SUPREME COURT OF QUEENSLAND

CITATION:	*Enco Precast Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union & Ors* [2022] QCA 94
PARTIES:	**ENCO PRECAST PTY LTD** ACN 072 772 037 (appellant) **v** **CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION** (first respondent) **BEAU SEIFFERT** (second respondent) **LUKE GIBSON** (third respondent)
FILE NO/S:	Appeal No 10511 of 2021 ICQ No C/2020/21
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Industrial Court at Brisbane – [2021] ICQ 15 (Davis J)
DELIVERED ON:	27 May 2022
DELIVERED AT:	Brisbane
HEARING DATE:	25 March 2022
JUDGES:	Sofronoff P and Bond JA and Brown J
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	INDUSTRIAL LAW – QUEENSLAND – APPEALS – APPEALS TO THE SUPREME COURT – where the respondent is a union – where the respondent entered the premises of the appellant relying upon a Work Health Safety Entry Permit issued to them purportedly pursuant to s 134 of the *Work Health and Safety Act 2011* (Qld) – where the appellant sought orders from the Industrial Commission – whether the legal burden of proof was borne by the appellant – whether the union constitution was correctly interpreted *Work Health and Safety Act 2011* (Qld), s 116, s 117, s 134, s 142, s 144(2) *870/97 S Print P3402 (Construction, Forestry, Mining and Energy Union and A Tech Carpentry Service Pty Ltd and others)* [1997] AIRC 1413, cited *Enco Precast Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union & Anor* [2021] ICQ 15, cited

Enco Precast Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union [2020] QIRC 188, cited
Rescrete Industries Pty Ltd v Jones (1998) 86 IR 269, cited
State of Queensland v Together Queensland [2014] 1 Qd R 257; [2012] QCA 353, considered
Waterside Workers' Federation of Australia v JW Alexander Ltd (1918) 25 CLR 434; [1918] HCA 56, cited

COUNSEL: J Murdoch QC, with T A Spence, for the appellant
W L Friend QC, with C A Massy, for the respondent

SOLICITORS: Hopgood Ganin Lawyers for the appellant
Hall Payne Lawyers for the respondent

[1] **SOFRONOFF P:** On 3 September 2019 two officers of the Construction, Forestry, Maritime, Mining and Energy Union, who are the respondents to this appeal, attempted to enter the premises of the appellant, Enco Precast Pty Ltd, relying upon a Work Health Safety Entry Permit issued to them purportedly pursuant to s 134 of the *Work Health and Safety Act 2011* (Qld) (the Act). Section 117 of the Act confers upon the holder of a valid permit a right to enter a workplace for the purpose of inquiring into a suspected contravention of the Act. The General Manager of the appellant, Mr James, who was present when the respondents attempted to enter the appellant's premises, refused to let them enter.[1] Mr James raised two objections to the validity of the permits but only one of these remains relevant to this appeal.

[2] It is not necessary to detail what happened on 3 September 2019. It is enough, in order to determine this appeal, to say that the respondents did not gain entry on that day. They returned on the following day with a fresh permit.[2] Mr James refused entry once more. The appellant immediately applied to the Industrial Commission for an injunction to restrain further attempts by the respondents to enter the appellant's premises. That application was dismissed on that day.[3]

[3] The respondents persisted. They returned on 5 September 2019, bearing yet another fresh permit. Once more Mr James refused them entry. He then relented and allowed the respondents to come onto the premises to perform an inspection.[4]

[4] About a week later, the appellant commenced new proceedings before the Industrial Commission. The contested entry and inspection having been carried out, the appellant now sought the following orders:[5]

> "The Applicant seeks the following orders pursuant to s 142(e) of the Work Health and Safety Act 2011:
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> 1. (a) That the Notices of Entry of the Second and Third Respondents dated 3 September 2019 were invalid and of no force and effect for the purposes of the *Work Health and Safety Act 2011*; and

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1 *Enco Precast Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union & Anor* [2021] ICQ 15 at [16].
2 Ibid at [17].
3 Ibid at [20].
4 Ibid at [21], [24].
5 Supra at [25].

(b) That the Second and Third Respondents were not entitled to enter the Enco precast facility at 73 Counihan Road, Seventeen Mile Rocks, in accordance with section 117 of the Act on 3 September 2019.

