FEDERAL COURT OF AUSTRALIA

Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Nine Brisbane Sites Case) (No 3) [2018] FCA 564

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| File number: |  |
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| Judge: | **COLLIER J** |
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| Date of judgment: | 24 April 2018 |
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| Catchwords: | **INDUSTRIAL LAW** – alleged contraventions of s 417 of the *Fair Work Act 2009* (Cth) – stop work meetings – where the enterprise agreement contained a union meeting clause – proper construction of union meeting clause – meaning of “industrial action” under s 19(1) of the *Fair Work Act 2009* (Cth) – whether otherwise unlawful conduct can be authorised within the meaning of s 19(2)(a) – whether authorised conduct is “industrial action” for the purposes of Pt 3-3 of the *Fair Work Act 2009* (Cth) – relevance and operation of s 194(e) of the *Fair Work Act 2009* (Cth) **INDUSTRIAL LAW** – where the respondent union instigated a campaign against the principal contractor across numerous sites – stop work meetings and strike action – admitted contraventions of ss 346(b), 355 and 417 of the *Fair Work Act 2009* (Cth) – appropriate penalties – application of s 556 of the *Fair Work Act 2009* (Cth) – general and specific deterrence – prior contraventions and similar previous conduct – contrition and cooperation – application of the totality principle under s 557 of the *Fair Work Act 2009* (Cth) |
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| Legislation: | *Crimes Act 1914* (Cth) s 4AA(1)*Fair Work Act 2009* (Cth) Pts 2-4, 3-1, 3-1 Div 4, 3-1 Div 5, 3-3; ss 19(1), 19(1)(a), 19(1)(b), 19(1)(c), 19(2)(a), 194, 194(e), 343(1)(a), 343(1)(b), 346(b), 346(c), 347, 347(a), 347(b), 347(b)(iv), 348, 355, 355(b), 406, 417, 556, 557, 557(1), 557(2) |
|  |  |
| Cases cited: | *Amcor Ltd v CFMEU* [2005] FCA 10; (2005) 222 CLR 241*Australian Building and Construction Commissioner v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (The Australian Paper Case) (No 2)* [2017] FCA 367*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 53; (2017) 249 FCR 458 *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113 *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (Perth Childrens’ Hospital Contraventions Case)* [2017] FCA 491 *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (the Webb Dock case)* [2017] FCA 62*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; (2017) 271 IR 321 *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCA 157*Australian Building and Construction Commissioner v Huddy (No 2)* [2017] FCA 1088*Australian Building and Construction Commissioner v Pauls* [2017] FCA 843*City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* [2006] FCA 813; (2006) 153 IR 426*Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2016) 258 CLR 482 *Construction, Forestry, Mining and Energy Union v Hail Creek Coal Pty Ltd* [2015] FCA 532*Director of the Fair Work Building Industry Inspectorate v Bragdon (No 2)* [2015] FCA 998*Director of the Fair Work Building Industry Inspectorate v Cartledge* [2014] FCA 1047*Director of the Fair Work Building Industry Inspectorate v CFMEU Construction, Forestry, Mining and Energy Union (The Mitcham Rail Case)* [2015] FCA 1173*Director of the Fair Work Building Industry Inspectorate v CFMEU (No 2)* [2015] FCA 407; (2015) 234 FCR 451 *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1213*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 226 *Director of the Fair Work Building Industry Inspectorate v Stephenson* [2014] FCA 1432; (2015) 146 ALD 75 *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCAFC 59*Kucks v CSR Limited* [1996] IRCA 141; (1996) 66 IR 182*La Macchia v Minister for Primary Industries and Energy* [1992] FCA 673; (1992) 110 ALR 201*Ponzio v B & P Caelli Constructions Pty Ltd* [2007] FCAFC 65; (2007) 158 FCR 543*Toyota Motor Corporation Australia Limited v Marmara* [2014] FCAFC 84; (2014) 222 FCR 152*Transport Workers’ Union of Australia v Linfox Australia Pty Ltd* [2014] FCA 829; (2015) 318 ALR 54 *Veen v The Queen (No 2)* [1988] HCA 14; (1988) 164 CLR 465 |
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| Date of hearing: | 22 May 2017 |
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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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| Counsel for the Respondents: | Mr WL Friend QC with Mr CA Massy |
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| Solicitor for the Respondents: | Hall Payne |

ORDERS

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|  | QUD 755 of 2016 |
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| BETWEEN: | AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONERApplicant |
| AND: | CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNIONFirst RespondentMATTHEW PARFITTSecond RespondentJUSTIN STEELE (and others named in the Schedule)Third Respondent |

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| JUDGE: | COLLIER J |
| DATE OF ORDER: | 24 APRIL 2018 |

THE COURT MAKES THE FOLLOWING ADDITIONAL DECLARATIONS BY CONSENT:

## Third Respondent (Steele)

1. By organising a stoppage on 21 September 2016 at the Ivy Apartments Project, site in South Brisbane, Queensland (the **Ivy site**), with the intent to coerce J Hutchinson Pty Ltd T/A Hutchinson Builders (**Hutchinson**) to engage a contractor covered by an enterprise agreement that also covers the Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**), the Third Respondent (**Steele**) contravened s 355 of the *Fair Work Act 2009* (Cth) (**FW Act**).
2. By organising a stoppage on 21 September 2016 at the Ivy site because Hutchinson was engaging, had engaged and was proposing to engage in industrial activity, namely, was not complying, had not complied, and was proposing not to comply, with a lawful request of the CFMMEU for Hutchinson to consult with the CFMMEU regarding the engagement of sub-contractors pursuant to clauses 33 and/or 35 of the J Hutchinson Pty Ltd T/A Hutchinson Builders and CFMEU Union Collective Agreement 2015-2019 (the **Hutchinson Agreement**), Steele contravened s 346 of the FW Act.
3. By organising a stoppage on 23 September 2016 at the Opera Apartments Project site in South Brisbane, Queensland (the **Opera site**), with the intent to coerce Hutchinson to engage a contractor covered by an enterprise agreement that also covers the CFMMEU, Steele contravened s 355 of the FW Act.
4. By organising a stoppage on 23 September 2016 at the Opera site because Hutchinson was engaging, had engaged and was proposing to engage in industrial activity, namely, was not complying, had not complied, and was proposing not to comply, with a lawful request of the CFMMEU for Hutchinson to consult with the CFMMEU regarding the engagement of sub-contractors pursuant to clauses 33 and/or 35 of the Hutchinson Agreement, Steele contravened s 346 of the FW Act.

## Fifth Respondent (Bland)

1. By organising a stoppage on 23 September 2016 at the Skytower Project site in Brisbane, Queensland (the **Skytower site**), with the intent to coerce Hutchinson to engage a contractor covered by an enterprise agreement that also covers the CFMMEU, the Fifth Respondent (**Bland**) contravened s 355 of the FW Act.
2. By organising a stoppage on 23 September 2016 at the Skytower site because Hutchinson was engaging, had engaged and was proposing to engage in industrial activity, namely, was not complying, had not complied, and was proposing not to comply, with a lawful request of the CFMMEU for Hutchinson to consult with the CFMMEU regarding the engagement of sub-contractors pursuant to clauses 33 and/or 35 of the Hutchinson Agreement, Bland contravened s 346 of the FW Act.

## Sixth Respondent (Floro)

1. By organising a stoppage on 27 September 2016 at the Illumina Apartments Project site in Toowong, Queensland (the **Illumina site**), with the intent to coerce Hutchinson to engage a contractor covered by an enterprise agreement that also covers the CFMMEU, the Sixth Respondent (**Floro**) contravened s 355 of the FW Act.
2. By organising a stoppage on 27 September 2016 at the Illumina site because Hutchinson was engaging, had engaged and was proposing to engage in industrial activity, namely, was not complying, had not complied, and was proposing not to comply, with a lawful request of the CFMMEU for Hutchinson to consult with the CFMMEU regarding the engagement of sub-contractors pursuant to clauses 33 and/or 35 of the Hutchinson Agreement, Floro contravened s 346 of the FW Act.

## Seventh Respondent (Stott)

1. By organising a stoppage on 23 September 2016 at the Newstead Central Apartments Project site in Newstead, Queensland (the **Newstead site**), with the intent to coerce Hutchinson to engage a contractor covered by an enterprise agreement that also covers the CFMMEU, the Seventh Respondent (**Stott**) contravened s 355 of the FW Act.
2. By organising a stoppage on 23 September 2016 at the Newstead site because Hutchinson was engaging, had engaged and was proposing to engage in industrial activity, namely, was not complying, had not complied, and was proposing not to comply, with a lawful request of the CFMMEU for Hutchinson to consult with the CFMMEU regarding the engagement of sub-contractors pursuant to clauses 33 and/or 35 of the Hutchinson Agreement, Stott contravened s 346 of the FW Act.

## Eighth Respondent (Davis)

1. By organising a stoppage on 23 September 2016 at the South Point A Project site in Southbank, Queensland (the **South Point A site**), with the intent to coerce Hutchinson to engage a contractor covered by an enterprise agreement that also covers the CFMMEU, the Eighth Respondent (**Davis**) contravened s 355 of the FW Act.
2. By organising a stoppage on 23 September 2016 at the South Point A site because Hutchinson was engaging, had engaged and was proposing to engage in industrial activity, namely, was not complying, had not complied, and was proposing not to comply, with a lawful request of the CFMMEU for Hutchinson to consult with the CFMMEU regarding the engagement of sub-contractors pursuant to clauses 33 and/or 35 of the Hutchinson Agreement, Davis contravened s 346 of the FW Act.

