FEDERAL COURT OF AUSTRALIA

Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2017] FCAFC 53

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| Appeal from: | *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2016] FCA 616 |
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| File number: |  |
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| Judges: | **NORTH, DOWSETT AND RARES JJ** |
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| Date of judgment: | 29 March 2017 |
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| Catchwords: | **INDUSTRIAL LAW** – *Fair Work Act 2009* (Cth) – course of conduct – where union and several officials organise industrial action in contravention of s 348 with intent to coerce person to engage in lawful action – whether contravening conduct of officials deemed by s 793 to have been engaged in by body corporate amounts to single course of conduct or several individual contraventions by body corporate – whether omission of s 348 from s 557 affects treatment of contraventions as a single course of conduct  **INDUSTRIAL LAW** – *Fair Work Act 2009* (Cth) – relevance of lawfulness of industrial activity – where s 348 prohibited organising or taking any action against another person with intent to coerce the person or third party to engage in industrial activity – where s 347 made lawfulness or unlawfulness of industrial activity irrelevant to prohibition against coercion in s 348 – whether primary judge erred in treating as mitigating factor lawfulness of rationale for industrial activity in assessing seriousness of contravention    **INDUSTRIAL LAW** – *Fair Work Act 2009* (Cth) – assessment of penalty – whether primary judge erred in imposing pecuniary penalties – whether primary judge imposed manifestly inadequate pecuniary penalties – where respondents had significant histories of prior contraventions of s 348 – need for specific and general deterrence |
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| Legislation: | *Fair Work Act 2009* (Cth) Pt 4-1, ss 347, 348, 417, 434, 539, 546, 557  *Fair Work (Registered Organisations) Act 2009* (Cth) |
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| Cases cited: | *Brookfield Multiplex Engineering and Infrastructure Pty Ltd v McDonald* [2014] FCA 389  *Brookfield Multiplex FSH Contractor Pty Limited v McDonald* [2014] FCA 359  *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 326 ALR 476  *Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner* [2016] FCAFC 184  *Construction, Forestry, Mining and Energy Union v Cahill* (2010) 269 ALR 1  *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 225  *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2014] FCA 126  *House v The King* (1936) 55 CLR 499  *Leighton Contractors Pty Ltd v Construction, Forestry, Mining and Energy Union* [2006] WASC 317  *Markarian v The Queen* (2005) 228 CLR 357  *R v Abbott* (2007) 170 A Crim R 306  *Veen v The Queen [No 2]* (1988) 164 CLR 465 |
|  |  |
| Date of hearing: | 23 November 2016 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 103 |
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| Solicitor for the Respondents: | Construction, Forestry, Mining and Energy Union |

ORDERS

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|  | | WAD 268 of 2016 |
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| BETWEEN: | AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER  Appellant | |
| AND: | CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION  First Respondent  MICHAEL BUCHAN  Second Respondent  JOSEPH MCDONALD (and others named in the Schedule)  Third Respondent | |

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| JUDGES: | NORTH, DOWSETT AND RARES JJ |
| DATE OF ORDER: | 29 MARCH 2017 |

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. Order 1 made on 30 May 2016 by the primary judge be set aside and in lieu thereof it be ordered that:
3. The following pecuniary penalties are imposed in respect of the contraventions referred to above:
   1. a total penalty of $195,000, comprising four single penalties of $40,000 each and a fifth in respect of the second contravention of the fourth respondent of $35,000;
   2. a penalty of $9,000 on each of the third respondent and fifth respondent;
   3. a penalty of $17,500 on the fourth respondent, comprising a penalty of $9,500 for his first contravention and $8,000 for his second contravention;
   4. a penalty of $5,000 on the sixth respondent;
   5. a penalty of $2,500 on the seventh respondent;
   6. a penalty of $4,000 on the eighth respondent.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

NORTH J:

1. Before the Court is an appeal brought by the Australian Building and Construction Commissioner, formerly the Director of the Fair Work Building Industry Inspectorate, the appellant, seeking that the civil penalties made against the respondents for contraventions of s 348 of the *Fair Work Act 2009* (Cth) (the Act) be set aside, and that the Court substitute pecuniary penalty orders as the Court sees fit, or alternatively, the matter be remitted to the Federal Court and pecuniary penalties be made against the respondents according to law.
2. Section 348 of the Act provides:

A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to engage in industrial activity.

1. Under s 347(b)(iv) a person engages in industrial activity if the person does or does not *comply with a lawful request made by, or requirement of, an industrial association*.
2. The first respondent, the Construction, Forestry, Mining and Energy Union (CFMEU), is an organisation of employees registered under the *Fair Work (Registered Organisations) Act 2009* (Cth).
3. The second respondent, Michael Buchan, was at all material times the Secretary of the Western Australian CFMEU Construction and General Division (the Division).
4. The third respondent, Joseph McDonald, was at all material times the Assistant Secretary of the Division.
5. The fourth respondent, Walter (Vinnie) Molina, was at all material times an organiser employed by the CFMEU.
6. The fifth respondent, Peter Joshua, was at all material times an organiser employed by the CFMEU.
7. The sixth respondent, Campbell McCullough, was at all material times the President of the Divison.
8. The seventh respondent, Tawa Harris, was at all material times an organiser employed by the CFMEU.
9. The events in question took place on 22 October 2013, at the site of the construction of a project known as T1 Arrivals Expansion Stage 2 at Perth International Airport (the Project).
10. Perth Airport Pty Ltd was the owner of the site. Broad Construction Services (WA) Pty Ltd (Broad) was the head contractor responsible for the construction of the project.
11. Concealed Interiors and Exteriors Pty Ltd (Concealed) was a sub-contractor performing work for Broad at the site. Mr Jan Eldred and Mr David Shoesmith were employees of Broad. Solwest Construction Pty Ltd (Solwest) was another sub-contractor to Broad performing work at the site.
12. On 23 April 2015, the parties filed a Statement of Agreed Facts and Admissions (the Statement).
13. As to the events of 22 October 2013, the following facts were agreed in the Statement:

13. As at 22 October 2013, the CFMEU had a reasonable belief that Concealed may have failed to pay some of its employees and sub-contractors for some of the work performed at the Site.

14. As at 22 October 2013, approximately 160 workers employed by 22 Subcontractors (**Site Workers**) were required to attend for duty and to perform work on the Project at the Site.

15. At about 6.30am on 22 October 2013, as Site Workers arrived for work, Buchan, McDonald, Molina, Joshua and approximately 100 other persons (the **Protesters**) attended the Site.

16. At some time between 6.30am and 10.00am, Joshua, McCullough and Harris also attended the Site.

17. At some time between 6.30am and 10.00am, Buchan, McDonald, Molina and Joshua established and maintained a blockade of the site (the **Blockade**) by:

(a) occupying the entrance to the Site;

(b) organising the Protestors to occupy the entrances to the Site;

(c) preventing or dissuading those employees of the Subcontractors who sought to work at the Site that day from entering the Site; and

(d) otherwise persuading the employees of the Subcontractors to engage in industrial action and not perform work at the Site that day.

18. From approximately 6.30 am to approximately 10.00 am, Buchan, McDonald, Molina, Joshua, McCullough, Harris and the Protesters:

(a) stood in front of the Site entrance gates blocking access to the Site;

(b) were holding CFMEU banners; and

(c) placed CFMEU signs and flags on the fence surrounding the Site, in red and white plastic water barriers by the entrance gate, and on the back of utility vehicles parked adjacent to the entrance gate.

