionable.<sup>6</sup>

The dispute first came before Jessup J on 6 February 2009 due to 21 Civil Pacific employees walking off the job on 5 February 2009 following a meeting with organisers from the two unions. A number of them, together with organisers from the two unions and others, picketed the project site the following day. Up to 100 people were present outside the entrance by 6.30am. A vehicle blocked the

entrance. The union organisers arranged for two portable toilets and a barbecue to be delivered to the site. Vehicles were turned away and deliveries to the site prevented. A CFMEU organiser told a John Holland employee: "This is big and if you want this to end you better start talking to us about an agreement".

Jessup J granted injunctions. The orders restrained the AMWU and CFMEU and two organisers from preventing or hindering access to the site, placing vehicles or things within 100 metres of the entrance to the site, counselling persons not to enter or work on the site and attending or organising persons to attend within 100 metres of the site. His Honour's reasons show the fine distinctions that must be drawn in considering whether a coercive intent can be inferred from activities at a picket.

### Preventing access to the site

Jessup J considered it strongly arguable that organising large groups of people to stand in the vicinity of the entrance to a workplace and prevent people having access to that site was illegitimate conduct that manifestly cut across the normal industrial and commercial

activities of people who were entitled to work and to carry on business.

His Honour said such conduct "should be regarded, if established at trial, as a very serious and potent form of direct pressure, in the face of which it would be in my view highly artificial to regard the object thereof as having any choice in the matter".<sup>7</sup>

### Persuading suppliers not to make deliveries

Jessup J was "prepared to accept that genuine peaceful picketing, in which picketers go no further than to use the occasion to communicate information or a point of view, should be regarded as unobjectionable under the general law".<sup>8</sup>

However, his Honour considered that attempts to persuade drivers not to enter a site so as to prevent ordinary commercial traffic were likely to be illegitimate. A communication to a supplier that contained a "sinister connotation", such as telling a manager by telephone that it is in his best interests not to make a delivery to the site, was also considered likely to be illegitimate, even though it did not occur on the picket line.

Such communication is "calculated to induce a certain apprehension into the thinking of managers of businesses which operate in the building and construction industry".<sup>9</sup>

### Interruption of established commercial transactions

According to Jessup J: "Whether or not the respondents propose to use direct, physical, impediments to entry to the site, and whether or not their conduct is in some respects unlawful, I consider it to be arguable that for them, as strangers to the commercial relationships pursuant to which people and vehicles come to the site, to procure those people, and the drivers of those vehicles, not to do so, is illegitimate".<sup>10</sup>

### MARCH 2009 PICKETS AT PROJECT OFFICE

On 8 February 2009, Civil Pacific and the CFMEU and AMWU made an agreement in relation to the West Gate Bridge project providing for higher rates of pay. On 2 March 2009, following John Holland's refusal to increase the rates of pay that it had agreed to



Smith Partners is a fictional law firm for the purposes of this illustration.



**Australia's only complete archiving solution specifically designed for law firms.**

Call us on 1800 738 532, email [sales@fileman.com.au](mailto:sales@fileman.com.au), or visit [www.fileman.com.au](http://www.fileman.com.au) to find out more.

pay Civil Pacific for the labour supplied by it for the project, Civil Pacific withdrew from the project and sacked its workforce on the project. Although John Holland invited all the former Civil Pacific employees to apply directly for employment with it, it would not guarantee they would all get a job, and indicated it would follow its usual due diligence process in hiring employees.

Between 3 March and 10 March 2009, a number of those employees and organisers of the unions maintained a presence outside John Holland's project office in Port Melbourne. Their objective was to get John Holland to give them jobs, and on certain terms and conditions contained in an agreement with the two unions. John Holland and the ABCC sought an injunction based on alleged contraventions of ss43 and 44 of the *BCII Act*. Section 43 of the *BCII Act* prohibits a person from organising or taking action with intent to coerce another person to, *inter alia*, employ a person as a building employee.

