Federal Court of Australia

Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (No 3) (The Botany Cranes Case) [2021] FCA 363

|  |  |
| --- | --- |
| File number(s): | NSD 574 of 2019 |
|  |  |
| Judgment of: | **RARES J** |
|  |  |
| Date of judgment: | 22 April 2021 |
|  |  |
| Catchwords: | **INDUSTRIAL LAW** – application for declarations of contraventions of ss 47(1), 52(a) and 54(1) *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) by officers of building industry participant acting on its behalf and by their conduct and states of mind also by participant under s 94 – where contraveners organised and or engaged in unlawful picket that prevented and intimidated persons accessing or leaving building site to coerce employer to reemploy employee and advance industrial objective of signing proposed enterprise agreement in contravention of s 47(1) – where officers of association acting on its behalf organised and engaged or threatened to organise or take action with intent to coerce employer to reemploy employee in contravention of s 52(a) – where officer of association acting on its behalf threatened to organise or take action against employer with intent to apply undue pressure to it to agree to make enterprise agreement in contravention of s 54(1)(a)  **STATUTORY INTERPRETATION** – whether multiple contraventions by conduct of officials acting on behalf of building industry participant taken to be its conduct can result in multiple contraventions by participant of same civil penalty provision under ss 83, 84 and 91 – whether conduct common to each contravener’s contraventions of one of ss 47(1) and 52(a) “same conduct” or “particular conduct” precluding more than one penalty being imposed in relation to that conduct for other contravention – meaning of “particular conduct”, “same conduct” and “same facts” in ss 83, 84 and 91  **INDUSTRIAL LAW** – penalty – where building industry participant and officials acting on its behalf have significant history of prior contraventions – where contravening conduct intimidated employees of and caused loss of revenue to building industry participant – power to order part of penalty to be paid to persons affected by contravention under s 81(5) |
|  |  |
| Legislation: | *Acts Interpretation Act 1901* (Cth) s 13(1)  *Building and Construction Industry (Improving Productivity) Act 2016*(Cth) ss 3, 5, 9, 45, 47, 51, 52, 54, 56, 57, 81, 83, 84, 91, 92, 94, 95  *Building and Construction Industry Improvement Act 2005* (Cth)  *Customs Act 1901* (Cth)  *Fair Work (Registered Organisations) Act 2009* (Cth)  *Fair Work Act 2009* (Cth) ss 185, 340, 343, 348, 355, 363, 413–416A, 417, 499, 500, 556, 557, 557A, 557B, 793 |
|  |  |
| Cases cited: | *Adams v Director of the Fair Work Building Inspectorate* (2017) 258 FCR 257  *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, Maritime, Mining and Energy Union (Constitution Place Case)* (2020) 299 IR 231  *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (No 3)* [2017] FCA 10  *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 249 FCR 458  *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68  *Australian Building and Construction Commissioner v Construction, Forestry, Mining, and Energy Union (The BKH Contractors Case) (No 2)* [2018] FCA 1563  *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (No 7)* [2020] FCCA 351  *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157  *Barton v Armstrong* [1976] AC 104  *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482  *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union v Australian Competition and Consumer Commissions* (2007) 162 FCR 466  *Construction, Forestry, Maritime, Mining and Energy Union* [2018] FWC 6708  *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commission* (2019) 272 FCR 290  *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner* (2020) 384 ALR 668  *Director of the Fair Work Building Industry Inspectorate v Robinson* (2016) 241 FCR 338  *Esso Australia Pty Ltd v Australian Workers’ Union* (2017) 263 CLR 551  *Hamilton v Whitehead* (1988) 166 CLR 121  *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 100 FCR 530  *L Vogel & Sons Pty Ltd v Anderson* (1967–1968) 120 CLR 157  *Mallan v Lee* (1949) 80 CLR 198  *McNamara v Consumer Trader and Tenancy Tribunal* (2005) 221 CLR 646  *Owners of The Ship ‘Shin Kobe Maru’ v Empire Shipping Company Inc* (1994) 181 CLR 404  *Parker v Australian Building and Construction Commissioner* (2019) 270 FCR 39  *Parker v Australian Building and Constructions Commissioner* (2019) 270 FCR 39  *Pattinson v Australian Building and Construction Commissioner* (2020) 384 ALR 75  *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355  *Stuart v Construction, Forestry, Mining and Energy Union* (2010) 185 FCR 308  *Stuart v Construction, Forestry, Mining and Energy Union* [2009] FCA 1119  *Trade Practices Commission v CSR Ltd* [1991] ATPR ¶41-076  *Trade Practices Commission v Tubemakers of Australia Ltd* (1983) 47 ALR 719  *Walker Corporation Pty Limited v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259 |
|  |  |
| Division: |  |
|  |  |
| Registry: |  |
|  |  |
| National Practice Area: |  |
|  |  |
| Number of paragraphs: | 163 |
|  |  |
| Date of last submission/s: | 9 December 2020 |
|  |  |
| Date of hearing: | 4 September 2020 |
|  |  |
| Counsel for the Applicant: | Mr M. White SC with Mr D. Mahendra |
|  |  |
| Solicitor for the Applicant: | Herbert Smith Freehills |
|  |  |
| Counsel for the Respondents: | Mr H. Borenstein QC with Mr I. Latham and Mr P. Boncardo |
|  |  |
| Solicitor for the Respondents: | Taylor & Scott Lawyers |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | NSD 574 of 2019 |
|  | | |
| BETWEEN: | AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER  Applicant | |
| AND: | CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION  First Respondent  ROBERT KERA  Second Respondent  MICHAEL GREENFIELD (and others named in the Schedule)  Third Respondent | |

|  |  |
| --- | --- |
| order made by: | RARES J |
| DATE OF ORDER: | 22 April 2021 |

**THE COURT ORDERS THAT:**

1. On or before 29 April 2021, the applicant file and serve any written submissions limited to 3 pages:
   1. in support of any orders for payment of any pecuniary penalty:
      1. to Rhonda Hodges,
      2. to New South Wales Police Service,
      3. by the seventh respondent conditioned on the making of a non-indemnification order, and
   2. in relation to the draft form of orders provided to the parties to give effect to the reasons for judgment delivered on 22 April 2021.
2. On or before 6 May 2021, the first, second, third, fifth and seventh respondents file and serve any written submissions limited to 3 pages in relation to the potential orders referred to in order 1 made today.

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

REASONS FOR JUDGMENT

RARES J:

1. The Australian Building and Construction **Commissioner** seeks pecuniary penalties for, and declarations of, contraventions of the *Building and Construction Industry (Improving Productivity) Act 2016*(Cth) (**the Act**) by the Construction, Forestry, Maritime, Mining and Energy Union (the **Union**) and four of its office holders in respect of conduct directed against Griffiths Cranes Pty Ltd, trading as **Botany Cranes**, that occurred on four occasions between 25 January 2019 and 1 February 2019. The office holders (collectively, the **officials**) were the fifth respondent, Rita **Mallia**, who was president of the New South Wales divisional **branch** of the Union and a member of its committee of management, the second and third respondents, Robert **Kera** and **Michael Greenfield**, who were each assistant secretaries of the branch and members of its committee of management, and the seventh respondent, Howard **Byrnes**, a delegate and member of the Union, who performed the function of dealing with an employer, Botany Cranes. Originally, Darren Greenfield, the secretary of the branch, was joined as the fourth respondent, but the Commissioner subsequently discontinued against him and seven others. I have referred to Michael Greenfield in these reasons using his first name to avoid any confusion in the future between the two Mr Greenfields.
2. The parties agreed a statement of facts (the **agreed facts**) that included three video clips of the early morning of 25 January 2019 comprising, *first*, footage taken by the New South Wales Police (the **police video**) of the **picket** outside Botany Cranes’ premises, *secondly*, a video of Mr Byrnes’ speech to the picketers and some of his use of a megaphone to lead them chanting in a threatening manner, and, *thirdly*, a video of an interview with Mr Byrnes at the site during the picket.

