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Précis Paper

Notice to Produce under Fair Work Act 2009 (Cth)

A discussion about the recent decision of *Fair Work Ombudsman v United Petroleum Pty Ltd* (2000) FCA 590.

Discussion Includes

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Notice to Produce under Fair Work Act 2009 (Cth)

In this edition of BenchTV, Richard Dalton QC (Barrister, Aickin Chambers, Melbourne) and Dimitri Ternovski (Barrister, Aickin Chambers, Melbourne) discuss the recent decision of *Fair Work Ombudsman v United Petroleum Pty Ltd* (2020) FCA 590.

Facts

1. The genesis of the case was in 2018 when, in the course of investigating a breach of section 558B of the *Fair Work Act 2009* (Cth) by United Petroleum as a responsible franchisor entity, the Fair Work Ombudsman issued United with Notice to Produce documents.
2. United, having read the Notice engaged in correspondence with the Fair Work Ombudsman objecting to the Notice and resisting compliance with it on various grounds, including that the notice was invalid.
3. Despite the parties engaging in correspondence over several weeks, they were unable to reach a resolution and some months later the Fair Work Ombudsman decided to bring an application in the Federal Court against United seeking the imposition of civil penalties against United for an alleged breach of section 712(3) of the *Fair Work Act* 2009 (Cth), being a failure to comply with a Notice to Produce.
4. When the matter came on for hearing, liability revolved around the question of the validity of the notice and on that point, United was successful with the result being that the proceeding was dismissed.

Relevance of case

5. This case is of relevance across the board for lawyers advising companies, private citizens and regulators across a range of activities where there is a regulator with the power to compel production of documents.
6. Such authorities include trade practices with the ACCC, ASIC, the Commissioner of Taxation, State and Federal level workplace safety regulators and environmental protection authorities.

The Bannerman Case

7. The case of *Bannerman v Mildura Fruit Juices Pty Ltd* [1984] FCA 156; (1984) 2 FCR 581 sets out some foundational principles.
8. The case concerned a notice to produce under what was then the *Trade Practices Act* 1975 (Cth) and it laid down principles that became principles of general application.

9. Each Notice to Produce is ultimately governed by the statutory regime under which it was issued but subject to there be something unusual in the statute, the Bannerman principles are the general principles which govern the validity of such notices.
10. Firstly, the Bannerman case notes that the Notice must disclose certain information on the face of the document. This means that the regulator that is trying to uphold the validity of the Notice cannot rely upon correspondence that took place before or after the Notice was issued. It must show that sufficient information was disclosed on the Notice itself.
11. The second critical principle is that Bannerman explains that the Notice must identify the "matter" to which it relates. The term "matter" has subsequently been applied across the board to other statutory regimes, including those that do not expressly use that term, such as the *Fair Work Act* 2009 (Cth).
12. It must be clear from reading the notice that the thing being investigated through the Notice falls within the regulator's investigatory powers. Further, the description of the matter must provide to the recipient a point of reference by which to judge whether particular documents or categories of documents are validly sought by the Notice.
13. There are two cases handed down by the Federal Court which confirmed the principles in Bannerman were adaptable and applicable to section 712 of the *Fair Work Act* 2009 (Cth).

Construction, Forestry, Mining and Energy Union v Alfred

14. The first of these is *Construction, Forestry, Mining and Energy Union v Alfred* [2016] FCA 591; 242 FCR 35 which concerned a Notice to Produce issued to the CFMEU by a Fair Work Building Inspector. The Notice specifically identified the date and location of the suspected contravention that the inspector was investigating and also specifically referred to two statutory provisions suspected to have been contravened; sections 346 and 349 of the *Fair Work Act* 2009 (Cth).
15. Beyond that, the notice said nothing about what the facts are what was suspected to constitute the suspected contravention. Justice Logan held that this was not enough to identify a matter and the notice was held to be invalid.

Construction, Forestry, Maritime, Mining and Energy Union v Fair Work Inspector Lam

16. The case of *Construction, Forestry, Maritime, Mining and Energy Union v Fair Work Inspector Lam* [2018] FCA 1379 concerned a notice to produce which disclosed that it was issued "for the purpose of determining whether the Fair Work Act is being or has been complied with, specifically Part 3(3) Compliance with Industrial Action Provisions." This was held to be insufficient because Part 3(3) contains several different civil penalty provisions and it was unclear which one was being investigated. It was held, however, that a Notice does

not need to specify the suspected contravention by section number, it can identify the contravention by sufficiently describing the facts said to constitute the contravention.

