

AUSTRALIA / JUDGMENT

A.M.I.E.U. v. Meneling Station Pty Ltd [1987] FCA 4

COURT

IN THE FEDERAL COURT OF AUSTRALIA)

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CATCHWORDS

INDUSTRIAL LAW - Breach of Award - Provision for inspection of time and wages record - Authorisation in writing by General Secretary to Union official - Reasonable notice of demand - Whether demand may be a general demand for all employees or a specific demand of a particular employee - Suspicion of breach necessary as condition precedent to granting of such authorisation - Whether strict compliance required - Whether multiple breaches have arisen out of a course of conduct - Whether breaches shall be treated as a single breach.

Conciliation and Arbitration Act 1904 ss. 42A, 119, 119(1A)

Northern Territory Meat Processing Award 1984 Clause 23(c)

Gapes v Commercial Bank of Australia Limited (1979) 27 ALR 87

The Australian Saddlery Leather Sail Canvas Tanning Leather Dressing and Allied Workers Employees Federation v S. Goldberg Pty Ltd (1940) 42 CAR 232

Marbut Pty Ltd v Amalgamated Engineering Union (1934) 33 CAR 558

Treharne v Geo. McEwin and Son Pty Ltd (1982) 44 ALR 543

The King v Bates (1911) 1 KB 964

R v Angel (1968) 2 All ER 607

Briginshaw v Briginshaw (1938) 60 CLR 336

Federated Carters and Drivers' Industrial Union of Australia v

McKay (1922) 30 CLR 159

Quinn v Martin (1977) 31 FLR 25

THE AUSTRALASTAN MEAT INDUSTRY EMPLOYEES UNION v MENELING STATION PTY LIMITED

19/1986 ~

Evatt J

Sydney

14 January 1987

IN THE FEDERAL COURT OF AUSTRALIA)
NEW SOUTH WALES DISTRICT REGISTRY } No. 9 of 1986
INDUSTRIAL DIVISION }
BETWEEN: AUSTRALASTIAN MEAT INDUSTRY
EMPLOYEES UNION
Applicant
AND: MENELING STATION PTY
LIMITED
Respondent
CORAM: Evatt J
DATE : 14 January 1987
PLACE: Sydney
MINUTES OF ORDER

THE COURT ORDERS
THAT:

1. Pursuant to s.119 of the Conciliation and Arbitration Act,
pecuniary penalties be imposed on the respondent of
(a) \$750 for a breach of Clause 23(c) of the Northern
Territory Meat Processing Award 1984 on 16 April 1986;
(b) \$750 for a breach of Clause 23(c) of the Northern
Territory Meat Processing Award 1984 on 20 May 1986;
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(c) \$750 for a breach of Clause 23(c) of the Northern
Territory Meat Processing Award 1984 on 30 May 1986; and
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(d) 2750 for a breach of Clause 22(c) of the Northern
Territory Meat Processing Award 1984 on 2 June 1986.
The said penalties to be paid to the Australasian Meat
Industry Employees Union. :
Note: Settlement and entry of orders is dealt with in Order 36
of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA)
NEW SOUTH WALES DISTRICT REGISTRY) No. 9 of 1986
INDUSTRIAL DIVISION)
BETWEEN: AUSTRALASIAN MEAT INDUSTRY
EMPLOYEES UNION
Applicant
Head
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MENELING STATION PTY
LIMITED
Respondent
CORAM Evatt J
DATE : 14 January 1987
PLACE Sydney

REASONS FOR JUDGMENT

By application dated 17. July 1986, the Australasian Meat Industry Employees Union (the organization), an organization registered under the Conciliation and Arbitration Act 1904 (the Act), sought orders that a penalty be imposed by the Court on Meneling Station Pty Limited for a breach or non-observance of

the Northern Territory Meat Processing Award 1984, as varied,
(the Award).

Clause 2 of the Award provides that the Award shall be binding on the organization, its officers and its members and on the Meat and Allied Trades Federation of Australia and its members (amongst other employers) in respect of their employees employed

in meat processing establishments in the Northern Territory.

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It is conceded by the respondent employer that the organization is an organization of employees registered under the Act and that the respondent is and was at all material times a member of the

Meat and Allied Trades Federation of Australia.

The application herein was amended by leave of the Court on 18 August 1986. The amended application particularised four breaches or non-observances of Clause 23(c) of the Award on 16 April 1986, 20 May 1986, 30 May 1986 and 2 June 1986. Each said particular alleged that on the respective dates the "respondent failed on demand on reasonable notice to produce for inspection roster and time and wages records to an official of the applicant (organization) authorised in writing to inspect such record by

the General Secretary thereof".

Although Clause 23(c) is the only Clause that is alleged to have been breached, it is necessary to set out other paragraphs of Clause 23 as it has been submitted by the respondent that in order that the proper construction of paragraph (c) of the Clause may be seen, reference should be made to other particular

paragraphs. Accordingly, Clause 23 is set out in full:

23 - TIME AND WAGES RECORD

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- (a) (i) Except where mechanical timing devices are used for the purpose of recording starting times and finishing times of employees, or where time and wages records are maintained on a computer or microfilm system, each employer shall provide a time-book or time-sheet in which shall be entered

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the employees name and classification. The employer shall cause to be entered each day in the time-book or time-sheet each days starting and finishing times, the times allowed for meals, each days hours of work of each employee and the wages received each week (including overtime and other payments). Such entries shall at least once a week be certified by the employee as a true record of the time worked if he is so satisfied and shall be vouched for by the signature of the employer or his representative or manager.