## First Respondent (CFMMEU)

1. By reason of ss 363 and 793 of the FW Act, and the principles of vicarious liability, the CFMMEU is taken to have contravened s 355 of the FW Act by reason of the conduct of Steele referred to in Declaration 61.
2. By reason of ss 363 and 793 of the FW Act, and the principles of vicarious liability, the CFMMEU is taken to have contravened s 346 of the FW Act by reason of the conduct of Steele referred to in Declaration 62.
3. By reason of ss 363 and 793 of the FW Act, and the principles of vicarious liability, the CFMMEU is taken to have contravened s 355 of the FW Act by reason of the conduct of Steele referred to in Declaration 63.
4. By reason of ss 363 and 793 of the FW Act, and the principles of vicarious liability, the CFMMEU is taken to have contravened s 346 of the FW Act by reason of the conduct of Steele referred to in Declaration 64.
5. By reason of ss 363 and 793 of the FW Act, and the principles of vicarious liability, the CFMMEU is taken to have contravened s 355 of the FW Act by reason of the conduct of Bland referred to in Declaration 65.
6. By reason of ss 363 and 793 of the FW Act, and the principles of vicarious liability, the CFMMEU is taken to have contravened s 346 of the FW Act by reason of the conduct of Bland referred to in Declaration 66.
7. By reason of ss 363 and 793 of the FW Act, and the principles of vicarious liability, the CFMMEU is taken to have contravened s 355 of the FW Act by reason of the conduct of Floro referred to in Declaration 67.
8. By reason of ss 363 and 793 of the FW Act, and the principles of vicarious liability, the CFMMEU is taken to have contravened s 346 of the FW Act by reason of the conduct of Floro referred to in Declaration 68.
9. By reason of ss 363 and 793 of the FW Act, and the principles of vicarious liability, the CFMMEU is taken to have contravened s 355 of the FW Act by reason of the conduct of Stott referred to in Declaration 69.
10. By reason of ss 363 and 793 of the FW Act, and the principles of vicarious liability, the CFMMEU is taken to have contravened s 346 of the FW Act by reason of the conduct of Stott referred to in Declaration 70.
11. By reason of ss 363 and 793 of the FW Act, and the principles of vicarious liability, the CFMMEU is taken to have contravened s 355 of the FW Act by reason of the conduct of Davis referred to in Declaration 71.
12. By reason of ss 363 and 793 of the FW Act, and the principles of vicarious liability, the CFMMEU is taken to have contravened s 346 of the FW Act by reason of the conduct of Davis referred to in Declaration 72.

THE COURT ALSO DECLARES THAT:

1. The reserved issue, as defined in the judgment, is decided in favour of the respondents.

THE COURT ORDERS THAT:

## Second Respondent (Parfitt)

1. In respect of Declarations 1, 2 and 3, the Second Respondent pay a pecuniary penalty of $5,000.
2. In respect of Declarations 4, 5 and 6, the Second Respondent pay a pecuniary penalty of $5,000.

## Third Respondent (Steele)

1. In respect of Declarations 7, 8 and 9, the Third Respondent pay a pecuniary penalty of $6,000.
2. In respect of Declarations 10, 11 and 12, the Third Respondent pay a pecuniary penalty of $6,000.
3. In respect of Declarations 13, 14 and 15, the Third Respondent pay a pecuniary penalty of $6,000.
4. In respect of Declarations 61 and 62, the Third Respondent pay a pecuniary penalty of $6,000.
5. In respect of Declarations 63 and 64, the Third Respondent pay a pecuniary penalty of $6,000.

## Fourth Respondent (Pauls)

1. In respect of Declarations 16, 17 and 18, the Fourth Respondent pay a pecuniary penalty of $6,000.
2. In respect of Declarations 19, 20 and 21, the Fourth Respondent pay a pecuniary penalty of $6,000.

## Fifth Respondent (Bland)

1. In respect of Declarations 22, 23 and 24, the Fifth Respondent pay a pecuniary penalty of $6,000.
2. In respect of Declarations 65 and 66, the Fifth Respondent pay a pecuniary penalty of $6,000.

## Sixth Respondent (Floro)

1. In respect of Declarations 25, 26 and 27, the Sixth Respondent pay a pecuniary penalty of $5,000.
2. In respect of Declarations 28, 29 and 30, the Sixth Respondent pay a pecuniary penalty of $5,000.
3. In respect of Declarations 67 and 68, the Sixth Respondent pay a pecuniary penalty of $5,000.

## Seventh Respondent (Stott)

1. In respect of Declarations 69 and 70, the Seventh Respondent pay a pecuniary penalty of $5,000.

## Eighth Respondent (Davis)

1. In respect of Declarations 71 and 72, the Eighth Respondent pay a pecuniary penalty of $6,000.

## First Respondent (CFMMEU)

1. In respect of conduct of 25 August 2016, the subject of Declarations 31, 32 and 33, the First Respondent pay a pecuniary penalty of $48,000.
2. In respect of conduct on 7 September 2016, the subject of Declarations 37, 38 and 39, the First Respondent pay a pecuniary penalty of $48,000.
3. In respect of conduct on 13 September 2016, the subject of Declarations 34, 35, 36, 46, 47 and 48, the First Respondent pay a pecuniary penalty of $48,000.
4. In respect of conduct on 14 September 2016, the subject of Declarations 40, 41, 42, 52, 53 and 54, the First Respondent pay a pecuniary penalty of $48,000.
5. In respect of conduct on 15 September 2016, the subject of Declarations 43, 44 and 45, the First Respondent pay a pecuniary penalty of $48,000.
6. In respect of conduct on 21 September 2016, the subject of Declarations 73 and 74, the First Respondent pay a pecuniary penalty of $48,000.
7. In respect of conduct on 23 September 2016, the subject of Declarations 49, 50, 51, 55, 56, 57, 75, 76, 77, 78, 81, 82, 83 and 84, the First Respondent pay a pecuniary penalty of $48,000.
8. In respect of conduct on 26 September 2016, the subject of Declarations 58, 59 and 60, the First Respondent pay a pecuniary penalty of $48,000.
9. In respect of conduct on 27 September 2016, the subject of Declarations 79 and 80, the First Respondent pay a pecuniary penalty of $48,000.

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

REASONS FOR JUDGMENT

COLLIER J:

# Background

1. The conduct the subject of the proceedings took place between 25 August 2016 and 27 September 2016 across nine construction projects in the Brisbane metropolitan area. On each of these projects J Hutchinson Pty Ltd T/A Hutchinson Builders (**Hutchinson**) was the principal contractor. The respondent union (the **CFMMEU**) had instigated a campaign against Hutchinson. The object of the campaign was the engagement by Hutchinson of subcontractors who had entered into enterprise agreements with the CFMMEU or other CFMMEU approved unions, and consultation by Hutchinson with the CFMMEU as to the engagement of subcontractors in accordance with the consultation provisions in Hutchinson’s enterprise agreements with the CFMMEU and in a manner the CFMMEU considered appropriate.
2. The Australian Building and Construction Commissioner (the **ABCC**) commenced proceedings against the CFMMEU and seven individual respondents who were CFMMEU organisers, alleging that by reason of the operation of ss 363 and 793 of the *Fair Work Act 2009* (Cth) (the **FW Act**) and the principles of vicarious liability at common law, the CFMMEU contravened ss 355, 346(b) and 417 of the FW Act. Further, the ABCC alleged that the individual respondents engaged in various unlawful industrial actions in breach of ss 343(1)(a) and (b), 346(b) and (c), 348, 355(b) and 417 of the FW Act. The industrial action that occurred is set out in the filed chronology as follows:
3. 25 August 2016: strike action taken for the day at Hutchinson’s Hercules site (CFMMEU organiser – the second respondent Mr Parfitt);
4. 7 September 2016: strike action taken for the day at Hutchinson’s Ivy site (CFMMEU organiser – the third respondent Mr Steele);
5. 13 September 2016: strike action taken for the day at Hutchinson’s Newstead site (CFMMEU organiser – the fourth respondent Mr Pauls);
6. 13 September 2016: strike action taken for the day at Hutchinson’s Hercules site (CFMMEU organiser – the second respondent Mr Parfitt);
7. 14 September 2016: strike action taken for the day at Hutchinson’s Ivy site (CFMMEU organiser – the third respondent Mr Steele);
8. 14 September 2016: strike action taken for the day at Hutchinson’s Wharf Street site (CFMMEU organiser – the fifth respondent Mr Bland);
9. 15 September 2016: strike action taken for the day at Hutchinson’s Opera Site which caused a concrete pour to be cancelled (CFMMEU organiser – the third respondent Mr Steele);
10. 21 September 2016: stop work meetings at Hutchinson’s Ivy site which caused a concrete pour to be cancelled (CFMMEU organiser – the third respondent Mr Steele);
11. 23 September 2016: stop work meeting at Hutchinson’s South Point A site which caused a concrete pour to be cancelled (CFMMEU organiser – the eighth respondent Mr Davis);
12. 23 September 2016: strike action taken for the day at Hutchinson’s Spire site (CFMMEU organiser – the fourth respondent Mr Pauls);
13. 23 September 2016: two stop work meetings totalling three and a half hours which disrupted work at Hutchinson’s Skytower site (CFMMEU organiser – the fifth respondent Mr Bland);
14. 23 September 2016: strike action for the day at Hutchinson’s Hercules site (CFMMEU organiser – the sixth respondent Mr Floro);
15. 23 September 2016: stop work meeting at Hutchinson’s Newstead site which caused a concrete pour to be cancelled (CFMMEU organiser – the seventh respondent Mr Stott);
16. 23 September 2016: stop work meetings at Hutchinson’s Opera site which caused a concrete pour to be cancelled (CFMMEU organiser – the third respondent Mr Steele);
17. 26 September 2016: strike action taken for the day at Hutchinson’s Illumina site (CFMMEU organiser – the sixth respondent Mr Floro); and
18. 27 September 2016: stop work meeting at Hutchinson’s Illumina site which delayed the start of work (CFMMEU organiser – the sixth respondent Mr Floro).
19. Hutchinson and the CFMMEU executed a deed of settlement and release on 23 February 2017 in which they resolved issues between them.
20. Subsequently on 22 May 2017, the Court made joint declarations submitted by the ABCC and the CFMMEU. By those declarations the CFMMEU and individual respondents made substantial admissions in respect of contraventions of ss 346(b), 355 and, in some instances, 417 of the FW Act. Admissions were not made in respect of ss 343(1)(a) and (b) or 348, and those sections are no longer in issue in the matter.
21. As such, the only matters remaining for determination are:
* In respect of liability of the respondents, including the CFMMEU: whether stoppages identified in the further amended statement of claim (**FASC**) cannot constitute a breach of s 417 of the FW Act because of applicable union meeting clauses in enterprise agreements (the **reserved issue**). Relevant enterprise agreements were the J Hutchinson Pty Ltd T/A Hutchinson Builders and CFMEU Union Collective Agreement 2015-2019 (the **Hutchinson EA**), and other enterprise agreements named in the annexures to the FASC.
* The appropriate penalties to be imposed on the respondents in respect of all breaches of the FW Act, including the admitted contraventions and (depending on the outcome of the determination of the reserved issue) the reserved issue (the **penalties issue**).