2. (a) That the Notices of Entry of the Second and Third Respondents dated 4 September 2019 were invalid and of no force and effect for the purposes of the Work health and Safety Act 2011; and

(b) That the Second and Third Respondents were not entitled to enter the Enco precast facility at 73 Counihan Road, Seventeen Mile Rocks, in accordance with section 117 of the Act on 4 September 2019.

3. (a) That the Notices of Entry of the Third, Fourth, Fifth and Sixth Respondent dated *5* September 2019 were invalid and of no force and effect for the purposes of the *Work Health and Safety Act 2011*; and

(b) That the Third, Fourth, Fifth and Sixth respondent were not entitled to enter the Enco precast facility at 73 Counihan Road, Seventeen Mile Rocks, in accordance with section 117 of the Act on *5* September 2019.

4. That for the purpose of the *Work Health and Safety Act 2011* the First Respondent is not entitled to represent the industrial interests of any worker employed by the Applicant at Enco precast facility at 73 Counihan Road, Seven Mile Rocks.

5. Any other order the Commission determines appropriate."

[5] That application invoked the jurisdiction conferred upon the Commission by s 142 of the Act, which provides:

"(1) The commission may deal with a dispute about the exercise or purported exercise by a WHS entry permit holder of a right of entry under this Act (including a dispute about whether a request under section 128 is reasonable).

(2) The commission may deal with the dispute in any way it thinks fit, including by means of mediation, conciliation or arbitration.

(3) If the commission deals with the dispute by arbitration, it may make 1 or more of the following orders—

(a) an order imposing conditions on a WHS entry permit;

(b) an order suspending a WHS entry permit;

(c) an order revoking a WHS entry permit;

(d) an order about the future issue of WHS entry permits to 1 or more persons;

(e) any other order it considers appropriate.

(4) The commission may deal with the dispute—

(a) on its own initiative; or

(b) on application by any of the following to whom the dispute relates—

(i) a WHS entry permit holder;

(ii) the relevant union;

(iii) the relevant person conducting a business or undertaking;

(iv) any other person in relation to whom the WHS entry permit holder has exercised or purported to exercise the right of entry;

(v) any other person affected by the exercise or purported exercise of the right of entry by a WHS entry permit holder;

(vi) the regulator.

(5) In dealing with a dispute, the commission must not confer any rights on the WHS entry permit holder that are additional to, or inconsistent with, rights exercisable by the WHS entry permit holder under this part.

(6) A person dissatisfied with the decision of the commission may appeal under the *Industrial Relations Act 2016*, chapter 11, part 6."

[6] Relevantly, the appellant submitted to the Commission that the entry permits issued on three successive days were all invalid because the Union did not represent any worker employed at the appellant's premises and nor could it do so because none of the workers were engaged in work of the kind covered by the Union.[6]

[7] Commissioner Hartigan presided at a trial that lasted for three days.[7] The appellant called three employees as witnesses and also called an expert engineer.[8] The respondents called six Union officers or employees.[9]

[8] As Commissioner Hartigan recorded in her reasons, the appellant contended that there were no "relevant workers" at the premises.[10] Section 116 of the Act defines the expression "relevant worker" to mean, relevantly, a worker who is a member, or who is eligible to be a member, of the Union and who works at the workplace. The appellant argued that none of its workers fell within that definition.

[9] There were two bases of eligibility for membership that emerged as contentious. First, there was Rule 2(A)(A)(1)(i) of the eligibility rules. That rule provided, relevantly, as follows:

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6 Supra at [52].
7 *Enco Precast Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union* [2020] QIRC 188.
8 Ibid at [38]-[39].
9 Ibid at [40].
10 Ibid at [164].

> "(A)(A) The following unlimited number of persons, whether male or female, are eligible to be members of the Union.
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> (1) employed in, usually employed in or qualified to be and desirous of being employed in or seeking to be employed in or in connection with the industry or industries, and/or occupations, and/or calling, and/or vocations and/or industrial pursuits of -
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> and/or
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> (2) who, otherwise than as employees or employers, follow an occupation in or in connection with the industry or industries of:
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> and/or
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> (3) who, otherwise than as employees or employers, are engaged in the industrial pursuit or pursuits of:
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> (i) … stonemasons, marble masons, polishers, machinists, sawyers and all other persons engaged in the dressing and preparation and/or erection of stone, marble or slate also those engaged in the preparation and/or erection of terrazzo or similar compositions …"

[10] The parties referred to this rule as the "Terrazzo Rule".