Jessup J again granted injunctions restraining the AMWU and CFMEU and three organisers from engaging in or organising persons to engage in certain conduct that he considered to be illegitimate. His

Honour analysed the conduct alleged to have occurred on those days for the purposes of determining whether the conduct revealed the coercive intent required by ss43 and 44 of the *BCII Act*.<sup>11</sup>

### **Illegitimate activities and behaviour**

Jessup J considered the following activities and behaviour to be readily described as illegitimate, if not unlawful: urinating on, or conspicuously in the vicinity of, the project office; damaging John Holland's property; banging on windows; abusing John Holland's staff; and impeding persons in the act of entering or leaving the project office.

At both the interlocutory stage and post-trial,<sup>12</sup> Jessup J acknowledged that John Holland might reasonably take the view that the normal work of its office staff at the project office would be so affected as to give it no choice, in a practical sense, but to yield to the demands being made of it. He acknowledged John Holland's obligation to provide and maintain a working environment, so far as is reasonably practicable, that was safe and without risks to health under the *Occupational*

*Health and Safety Act 2004 (Vic)*, s21. He concluded that the conduct was intended to negate John Holland's choice.

### **Legitimate activities and behaviour**

#### *Union flags and peaceful presence of multiple persons*

His Honour considered that taken in isolation, the display of union flags and paraphernalia and the peaceful presence of many persons who, by their numbers and demeanour, were not intimidating, was not even arguably illegitimate. Nor did he consider that there was any sense in which John Holland's choice was negated by them.

#### *Interference in recruitment process*

His Honour made a provisional finding at the interlocutory stage that two job applicants whom John Holland had arranged to interview at the project office were advised by those present outside the project office not to cross, or that it would not be a good idea to cross, the picket line.

Jessup J accepted that it was arguable that pressure created by interference in the hiring process that caused consequential delays

## **BUSINESS VALUATIONS**

*Family Court, Supreme Court,  
Federal Court*

**Roly Wettenhall**

Over 30 years audit, financial, forensic  
accounting and valuations experience

**Wettenhall & Co.**

CHARTERED ACCOUNTANTS

*Level 3, 488 Bourke Street,  
Melbourne 3000*

*Fax: (03) 9642 3972*

*Phone: (03) 9640 0022*

*Email: valuations@wettenhallco.com.au*

## **Valuations byjoel**

Byjoel has the accreditation and over 35 years of experience to understand your specific valuation needs, whether it be for a single painting, complete household inventory or legal document for court proceedings.

- Family Law
- Australian and International Art
- Superannuation Collections
- Market
- Corporate Collections
- Insurance
- Asset Management
- Art Gallery and Museum Collections
- Cultural Gift Program
- Local Government Reporting

**byjoel** WARREN JOEL  
AUCTION & VALUATION SERVICES

Phone 1300 295 635 [www.byjoel.com.au](http://www.byjoel.com.au)

to the resumption of productive work on the project was sufficient to involve a negation of choice in the relevant sense.

However, his Honour considered that as the two job applicants had no existing business or employment relationship with John Holland, they were persons "within the cohort of persons with whom the [unions] had a conventional and, I consider, legitimate concern". Further, His Honour said:

"In a nutshell, unless otherwise unlawful in some way, I do not consider that it should be regarded as industrially illegitimate for a trade union, in dispute with an employer, to draw to the attention of an intending worker the nature of that dispute, and to ask the worker to take the union's side, as it were, rather than accepting employment under terms and conditions which the union has placed in dispute. Describing their presence as a 'picket line', and asking the job applicants not to cross the notional line, was, I consider, compendious and well-understood terminology which would not, without more, involve illegitimacy".<sup>13</sup>

Jessup J did, however, consider it was arguable that "however legitimate the conduct of a peaceful picket line might be as a matter of

industrial relations, the use of such a means to stifle the flow of employment to a major construction project, with the delays and significant costs which would self-evidently result from that stratagem, should be regarded as the application of undue pressure".<sup>14</sup>

## PRESENCE AT WORKPAC OFFICE

If Jessup J drew the line where industrial legitimacy ends and illegitimacy starts, the respondents subsequently crossed it. Later during the dispute, on 17 March 2009, four unidentified men walked into the reception area of the Workpac office in Glen Waverley. Workpac had been engaged by John Holland to supply labour to the project. The men handed to the receptionist a flyer bearing the logos of the AMWU and CFMEU headed "Hollands can't bridge the gap". The flyer outlined the unions' version of the dispute with John Holland, and ended with the words "these workers need your support".