Aurora Construction Materials Pty Ltd v Victorian WorkCover Authority

17. The case of *Aurora Construction Materials Pty Ltd v Victorian WorkCover Authority* [2018] VSCA 16 concerned an industrial accident following which a Notice was issued by the work safe authority. The notice specified the date and location of the accident, identified the injured employee and the employer and it stated what the alleged cause of the accident was — being that a truck that the employee was operating failed to brake. Beyond that it did not specify a particular statutory provision that was allegedly contravened.
18. The Court of Appeal held that this was sufficient because, although the Notice did not specify a section number, it sufficiently disclosed the gist of the facts that gave rise to the contravention. This was enough to allow the recipient to be satisfied that the thing being investigated fell within the scope of that which the regulator could investigate and also to identify which categories of documents were relevant to the investigation.

Decision in *United*

19. The Notice to Produce issued in the United case involved the invocation and recitation of sections that had generally expressed obligations and the absence of sufficient contextual information.
20. A former employee of United's commission agent, Parashar's, made a complaint to the Fair Work Ombudsman, who then conducted an investigation and found that Parashar's had contravened the *Fair Work Act* 2009 (Cth). The Ombudsman then commenced an investigation into United under section 558B of the *Fair Work Act* 2009 (Cth), alleging Parashar's to be a franchisee of United.
21. Section 558B creates a form of secondary liability for responsible franchisor entities with respect to certain types of contraventions of the *Fair Work Act* by the franchisees. One of the things that the regulator needs to do to establish liability under the section is to establish the knowledge element. As such, the regulator needs to show that the franchisor could have reasonably been expected to know that the contravention by the franchisee entity would occur or that a contravention by the franchisee entity of the same or similar character would have been likely to occur.
22. In this case, the Ombudsman issued a notice to United seeking several categories of documents which broadly speaking, seemed to relate to United's knowledge of the franchisee's profitability.
23. The Notice specified the following information about the matter being investigated;

a. It said that the Ombudsman was investigating United's liability under section 558B with respect of suspected contraventions by the franchisee and, in particular the Ombudsman was investigating the knowledge element
b. It then gave the information relating to the franchisee's contravention, that is, that following a complaint from the employee it investigated the franchisee's compliance with specified sections of the Act.
c. It then listed the sections of the *Fair Work Act* 2009 (Cth), including section 44, which provides for compliance with the National Employment Standards, and section 45, which details compliance with the Modern Award.
d. It then said that as a result of the investigation, it had made finding that the franchisee had contravened some provisions of the Award and the Act and the Regulations. However, it did not specify what those contraventions were.

24. United argued that the Notice was not valid and the Ombudsman then brought a civil penalty prosecution against United for failing to comply with the Notice. The Ombudsman said that it was not necessary to identify the underlying contraventions by the franchisee and that it was enough to simply refer to section 558B of the *Fair Work Act* 2009 (Cth).
25. Justice Anderson disagreed and noted that the Notice needed to sufficiently identify the primary contraventions by the franchisee. His Honour then concluded that the Notice failed to do so for two distinct reasons;
    a. Whilst the notice specified the section numbers that the Ombudsman had investigated, when it came to the findings made by the Ombudsman, it merely said that she had made findings of the contravention of some provisions of the Fair Work Act but did not specify the provisions.
    b. Even if the list of provisions that were *investigated* were to be a list of provisions that the franchisee had actually *breached*, the list was still deficient as the court held that the references to section 44 and 45 of the act were "unhelpful". The sections simply require a person to comply with some standards of conduct which are found elsewhere. The Notice had to identify the particular underlying obligation that is suspected to have been contravened.

<u>Tips on drafting a Notice</u>

26. Two general provisions emerge from the judgement that go beyond the pre-existing case law:
    a. That with a notice investigating a suspected *secondary* liability it is generally necessary to identify the underlying *primary* contraventions.
    b. Where the suspected contravention is a breach of the National Employment Standards it is not enough to simply refer to section 44 or where a suspected contravention is a breach of the Award, it is not enough to refer to section 45.

