

**ROYAL COMMISSION INTO TRADE UNION
GOVERNANCE AND CORRUPTION**

HSU

REASONS FOR DECISION OF 25 AUGUST 2014 APPLICATIONS

Level 5, 55 Market Street, Sydney, NSW 2000

On Wednesday, 3 September 2014 at 2.42pm

Before the Commissioner: The Hon. John Dyson Heydon AC QC

Counsel Assisting: Mr Jeremy Stoljar SC
Ms Fiona Roughley

Instructed by: Minter Ellison, Solicitors

1
2 THE COMMISSIONER: On 25 August 2014 hearings related to
3 the Health Services Union recommenced.
4

5 Diana Asmar is the Branch Secretary of the Victoria
6 No. 1 Branch of the Health Services Union. Kimberley
7 Kitching is its General Manager. Diana Asmar and Kimberley
8 Kitching will be referred to hereafter as "the applicants".
9

10 At the start of the hearing on 25 August 2014 counsel
11 for the applicants stated that certain witnesses who were
12 to be called (and in due course were in fact called)
13 objected to being cross-examined by him unless their legal
14 representatives were present.
15

16 The applicants then made several applications.
17 Although the applicants gave them a lower number, they may
18 be grouped into five categories. To some degree they
19 overlap, and the considerations urged in their support
20 overlap.
21

22 The first application was that what was described as
23 "a suppression order" should be made in relation to the
24 address of the applicants' counsel in support of the other
25 applications.
26

27 The second was that a matter raised in evidence
28 adverse to the applicants, namely their role in the
29 preparation of documents leading to the issue of "right of
30 entry" permits, should not be dealt with at all, at any
31 stage, by this Commission on the ground that the matter had
32 been and remained under investigation by the Fair Work
33 Commission.
34

35 The third was that it was unfair that witnesses be
36 examined on 25 August by counsel assisting but only later
37 by counsel for the applicants, and that the examination to
38 take place that day should be adjourned until their legal
39 representatives were present.
40

41 The fourth application was that the hearing should be
42 adjourned in order to permit the applicants to complete the
43 procuring of expert computer evidence which would falsify
44 the allegations against them, but which was not yet ready,
45 and that the hearing ought to be adjourned until it was.
46

47 The fifth and more indeterminate application was that

1 it was desirable to resume hearings on some future date,
2 perhaps in Melbourne, whence all relevant witnesses had
3 come on 25 August, and where all relevant facilities could
4 be inspected.

5
6 All applications were dismissed. The applicants
7 requested reasons for this course. They are as follows.

8
9 The first application was dismissed on the ground that
10 it is desirable for hearings of the Commission to be open
11 as far as reasonably possible. At this stage the
12 allegations of one group of witnesses against the
13 applicants are only allegations. To hear the evidence of
14 that group of witnesses separately from what they say in
15 cross-examination does not entail the making of any finding
16 about the allegation. It remains open to persons who, like
17 the applicants, deny the allegations to procure their
18 rejection by cross-examination, by giving testimony of
19 their own, by tendering other evidence, and by making
20 submissions about the competing points of evidence and
21 characterisation. No findings will be made until these
22 processes are complete.

23
24 The applicants stressed that a separation of the
25 testimony making the allegations from the cross-examination
26 on that testimony and its evidentiary rebuttal was unfair.
27 Their counsel referred to "the heavy media attention in
28 relation to this matter" (p 424 line 6). He made
29 criticisms of the form of the witness statements his
30 clients disagreed with. He said it was "scuttlebutt",
31 "hearsay and inflammatory" (p 424 line 25 and p 426 line
32 1). The public discussion of these matters in submissions
33 was said to be of itself so damaging to the applicants that
34 it should be treated as confidential.

35
36 In considering these points it is necessary to balance
37 the benefits that flow from publicity against its
38 detriments. The fact that the Commission's hearings take
39 place in public creates significant benefits. It operates
40 not only as a stimulus to the flow of further relevant
41 material from the public - whether supporting or denying
42 particular allegations - but also enables interested
43 members of the public to follow particular aspects of the
44 inquiry. The order applied for, by denying media freedom,
45 would nullify those benefits.

