



DECISION

Fair Work Act 2009

s.512 - Application for a right of entry permit

Application by Construction, Forestry, Maritime, Mining and Energy Union-Construction and General Division, WA Divisional Branch (RE2022/1430)

DEPUTY PRESIDENT BINET

PERTH, 24 APRIL 2023

Bradley John Henley Upton

[1] On 16 December 2022, the Construction, Forestry, Mining and Energy Union - Construction and General Division, Western Australian Divisional Branch (**CFMMEU**) filed an application (**Application**) pursuant to section 512 of the *Fair Work Act 2009* (Cth) (**FW Act**) for a right of entry permit for Mr Bradley Upton (**Mr Upton**).

[2] The Application was allocated to my Chambers for determination.

[3] On 23 February 2023, notification was received from the Fair Work Ombudsman (**FWO**) indicating that it may wish to make submissions in respect of, the Application pursuant to section 590 of the FW Act.

[4] Directions were issued on 28 February 2023 (**Directions**) requiring the CFMMEU to file submissions in relation to the Application and any additional evidence upon which it relied by 4pm, 9 March 2023. The Directions invited the FWO to file any materials in reply by 4pm, 16 March 2023.

[5] On 7 March 2023, the CFMMEU requested an extension of time to file their materials. Amended Directions were issued on 7 March 2023 (**Amended Directions**). The Amended Directions required the CFMMEU to file its materials by 4pm, 14 March 2023. The Amended Directions invited the FWO to any materials in reply by 4pm, 21 March 2023.

[6] The CFMMEU filed their materials pursuant to the Amended Directions. These materials included:

- a. An outline of submissions.
- b. A witness statement of Mr Upton.
- c. A report of Mr Brian Lacy AO (**Mr Lacy**) in relation to training Mr Lacy AO recently conducted with Mr Upton. Mr Lacy is a highly respected former Senior Deputy President of the FWC's predecessor.

[7] The Amended Directions specified if either the CFMMEU or FWO sought to make oral submissions in respect of the Application, they should advise the Chambers by 4pm, 28 March 2023. The Directions stated that if neither the CFMMEU nor FWO wished to make oral submissions in respect of the Application, a conclusion may be made on the basis of the written materials filed in accordance with the Amended Directions.

[8] On 21 March 2023, the FWO advised that it would not be filing any materials in relation to the Application. The FWO has not sought to be heard orally in relation to the Application.

[9] In reaching my decision, I have considered all the submissions made and the evidence tendered, even if not expressly referred to in these reasons for decision.

Background

[10] Mr Upton is currently 54 years old. He commenced working in the construction industry in 1983. Initially as a bricklayers assistant, then a roof plumber and eventually as a crane driver.¹

[11] Mr Upton has been a member of the CFMMEU for a quarter of a century. In 2003 he was elected as worksite delegate. He was appointed an organiser in February 2008, working primarily in the northwest region of Western Australia, for the most part in and around Karratha.

[12] In 2017 he was forced to relocate to Perth after losing his right of entry permit.²

[13] In 2020 he was elected the Assistant State Secretary of the CFMMEU. He commenced office on 1 January 2021 and still holds this position. He says that his has given him a new sense of responsibility as a role model for younger organisers.³

[14] Mr Upton provided evidence that in his role as Assistant State Secretary he is responsible for ten organisers and coordinates their day-to-day responsibilities, is involved in negotiating enterprise agreements and ensures the health and safety of workers represented by the CFMMEU. He says that work in the construction industry is stressful due to contractual deadlines. He explained that in his role he is also routinely exposed to additional stresses such as dealing with traumatic events like industrial fatalities including providing support to bereaved families.⁴

[15] He admits that in the past there have been occasions when he did not deal with his emotions particularly well and did not employ strategies to reduce the stress he experienced performing his role with the CFMMEU. He says that he has since sought therapy to deal with these issues and has made positive changes to his life style. He reports that he has reduced his consumption of alcohol, started exercising and lost weight.⁵

[16] Mr Upton has previously been issued entry permits under both Federal and State industrial legislation.⁶ The most recent Federal permit was issued in RE2014/642. In November 2017 I declined to grant his last application for a permit based on conduct in which he engaged in between 2012 and 2015.⁷ He says that the loss of his permit resulted in him having to relocate his family at great personal cost. He also reports that the loss of his permit hampered his ability to effectively represent members. For these reasons he says that he is

committed to ensuring he does not engage in any future contraventions which would jeopardise any future permit he might be granted.⁸