# The Reserved Issue

1. The remaining alleged contraventions relate to alleged contraventions of s 417 of the FW Act and certain of the respondents. The relevant respondents are:
* the third respondent, Mr Steele;
* the fifth respondent, Mr Bland;
* the sixth respondent, Mr Floro;
* the seventh respondent, Mr Stott;
* the eighth respondent, Mr Davis; and
* the first respondent, the CFMMEU.
1. In summary, the alleged contraventions in respect of which the parties are unable to agree concerned the following conduct:
* in respect of Mr Steele:
* stop work meetings at Hutchinson’s Ivy site on 21 September 2016 which caused a concrete pour to be cancelled; and
* stop work meetings at Hutchinson’s Opera site on 23 September 2016 which caused a concrete pour to be cancelled;
* in respect of Mr Bland, two stop work meetings totalling three and a half hours on 23 September 2016 which disrupted work at Hutchinson’s Skytower site;
* in respect of Mr Floro, a stop work meeting on 27 September 2016 at Hutchinson’s Illumina site which delayed the start of work;
* in respect of Mr Stott, a stop work meeting at Hutchinson’s Newstead site on 23 September 2016 which caused a concrete pour to be cancelled;
* in respect of Mr Davis, stop work meeting at Hutchinson’s South Point A site on 23 September 2016 which caused a concrete pour to be cancelled; and
* in respect of the CFMMEU, six contraventions by reason of the conduct of its five officials as set out above.
1. It is convenient to refer to these stop work meetings as the **Stoppages**.
2. Alleged contraventions referable to the Stoppages are pleaded at [65]-[71], [75]-[82], [83]-[85], [90]-[93], [94]-[99] and [105]-[108] of the FASC. These paragraphs are as follows:

**21 September 2016 – Ivy Site – the First Stoppage – concrete pour cancelled**

65. On 21 September 2016:

(a) a concrete pour was scheduled to occur at the Ivy Site, which was to last for 8.5 hours;

(b) by reason of (a) above, present at the Ivy Site on 21 September 2016 were:

(i) approximately 12 Sub-contractor Employees of Sartor Concrete (**Sartor Concreters**); and

(ii) approximately four Sub-contractor Employees of Specialised Concrete Pumping (**Specialised Pumpies**), together the Annexure H Employees

66. On 21 September 2016 at approximately 6.35 am, Steele entered the Ivy Site and said to Mitchel Smith words to the effect of “*you need to pull up your [concrete] pour mate, I want to talk to the concrete labour and then after that speak to the concreters*”.

67. Steele:

(a) met with the Specialised Pumpies from approximately 6.45am to 8.45am (**Pumpies Meeting**);

(b) met with the Sartor Concreters from approximately 7.30am to 9.30am (**Concreters Meeting**).

68. Further, due to Steele’s direction between:

(a) 6.45am and 7.30am, the Sartor Concreters also did not perform any work; and

(b) 8.45am and 9.30am, the Specialised Pumpies also did not perform any work.

69. At approximately 9.30am, Steele left the Ivy Site.

70. Steele organised the Pumpies Meeting, the Concreters Meeting and the stoppages referred to in paragraph 68 (together the **First Stoppage**) in order to disrupt work at the Ivy Site.

71. For reasons that included the First Stoppage, Hutchinson cancelled the concrete pour scheduled for that day.

….

**23 September 2016 – South Point A Project – the Second Stoppage – concrete pour cancelled**

75. On 23 September 2016 prior to 6.30am, Davis entered the South Point A Site and:

(a) spoke with five employees of Placecorp (Australia) Pty Ltd (**Concreters**)

(b) said to Henk Thone (**Thone**), a Hutchinson site manager, words to the effect that “*I’m going to call the blokes for a meeting and I’m going to discuss working eight hours only on every Friday*”.

**Particulars**

The conversation occurred in Thone’s office.

76. At approximately 6.15am, Davis held a meeting with employees, including 11 Hutchinson Employees and various employees of Sub-contractors listed in Annexure J, including the Concreters (**Annexure J Employees**) in the smoko shed, during which he directed those present to limit the number of hours they worked that day (**South Point A 23 September 2016 Meeting**).

**Particulars**

The South Point A 23 September 2016 Meeting lasted for approximately 15 minutes.

Approximately:

(a) 11 Hutchinson employees attended the South Point A 23 September 2016 Meeting;

(b) 12 Annexure J Employees attended the South Point A 23 September 2016 Meeting

77. Following the South Point A 23 September 2015 Meeting, at the direction of Davis, the Concreters remained in the smoko shed (**Concreter Sit-In**)

78. A short time later, Davis said to Thone words to the following effect, “*You’re not going to pour concrete today. You can pour on Saturday because I’ll be sleeping in.*”

79. Davis organised the South Point A 23 September 2016 Meeting and the Concreter Sit-In to disrupt work at the South Point A site, including to disrupt a concrete pour scheduled for that day.

80. No work was performed by the Concreters during the South Point A 23 September 2016 Meeting or during the Concreter Sit-In (the **Second Stoppage**)

81. By reason of the Second Stoppage and/or the matters in paragraph 78, at approximately 7.00 am, Hutchinson directed the concrete pour scheduled for 23 September 2016 on the South Point A Project Site to be cancelled.

82. At approximately 8.00 am, Davis instructed the Concreters to return to work.

**23 September 2016 – Skytower Site – Third Stoppage – concrete pour to slab cancelled**

83. On 23 September 2016, Bland entered the Skytower Site and:

(a) from approximately 6.30 am to 8.30 am, met with Hutchinson Employees who were employed to perform concrete pumping (**First Skytower Meeting**).

(b) from approximately 8.30 am to 10.00 am, met with Hutchinson Employees who were employed to perform concreting works (**Second Skytower Meeting**)

84. Bland organised the First Skytower Meeting and the Second Skytower Meeting (together the **Third Stoppage**) to disrupt work at the Skytower Site, including a concrete pour scheduled for that day.

85. As a result of the Third Stoppage, various building works scheduled to take place at the Skytower Site on 23 September 2016 could not be commenced or completed.

**Particulars**

Planned concreting work to a slab on the Skytower Site was re-scheduled.

…

**23 September 2016 – Newstead Site – Fourth Stoppage – concrete pour cancelled**

90. At approximately 6.40 am, Stott said to Sengelman that the events on that [***sic***] were to occur on the Newstead Site that day were due to an issue at a Hutchinson site “*up there*” where CFMEU members were missing out on work (being a reference to the use in Darwin by Hutchinson of sub-contractors who did not have enterprise agreements with the CFMEU and/or were not otherwise CFMEU approved sub-contractors, such conduct causing CFMEU members to miss out on work).

**Particulars**

The conversation took place in the Newstead Site Office, which is across the road from the Newstead Site.

91. At around 6.45 am, Stott entered the Newstead Site and held a meeting in the common lunch shed with the employees of the Sub-contractors listed in Annexure L (**Annexure L Employees**), who were to perform concreting works (**Newstead 23 September 2016 Meeting**).

**Particulars**

The Newstead 23 September 2016 Meeting lasted two hours. Approximately 15 Annexure Employees attended the Newstead 23 September 2016 Meeting.