[11] Second, there was "The FEDFA Rule". It is unnecessary to recite this lengthy rule. It is enough to say, as Commissioner Hartigan summarised it, that there were four categories of work that, if performed by a worker at the site, could render that worker eligible to be a member of the Union.[11]

[12] In the result, Commissioner Hartigan found that there were workers on site who were eligible under the Terrazzo Rule but that, upon the evidence before her, she could not be satisfied whether any workers at the site were doing work of a kind that made them eligible to join the Union under the FEDFA Rule.[12]

[13] Accordingly, Commissioner Hartigan was not satisfied that the permits were invalid and dismissed the application.[13]

[14] The appellant appealed to the Industrial Court. On that appeal, the appellant challenged Commissioner Hartigan's construction of the Terrazzo Rule and contended that her Honour ought not have concluded that any worker satisfied the eligibility criterion in that rule. The appellant also contended that the

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11 Ibid at [217]; These were operation of a bobcat skid-steer, the work of boiler attendants, the operation of gantry cranes and the operation of hydraulic pumps for the purpose of prestressing process.

12 Ibid at [215], [248], [295].

13 Her Honour found against the appellant on the other ground relied upon to establish invalidity. That ground is not material to this appeal.

Commissioner was wrong in concluding that the appellant bore an onus to prove that no worker on the site was eligible under the FEDFA Rule.[14]

[15] President Davis dismissed the appeal.[15] The appellant now appeals to the Court of Appeal upon two grounds which can be summarised as follows:

(a) President Davis, like Commissioner Hartigan, was wrong in concluding that the Terrazzo Rule covered some of the appellant's workers; and

(b) President Davis, like Commissioner Hartigan, was wrong in concluding that the appellant bore the onus of proving that none of its workers were eligible under the FEDFA Rule.

[16] A decision that President Davis was wrong about the meaning of the Terrazzo Rule would not lead to a determination of the case. It would still be necessary to decide whether the failure of the appellant to prove as part of its case that the FEDFA Rule did not apply to any workers on the site should have led to the dismissal of the proceedings. That is why the appellant has put forward the question of onus of proof as an issue.

[17] As Mr Friend QC, who appeared with Mr Massy for the respondents, correctly submitted, logically it follows that the first question that has to be decided is whether, the appellant bore the onus of proving its entitlement to that order. If the appellant bore the onus, then it failed to prove its entitlement to the order because it failed to prove that no eligible worker was working on the site. Accordingly, the appeal to the Industrial Court was rightly dismissed.

[18] In general, it is the rule that the party who asserts a conclusion must prove the facts that lead to that conclusion.[16] Courts and tribunals do not make orders affecting persons just for the asking; *something* must be shown to move the court or tribunal to exercise its jurisdiction to make an order to bind another person. Hence the old maxim "He who moves, proves".

[19] This was a case that was conducted without pleadings. Had there been pleadings, it would have been insufficient for the appellant to allege simply that the respondents had asserted a right to enter the appellant's premises but that the permits upon which they relied for their right of entry were invalid. The appellant would have had to plead the actual basis for that conclusion of law.

[20] The Commission has a wide power under s 142(3) of the Act to make such order as it considers appropriate to determine a dispute about a purported exercise of a right of entry under a permit. Before the Commission could make an order, it would have to be satisfied that valid grounds existed to make a particular order. That would require the Commission to be satisfied that relevant facts exist that raise the discretion conferred by s 142(3) and that relevant facts also existed that would justify the exercise of the discretion that has arisen. According to long established principle, it would have been necessary for the appellant, as the party attempting to invoke the Commission's jurisdiction to exercise the discretion in the appellant's

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14 The appellant also raised other grounds, but they are no longer relevant.

15 Supra at [148].

16 *Ei qui affirmat non ei qui negat incumbit probatio.* See *Currie v Dempsey* [1967] 2 NSWR 532; *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd* [1942] AC 154 at 174.

favour, to allege, and to prove, the requisite facts, proof of which would satisfy the Commission that the order sought by the appellant should be made.

[21] The position would have been otherwise if the respondents, seeking to enforce their right of entry, had sought to invoke the Commission's jurisdiction to compel the appellant to permit entry. In that case, the respondents would have had to allege, and then prove, the facts which they said justified the Commission's exercise of its discretion to make the order compelling the appellant to submit to the respondents' right of entry.