It shall be a breach of this Award if any person knowingly makes, certifies or vouches for a false entry in such time-book or time-sheet.

(ii) Where mechanical timing devices are used for the purposes of recording starting and finishing times of employees, each employer shall keep a record from which can be readily ascertained the name and classification of each employee, the hours worked each day and the wages received each week (including overtime and other payments).

(iii) Where time and wages records are maintained on microfilm or on a computer system of recording, such microfilm or computer record shall be capable of producing records from which it can be readily ascertained the name and classification of each employee, the hours worked each week and

the wages received each week (including overtime and other payments).

The time-book or time-sheet shall conform to the specimen contained within this clause.

The roster and time and wages record shall on demand upon reasonable notice be produced by the employer for inspection at the place where the employer carries on business and employs the employee whose time has been recorded or at the employer's election at the employer's head office at any time between 10.00am and 4.00pm Monday to Thursday inclusive and between 10.00am and 1.00pm on Friday, to an official of The Australasian Meat Industry Employees Union who has been authorised, in writing, to inspect it by the General Secretary or the Secretary of a State branch of the said Union or to an official of the Meat and Allied Trades Federation of Australia who has been authorised, in writing to inspect it by the General Secretary or the Secretary of a State division of the said Federation.

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An inspection shall not be demanded unless the Secretary of the Union or Federation or the District Secretary or

organizer of any division of the Union or Federation suspects that a breach of this Award is being or has been committed.

Only one demand for such inspection may be made in any one fortnight at the same establishment and no inspection shall be demanded on Saturday.

Provided that one further demand may be made within a fortnight of the previous demand if the Secretary, District Secretary or organizer certifies in writing that the reason for such further demand is that he suspects that a breach of this Award is being or has been committed and that such certificate is produced to and a copy thereof handed to the employer or his

representative at the time of demanding such further inspection.

The officer making an inspection shall be entitled to take a copy of entries in the time-book, time-sheet or roster relating to the suspected breach of this Award.

Time-books, time-sheets or mechanical records shall be

kept for at least 12 months after they have been completed.

(i) Each employer shall cause to be maintained in respect of each employee during the period of employment with the employer a record containing the following information:

(a) The full name and address of the employee.

(b) The date of commencement and the date of termination of the employee's service with the employer.

(c) The date of commencement and the date of termination of any sick leave taken by the employee during his service with the employer.

(ad) The date of commencement and the date of termination of any period of annual leave taken by the employee during his service with the employer.

(e) The date of commencement and the date of termination of any period of long service leave taken by the employee during his service with the employer.

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(ii) Such a record of each employee shall on demand upon reasonable notice be produced by the employer for inspection at the place where the employer carries on business or at the employer's head office at any time between 10.00am and 4.00pm Monday to Thursday inclusive and between 10.00am and 1.00pm on Friday to an official of The Australasian Meat Industry Employees Union who has been authorised in writing to inspect it by the General Secretary or the Secretary of a State branch of the said Union or to an official of the Meat and Allied Trades Federation of Australia who has been authorised in writing to inspect it by the Federal Secretary or the Secretary of a State division of the said Federation but such inspection shall not be demanded unless the Secretary of the Union or Federation or the District Secretary or organiser of any division of the Union or Federation suspects that a breach of

this Award is being or has been committed. (iii) The official making an inspection shall be entitled to take a copy of entries in such record

of any employee relating to the suspected breach of this Award.

(iv) Only one demand for such inspection may be made in any one period of three months in respect of such record of any employee.

(v) Such record shall be retained by the employer for at least twelve months after the termination of the employment of the employee concerned.

In relation to paragraph (b), there is set out at the end of Clause 23 a pro-forma time and wage sheet headed WEEKLY ATTENDANCE, TIME AND WAGES SHEET, with columns making provision for date, employee's name, starting time, finishing time, time allowed for meals, ordinary hours worked, overtime hours worked, time worked during meal hours, payment ordinary time, overtime

payment, tea money etc on a dally basis with provision made for weekly totals for each column and deduction of tax.

It will be seen that Clause 25 of the Award may be relevant. particularly in respect of the functions carried out by an officer of the organization, a Trevor Raymond Surplice, the organiser for the Northern Territory attached to the Queensland

Branch of the organization. Clause 25 reads:

25 - UNION OFFICIALS AND RIGHT OF ENTRY

A duly accredited representative of The Australasian Meat Industry Employees Union shall have the right to enter employers' premises during the meal hour for the purpose of

interviewing employees on legitimate Union business on the following conditions:

(a) that they produce their authority to the manager or such other person as may be appointed by the employer;

- (b) that they interview employees only at the place where they are taking their meal;
- (c) that not more than two representatives visit the premises at any one time;
- (d) that no more than two representatives visit the same premises more than once in a week;
and
- (e) that if any employer alleges that a representative is unduly interfering with his business or is creating disaffection amongst his employees or is offensive in his methods, or is committing a breach of any of the previous conditions, such employer may refuse the right

of entry but the representative shall have the right to bring such refusal to the Board of Reference.