Consideration

[17] The provisions concerning entry permits are found in Part 3-4 of the FW Act. The object of Part 3-4 is set out in section 480 of the FW Act:

“480 Object of this Part

The object of this Part is to establish a framework for officials of organisations to enter premises that balances:

- (a) *the right of organisations to represent their members in the workplace, hold discussions with potential members and investigate suspected contraventions of:*
 - (i) *this Act and fair work instruments; and*
 - (ii) *State or Territory OHS laws; and*
- (b) *the right of employees and TCF award workers to receive, at work, information and representation from officials of organisations; and*
- (c) *the right of occupiers of premises and employers to go about their business without undue inconvenience.”*

[18] In *Maritime Union of Australia v Fair Work Commission*⁹, the Full Court of the Federal Court (North, Flick and Bromberg JJ) observed:

“Section 480 ... sets out that the object of Part 3-4 is to establish a framework that balances the right of organisations to represent their members, the right of employees to receive information and representation, and the right of occupiers of premises and employers to go about their business without undue inconvenience. The rights conferred by Part 3-4, including to enter premises and interview persons about suspected contraventions and to hold discussions with employees, have thus been assessed by the legislature as an appropriate balance between the rights of organisations, employees and occupiers. The rights conferred, however, are not “untrammelled” and are subject to both express and implied constraints: Australasian Meat Industry Employees’ Union v Fair Work Australia [2012] FCAFC 85 at [56], [2012] FCAFC 85; (2012) 203 FCR 389 at 405 per Flick J (Tracey J agreeing). The exercise of rights conferred upon a “permit holder” renders lawful that which would otherwise be unlawful: cf. Federal Commissioner of Taxation v Australia and New Zealand Banking Group Limited [1979] HCA 67; (1979) 143 CLR 499 at 540 per Mason J.”¹⁰

[19] Section 512 of FW Act states that:

“512 FWC may issue entry permits

The FWC may, on application by an organisation, issue a permit (an entry permit) to an official of the organisation if the FWC is satisfied that the official is a fit and proper person to hold the entry permit.”

[20] In *The Maritime Union of Australia*¹¹ a Full Bench considered the question of whether a person is a fit and proper person in the context of the right of entry regime established by Part 3–4 of the FW Act and observed that:

“...the relevant question, in determining whether the Commission is permitted to exercise the discretion to issue an entry permit to an official of an organisation under s.512, is whether the official “is a fit and proper person to hold an entry permit”. The description “fit and proper person” in s.512 is not defined and standing alone, it carries no precise meaning. Generally though, the description is used as a measure of suitability to perform or carry out a particular function, to be appointed to a particular position or to be given a particular right or privilege. However, the description will take its meaning from its context, from the activities in which the person to be assessed is or will be engaged and the ends to be served by those activities. Taking into account context, the structure of s.512 and the activities to be engaged in by an official if an entry permit will issue, it seems to us clear that that description is to be applied by reference to the suitability of the official “to hold the entry permit”.¹²

[21] Section 513(1) of the FW Act sets out the matters that are to be taken into account in determining whether a proposed permit holder is a fit and proper person to hold a right of entry permit (**Permanent Qualification Matters**) as follows:

“513 Considering application

- (1) *In deciding whether the official is a fit and proper person, the FWC must take into account the following permit qualification matters:*
- (a) *whether the official has received appropriate training about the rights and responsibilities of a permit holder;*
 - (b) *whether the official has ever been convicted of an offence against an industrial law;*
 - (c) *whether the official has ever been convicted of an offence against a law of the Commonwealth, a State, a Territory or a foreign country, involving:*
 - (i) *entry onto premises; or*
 - (ii) *fraud or dishonesty; or*
 - (iii) *intentional use of violence against another person or intentional damage or destruction of property;*