92. Stott organised the Newstead 23 September 2016 Meeting (**Fourth Stoppage**) to disrupt work at the Newstead Site, including the concrete pour scheduled for that day.

93. As a result of the Fourth Stoppage, Hutchinson directed the scheduled concrete pour to be cancelled.

**23 September 2016 – Opera Site – Fifth Stoppage – concrete pour cancelled**

94. Shortly before 6.30 am on 23 September 2016, Steele attended at the front of the Opera Site and said to Rushton words to the effect of:

(a) he had called a two hour stop work meeting with Sartor’s Concreters;

(b) after the meeting with Sartor’s Concreters, he would meet with the employees of Specialised Concrete Pumping (the Sartor’s Concreters and employees of Specialised Concrete Pumping together the **Annexure M Employees**);

(c) if necessary, he would then meet again with the employees of Sartor’s Concreters.

95. Steele met with employees from Sartor Concrete from 6.30 am until 8.45 am, who were present on site to perform concreting services that day (**Sartor Stop Work Meeting**).

96. During the Sartor Stop Work Meeting, at approximately 8.15 am, Steele approached Ruston and said “*Just call the concrete pour off and I will leave the site*”.

97. At approximately 8.30 am, employees from Specialised Concrete Pumping joined the Sartor Stop Work Meeting.

98. Steele organised the Sartor Stop Work Meeting (**Fifth Stoppage**) to disrupt work at the Opera Site, including a concrete pour scheduled for that day.

99. By reason of the Fifth Stoppage, Hutchinson directed that the concrete pour scheduled for 23 September 2016 on the Opera Site be cancelled.

…

**27 September 2016 – Illumina Site – Sixth Stoppage**

105. At approximately 6.40 am on 27 September 2016, Floro entered the Illumina Site and held a meeting with the workforce, including Hutchinson Employees and the Annexure O Employees (**Second Illumina Meeting**).

Approximately:

(a) 5 Hutchinson Employees; and

(b) 3 Annexure O Employees –

attended the Second Illumina Meeting.

106. Floro organised the Second Illumina Meeting (**Sixth Stoppage**) in order to disrupt work at the Illumina Site.

107. At approximately 7.10 am, the Second Illumina Meeting concluded and work at the Illumina Site thereafter commenced.

108. By reason of the Sixth Stoppage, work at the Illumina Site was disrupted or otherwise delayed.

(Original emphasis. Tracked changes omitted.)

## Submissions of the parties

1. In summary the ABCC submits that:
* The union meeting clause is not engaged because the meetings held were not genuine union meetings.
* The respondents’ contention that the meetings the subject of the alleged contraventions of s 417 of the FW Act did not constitute “industrial action” because the meetings were authorised by the enterprise agreement, was inconsistent with the respondents’ admissions that the various stoppages were taken and amounted to contraventions of ss 346(b) and 355 of the FW Act.
* The meetings were not authorised or agreed to by Hutchinson within the meaning of the union meeting clause, and therefore do not fall within a relevant exception in s 19(2)(a).
* The relevant clause in the enterprise agreement must be read consistently with the regulatory framework of the FW Act, in particular the regimes pertaining to the making of enterprise agreements under Pt 2-4 of the FW Act and the taking of protected industrial action under Pt 3-3 of the FW Act. The proper construction must also be construed in a way that results in a “sensible industrial outcome” that “operate[s] fairly towards both parties”: *Amcor Ltd v CFMEU* [2005] FCA 10; (2005) 222 CLR 241 at [96].
1. In summary the respondents submit as follows:
* Assuming that the union meeting clause was engaged, the meetings could not amount to industrial action because they were authorised or agreed to by the employer on each of the relevant occasions.
* The relevant enterprise agreement clauses give rights to employees, namely employees are entitled to be absent from work without loss of pay, provided that the absence is of the type specified, being attendance at a union meeting or activity. Once this is accepted, there is nothing to suggest that a stoppage for the purpose as in this case, relating to coercion of Hutchinson in respect of its engagement of certain subcontractors, is not agreed to by the employers.
* If the conduct cannot be classified as industrial action, which requires the respondents’ proposed construction to be accepted, then the conduct is not regulated by Pt 3-3 of the FW Act, a provision in an enterprise agreement authorising it cannot be inconsistent with Pt 3-3, and s 194(e) of the FW Act has no operation in relation to it.
* The ABCC has not identified any inconsistency between the rights conferred by the union meeting clause and the FW Act referable to s 194(e).
1. Finally the respondents rely on the judgment of Reeves J in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCA 157 (the ***Carrara*** case) to support their proposition that a union meeting clause can be construed to permit union meeting for the purpose for delaying and disrupting work. The ABCC submits that this decision should not be followed because it is ‘clearly wrong’: *La Macchia v Minister for Primary Industries and Energy* [1992] FCA 673; (1992) 110 ALR 201.

## Consideration

1. Framed in terms of the provisions of the FW Act, the reserved issue involves consideration of whether relevant clauses in the enterprise agreements could legitimise the Stoppages and prevent a finding that there was a contravention of s 417 of the FW Act, notwithstanding that the Stoppages were taken to cause disruption and in any event involved a contravention of ss 346(b) and 355 of the FW Act. This is because either:
* the conduct was not industrial action within the meaning of s 19(1) of the FW Act; or
* the enterprise agreement authorised the meetings such that s 19(2)(a) operated to preclude the conduct from being industrial action.
1. As I have already noted, the respondents conceded contraventions by them of ss 346(b) and 355 of the FW Act by reference to the Stoppages.
2. Sections 346(b) and 355 are in Pt 3-1 of the FW Act, which is headed “General protections”. Further, s 346 is in Pt 3-1 Div 4 of the FW Act, which deals with “Industrial activities”. Section 346(b) prohibits a person taking adverse action against another person because the other person engages, or has at any time engaged or proposed to engage, in ***industrial activity*** within the meaning of s 347(a) or (b). A person “engages in industrial activity” pursuant to s 347(a) or (b) if the person:

(a) becomes or does not become, or remains or ceases to be, an officer or member of an industrial association; or

(b) does, or does not:

(i) become involved in establishing an industrial association; or

(ii) organise or promote a lawful activity for, or on behalf of, an industrial association; or

(iii) encourage, or participate in, a lawful activity organised or promoted by an industrial association; or

(iv) comply with a lawful request made by, or requirement of, an industrial association; or

(v) represent or advance the views, claims or interests of an industrial association; or

(vi) pay a fee (however described) to an industrial association, or to someone in lieu of an industrial association; or

(vii) seek to be represented by an industrial association; or

1. Section 355 is in Pt 3-1 Div 5 of the FW Act entitled “Other protections”, and provides that:

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:

(a) employ, or not employ, a particular person; or

(b) engage, or not engage, a particular independent contractor; or

(c) allocate, or not allocate, particular duties or responsibilities to a particular employee or independent contractor; or

(d) designate a particular employee or independent contractor as having, or not having, particular duties or responsibilities.

Note: This section is a civil remedy provision (see Part 4-1).

1. Section 417(1) of the FW Act is in Pt 3-3 headed “Industrial action”. It provides:

**Industrial action must not be organised or engaged in before nominal expiry date of enterprise agreement etc.**

*No industrial action*

(1) A person referred to in subsection (2) must not organise or engage in industrial action from the day on which:

(a) an enterprise agreement is approved by the FWC until its nominal expiry date has passed; or

(b) a workplace determination comes into operation until its nominal expiry date has passed;

whether or not the industrial action relates to a matter dealt with in the agreement or determination.

Note: This subsection is a civil remedy provision (see Part 4-1).

1. Persons referred to in subs 417(2) are:

(2) The persons are:

(a) an employer, employee, or employee organisation, who is covered by the agreement or determination; or

(b) an officer of an employee organisation that is covered by the agreement or determination, acting in that capacity.

1. Section 19(1) of the FW Act defines “industrial action” to mean action of any of the following kinds:

(a) the performance of work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work;

(b) a ban, limitation or restriction on the performance of work by an employee or on the acceptance of or offering for work by an employee;

(c) a failure or refusal by employees to attend for work or a failure or refusal to perform any work at all by employees who attend for work;

(d) the lockout of employees from their employment by the employer of the employees.

1. Section 19(2)(a) specifically excludes from the definition of “industrial action” such action by employees that is authorised or agreed to by the employer of the employees.
2. The reserved issue is concerned primarily with the operation and construction of a clause to the following effect:

32.9 The Employer agrees to Employees attending Union meetings or participating in Union activities during working hours and that the Employees shall be entitled to receive payment for attendance at those meetings / activities provided that:

(a) the Union provides the Employer with written notice of the intention to hold the meeting/ undertake the activities prior to commencement;

(b) the duration of the meeting / activities is two hours or less (the duration of meeting/activities may be extended beyond two hours by way of agreement between the Union and the Company). Authority to grant extension by the Employer rests with the General Manager or their nominee;

(c) up to two meetings / activities of up to two hours each may be held per shift, either consecutively or separately, provided that notice is given in accordance with clause 32.9(a) above.