[22] There is nothing novel in this.

[23] Mr Murdoch QC and Mr Spence, who appeared for the appellant, relied on several cases which, they submitted, were authority for the proposition that in proceedings for an order under s 142(3) of the Act an applicant bore no onus of proof.

[24] One of the cases was *Construction, Forestry, Mining & Energy Union v A Tech Carpentry Service Pty Ltd*.[17] The appellant relied upon the passage that is underlined and in bold in the quotation following:

> "**Some qualifications must always attach to the use of notion of onus of proof in Commission proceedings. The basis for the Commission's exercise of power is that it be satisfied as to the existence of particular facts or situations.** However the passage we have quoted indicates that the union, as the party having the carriage of the notification of a dispute, bears the risk of any failure to satisfy the Commission about the existence of any fact or state of affairs on which the Commission must be satisfied if it is to exercise jurisdiction."

[25] The passage to which reference was made in that case was from a decision of the Australian Industrial Relations Commission[18] in which the following appeared:

> "In the Commission, the onus of establishing authority to serve a log of claims rests with a union asserting the existence of an industrial dispute by reasons of the employers' non-compliance with the log."

[26] Another case relied upon by the appellant is *State of Queensland v Together Queensland*.[19] In its written outline the appellant cited the part that is underlined and in bold below:

> "No one can foresee for any appreciable period the legislative requirements of industrial peace in any one industry, much less in all industries of the Commonwealth which are common to more than one State. Any attempt at detailed regulation, applicable to all industries even if suitable to-day – practically an impossible hypothesis, – would certainly be less suitable a month hence. Nevertheless, it was thought necessary that such disputes should not go uncontrolled but that the control should be exercised only by means of conciliation and arbitration. That is essentially different

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17 [1997] AIRC 1413.

18 *Re Local Government Administration: Contract Labour Dispute* [1996] AIRC 615 at [24].

19 [2014] 1 Qd R 257, citing *Clyne v East* (1967) 68 SR (NSW) 385 at 401, quoted from *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 462-463.

> from the judicial power. Both of them rest for their ultimate validity and efficacy on the legislative power. Both presuppose a dispute, and a hearing or investigation, and a decision. But the essential difference is that the judicial power is concerned with the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist, or are deemed to exist, at the moment the proceedings are instituted;…
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> **The arbitral function is ancillary to the legislative function, and provides the factum upon which the law operates to create the right or duty. The judicial function is an entirely separate branch, and first ascertains whether the alleged right or duty exists in law, and, if it finds it, then proceeds if necessary to enforce the law.**"

[27] An industrial dispute is a claim by one of the disputants that existing relations should be altered and a claim by the other that the applicant's claim should not be conceded. It is therefore a claim for new rights. And the duty of the arbitrator is to determine whether the new rights ought to be conceded in whole or in part.[20]

[28] *Waterside Workers' Federation of Australia v JW Alexander Ltd*[21] was a decision of the High Court that was concerned with the nature of the power conferred upon the Parliament by the Constitution to make laws with respect to "conciliation and arbitration". At the Constitutional Conventions where this provision of the draft Constitution was discussed, the power was understood to involve a power to "fix the rate of wages" or to make an award.[22] That is also the particular meaning that Isaacs and Rich JJ attributed to the expression "conciliation and arbitration", as can be apprehended from the full passage quoted above.

[29] That is not to say that the Queensland Industrial Commission does not perform judicial and *quasi*-judicial functions. Commissioner Hartigan was not engaged in a proceeding that required her to create new rights. To use the words of Isaacs and Rich JJ, she was "concerned with the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist".[23] That was so even though the powers that she was exercising might be described in strict legal terms as the arbitration power conferred upon the Commission by s 142 of the Act.

[30] It is unnecessary to consider the other cases cited for the appellant's proposition.[24] None of them bear it out.

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20 Appellant's Outline of Submissions at [7]; *Waterside Workers' Federation of Australia v JW Alexander Ltd*, supra at 464 per Isaacs and Rich JJ.

21 Supra.

22 *Cf* Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (LexisNexis Butterworths Australia, 1st ed, 1901) at 647.

23 *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 463.