46
47 The applicants said:

1
2 *It is not as if we're interfering with the*
3 *rights of the free press in terms of*
4 *publishing material (p 428, lines 17-18).*
5

6 The fact is that if the application succeeded, the
7 order would interfere with "the rights of the free press".
8 Adverse publicity about the applicants, including the
9 adverse publicity that may flow from the submissions made
10 on their behalf, may no doubt in some sense be a mischief
11 if it turns out to be incorrect. But it is well known to
12 both the suppliers and the consumers of material published
13 in the print and electronic media that the validity of
14 one's story can only be assessed after another has been
15 told, and that tends to minimise the mischief.
16

17 The applicants also submitted that they faced
18 a particular difficulty. They argued that if publicity
19 were given to their submissions it could improve the
20 position of persons opposed to them in pending union
21 elections. The applicants submitted that many of the
22 comments made in the statements adverse to the applicants
23 "are for no reason other than for political motivation"
24 (p 425 line 32).
25

26 However, they were not able to point to any case in
27 which an argument of this kind had resulted in
28 a confidentiality order being made. That is not
29 surprising. In this country free speech is important not
30 only to elections for governmental legislatures, but also
31 for elections to other public positions like those held by
32 union officials. Elections in their nature are usually
33 partisan and sometimes rancorous. Those who run for
34 election naturally make incomplete statements. The
35 electors understand that and make allowances for it.
36 Nominations in the elections referred to have opened and
37 closed. The ballot will open on 9 September 2014. It will
38 close on 10 October 2014. It is not anticipated that this
39 Commission will be receiving evidence after 26 September
40 2014. Hence the evidence which both sides in the present
41 controversy will be relying on will have been completed
42 well before the ballot closes.
43

44 The applicants draw an analogy between their position
45 and the position of persons facing trial on criminal
46 charges. They submitted, to use their verb, that in
47 similar fashion the media ought to be "muzzled" (p 430

1 lines 34-42). That is an unsound analogy for the reasons
2 given above. Further, the Commission is not conducting
3 a trial and, even if it were, the mode of trial is not
4 trial by jury.

5
6 There was an event which was highly foreseeable at the
7 time the applications were made which considerably weakened
8 the applicants' submissions. That event was that the day
9 after the evidence of those who criticised the applicants
10 was received, the applicants themselves gave evidence
11 denying or qualifying much of that evidence.

12
13 The second application related to training for "Rights
14 of Entry" ("ROE"). There is legislative provision for
15 union officials to enter the property of others. That
16 right of entry is subject to statutory preconditions. One
17 is that the relevant officials undergo training. The
18 training includes a test and results in the award of
19 certificates. The grant of a right of entry depends on the
20 applicant making a declaration that training has been
21 undergone and on a supporting declaration being made by an
22 elected union official. The tests, and the antecedent
23 training necessary, to pass them, were provided by
24 the Australian Council of Trade Union, and could be
25 undertaken online. There are allegations in the evidence -
26 allegations which the applicants deny - that officials in
27 the Victoria No. 1 Branch had certificates granted even
28 though they had not undergone the training and that others
29 had done the tests in their place.

30
31 The applicants tendered a bundle of documents
32 (Kitching MFI-1). Those documents reveal the following
33 history. In August 2013, Leonie Flynn, Assistant
34 Secretary/Treasurer made a complaint to the Fair Work
35 Commission about how the Victoria No. 1 Branch was being
36 managed. One aspect of that complaint related to "Right of
37 Entry" tests. Certain other employees of the Branch also
38 made complaints on that subject.

39
40 The Director of the Regulatory Compliance Branch of
41 the Commission then began inquiries. They were conducted
42 between 4 September 2013 and 24 March 2014. On 26 March
43 2014, 15 Notices of Adverse or Potentially Adverse Findings
44 were served on various officeholders or former
45 officeholders of the Victoria No. 1 Branch (including the
46 applicants). A response by 15 April 2014 was requested.
47 No response was received. However, on 23 April 2014, the

1 solicitors acting for the Victoria No. 1 Branch (and the
2 abovementioned officeholders) advised that notices served
3 at their offices on 26 March 2014 had been misplaced in
4 error.

5
6 On 30 April 2014, those solicitors sent a letter to
7 the President of the Fair Work Commission requesting
8 a separation of what the letter termed the "investigation"
9 and "prosecution" stages from the "adjudication" stage of
10 the inquiry. This was said to be "in the interests of
11 ensuring that the person who determines the matters in
12 question would approach the issue with an open mind". The
13 letter made many criticisms of the Director. It requested
14 that the matter be dealt with by a member of the Fair Work
15 Commission.