1. In respect of each stoppage, it is not in dispute that:
* the relevant Stoppages occurred;
* a notice of the intention to hold a meeting was given prior to each of the stoppages (as required by the relevant clause of the applicable enterprise agreement);
* each stoppage/meeting that did not exceed two hours;
* at the direction of the relevant individual respondents, employees did not perform any work during the relevant Stoppages;
* the Stoppages were organised by the individual respondents:
* in order to disrupt work at the site;
* with the intent to coerce Hutchinson to engage particular independent contractors, and thus contravened s 355 of the FW Act;
* because Hutchinson was engaging in industrial activity, and thus contravened s 346(b) of the FW Act;
* at all relevant times, the CFMMEU and the employees involved in the Stoppages were covered by in-term enterprise agreements;
* in organising the Stoppages, the respondents were acting individual capacities as officials of the CFMMEU; and
* the technical requirements of the u nion meeting clause were met in all instances.

### Was the union meeting clause engaged?

1. Although the ABCC alleges that the Stoppages were “sham meetings”, the evidence before the Court does not substantiate this contention. It is common ground that proper notices of meetings were given, the Stoppages occurred, and union meetings were held (see, for example, evidence from various Hutchinson site managers acknowledging such meetings were conducted: the affidavit of Peter Owen Haidley filed 3 February 2017 at [25], affidavit of Andrew Bruce Morgan filed 3 February 2017 at [26], affidavit of Bryce Cameron Fraser Ward filed 3 February 2017 at [13], [14] and [49], affidavit of Henk Nicolaas Thone filed 3 February 2017 at [17], affidavit of Mitchel Anthony Smith filed 3 February 2017 at [32], [48], [61] and [64], affidavit of Gavin Grosse filed 3 February 2017 at [44], affidavit of Stephen James Rushton filed 3 February 2017 at [33], [37] and [52], affidavit of Terence David Bowden filed 3 February 2017 at [24] and [42], and affidavit of Wayne Raymond Sengelman filed 3 February 2017 at [57]). There was no “sham” in that respect. Certainly, there is no evidence before the Court supporting a finding that the meetings that were held were “sham meetings”.
2. Accordingly, it follows that the union meeting clause in the relevant enterprise agreements was engaged.

### Was the conduct “industrial action” within the meaning of the FW Act?

1. The contentions of the parties in relation to this issue focussed on the authority of *Carrara* and whether it was correctly decided. There are, however, broader issues referable to the framework of the FW Act, in particular the relevance of s 194(e) and whether what would otherwise be unlawful conduct of employees can be authorised by an employer within the meaning of s 19(2)(a) of the FW Act as alleged by the CFMMEU in this case.

#### Carrara

1. *Carrara* involved an application by the ABCC relating to conduct of the union, being a series of twice-daily, two hour union meetings that occurred at the Carrara Sports and Recreation Project on the Gold Coast in Queensland to coerce a construction company to enter an enterprise agreement with the union. Clauses considered by the Court in *Carrara* as found in separate enterprise agreements were:

32.9 The Employer agrees to Employees attending Union meetings or participating in Union activities during working hours and that the Employees shall be entitled to receive payment for attendance at those meetings/ activities provided that:

(a) the Union provides the Employer with written notice of the intention to hold the meeting / undertake the activities prior to commencement;

(b) the duration of the meeting / activities is two hours or less (the duration of the meeting / activities may be extended beyond two hours by way of agreement between the Union and the Company). Authority to grant extension by the Employer rests with the General Manager or their nominee;

(c) up to two meetings / activities of up to two hours each may be held per shift, either consecutively or separately, provided that notice is given in accordance with clause 32.9(a) above.

and

33.9 Employees are entitled to have paid time off to attend union meetings of up to 2 hours (or more by agreement) or participate in union activities.

and

32.8 Employees are entitled to have paid time off to attend union meetings of up to 2 hours (or more by agreement) or participate in union activities but not more than once per week.

1. Relevantly, the primary Judge in that case found as follows:

107 Secondly, I reject the Commissioner’s contention that the union meeting clauses should not be construed to permit union meetings for the purpose of delaying and disrupting the orderly progress of work at a workplace. While some flexibility is allowed in construing industrial instruments to take account of their industrial context and without being too astute to discern infelicitous expression or absurdity, the general approach to their construction is similar to that taken with commercial contracts (see the cases quoted in *Linfox* at [30]–[31]). That is, they should be “construed practically so as to give effect to their presumed commercial purposes and so as not to defeat the achievement of such purposes by an excessively narrow and artificially restricted construction”: see *Pan Foods Co Importers & Distributors Pty Ltd v Australia and New Zealand Banking Group Ltd* (2000) 170 ALR 579; [2000] HCA 20 at 584 per Kirby J. The union meeting clauses have, in reasonably clear terms, expressed the nature of the activities that may be undertaken: “union meetings or participating in union activities”. They have also variously stated the duration of the meetings: “up to two hours”. Finally, five of the clauses contain limitations on the frequency of the union meetings. Given these features of the union meeting clauses, I agree with the CFMEU that the Court is not permitted to redraft them to achieve the outcome identified by the Commissioner above. Furthermore, even if that were permitted, the Commissioner has not specified how that drafting or construction exercise would proceed.

(References omitted.)

1. Later, his Honour continued:

109 Having regard to the exception contained in s 19(2)(a) above, I agree with the CFMEU that the actions of the employees of the structural subcontractors in attending the union meetings did not fall with the expression “industrial action” in s 19(1) because they were authorised or agreed under the provisions of the various union meeting clauses.

1. It is plain that the clause the subject of proceedings before me is in the same terms as that identified as cl 32.9 in the proceedings in *Carrara*. Unless the reasoning of his Honour in *Carrara* is flawed, it is applicable in the circumstances before me.

#### Is the conduct capable of being authorised?

1. While the respondents have conceded that the conduct referable to the Stoppages constituted contraventions of ss 346(b) and 355 of the FW Act, I do not consider that this concession, or the existence of these contraventions, are relevant to the question whether the Stoppages constituted “industrial action” within the meaning of ss 19(1) and 417 of the FW Act.
2. The concept of “industrial activity” contemplated by ss 346(b) and 347 of the FW Act does not equate with that of “industrial action” in the legislation. Section 19(1) defines “industrial action” by reference to specific types of action by employees only. Part 3-3 (in which s 417 is located) sets out a regime for industrial action including when industrial action is protected. On the other hand, engagement in industrial activity in terms of s 347 involves broader concepts relating to the conduct of persons by reference to an industrial association. Engagement in “industrial activity” by an employee which contravenes provisions of the FW Act may or may be part of “industrial action” taken by an employee for the purposes of Pt 3-3 of the FW Act. Similarly in relation to “action” within the meaning of s 355 of the FW Act – such conduct may not relevantly be “industrial action” for the purposes of Pt 3-3.

#### Section 194 (e)

1. As the Full Court observed in *Toyota Motor Corporation Australia Limited v Marmara* [2014] FCAFC 84; (2014) 222 FCR 152 at [84], s 194 of the FW Act in part bespeaks the giving of detailed legislative attention to the circumstances in which an enterprise agreement should be of no effect because of its tendency to undermine the policy and scheme of the FW Act itself.
2. It does not appear that, in *Carrara*, the primary Judge was directed to consideration of s 194(e). The ABCC has sought to distinguish the present proceedings from *Carrara* on that basis. Section 194(e) of the FW Act provides:

A term of an enterprise agreement is an ***unlawful term*** if it is:

…

…

…

…

(e) a term that is inconsistent with a provision of Part 3-3 (which deals with industrial action); or