- (d) *whether the official, or any other person, has ever been ordered to pay a penalty under this Act or any other industrial law in relation to action taken by the official;*
- (e) *whether a permit issued to the official under this Part, or under a similar law of the Commonwealth (no matter when in force), has been revoked or suspended or made subject to conditions;*
- (f) *whether a court, or other person or body, under a State or Territory industrial law or a State or Territory OHS law, has:*
 - (i) *cancelled, suspended or imposed conditions on a right of entry for industrial or occupational health and safety purposes that the official had under that law; or*
 - (ii) *disqualified the official from exercising, or applying for, a right of entry for industrial or occupational health and safety purposes under that law*
- (g) *any other matters that the FWC considers relevant.”*

[22] The Permit Qualification Matters delineated by section 513(1) of the FW Act are mandatory considerations. Each of the Permit Qualification Matters must be considered and given appropriate weight. There is no statutory indication that any particular Permit Qualification Matter should be given more weight than any other.¹³

[23] Whilst the weight to be accorded to any of the Permit Qualification Matters is a ultimately matter for the FWC, a permit qualification matter will not be ‘taken into account’ by being discarded and determined to be irrelevant. It will, for instance, be just as relevant that the official has never been convicted of an offence against industrial law or has completed appropriate training, as it is that pecuniary penalties have been imposed on the official or another person as a result of actions taken by the official.¹⁴

[24] The question of whether a proposed permit holder is a fit and proper person to hold an entry permit will require consideration of the rights the holder of an entry permit may exercise, the limitations on and conditions attached to the exercise of those rights and the responsibilities that must be discharged in the exercise of those rights.¹⁵

[25] Consideration of Permit Qualification Matters is to be directed to the personal characteristics of the proposed permit holder pertinent to the discharge of the functions and the exercise of the rights associated with holding a permit.¹⁶

[26] The Permit Qualification Matters must be considered in the context of whether the proposed permit holder is a fit and proper person to hold an entry permit, not whether the proposed permit holder is a fit and proper person per se.¹⁷

[27] The temporal focus is on the present fitness and propriety of a permit holder to hold an entry permit. Whilst the past conduct of a permit holder may inform the assessment of their

present fitness and propriety, the FWC's jurisdiction under section 512 is not punitive and is directed to whether or not at the time the application is determined it is satisfied that the official is a 'fit and proper person' to hold an entry permit.¹⁸

[28] If the FWC identifies deficiencies with an official's fitness and propriety to hold a permit, it must consider whether these can be addressed by the imposition of appropriate conditions. Conditions can only be imposed if they are capable of assisting the FWC to achieve the state of satisfaction that the official is a fit and proper person to hold an entry permit.¹⁹

Permit Qualification Matter One – Appropriate training (s. 513(1)(a))

[29] In relation to the Permit Qualification Matter set out in section 513(1)(a) of the FW Act, Mr Upton produced evidence that he successfully completed the Australian Council of Trade Unions Federal Right of Entry Training Course on 22 November 2022.²⁰ This has previously been held to constitute 'appropriate training' for the purposes of section 513(1)(a) of the FW Act.²¹

[30] Additionally, Mr Upton undertook training with Mr Lacy on 10 October 2022. That training was directed to Mr Upton's previous contraventions of industrial law, as well as his rights and responsibilities as a permit holder. Mr Lacy explained to Mr Upton why his conduct breached the law and outlined steps that can be taken by Mr Upton to prevent the breaches reoccurring. The training provided by Mr Lacy has been described by a Federal Court judge who assessed the training provided by Mr Lacy to officials of another Branch of the CFMMEU as both positive and comprehensive.²² Mr Upton submits that he found the training with Mr Lacy which included practical scenarios immensely informative and valuable.²³ In the course of the training Mr Lacy formed the view that Mr Upton was genuinely remorseful for his prior conduct and was likely to take steps to ensure compliance in the future.²⁴

[31] In 2021, Mr Upton also undertook training with Barclays as part of the CFMEU leadership's exploration of a more "human" and strategic path forward. Mr Upton reports that through these sessions, he learnt practical strategies about how he could deal with conflict diplomatically and developed his oral communication and interpersonal skills.²⁵

[32] On 4 January 2023, prior to the Application being allocated to me for determination the CFMMEU were advised by the FWC that there was no evidence before the FWC to suggest that Mr Upton had completed training in relation to the Textile, Clothing and Footwear (TCF) right of entry provisions under Subdivision AA of Division 2 of Part 3-4 of the FW Act. The FWC put the CFMMEU on notice, that a condition may be imposed that the permit holder must not exercise any entry rights under the TCF right of entry provisions, until evidence of completion of the relevant training has been filed with the FWC. On 17 January 2023 the CFMMEU provided consent for this condition to be imposed if the permit is granted.