Affidavit evidence was filed on behalf of the applicant, the deponents to such affidavits being Jack O'Toole, the Federal Secretary of the organization; Patrick Roughan, the National Organiser of the said organization; Leslie Day, the Queensland Branch Secretary of the organization and the said Mr Surplice. All deponents who were requested by the respondent to be in attendance for cross-examination gave oral evidence.

The respondent called no oral evidence but tendered copies of telexes and telegrams exchanged between the organization and the respondent company after the same had been called for by the respondent.

The following facts are, on the balance of probabilities, accepted (see *Gapes v Commercial Bank of Australia Limited* (1979) 27 ALR 87).

Mr O'Toole is and was at all relevant times the Federal Secretary of the organization. At this stage it is convenient to dispose of a submission put by the respondent in respect of an authorisation given by Mr O'Toole as Federal Secretary of the Organization to Mr Roughan. Clause 23(c) provides that such an

authority is to be in writing under the hand of "the General Secretary of the said Union".

It was argued by the respondent that the rules of the organization make no provision for a General Secretary so that

the purported authorisation by Mr O'Toole as Federal Secretary was a nullity.

This submission is rejected. The Award, in so far as it relates

to employees, is binding only on the organization, its officers and members (Clause 4). No other organization is mentioned in the Award. The particular Award was handed down in 1984 and at et a

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no relevant time did the certified rules of the organization contain any provision in respect to an office known as "the General Secretary". It is obvious, in my view, that the draftsman of Clause 23, when making reference to "the General Secretary", was referring to the office of the Secretary of the organization, that is that office as provided for in the rules. That office is in fact referred to in the rules as "the Federal Secretary", a fact which ought to have been known to the draftsman of Clause 23. One could be excused for inferring that Clause 23, or at least parts of it, has been copied from an award in respect of another organization where the Secretary of that organization is referred to as "the General Secretary". Clearly, in my view, the reference to "the General Secretary ... of the said Union" in paragraph (c) of Clause 23 is a reference to the person carrying out the duties of the Secretary of the

organization namely, the Federal Secretary of the organization.

The maxim "falsa demonstratio non nocet" applies.

It is accepted that in or about September/October 1984 Mr Roughan was appointed to a position known as National Organiser by the Federal Council of the organization. Such appointment was in accordance with the rules of the organization and was for a period of 12 months which could be extended by the Federal Executive being satisfied with the work performance of Mr Roughan. The rules do not provide for a so-called position of National Organiser but I am satisfied that the Federal Council

under the rules of the organization was empowered to appoint

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employees, including Mr Roughan, to perform certain nominated duties. The fact that the Council saw fit to call the holder of that position a National Organiser is, in my view, not a matter of consequence. The duties that he had to perform from time to time at the direction of the Federal Secretary were such that he, whilst carrying out those duties, was clearly an "official" of the organization within the meaning of that word in Clause 23(c) of the Award. In other words, he was the representative of the organization. There was no dispute that Mr Roughan's appointment to the said position of National Organiser was current at all relevant times.

At all relevant times Mr Surplice was an elected organiser of the Queensland Branch of the Organization for the area covering the Northern Territory of Australia. That Territory was, for the purpose of administration within the organization, attached to the Queensland Branch. As such an elected organizer, Mr Surplice, held office in the organization and under the rules of the organization was an "officer" of the Queensland Branch of the organization.

On 16 September 1985 Mr Day as the Queensland Branch Secretary of the Organization authorised Mr Trevor Raymond Surplice to act as a representative of the said organization for the purposes of certain Awards including the Northern Territory Meat Processing Award of 1984. That authorisation was current at all relevant times. I am satisfied on the evidence that the said

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authorisation to Mr Surplice was granted pursuant to 5.42A of the

Act. Relevant parts of that section read:

42A(1) CPower of officerd An officer of an organization authorized in writing by the secretary of the organization or of a branch of the organization to act under this sub-section may, at any time during working hours, but subject to any conditions provided by the relevant award, enter any premises in which work to which an award binding on the organization is applicable is being carried on, being premises specified in the authority, or premises occupied by an employer who is bound by the award and is specified in the authority, for the purpose of ensuring observance of the award, and may for that purpose inspect any work, books or documents and interview any employee, being a member or a person eligible to be a member of his organization, on those premises, but an officer so authorized shall not hinder or obstruct an employee in the performance of his work during working time.

42A(2) CEvidence of authorityJ If an officer of an organization proposing to enter, or being in or on, premises in pursuance of this section is required by the occupier or person in charge of the premises to produce evidence of his authority to that occupier or person, the officer is not entitled to enter or remain on the premises unless he produces to that occupier or other person the authority in writing referred to in sub-section (1).

42A(3) ... 42A(4) CDefinitionsJ In this section -

"officer", in relation to an organization, means a person holding an office in, or employed by, the organization or a branch of the organization;

"premises" includes any building, structure, mine, mine working, ship, vessel or place.

It is clear in my view that the draftsman of Clause 23 has used

the words "the officer" and "an official" as being synonymous. Of course s.43A(4) of the Act gives an extended definition to the word "officer". Note also that s.4 of the Act defines the word

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"office" as used in the Act.

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There is evidence which is accepted, that both Mr O'Toole as Federal Secretary of the organization and Mr Day as Queensland Branch Secretary of the organization at all relevant times suspected that a breach of the Award was being or had been

committed by the respondent. This question is referred to later

herein.