1. As s 406 explains, Pt 3-3 deals mainly with industrial action by national system employees and national system employers, including provisions to the effect that:
* no action lies under any law in force in a State or Territory in relation to protected industrial action except in certain circumstances (Div 2);
* industrial action must not be organised or engaged in by certain persons before the nominal expiry date of an enterprise agreement or workplace determination has passed (Div 3);
* the Fair Work Commission can make orders, in certain circumstances, that industrial action stop, not occur or not be organised for a specified period (Div 4);
* injunctions against industrial action if a bargaining representative of an employee who will be covered by a proposed enterprise agreement is engaging in pattern bargaining (Div 5);
* the Fair Work Commission can make orders suspending or terminating protected industrial action for a proposed enterprise agreement in certain circumstances, at which point the action will no longer be protected industrial action (Div 6);
* the Minister can make a declaration terminating protected industrial action for a proposed enterprise agreement in certain circumstances, at which point the action will no longer be protected industrial action (Div 7);
* the FW Act establishes a process that will allow employees to choose, by means of a fair and democratic secret ballot, whether to authorise protected industrial action for a proposed enterprise agreement (Div 8);
* there are restrictions about payments to employees relating to periods of industrial action (Div 9); and
* applications may be made under the Part (Div 10).
1. Section 417 falls within Div 2 of Pt 3-3 of the FW Act. I note again that (*inter alia*) s 417 specifically prohibits employees or employee organisations covered by an enterprise agreement from organising or engaging in industrial action from the day on which the enterprise agreement is approved by the Fair Work Commission until its nominal expiry date, whether or not the industrial action relates to a matter dealt with in the agreement.
2. The submissions of the parties raise a prospectively circular argument, dependent upon the interaction of ss 19(1) and 19(2)(a) on the one hand, and ss 194(e) and 417 on the other. In effect, the position of the ABCC is that s 194(e) precludes the operation of s 19(2)(a) where the conduct purportedly authorised by the enterprise agreement is otherwise inconsistent with s 417, because otherwise relying on s 19(2)(a) to remove contravening conduct from the meaning of “industrial action” would be inconsistent with the overall regulatory scheme of the FW Act.
3. I do not accept this argument. In my view, the interpretation of the interaction of these sections advanced by the ABCC would restrict s 19(2)(a), contrary to both its plain language and purpose. I also do not accept that the ABCC’s proposed construction of the union meeting clause is necessary to achieve a “sensible industrial outcome” that “operates fairly to both parties”: *Amcor* [2005] FCA 10; (2005) 222 CLR 241 at [96].
4. Section 19(2)(a) of the FW Act is expressed in unqualified terms. There is no reference in the section to other parts of the FW Act. It contemplates authorisation or agreement by the employer of action by employees, without restriction on the nature (including potential unlawfulness) of the actions of the employees.
5. There is nothing in ss 19(1) or 19(2)(a) of the FW Act which confines conduct that may be authorised to only lawful activities. Unlawful conduct may contravene the FW Act – this does not mean, however, that such conduct is not “industrial action” which is incapable of being authorised or agreed to by an employer and, therefore, excluded from being subject to the regulatory scheme.
6. Section 194(e) deems “unlawful” a term of an enterprise agreement which is inconsistent with a provision of Part 3-3 of the FW Act. On its face, cl 32.9 does not undermine the policy and scheme of the FW Act, and is certainly not inconsistent with Pt 3-3. It may be that the objective of the union in conducting certain union meetings or promoting certain union activities is contrary to provisions of the FW Act, however that is secondary to the operation of the clause, rather than required by the clause itself. The union meeting clause in this case sets out the agreement of the employer, where certain conditions are met, to employees attending union meetings or participating in union activities during working hours. It is an unwarranted strain on the language of cl 32.9 to construe it by reading in purpose or objectives not specifically contemplated, as contended by the ABCC. In my view, such an interpretation would be untenable.
7. Further, s 19(2)(a) of the FW Act is clearly intended to allow an employer to ***authorise or agree*** to certain conduct of employees, identified in s 19(1), which would otherwise be subject to the regulatory framework of the FW Act, ***including*** Pt 3-3. Performance of work in a manner different from that in which it is customarily performed (s 19(1)(a)), bans, limitations or restrictions on the performance of work by employees (s 19(1)(b)) and failure or refusal by employees to attend for work or perform work when there (s 19(1)(c)) are obviously the types of industrial action which are contemplated by Pt 3-3 of the FW Act, including s 417. Indeed, the Stoppages in this case clearly fell into one or more of the categories of industrial action set out in s 19(1).
8. If, in the terms of a clause such as that currently before the Court, the employer sought to qualify the conduct of employees to which the employer agreed by reference to the consequences of the conduct (including that relevant to Pt 3-3), it was open to the parties to specifically so agree. The interpretation advanced by the ABCC seeks to import such extraneous qualifications into the language agreed by parties, and subverts the purpose of s 19(2)(a) in allowing the parties to reach their own agreement on what the employer can authorise or agree to. I reiterate the observation of Reeves J in *Carrara* that the Court is not permitted to redraft the terms of an enterprise agreement to achieve the outcome identified by the ABCC. Again, such an interpretation is untenable.

#### Conclusion

1. I reject the submission of the ABCC that *Carrara* was incorrectly decided. In my view the reasoning of his Honour in that case is equally applicable to the proceedings before me. The conduct in question was capable of being authorised or agreed to by Hutchinson if the union meeting clause in fact had this effect. The Stoppages were not “industrial action” for the purposes of ss 19(1) or 417 of the FW Act.

### Did the union meeting clause in fact authorise the Stoppages?

1. In *Carrara,* Reeves J found that the relevant terms of the clause in the enterprise agreement in fact authorised the meetings in that case, and that the relevant meetings therefore did not constitute “industrial action”. In my view, the Stoppages in this case were similarly authorised by the terms of the enterprise agreements, such that by operation of s 19(2)(a) they were not “industrial action”. I have formed this view for the following reasons.
2. It is well settled that narrow or pedantic approaches to the interpretation of an award are misplaced: *Kucks v CSR Limited* [1996] IRCA 141; (1996) 66 IR 182 at 184; *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* [2006] FCA 813; (2006) 153 IR 426 at [57]; *Transport Workers’ Union of Australia v Linfox Australia Pty Ltd* [2014] FCA 829; (2015) 318 ALR 54 at [30]; *Amcor* [2005] HCA 10 at [96], [129]; (2005) 222 CLR 241 at 271, 282-3; *Construction, Forestry, Mining and Energy Union v Hail Creek Coal Pty Ltd* [2015] FCA 532 at [6]. The plain language of cl 32.9 encompasses the conduct of the nature of the Stoppages. By cl 32.9, Hutchinson agreed to employees attending union meetings or participating in union activities during working hours provided conditions specified in cl 32.9 were met. There is no dispute that the conditions set out in cll 32.9(a), (b) and (c) were met in respect of each Stoppage.
3. I am satisfied that the union meeting clause in this case, in fact, authorised the Stoppages.

### Conclusion

1. It follows that, because of the operation of cl 32.9 and other clauses to that effect in relevant enterprise agreements, the Stoppages identified in the FASC were not in contravention of s 417 of the FW Act. Accordingly, the first respondent also has no vicarious liability in relation to them. I find in favour of the respondents in respect of the reserved issue.

# Appropriate Penalties for Admitted Contraventions

1. As I noted earlier in this judgment, the individual respondents and the CFMMEU made admissions of contraventions of ss 355, 346(b) and 417 of the FW Act. It is common ground that there were 16 occasions of industrial disruption involving the relevant contraventions, principally by the relevant individual respondent but also vicariously by the CFMMEU. The respondents have admitted liability in respect of all contraventions, save for the allegations of s 417 concerning the Stoppages which I have addressed earlier in this judgment. On 22 May 2017 I made declarations in respect of these contraventions.
2. I note further that the declarations of 22 May 2017 did not include the admitted contraventions by the respondents of ss 355 and 346(b) of the FW Act in relation to the Stoppages. The parties have requested that I make further declarations referable to those admitted contraventions, and I am prepared to do so.

## The admitted contraventions

1. In summary, the admitted contraventions are as follows.

### Section 355 of the FW Act

1. In respect of s 355 of the FW Act:
* the second respondent Mr Parfitt – two contraventions involving industrial action:
	1. on 25 August 2016 (Hercules site) and
	2. on 13 September 2016 (Hercules site).
* the third respondent Mr Steele – five contraventions involving industrial action:

(a) on 7 September 2016 (Ivy Site);on 14 September 2016 (Ivy Site);

(b) on 15 September 2016 (Opera Site);

(c) on 21 September 2016 (Ivy Site); and

(d) on 23 September 2016 (Opera Site).

* the fourth respondent Mr Pauls – two contraventions involving industrial action:

(a) on 13 September 2016 (Newstead Site); and

(b) on 23 September 2016 (Spire Site);

* the fifth respondent Mr Bland – two contraventions involving industrial action:

(a) on 14 September 2016 (Wharf Street Site); and

(b) on 23 September 2016 (Skytower Site);

* the sixth respondent Mr Floro – three contraventions involving industrial action:

(a) on 23 September 2016 (Hercules Site);

(b) on 26 September 2016 (llumina Site); and

(c) on 27 September 2016 (llumina Site);

* the seventh respondent Mr Stott – one contravention involving industrial action on 23 September 2016 (Newstead Site);
* the eighth respondent Mr Davis – one contravention involving industrial action on 23 September 2016 (South Point A Site).
1. Each of the individual respondents admitted that on each of the dates and at the relevant sites, they organised meetings with Hutchinson employees, and/or employees of various subcontractors engaged at the Hutchinson projects, at which they directed employees:
* to withdraw their labour from the site, or take strike action for the remainder of the day; or
* not to perform any work for a period not in excess of two hours.
1. The individual respondents also admitted that, by their conduct, they contravened s 355 of the FW Act by taking action against Hutchinson with the intent to coerce Hutchinson to engage a particular class of independent contractor, namely those independent contractors covered by an enterprise agreement that also covers the CFMMEU.
2. The CFMMEU admitted to 16 contraventions of s 355 of the FW Act by reasons of this conduct of its officials.

### Section 346(b) of the FW Act

1. In respect of s 346(b) of the FW Act:
* the second respondent Mr Parfitt – two contraventions involving industrial action:
	1. on 25 August 2016 (Hercules Site); and
	2. on 13 September 2016 (Hercules Site);
* the third respondent Mr Steele – five contraventions involving industrial action:
	1. on 7 September 2016 (Ivy Site);
	2. on 14 September 2016 (Ivy Site);
	3. on 15 September 2016 (Opera Site);
	4. on 21 September 2016 (Ivy Site); and
	5. on 23 September 2016 (Opera Site);
* the fourth respondent Mr Pauls – two contraventions involving industrial action:

(a) on 13 September 2016 (Newstead Site); and

(b) on 23 September 2016 (Spire Site);

* the fifth respondent Mr Bland – two contraventions involving industrial action:

(a) on 14 September 2016 (Wharf Street Site); and

(b) on 23 September 2016 (Skytower Site);

* the sixth respondent Mr Floro – three contraventions involving industrial action:

(a) on 23 September 2016 (Hercules Site);

(b) on 26 September 2016 (Illumina Site); and

(c) on 27 September 2016 (Illumina Site);

* the seventh respondent Mr Stott – one contravention involving industrial action on 23 September 2016 (Newstead Site);
* the eighth respondent Mr Davis – one contravention involving industrial action on 23 September 2016 (South Point A Site).
1. Each of the individual respondents admitted that they contravened s 346(b) of the FW Act by taking adverse action against Hutchinson because Hutchinson was engaging, had engaged and was proposing to engage in industrial activity within the meaning of s 347(b)(iv) – specifically, Hutchinson was not complying, had not complied and was proposing not to comply with a lawful request of the CFMMEU regarding the engagement of subcontractors pursuant to the Hutchinson EA. The CFMMEU admitted to 16 contraventions of s 346(b) of the FW Act by reason of this conduct of its officials.

