

# Washington v Hadgkiss [2008] FCA 28 (29 January 2008)

Last Updated: 30 January 2008

FEDERAL COURT OF AUSTRALIA

Washington v Hadgkiss [\[2008\] FCA 28](#)

**INDUSTRIAL RELATIONS** – Australian Building and Construction Industry Commission investigation into alleged breach of s 816 of [Workplace Relations Act 1996](#) (Cth) – whether investigation tainted by improper purpose – whether improper purpose the substantial purpose of investigation – "substantial purpose" test – inference of improper purpose

**Held:** application dismissed – no improper purpose

[Workplace Relations Act 1996](#) (Cth) ss 4, 816

[Building and Construction Industry Improvement Act 2005](#) (Cth) ss 52, 53, Pt 5

*Jones v Dunkel* [\[1959\] HCA 8](#); (1959) 101 CLR 298, considered

*Industrial Equity Ltd v Deputy Commissioner of Taxation* [\[1990\] HCA 46](#); (1990) 170 CLR 649, applied

*The Wilderness Society Inc v Turnbull, Minister for the Environment and Water Resources* [\[2007\] FCAFC 175](#), applied

*Thompson v The Council of the Municipality of Randwick Corporation* [\[1950\] HCA 33](#); (1950) 81 CLR 87, applied

**NOEL WASHINGTON, JOHN SETKA, DAVID MIER AND IVAN BALTA v  
NIGEL HADGKISS, DEPUTY AUSTRALIAN BUILDING AND  
CONSTRUCTION COMMISSIONER**

**VID 1051 OF 2007**

**MARSHALL J  
29 JANUARY 2008  
MELBOURNE**

**IN THE FEDERAL COURT OF AUSTRALIA  
VICTORIA DISTRICT REGISTRY**

**VID 1051 OF 2007**

**BETWEEN: NOEL WASHINGTON  
First Applicant**

**JOHN SETKA  
Second Applicant**

**DAVID MIER  
Third Applicant**

**IVAN BALTA  
Fourth Applicant**

**AND: NIGEL HADGKISS, DEPUTY AUSTRALIAN  
BUILDING AND CONSTRUCTION COMMISSIONER  
Respondent**

**JUDGE: MARSHALL J**

**DATE OF ORDER: 29 JANUARY 2008**

**WHERE MADE: MELBOURNE**

**THE COURT ORDERS THAT:**

1. The application is dismissed.
2. The applicants pay the respondent's costs of the proceeding.

Note: Settlement and entry of orders is dealt with in Order 36 of the [Federal Court Rules](#).

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**AND: NIGEL HADGKISS, DEPUTY AUSTRALIAN**  
**BUILDING AND CONSTRUCTION COMMISSIONER**  
**Respondent**  
**JUDGE: MARSHALL J**  
**DATE: 29 JANUARY 2008**  
**PLACE: MELBOURNE**

## **REASONS FOR JUDGMENT**

1 The applicants are officials employed by unions engaged in the building and construction industry. The respondent is the Deputy Commissioner of the Australian Building and Construction Commission ("the ABCC"). The ABCC has commenced an investigation into alleged contraventions of [s 816](#) of the [Workplace Relations Act 1996](#) (Cth) ("the [WR Act](#)"), that being one of the functions conferred on it by the [Building and Construction Industry Improvement Act 2005](#) (Cth) ("the [BCII Act](#)").

2 [Section 816](#) of the [WR Act](#) provides:

*A person who:*

*(a) threatens, intimidates or coerces another person; or*

*(b) prejudices another person;*

*because the other person:*

*(c) provided, or proposed to provide, information to the Commission;*

*(d) produced, or proposed to produce, documents to the Commission; or*

*(e) appeared, or proposed to appear, as a witness before the Commission;*

*is guilty of an offence punishable on conviction by imprisonment for not more than 12 months.*

3 Under [s 4](#) of the [WR Act](#), "Commission" means the Australian Industrial Relations Commission ("the AIRC").

4 The issue arising for determination is whether the investigation is being conducted for a purpose not permitted by [s 52](#) of the [BCII Act](#).