[33] I accept, that Mr Upton has completed appropriate training about the rights and responsibilities of a permit holder in accordance with section 513(1)(a), with the exception of the training in relation to the TCF right of entry provisions. This weighs in favour of his fitness and propriety to hold an entry permit.

Permit Qualification Matter Two – Offences against industrial laws (s. 513(1)(b))

[34] In relation to the Permit Qualification Matter set out in section 513(1)(b), Mr Upton has declared that he has not been convicted of any offence against an industrial law.²⁶ There is no evidence before me that Mr Upton has been convicted of an offence against an industrial law.²⁷

[35] It is relevant to note that Mr Upton:²⁸

- a. has worked in the building and construction industry for 40 years;
- b. was a union delegate for approximately 5 years; and
- c. has been a union official since 2008.

[36] This weighs in favour of his fitness and proprietary to hold an entry permit.

Permit Qualification Matter Three – Criminal Offences (s. 513(1)(c))

[37] In relation to the Permit Qualification Matter set out in section 513(1)(c), Mr Upton has declared that he has not been convicted of any offence against a law of the Commonwealth, a State, a Territory or a foreign country involving: entry onto premises, fraud or dishonesty or intentional use of violence against another person or intentional damage or destruction of property.²⁹ There is no evidence before me that Mr Upton has been convicted of such an offence. This weighs in favour of Mr Upton's fitness and proprietary to hold an entry permit.

Permit Qualification Matter Four – Penalties Imposed (s. 513(1)(d))

[38] In relation to the Permit Qualification Matter set out in section 513(1)(d) of the FW Act, Mr Upton has declared that neither he nor the CFMMEU has been ordered to pay a penalty under the FW Act or any other industrial law in relation to action taken by him other than being ordered to pay a penalty under the FW Act except as follows:³⁰

- a. In *Director of the Fair Work Building Industry Inspectorate v Upton* [2015] FCA 672 (**Wheatstone Case**), Gilmore J ordered that Mr Upton pay penalties of \$3,000.00 and \$1,000.00 for two contraventions of section 500 of the FW Act.
- b. In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (Perth Children's Hospital Contraventions Case)* [2017] FCA 491 (**PCH Case**), Barker J ordered that Mr Upton pay a penalty of \$3,500.00 for a contravention of section 340 of the FW Act.
- c. In *Australian Building and Construction Commissioner v Upton* (Gorgon Project Case) (No 2) [2018] FCA 897 (**Gorgon Case**), Barker J ordered that Mr Upton pay a penalty of \$8,100.00 for a contravention of section 348 of the FW Act and the CFMMEU to pay a penalty of \$43,200.

[39] There is no evidence before me that Mr Upton has been ordered to pay any other penalty under the FW Act or any other industrial law in relation to action taken by him.

[40] The penalties imposed in the Wheatstone Case arose from two incidents which occurred on the Wheatstone Project. The first occurred on 8 October 2012 when Mr Upton visited the Wheatstone Project to hold discussions with workers. On arrival at the worksite, he was allocated a meeting room which was found by Justice Gilmour to be unfit for purpose. While Justice Gilmour accepted that the circumstances in which Mr Upton found himself led to understandable frustration and anger, Justice Gilmour concluded that those circumstances did not excuse Mr Upton's conduct or operate to mitigate penalty. Mr Upton's conduct was found to have involved the use of racially tainted obscene and offensive language as follows:³¹

"That's the AWU way, we don't do things that way. We do things the fucking CFMEU way."

"I won't accept you treating the boys like fucking dogs. Fuck off."

"Is this shithole place acceptable to you? Is this shithole good for you fucking American's? This is not fucking America. You think you can treat us like shit, you fucking American's. Australia's won't stand for this. You fucking America can't push us around like we're pieces of shit. We won't put up with you fucking American's here, not here."