19. At approximately 8.57 am Buchan stood in front of the Site with a crowd of people standing behind him, including McDonald, Molina, Joshua, McCullough and Harris. Buchan was interviewed by a television news reporter from Channel 10 where the following exchanges occurred:

Reporter: *“Mick do you want to just tell us why the workers walked off the job this morning.”*

Buchan: *“What’s happened for, it’s been very frustrating for the workers on this particular project over the last couple of months, they’re being paid in dribs and drabs as it goes through. We’ve got some workers here that are owed in excess of 6 to 8 weeks pay outstanding not to mention their statutory entitlements of superannuation and long service leave that there hasn’t been 1 cent paid since they started on the project and I suppose with everything it comes to a point where enough is enough their employer is not listening to them, the principal contractor is not listening to them, they give us a bell, our area organisers and we turned up this morning”.*

…

Reporter: *“Who is it that has to pay who is not paying them, is it the ceilings company?”*

Buchan: *“Well I suppose that’s something that we’ll get to the bottom of at the end of the day, I think that everyone ducks for cover whether it’s the principal contractor or the subcontractor at the end of the day what we care most about that is that we don’t care where it comes from whether it’s from the client whether the principal whether the subcontractor the worker’s given up his work and put his blood to the stone and built the project and needs to be paid properly.”*

Reporter: *“So these guys here are they subcontractors or …”*

Buchan: *“The guys involved here are employees of the ceiling and wall contractor on the project”.*

Reporter: *“Which is Broad … What’s the name of the company?”*

Buchan: *“The wall and ceiling company on this particular project …”*

Reporter: *“That’s what”.*

Buchan: *“The principal contractor is Broad”.*

Reporter: *“Wall and Ceiling company. Is that what it’s called?”*

Buchan: *“Concealed Interiors”.*

20. After the above interview, Buchan addressed the crowd from the back of a truck, and he and McDonald were recorded on Channel 10 video footage as saying:

Buchan: *“We have gone directly to Perth Airports today because of the blue, given the arrogance and often ignorance that Broad has shown for the Concealed fellas and Concealed’s management as well, they’re just not interested all they want to see is their job done … They will see and ensure that no-one is out of pocket … put all the starting dates all the hours and everything that’s owed. For those that don’t know these guys are being deducted 15% a week out of their pay to pay for workers compensation, superannuation and long service leave and yet on top of that no payments … and it’s just another factor that we’ve got to get through moving forward that in the future that we see more reparable ceiling fixers get on these jobs that’s it it’s bullshit, so thanks again for that. Watch this space.”*

…

McDonald: *“Fair play to Vinnie he just kept and wouldn’t give up”.*

Buchan: *“Fair play to Vinnie with his area here with the Concealed guys, getting here before they start … by their employer time and time again that it gets to the point where you’ve got to make a stand and you need to know that when you do make a stand you’ve got support from all jobs around the fucking area to help you out, alright.”*

21. The DVD and transcript annexed to this agreed statement of facts is a true and accurate record of the interviews conducted by Channel 10 at the Perth Airport on 22 October 2013.

22. At some time between 9.00am and 9.15am, Eldred tried to escort a person named Dave from Solwest Construction through the rear entrance of the airport terminal. Eldred and Dave were followed and stopped by Molina and another person wearing a shirt bearing the CFMEU logo (Second CFMEU Representative). The following exchange occurred between Molina, Dave and the Second CFMEU Representative:

Molina: *“You are not going on Site today”.*

Dave: *“I just want to go on to measure some stuff up”.*

Second CFMEU Representative: *“Not today mate, surely you’ve got another place to work today, you don’t need to be here today we can organise and deliver your tools to another Site”.*

Dave: *“I just need to go measure up”.*

Second CFMEU Representative: *“I know your bosses, Nathan and Wes and I’m about to give them a call”.*

Molina: *“Can you please just wait until the camera crews have gone before you come back on Site”?*

23. At about 9.15 am, Joshua approached Mr David Lewis, as site supervisor employed by Broad and said words to the effect: *“You guys need to sort out your CA’s as Concealed are a shower of shit. They need to make it happen and pull the pin on them. We are doing exactly the same thing as we did with them six months ago”.*

24. At approximately 9.30am, Shoesmith was spoken to by Molina who said: “Help us out by sending the guys to a different site for the day”, to which he replied: “No, I couldn’t do that”.

25. By reason of the facts set out at paragraph 15 to 24, all but 10 to 15 of the 160 Site Workers were prevented or dissuaded from entering the Site and consequently refused or failed to perform work at the Site between 6.30am and 10.00am on 22 October 2013.

…

28. At approximately 10.00am on 22 October 2013, immediately following the events referred to in paragraph 13 to 25, McDonald was overheard saying words to the effect that the Respondents would return to the Site the following morning with 100 people.

# THE PRIMARY JUDGE’s REASONS

1. In this section of these reasons for judgment, an overview of the approach taken by the primary judge is set out. Detailed reference to specific passages will be made in respect of the grounds of appeal considered later in these reasons for judgment.
2. The primary judge first considered the circumstances, nature and extent of the conduct undertaken by the respondents. He said the contravening conduct, other than that of Mr McDonald’s threat, was organising and participating in a blockade of the entrances of the site with the intention to coerce payment of the workers’ outstanding entitlements. Mr Buchan, Mr McDonald, Mr Molina and Mr Joshua were involved in organising the blockade, whereas Mr McCullough and Mr Harris were not. They did, however, participate in the blockade.
3. In assessing the nature and extent of the conduct of the respondents, the primary judge took into account that the CFMEU had a reasonable belief that Concealed may have failed to pay some of its employees for some of their work on site and that the blockade lasted only three and a half hours. These factors placed the conduct of the respondents at the lower end of the scale of seriousness.
4. The primary judge then had regard to the nature and extent of the loss and damage involved. All but 10 to 15 of the 160 site workers were prevented from attending for almost three and a half hours. The agreed facts did not identify any quantifiable economic loss or damage suffered by any party.
5. The primary judge then referred to the prior relevant conduct of the respondents. He said that it was relevant that the conduct of the respondents with one or more prior contraventions was not mitigated by a clean record, and the history of prior contraventions is relevant to deterrence in setting the appropriate penalty. The primary judge recorded that Mr Buchan had been found liable for six contraventions of industrial law, Mr McDonald for 53, Mr Molina for nine and Mr Harris for three. Mr Joshua and Mr McCullough had no prior history of contraventions of industrial law. The CFMEU had a very extensive history of contravention of industrial laws.
6. Then the primary judge held that the five contraventions by Mr Buchan, Mr Molina, Mr Joshua, and Mr McDonald comprising the organisation of the blockade and the additional contravention by Mr McDonald of the threat, all of which were to be attributed to the CFMEU, were a single course of conduct because the coercion arose from a single event, namely, the three and half hour blockade of the site. The blockade arose from the conduct of four people organising and participating in a single act of interference. The threat made by Mr McDonald was also part of the single course of conduct.
7. The primary judge then considered whether the contraventions were deliberate, and held that they were.
8. Then the primary judge found that the CFMEU was a large, prominent, and influential national union that would have no difficulty paying any penalty imposed on it for the contravention. He also held that Mr Buchan and Mr McDonald held senior positions in the CFMEU in Western Australia at the time.
9. Next, the primary judge found that the respondents had not demonstrated any contrition, but had cooperated with the applicant by admitting at an early stage to the relevant facts and contraventions.
10. The primary judge then noted the need for the penalties imposed to provide for general deterrence, and subject to the principle of proportionality, specific deterrence in respect of the CFMEU, Mr Buchan, Mr McDonald, Mr Molina and Mr Harris because of their long history of disregard for industrial laws.
11. The primary judge then recorded the quantum of the penalties proposed by the parties. He continued by observing that the maximum penalty should be reserved for the most serious contraventions.
12. The primary judge next said that the principle of proportionality was important in this case because of the competing considerations between the rationale of the blockade and the very extensive record of prior contraventions of industrial laws by the CFMEU, and in particular by Mr McDonald. The former consideration places the contraventions at the lower end of seriousness but the latter requires the penalty to be set at a level which would give effect to the requirement of deterrence. Applying that principle the penalty should be fixed at the lower level of the range because the rationale for the blockade was to support employees who had not been paid, the duration of the interference was only three and a half hours, there was no evidence of any quantifiable loss, and the respondents had cooperated with the applicant at an early stage of the proceedings. Nevertheless, the means used by the respondents were unlawful. Applying the instinctive synthesis to the factors outlined, the primary judge imposed the following penalties:

(a) A total penalty of $12,000, comprising five single penalties of $2,400, on the CFMEU.

