

Article Information

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High Court confirms that permits are mandatory for union officials attending construction sites

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Megan Calder, Partner, and **Alexander Marcou, Lawyer**, discuss the decision of the High Court.

The *Fair Work Act 2009* (Cth) (**Fair Work Act**) requires a union official to hold a permit in order to exercise a State or Territory OHS right. *ABCC v Powell* involved Mr Powell, a union official from the CFMEU. Mr Powell did not hold a Fair Work Act permit, despite attending a construction site in Ringwood, Victoria multiples times pursuant to OHS laws. Mr Powell argued that he was invited to assist a health and safety representative under the *Occupational Health and Safety Act 2004* (Vic) (**Victorian Act**) and that therefore he did not require a permit. He argued that the Fair Work Act only requires a person to hold a permit where the right to enter arises by virtue of a person's position as a union official (e.g. to investigate suspected contraventions of health and safety laws) rather than where a person is permitted entry for reasons unrelated to the person's position as a union official (e.g. where invited to assist a health and safety representative). Further, he argued that the right of entry was conferred on the health and safety representative rather than on him as an assistant, and so a permit was not required.

The Full Federal Court disagreed with Mr Powell. In delivering its decision the Full Federal Court considered that Fair Work Act only requires that Mr Powell was in fact relying upon a right of entry conferred by the Victorian Act, whether his own right or the right of the health and safety representative. The Court also disagreed with the construction of the Fair Work Act as limiting the need for permits to situations where a union official is exercising a right of entry as a union official, rather than in any other capacity.

The effect of the High Court's refusal to award special leave is to confirm that where a union official exercises a right to enter premises or access employee records under occupational health and safety laws, in any state, the official is always required to hold an entry permit, regardless of how the official came upon the right of entry.

As the High Court echoed from the decision of the Full Federal Court the opposite conclusion would allow circumvention of the legislation and could lead to uncertainty and disruption on construction sites. For example, in this case, each time Mr Powell sought access on the basis that he did not need a permit, allegations of trespass were made and the police were called. The High Court pointed out that otherwise situations could become particularly murky where a union official is permitted entry to site for more than one purpose.

In deciding whether to issue a permit, the Fair Work Commission will consider whether a union official is a fit and proper person to hold the entry permit. This will depend on the personal characteristics of the official and involves taking into account the official's criminal record in respect of trespass, fraud or dishonesty, and the use of violence. It also involves taking into account offences committed against industrial law. In a recent case before the Fair Work Commission, Mr Upton of the CFMEU was found, due to a series of misconduct, not to be a fit and proper person and so was denied an

entry permit. Mr Upton was found to have, for instance, threatened non-members on a construction site that did not sign up with the CFMEU. The purpose of the provision in the Fair Work Act requiring permits is to try to prevent this kind of behaviour. Therefore, had Mr Powell's arguments been accepted, Mr Upton might be allowed to circumvent the permit scheme and to attend sites in particular circumstances.