### Section 417 of the FW Act

1. In respect of s 417 of the FW Act:
* the second respondent Mr Parfitt – two contraventions involving industrial action:
	1. on 25 August 2016 (Hercules Site); and
	2. on 13 September 2016 (Hercules Site);
* the third respondent Mr Steele – three contraventions involving industrial action:
	1. on 7 September 2016 (Ivy Site);
	2. on 14 September 2016 (Ivy Site); and
	3. on 15 September 2016 (Opera Site);
* the fourth respondent Mr Pauls – two contraventions involving industrial action:
	1. on 13 September 2016 (Newstead Site); and
	2. on 23 September 2016 (Spire Site);
* the fifth respondent Mr Bland- one contravention involving industrial action on 14 September 2016 (Wharf Street Site); and
* the sixth respondent Mr Floro – two contraventions involving industrial action involving industrial action
	1. on 23 September 2016 (Hercules Site); and
	2. on 26 September 2016 (Illumina Site).
1. Each of the second to sixth respondents admitted that on each of those dates and at those sites, they contravened s 417 of the FW Act by organising strikes that concerned employees who were covered by an in-term enterprise agreement. The CFMMEU has admitted to 10 contraventions by reason of this conduct by its officials.

## Relevant principles

1. Sections 355, 346(b) and 417 of the FW Act are civil remedy provisions, with maximum penalties being referable to the value of penalty unit under s 4AA(1) of the *Crimes Act 1914* (Cth). At the relevant times, one penalty unit was $180, and the maximum penalty for contravention of ss 355, 346(b) and 417 was 300 penalty units for a body corporate (that is, $54,000) and 60 penalty units for an individual (that is, $10,800).
2. Principles applicable by the Court in considering appropriate civil penalties for contraventions were recently reiterated by the Full Court in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; (2017) 271 IR 321 at [98]-[121]. These principles include the following:
* Unlike criminal penalties which import notions of retribution and rehabilitation, the purpose of a civil penalty is protective in promoting the public interest in compliance.
* The principal object of a pecuniary penalty is to attempt to put a price on the contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene.
* Both specific and general deterrence are important.
* The penalty must be fixed with a view to ensuring that the penalty is not to be regarded by the offender or others as an acceptable cost of doing business.
* The fixing of a pecuniary penalty may to an extent be likened to the “instinctive synthesis” involved in criminal sentencing.
* The process of fixing an appropriate pecuniary penalty should not be approached as a mathematical exercise involving increments to or decrements from a predetermined range of sentences.
* Factors relating to the objective seriousness of the contravention include:
* the extent to which the contravention was the result of deliberate, covert or reckless conduct, as opposed to negligence or carelessness;
* whether the contravention comprised isolated conduct, or was systematic or occurred over a period of time;
* if the defendant is a corporation, the seniority of the officers responsible for the contravention;
* the existence, within the corporation, of compliance systems and whether there was a culture of compliance at the corporation;
* the impact or consequences of the contravention on the market or innocent third parties; and
* the extent of any profit or benefit derived as a result of the contravention.
* Factors that concern the particular circumstances of the defendant generally include:
* the size and financial position of the contravenor;
* whether the contravenor has been found to have engaged in similar conduct in the past;
* whether the contravenor has improved or modified its compliance systems since the contravention;
* whether the contravenor (through its senior officers) has demonstrated contrition and remorse; and
* whether the contravenor has cooperated with and assisted the relevant regulatory authority in the investigation and prosecution of the contravention.
* Careful attention must also be given to the maximum penalty for the contravention.
* The amount of the penalty should be proportionate to the contravention and should not be so high as to be oppressive.
* The totality principle, often in conjunction with the course of conduct principle, has been relied on to support the imposition of a single pecuniary penalty for multiple contraventions.

## Section 556 of the FW Act

1. In this case, an important threshold issue is that the contraventions in respect of each respondent have arisen from the same conduct by those respondents. Section 556 of the FW Act provides:

If a person is ordered to pay a pecuniary penalty under a civil remedy provision in relation to particular conduct, the person is not liable to be ordered to pay a pecuniary penalty under some other provision of a law of the Commonwealth in relation to that conduct.

Note: A court may make other orders, such as an order for compensation, in relation to particular conduct even if the court has made a pecuniary penalty order in relation to that conduct (see subsection 546(5)).

1. The respondents rely on recent decisions of Jessup J in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (the Webb Dock case)* [2017] FCA 62 at [74] and *Australian Building and Construction Commissioner v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (The Australian Paper Case) (No 2)* [2017] FCA 367. In particular, at [40] in *The Australian Paper Case*, Jessup J observed:

… the reference to “particular conduct” in s 556 is to what the person actually did, with all of its attributes and in its whole context. If that conduct gives rise to liability to penalty under two or more provisions, the section is, in my view, engaged…

1. I understand that, while the ABCC accepts that, by operation of s 556 of the FW Act, two separate penalties cannot be imposed for the same conduct which gave rise to contraventions of ss 346 and 355, he submits that a separate penalty should be imposed for each contravention of s 417. However ss 346, 355 and 417 of the FW Act are all civil penalty provisions. Further, in light of recent decisions of this Court including that of Jessup J in *The Australian Paper Case*, Rangiah J in *Australian Building and Construction Commissioner v Pauls* [2017] FCA 843 and White J in *Australian Building and Construction Commissioner v Huddy (No 2)* [2017] FCA 1088, it is clear that the conduct attracting liability under s 417(1) and other civil penalty provisions engages s 556. It follows that if the Court orders payment of a pecuniary penalty under any of ss 345, 355 or 417 by a respondent in respect of particular conduct, that respondent is not liable to be ordered to pay a pecuniary penalty under some other provision in relation to that conduct.
2. In this case, the conduct on which the ABCC relies in establishing contravention of s 417 of the FW Act is the same conduct as that relied on in respect of ss 346 and 355. It follows that the maximum number of penalties which may be imposed against the respondents are as follows:
* CFMMEU: 16 penalties;
* Mr Parfitt: 2 penalties;
* Mr Steele: 5 penalties;
* Mr Pauls: 2 penalties;
* Mr Bland: 2 penalties;
* Mr Floro: 3 penalties;
* Mr Stott: 1 penalty; and
* Mr Davis: 1 penalty.

## Factors for consideration

1. In considering factors relevant to determination of appropriate penalties I note that there is extensive commonality in the background circumstances of each contravention by individual respondents. Notwithstanding the separate conduct of the individual respondents, this commonality is conducive to general observations in respect of those respondents, and the CFMMEU.

###  Nature of the relevant conduct

1. The respondents submit that the conduct involved the individual respondents attending nine sites, organising meetings at the sites, and organising those workers to stop work on nine different dates in August and September 2016. They submit further that a stoppage of work was not organised at every site on every day in question, and the stoppages were no more than one day at a time.
2. However, as the ABCC submits, it is proper to describe the conduct of the individual respondents as contributing to a deliberate, premeditated and sustained campaign of unlawful industrial behaviour orchestrated by the CFMMEU, including elements of intimidation, threat and coercion. The timing of the disruption at the various sites was such that eight concrete pours were cancelled due to the Stoppages (affidavit of Mitchel Anthony Smith filed 3 February 2017 at [33], [46], [50], [51], [65], [66], annexure MAS-1 at 20, 22 and 25, annexure MAS-2 at 33, annexure MAS-3 at 39, annexure MAS-4 at 42 and 45 and annexure MAS-5 at 50; affidavit of Terence David Bowden filed 3 February 2017 at [45]; affidavit of Henk Nicolaas Thone filed 3 February 2017 at [22], annexure HNT-2 at 12 and annexure HNT-3 at 17; affidavit of Peter Own Haidley filed 3 February 2017 at [25]-[27]; affidavit of Wayne Raymond Sengelman filed 3 February 2017 at [58], annexure WRS-2 at 25; and affidavit of Stephen James Rushton filed 3 February 2017 at [36] and [56] and annexure SJR-4 at 38 and 41). The ABCC submits that on any given day on which the industrial disruption occurred somewhere between three and 136 sub-contractor employees were also affected because they were directed to leave the relevant site by various individual respondents. This submission is not rebutted by the respondents.
3. The ABCC also points out that the conduct escalated in seriousness over the course of the period in question, such that action was taken at single Hutchinson sites on 25 August 2016 and 7 September 2016 (affidavit of Wayne Jenkinson filed 28 September (the **Jenkinson Affidavit**) 2016 at [8] and [16]), but was taken at two Hutchinson sites each day on 13 and 14 September (Jenkinson Affidavit at [6], [8], [16] and [20]), at six separate Hutchinson projects on 23 September 2016 (Jenkinson Affidavit at [14], [18], [22], [26], [27] and [32]) , and on consecutive days on one Hutchinson project on 26 and 27 September 2016 (Jenkinson Affidavit at [30]).
4. The ABCC has not adduced evidence quantifying economic loss suffered by anyone as a result of the actions of the respondents. The respondents concede, however, that there was disruption at the sites in question. I am prepared to infer that the respondents intended that loss be suffered by Hutchinson, as well as sub-contractors, at the various sites as a result of the disruptive conduct of the respondents, and that consequential loss was suffered.