*"You want to hit me? Go ahead and hit me you fucking American. Come on and hit me you fucking American. Hit me, go ahead."*³²

[41] Justice Gilmore described the conduct as: "...deplorable particularly so for someone acting in his official capacity" given there were other lawful avenues Mr Upton could have explored to address his concerns.³³

[42] The second incident occurred on 13 February 2013, when Mr Upton again attended the Wheatstone Project to hold discussions with workers and was again allocated a meeting room that was unfit for purpose. Mr Upton consequently held his meeting in an open area used mainly for residential purposes, which he did not have a right to enter. Justice Gilmore found that Mr Upton had acted in an improper manner, but that Mr Upton was ignorant at the time that his conduct was in contravention of the FW Act and that therefore the contravention was at the less serious end of the scale.³⁴

[43] Mr Upton apologised to the Court and explained he was remorseful for both contraventions. The CFMMEU points out that no economic loss or damage was caused by Mr Upton and that a substantial amount of time has passed since the contraventions took place. Mr Upton now understands why his conduct was unlawful and says that he is embarrassed and ashamed of his conduct. He explained that if faced with the same situation again he would pursue an alternative course of action, whether that be seeking the assistance of the CFMMEU's legal and industrial officers or commencing proceedings with the FWC.³⁵

[44] The penalties imposed in the PCH Case arose from an incident which occurred on 25 January 2013 when Mr Upton attended a safety meeting, after which a vote was taken for industrial action. Mr Upton stood at the front entrance to the project, along with other officers of the CFMMEU, and discouraged employees from working that day. On the day in question, Mr Upton was on annual leave and was not exercising a right of entry under the FW Act.³⁶

[45] The CFMMEU point out that the contravening conduct occurred over ten years ago, with Mr Upton since admitting to and expressing regret for the contravention. Mr Upton says that he now has insight into the contravention and understands the importance of pursuing industrial grievances by lawful means, not the action previously taken.³⁷

[46] The penalty imposed in the Gorgon case arose from contraventions that occurred on 3 December 2015 when Mr Upton exercised a right of entry to the Gorgon Project and addressed a group of employees which included a number of employees eligible for membership, but not members, of the CFMMEU. Justice Barker found that Mr Upton addressed the group for about ten minutes in a manner which might best be described as a rant, during which he said, or words to the effect of:

“The fucking 90 dog cunts that resigned from the union the day after we fucking signed the EBA after we got the conditions we got now, this is a fucking union site. If you don’t fucking like it, fuck off somewhere else. We got you these conditions, we know who you are. We’re going to put your names of the back of the toilet doors ...”

*If you’re not in the union, you can fuck off somewhere else. This is a fucking union site, we have other union sites starting up next year and if you’re not in the union, you can fuck off too, you are not welcome.”*³⁸

[47] Justice Barker was of the view that the threats made by Mr Upton during the rant inter alia:

“... negated choice as to whether or not a presently un-unionised employee should, or should not, join the union. Plainly, the only practical choice they had – if they were to avoid the opprobrium that would follow from the threat if implemented – was Hobson’s choice – no real choice at all. That was an unconscionable threat to make.”

[48] Justice Baker found that Mr Upton caused the non-unionised employee, who reported Mr Upton’s conduct to his employer, emotional distress and harm.³⁹

[49] Mr Upton understands how his conduct was unlawful. He says that he regrets his conduct and should never have said what he did. He says that he is committed to not repeating this conduct again.⁴⁰

[50] The CFMMEU concede that the contraventions in this matter weight against a finding that Mr Upton is a fit and proper person to hold an entry permit. However, the CFMMEU submit that the contraventions should not be accorded dispositive or substantial weight against a finding of present fitness and propriety for the following reasons:

- a. The contravening action occurred more than 7 years ago, with no further contraventions since demonstrating that Mr Upton has learnt his lesson and ensured his compliance with industrial law since.
- b. Mr Upton regrets his conduct and whilst he did not express regret at the time of the hearing, the focus is on Mr Upton’s present attitude towards the contraventions.

- c. Mr Upton understands his prior conduct was completely unacceptable and contrary to freedom of association. He now has insight into why his conduct was unlawful and is committed to ensuring he does not engage in similar conduct in the future.

[51] These matters weigh against a finding that Mr Upton is fit and proper person to hold a right of entry permit.