(b) A penalty of $2,250 on each of Mr Buchan and Mr Molina.

(c) A total penalty of $2,750 on Mr McDonald, comprising two separate penalties of $1,750 and $1,000.

(d) A penalty of $2,000 on Mr Joshua.

(e) A penalty of $1,000 on Mr McCullough.

(f) A penalty of $1,250 on Mr Harris.

1. The primary judge finally said that the application of the totality principle did not change the amounts of the penalties imposed.

# GROUNDS OF APPEAL

## Prior Record Ground

1. The appellant contended that the primary judge arrived at the conclusion that the contraventions were at the lower level of seriousness because he effectively excluded the prior history of contravention from the assessment of the seriousness of the conduct. The appellant also contended under this ground of appeal that the primary judge failed to take into account the prior history of contraventions in the assessment of where in the range the penalties should fall.
2. The primary judge dealt with the matters relevant to this argument as follows:

47 A history of prior contraventions of industrial laws has the following consequences in assessing penalty. First, the conduct of the respondents with one or more prior contraventions is not mitigated by a clean record. Secondly, history of prior contraventions is relevant to the element of deterrence in setting the appropriate penalties.

…

72 Further, the principle of proportionality is important in this case because of the competing considerations between the rationale for the blockade and the very extensive record of prior contraventions of industrial laws by the CFMEU and by, in particular, Mr McDonald. The former consideration places the conduct of the respondents at a lower level of seriousness comprising, as it does, supporting workers who were the victims of the failure by their employer to pay them their outstanding wages. The latter consideration, however, demonstrating as it does, a cavalier attitude to compliance with the industrial law, invokes a need to set a penalty at a level which would give effect to the requirement for deterrence.

73 In my view, the following observations of the High Court in *Veen v The Queen* [No 2] (1988) 164 CLR 465 at 477 in respect of the principle of proportionality are relevant to the balancing of those two considerations:

[T]he antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. To do so would be to impose a fresh penalty for past offences…

74 In many instances, the past conduct of the CFMEU and, in particular, Mr McDonald, would require the Court to impose a heavy penalty to reflect the requirement for deterrence. However, the principle of proportionality requires that **the circumstances of each case must be viewed separately** to ensure that past history of the offender does not result in an imposition of a penalty which is disproportionate to the gravity of the offence concerned.

75 In my view, applying the proportionality principle, the penalties to be imposed should be at the lower level of the range for the following reasons.

76 First, as I have said, the rationale for the holding of the blockade was to support employees who had not for some weeks been paid wages to which they were lawfully entitled. The legitimacy of this concern by the CFMEU, is recognised in the agreed facts by the characterisation of the request made by the CFMEU for the payment of outstanding wages due to Concealed Interiors’ employees as a “lawful request”.

77 Secondly, the duration of the interference with the work on the site was only about three and a half hours.

78 Thirdly, there was no evidence of any quantifiable economic loss being suffered by the parties concerned by reason of the blockade.

79 Fourthly, the respondents have cooperated with the applicant at an early stage of the proceeding by agreeing a statement of agreed facts and admissions.

80 Nevertheless, albeit that the cause for which the respondents organised and participated in the blockade, may be regarded as just, the means by which the respondents sought to pursue that cause was unlawful, and the maintenance of the rule of law requires that appropriate penalties be imposed.

81 Applying an instinctive synthesis, taking into account the factors to which I have referred, and having regard to the circumstances of the contraventions and the need to sustain public confidence in the statutory scheme for the enforcement of industrial laws,… [His Honour imposed the specified penalties]

[Emphasis added.]

1. The appellant’s written submissions encapsulated the argument at [20] as follows:

It appears that his Honour effectively disregarded the prior history in the assessment of where in the range the penalty should fall. His Honour noted that the prior history would, in many cases, require a heavy penalty to be imposed. However, his Honour considered the proportionality principle required the “circumstances” to be viewed “separately” to the prior history. His Honour concluded that this meant that the penalties should be at the lower end of the range.

1. It can thus be seen that the appellant asks the Court to read [74] of the primary judge’s reasons as if there was set up a dichotomy between the circumstances of the contraventions and the prior history of the respondents. Having done so the primary judge, so it was argued, assessed the seriousness of the conduct without reference to the history of prior offending.
2. However, in the sentence emphasised in [74] the primary judge was directing himself to the passage extracted from *Veen v The Queen* *[No 2]* (1988) 164 CLR 465 (*Veen*) in the previous paragraph of his reasons in which it was explained that there is a limit to the extent to which past conduct may be taken into account. That limit is concerned to avoid the instant case becoming a vehicle to impose a fresh penalty for past offending. In directing himself to that passage, the primary judge sought to reconcile the tension that exists in such cases between competing factors, being the poor prior record of the respondents and mitigating factors relevant to the present contravention.
3. That process did not involve excluding past offending from consideration. The primary judge explicitly took the past history of compliance into account. There is no basis for concluding that his Honour did not do as he said.
4. The argument on this ground is without foundation.

## The Multiple Actors Ground

1. The appellant argued that the primary judge should have treated the conduct of each of Mr Buchan, Mr McDonald, both in relation to the blockade and the threat to return, Mr Molina and Mr Joshua as five contraventions attributed to the CFMEU rather than treating that conduct as a single course of conduct and imposing penalties on that basis. In considering the single course of conduct principle the primary judge referred to a passage in *Construction, Forestry, Mining and Energy Union v Cahill* (2010) 269 ALR 1 (*Cahill*) which included the following at [39]:

…The principle recognises that where there is an interrelationship between the *legal and factual elements of two or more offences* for which an offender has been charged, care must be taken to ensure that the offender is not punished twice for what is essentially the same criminality. That requires careful identification of what is “the same criminality” and that is necessarily a factually specific enquiry…

[Original emphasis.]

1. Then at [55] – [58] the primary judge said:

55 The question then is whether there is an interrelationship between the legal and factual elements of two or more of the contraventions, which have been attributed to the CFMEU. Further, it is necessary to have regard to whether the offender would, but for the application of this “principle”, be punished twice for “what is essentially the same criminality”. It is necessary, therefore, to characterise the “criminality” in this case. In this case, the “criminality” was the coercion which arose from a single event, namely, the interference for about three and a half hours in the carrying on of work at the project site. The number of contraventions for which the CFMEU is liable arises from the conduct of four different persons organising and participating in that single act of interference. The interference was, in fact, effected by about 100 people (including the respondents) acting collectively, but the number of persons in the blockade is incidental because a similar interference could have been effected by a smaller or larger number of persons. Further, although the organisation of the blockade and the mobilisation of the protesters was effected by four CFMEU persons, this is also incidental because the blockade could have been organised by one or more persons without in any way affecting the nature of the offending conduct. In other words, the nature of the offending conduct, namely, the three and a half hour interference, did not vary in character by reason that it was organised by one, or more than one, person or by reason of the number of persons participating in the blockade.

56 In my view, therefore, there is an interrelationship, namely, an overlap, between the factual and legal elements of the offences which are attributable to the CFMEU and, accordingly, I will treat the four contraventions as a single course of conduct in assessing the appropriate penalty to be imposed on the CFMEU.

57 Further, in my view, the comments made by Mr McDonald in threatening to return the next day, were also part of the single course of conduct referred to above. This is because implicit in the interference by the blockade was the threat that it would be repeated if the Concealed demand for the payment of the outstanding wages was not met. Applying the observations of the Full Court in *Williams* at [25], Mr McDonald’s threatening words were part of a continuum of the acts intended to coerce Perth Airport, Broad and Concealed Interiors to make the necessary arrangements amongst themselves to ensure that the workers were paid their outstanding wages.

58 Therefore, in assessing the penalty to be imposed on the CFMEU, this contravention will, with the other four contraventions already referred to, be treated as a single course of conduct. Likewise, the two contraventions by Mr McDonald will also be treated as a single course of conduct.