24 *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (Kiama Aged Care Centre Case)* [2021] FCA 920; *Basic Wage Inquiry 1959* (1959) 91 CAR 680; *Coal & Allied Operations Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Australia* (1997) 73 IR 311; *870/97 S Print P3402* (*Construction, Forestry, Mining and Energy Union and A Tech Carpentry Service Pty Ltd and others)* [1997] AIRC 1413; *Construction, Forestry, Mining & Energy Union v A Tech Carpentry Service Pty Ltd* (1996) 71 IR 353; *Construction, Forestry, Mining and Energy Union v Ostwald Bros Pty Ltd* [2012] FWA 2484; *O'Connor v Setka* [2020] FCAFC 195; *Queensland Public Service Union of Employees v Queensland Medical Laboratories* (2001) 166 QGIG 64; *R v Aird; Ex parte Australian Workers' Union* (1973) 129 CLR 654; *Ramsay v Menso* [2017] FCCA 1416; *Ramsay v Menso* (2018)

[31] The appellant moved the Commission to make orders declaring the invalidity of the entry permits. For orthodox reasons, the appellant bore the burden of establishing the existence, or non-existence, of the facts that would justify the grant of the orders that it sought.

[32] Commissioner Hartigan found that the appellant had failed to prove that there were no workers on the site who were eligible to be members of the Union pursuant to the FEDFA Rule, that having been a live issue between the parties.[25] Commissioner Hartigan also found that there were relevant workers on site because some of the workers were eligible to be members of the Union by virtue of the Terrazzo Rule.[26] On that footing she dismissed the application. Even if her conclusion about the Terrazzo Rule was wrong, the failure by the appellant to establish the non-application of the FEDFA Rule meant that it had failed to prove a fact necessary to support the orders that it sought.

[33] The appellant relied upon the evidential burden of proof that s 144(2) of the Act places upon a defendant charged with the offence of refusing or delaying a person's entry into a workplace in reliance upon an entry permit. That provision cannot assist. It is concerned with a criminal prosecution, in which the whole of the burden of proof lies upon the party asserting a legal conclusion and it merely requires a defendant, who wishes to make an issue about the existence of a reasonable excuse for doing the act charged, to raise that issue in the evidence. The provision is concerned with the evidential burden borne by a defendant, not the legal burden of proof. The present appeal does not concern the evidential burden of proof; it concerns the legal burden of proof.

[34] The appellant also argued (faintly) that if the Commissioner thought that the evidence was insufficient on a particular point, she should have asked for more evidence. That submission is misconceived. In a proceeding in which parties to an adversarial proceed have prepared for a three-day trial at which they are represented by counsel and solicitors with expertise in the field, it is impossible to accept that the presiding judicial officer has any obligation to shore up the deficient case of one of the parties. A judicial officer who attempted to do so might well be regarded as biased.

[35] These conclusions are enough to determine this appeal. The appellant invited the Court also to determine the correctness of President Davis' interpretation of the Terrazzo Rule. There are two reasons why I would decline to do so.

[36] First, a decision on the question is unnecessary.

[37] Second, the same issue was considered and answered in the same way by the Full Federal Court in *Rescrete Industries Pty Ltd v Jones*.[27] It is arguable that that decision proceeded upon a different basis and that it might be distinguished. If not, in order to determine that issue in favour of the appellant, it would require this

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260 FCR 506; *Rescrete Industries Pty Ltd v Jones* (1998) 86 IR 269; *Regional Express Holdings Limited v Australian Federation of Air Pilots* (2017) 262 CLR 456; *Seiffert v Commissioner of Police* [2021] QCA 170.

25 *Enco Precast Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union* [2020] QIRC 188 at [248], [298].

26 Ibid at [213]-[215], [297].

27 (1998) 86 IR 269.

Court to conclude that the decision was plainly wrong. It would not be appropriate to venture upon that challenge in a case in which it is unnecessary to decide the point.

[38] For these reasons, I would dismiss this proceeding with costs.[28]

[39] **BOND JA:** I agree with the reasons for judgment of Sofronoff P and with the order proposed by his Honour.

[40] **BROWN J:** I have reviewed and agree with the reasons of Sofronoff P for dismissing the present appeal. Given President Sofronoff's conclusion, the present case is not the appropriate occasion upon which this court should determine whether or not President Davis' interpretation of the "Terrazzo Rule" was correct.

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[28] There was a technical point identified by the parties as to the competence of the form in which this matter was brought before the Court of Appeal. Neither party contends that anything of substance depends upon this issue and it can be disregarded.