### **The legislative context**

5 [Section 52\(1\)](#) of the [BCII Act](#) provides, so far as is material:

*(1) If the ABC Commissioner believes on reasonable grounds that a person:*

*(a) has information or documents relevant to an investigation; or*

*(b) is capable of giving evidence that is relevant to an investigation;*

*the ABC Commissioner may, by written notice given to the person, require the person:*

...

*(e) to attend before the ABC Commissioner, or an assistant, at the time and place specified in the notice, and answer questions relevant to the investigation.*

6 Under [s 52\(6\)\(b\)\(iii\)](#) of the [BCII Act](#), if a person, who has been given a notice under [s 52\(1\)](#), fails to attend to answer questions at the time and place specified in the notice, that person is subject to a penalty of six months imprisonment. The same applies to a person who fails to answer questions relevant to the investigation while attending as required by the notice; see [s 52\(6\)\(v\)](#).

7 An investigation is defined by [s 52\(8\)](#) to mean: "an investigation by the ABC Commissioner into a contravention, by a building industry participant, of a designated building law."

8 "Building industry participant" includes a union official in the building and construction industry and "designated building law" includes the [WR Act](#); see [s 4](#).

9 Under [s 53](#), a person is not excused from answering a question on the ground that the answer might tend to incriminate that person. However, such an answer, or information obtained as a consequence of it being given, is not admissible in evidence against the person in proceedings under the [WR Act](#).

### **The investigation**

10 On 26 February 2007, Ms Melissa Martino, an inspector employed by the ABCC commenced a proceeding in the AIRC seeking the revocation of a permit held by Mr Adrian McLoughlin ("the McLoughlin proceeding"). The permit enabled Mr McLoughlin to enter and inspect certain premises in accordance with [Pt 15](#) of the [WR Act](#).

11 In the AIRC proceeding, Ms Martino filed witness statements of Craig Peterson and Stephen Broadhead on 4 April 2007. Mr Peterson and Mr Broadhead are each employed in a managerial capacity by a construction company called Bovis Lend Lease Pty Ltd ("Bovis").

12 The ABCC has raised an allegation contained in a notice sent to the first applicant, Mr Washington, to answer questions relevant to an investigation undertaken by it (being the investigation the subject of this matter) that the second applicant, Mr Setka, engaged in threatening, intimidating and prejudicial conduct towards Mr Peterson. The conduct was said to have occurred at a barbecue at Docklands Park on 23 May 2007 and to consist of derogatory comments made about Mr Peterson and also by Mr Setka including a direction to those at the barbecue to call Mr Peterson, "Lassie". The purported reason for the alleged conduct was that Mr Peterson had provided information to the AIRC and proposed to appear as a witness before it in the McLoughlin proceeding.

13 The ABCC has also raised an allegation that, on 20 June 2007, at a building site at 500 Collins Street, Melbourne, Mr Setka and/or Mr Washington and the third applicant, Mr Mier, threatened, intimidated or prejudiced Mr Peterson and Mr Broadhead by distributing a flyer which contained derogatory comments about them allegedly because they each provided information to the AIRC and each proposed to appear as a witness in the McLoughlin proceeding.

14 On 10 and 11 July 2007 respectively, Mr Broadhead and Mr Peterson gave evidence in the McLoughlin proceeding in the AIRC before Watson SDP.

15 In a decision published on 29 August 2007, in *Re Australian Building and Construction Commission* [2007] AIRC 717 at [233], Watson SDP ordered the suspension of Mr McLoughlin's permit until 31 October 2007 and ordered him in the interim to:

*...undertake appropriate training about the rights and responsibilities of a permit holder under [Part 15](#) of the Act, and the relationship of those rights and responsibilities with entry rights under the Victorian OHS Act and appropriate legislative means of challenging allegedly unreasonable requests on behalf of occupiers.*

16 The ABCC has raised further allegations that on 6 September 2007, outside the Yarra Arts site, Mr Setka threatened, intimidated or prejudiced Messrs Peterson and Broadhead allegedly because each of them had provided information to the AIRC and appeared as a witness in the McLoughlin proceeding. It is alleged that Mr Setka made threats of violence to Mr Peterson and assaulted Mr Broadhead.