1. The appellant contended that the primary judge mischaracterised the level of the offending by failing to view the conduct as the actions of four people, two of whom held senior positions in the CFMEU. The fact that the same result may have been achieved if the blockade had been organised by one person, as the primary judge viewed it, did not take account of the factual difference involved in the actual circumstances where the blockade was arranged by and participated in by the four men. The number of CFMEU officials involved in the organisation and conduct of the blockade, so it was argued, was relevant to the characterisation of the nature of the offending conduct.
2. In the end, this argument was pressed in only a limited way. Ms Archer, who appeared as senior counsel for the appellant, explained:

MS ARCHER: …it actually practically doesn’t matter because whether you treat it as single course of conduct and impose a penalty that reflects the total of that conduct or treat it as separate contraventions and then apply the totality principle, you’re still going to end up with a … penalty that is proportionate to the overall conduct and so ---

DOWSETT J: It probably is a course of conduct, isn’t it?

MS ARCHER: There’s definitely an overlap, your Honour, but course of conduct, as your Honour will be familiar, is simply a tool. It’s not a rigid rule.

DOWSETT J: No. No.

MS ARCHER: And if you apply the tool, then the way in which the court uses it is quite flexible and there are lots of authorities that deal with that. Cahill is perhaps the most often cited decision about it. But it’s just a tool and it’s a tool that is designed to make sure that at the end the total penalty reflects the total criminality. How you get there kind of doesn’t matter, so long as you get there, but what we say his Honour did in getting there was to mischaracterise the criminality because his Honour misunderstood, with respect, that the coercion – that the conduct was this single event of the blocking for three and a half hours, without understanding, with respect, that it also required consideration of the surrounding facts that affected it, including the fact that multiple people were sent out. This wasn’t just one union officer on a frolic of his own, doing his thing. This was a concerted campaign by all of these men acting in their capacity as union officers and on behalf of the union.

1. To the extent that the appellant relied on the argument that the primary judge was wrong to conclude that the conduct attributed to the CFMEU constituted a single course of conduct, the argument is not sustained. The primary judge took an orthodox approach by examining whether there was a factual interrelationship between the actions of each of the four men whose conduct was in question. The primary judge concluded that they were all involved in the same event, the blockade of the site, and hence their actions amounted to a single course of conduct. This ground of appeal should also be rejected.

## Alternative Means Ground

1. The appellant argued before the primary judge that there were alternative means available to the respondents to vindicate the workers’ rights to the payment of accrued wages. The primary judge asked for further submissions on what the alternative lawful means were. The parties’ further submissions noted that the alternative lawful means comprised various methods of suing for the outstanding wage entitlement or utilising the dispute resolution procedure provided for in the relevant award.
2. On appeal the appellant contends that the primary judge did not refer to that argument in his reasons for judgment. Consequently, it should be inferred that he did not consider the argument and thereby fell into error.
3. This argument is without merit. There can be no doubt that the primary judge was aware that the workers could sue for outstanding wage entitlements or engage in dispute resolution processes. That was part of the obvious background of the circumstances of the proceeding. It was unnecessary for the primary judge to state the obvious. There is no basis for inferring that because the primary judge did not refer to the obvious, he did not consider it. This ground of appeal should not be accepted.

## The Element Ground

1. The appellant contends that the primary judge erred by characterising the lawful request as a mitigating factor in assessing the penalty against the CFMEU when it was an element of the admitted contravention of the CFMEU.
2. The appellant’s written submissions state at [37]:

The Appellant accepts that, on its own, this error was of limited practical impact. However, it serves to underline the significance of the Alternative Means Ground.

1. The argument is directed to the consideration by the primary judge of the circumstances, nature and extent of the conduct which he described as follows:

40 The reason for the blockade was that the CFMEU had received reports that a number of employees of Concealed Interiors working on the project had been unpaid for six to eight weeks. It is an agreed fact that the CFMEU had reasonable belief that this may be the case.

41 In assessing the nature and extent of the conduct of the respondents, it is material to have regard to the fact that by 22 October 2013, the CFMEU had a reasonable belief that Concealed Interiors may have failed to pay some of its employees for some of the work performed at the project site. In this regard, I take this agreed fact to mean that Mr Buchan’s belief as to the circumstances of Concealed Interiors’ failure to pay some of its employees, as expressed by Mr Buchan in his statements to the Channel 10 reporter (referred to at [24] above), was reasonably entertained by Mr Buchan.

42 In the case of *Fair Work Ombudsman v Maritime Union of Australia* [2012] FCA 1232, Barker J observed that the purpose of the impugned conduct may be a relevant factor in considering the seriousness of the impugned conduct. At [25], Barker J observed:

Although, as was agreed by the respondents, the industrial action was unlawful, I accept that it arose out of concerns for the treatment of the BPA employees. As such, the conduct of the respondents is to be contrasted with conduct carried out for arbitrary or base motives.

43 That the purpose of the contravening conduct was directed at seeking to assist workers who the CFMEU reasonably believed, had for some time not been paid their wages, is an important mitigating factor in assessing the seriousness of the admitted contraventions.

1. It would, of course, have been an error for the primary judge to have treated the lawfulness of the request as itself a reason for viewing the contraventions as less serious. That would be for the reason that a lawful request may, in the terms of s 348, be the subject of a contravention.
2. However, that is not the approach which the primary judge took. He looked at the purpose of the lawful request in order to place the conduct on a scale of seriousness. To speak of the lawfulness of the request as an element of the contravention does not advance matters. The conduct which amounts to coercion is an element of the contravention, but it is not suggested that it is not assessed on a scale of seriousness. Blockading a site may be coercive conduct but it is of a different level of seriousness than holding a gun to a person’s head. The nature of the request made is similarly an element in the definition of the offending conduct. That does not exclude it from consideration as part of the assessment of the seriousness of the offending. The request may be motivated by altruistic or base motives. For instance, blockading a site to prevent an immediate and serious risk to worker safety is of a different level of seriousness to blockading a site to consolidate a particular union official’s position in an internal union power struggle. The primary judge was correct to include the purpose of the lawful request as part of his consideration of the seriousness of the offending. That consideration does not exclude consideration of the nature of the coercion used. That is to say, the assessment of the seriousness of the contravention may involve an assessment of the nature of the conduct undertaken, and also, the purpose for which the request was made.
3. The element ground of the appeal should not be accepted.

## Manifest Inadequacy Ground

1. The appellant contends that the penalties imposed by the primary judge were manifestly inadequate in all the circumstances. Certain specific considerations were raised in the appellant’s written submissions to demonstrate the manifest inadequacy of the penalties as follows:

46. The respondents took the action to force the principal on the site, the head contractor on the project) [sic] and Concealed to pay the workers the alleged unpaid entitlements, when only Concealed was believed to have underpaid its workers. The respondents did not care which company was forced by their unlawful conduct into paying the alleged unpaid entitlements, regardless of whether, if there were unpaid entitlements, the company would have been legally responsible to pay them.

47. The contraventions affected 22 sub-contractors, of which only one was believed to have underpaid its workers. All but 10-15 of the 160 site workers were prevented or dissuaded from entering the site. This meant that 21 subcontractors which had done absolutely nothing wrong, even on the CFMEU’s view, couldn't do work. The blockade lasted approximately 3.5 hours.

48. The evidence was that the respondents had reasonable grounds for believing that some workers of one of the sub-contractors had not been paid. The evidence was not that those workers had in fact not been paid. His Honour appeared to assume the workers had not been paid. This was a significant factor in his Honour’s conclusion that the penalties should be at the lower end of the range. There was no evidence that they had actually been underpaid.

49. There were lawful means available to the respondents to achieve their goal.

50. In relation to the CFMEU, its conduct was the conduct of four officers, two of whom held senior positions.

51. In relation to McDonald, he committed two contraventions. Both contraventions had a degree of commonality, in that they were conducted with the coercive intention in relation to the alleged unpaid entitlements. However, each was a distinct act. The first contravention was McDonald’s organisation and participation in the blockade on 22 October 2013. The second was his threat that the respondents would return to the site the next morning with 100 people.