The manager/proprietor of the respondent company's abattoir at Batchelor in the Northern Territory was at all material times a Mr Robert Bright, whilst the respondent's foreman during this time was a Mr Glen Storer. The history leading up to the incidents in April, May and June of 1986 are as follows. The said Award was the first federal award covering operations in the Northern Territory which had been usually carried out by members of the applicant organization or covered by the said organization in other parts of Australia. Clause 33 of the Award - Payments by Results, had been amended following a decision of the Full Bench of the Industrial Commission in March 1986 which amendment prevailed during the killing season between April 1986 to about November 1986. Mr Roughan, in his capacity as National Organiser, had met up with Mr Bright in 1985 both at the abattoir at Batchelor and during court proceedings leading up to the handing down of the Award. I accept that Mr Bright had then been informed that Mr Roughan held the position known as National

Organiser of the organization and that he well understood that

that was Mr Roughan's position within the organization. I also

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accept that Mr Storer was also made aware, during 1985, that Mr

Roughan held that position within the organization.

Further it is accepted that, in or about November 1985, after some earlier refusal, Mr Bright had made available for inspection by Mr Roughan the time and wages records of employees of the respondent company during 1985 killing season.

On or about 12 November 1985 Mr O'Toole, as Federal Secretary,

issued an authorisation to Mr Roughan as follows:

AUTHORISATION I, Jack O'Toole, Federal Secretary of the Australasian Meat Industry Employees' Union, authorise Pat Roughan, an official of the Australasian Meat Industry Employees' Union, to inspect the time and wages records of all employees held by Meneling Station Pty Limited.

This authorisation is given under the Clause 23 of the Northern Territory Meat Processing Award 1984.

SIGNED: JACK O'TOOLE FEDERAL SECRETARY

As to the Alleged Breach on Wednesday 16 April 1986

It is accepted that Mr Roughan telephoned Meneling abattoir on 14 April 1986 and spoke with the abattoir foreman, Mr Glen Storer, as Mr Bright, the proprietor, was then away. Mr Roughan informed Mr Storer that he would be visiting the abattoir on Wednesday 16 April 1986 "to address Members and to look at wage and time records". On 16 April 1986 Mr Roughan spoke to employees of the respondent company in the lunch room at the abattoir. Following

that meeting Mr Roughan spoke to Mr Bright who had then arrived.

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Mr Bright said to Mr Roughan, "why should I allow your organization into my work when so far I have kept you out. Why should I make problems for myself by having this a union shed?"

No time and wages records were then produced by Mr Bright.

As_ to the Alleged Breach on 20 May 1986 It is accepted that on Saturday, 17 May 1986 Mr Roughan and Mr

Surplice travelled to Meneling abattoir when Mr Roughan spoke with Mr Storer and informed him that both he and Mr Surplice would be coming back past the abattoir the following Tuesday and that they would come in an inspect the time and wage records and speak to the employees of the respondent company. On Tuesday, 20 May 1986 both Mr Surplice and Mr Roughan attended at Meneling abattoir. Again Mr Storer informed them that Bobby (that is Mr Bright) was not there and that he could not let them see the "pbooks". He went on to say, "Bobby is the only one who has the right to show anyone the wage and time books. It would be worth my job to show them to you". No books or records were then produced and after addressing employees both Mr Surplice and Mr

Roughan departed.

As to the Alleged Breach on 30 May 1986

It is accepted that on Thursday 29 May 1986 Mr Roughan travelled from Sydney to Darwin and thence to Meneling abattoir where he

met a number of persons employed by the respondent and had

conversations with them. That evening on his return to Darwin he

rang Mr Bright and said,

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Bobby, it is Pat Roughan here. Trevor Surplice and I will be coming to Meneling tomorrow to see you and to inspect your

books. Is that alright?

Mr Bright said to Mr Roughan, Don't bring Trevor.

To which Mr Roughan replied,

Trevor is the Northern Territory Organiser and he will be present at any discussion I have with you.

On Friday 30 May 1986 Mr Surplice and Mr Roughan travelled to Meneling abattoir arriving at about 8.30am. Both met up with Mr

Bright when Mr Roughan stated,

Bobby, we are here at the request of the boning room personnel who are in dispute with you over your payment by results system. We had a meeting last night at which the boners and some of the boning room labourers nominated the union to negotiate a payment by results scheme on their

behalf. Mr Bright then said,

I have no employees on strike. The people you spoke to all quit their jobs. You most certainly do not represent the

people still working in the boning room.

It is accepted that Mr Roughan then stated,

I would like to look at your wage and time records.

To which Mr Bright replied,

I am not going to show them to you; if I show them to you it will only give you more information to use against me.

And added,

There are some areas of the Award that I am in breach of but I have reasons for this and I will give my reasons if you take me to Court. (Or words to that effect).

Adding,

I cannot afford to pay my workers the rates you have talked about.

As to the Alleged Breach on 2 June 1986

It is accepted that on Sunday evening, 1 June 1986, Mr Roughan telephoned Mr Bright at Meneling abattoir and said,

Bobby, am I right to come down Tuesday? Are you going to be there?

To which Mr Bright replied,

No, I won't be here. I have got to go out and buy stock.

Mr Roughan then stated,

It doesn't matter, I am still coming down to talk to the employees.