Permit Qualification Matter Five – Federal permits (s. 513(1)(e))

[52] In relation to the Permit Qualification Matter set out in section 513(1)(e) of the FW Act, Mr Upton has declared that he has not had an entry permit under the FW Act, or under a similar law of the Commonwealth, revoked, suspended or made subject to conditions except for the following two occasions on which an entry permit issued to Mr Upton under the FW Act was made subject to conditions:⁴¹

- a. In 2008, a condition not to enter or remain on a site with Mr Joseph McDonald was imposed on a previous entry permit issued to Mr Upton.⁴²
- b. On 29 April 2014, conditions that Mr Upton should not be permitted to exercise a right of entry at the Wheatstone Project for the balance of the calendar year, and that clear obligations be placed on Mr Upton if he chose to exercise a right of entry from 1 January 2014 to the conclusion of the construction of the Wheatstone Project, were imposed on Mr Upton's right of entry permit (**Permit Conditions Case**).⁴³

[53] There is no evidence before me that Mr Upton has had an entry permit under the FW Act, or under a similar law of the Commonwealth, revoked, suspended or made subject to any other conditions.

[54] The condition imposed in 2008 did not result from behaviour on the part of Mr Upton, but rather was a condition was placed on all entry permitholders in the WA branch of the CFMEU. It is not contested that the condition was complied with by Mr Upton until its expiration in 2010. In these circumstances, the imposition of the condition should not weigh against the assessment that Mr Upton is a fit and proper person.

[55] The conditions imposed on Mr Upton in the Permit Conditions Case were imposed as a consequence of Mr Upton's failure to ensure he held discussions only with employees he was entitled to meet with while exercising a right of entry on 20 and 21 March 2013.⁴⁴

[56] The imposition of conditions in the Permit Conditions Case weigh against a finding that Mr Upton is a fit and proper person to hold a right of entry permit however it is mitigated by his compliance with those conditions and the historical nature of those conditions.

Permit Qualification Matter Six – State Permits (s. 513(1)(f))

[57] Mr Upton has historically held permits under the *Industrial Relations Act 1979* (WA).

[58] In relation to the Permit Qualification Matter set out in section 513(1)(f) of the FW Act, Mr Upton has declared that no right of entry for industrial or occupational health and safety

purposes that Mr Upton might have had a under a State or Territory industrial or occupational health and safety law has been cancelled, suspended or had conditions imposed.

[59] There is no evidence before me that Mr Upton has had a right of entry for industrial or occupational health and safety purposes that Mr Upton might have had a under a State or Territory industrial or occupational health and safety law cancelled, suspended or had conditions imposed.

[60] This weighs in favour of his fitness and propriety to hold an entry permit.

Permit Qualification Matter Seven – Other relevant matters (s. 513(1)(g))

[61] Section 513(1)(g) of the FW Act requires the FWC to take into account any other matter it considers relevant. A matter will be relevant if it can rationally affect the assessment of whether the proposed permit holder is a fit and proper person to hold an entry permit. Matters that may be relevant and therefore fall to be considered under s 513(1)(g) are matters that relate to the personal characteristics of the proposed permit holder and are pertinent to the discharge of the functions and exercise of the rights and privileges associated with holding a permit.⁴⁵

[62] The CFMMEU submit the following factors are relevant to the FWC's assessment under section 513(1)(g) as to Mr Upton's current fitness and propriety to hold an entry permit:

- a. Mr Upton's regret for his historical contraventions;
- b. Mr Upton's insight into his prior contraventions and the training he has undertaken with Mr Lacy in relation to the contraventions;
- c. Mr Upton's determination to comply in future with his obligations as a permit holder;
- d. Mr Upton's appreciation, as a result of his leadership position, of the imperative for him to lead by example and adhere to his obligations under industrial law generally; and
- e. Mr Upton's appreciation that any contravening conduct on his part will place any approved permit in jeopardy.

[63] These matters weigh in favour of Mr Upton's fitness and propriety to hold an entry permit.

[64] I note that in November 2021, the Australian Building and Construction Commission (ABCC) commenced court proceedings in WAD259/202. In those proceedings the ABCC alleged that Mr Upton and Mr Stephen Parker, and through them the CFMMEU, engaged in an unlawful picket, and that the union also organised the unlawful picket, at a company's construction yard in Balcatta, Perth in breach of section 47 of the *Building and Construction Industry (Improving Productivity) Act*. In December 2022, these proceedings were transferred from the ABCC to the FWO. On 28 March 2023, the FWO discontinued these proceedings.

