

Case Law - Ark Tribe prosecution dropped over invalid interview notice

The Magistrate's Court of South Australia has dismissed the Commonwealth Director of Public Prosecutions' (DPP) prosecution of SA rank and file building worker and CFMEU member Ark Tribe, finding the notice purporting to require Tribe to attend an interview with the Australian Building & Construction Commission (ABCC) was not valid.

The case against Tribe had become a flagship case for the Australian union movement's campaign against the coercive powers of the ABCC under s.52 of the Building & Construction Industry Improvement Act, with the CFMEU footing the bill for Tribe's legal expenses in defending the prosecution.

Under s.52 of the BCII Act, the ABCC can, as long as it fulfils certain statutory pre-requisites, require a person to attend an interview and answer questions in relation to one of its investigations.

In May 2008, following unprotected strike action by building workers at the Flinders University construction site run by Hindmarsh Constructions, the ABCC identified Tribe as a person who was likely to have information about the incident to inform the regulator's investigation of it. Tribe took part in the action following a meeting between the CFMEU and workers on the site.

The ABCC issued a notice for Tribe to attend on October 2, 2008. Tribe did not attend.

As a result, the DPP launched a prosecution against Tribe for refusing to attend the compulsory meeting.

During the hearings, Tribe's legal counsel argued the notice issued under s.52 was not valid, for reasons including that s.52 powers had to relate to an investigation by the ABC Commissioner. In this case, the investigation was being run by an ABCC inspector and it could not be said that the Commissioner was more than superficially aware of the investigation, it argued.

Magistrate David Whittle in his November 24 decision said the BCII Act did not require the ABC Commissioner to "personally carry out all acts of investigation of suspected contraventions unless he or she delegates in writing to another eligible person".

However, where an investigation is one in relation to which the use of the compliance powers under s.52 are sought to be used, "the legislative intention is clear that the ABC Commissioner must have taken steps to assume the investigation as his or her own, in the sense of assuming the task of directing the investigation, as opposed to one which, as I have concluded, might be conducted by an ABC inspector without a delegation of the commissioner's function".

The magistrate said there was nothing to suggest in this case that then-ABC Commissioner John Lloyd had anything other than "some general awareness" of the investigation. The matter of conducting that investigation was not a matter covered by s.52 of the BCII Act but rather by s.10, the magistrate said.

Section 10 of the Act outlined the "functions" of the ABC Commissioner, which included conducting an investigation. Section 52 outlined the "powers" of the ABC Commissioner, which included being able to force a person to attend an interview. This power could be delegated to the deputy commissioner or an inspector.

However, in this case only the powers under s.52 had been delegated, not the functions under s.10, which meant that the investigation was never the Commissioner's investigation as required, the magistrate found.

As a result, the notice served on Tribe requiring him to attend an interview was not valid because those functions had not been delegated. Therefore the case against Tribe had to be dismissed, the magistrate said.

To view the decision, click [here](#).