To which Mr Bright replied,

Well, if you are going to come down I am not going.

On Monday, 2 June 1986 Mr Roughan and Mr Surplice travelled to Meneling Station arriving at about 10.00am. Later during the lunch period Mr Roughan spoke to the respondent's employees after

which he spoke to Mr Bright briefly as follows,

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You're not going to show me those books, are you Bobby? To which Mr Bright replied, No.

The conversations alleged to have occurred between Mr Roughan and Mr Bright or Mr Storer other than that occurring on 14 April 1986

were corroborated by Mr Surplice.

It is further accepted that on each of the four occasions mentioned above Mr Roughan offered to show either Mr Bright or Mr Storer his authorization from Mr O'Toole given under Clause 23 of the Award.

Certain telexes between the Federal Secretary of the organization and Mr Bright and the solicitors for the applicant and the solicitors for the respondent dated 8 and 9 October 1986 were tendered by the applicant and admitted into evidence subject to objection by the respondent. These documents were accepted as relevant as to any penalty that the Court might see fit to impose

upon the respondent should the court be satisfied that a breach or breaches of the Award as alleged had occurred.

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The hearing of the applicant's application herein had been listed for hearing on 13 October 1986 prior to 8 October 1986.

On 8 October 1986 Mr O'Toole had telexed Mr Bright as follows:

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In the interests of avoiding next weeks legal proceedings please advise if you are prepared to permit inspection of

time and wages records forthwith either by Mr Trevor Surplice or Jack O'Toole.

That telex was replied to by the respondent as follows:

Received your telex. Mr Bright is unavailable. If matter

is urgent suggest you contact his lawyer (name of Solicitor and Company and telephone number stated).

On 8 October 1986 the applicant's solicitors wrote to the Sydney agents of the respondent's solicitors by facsimile transmission

in identical terms to those of Mr O'Toole's telex to Mr Bright of that date.

On 9 October 1986 the respondent's solicitors wrote by facsimile transmission to the applicant's solicitors as follows:

We refer to your letter dated 8th October 1986 faxed to our Sydney agents.

Our client instructs us to reply in the negative to the matters raised in your letter in the terms thereof.

Subsequently, a further letter dated 9 October 1986 was received by the applicant's solicitors from the respondent's solicitors as follows:

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We refer to your letter of 8th October 1986 and to our reply of 9th October 1986 and advise that we have now been able to

take more detailed instructions from our client and advise as follows:

1. Our client has at all times been willing to show your clients the time and wages records on appropriate compliance with clause 23 of the Award.

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In replying in "the negative" in our letter of 9th October 1986 it should be noted that such reply indicates that our client is deeply concerned to protect

its position in these proceedings which of course make serious allegations against it and indeed against Mr Bright.

3. The proceedings have been on foot since 17th July 1986 and as you are aware our client has at all times denied the allegations made against it and against Mr Bright.
4. The "negative" response in our letter should not be taken as a refusal to approach the litigation in a reasonable manner but should be seen as the only

alternative our client has at this stage having regard to the nature of the proceedings in particular:

- (1) That your client seeks a finding that our client has breached the Award; and
- (2) That your client seeks an order from the Court imposing a fine on our client.

We trust that this letter will help to clarify the position.

As stated earlier herein the respondent called no oral evidence nor was any explanation given to the Court as to the unavailability of Mr Bright or Mr Storer. Certain copies of telexes and telegrams were tendered at the request of the applicant by the respondent after the same had been called for by the respondent. These were a telegram from Mr O'Toole to Mr Bright sent on 11 November 1985 informing Mr Bright that Mr Roughan and Mr Surplice would be arriving at Meneling on 14 November 1985. An undated telex from Mr O'Toole to Mr Bright

sent before 14 November 1985 reads as follows:

As Federal Secretary of the Australasian Meat Industry Employees Union I suspect that breaches of the Northern Territory Meat Processing Award 1984 have been and continue to be committed at your establishment.. Pursuant to Clause 23

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of the Award I require you to produce at Meneling abattoir to Mr Pat Roughan the roster and time and wages records for all employees at Meneling abattoir at 10am on Thursday Nov 14. Mr Roughan is authorised by me in writing to inspect these documents. This visit will be in conjunction with request made yesterday 11 Nov 85 by telegram. Regards Jack O'Toole Federal Secretary. Sometime shortly before 23 April 1986 a telegram and a telex in identical terms were sent by Mr Bright to Mr O'Toole as Federal

Secretary of the applicant organization. Those messages read:

You are being advised pursuant to sub clause 33C (sic) of the Northern Territory Meat Processing Award 1984 that we intend to operate to a system of payment by result.

We intend to operate under this agreement as of the 23/4/1986.

Regards Robert Bright, Meneling Station Pty Ltd

Further two telex messages dated 7 August 1986 and 11 August 1986 referring to a proposed visit by Mr Roughan and Mr Surplice to Meneling Station were forwarded by Mr O'Toole to the respondent. The earlier message nominated 15 August 1986 as the date of the proposed visit for the purpose of inspecting time and wages records. The later telex of 11 August 1986 was to inform Mr Bright that the planned visit for 15 August was unsuitable to his representatives and asked for confirmation whether Wednesday 13

August or Monday 18 August would be a satisfactory day for such a visit. These two August telexes of course were subsequent to the

Gate of the application herein.