52. In relation to the CFMEU, Buchan, McDonald and Molina, they each had a history of prior contraventions.

[Footnotes omitted.]

1. It will be recalled that the primary judge came to the view that the offending was at the lower end of the scale of seriousness because of the purpose of the blockade, its short duration, and the absence of evidence of any quantifiable loss or damage. The primary judge arrived at this view after taking into account the prior history of the respondents and the need for both specific and general deterrence.
2. In *Cahill*  at [51] Middleton and Gordon JJ said:

The ground of manifest excess is not an occasion on which to re-argue the plea. [This ground] will only succeed where it can be shown that the sentence was “wholly outside the range of sentencing options available” to the sentencing judge.

1. In *R v Abbott* (2007) 170 A Crim R 306 Maxwell P said at [14]:

The ‘range’ for this purpose is the range within which it would have been reasonable for a sentencing judge to sentence this appellant for this offence in these circumstances. It follows that the ground of manifest excess will only succeed if it can be shown that no reasonable sentencing judge could have imposed this sentence on this offender for this offence in these circumstances. That is a stringent requirement, difficult to satisfy. It reflects the oft-repeated policy that sentencing is for judges and magistrates at first instance. Sentencing is not the task of appellate courts, except where clear error is shown. Where the ground of appeal is manifest excess, error will only be shown where it can be demonstrated that the sentence is obviously wrong in the sense I have described, that is, it is a sentence which no reasonable judge could have imposed in the circumstances.

1. The appellant contended that the primary judge erred by assuming that the workers had in fact not been paid, when the agreed facts were only that the respondents had a reasonable belief that the workers had not been paid. This contention is without foundation. At [41], the primary judge examined the purpose of the contravening conduct by reference to the respondents’ reasonable beliefs regarding non-payment.
2. The major difference in approach between the primary judge and the appellant which gives rise to the alleged manifest inadequacy of the penalties is that the appellant relies on the facts that the action was taken against the head contractor when it was only Concealed which was thought to have underpaid its workers, that the blockade affected 22 sub-contractors when only one was believed to have underpaid its workers, and all but 10 – 15 of the 160 site workers were prevented or dissuaded from entering the site.
3. These factors, however, must be seen against the primary judge’s reliance on the fact that there was no evidence of quantifiable damage to those people. The agreed statement of facts did not state that any loss had been suffered. Where parties agree that a proceeding is to be determined on agreed facts, those facts must govern the determination. Whilst it is open to the Court to draw inferences from agreed facts, there is no basis on which to infer, as the appellant submits, that loss significant enough to warrant heavier penalties was suffered as a result of the blockade. Had that been so, the fact would have been agreed, or subject to oral evidence. The agreed statement of facts shows that for three and a half hours there was no work done on the site. The amount, if any, of economic loss would depend on the commercial arrangements between the parties and the availability of alternative work on other sites. In the absence of evidence, the Court should not infer the magnitude or significance of the lost time.
4. During oral argument, counsel for the appellant referred to *Leighton Contractors Pty Ltd & Anor v Construction, Forestry, Mining and Energy Union & Ors* [2006] WASC 317 as authority for the proposition that economic loss as the result of a work stoppage may be inferred in the absence of evidence to that effect. However, that case differed from the present case in a number of ways. First, the parties had agreed not only a statement of facts, but also agreed penalties to be paid by the defendants. Second, the matter was prosecuted by the affected contractors working on the construction project, rather than the regulator, who appeared as an intervener. In determining whether the proposed consent orders, including the imposition of civil penalties should be made, Le Miere J at [52] inferred that the plaintiffs suffered damage from the fact that work on the construction project was not carried out during the contravening conduct. The regulator, seeking larger penalties against the defendants than was proposed by the parties, submitted that it was open to the Court to conclude that the pecuniary loss caused by the contravening conduct may be significant and potentially extensive. Le Miere J rejected this argument, stating at [61]:

…there is no evidence before the Court as to the effect of the contraventions, other than the duration of stoppages constituting or involved in each contravention. There is no evidence of the magnitude of any delay caused to the Project.

Thus, despite the inference drawn at [52] that there was some damage suffered, Le Miere J did not draw the inference that the damage suffered was sufficient to be a factor in the consideration of the seriousness of the contravening conduct.

1. The primary judge recounted that the stoppage affected the site owner, the head contractor, the sub-contractors and workers. Those were not factors which the primary judge ignored. He weighed them in the balance. It is not the role of this Court on appeal to reweigh those factors unless the approach taken by the primary judge is without a reasonable foundation on the facts of the case. The primary judge’s assessment that the offending was at the lower end of the scale is not inconsistent with the evidence of the impact on the collaborators on the project. His Honour was entitled to take into account that the stoppage was short and there was no proof of quantifiable loss. Furthermore, it should not be assumed, as the contentions of the appellant assume, that the collaborators in the project might not carry some responsibility, albeit not a legal liability, for the conduct of other collaborators on the project. Their interests are interconnected in that they all benefit from the efficient conduct of the construction process and they each generally depend on the actions of the others.
2. The primary judge assessed all the penalties imposed based on an analysis of the agreed statement of facts. The view he formed was open to him. It was closely reasoned. It cannot be said that a reasonable judge could not have come to that view. It is not the role of this appeal court in effect to retry the case. The penalties imposed were within the range of sentencing options available.
3. The manifest inadequacy ground is not made out.

## Conclusion

1. For the above reasons, the appeal should be dismissed.

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| --- |
| I certify that the preceding sixty-one (61) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice North. |

Associate:

Dated: 29 March 2017

REASONS FOR JUDGMENT

DOWSETT AND RARES JJ:

1. The sole substantive issues in this appeal are whether the primary judge erred in imposing, or imposed manifestly inadequate, pecuniary penalties on the respondents for their admitted contraventions of s 348 of the *Fair Work Act 2009* (Cth) on 22 October 2013. North J has set out the facts, the relevant arguments raised by the parties and a summary of the primary judge’s reasons. We will refer only to the particular matters necessary to explain our reasons for coming to a different conclusion as to the disposition of the appeal.

## Introduction

1. On 22 October 2013 the Construction, Forestry, Mining and Energy Union (the **CFMEU**), the first respondent, and the other six respondents, being officials or organisers of the CFMEU, arranged a **blockade** of about 100 protestors at the construction **site** for the redevelopment of Terminal 1 at Perth International Airport. The individual respondents were Michael **Buchan**, the Secretary of the CFMEU’s Western Australia Construction and General Division, Joseph **McDonald**, the Assistant Secretary of the Division, Campbell **McCullough**, the President of the Division, and three organisers of the CFMEU, Walter (Vinnie) **Molina**, Peter **Joshua** and Tawa **Harris**.
2. The primary judge considered that, applying the proportionality principle, the penalties that he imposed should be at the lower end of the range. The maximum penalty for a contravention of s 348 fixed by item 11 in the table in s 539(2) and by s 546(2) was 60 penalty units, being $10,200, for an individual and 300 penalty units, being $51,000, for a body corporate such as the CFMEU.
3. His Honour imposed a total penalty on the CFMEU of $12,000 for its five contraventions (i.e. $2,400 each), a total penalty on Mr McDonald of $2,750 for his two contraventions ($1,750 for the first and $1,000 for the second), a penalty of $2,250 on each of Mr Buchan and Mr Molina, $2,000 on Mr Joshua, $1,250 on Mr Harris and $1,000 on Mr McCullough.
4. The primary judge gave four reasons for selecting those quanta, namely:

(1) the rationale for the blockade was the CFMEU’s legitimate concern “to support employees who had not for some weeks been paid wages to which they were lawfully entitled”. His Honour made this finding based on the characterisation in the agreed facts that the CFMEU’s “request … for the payment of outstanding wages due to Concealed Interiors’ employees [w]as a ‘lawful request’”. His Honour said that this purpose was “an important mitigating factor in assessing the seriousness of the admitted contraventions”;

(2) the duration of the interference with the work on the site was only about three and a half hours;

(3) there was no evidence of “any quantifiable economic loss being suffered … by reason of the blockade”. His Honour found that the respondents’ conduct prevented all but 10 to 15 of the 160 site workers from attending work for about three and a half hours; and

(4) the respondents had cooperated from an early stage of the proceeding by making admissions and the agreed statement of facts.