## The agreed facts

### Background

1. The agreed facts included admissions by the individual respondents and the Union (collectively, the **contraveners**) that:

* each of Ms Mallia, Mr Kera and Michael Greenfield was an employee and member of the Union, as well as being an official of it acting in that capacity and within the scope of his or her actual or apparent authority, when he or she engaged in the conduct complained of, within the meaning of s 94(1)(a) of the Act, and
* Mr Byrnes was a member of the Union and an agent of it within the meaning of ss 94 and 95 of the Act, and
* each official was a building industry participant within the meaning of s 5 of the Act.

1. Botany Cranes supplied mobile cranes and mobile crane hire services under contracts to building contractors in New South Wales for residential and commercial construction purposes, and, during January and February 2019, had contracts with its customers to provide mobile cranes for those purposes. It was also a building industry participant for the purposes of s 5 of the Act. Botany Cranes had **premises**, including a **yard**, in Hale Street, Botany (a suburb of Sydney) where it conducted operations, including storing, servicing and maintaining mobile cranes and did other work relating to building work. Botany Cranes’ employees attended the premises for work, including to receive information about who was to take mobile cranes from the premises for each day’s work on construction sites before they went about their assigned tasks. The yard was an ancillary site within the meaning of s 9 of the Act.
2. Damian **Griffiths** was the managing director, and an employee, of Botany Cranes. Botany Cranes employed Rhonda **Hodges** as operations manager, Jason Petersonas a dogman, Ross Griffiths and Paul **Hall** as mechanics, and Tara **Canin** as a receptionist.
3. From 2012, an enterprise agreement with a nominal expiry date of 31 May 2015 had covered Botany Cranes, its employees and the Union. In about February 2018, the Union, on behalf of its members who were employees of Botany Cranes, began negotiating with the company with a view to arriving at terms for a replacement enterprise agreement. This process included the Union providing Botany Cranes with its terms for a proposed enterprise agreement in February 2018.
4. In about July 2018, the Union provided Botany Cranes with a further version of a proposed enterprise agreement (the **CFMMEU proposed EBA**). Mr Griffiths did not agree to or accept the CFMMEU proposed EBA. In August 2018, Botany Cranes provided a copy of its proposed enterprise agreement to the Union. Botany Cranes’ employees voted to approve the CFMMEU proposed EBA on 23 August 2018.
5. In September 2018, the Union commenced proceedings in the **Fair Work Commission** seeking approval of the CFMMEU proposed EBA under s 185 of the ***Fair Work Act*** *2009*(Cth). The Union alleged, and Botany Cranes denied, that Botany Cranes had accepted the CFMMEU proposed EBA.
6. On 11 December 2018, the Fair Work Commission dismissed the Union’s application: *Construction, Forestry, Maritime, Mining and Energy Union* [2018] FWC 6708 (the **dismissal decision**). On 24 January 2019, a Full Bench of the Fair Work Commission heard the Union’s appeal against the dismissal decision and reserved its decision.

### The circumstances of the contraventions

1. It is convenient to set out verbatim below pars 21–58 of the agreed facts as to the circumstances of the contraventions, namely:

**D. Botany Cranes's jobs and termination of Byrnes in January 2019**

21. By 24 January 2019 Griffiths had formed the view that Byrnes was providing advance information to the CFMMEU about the locations of Botany Cranes's jobs, thereby assisting the CFMMEU to conduct interference with Botany Cranes's business.

22. As a consequence of the view formed by Griffiths, at about 1pm on 24 January 2019 he met with Byrnes and told Byrnes someone was tipping off the CFMMEU, to which Byrnes responded with words to the effect: "Maybe sign the EBA and it will stop." Later that day Griffiths asked Byrnes if he was sabotaging the business, and not believing Byrnes's denial, terminated Byrnes's employment by Botany Cranes with immediate effect. Byrnes then said to the nearby employees "Don't worry boys, I'll be back."

**E. CONTRAVENING CONDUCT – 25 JANUARY 2019**

23. After the termination of Byrnes on 24 January 2019, the CFMMEU circulated to all its members, including Botany Cranes employees, a text message calling on them to attend at the Botany Cranes Yard on 25 January 2019 to protest against the termination of Byrnes's employment. A copy of the text was received by Griffiths on 24 January 2019.

24. As a consequence of receiving the text, Hodges arranged for Botany Cranes to sub-contract or cancel some of its jobs scheduled for 25 January 2019, causing Botany Cranes to lose revenue of approximately $31,723.50 and an amount of profit.

25. Griffiths also instructed all Botany Cranes employees to attend for work at the Botany Cranes Yard at 7 am on 25 January 2019 to receive instructions for work on other jobs scheduled for that day.

26. From approximately 5:30 am on 25 January 2019 Kera, Mallia, M Greenfield, Byrnes, and other CFMMEU members attended the Botany Cranes Yard and congregated outside the main vehicle entrance of the Yard. By 6:45 am the group contained about 50 persons.

27. Some members of the group:

(a) wore CFMMEU branded clothing (including Kera, M Greenfield and Mallia);

(b) carried or affixed to the Botany Cranes Yard fence approximately 15 CFMMEU flags or banners;

(c) parked a square box trailer emblazoned with "CFMEU" in large letters adjacent to the driveway;

(d) positioned themselves as a group across the entry gate so that any person or vehicle entering or leaving the Yard had to pass through them as well as obstructing the public footpath outside the Yard in Hale Street and spilling out onto the roadway of Hale Street;

(e) stood with their arms folded across the entry gate;

(f) set up and sat in chairs on the driveway immediately outside the Yard gate in such a position that any vehicle leaving the Yard would have to collide with the chairs;

(g) were addressed by Kera who, inter alia, thanked the CFMMEU members for turning out, told them they were forming a picket, told them they were going to fight to the death to have Byrnes reinstated, told them the. company had sacked the delegate before and that the union had got the delegate reinstated, told them Botany Cranes had picked a fight with the CFMEU, told them the workers hadn't had a pay rise in three and a half years, told them the company had double-crossed the CFMMEU on the CFMMEU Proposed EBA by refusing the sign it after agreeing to it, told them they were going to wipe the floor with Botany Cranes and accused Botany Cranes of double-crossing the CFMMEU on the CFMMEU proposed EBA;

(h) were addressed by M Greenfield and Mallia, who thanked the CFMMEU members for turning up at the Botany Cranes Yard;

(i) listened to an address by Byrnes who said words to the effect "Thank you for your support. I've worked for three owners of Botany Cranes. This has to be the worst owners (sic) I've ever witnessed in my whole life in the building industry" and thanked those present for turning up to support him ;

(j) told Hall upon his arriving for work that he could not enter the Yard and no­one could enter the Yard;

(k) Hodges heard upon her arriving for work to the effect "Here's one of them", "They're a bunch of dogs", "CFMEU" and "They shafted Howard for standing up for his men", making her feel fearful, ill and causing her to cry. The Applicant does not contend that the quoted statements were directed at Hodges. A copy of video footage showing Hodges entering the Yard is annexed and marked “A";

(l) (including Mallia, M Greenfield, Kera and Byrnes) chanted aggressively "*Union, Power!*'' and "*Who are we- CFMEU!*", "*One day longer, one day stronger*" and "*The workers united will never be defeated*" led by Byrnes on a megaphone, while some shook their fists in the air towards the Botany Cranes offices, which conduct was visible and audible from those offices; and

(m) shouted together from time to time words to the effect "*CFMEU, one fight, stand together*", "*CFMEU*" , "We'll be here everyday until our delegate is reinstated'', "*We 're here/or Howard Byrnes*" and "*Our Brother Howard Byrnes*".