17 By letter dated 6 September 2007, Mr Warren Cruse, an investigator employed by the ABCC, wrote to Mr Washington, requesting that he attend for an interview "in furtherance to" an investigation by the ABCC into "a suspected contravention of [section 816](#) of the [Workplace Relations Act 1996](#)".

18 On 8 October 2007, the ABCC served a notice on Mr Washington requiring him to answer questions at an investigation. The notice was dated 28 September 2007. The investigation was said to concern suspected contraventions of [s 816](#) of the [WR Act](#) by Mr Setka and Mr McLoughlin at four named construction sites.

19 After correspondence between the ABCC and the legal officer of Mr Washington's union, the Construction Forestry Mining and Energy Union ("CFMEU"), the ABCC, by letter dated 22 October 2007, withdrew the notice dated 28 September 2007 directed to Mr Washington.

20 On 30 October 2007, the ABCC served a further notice on Mr Washington dated 29 October 2007. It differed from the 28 September 2007 notice in the following material respects:

- only 3 construction sites were listed;
- Mr Washington and Mr Mier were now also under investigation in respect of the alleged breaches of the [WR Act](#);

- Mr McLoughlin was no longer subject to the investigation;
- the suspected contraventions were particularised as set out at [12], [13], [16] and [17] above in respect of the events of 23 May 2007, 20 June 2007 and 6 September 2007 (twice).

### **ABCC complaints about Mr Setka**

21 On 15 August 2007, the respondent, Mr Hadgkiss, wrote to the Australian Council of Trade Unions ("ACTU") concerning the conduct of Mr Setka on 10 August 2007 towards two ABCC inspectors who attended the CFMEU office to collect documents. The letter alleged that Mr Setka had harassed and intimidated the officers, and requested an assurance that such behaviour was not endorsed by the ACTU, and that Mr Setka would be counselled in relation to it.

22 On 20 September 2007, Mr Hadgkiss again wrote to the ACTU. He referred to his previous letter of 15 August 2007 and attached an article from the "Herald Sun" newspaper dated 20 September 2007 concerning recent alleged conduct by Mr Setka. The article referred to a matter the subject of the investigation, stating: "The latest incident on September 6, involved an alleged assault on Steve Broadhead, a manager for developer Bovis Lend Lease."

23 On 15 October 2007, Mr Jeff Lawrence, the Secretary of the ACTU, wrote to Mr Hadgkiss saying that he had referred his correspondence to Mr Noonan, the National Secretary of the CFMEU's Construction Division and had discussed the matter with him. The letter concluded:

*I am advised that it is in the hands of the Victoria Police. I am confident they will deal with it appropriately.*

*I trust that you will agree that the Police investigation should be allowed to run its course.*

24 On 1 November 2007, Mr Hadgkiss again wrote to Mr Lawrence. He agreed that the conduct of Mr Setka "as referred to in the Herald Sun article" is a matter most properly dealt with by the Victoria Police. However, Mr Hadgkiss was concerned that the matters alleged against Mr Setka on 10 August 2007 had not been addressed.

### **The notices to Mr Balta**

25 The fourth applicant, Mr Balta, also received a notice dated 28 September 2007 from the ABCC. It was in materially identical terms to the 28 September 2007 notice sent to Mr Washington.

26 Mr Balta also received a second notice dated 29 October 2007. In that notice the suspected contravention was confined to the alleged events of 6 September 2007. The only building industry participant the subject of the investigation was Mr Setka and the only site listed was the Yarra Arts site.

### **The improper purpose allegation**

27 On 13 November 2007, the CFMEU in-house solicitor, Mr Chris Gamble, wrote to Mr Hadgkiss with reference to the notice dated 29 October 2007 served on Mr Washington. Amongst other things the letter said:

*The new notice now discloses that Mr Washington was himself being investigated as a possible contravener of [s816](#) of the [Workplace Relations Act 1996](#), and specifies his suspected contravention. At the same time, the new notice no longer refers to Adrian McLoughlin who was named as a suspected contravenor in the earlier notice.*

*These changes give rise to a clear apprehension that your investigation is tainted by improper behaviour and an improper purpose.*

...