1. His Honour said that despite the cause for which the respondents organised and participated in the blockade being capable of being regarded as “just”, the means adopted were unlawful and the maintenance of the rule of law required that appropriate penalties be imposed. He had earlier concluded that the CFMEU’s five contraventions constituted a single course of conduct. He had regard to its liability arising out of Mr McDonald’s two contraventions and the single contravention by each of Messrs Buchan, Molina and Joshua. He found that Mr McDonald’s threat to return the next day was “part of a continuum of the acts intended to coerce Perth Airport, Broad and Concealed Interiors to make the necessary arrangements amongst themselves to ensure that the workers were paid their outstanding wages”. The primary judge reasoned that Mr McDonald’s threat was part of a single course of conduct that included his organising of, and participating in, the blockade itself on 22 October 2013.
2. Critically, his Honour said that the Court should adopt an approach whereby the maximum penalty for a contravention of s 348 “is to be reserved for the most serious of the contraventions”.

## The respondents’ submissions

1. The respondents argued that the Commissioner had failed to identify any error within the principles in *House v The King* (1936) 55 CLR 499 at 504-505 to justify interference with his Honour’s discretionary judgment in fixing penalties. They contended that his Honour had appropriately had regard to the prior records of the CFMEU and of Messrs McDonald, Molina, Buchan and Harris. The respondents submitted that his Honour correctly held that there was one course of conduct. They argued that the primary judge had not erred in failing expressly to consider whether the respondents could have pursued alternative, but lawful, means of securing the payment of any unpaid entitlements owed to employees of Concealed Interiors. They noted that his Honour had sought and received written submissions on that very question and that he should be credited with having taken them into account even though he had not referred to those submissions in his reasons.
2. The respondents contended that his Honour’s characterisation of the “lawful request” as an important mitigating factor in the assessment of penalties had no relevant role in that assessment. The respondents argued that the Commissioner’s assertion that the penalties were manifestly inadequate was an attempt to have the Full Court engage in merits review of penalties that were within the range apposite for the contraventions.

## Consideration

1. In *House* 55 CLR at 505, Dixon, Evatt and McTiernan JJ said:

If the judge acts upon a wrong principle, **if he allows extraneous or irrelevant matters to guide or affect him**, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, **if upon the facts it is unreasonable or plainly unjust**, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred. (emphasis added)

1. We are of opinion that his Honour erred in treating what he said was the “rationale” of the respondents’ participation in and organisation of the blockade as a, let alone an important, mitigating factor in assessing the seriousness of their contraventions. That factor could not be taken into account in mitigation, as his Honour did, because s 347(b)(ii), (iii), (iv), (c), (d) and (e) included within the meaning of a person who “engages in industrial activity”, the situations in which the person does, or does not, “organise or promote a lawful [or unlawful] activity for, or on behalf of, an industrial association”, “encourage, or participate in, a lawful [or unlawful] activity organised or promoted by an industrial association” and “comply with a lawful [or unlawful] request made by, or requirement of, an industrial association”. Thus each of s 347(b)(ii), (iii) and (iv), when read with s 347(c), (d) and (e) (which each used the word “unlawful” as appears in the square brackets in the preceding sentence), made the lawfulness or unlawfulness of the character of the particular activity irrelevant to the prohibition against coercion imposed by s 348.
2. The legislative prohibition in s 348 is designed to proscribe the use of industrial action to coerce someone else into, among other things, complying with a request whether it is lawful or not. The purpose of s 348 is to make the act of coercion itself unlawful, regardless of its motivation. The lawfulness of a request, the fulfilment of which the person seeks to achieve by taking coercive action, is an element of a contravention of s 348 and cannot be treated as, in any way, mitigating the seriousness of that contravention.
3. Thus, the respondents’ motivation for organising and participating in the blockade could not be a mitigating factor and should have been treated as irrelevant to the primary judge’s consideration of the appropriate penalties. However, in arriving at his decision that the penalties should be at the lower end of the range, his Honour expressly took into account the “lawfulness” of the “request” that he characterised as the respondent’s motive for organising and participating in the coercive blockade.
4. His Honour also took into account that “there was no evidence of any quantifiable economic loss being suffered by the parties concerned by reason of the blockade”. In our opinion, his Honour’s reliance on the absence of evidence of “quantifiable economic loss” ignored the undisputed facts of actual substantive loss. The following facts demonstrated that the respondents’ coercive action achieved what they intended it to achieve: that was the indiscriminate infliction of substantive economic loss not only on the “believed” wrongdoer, Concealed Interiors, but also on 21 other businesses working at the site and between 145 and 160 employees of those businesses, to say nothing of the impact of the blockade on a fine sunny day (as appeared in the television footage in evidence) on the timely completion of the overall construction work.
5. The agreed facts before his Honour and the Full Court included a copy of the television station’s video recording of events that depicted a deal of the verbal and physical conduct complained of. The agreed facts must be considered in their context, including the contents of the video, any previous history of contraventions by the CFMEU and, where relevant, each individual respondent, and the objective circumstances.
6. *First*, Mr Buchan explained the respondents’ “rationale” for the blockade by saying to the television reporter:

Reporter: Who is it that has to pay who is not paying them, is it the ceilings company?

Mick Buchan: Well I suppose **that’s something that we’ll get to the bottom of at the end of the day**, I think that everyone ducks for cover whether it’s the principal contractor or the subcontractor[. A]t the end of the day what we care most about is that **we don’t care where it comes from whether it’s from the client whether the principal whether the subcontractor** the workers [sic] given up his work and put his blood to the stone and built the project and needs to be paid properly.

Reporter: So these guys here are they subcontractors or…

Mick Buchan: The **guys involved here are the employees of the ceiling and wall contractor on the project**.

…

Reporter: What’s the name of the company?

…

Mick Buchan: The principal contractor is Broad

Reporter: Wall and ceiling company. Is that what it’s called?

Mick Buchan: Concealed Interiors. (emphasis added)

1. In other words, the CFMEU and at least Mr Buchan, but we would infer all of the respondents, intended the blockade to affect, and so to injure, a wide range of persons quite apart from Concealed Interiors. As Mr Buchan said, “we don’t care where it comes from”. That statement reflected the reality of the blockade as industrial bullying. It indiscriminately targeted all persons and businesses associated with the construction work at the site, regardless of their possible responsibility for what was only a “reasonable belief” of the respondents that Concealed Interiors was in default of paying its, or some of its, employees their entitlements. Similarly, in the agreed facts (at [23] that North J has quoted in [15] of his reasons), Mr Joshua approached Broad’s site supervisor, David Lewis, and said words to the effect:

**You guys need to sort out your CA’s** as Concealed are a shower of shit. They need to make it happen and pull the pin on them [sic]. **We are doing exactly the same thing as we did with them six months ago.** (emphasis added)