28. At approximately 6 am members of the group identified to Police in attendance that Kera was the person in charge of the group.

29. In response to the conduct of the group:

(a) A number of NSW Police attended the Yard from approximately 6:00am onwards and monitored the group outside the Yard gate;

(b) Hodges was fearful and cried out: "someone get me inside the gate" and she requested Police assistance to enter the Yard and entered the Yard through the group;

(c) Hodges called the office receptionist, Tara Canin, and advised her not to attend work for fear of being intimated and distressed by the group;

(d) Hall did not attend for work;

(e) the NSW Police advised Griffiths that the picket would not allow any cranes to leave the Yard, that staff and management could leave, and that for their safety they should be escorted by Police due to the presence and conduct of the group;

(f) Griffiths decided that cranes could not be moved from the Yard that day and to close the office for the day and that the employees inside the Yard should leave.

30. At approximately 7:00 am Kera advised NSW Police that the management and staff of Botany Cranes could leave the Yard only in their personal cars.

31. At approximately 8:00 am Griffiths, Hodges, Ross Griffiths, Peterson and other staff of Botany Cranes, with the assistance of Police, left the Yard in their personal vehicles at which time members of the First Picket:

(a) formed groups close on either side of the leaving vehicles;

(b) shouted aggressively and in unison, led by M Greenfield, chants to the effect of and "CFMEU!" and words to the effect of "One day longer, one day stronger".

32. Each of Kera, M Greenfield, Mallia, and Byrnes joined in the conduct of the group, lent their aid to and associated themselves with the group by actively remaining in it until at least about 9:00 am, and participated in the activities of the group in restricting access and egress to the Yard, including blocking the egress of persons driving any cranes, and chanting slogans.

33. At approximately 8:45 am Kera advised Inspector Halliday of the NSW Police that the group would remain in place until 2 pm or possibly later.

34. Some members of the group, including M Greenfield, remained outside the Yard until approximately 4 pm.

35. At 8:45 pm the CFMMEU posted on its Facebook page a photograph of Byrnes, Bulley, Mclvor, Anderson, Miller and Astrup standing on the pavement in Hale Street. The page stated: "*Botany Cranes sacked this man for standing up for a fair go at work*' and marked with an arrow pointing at the image of Byrnes, and further captioned, inter alia, "*Reinstate CFMEU delegate Howard Byrnes who was unfairly sacked for standing up for his fellow workers. Sign the EBA that was agreed upon! Don't go back on your word!*". A copy of that Facebook post is annexed to this Statement and marked "B". A copy of a Google Maps image depicting where the photograph was taken is annexed to this Statement and marked "C". A copy of a Google Streetview image depicting where the photograph was taken is annexed to this Statement and marked "D".

36. The actions of each of Kera, M Greenfield, Mallia and Byrnes in participating in the activities of the group set out in paragraphs 26 to 32 above constituted engaging in (and in the case of M Greenfield, organising) an unlawful picket within the meaning of section 47 of the BCIIP Act in that their actions:

(a) had the purpose of preventing or restricting persons from accessing or leaving the Botany Cranes Yard; or

(b) prevented Hall and persons driving cranes from leaving the Botany Cranes Yard, and restricted persons from accessing or leaving the Botany Cranes Yard; or

(c) would reasonably be expected to intimidate persons accessing or leaving the Botany Cranes Yard; and

(d) were motivated by the purpose of supporting or advancing claims against Botany Cranes in respect of employment of employees by Botany Cranes; or

(e) were motivated by the purpose of advancing industrial objectives of the CFMMEU, namely, the claim to reinstate Byrnes to his employment, and the securing of Botany Cranes's agreement to the EBA proposed by the CFMMEU.

37. By reason of the matters in paragraphs 23 to 36 above, each of Kera, M Greenfield, Mallia and Byrnes contravened section 47 of the BCIIP Act by engaging in (and, in the case of M Greenfield, organising) an unlawful picket.

38. The conduct and actions of each of Kera, M Greenfield, Mallia and Byrnes on 25 January 2019 at Botany Cranes Yard, as set out at 23 to 36 above, by reason of sections 94(1)(a) and 95(1)(b) of the BCIIP Act, was the conduct and actions of the CFMMEU, which thereby contravened section 47 on 25 January 2019.

39. The conduct of each of Kera, M Greenfield, Mallia and Byrnes on 25 January 2019 at the Botany Cranes Yard, referred to in paragraphs 23 to 36 above, constituted the taking of action against Botany Cranes with intent to coerce Botany Cranes to employ Byrnes as a building employee, that was unlawful, and contravened section 52 of the BCIIP Act.

40. For the purposes of "coercion" within the meaning of section 52, the conduct of Kera, M Greenfield, Mallia and Byrnes was unlawful in that it constituted an unlawful picket in contravention of section 47 of the BCIIP Act

41. The conduct and actions of each of Kera, M Greenfield, Mallia and Byrnes on 25 January 2019 at Botany Cranes Yard, as set out in paragraphs 23 to 36 and 39 to 40, by reason of sections 94(1)(a) and 95(1)(b) of the BCIIP Act, were the conduct and actions of the CFMMEU, which thereby contravened section 52 on 25 January 2019.

**F. CONTRAVENING CONDUCT – 30 JANUARY 2019**

42. On 29 January 2019 Hodges sent a text message to all Botany Cranes employees requiring them to attend for work at the Botany Cranes Yard at 6:45 am on 30 January 2019.

43. On 30 January 2019 a group of persons, including M Greenfield, Byrnes and other CFMMEU members attended the Botany Cranes Yard from about 5:00 am and congregated in a group outside the main vehicle entrance.

44. Members of the group:

(a) wore CFMEU branded clothing (including M Greenfield);

(b) carried or affixed to the Yard fence approximately 15 CFMMEU flags or banners;

(c) positioned themselves as a group across the entry gate such that any person or vehicle entering or leaving the Yard would be obstructed;

(d) set up chairs and tables across the driveway in such a position that vehicles entering or leaving the yard would be obstructed.

45. At about 5:10 am M Greenfield and Griffiths had a meeting just inside the Yard fence and a conversation to the following effect occurred:

M Greenfield: "*Do you really want to do this?*"

Griffiths: "*It's you blokes have done this, not me*".

M Greenfield: "*This is going to be pretty bad today, worse than you have seen. Or I can stop it immediately. It's going to be full on. Really bad for you. Once this happens today there's no going back for you. Or we can settle it if you put Howard back on. We'll come to terms with the things you want in the EBA. We'll start negotiating fairly, give you what you want and we can move forward. I want the lawyers kept out of it. Lawyers are dogs*."

Griffiths: "*If I put Howard back on, you will agree to my terms and this will all go away immediately and you will leave my customers alone?*"

M Greenfield: "*Yes and all the stuff at Fair Work will stop as well. Everything against you will cease. We have organised a huge protest for today. We have gone out to different industries.*"

46. At about 6:00 am a further meeting occurred inside the Yard between Kera, M Greenfield, Griffiths and Peterson. During that meeting M Greenfield said words to the effect: "*Let Howard in now and give him back his job, make up and we'll tell all the other boys to go home for the day. We’lI let your Franna out at 11 and we'll meet at 1.30 to start finalising the EBA at our office.*"

47. At about 6:15 am Kera went and brought Byrnes into the Yard to the meeting and Griffiths agreed to reinstate him as an employee of Botany Cranes. M Greenfield said words to the effect: "*All social media will be removed. The protest will be cancelled. We want to say Howard's back. All will be gone by 7.30*."