Rather, what the notice needs to do is identify the substance of the contravention of the National Employment Standard or the Award.

Options for the Regulator

27. Ideally, if asked before the drafting of the Notice commenced the main drafting recommendations for the regulator would be
    a. To make sure they identify the matter in sufficient detail.
    b. The court is generally sympathetic to the fact that as notices are generally issued at the investigative stage before final decisions are made in terms of bringing civil penalty proceedings, there needs to be some leeway given to the regulators in terms of specificity in the notice, in that they may not know precisely what provision of the act is being or has been contravened
28. Once a dispute has emerged after a Notice has been issued, the regulator should carefully look at the complaints being raised to assess whether there is any substance to them. If there is, the best course of action in most cases would be to simply fix the potential issues and reissue the Notice.

Options for the recipient

29. The first thing for a recipient of a Notice to do is to assess the validity of the Notice. Bannerman assists by providing that one must look at the face of the Notice. If you form the view that there is a real question about the validity of the Notice, in most cases, the first port of call would be to raise this issue in correspondence to the regulator and try to reach a compromise.
30. If a resolution cannot be found the recipient has three options;
    a. to comply anyway;
    b. to issue their own proceeding challenging the validity of the Notice; or
    c. do nothing and wait for the regulator to do something.

Collateral challenge

1. There are two ways to challenge the validity of the Notice:
    a. bring your own proceeding challenging the Notice (direct challenge); or
    b. to challenge validity as a defence in a proceeding that is not itself about the validity of the notice but is a proceeding to enforce the notice (collateral challenge).
2. A collateral challenge to an administrative decision, such as a Notice to produce, is a challenge that is raised as a *defence* in a proceeding that relies on that decision as distinct from a separate proceeding that directly challenges the validity of the decision.

3. This was the case in the proceeding brought by the Ombudsman against United seeking civil penalties for failing to comply with the notice and the challenge to the validity of the notice was a defence raised by United.
4. There is complex law that governs when a collateral challenge to an administrative decision is or is not permissible. As a general proposition, you can collaterally challenge a decision on the face of the document.

Severance

5. There are cases which seem to acknowledge that there may be an ability of the court to treat parts of the Notice which are defective and invalid as severable thereby preserving the validity of the rest of the Notice. Whether severance is possible depends upon what the problem with the Notice is and where the source of the invalidity lies.

BIOGRAPHY

Richard Dalton QC

Barrister, Aickin Chambers, Melbourne

In over 25 years of practice as a workplace relations lawyer, Richard has acted for most of the significant employers in Australia across all industries, including coal and metalliferous mining, offshore oil and gas, airlines, stevedoring, transport and logistics, building and construction, power generation, telecommunications and manufacturing. Richard has also acted extensively for government and public sector employers, as well as regulators such as the Fair Work Ombudsman and the ABCC. Richard has a national practice, regularly advising and appearing interstate.

Dimitri Ternovski

Barrister, Aickin Chambers, Melbourne

Dimitri's practice covers a broad range of disputes, including: contractual, equitable and trade practices matters; restraint of trade matters; enterprise agreement disputes (including approval and termination applications); breaches of fiduciary duties and directors' and officers' duties; economic torts (including torts of inducing a breach of contract, conspiracy to injure and intimidation); general protections applications under the Fair Work Act 2009; sale of land and other real property disputes; judicial review applications and other administrative law matters; disputes about statutory and contractual employment entitlements; regulatory matters and civil penalty prosecutions; private international law disputes (including choice of law, jurisdiction and enforcement of foreign judgments); and contempt of court applications. In the past he has been an associate to the Hon Chief Justice Warren, the Hon Justice Cavanough and the Hon Justice Digby, Supreme Court of Victoria.

BIBLIOGRAPHY

Legislation

Fair Work Act 2009 (Cth)

Trade Practices Act 1975 (Cth)

Cases

Bannerman v Mildura Fruit Juices Pty Ltd [1984] FCA 156; (1984) 2 FCR 581

Fair Work Ombudsman v United Petroleum Pty Ltd (2000) FCA 590

Construction, Forestry, Maritime, Mining and Energy Union v Fair Work Inspector Lam [2018] FCA 1379

Construction, Forestry, Mining and Energy Union v Alfred [2016] FCA 591; 242 FCR 35