Counsel for the respondent submitted that as a penalty was being sought against the respondent the Court should only be satisfied

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that a breach of the Award had occurred if there were "strict proof" or "strict legal evidence" of such a breach. Counsel

relied heavily upon the judgments of Piper J in *The Australian*

Saddlery Leather Sail Canvas Tanning Leather Dressing and Allied

Workers Employees Federation v S Goldberg Pty Ltd (1940) 42 CAR

232 and Chief Judge Dethridge in *Marbut Pty Ltd v Amalgamated*

Engineering Union (1934) 33 CAR 558 where consideration is given

to the forerunner to s.42A of the Act (which is set out earlier herein). Both decisions express views that there should be strict compliance with the terms of the section of the Act or to Clauses of an Award giving right of entry to officials of organizations. These decisions of course are not binding upon this Court. It would appear from the reasons for judgment of

Piper J in *Goldberg's* case which concerned an application for an

alleged breach of an award under the forerunner to s.119 of the Act that His Honour may have considered the application on the assumption that the applicant carried the criminal onus of proof. The Full Court of this Court in *Gapes'* case (supra) has determined that the onus of proof borne by the applicant in an application under s.119 of the Act is a civil onus. Reference

was also made to *Treharne v Geo. McEwin and Son Pty Ltd* (1982) 44

ALR 543. Further, it should be noted that in the present case, the authority issued by Mr O'Toole to Mr Roughan, was issued under the Award and not under s.42A of the Act. Accordingly I am

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of the view that the decision of Piper J in *Goldberg's* case and

Dethridge CJ in Marbut's case do not assist in the determination of the present matter.

Further the respondent submitted that as a pecuniary penalty was being sought against the respondent the Court should consider the authority granted to Mr Roughan by the Federal Secretary of the organization in the same fashion as a Court would consider a search warrant, so that principles laid down in cases such as *The King v Bates* (1911) 1 KB 964 and *Rv Angel* (1968) 2 All ER 607 applied in respect thereto. I reject this submission. Such cases involved criminal matters and the heavy burden carried by the prosecutor supporting search warrants issued prior to prosecutions in criminal matters and actions taken pursuant to the issue of such warrants are not applicable to the authorising document issued to an official of an organization being the document under which that official sought an inspection of time and wages records forming the basis for a subsequent application

by the organization under s.119 of the Act alleging a breach of an Award made under the Act.

This is not to say that the applicant does not need to satisfy the Court on the balance of probabilities, and to that degree of satisfaction referred to in *Briginshaw v Briginshaw* (1938) 60 CLR 336, on each and every essential matter necessary to show that a breach of Clause 23(c) of the Award has been committed. Such matters include first, that the relevant official of the organization in accordance with Clause 23(d) suspects that a

breach of the Award is being or has been committed; that

reasonable notice is given to the employer that an inspection of

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the time and wages records is to be carried out; that the person who seeks the inspection is an official of the organization; that that person has been duly authorised in writing to make the

inspection by the Secretary of the organization or by the Branch

Secretary.

But the respondent goes further and submits that in order that proper notice of demand be given and that the authority be a valid authority for the purposes of Clause 23, both the notice and the authority should particularise the name or names of employees whose records are to be inspected and both should nominate the time of the day and the day of the week on which the inspection is to take place. Further, it is claimed by the respondent that it is incumbent upon the person carrying out the inspection to produce at the time of inspection his authority to

the employer or its representative whether it is asked for or

not.

I reject these submissions. There is nothing in Clause 23(c) which prevents a general demand being made to inspect the time and wages records which the Clause prescribes are to be kept by the employer. Such a demand may be oral or in writing or both. In practice the union representative of course, when giving notice, would endeavour to arrange some mutually convenient day for the inspection but failing such agreement, if notice is given that it will be carried out on a particular day of the week then,

in my view, it is not incumbent upon the organization or its

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representative to nominate the time of such inspection. It is to be inferred that the inspection is to be carried out within the times mentioned in Clause 23(c) or at some mutually agreed time outside those times. Nor does the paragraph indicate in any way that the authority must include such particulars. In this regard, reference is made to the High Court decision in Federated

Carters and Drivers' Industrial Union of Australia v McKay (1922

30 CLR 139.

In the present case, the Court is satisfied that the authorisation given by Mr O'Toole to Mr Roughan, and which the Court has found was offered to Mr Bright or Mr Storer by Mr Roughan on each particular visit to Meneling abattoir, was a

valid authorization within Clause 23(c).

This then leaves for consideration the question whether reasonable notice of the demand for inspection was given. This in my view is a question of fact and I am satisfied that prior to each of the visits, reasonable notice had been given within the meaning of Clause 23(c) that an inspection of the time and wages records was required on the days nominated. The Court has already rejected the respondent's submission that Clause 23(c) requires the document to be signed by the General Secretary.