48. At about 6:35 am the CFMMEU posted on its Facebook site a photograph of Byrnes, M Greenfield and Kera and the group outside the Botany Cranes Yard, stating "Howard's back at work. Thanks for all your solidarity and support". The post was still there at 9:20 pm when it was seen by Griffiths.

49. The group congregated outside the Botany Cranes Yard dispersed by approximately 7.30 am.

50. The conduct of M Greenfield on 30 January 2019 at the Botany Cranes Yard, referred to in paragraphs 43 to 46 above, constituted threatening to organise or take action against Botany Cranes with intent to coerce Botany Cranes to employ Byrnes as a building employee, that was unlawful, illegitimate or unconscionable, and contravened section 52 of the BCIIP Act.

51. For the purposes of "coercion" within the meaning of section 52, the conduct of M Greenfield was unlawful in that it constituted a threat to interfere with Botany Cranes's contractual relations with its employees and contractors by threatening to engage in interference with the operation of mobile cranes on job sites and was illegitimate and unconscionable in that it was adverse and prejudicial to Botany Cranes in threatening to prevent its employees from working using its mobile cranes to carry out work on 30 January 2019 and threatened to cause Botany Cranes to lose revenue and profit, and was disproportionate to any legitimate interest the threat supported, and which none of M Greenfield or the CFMMEU had any entitlement to make or carry out.

52. The conduct and actions of M Greenfield on 30 January 2019 at Botany Cranes Yard, as set out in paragraphs 43 to 51 above, by reason of sections 94(1)(a) and 95(1)(6) of the BCIIP Act, was the conduct and actions of the CFMMEU, which thereby contravened section 52 on 30 January 2019.

**G. CONTRAVENING CONDUCT ON 31 JANUARY AND 1 FEBRUARY 2018**

53. At 6 am on 31 January 2019 Kera and M Greenfield attended the Botany Cranes Yard and met with the Botany Cranes employees outside the Yard gate. While present at the Yard M Greenfield had a conversation with Griffiths, during which words to the following effect were said:

*M Greenfield: "The CFMEU will be telling your workers it does not endorse the EBA proposed by you."*

*Griffiths: "Botany Cranes cannot afford the EBA proposed by the CFMEU."*

*M Greenfield: "If I were you, I'd fuckin' sign it. You haven't seen anywhere near bad yet. See what happened to WGC and Boom Logistics, and they had money, what do you think will happen to you?"*

54. WGC Cranes and Boom Logistics were other crane hire companies against which the CFMMEU had conducted campaigns for the purpose of securing their agreement to new EBAs proposed by the CFMMEU including by protected action.

55. At approximately 6:55 am on 1 February 2019 Kera and M Greenfield met with the Botany Cranes employees at the Botany Cranes Yard to discuss the proposed new EBA. At about 7:10 am Kera, Byrnes and M Greenfield had a meeting with Griffiths and Peterson in the Botany Cranes office. During the meeting words to the following effect were said:

*M Greenfield/ Kera: "The CFMEU does not accept staggered pay increases, the full increase will take place at the commencement of the EBA. We do not endorse the expiry of the new EBA in December 2019 as advanced by Botany Cranes, the term will be until, October 2019."*

*M Greenfield: "If you sign the EBA we will leave your sites alone."*

56. On 12 February 2019 Griffiths signed on behalf of Botany Cranes a version of the EBA proposed by the CFMMEU, thereby agreeing to the Griffiths Cranes Pty Ltd t/as Botany Cranes & Forklift Services/CFMMEU Collective Agreement 2019.

57. The conduct of M Greenfield on 31 January 2019 and 1 February 2019, referred to in paragraphs 53 to 56 above, constituted the organising or taking of action against Botany Cranes, with intent to apply undue pressure to Botany Cranes to agree to make or approve a building enterprise agreement, that was unlawful, illegitimate or unconscionable, and contravened section 54(1) of the BCIIP Act.

58. The conduct and actions of M Greenfield on 31 January 2019 and 1 February 2019, as set out in paragraphs 53 to 58 above, by reason of sections 94(1)(a) and 95(1)(b) of the BCIIP Act, was the conduct and actions of the CFMMEU, which thereby contravened section 54(1) on 31 January and 1 February 2019.

## The statutory context

1. Chapter 5 of the Act was headed ‘Unlawful action’. Section 45 provided, relevantly, that Ch 5 applied to action taken that, *first*, affected, or was capable of affecting, or was taken with intent to affect, the activities, functions, relationships or business of a corporation, or, *secondly*, consisted of advising, encouraging or inciting, or action taken with intent to coerce, a corporation to take, or not take, or to threaten to take, or not take, particular action in relation to another person.
2. Section 47 provided:

**47 Unlawful picketing prohibited**

(1) A person must not organise or engage in an unlawful picket.

Note: Grade A civil penalty.

(2) An ***unlawful picket*** is action:

(a) that:

(i) has the purpose of preventing or restricting a person from accessing or leaving a building site or an ancillary site; or

(ii) directly prevents or restricts a person accessing or leaving a building site or an ancillary site; or

(iii) would reasonably be expected to intimidate a person accessing or leaving a building site or an ancillary site; and

(b) that:

(i) is motivated for the purpose of supporting or advancing claims against a building industry participant in respect of the employment of employees or the engagement of contractors by the building industry participant; or

(ii) is motivated for the purpose of advancing industrial objectives of a building association; or

(iii) is unlawful (apart from this section).

Note: See also Division 2 of Part 2 of Chapter 6 (reason for action and coercion)

(emphasis in original)

1. Chapter 6 was headed ‘Coercion, discrimination and unenforceable agreements’. Section 51 provided that Pt 2 of Ch 6, headed ‘Coercion and discrimination’, applied to action of the same kinds, and in the same words, as s 45.
2. Relevantly, ss 52(a) and 54(1) were in Pt 2 of Ch 6 and provided:

**52  Coercion relating to allocation of duties etc. to particular person**

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 as a building employee; or

…

Note 2: Grade A civil penalty

…

**54 Coercion of persons to make, vary, terminate etc. enterprise agreements etc.**

(1) A person must not:

(a) organise or take, or threaten to organise or take, any action; or

(b) refrain, or threaten to refrain, from taking any action;

with intent to coerce another person, or with intent to apply undue pressure to another person, to agree, or not to agree:

(c) to make, vary or terminate a building enterprise agreement; or

(d) to approve any of the things mentioned in paragraph (c).

Note 1: See also Division 2 (reason for action and coercion).

Note 2: Grade A civil penalty.

…

1. Sections 56 and 57 provided that, for the purposes of s 47 and Pt 2 of Ch 6, a person took unlawful action for a particular reason if the reasons for this action included that reason (s 56), and that if an application in relation to a contravention of s 47 and, relevantly, ss 52 and 54 alleged that a person took action for a particular reason or with a particular intent, and doing so for that reason or with that intent constituted a contravention of the provision, the person would be presumed to have taken the action for the reason or with the intention alleged, unless the person proved otherwise (s 57).
2. Chapter 8 provided for enforcement and contained ss 81–100. Relevantly, s 81(1)(a) conferred jurisdiction on this Court on application by, among others, the Commissioner (and a person affected by a contravention), to make an order imposing a pecuniary penalty on a person who contravened ss 47, 52 or 54.
3. The maximum penalties applicable here for each contravention of a civil remedy provision, based on the value of a penalty unit ($210) at the time of each contravention, are $210,000 for the Union and $42,000 for each official (s 81(2)(a)). A pecuniary penalty imposed under s 81(1)(a) may be recovered as a debt, and the Court is able to direct that, instead of being payable to the Commonwealth, it be payable to some other person (s 81(5)). Importantly, ss 81(6), 83, 84 and 91 provided:

**81 Penalty etc. for contravention of civil remedy provision**

…

(6)  In determining a pecuniary penalty under paragraph (1)(a), the court must take into account all relevant matters, including:

(a)  the nature and extent of the contravention; and

(b)  the nature and extent of any loss or damage suffered because of the contravention; and

(c)  the circumstances in which the contravention took place; and

(d)  whether the person has previously been found by a court (including a court in a foreign country) to have engaged in any similar conduct.