[65] No admissions were made by Mr Upton in relation to the alleged contraventions and no findings made in relation to the alleged contraventions prior to the matter being discontinued. Both the CFMMEU and the FWO submit that proceedings are not a relevant consideration in determining the application for a right of entry permit for Mr Upton. I accept that is the case.

Conclusion

[66] The object of Part 3-4 is to establish a framework that balances the right of organisations to represent their members, the right of employees to receive information and representation, and the right of occupiers of premises and employers to go about their business without undue inconvenience.

[67] Mr Upton has been found to have contravened the FW Act and had penalties and/or conditions imposed in relation to incidents which occurred in 2012, 2013 and 2015 which had adverse impacts on both employers and employees. Mr Upton's actions displayed a disregard for both the law and basic principles of civility.

[68] When I declined to grant Mr Upton's application for a permit in 2017 I did so on the basis that the contraventions of the FW Act in 2015 occurred so closely in time to proceedings in relation to past contraventions that they suggested a lack of genuine contrition and a propensity to continue to engage in unlawful conduct.

[69] However, a significant period has expired since that time. Mr Upton has now been employed by the CFMMEU as an Organiser within an industrially volatile industry for more than fifteen years. He has not been found to have engaged in any inappropriate conduct since 2015.

[70] His evidence in these proceedings reveal:

- a. An understanding of why his previous conduct was inappropriate.
- b. Remorse for his prior conduct.
- c. The undertaking of specialised training delivered by a highly knowledgeable former Member of this tribunal.
- d. Credible motivations to avoid further contraventions.
- e. A record of seven years without contraventions.
- f. A clear understanding of alternative methods to resolve issues to avoid future contraventions occurring.

[71] Mr Lacy who is well placed to make such an assessment gave evidence that he formed the view that Mr Upton understood his statutory obligations, was genuinely remorseful and was unlikely to reoffend.

[72] The CFMMEU and Mr Upton have agreed to make the following undertaking:

"The Construction, Forestry, Maritime, Mining and Energy Union and Bradley Upton undertake that they will notify the Commission in writing if any findings are made or penalties imposed on Mr Upton that are relevant to the permit qualification matters at ss 513(a) - (f) of the FW Act, or proceedings commenced that may lead to findings or the imposition of penalties that are relevant to the permit qualification matters at ss 513(a) - (f) of the FW Act in relation to Mr Upton within two weeks of the finding being made, the penalty being imposed or the proceeding commenced."

[73] Taking into account the permit qualification matters and the undertaking provided by the CFMMEU and Mr Upton, for the reasons earlier stated I am satisfied that Bradley John Henley Upton is a fit and proper person to hold an entry permit with the following condition:

1. Bradley John Henley Upton must not exercise rights under Subdivision AA of Division 2 of Part 3-4 of the Act until he has completed appropriate training in relation to that subdivision and he has filed a copy of the training completion certificate in the Commission.

[74] An order⁴⁶ to this effect will be issued separately.



DEPUTY PRESIDENT

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¹ Witness statement of Mr Bradley John Henley Upton dated 14 March 2023 at [2]-[3].

² Witness statement of Mr Bradley John Henley Upton dated 14 March 2023 at [9].

³ Witness statement of Mr Bradley John Henley Upton dated 14 March 2023 at [4]-[8].

⁴ Witness statement of Mr Bradley John Henley Upton dated 14 March 2023 at [10]-[14].

⁵ Witness statement of Mr Bradley John Henley Upton dated 14 March 2023 at [15]-[16].

⁶ RE2010/3968, RE2012/583, RE2014/642.

⁷ RE2017/657.

⁸ Witness statement of Mr Bradley John Henley Upton dated 14 March 2023 at [40]-[43].

⁹ [2015] FCAFC 56.

¹⁰ Maritime Union of Australia v Fair Work Commission [2015] FCAFC 56 at [15].

¹¹ [\[2014\] FWC FB 1973](#).

¹² The Maritime Union of Australia [\[2014\] FWC FB 1973](#) at [23]

¹³ *Construction, Forestry, Mining and Energy Union – Construction and General Division, Victoria and Tasmanian Divisional Branch* [\[2018\] FWC 1325](#) at [27]; *Construction, Forestry, Mining, Maritime and Energy Union for a right of entry permit to be issued to Mr Michael Kenneth Robinson* [\[2018\] FWC 1777](#) at [39].