### Similar previous conduct

1. It is not in dispute that the CFMMEU has an extensive history of prior contraventions of industrial laws. The ABCC has filed a Contraventions Table (see the table titled “Prior Penalties and Declarations Under Industrial Laws Against Building Industry Associations and Other Participants” filed on 18 May 2017) detailing this history. It is not an understatement to descript the number of separate legal proceedings involving the CFMMEU as “vast”. Heavily critical comments of the CFMMEU and its recidivism in respect of breaches of industrial relations laws have been made in many cases including *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 226 at [28]-[30], *Director of the Fair Work Building Industry Inspectorate v Cartledge* [2014] FCA 1047 at [93], *Director of the Fair Work Building Industry Inspectorate v Stephenson* [2014] FCA 1432; (2015) 146 ALD 75 at [77], *Director of the Fair Work Building Industry Inspectorate v Bragdon (No 2)* [2015] FCA 998 at [15], *Director of the Fair Work Building Industry Inspectorate v CFMEU (No 2)* [2015] FCA 407; (2015) 234 FCR 451 at [106]-[107], *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1213 at [63] and *Director of the Fair Work Building Industry Inspectorate v CFMEU Construction, Forestry, Mining and Energy Union (The Mitcham Rail Case)* [2015] FCA 1173 at [29]. While prior contraventions may not warrant the imposition of a penalty that is disproportionate to the gravity of the instant offence (*Veen v The Queen (No 2)* [1988] HCA 14 at [14]; (1988) 164 CLR 465 at 477-478), they are directly relevant to the principles of specific and general deterrence.
2. At the date of the hearing only the eighth respondent, Mr Davis, had previously contravened the legislation, although the respondents concede that the third, fourth and fifth respondents had recently admitted engaging in similar conduct in 2016. In that respect the respondents submitted that the absence of prior contraventions was a mitigating factor for the second, sixth and seventh respondents.

### Deterrence

1. Principles referable to the need for specific and general deterrence in respect of civil penalties are well-settled. In considering specific deterrence an assessment must be made of the risk of re-offending, whereas in respect of general deterrence it is assumed that an appropriate penalty will act as deterrent to others who might be likely to offend (*Ponzio v B & P Caelli Constructions Pty Ltd* [2007] FCAFC 65; (2007) 158 FCR 543 at [93]; *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2016) 258 CLR 482 at [55]; *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (Perth Childrens’ Hospital Contraventions Case)* [2017] FCA 491 at [100], *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCAFC 59 at [68], *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113 at [98]).
2. The respondents have emphasised the necessity of fixing a penalty that is proportionate to the gravity of the offence, and submit that deterrence has no overriding role in this proceeding. I do not consider there is an overriding role for deterrence, however I accept the submission of the ABCC that the history of prior contraventions on the part of the CFMMEU demonstrates a strong need for specific deterrence. As Jessup J observed in *The Mitcham Rail Case* at [29], the record of contraventions on the part of the CFMMEU bespeaks an organisational culture in the union in which contraventions of the law have become normalised. It is questionable whether the imposition of pecuniary penalties in previous cases has affected the conduct of the CFMMEU. To that extent the need for specific deterrence of the CFMMEU is a very important factor for consideration in this case.
3. The fact that four of the individual respondents have either contravened, or admitted to previous contravention of, the legislation demonstrates that specific deterrence is a relevant consideration in respect of those respondents.
4. Insofar as concerns general deterrence, I consider it of particular relevance in respect of the individual respondents. I take this view in circumstances where, at material times, each of the individual respondents was an office holder or employee of the CFMMEU, and an appropriate penalty should act as a deterrent to other CFMMEU officials who might be likely to offend.

### Contrition and co-operation

1. In this case there has been no expression of contrition by any of the respondents. However, the respondents have co-operated by making admissions and agreeing to allegations in the amended pleadings. This co-operation has obviated the need for a contested trial on liability, other than in respect of the reserved issue, and this issue has been resolved in the respondents’ favour.
2. The co-operation of the respondents is a mitigating factor in assessing appropriate penalties.

### Whether senior management was involved in the conduct

1. The second to eighth respondents were officials and employees of the CFMMEU. However the level of co-ordination of action across the various Hutchinson sites over the month long period indicates involvement of more senior officers of the CFMMEU. There is also evidence including:
* A statement by Mr Steele on 14 September 2016 to the site manager of the Ivy Site that he had been “instructed from above” to shut down the site (affidavit of Mitchel Anthony Smith filed 3 February 2017 at [46] and annexure MAS-1 at 15);
* A suggestion by Mr Floro to the acting site manager of the Illumina Site that the site manager contact Mr Jade Ingham, the then Assistant State Secretary of the CFMMEU (affidavit of Gavin Grosse filed 3 February 2017 at [27] and [29]); and
* References to matters in Darwin and “up north” that suggested there were issues spanning further than sites in metropolitan Brisbane and the individual respondents were instructed by senior officers (affidavit of Wayne Raymond Sengelman filed 3 February 2017 at [54], [55]; and affidavit of Andrew Bruce Morgan filed 3 February 2017 at [55]-[57]).

### Totality principle

1. Section 557(1) of the FW Act provides generally that two or more contraventions of a civil remedy provision referred to in s 557(2) are taken to constitute a single contravention. Section 557(2) of the FW Act refers to s 417(1), but not ss 346 or 355. However the Full Court in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 53; (2017) 249 FCR 458 at [88] found that 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. Accordingly, it is appropriate to consider the extent to which the actions of the respondents in this case constituted a single course of conduct.
2. In relation to the CFMMEU, the various stoppages and strike actions were referable to the campaign it had conducted against Hutchinson across various sites. Upon examination of this conduct it is in my view apparent that the actions of the CFMMEU, through its officials and employees, was orchestrated to take place on particular dates to cause maximum disruption on those dates. To that extent, I consider that the conduct of the CFMMEU on each particular date was a single course of conduct, namely on:
* 25 August 2016;
* 7 September 2016;
* 13 September 2016;
* 14 September 2016;
* 15 September 2016;
* 21 September 2016;
* 23 September 2016;
* 26 September 2016; and
* 27 September 2016.
1. Consistently with this approach, I consider that the conduct of the individual respondents was referable to their actions on particular dates. I particularly take this view in light of the varying conduct and sites affected by that conduct. So:
* Mr Parfitt organised strike action at the Hercules site on 25 August 2016, and again on several weeks later at the same site on 13 September 2016 (two separate incidents);
* Mr Steele organised strike action at the Ivy site on 7 September 2016, again a week later at the same site on 14 September 2016, and at the Opera site on 15 September 2016; he subsequently organised stop-work meetings at the Ivy site on 21 September 2016 and further stop-work meetings at the Opera site on 23 September 2016 (five separate incidents);
* Mr Pauls organised strike action on 13 September 2016 and again at the Spire site on 23 September 2016 (two separate incidents);
* Mr Bland organised strike action at the Wharf Street site on 14 September 2016 and two stop work meetings totalling three and a half hours on 23 September 2016 at the Skytower site (two separate incidents);
* Mr Floro organised strike action at the Hercules site on 23 September 2016, further strike action at the Illumina site on 26 September 2016, and a stop work meeting at the stop work meeting at Hutchinson’s Illumina site on 27 September 2016 (three separate incidents);
* Mr Stott organised a stop work meeting at the Newstead site on 23 September 2016: (one incident); and
* Mr Davis organised a stop work meeting at the South Point A site on 23 September 2016 (one incident).

## Conclusion

1. Insofar as concerns the contraventions by the CFMMEU, I conclude that the penalties for contraventions should be in the high range. I note that the CFMMEU does not dispute this. I note the co-operation by the CFMMEU and take this into consideration, however I also consider that considerations of specific deterrence are of high importance in this case. In the circumstances I consider it appropriate to impose a penalty of $48,000 for each of the nine courses of conduct, totalling $432,000.
2. Insofar as concerns the individual respondents, I consider that penalties in the mid-range are appropriate. In my view, $6,000 for each contravention should be imposed on the third, fourth, fifth and eighth respondents, being those individuals who have either previously been found to have contravened the FW Act or have admitted to engaging in past similar conduct. I consider that $5,000 for each contravention should be imposed on the second, sixth and seventh respondents. Accordingly, I will order penalties as follows:
* Mr Parfitt: $10,000;
* Mr Steele: $30,000;
* Mr Pauls: $12,000;
* Mr Bland: $12,000;
* Mr Floro: $15,000;
* Mr Stott: $5,000; and
* Mr Davis: $6,000.

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| We certify that the preceding eighty-three (83) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Collier. |

Associates:

Dated: 24 April 2018

SCHEDULE OF PARTIES

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|  |  |
| Respondents |  |
| Fourth Respondent: | KURT PAULS |
| Fifth Respondent: | EDWARD BLAND |
| Sixth Respondent: | ANTONIO FLORO |
| Seventh Respondent: | ANTHONY STOTT |
| Eighth Respondent: | MICHAEL DAVIS |