…

**83  Conduct contravening more than one civil remedy provision**

(1)  If conduct constitutes a contravention of 2 or more civil remedy provisions, proceedings may be instituted under this Part against a person in relation to the contravention of any one or more of those provisions.

(2)  However, **the person is not liable to more than one pecuniary penalty** under this Part **in relation to the same conduct.**

**84  Multiple contraventions**

(1) **A relevant court may make a single civil penalty order against a person for multiple contraventions of a civil remedy provision if proceedings for the contraventions are founded on the same facts**, or if the contraventions form, or are part of, a series of contraventions of the same or a similar character.

(2) However, any pecuniary penalty imposed must not exceed the sum of the maximum penalties that could be ordered if a separate pecuniary penalty were ordered for each of the contraventions.

…

**91 Civil double jeopardy**

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 civil penalty order in relation to that conduct.

(emphasis added)

1. Next, s 94(1)(a) and (2) provided, relevantly, that any conduct engaged in on behalf of a body corporate by an officer, employee or agent of the body within the scope of his or her actual or apparent authority was taken, for the purposes of the Act, *also* to have been engaged by the body, and that the individual’s state of mind (including his or her intentions and purposes, and his or her reasons for them) was deemed to be also the body’s state of mind.
2. For the purposes of the Act, s 95(1)(b) and (d) deemed an action taken by an officer or agent of a building association (which included a union registered under the *Fair Work (Registered Organisations) Act 2009* (Cth)) acting in that capacity, or a union member who performs the function of dealing with an employer on behalf of that person and other members of the union acting in that capacity, to be an action of the union. Section 95(3) attributed to the union the state of mind of the relevant officer, agent or member in taking that action.

## The parties’ submissions

1. The parties agreed that the Union contravened ss 47(1) and 52(a) of the Act on 25 January 2019, but are in dispute as to how many contraventions of those provisions it committed, and are also in dispute as to whether s 91 applied to require that only one pecuniary penalty be imposed where a person contravened both ss 47 and 52 on that occasion. The Commissioner asserted that the conduct of each of the officials constituted a separate contravention by the Union, while the Union contended that there was only one unlawful picket and act of coercion giving rise to only one penalty for which it could be found liable.
2. In the amended statement of claim, the Commissioner alleged that, by reason of ss 94(1)(a), 95(1)(b) (in the case of Ms Mallia, Mr Kera and Michael Greenfield) and 95(1)(d) (in the case of Mr Byrnes), the conduct engaged in and state of mind constituting each contravention of s 47 in the unlawful picket on 25 January 2019 was a separate contravention of s 47(1) by the Union, so that it was liable to four pecuniary penalties derived from each official’s conduct. The Commissioner made similar pleaded allegations that the Union had committed four contraventions of s 52(a) on 25 January 2019. He alleged that Mr Kera, Michael Greenfield and Mr Byrnes organised and, with Ms Mallia, took action against Botany Cranes with intent to coerce it to reemploy Mr Byrnes.
3. Next, he alleged that Michael Greenfield and, through his conduct, the Union, each contravened s 52(a) again on 30 January 2019 by threatening to organise and take action against Botany Cranes with intent to coerce it to reemploy Mr Byrnes.
4. Last, the Commissioner alleged that Michael Greenfield and, through his conduct, the Union, each contravened s 54(1) on 31 January and 1 February 2019 by threating to organise and take action against Botany Cranes with intent to apply undue pressure to it to make or approve a building enterprise agreement, being the CFMMEU proposed EBA.
5. The Commissioner sought individual declarations in his further amended originating application (that he filed at about the same time as the parties signed the agreed facts) that by each of Ms Mallia, Mr Kera, Michael Greenfield and Mr Hughes respectively engaging in the unlawful picket on 25 January 2019, the Union contravened ss 47(1) and 52(a) of the Act by force of ss 94(1)(a) and 95(1)(b) and (d). He sought similar declarations in respect of Michael Greenfield’s and the Union’s conduct, actions and states of mind in relation to his contravention of s 52(a) on 30 January 2019 and in relation to his contravention of s 54(1) on 31 January and 1 February 2019.

### The contraveners’ submissions

1. The contraveners submitted that, by force of s 91 of the Act, they could only be found liable to one civil penalty each in relation to the totality of their conduct on 25 January 2019, relying on *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commission* (2019) 272 FCR 290 (the *Hassett Appeal*)at 293–294 [15]–[19], 296 [26]. They argued that this was because even though each official may have contravened both ss 47(1) and 52(a) on 25 January 2019, the conduct involved in the unlawful picket in contravention of s 47(1) was the “particular conduct” that also comprised their coercion in relation to s 52(a). They contended that s 83(2) also produced the same result, as did the common law (relying on *Stuart v Construction, Forestry, Mining and Energy Union* (2010) 185 FCR 308 at 331–332 [82]–[84]).
2. The contraveners argued that s 47 was a novel provision, and that “picketing” was apt to encompass a spectrum of conduct of varying degree and seriousness. They pointed to hypothetical examples of how the picketing on 25 January 2019 could have been more serious had it involved actual or threatened physical violence, locking and chaining gates or parking vehicles to obstruct ingress and egress. They contended that, while Ms Hodges may have been distressed, her reaction was not provoked by any threats or abuse directed specifically to her. They submitted that the picket was motivated by the purpose of having Botany Cranes reinstate Mr Byrnes’ employment, and that this was not a “base motive”. The contraveners argued that there was no evidence that anyone, other than Botany Cranes and its employees, suffered inconvenience, and that there was no evidence of any loss of Botany Cranes’ profit or productivity.
3. The Union put that its contraventions on 25 January 2019 were in the middle of the range of seriousness. And, the officials argued that on 25 January 2019, Ms Mallia’s and Mr Byrne’s contraventions were toward the lower end of the range, Mr Kera’s fell towards the low to middle of the range and Michael Greenfield’s on that day towards the middle.
4. The Union argued that the text message that the Union (I infer at Michael Greenfield’s instigation) sent on 24 January 2019 to all its members, calling on them to attend at the yard the next morning to protest about the termination of Mr Byrnes’ employment, did not refer to the CFMMEU proposed EBA or suggest any intention to engage in coercive behaviour. It contended that this warranted an inference that its conduct was consistent with what it said was the mild and inoffensive nature of the picket as, it suggested, the police video depicted.
5. The Union and Michael Greenfield argued that their contraventions on 30 January 2019 comprised threatening to take action, but there was no evidence that this had caused Botany Cranes any loss. They contended that the conduct and action on 30 January 2019 was interrelated with the events of 25 January 2019 as it had the same purpose of seeking Mr Byrnes’ reinstatement. Indeed, they submitted that there was a single course of conduct on both days so that no additional penalty at all ought be imposed.
6. The Union and Michael Greenfield submitted that his conduct on 31 January and 1 February 2019 constituted a threat to organise or take action with intent to apply undue pressure, which was less egregious than coercion. They argued that this did not result in any financial loss for Botany Cranes, and fell into the middle of the range of seriousness.
7. The contraveners argued that there was little need for specific deterrence of Ms Mallia and Mr Byrnes. They accepted that specific deterrence and prior histories of contravening were relevant to the penalties that should be imposed on Mr Kera, Michael Greenfield and the Union. They contended that they were entitled to significant credit for their cooperation in resolving the proceeding. They submitted that the penalties to be imposed had to be proportionate to the circumstances and that Mr Kera, Michael Greenfield and the Union could not be given disproportionate penalties by reason of their prior history of contraventions. They submitted that the totality principle had to be applied in assessing the overall penalties for Michael Greenfield and the Union. They argued that it was not necessary in the circumstances to make any non-indemnification orders to achieve deterrence.