The men remained in the car park for about an hour and repeatedly walked up to the glass front of the office, attempting to peer in. One of them told a Workpac employee: "I'm

looking for a bin because I have some scabs I'm wanting to get rid of". Pointing to the Workpac office, he continued: "And they're in there". The flyers were placed under the windscreens of all the cars in the car park.

This conduct had been preceded a few days earlier by some workers from Workpac being harassed by persons at a picket line outside the site facility, and followed to a McDonald's restaurant and to John Holland's office in Abbotsford. In that context, Jessup J accepted that the conduct at the Workpac office was illegitimate because it "implies a more sinister purpose: the silent but potent message that Workpac and its staff were now within the general envelope of the dispute and might, at the discretion of the respondents, have the conduct of their normal working arrangements interrupted".<sup>15</sup>

It seems clear from Jessup J's comments that particular conduct will not be viewed in isolation when considering its illegitimacy or legitimacy, and that the context of such conduct, taking into account other surrounding facts and circumstances, will be important.

Lenovo recommends Windows® 7 Professional.

Lenovo® ThinkPad® T420s (41715AM)  
Powered by 2nd gen Intel® Core™ i5-2520M Processor

**\$350 CASH BACK OFFER  
YOU BE THE JUDGE.**

**lenovo** FOR THOSE WHO DO.

**BONUS** ADAPTER WITH JSB HUB AND COMPACT TOP LOAD BAG

ThinkPad T420s (41715AM)  
Performance & connectivity in a thin & light package

- 2nd gen Intel® Core™ i5-2520M Processor (2.50GHz)
- Genuine Windows® 7 Professional 64bit
- 4GB RAM (4GBx1)
- 320GB Hard Drive (7200rpm)

**intel inside**  
**CORE™ i5**  
**Visibly Smart**  
**NEW**

**THE MONEY TREE** EARN \$250 ON A VIRTUAL VISA CARD,  
FULL DETAILS AT [LENOVO.COM.AU/MONEY](http://LENOVO.COM.AU/MONEY)

AS A BONUS, YOUR POWERBUY MEMBERSHIP GIVES  
YOU GREAT REBATES. LOG ON NOW, RECEIVE \$100  
CASH BACK AND WATCH YOUR BUSINESS GROW.  
[POWERBUY.COM.AU/LENOVO](http://POWERBUY.COM.AU/LENOVO)

**\$350\* MEMBER REBATE**

**!** Visit [www.powerbuy.com.au/lenovo](http://www.powerbuy.com.au/lenovo) to claim your rebate\*

**powerbuy**

\* Available to Australian Business Number (ABN) holders only. This offer entitles you to a rebate, on top of the best price you can negotiate, providing the eligible item is purchased new and from an authorised Australian supplier. Offer expires 31st July 2011 and is only available on selected products. See [www.powerbuy.com.au](http://www.powerbuy.com.au) for more details.

## OTHER COERCIVE CONDUCT

Other conduct which Jessup J found to be illegitimate post-trial included:

- the continuing blockade to the entrance to the site facility, the intent of which was to shut off supplies to the project;
- protestors surrounding a car containing Workpac workers and forcefully pushing it up and down on the bonnet and boot so as to make the car bounce;
- protestors heckling, yelling at and abusing the Workpac workers as they were leaving the project office premises on foot;
- direct physical force to prevent vehicles leaving the project head office and wilful damage to property;
- bans imposed by a CFMEU organiser against other contractors performing work on the project intended to procure the cessation of work on the project, which interfered in the contractual arrangements between John Holland and third parties; and
- the presence of CFMEU organisers and protestors at the site facility known as the Eastern Compound in Port Melbourne on 14 and 15 April, necessitating a large police presence simply to secure the physical means by which the workers could be moved between work sites.