16
17 In response, on 9 May 2014, after receiving a report
18 from the Director dated 5 May 2014, the President directed
19 that Vice-President Watson deal with the matter. After
20 a mention of the matter on 22 May 2014, directions were
21 made for a timetable relating to the filing of issues,
22 draft orders, expert statements, witness statements, the
23 production of documents, notices of cross-examination and
24 outlines of submissions. A hearing was fixed for
25 8-12 September 2014. On 18 July 2014, the Commission
26 formulated 20 questions for its determination.

27
28 On 20 August 2014, the solicitor having carriage of
29 the matter of the Victoria No. 1 Branch and certain
30 affected persons (including the applicants) affirmed an
31 affidavit seeking an adjournment of the hearing fixed to
32 begin on 8 September 2014. As a result, there was
33 a hearing on 22 August 2014 which led to the 8 September
34 2014 fixture being vacated.

35
36 The affidavit of 20 August 2014 records that of the
37 directions made in consequence of the directions hearing on
38 22 May 2014, two in particular had not been complied with.
39 The first was that on or before 17 July 2014: "The Union
40 and/or any relevant witness file in the Commission any
41 expert statement on which it is intended to rely (including
42 but not limited to an expert statement as to relevant
43 electronic records held by the ACTU) in the Inquiry".

44
45 The second was that "on or before 31 July 2014 the
46 Union and/or any relevant official file in the Commission
47 any witness statement on which it intended to rely in the

1 Inquiry". The affidavit stated, however, that substantial
2 preparatory work had been done on eight witness statements
3 (including one of Diana Asmar). Paragraphs 8-11 of the
4 affidavit then stated:

5
6 *As to an expert statement as to relevant*
7 *electronic records held by the ACTU, KPMG*
8 *has been formally retained as an*
9 *independent expert by the Union. There was*
10 *some delay in the retainer of KPMG because*
11 *another firm proposed to be retained*
12 *offering relevant independent expert*
13 *services was unable to proceed with any*
14 *retainer because of a conflict of interest.*
15 *Before that, some initial work done by an*
16 *independent expert was not progressed on*
17 *the basis that relevant officials of the*
18 *union formed the opinion that the person*
19 *was not the most suitable person to be*
20 *retained to conduct necessary expert*
21 *evidence.*

22
23 *Work done to date by KPMG is to the effect*
24 *that there are issues for legitimate and*
25 *proper further inquiry as to the*
26 *reliability (or otherwise) of the data*
27 *which has been provided to the Union in*
28 *connection with this Inquiry. Now produced*
29 *and shown to me and marked [with] the*
30 *letters 'DS-1' is a copy of a memorandum of*
31 *KPMG as to three issues in respect of which*
32 *KM PG wishes to make further inquiries.*

33
34 *In the memorandum, provided necessary*
35 *access to ACTU data can be promptly*
36 *arranged, KPMG anticipates that these*
37 *inquiries will take in the order of three*
38 *weeks from the date of this affidavit.*

39
40 *In short, this expert analysis will not be*
41 *able to be completed in time for the Union*
42 *to provide this expert analysis to the*
43 *Commission ahead of scheduled hearing dates*
44 *on 8-12 September 2014.*

45
46 The affidavit went on to refer to the pendency of the
47 Royal Commission's proceedings relating to the HSU, which

1 were to recommence on 25 August 2014. Diana Asmar had been
2 served with a summons to attend those hearings. The
3 affidavit suggested that the proceedings required
4 considerable work which would interfere with preparation
5 for the 8 September 2014 Fair Work Commission hearing.
6 Paragraphs 12 and 13 of the affidavit said:

7
8 *On 18 August 2014 Ms Asmar was served with*
9 *a summons requiring her to give evidence to*
10 *the Royal Commission in the week commencing*
11 *25 August 2014. In the Royal Commission*
12 *proceedings Ms Asmar's legal*
13 *representatives have been provided with*
14 *documents consisting of statements and*
15 *attachments amounting to 500 pages*
16 *(Ms Asmar has different solicitors in the*
17 *Royal Commission proceedings but the same*
18 *Counsel as in these proceedings). It is*
19 *apparent from the material that the Royal*
20 *Commission is also considering the question*
21 *of ROE testing within the Union. Apart*
22 *from the issue of ROE testing, the*
23 *statements and attachments cover many*
24 *issues in relation to the governance of the*
25 *Union which requires the taking of*
26 *instructions from Ms Asmar and others, the*
27 *preparation of documents and preparing for*
28 *a hearing over some days next week in*
29 *Sydney.*

30
31 *For the reason set out above, the Union*
32 *wishes to apply for the current hearing*
33 *dates of 8-12 September 2014 to be*
34 *adjourned for a period of approximately 1*
35 *month to permit KPMG to complete necessary*
36 *independent inquiries and to enable*
37 *proceedings to be made for the FWC*
38 *proceedings separate from the Royal*
39 *Commission proceeding.*

40
41 The affidavit did not foreshadow the second application (ie
42 that which is presently under consideration).