*The improper purpose is constituted by the misuse of the investigation process to target union officials suspected of speaking out against the ABCC. This is exemplified by the "flyer" attached to the new notice and marked "A". On its face that flyer complains of voluntary cooperation with the ABCC and makes no mention of the matters listed in [s816](#), namely, provision of information to the AIRC or appearance as a witness before the AIRC. It could not constitute a breach of [s816](#).*

28 In a reply letter dated 15 November 2007, Ms Janine Drennan, an in-house lawyer with the ABCC, said that the subject matter of Mr Washington's evidence relates to three specific dates which do not concern Mr McLoughlin. The letter also stated that: "it is **now** suspected that Mr Washington may be involved in suspected contraventions of [s816](#) of the [WR Act](#) on 20 June 2007." (Emphasis added.) The letter also stated that:

*...whether distribution of the flyer entitled "Shame File Facts Education (1)" may constitute a breach of [s816](#) of the [WR Act](#) is a matter that cannot be determined simply by an examination of the flyer. Any assessment must have regard to the entire relevant factual matrix.*

### **The flyer**

29 The flyer is an appendix to the notice to Mr Washington dated 29 October 2007. It refers to Mr Peterson voluntarily going to the "Building Industry Taskforce" (a prior name for what is now the ABCC). It also refers to Mr Peterson as a "no good give up Dog".

30 The flyer contains a photo of a border collie resembling the television show dog called "Lassie" (to those old enough to remember). It describes Mr Peterson as "Lassie" and a "disgrace to the Building Industry" amongst other things.

31 On the top right hand corner of the flyer there is a boxed section darker in colour than most of the document and headed "COMING SOON: (MORE ON CRAIG LASSIE PETERSON)". It then contains three dot points, the first of which says: "OTHER BUILDING INDUSTRY GIVE UP DOGS. Their statements and denials in full."

### **Is the investigation being conducted for an improper or extraneous purpose?**

32 The ABCC's investigation, the subject of this proceeding, is one into suspected contraventions of [s 816](#) of the [WR Act](#). Mr Setka, Mr Washington and Mr Mier are named as persons subject to the investigation. Mr Washington and Mr Balta have been served with notices to attend at ABCC premises to be questioned concerning the investigation.

33 Counsel for the applicants contend that Mr Hadgkiss's principal concern in conducting the investigation is the conduct of union officials in relation to the ABCC. They submit that that is the substantial concern of the investigation and not the alleged breaches of [s 816](#) of the [WR Act](#).

34 Counsel point to the correspondence from Mr Hadgkiss to the ACTU complaining about Mr Setka's conduct and to the reference in the "Herald Sun" to an alleged incident the subject of the investigation. Counsel contend that the difference between the wording of the initial notices to Mr Washington and Mr Balta and the later ones shows that:

*...the real purpose of the investigation, [and] substantial purpose of the investigation, is not to look out for contraventions of [s 816](#) but rather to look for conduct which was obstructive of the ABCC carrying out its functions.*

35 Counsel also contend that Mr Hadgkiss's failure to give evidence in regard to the changes to the investigation is significant. Counsel submitted that the inference of an improper purpose raised, so it is said, by the changes to the investigation are not rebutted by Mr Hadgkiss and therefore, the inference should be accepted by the Court; see *Jones v Dunkel* [[1959](#)] [HCA 8](#); (1959) 101 CLR 298. Counsel submit it was not sufficient for the ABCC's solicitor, through the admission of her letter asserting a changed position, to rebut the inference without Mr Hadgkiss deposing to the changed position himself.

36 Counsel also submit that there is nothing on the face of the flyer that would support an allegation of breach of [s 816](#). Counsel suggested that the better construction of the flyer was that it admonished people who co-operated with the ABCC rather than those who gave evidence or intended to give evidence to the AIRC, as the flyer says nothing about AIRC proceedings. They contend that a substantial purpose of the investigation is to investigate lack of co-operation with the ABCC.