### The Commissioner’s submissions

1. The Commissioner argued that s 94 attributed the conduct, but not the contraventions, of each of the officials to the Union. He contended that a contravention of s 47 is a contravention by a person, not by a group, when the person organises or engages in an unlawful picket. He submitted that s 47(1) proscribes a person’s engagement in (or organisation of) the picket, not the picket itself. He argued that s 52 operated in the same way when a person formed the particular state of mind when engaging in conduct and that, again, an individual had to form his or her own contravening state of mind when taking action to fall foul of the prohibition in s 52. He contended that cases such as *Director of the Fair Work Building Industry Inspectorate v Robinson* (2016) 241 FCR 338 and *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (Constitution Place Case)* (2020) 299 IR 231 were distinguishable, as Katzmann J had suggested may occur (299 IR at 254 [79]), where the conduct sought to be attributed to the Union was of individuals who had engaged in (as oppose to organising) action that contravened a statutory provision.
2. The Commissioner argued that, where a person contravened different provisions by different conduct, s 91 did not limit the pecuniary penalty available to only one, based on *Parker v Australian Building and Construction Commissioner* (2019) 270 FCR 39 at 139 [312]. He contended that each official engaged in different physical conduct from the others, and that the motivations for the two contraventions were different in that the motivation for the picket included, in addition to that in the coercion seeking the reinstatement of Mr Byrnes’ employment, the purpose of advancing the industrial objective of procuring Botany Cranes’ agreement to the CFMMEU proposed EBA.
3. The Commissioner alleged that the Union committed as many contraventions of ss 47(1) and 52(a) as were constituted by each official engaging in an unlawful picket and taking coercive action by reference to his or her individual, particular contravening conduct.

## The contraventions on 25 January 2019

### The agreed facts and pleaded claims

1. It is important to analyse the contraventions of each of the officials on 25 January 2019 to ascertain whether the Union engaged in a single contravention of each of ss 47(1) and 52(a) or in multiple contraventions. In essence, the agreed facts described that conduct as follows:

* as to Mr Kera, by him addressing the group as set out in par 27(g), appearing to have taken charge of activities of the group (par 28) and restricting the capability of those employees of Botany Cranes in the yard to leave (par 30);
* as to Michael Greenfield and Ms Mallia, by what each of them said separately addressing and thanking the Union members for turning up at the yard (par 27(b));
* as to Michael Greenfield, by organising the unlawful picket (pars 36–37);
* as to Mr Byrnes, by addressing the group and leading aggressive chanting on a megaphone (pars 27(i) and (l));
* as to each of the officials, by behaving with others aggressively, and at times shouting slogans together (pars 27(l)–(m)), joining in the conduct of the group, lending their aid to and associating with it in creating and maintaining the blockade, and chanting slogans up to at least 9:00am (par 32).

1. The agreed facts recorded, in par 36, that the actions of each of the officials, set out in pars 26 to 32, contravened s 47(1) of the Act by, in the separate cases of Ms Mallia, Mr Kera and Mr Byrnes, engaging in, and in Michael Greenfield’s case, organising and engaging in, the unlawful picket with the two motivations or purposes of, *first*, bringing about the reinstatement of Mr Byrnes’ employment and, *secondly*, the agreement of Botany Cranes to the CFMMEU proposed EBA. The agreed facts recorded those contraventions of s 47(1) in par 37, namely that, *first,* Ms Mallia, Mr Kera and Mr Byrnes engaged in and, *secondly*, Michael Greenfield organised and engaged in, an unlawful picket. Next, the agreed facts called in aid the deeming provisions in ss 94(1)(a) and 95(1)(b) to attribute the several conduct and actions of each of the officials to be conduct and actions of the Union “which thereby contravened section 47 on 25 January 2019”.
2. The agreed facts then recorded that the conduct of each of the officials on 25 January 2019, set out in pars 23–36, constituted the taking of action that was unlawful against Botany Cranes, with intent to coerce it by the unlawful picket to employ Mr Byrnes as a building employee, and so contravened s 52(a) (pars 39–40).
3. The agreed facts also attributed the conduct and actions of each of the officials in pars 23–36, 39 and 40 to be conduct and actions of the Union, by relying on the deeming in ss 94(1)(a) and 95(1)(b), so that the Union also contravened s 52(a) on 25 January 2019 (par 41). I note that the agreed facts departed from the somewhat wider allegations against the officials in the amended statement of claim.
4. On a fair reading of the amended statement of claim filed on 17 May 2019, the rolled up allegations against the Union in pars 47–49 and 96–98 of the pleading (that were left unamended when the parties signed the agreed facts on 7 July 2020 and the Union consented on 9 July 2020 to the further amended originating application being filed), read together with the further amended originating application, pleaded claims that on 25 January 2019:

* each of Ms Mallia, Mr Kera and Mr Byrnes contravened s 47 by engaging in an unlawful picket (prayers 2, 4, 6);
* Michael Greenfield contravened s 47 by organising and engaging in an unlawful picket (prayer 3);
* each of Ms Mallia, Mr Kera and Mr Byrnes contravened s 52 by taking action against Botany Cranes at the yard with intent to coerce it to employ Mr Byrnes (prayers 13, 15, 17);
* Michael Greenfield contravened s 52 by organising and taking action against Botany Cranes at the yard with intent to coerce it to employ Mr Byrnes (prayer 14).

1. In my opinion, the Commissioner did plead and seek relief against the Union on the basis that the conduct and actions of each of the officials on 25 January 2019 was qualitatively distinct from, and added to, the overall unlawful picket and coercive action so as to create four separate contraventions by the Union of each of ss 47(1) and 52(a). I agree with that characterisation of the contraventions of each of ss 47(1) and 52(a) being substantively distinct.
2. That raises the questions that the contraveners agitated, namely:
3. if the Union is taken to have organised and engaged in the unlawful picket, and organised and taken the action to coerce Botany Cranes, on 25 January 2019 because of the attribution to it of Michael Greenfield’s conduct and action, how can the Union also have contravened ss 47(1) and 52(a) by further engaging in such conduct and action by the attribution to it of the conduct and actions of each of Ms Mallia, Mr Kera and Mr Byrnes?
4. if the same conduct of engaging (or, in Michael Greenfield’s case, organising and engaging) in the unlawful picket was common to each contravener’s contraventions of ss 47(1) and 52(a), did s 91 prevent more than one penalty being imposed in respect of the two contraventions of each of the officials and however many (up to eight) contraventions the Union committed?