43
44 The last paragraph of the affidavit made the following
45 point:

46
47 *In circumstances in which computer data may*

1 *be important to the Inquiry, the interests*
2 *of justice weigh in favour of a proper*
3 *analysis of the computer data.*
4

5 That point was stressed in the applicants' arguments in
6 various ways.
7

8 The applicants submitted that the "Rights of Entry"
9 issue be left to the Fair Work Commission. They said that
10 the Commission "can more properly, with respect, deal with
11 it because they're in a position to hear all the evidence",
12 and they said that would not be easy or convenient for the
13 Commission. The applicants also submitted that though the
14 "Rights of Entry" issues fall within the terms of
15 reference, and though the conduct connected with a failure
16 to set tests may be a breach of the criminal law, it was
17 "not of great moment" (p 434 line 31) compared to more
18 considerable matters of corruption and abuse of power.
19 Hence, they submitted that the issue could safely be left
20 to the Fair Work Commission.
21

22 It may be true that the "Rights of Entry" issues do
23 not represent the worst types of corruption. But they are
24 serious. If those who criticise the applicants are
25 correct, there have been statutory breaches and instances
26 of false swearing. It is possible that unqualified persons
27 are exercising statutory rights which they do not have.
28

29 The trouble with the applicants' submission is that
30 for various reasons the Fair Work Commission has not been
31 able to make much progress. In view of what has happened
32 it is highly unlikely to complete its task before 31
33 December 2014, the date which this Commission is obliged to
34 report by. Accordingly, this Commission must endeavour to
35 make whatever investigations it usefully can in the time
36 available.
37

38 The third application related to the unfairness of
39 separating the evidence given by witnesses from the
40 cross-examination on that evidence. In consequence, it was
41 submitted that an adjournment be granted so that both
42 categories of testimony could be received at the same time.
43 That application is rejected for reasons stated in relation
44 to the first application. In all the circumstances, there
45 is no unfairness which outweighs the disadvantage of the
46 contrary course.
47

1 The fourth application was that the hearing scheduled
2 for 25 August 2014 be adjourned until the expert computer
3 evidence is to hand. The applicants submitted that the
4 expert computer evidence referred to in the affidavit
5 quoted above "may well" demonstrate the falsity of the
6 allegations against the Victoria No. 1 Branch officials.
7 It was not made clear why or how this was so. But assuming
8 it is so, why has the evidence not been obtained in the
9 last 11 months, or even over the months since March?

10
11 Explanations have been offered for the delay in the
12 earlier provision of this material, but they are not
13 satisfactory explanations. Persons determined to give the
14 lie to those alleging malpractice in relation to "Right of
15 Entry" tests could have refuted them by expert evidence,
16 assuming it is of any use, months ago. An opportunity to
17 supply it was given to the applicants on 26 March 2014 by
18 the Director, and the relevant dates for its provision was
19 15 April 2014. It is not said to be the Director's fault
20 that his Notices of Adverse or Potentially Adverse Findings
21 were misplaced in the solicitors' offices. The energy of
22 the applicants, instead of being devoted to the task of
23 assembling the expert evidence, has been diverted into
24 other fields. Even Vice-President Watson's direction that
25 it be done by 17 July 2014 has not been complied with. The
26 direction of Vice-President Watson specifically referred to
27 an electronic expert. If the applicants want to rely on
28 expert electronic evidence before the Commission, subject
29 to the views of counsel assisting, they can, but they
30 should assemble it with much greater expedition than has
31 been apparent so far.

32
33 The fifth application, for an adjournment to some time
34 in Melbourne, was rejected in view of the tightness of the
35 timetable confronting the Commission. To do otherwise
36 would have wasted an entire day of hearing time.

37
38 Those are the reasons for dismissing the applications.

39
40 MR STOLJAR: May it please the Commission.

41
42 THE COMMISSIONER: The hearing will adjourn until 10.00am
43 tomorrow.

44
45 **AT 3.05PM THE COMMISSION WAS ADJOURNED ACCORDINGLY**
46
47