¹⁴ *CFMEU—Construction and General Division* [\[2023\] FWC 582](#) at [5]; *Construction, Forestry, Maritime, Mining and Energy Union—Construction and General Division, WA Divisional Branch* [\[2023\] FWC 287](#) at [7].

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- ¹⁵ *Re Australian Salaried Medical Officers Federation* [2017] FWC 3282 at [11] citing *Re Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2015] FWC 1522 at [32].
- ¹⁶ *Re Australian Salaried Medical Officers Federation* [2017] FWC 3282 at [11] citing *Re Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2015] FWC 1522 at [32]. *CFMMEU, Construction and General Division, Victoria-Tasmania Divisional Branch* (Re Mark Travers) [2023] FWC 410 at [3].
- ¹⁷ Ibid.
- ¹⁸ *CFMEU—Construction and General Division* [2023] FWC 582 at [2].
- ¹⁹ *Maritime Union of Australia v Fair Work Commission* (2015) 230 FCR 15; *Application by Construction, Forestry, Maritime, Mining and Energy Union – Construction and General Division, Australian Capital Territory Divisional Branch* [2019] FWC 4087 at [59].
- ²⁰ Witness statement of Mr Bradley John Henley Upton dated 14 March 2023 at [33].
- ²¹ *Construction, Forestry, Mining and Energy Union—Construction and General Division, New South Wales Divisional Branch* [2018] FWC 379 at [16]-[18].
- ²² See *ABCC v CFMMEU* [2022] FCA 774 at [44].
- ²³ Witness statement of Mr Bradley John Henley Upton dated 14 March 2023 at [34]-[35]; Report of Brian Lacy.
- ²⁴ Report on Training and Instruction given by Mr Brian Lacy AO to Mr Bradley Upton dated 22 October 2022.
- ²⁵ Witness statement of Mr Bradley John Henley Upton dated 14 March 2023 at [36].
- ²⁶ Form 42 – Application for an entry permit dated 16 December 2022.
- ²⁷ Form 42 – Application for an entry permit dated 16 December 2022.
- ²⁸ Witness statement of Mr Bradley John Henley Upton dated 14 March 2023 at [3]-[7].
- ²⁹ Form 42 – Application for an entry permit dated 16 December 2022.
- ³⁰ Witness statement of Mr Bradley John Henley Upton dated 14 March 2023 at [17]-[32]; Form 42 – Application for an entry permit dated 16 December 2022.
- ³¹ *Director of the Fair Work Building Industry Inspectorate v Upton* [2015] FCA 672 at [20] – [28].
- ³² Ibid at [23].
- ³³ Ibid at [28].
- ³⁴ Exhibit A2 at [14]-[20]; Exhibit R2 at [11]-[18] and *Director of the Fair Work Building Industry Inspectorate v Upton* [2015] FCA 672 at [32] – [49].
- ³⁵ Witness statement of Mr Bradley John Henley Upton dated 14 March 2023 at [18]-[22].
- ³⁶ *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (Perth Children’s Hospital Contraventions Case)* [2017] FCA 491.
- ³⁷ Witness statement of Mr Bradley John Henley Upton dated 14 March 2023 at [25]-[27].
- ³⁸ *Australian Building and Construction Commissioner v Upton (The Gorgon Project Case)* .
- ³⁹ Ibid at [144].
- ⁴⁰ Witness statement of Mr Bradley John Henley Upton dated 14 March 2023 at [30]-[32].
- ⁴¹ Exhibit A2 at [11] and Exhibit R2 at [29]-[30].
- ⁴² RE2008/2153.
- ⁴³ *Bechtel (Western Australia) Pty Ltd v Construction, Forestry, Mining and Energy Union – Western Australian Branch* [2013] FWC 2498.
- ⁴⁴ *Bechtel (Western Australia) Pty Ltd v Construction, Forestry, Mining and Energy Union – Western Australian Branch* [2013] FWC 2498 at [54].
- ⁴⁵ *Construction, Forestry, Maritime, Mining and Energy Union—Construction and General Division, WA Divisional Branch* [2023] FWC 287 at [8].
- ⁴⁶ PR760617.