### Consideration – construction of ss 94 and 95 of the Act

1. Relevantly, s 94(1) deems conduct engaged in on behalf of a body corporate by an officer acting within the scope of his or her actual or apparent authority to have been engaged in also by the body. Likewise, s 94(2) deems the state of mind of that individual to be the body’s state of mind in respect of the individual’s attributed conduct. In contrast, s 95(1) attributes the action of certain individuals or groups within the internal structure of a building association to be the conduct of that building association, and s 95(3) attributes the state of mind of that individual or group to be that of the association.
2. The heading to s 94 is “Liability of bodies corporate”, whereas the heading to s 95 is “Actions of building associations”. Those headings are part of the Act: s 13(1) of the *Acts Interpretation Act 1901* (Cth). What s 94(1) does is to deem the conduct of the individual *on behalf of* the body “to have been engaged in **also** by the body” (emphasis added). That is unlike s 95, which deems (rebuttably, as s 95(2) allows) particular action taken by individuals or groups identified in s 95(1) to be the action of the building association. Importantly, s 95(4) provides that s 95(1)–(3) have effect “despite” s 94(1) and (2). That is why s 95(1) does not require, unlike s 94(1), that the individual or group take the action *on behalf of the building association*; rather, s 95(1) deems the action, however inadvertent, to be that of the association unless an individual or group identified in s 95(2) has taken all reasonable steps to prevent the action. The purpose of s 94 is to facilitate proof of liability of the body corporate as a principal, for any conduct engaged in on its behalf by an individual with the relevant characteristics. In other words, s 94(1) makes the conduct of particular individuals who act on its behalf the conduct of the body “for the purposes of this Act”. That is in contrast to the function of s 92, which creates accessorial liability and a liability (in s 92(2)) to a civil penalty for an accessory.
3. Thus, if the conduct (including the state of mind) of an individual to whom s 94(1) applies contravened a provision of the Act, such as ss 47(1), 52(a) or 54(1), s 94 deems that the body corporate (here, the Union) *also* engaged in that conduct. In *Hamilton v Whitehead* (1988) 166 CLR 121 at 126–129, Mason CJ, Wilson and Toohey JJ discussed the distinction between statutory provisions that impose liability directly on both an officer of a body corporate and the body for the same conduct, on the one hand, and on the officer as an accessory to the conduct in which he or she caused the body to engage, on the other. They explained that a statute may provide that a person and a body corporate on whose behalf that person acts can both be liable as principals for the same acts as Dixon J held in *Mallan v Lee* (1949) 80 CLR 198 at 215–216, where he said:

On the interpretation I have given to s. 230(1), for more than one reason s. 5 of the *Crimes Act* cannot apply to a public officer so as to make him an accessory to the offence of the company. **In the first place, the public officer's act on behalf of the company making it an offender ipso facto amounts to a substantive offence on his part under s. 230(1). In the second place, the sub-section makes him the actor, the principal, for whose guilty conduct the company is responsible vicariously.** It would be an inversion of the conceptions on which the degrees of offending are founded to make the person actually committing the forbidden acts an accessory to the offence consisting in the vicarious responsibility for his acts.

(emphasis added)

1. It follows that, where conduct of an individual, to which s 94 applies, constitutes a contravention of the Act, *ipso facto*, the body corporate will *also* contravene in the same way and by the same conduct as that individual: *Mallan* 80 CLR at 215–216; *Whitehead* 166 CLR at 126–127.
2. Conceptually, each person in a group who engages in an unlawful picket in contravention of s 47(1), or takes action in contravention of s 52(a), separately contravenes the relevant provision for the reasons that Dowsett, Greenwood and Wigney JJ gave in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68 (the *Queensland Children’s Hospital Appeal*) at 84–86 [77]–[86]. They explained why there can be no collective contravention of provisions expressed in the language of ss 47(1), 52(a) and 54(1). That is because those provisions proscribe a person from engaging in conduct amounting to a specific act or omission. As the Full Court explained (at 84 [78]), while the ordinary rule of statutory interpretation that the singular includes the plural could be invoked to suggest that “a person” could mean “persons”, that cannot be so here. They said that “a person”, as used in those provisions, cannot “be a group of individuals, even if that group was acting in a collective way”. Their Honours pointed out that it may be that conduct engaged in, or action taken by, an individual alone would not amount to a contravention.
3. In the *Queensland Children’s Hospital Appeal* 254 FCR at 85 [81]–[82], Dowsett, Greenwood and Wigney JJ explained that, there, the union was accessorily liable under an analogue of s 92 of the Act (being expressed in the familiar drafting of the Commonwealth’s statutory formula for creating accessorial liability) for each individual worker’s contravention of the statutory prohibition as a separate contravention by it. The liability of the Union here is not that of an accessory but of a principal. Each of ss 47(1), 52(a) and 54(1) proscribe conduct by a “person”, being an expression that includes both individuals and bodies corporate. The effect of s 94 is to fix the body corporate with conduct engaged in on its behalf by specific individuals.
4. In *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 100 FCR 530 at 542–544 [50]–[59], Ryan, Moore and Goldberg JJ came to the same conclusion, saying of an analogue to s 94 (s 84(2) of what is now called the *Competition and Consumer Act 2010* (Cth)) at 544 [56]:

In *Trade Practices Commission v Tubemakers of Australia Ltd* (1983) 76 FLR 455; 47 ALR 719, Toohey J also concluded that s 84(2) was not intended to exclude the common law saying (at 475; 739):

"In my view s 84(2) is not intended to be an exhaustive statement of corporate responsibility under the *Trade Practices Act*. It deems certain conduct 'to have been engaged in *also* by the body corporate' (emphasis added) so that conduct by the director, agent, servant or other person becomes as well conduct by the body corporate. *It does not seek to make a corporation vicariously responsible ... conduct of those persons is conduct of the corporation.*" (Emphasis added.)

(emphasis in original)

1. In *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner* (2020) 384 ALR 668 (the *Bay Street Appeal*) at 723–724 [257]–[262], White J, in *obiter dicta* (see at 720 [245]), with whom Allsop CJ (at 669 [1]) and Flick J (at 678 [46]) agreed, characterised the Commissioner as having pleaded that the Union was liable under a form of vicarious liability that relied on ss 363 and 793 of the *Fair Work Act* (which are analogues of s 94(1) and 95). White J observed that, there, the primary judge had found that the contravening conduct and actions attributed to the Union consisted of one work stoppage. That comprised the sum of all the conduct of the two Union officials (see 721 [249] and 723 [259]). As White J noted, provisions such as ss 94 and 95 of the Act are facultative to prove conduct of a body corporate by deeming and attributing to it the conduct of an individual whose conduct the statute identifies as those of the inanimate body corporate (at 722–723 [251]).
2. Importantly, White J recognised that, in any particular situation, it is possible that more than one unlawful act by a body corporate can have occurred through the statutory agency created by the deeming of conduct and actions of one or more individuals within an overall event to be that of the body, and that this can be alleged and proved. He cited, as an example, Besanko J’s decision in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (No 3)* [2017] FCA 10 (*Cartledge*). Indeed, it is a commonplace in criminal prosecutions to allege multiple contraventions on one occasion where the accused has engaged in allegedly multiple criminal acts. Similarly, in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 249 FCR 458 (the *Perth Airport Appeal*) at 480 [96], Dowsett and Rares JJ noted that the primary judge had found the Union liable for multiple contraventions arising out of two events of coercion based on the attribution to it of the conduct and actions of its officers. No issue arose in that appeal as to the application of ss 363 or 793 of the *Fair Work Act*.