The Court also rejects the submission of the respondent that as the allegations here are that on each of the four occasions particularised the respondent breached Clause 23(c) the Court

must be satisfied that the demand on each occasion was in respect

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of the "roster and time and wages record", that is in respect of a document being a "roster and time and wages record". This argument, as the Court understands it, is a consequence of the use within paragraph (c) of Clause 23 of the words "to inspect it" together with the evidence by Mr Roughan that he asked to see the "time and wages record" and not the "roster and time and wages record". It is clear in my view that the Clause is speaking about documents making up the roster, the time and wages records or any other relevant documents concerning employees' hours of work and type of work. In the particular circumstances of this case the Court is well and truly satisfied that the respondent, through Mr Bright and Mr Storer, knew exactly what Mr Roughan

was asking to see. It is to be remembered that such documents had been produced by Mr Bright in November 1985. Further, even though the gap between 'the giving of notice and the date of inspection became shorter as each demand was unsuccessful, such shortened notice was nevertheless reasonable in all the circumstances. Further, when, on 2 June 1986 Mr Roughan simply said to Mr Bright, "You're not going to show me those books are you Bobby?" that statement was a valid demand to be shown the relevant time and wages records. I am satisfied that that statement was understood by Mr Bright in that light. It is noted of course that this request by Mr Roughan was made on Monday, 2 June 1986 and not on the Tuesday, 3 June 1986, which was the day that Mr Roughan had informed Mr Bright that he would be coming down to visit the abattoir. Nevertheless, the Court is

Satisfied that it is to be inferred from the said conversation

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that what Mr Roughan was saying (and what Mr Bright probably so inferred) was that "if I return tomorrow, 3 June 1986, I take it

you will not show me the books".

Counsel for the respondent also submitted that on a proper construction of Clause 23 it was incumbent upon the applicant organization to lead evidence of facts from which the Court could be satisfied that Mr O'Toole and/or Mr Day had, at relevant times, properly held a suspicion that a breach of the Award was occurring or had occurred. Here, so it was argued, this necessary evidence was lacking in the applicant's case. I reject this submission. Mr O'Toole and Mr Day, who are the persons on which the applicant organization here relies as having the necessary suspicion both stated in their affidavits that each suspected that a breach of the Award had been or was being committed at the time they respectively authorised Mr Roughan and Mr Surplice to inspect relevant records kept by the respondent. Both Mr O'Toole and Mr Day were called for cross-examination. Any cross-examination by Counsel for the respondent of Mr O'Toole in this regard appeared to be curtailed by an answer given by Mr

O'Toole to Counsel when asked:

MISS BERGIN: But so far as paragraph 5 (of Mr O'Toole's affidavit where he makes reference to having the said suspicion) is concerned, you have said that you suspected

that a breach of the award had been or was being committed?---Yes.

And presumably you said that, Mr O'Toole, was because that had to be part of your reason for giving that authority; is that what you thought?---No.

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Did you see it as part of your role that you should have a suspicion before you authorised Mr Roughan? - I had what I believed to be knowledge of a breach.

Could you just listen to the question. Did you see it as part of your role - I withdraw that. Did you think it was required of you to have a suspicion at the time that you authorised or sought to authorise Mr Roughan?---Clause 23 indicates that, your Honour, yes.

After Mr Day's affidavit was read, Counsel for the respondent indicated that the respondent had no questions to direct to Mr Day.

The respondent further submitted that assuming the Court was against the respondent's submissions that Mr Roughan's authority was invalid and that the particular demands were not proper demands within the meaning of Clause 25(c) then the demands made subsequent to 14 April 1986 had been made contrary to the provisions of Clause 23(e). That 15, each subsequent demand had been made within a fortnight of the earlier demand or had been

demand on a Saturday. The Court rejects these submissions.

As to the first submission, Clause 23(e) only applies, in my view, when a demand made by the representative of the organization has been complied with by the employer. In that case a further demand shall not be made for an inspection within

14 days of such inspection other than in accordance with the proviso to that paragraph.

The purpose of Clause 23(e) is, in my view, to protect an employer, who has produced for inspection to the relevant

official on reasonable demand, time and wages records in compliance with the Award. It should not be construed so as to protect an employer who, contrary to the Award, fails to produce records for inspection. Even though it maybe possible for an official to give "reasonable notice of demand" within the meaning of the Clause more than once in the two weeks immediately following that in which an employer has complied with a demand, such further demands would in fact be oppressive and unreasonable. The purpose of Clause 25(e) is to give to an employer in those circumstances, the right to refuse further inspection. It is not designed to give to an employer who, having refused to produce records contrary to the Award, the right to say - "Clause 25(e) prevents you from again asking me

within 14 days for those records".

As to the second submission that one of the demands had been made on Saturday, 17 May 1986, contrary to Clause 22(e). In my view no inspection was demanded on Saturday, 17 May 1986. What occurred on that date was merely that Mr Roughan gave notice that he and Mr Surplice would be passing the abattoir on the following Tuesday and that they would then come in to inspect the relevant time and wages records. The inspection was to be made on the Tuesday. What the sub-clause prohibits is that the actual inspection of the records be carried out on a Saturday.

Accordingly in all the circumstances I am satisfied that the respondent breached Clause 23(c) of the Award on each of the four occasions particularised in the amended application of the applicants by failing to produce for inspection, on the particular dates, the time and wages records of its employees following a demand on each of those dates for the production of such records by duly authorised officials representing the organization. Such demands were made by Mr Roughan on each of the four particular days and by Mr Surplice on the three dates other than the 14 April 1986.

The respondent has submitted that in the event of the Court finding that more than one of the alleged breaches had occurred, then the Court should determine, pursuant to s.119(1A) of the Act, that the said breaches arose out of a course of conduct by the respondent so that the breaches, for the purposes of s.119 should be treated as constituting a single breach of the Particular Clause of the Award. (See *Quinn v Martin* (1977) 31 FLR 25).