## 29 APRIL PROTEST AT THE EASTERN COMPOUND

The dispute culminated in the CFMEU respondents organising some 500 protestors from other construction sites to converge on the area outside the Eastern Compound on 29 April 2009 to prevent John Holland bringing its workers into and out of the compound. Police were again present in large numbers. The protestors erected a substantial barricade to block an entrance gate and later gathered in Lorimer Street in such numbers, and resorted to abuse and ugly gesticulations to such an extent, as must have been highly intimidatory for the John Holland workers who were the targets of those measures. Jessup J said that in the absence of the police presence, the protestors would have physically prevented the egress of any vehicles, and the only conclusion available was that the CFMEU respondents had intended to coerce John Holland.<sup>16</sup>

## CONCLUSION

Sections 343, 344 and 355 of the *FWA* contain prohibitions against coercive conduct and the application of undue pressure. While the West Gate Bridge dispute provides numerous examples of conduct that can readily be seen to be illegitimate in a construction industry context, Jessup J's decisions show that boundaries will be carefully drawn by courts between legitimate and illegitimate conduct, and the importance of presenting evidence of all facts and surrounding circumstances in applications seeking injunctive relief and in ultimately proving coercive conduct under either the *BCII Act* or the *FWA*. ●

**GLEN PAULINE** is a Victorian barrister, practising in workplace relations and commercial litigation. He appeared as junior counsel for the Australian Building & Construction Commissioner in the West Gate Bridge dispute proceedings before Jessup J.

1. *Williams v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2010] FCA 754.
2. *Williams v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2009] FCA 86; *Williams v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (No 2)* [2009] FCA 103.
3. *John Holland Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2009) 174 FCR 526; [2009] FCA 235.
4. Note 1 above, at [158]–[221].
5. Section 44 now refers to a “building enterprise agreement” which means an “enterprise agreement that applies to building work”. “Enterprise agreement” has the same meaning as in the Fair Work Act 2009.
6. *Seven Network (Operations) Limited v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2001) 109 FCR 378, per Merkel J at 388.
7. *Williams v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union*, note 2 above, at [37]. See also Jessup J's comments in his reasons for judgment in imposing penalties, note 1 above, at [177].
8. *Williams v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (No 2)*, note 2 above, at [41].
9. *Williams v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (No 2)*, note 2 above, at [42].
10. *Williams v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (No 2)*, note 2 above, at [44]. See also note 1 above at [177].
11. Note 3 above.
12. See note 3 above, at 540, [48] and note 1 above, at [182].
13. Note 3 above, at [53].
14. Note 3 above, at [63].
15. Note 1 above, at [206].
16. Note 1 above, at [220].

## 21st Annual Credit Law Conference

The fast lane: clear guidance through risk, compliance and reform

28-30 September 2011

Palazzo Versace, Gold Coast, Queensland

## Program highlights

- Get the latest from the Australian Treasury on Phase 2 of the reforms, and how the regulations are being designed
- In depth analysis of various aspects of the new reforms including small business lending, changes to credit products and disclosure requirements
- Deconstruct the key issues coming out of the implementation of responsible lending changes
- Engage in discussions on privacy reforms, the EFT Code and external dispute resolution

## Claim up to 16 CPD/MCLE points

Early bird discount expires 19 August 2011

Register Today!

Visit: [www.lexisnexis.com.au/creditlaw](http://www.lexisnexis.com.au/creditlaw)  
Phone: 1800 772 772

Sponsored by:

**HWL EBSWORTH**  
LAWYERS

Product of:

**100**  
LexisNexis  
Butterworths 1911 to 2011