1. *Secondly*, it was unnecessary to have evidence of any particular or quantified loss in those circumstances, when the agreed facts accepted that all but 10 to 15 of the 160 workers employed by the 22 subcontractors working on the site on 22 October 2013 were prevented or dissuaded from entering the site “and consequently refused or failed to perform work at the Site between 6.30am and 10.00am”. As a result, those 145 to 150 workers either were not paid for that time, or perhaps longer, or if they were, their employers paid them and incurred the overheads of running their businesses for no productive result. Moreover, at least three and a half hours of work, on a fine day, were lost and there were likely to be disputes among the various parties as to who bore the contractual liability for the loss of productivity and time caused by the blockade.
2. Where a major building site is blockaded so that work cannot be performed, substantive economic loss to someone is an inevitable consequence. Indeed the infliction of that type of loss was the respondents’ purpose. They intended that their coercion would produce the result that someone would pay Concealed Interiors’ employees in circumstances where, as Mr Buchan said, “we don’t care where it comes from”.
3. *Thirdly*, the coercion was reinforced by Mr McDonald’s threat at about 10.00am on 22 October 2013 that the respondents would return to the site the next morning, again with 100 people. Nothing could be clearer than that as evidence that the respondents knew that the blockade had caused, and would, if repeated, cause, substantive economic loss to any workers at the site who were not paid and to the businesses there.
4. *Fourthly*, there was no evidence that the respondents had done anything, prior to instituting the blockade, to enquire about the correctness of their “belief” that some employees of Concealed Interiors had not been paid or to seek to pursue obtaining payment for them through negotiations or an application to the Fair Work Commission or a Court. On the facts before his Honour, the first indication of the respondents’ involvement in pursuing the cause of Concealed Interiors’ employees was the blockade itself.
5. *Fifthly*, as Jessup J, with the agreement of Allsop CJ and North J, said in *Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner* [2016] FCAFC 184 at [94], the CFMEU had a “deplorable record of contraventions” that had been the subject of many Court judgments. The Commissioner provided tables to the primary judge and us, that summarised about 150 cases of contraventions of industrial legislation involving the CFMEU. Some cases also involved one or more of the other respondents, except for Messrs McCullough and Joshua, each of whom had no prior history. His Honour recorded that the individual respondents with a prior record of contraventions were Mr McDonald (53), Mr Molina (9), Mr Buchan (6) and Mr Harris (3). The primary judge also said that the CFMEU had a very extensive record of non-compliance with industrial law. In *CFMEU* [2016] FCAFC 184 at [90]-[95] Jessup J considered the CFMEU’s ground of appeal against a finding of Mortimer J, whom he quoted at [90] as follows:

While recognising there are more serious examples of coercion contrary to s 348 that can be imagined, **the very conscious and deliberate nature of these contraventions, borne out of the respondents’ attitude that the end justifies the means, makes the contraventions very serious because of the respondents’ deliberate disregard for the law. There was a planned strategy, executed knowing it would be unlawful, and not caring about that fact.** Industrial power was used to attempt to secure a desired outcome. A further repeated strategy was used of eventually capitulating when the time was right and submitting to penalty. That conduct in itself has an aspect of the respondents thumbing their noses at the system, including at the courts. (emphasis added)

1. The CFMEU had argued that Mortimer J made her findings about the strategies that her Honour had identified without affording it procedural fairness. Jessup J, with the agreement of Allsop CJ at [18] and North J at [29], found that her Honour had been entitled to draw the inference that the CFMEU had a deliberate strategy to contravene s 348 on the basis of the ends justifying the means. Jessup J said (at [94]-[95]):

No attempt was made, on behalf of the appellants, to demonstrate the falsity of the pattern of conduct which her Honour perceived in the judgments to which she had been referred. **So far as appears, that pattern involved the CFMEU initially defending the indefensible, and then, late in the day, admitting to incriminating facts and conclusions in place of participating in contested proceedings. This perverse approach to penal litigation had become so ubiquitous, in these judgments, that it could scarcely have been accidental. Presumably, it was not the result of the incompetence of the CFMEU’s legal advisers.** To describe it as a “strategy” may not have been to employ the metaphor that everyone would have chosen, but the underlying inference, of which complaint is now made, was readily available to the primary Judge.

That leaves the question of procedural fairness ... Here, the facts were again on the table before the primary Judge, but no suggestion had previously been made that those facts might be viewed as bespeaking a strategy of the kind to which her Honour referred. That case was not, and the present case is not, an instance of the denial of procedural fairness. In the present case, I would add that, **having, by its own conduct, built up such a substantial and conspicuous record of prior instances, the CFMEU is in no position to complain that it was not warned that those instances might be recognised for what they were**. (emphasis added)

1. The evidence in these proceedings before the primary judge, which he took into account in fixing the penalties, included the agreed fact that the respondents had cooperated with the Commissioner (or rather his predecessor) at an early stage of the proceedings (that had commenced in September 2014). That finding of early cooperation could distinguish the respondents’ conduct in this instance to a limited degree from the pattern of conduct to which Mortimer J and Jessup J referred. But, the salient features are present. The respondents deliberately and flagrantly contravened s 348 on 22 October 2013. Much of their conduct on that day appeared in the television station’s footage. The facts establishing the admitted contraventions were overwhelming and easily proved. The respondents’ cooperation, while having utility and being relevant to the determination of the penalties, can be seen to fit into the pattern of its past conduct to which Mortimer J and Jessup J referred.
2. The respondents’ conduct complained of, that occurred on 22 October 2013, is a clear instance of them taking the law into their own hands and flouting the protection from coercion that s 348 is intended to provide. On the agreed facts, the respondents deliberately engaged in coercion, knowing that their conduct was unlawful. They intended to bully each of the 22 businesses working at the site until their demands were met, as exemplified by the attitude of Mr Buchan when he said, “we don’t care where it comes from”. The conduct was premeditated and orchestrated, as is plain from the organisation required to ensure that 100 people were present to conduct the blockade. The respondents, by that conduct, effectively prevented access to a large worksite for about three and half hours.
3. The primary judge considered that the CFMEU (in respect of the contraventions of Messrs Buchan, Molina and Joshua) and Mr McDonald (in respect of his two contraventions) had engaged in a single course of conduct. His Honour did not address s 557 of the Act. That provided that for the purposes of Pt 4-1 (in which the power in s 546 to impose a pecuniary penalty appears), two or more contraventions by the same person of a civil remedy provision referred to in s 557(2) are deemed, subject to s 557(3), to constitute a single course of conduct and must be taken to be a single contravention. Importantly, s 348 was not included in s 557(2), so the automatic deeming effected by s 557(1) did not apply to any contravention of s 348. That was unlike, for example, the position under s 557 in respect of multiple contraventions of either s 417(1), which dealt with industrial action before the normal expiry date of an enterprise agreement, or s 434, which dealt with contraventions of Ministerial directions in relation to industrial action (see s 557(2)(j) and (l)). Moreover, s 557(3) provided that the deeming in s 557(1) of a single course of conduct did not apply to the contravention of any civil remedy provision (including ss 417(1) and 434) that was committed by a person after a court had imposed a pecuniary penalty on the person for an earlier contravention of the provision.
4. In our opinion, s 557 did not cover the field and did not exclude the common law principle of taking into account, when imposing a penalty, whether the conduct complained of constituted a single course of conduct. However, s 557 provided a legislative indication that certain forms of concerted industrial action, such as multiple contraventions of ss 417(1) and 434, would be deemed, only in the case of a first contravention by the person, to be a single contravention. That contrasted with the legislative purpose of treating one contravention of s 348 differently from ones to which s 557 applied. The Parliament appears to have intended that multiple contraventions of s 348, in what, in other circumstances (such as those covered by s 557), might be treated as a course of conduct, would not necessarily attract any sentencing leniency.
5. Here, of course, all but two of the respondents, Mr Joshua and Mr McCullough, had prior records. Although they had histories of prior contraventions of industrial laws, the parties did not identify any proceedings in which Messrs Buchan or Harris had contravened s 348. The record of the CFMEU in evidence included 10 proceedings in which it had been found liable for breach of s 348, sometimes for multiple contraventions (e.g. *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 225). In *Brookfield Multiplex Engineering and Infrastructure Pty Ltd v McDonald* [2014] FCA 389 and *Brookfield Multiplex FSH Contractor Pty Limited v McDonald* [2014] FCA 359, North J found respectively contraventions of s 348 against the CFMEU (3) and (1), Mr McDonald (3) and (1) and Mr Molina (3). In *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2014] FCA 126, Gilmour J found three contraventions of s 348 by each of the CFMEU and Mr McDonald.
6. The primary purpose of imposing a civil penalty is to deter the contravener and others from repeating conduct of the kind complained of. As French CJ, Kiefel, Bell, Nettle and Gordon JJ explained in *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 326 ALR 476 at 490 [54]-[55]:

… a criminal prosecution is aimed at securing, and may result in, a criminal conviction. By contrast, a civil penalty proceeding is precisely calculated to avoid the notion of criminality as such.