The respondent submitted that the Court might well be satisfied, on the evidence before it, that the reason why the respondent company, through Mr Bright, would not produce the records for inspection was that neither Mr Roughan or Mr Surplice would inform Mr Bright what was claimed to be the breach of the Award said to have been committed by the respondent. In this regard Mr

Roughan, in his oral evidence, had mentioned in one of his answers that Mr Bright on 13 August 1986, that is after the present application had been filed, had then refused him access to the records, demanding to know what the breach was. Mr

Roughan then produced a copy of Mills and Sorrell, *Federal Industrial Law*, and pointed out to Mr Bright that the learned authors of that publication were of the view that there was no obligation upon the organization or its representative to particularise at that stage any alleged breach. It was submitted that a reading of the transcript of Mr Roughan's evidence in this regard, particularly page 100 of the official transcript, might lead to the inference that Mr Bright had on each of the four particular occasions, indicated to Mr Roughan that until Mr Roughan informed him what the alleged breach was then he, Mr

Bright, was not going to produce the said records.

In my view where a respondent wishes to rely upon a submission that breaches of an award resulted from a course of conduct as referred to in s.119(1A), then unless there is clear and unequivocal evidence in the applicant's case of such a course of conduct then it is incumbent upon that respondent to lead evidence to support such a submission before the Court could be satisfied that such was the case. The situation is, in my view, equivalent to that where a defendant leads evidence before a Court in mitigation of an offence which has been proved. Defending upon the particular circumstances the Court may, if it so wished, accept statements in this regard from the defendant's legal representative or on the other hand be unwilling to accept such statements unless confirmed formally by some witness called to give that evidence. Here, of course, the Court did not have the advantage of hearing what Mr Bright or a representative of the respondent company had to say in this regard.

The Court being satisfied that the breaches, as alleged, have occurred, has considered the respondent's submissions in this regard. In all the circumstances, the Court is not satisfied that each of the four breaches arose out of a course of conduct, within the meaning of that phrase in s.119(1A) of the Act.

Finally, reference is made to paragraph 3 of the application filed herein wherein the applicant organization sought the following order:

an order that the Respondent produce its roster and time and wages record to this Honourable Court for the purposes of being made available for inspection by an official of the Applicant such record to be for the period of twelve months immediately preceding the date of order. Counsel for the applicant organization informed the Court that the organization's ultimate aim was that the organization be able to inspect the said records. However, Mr Kenzie of Senior Counsel, representing the organization, submitted that on consideration, the Court had no power under the Act to make the order as asked and accordingly withdrew that part of the application. It is clear in my view that the Court has no power under the Act to make such an order which in effect would be a mandatory injunction.

However, Mr Kenzie submitted that the Court would, through its accrued jurisdiction, have power under s.22 of the Federal Court

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of Australia Act 1976, having ordered that penalties be imposed for the breaches totalling \$H%, to order that that total be reduced to \$Y if the respondent produce for inspection the said books or records within a stated period. Section 22 of the

Federal Court of Australia Act 1976 reads:

22. The Court shall, in every matter before the Court, grant, either absolutely or on such terms and conditions as the Court thinks just, all remedies to which any of the parties appears to be entitled in respect of a legal or equitable claim properly brought forward by him in the matter, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of proceedings concerning any

of those matters avoided. Counsel for the respondent objected to any such proposal, submitting that the Court had no such jurisdiction or power.

Without deciding this problem, the Court is of the view that assuming such power it would not be proper at this stage to make such an order. It is to be remembered that the Award is the first federal award applying to the Territory in this industry. The Court is aware of the struggle that has occurred in the Territory following the handing down of the said Award and the lengthy litigation between the applicant organization and members of the Meat and Allied Trades Federation of Australia following the making of the Award. The Court is confident that the present respondent will, after the Court's reasons for judgment herein are fully understood, make the particular records available for inspection by officials of the organization. It is assumed that

the expressions set out in the respondent's solicitors letter of 9 October 1986 to the applicant's solicitor are sincere.

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In all circumstances, penalties should be imposed. The maximum penalty under s.119(1D)(a)(i) is \$1000 for each breach. On the evidence, and being conscious that Mr Bright was not called to give evidence, I am nevertheless left with the clear impression that the respondent herein was simply not prepared to comply with the provisions of Clause 23(c) thinking that those provisions were unreasonable and unworkable. Each breach in my view is a serious one. Employers must understand that Award breaches will not be excused merely on the ground that the Award is thought by

them to be unreasonable.

There is to be a penalty of \$750 imposed in respect of each of the four breaches, making a total of \$3000, which sum is to be paid, pursuant to s.120 of the Act, to the applicant organization.

I certify that this and the fdvty-oae preceding pages are a true copy of the Reasons for Judgment herein of his

Honour Me Justice Evatt

Associate

Dated: /4-/97

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} by Counsel for the Applicant

Solicitors for the Applicant

Counsel for the Respondent :

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Mr R Kenzie OC and Ms C Simpson

Maurice May & Co, Sydney

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Messrs Tress Cocks & Maddox, Sydney, as agents for Maildren Silvester & Partners, Darwin.

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Prepared on 28 October 2026 · Esheria