### **Consideration**

37 As Gaudron J said in *Industrial Equity Ltd v Deputy Commissioner of Taxation* [[1990](#)] [HCA 46](#); (1990) 170 CLR 649 at 672:

*An improper purpose will not lightly be inferred and, by application of a presumption of regularity, will only be inferred if the evidence cannot be reconciled with the proper exercise of the power...*

38 Justice Tamberlin (with whom Branson and Finn JJ agreed on that issue) applied that approach in *The Wilderness Society Inc v Turnbull, Minister for the Environment*

and *Water Resources* [2007] FCAFC 175 at [126] to [127]. His Honour also referred to "the test of substantiality necessary to establish improper purpose" referred to in *Thompson v The Council of the Municipality of Randwick Corporation* [1950] HCA 33; (1950) 81 CLR 87 at 106. In *Thompson* at 106, Williams, Webb and Kitto JJ said that a purpose is an "ulterior" one:

*...if such a purpose is a substantial purpose in the sense that no attempt would have been made to resume this land if it had not been desired to reduce the cost of the new road by the profit arising from its re-sale.*

39 To meet the *Thompson* test of substantiality, the applicants must prove that the investigation by the ABCC into alleged contraventions of s 816 of the [WR Act](#) would not have been commenced had it not been for the desire to question union officials about their lack of co-operation or encouraging lack of co-operation with the ABCC.

40 The evidence can be reconciled with the proper exercise of power. [Section 52](#) of the [BCII Act](#) has been engaged because Mr Hadgkiss is investigating an alleged contravention of a designated building law by building industry participants. The particulars given in the notices to attend for questioning refer to alleged breaches of s 816. It is not to the point that the allegations as particularised may be weak or that the flyer relied upon may be open to an explanation not related to s 816.

41 Further the test of substantiality is not met. The evidence does not support the proposition that the investigation would not have occurred but for a desire to question union officials about their attitude to co-operation with the ABCC. The 29 October 2007 notice to Mr Washington and Mr Balta make serious allegations about the conduct of Mr Setka with respect to Mr Peterson and Mr Broadhead which seek to connect that conduct with their provision of information to the AIRC and appearances before it.

42 The matter in respect of which Mr Washington is the subject of allegations, on the other hand, appears to be more trivial. However, its reference to Mr Peterson and Mr Broadhead proximate to their AIRC appearances may give rise to a legitimate suspicion of connection to co-operation with the AIRC rather than the ABCC.

43 The evidence of Mr Hadgkiss's concern about Mr Setka's alleged conduct on 10 August 2007, augmented by his reference to Mr Setka's alleged conduct on 6 September 2007 is insufficient to show that the investigation is substantially about discouraging co-operation with the ABCC. The point of Mr Hadgkiss's complaint about the 10 August 2007 matter is not lack of co-operation but lack of respect and dignity towards fellow human beings who are performing their duties as employees.

44 The applicants have not discharged their onus of establishing that the investigation was commenced for a purpose other than a purpose contained in the [BCII Act](#) for which the power to investigate is confined.

45 A person who is questioned by the ABCC is not required to answer questions which are irrelevant to the investigation. In the event that questioning of a person subject to a notice to attend from the ABCC strays into an extraneous area, an objection could be promptly taken to that line of inquiry. If it transpires from the

questioning in the investigation that the investigation is not being conducted for its stated purpose it remains open to the building participant concerned to apply for injunctive relief to this Court at that stage.

46 In considering this matter I have been concerned about the change in focus of matters the subject of the two notices directed to Mr Washington and Mr Balta. I am satisfied that the ABCC re-focused its attention on the precision required for its investigation. I am content to accept that assurance, via Ms Drennan, however it would have been preferable had Mr Hadgkiss himself stated, on affidavit, the reason for the changes. That step may have obviated the need for this proceeding to have been heard to finality.

### **Order**

47 Having regard to the foregoing it is appropriate to order as follows:

1. The application is dismissed.
2. The applicants pay the respondent's costs of the proceeding.

I certify that the preceding forty-seven (47) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Marshall.

Associate:

Dated: 29 January 2008

Counsel for the Applicants: Mr H Borenstein SC with Mr C Dowling.

Solicitor for the Applicants: Slater & Gordon.

Counsel for the Respondent: Mr A Southall QC with Mr J Bourke.

Solicitor for the Respondent: Australian Government Solicitor.

Date of Hearing: 11 December 2007.

Date of Judgment: 29 January 2008.