No less importantly, whereas criminal penalties import notions of retribution and rehabilitation, **the purpose of a civil penalty**, as French J explained in *Trade Practices Commission v CSR Ltd* [(1991) ATPR 41-076 at 52,152], **is primarily if not wholly protective in promoting the public interest in compliance**:

“Punishment for breaches of the criminal law traditionally involves three elements: deterrence, both general and individual, retribution and rehabilitation. Neither retribution nor rehabilitation, within the sense of the Old and New Testament moralities that imbue much of our criminal law, have any part to play in economic regulation of the kind contemplated by Pt IV [of the Trade Practices Act]. … **The principal, and I think probably the only, object of the penalties imposed by s 76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act.**” (footnotes omitted; emphasis added)

1. In our opinion, the primary judge failed to have regard to the need to deter serial recidivists, like the CFMEU and Mr McDonald, and their immediate co-contraveners on 22 October 2013, being the other respondents, from contravening s 348 of the Act again. Instead, his Honour wrongly characterised their deliberate coercion as at the lower end of the scale, in part because of his finding that the conduct had the purpose of enforcing a “lawful” request. For the reasons we have explained, the “request” was based only on a belief and there was no evidence that the respondents had raised any concerns with, let alone sought to negotiate with or otherwise pursue lawful remedies against, Concealed Interiors in a way that would have avoided any industrial action. Indeed, his Honour in the latter part of his reasons at [72] and [76] (that North J has set out at [30] of his reasons) described the respondents’ conduct as “supporting workers who were the **victims** of the **failure** by their employer to pay them their **outstanding** wages” and “the request made by the CFMEU **for the payment of outstanding wages due** to Concealed Interiors’ employees”. That description appears to have treated differently the agreed fact that the primary judge had noted earlier in his reasons (at [40]) that “the CFMEU had [a] reasonable belief” that Concealed Interiors’ employees had not been paid. The penalties that the primary judge imposed, by reference to the importance to his Honour of the mitigating factor of the lawfulness of the request, were not calculated to, or fixed at a level that would, achieve the purpose of deterrence of future contravening conduct by the respondents or others.
2. Because his Honour erred in the exercise of his discretion for the reasons above, it is necessary to set aside all the penalties that he imposed and reassess the appropriate penalty for each respondent.
3. In the circumstances, although it is not necessary to decide this ground, we are of opinion, for the same reasons, that the penalties imposed by his Honour on each of the respondents were also unreasonable and manifestly inadequate: *Markarian v The Queen* (2005) 228 CLR 357 at 370-371 [25] per Gleeson CJ, Gummow, Hayne and Callinan JJ.
4. The prior history of multiple contraventions of s 348 by each of Messrs McDonald and Molina required that they be punished more severely than the other individual respondents. Mr Buchan had a record of six prior contraventions, although none for breaching s 348. However, he was active in promoting the blockade on 22 October 2013. Mr Harris also had a record of unlawful industrial conduct. Both Mr Joshua and Mr McCullough had no record, but the parties agreed that Mr Joshua’s role was more significant than Mr McCullough’s.
5. Mr McDonald’s conduct involved two separate contraventions of s 348. The first was his role in organising and participating in the blockade on 22 October 2013. That conduct came to an end, on the agreed facts, at about 10.00am, when the second contravention occurred as Mr McDonald made his threat that the respondents and others would return the next day. There was no evidence or explanation about how that threat was part of the original coercion, other than to add a greater sting to it. Mr McDonald had an extensive history of flouting the law, including seven prior instances of contravention of s 348. His conduct in making the threat, although arising in a broad way out of the same events, was separate and discrete from the earlier events. It was a new, deliberate act of unlawful coercion and must be penalised appropriately as a separate contravention.
6. The CFMEU’s five contraventions arose by reason that the conduct of Messrs McDonald (on both occasions), Buchan, Molina and Joshua, were its conduct, as the agreed facts acknowledged. The success of the blockade depended on the activities of those two officials and two organisers in organising it so that about 100 people were present and made it effective. The coercion was the more forceful because it had more people involved.
7. The Parliament did not enlist s 557(2) to deem that a course of conduct involving multiple contraventions of s 348 would be punishable as a single contravention for a first offender. It is important to recognise that coercion is a particularly serious form of industrial (mis)conduct. If more principal actors are involved in unlawful coercion, there is a potentially greater impact on the target. Of course, all will depend on the facts. Here, the CFMEU acted through four agents to organise and execute the blockade. Its enlistment of each agent and his conduct was a separate contravention of s 348 and each made the overall impact and effectiveness of the blockade greater. There was some overlap between the conduct of each of Messrs Buchan, McDonald, Molina and Joshua, whose acts created each contravention by the CFMEU. However, the CFMEU knew that the conduct of each of its officials or organisers, whom it deployed in effecting its coercion, would render it liable for a separate contravention of s 348.

## Conclusion

1. Trade unions are recognised by statute and have privileges and responsibilities associated with such recognition. Generally, trade unions and their members abide by the law. Indeed, as history has shown, trade unions can play a significant role in exposing and reforming inadequate or inappropriate terms and conditions of employees in not only a particular employer’s workforce but in an industry. Ordinarily, trade unions have achieved such results by acting within, and respecting, the law that regulates the conduct of all participants involved in the employer-employee relationship.
2. The conduct of the CFMEU seen in this case brings the trade union movement into disrepute and cannot be tolerated.
3. In a liberal democracy, it is assumed that citizens, corporations and other organisations will comply with the law. Such compliance is not a matter of choice. The community does not accept that a citizen, corporation or other organisation may choose to break the law and simply pay the penalty. The courts certainly do not accept that proposition. Such acceptance would pose a serious threat to the rule of law upon which our society is based. It would undermine the authority of Parliament and could lead to the public perception that the judiciary is involved in a process which is pointless, if not ridiculous.
4. The Parliament’s purpose in legislating to provide that particular proscribed conduct will attract a civil penalty was to deter persons, including but not limited to trade unions or corporations, from engaging or continuing to engage in such conduct. A civil penalty would lose its utility if the person on whom it was imposed simply treated it as a cost of continuing to carry on with the very conduct that had just been penalised.
5. The CFMEU can be seen to have chosen to pay penalties in preference to obeying the law. It is not entitled to any leniency in the circumstances of the conduct complained of. The legislative purpose in the Act, of creating separate contraventions and imposing pecuniary penalties on organisations, such as the CFMEU, for conduct engaged in on the one occasion by their agents, will not be served by equating multiple contraventions by a recidivist as a wholly single course of conduct. Each separate contravention by the CFMEU’s officials and organisers on 22 October 2013 had a distinct effect and impact in making the blockade of a very large site effective. The Act contemplates that the Court can fix a high price, by way of aggregated penalties, on an organisation in circumstances such as the present to deter future repetition.

## Conclusion as to penalties

1. Having regard to all of the material in evidence, we would allow the appeal, set aside the penalties fixed by the primary judge and in their place impose the following penalties:
   1. $17,500 on Mr McDonald consisting of $9,500 for his first contravention and $8,000 for his second (being the threat he made at about 10.00am);
   2. $9,000 each on Mr Buchan and Mr Molina;
   3. $5,000 on Mr Joshua;
   4. $4,000 on Mr Harris;
   5. $2,500 on Mr McCullough; and
   6. $195,000 on the CFMEU consisting of four penalties of $40,000 and a fifth, in respect of Mr McDonald’s threat, of $35,000.

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| I certify that the preceding forty-two (42) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Dowsett and Rares. |

Associate:

Dated: 29 March 2017

SCHEDULE OF PARTIES

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| Respondents |  |
| Fourth Respondent: | WALTER (VINNIE) MOLINA |
| Fifth Respondent: | PETER JOSHUA |
| Sixth Respondent: | CAMPBELL MCCULLOUGH |
| Seventh Respondent: | TAWA HARRIS |