### Consideration – construction of s 91

1. The Act creates two contraventions in each of ss 47(1) and 52(a), namely, *first*, organising, and, *secondly*, engaging in, respectively an unlawful picket (s 47(1)) or threatening to take action against a person with intent to coerce that person to employ a particular person (s 52(a)).
2. In the *Hassett Appeal* 272 FCR at 293–294 [14]–[19], Bromberg, Wheelahan and Snaden JJ construed s 556 of the *Fair Work Act*, which is expressed in the same words as s 91 of the Act. There, Mr Hassett, as a permit holder, contravened, *first*, s 499 of the *Fair Work Act* by climbing a crane whilst it was in operation and, *secondly*, s 500 of the *Fair Work Act* by so climbing the crane, refusing a reasonable request of the occupier of the site to get off the crane and using insulting language and engaging in abusive behaviour (at 292 [6]–[7]). An element of a contravention both of ss 499 and 500 was Mr Hassett’s refusal to comply with a reasonable request by the occupier. The Full Court held that this particular conduct, comprising both contraventions, overlapped and engaged the protection from double jeopardy in s 556 of the *Fair Work Act* (272 FCR at 293 [14]).
3. Their Honours held that, despite what, on one view, might appear to be three distinct instances of conduct in three contraventions, the conduct attracted only one penalty by force of s 556 of the *Fair Work Act*. That was because they held that the expression “particular conduct” meant “what the person actually did, with all of its attributes and in its whole context”. They approved Jessup J’s construction of the provision in *Australian Building and Construction Commissioner v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (The Australian Paper Case) (No 2)* [2017] FCA 367 at [39]–[40] (at 272 FCR at 294 [18]–[19], 296 [26]). Jessup J had held that the statutory protection from the imposition of an additional penalty applied, even if adjectival elements of the two different prohibitions required the presence of additional facts that were necessary ingredients to amount to a contravention of each, so as to give separate legal consequences to what the person actually did. Their Honours did not discuss principles relating to a course of conduct at common law or s 557 of the *Fair Work Act* (and ss 557A and 557B had not been in force at the time of the contraventions there).
4. The decision in the *Hassett Appeal* 272 FCR 290 is not binding here because it relates to the construction of a different Act: *McNamara v Consumer Trader and Tenancy Tribunal* (2005) 221 CLR 646 at 661 [40] per McHugh, Gummow and Heydon JJ (and see too *Adams v Director of the Fair Work Building Inspectorate* (2017) 258 FCR 257 at 278 [55] per North, Dowsett and Rares JJ). In *Walker Corporation Pty Limited v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259 at 270 [31], Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ said that prior judicial decisions that construed a different statute containing an identically worded phrase or section as that currently in issue could not be applied as if there were a “common law principle” established by such a construction:

The caution required in construing modern Australian legislation by reference to “principles” derived in this way is indicated by McHugh J in *Marshall v Director-General, Department of Transport* ((2001) 205 CLR 603 at 632-633 [62]). That case concerned the expression “injuriously affecting” as it appeared in s 20 of the *Acquisition of Land Act 1967* (Qld); ss 49 and 63 of the 1845 Act had used the same phrase as had the subsequent legislation in various jurisdictions. Differing interpretations had been given to the expression in question. McHugh J noted the similarity in the terms of the legislation and went on (205 CLR at 632-633 [62]):

“But that does not mean that the courts of Queensland, when construing the legislation of that State, should slavishly follow judicial decisions of the courts of another jurisdiction in respect of similar or even identical legislation. The duty of courts, when construing legislation, is to give effect to the purpose of the legislation. **The primary guide to understanding that purpose is the natural and ordinary meaning of the words of the legislation. Judicial decisions on similar or identical legislation in other jurisdictions are guides to, but cannot control, the meaning of legislation in the court’s jurisdiction.** Judicial decisions are not substitutes for the text of legislation although, by reason of the doctrine of precedent and the hierarchical nature of our court system, particular courts may be bound to apply the decision of a particular court as to the meaning of legislation.”

(emphasis added)

1. In *Stuart* 185 FCR at 331–332 [80], [82]–[86], Besanko and Gordon JJ held, on the facts, that a contravener could not be liable to two penalties for contraventions of ss 38 and 44 of the *Building and Construction Industry Improvement Act 2005* (Cth). Relevantly, s 38 prohibited a person from engaging in unlawful industrial action. In that case, the contraventions of s 38 were the organisation of a stop work meeting on 3 October 2006. Section 44 prohibited a person, relevantly, taking action with intent to apply undue pressure to another person to agree to an enterprise bargaining agreement. In that case, the contravention of s 44 consisted of three cognate elements, being two acts of a shop steward who was an officer of the Union refusing to do work on 19 September 2006 and the third act being his organisation of the same stop work meeting on 3 October 2006 the subject of the contravention of s 38: see the fuller statement of the facts in *Stuart v Construction, Forestry, Mining and Energy Union* [2009] FCA 1119 at [2], [6]–[8], and on appeal 185 FCR at 322–323 [30]. Thus, the contravention of s 38 was an integral element of the contravention of s 44. Besanko and Gordon JJ found that the unlawful conduct of the shop steward in organising the stop work meeting on the later day “was entirely subsumed in the conduct constituting” the broader contravention of s 44 (involving both days). They held that the Union and the shop steward could only be liable to one pecuniary penalty each, based on the more serious conduct in the contravention of s 44 (185 FCR at 331 [80] and 331–332 [84]). As their Honours said of the organisation of the stop work meeting, “it would be wrong to punish the CFMEU twice for the commission of that element” (at 332 [84]).
2. In *Parker* 270 FCR 39, Besanko and Bromwich JJ, with whom Reeves J agreed, held that s 556 of the *Fair Work Act* did not apply to manifestly different conduct constituting different contraventions (at 139–140 [312]–[315]). The Full Court also held that individuals who had engaged in “much the same conduct” on successive days could be treated as having contravened on distinct occasions, and did not have to be penalised on the more limited basis that their contraventions were part of a course of conduct (at 131 [280]).
3. Importantly, s 84(1) expressly confers power on the Court to make a single civil penalty order for multiple contraventions of a civil penalty provision if the contraventions are founded “on the same facts”. And, s 84(2) allows up to the maximum penalty applicable for each contravention to be used in the total of the ultimate single penalty ordered for all contraventions. I consider that s 84 reflects the common law, and common sense, in using the expression “founded on the same facts”. It must be directed to a situation where, for example, several individuals in contravention of s 47(1) engage in a picket and their conduct creating each contravention is deemed to be that of a body corporate, or the conduct is repeated in a picket that occurs at the same place on consecutive days in the same way over the same issue, as in *Parker* 270 FCR 39.
4. At first blush, if the *Hassett Appeal* 272 FCR 290 were binding as to the construction of s 91 of the Act, it could be said that if two contraventions are “founded on the same facts” they would also appear to have occurred “in relation to the same conduct” or “in relation to particular conduct” as provided in ss 83(2) and 91 and that scenario also applies to the very situation provided for in s 84.
5. Here, s 83(2) of the Act would be otiose and s 84 meaningless if the construction of s 556 of the *Fair Work Act* in the *Hassett Appeal* 272 FCR 290 were binding on the construction of s 91 of the Act, even though both s 556 and s 91 are expressed in identical words. Importantly, ss 83 and 84 refer to the consequences of there being more than one contravention of a “civil remedy provision”, being a term defined in s 5 of the Act. In contrast, s 91 is directed to what will occur if a person is ordered to pay a civil penalty “under a civil remedy provision”, by excluding the person from liability to pay a pecuniary penalty “under some other provision of a law of the Commonwealth in relation to that conduct”. The reference to “some other provision of a law of the Commonwealth” is to another Act of the Parliament or a regulation or other legislative instrument creating such a liability. That reference cannot be to another provision of the Act, because s 83(2) specifically deals with, and prevents, liability to the imposition of more than one pecuniary penalty *under the Act* “in relation to the **same** conduct” (emphasis added), and s 84(1) expressly allows the Court to impose multiple civil penalties for multiple contraventions of a civil remedy provision (under the Act) “founded on the **same** facts” (emphasis added).
6. In my opinion, ss 83, 84 and 91 of the Act operate, harmoniously (as, ordinarily, does the common law), to prevent a person being exposed to jeopardy twice for exactly the same conduct, being all of the physical and mental elements that go to making a person liable for a contravention of two laws at once: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381–382 [69]–[71] per McHugh, Gummow, Kirby and Hayne JJ. However, once there is a substantive difference between one or both of the physical or mental elements, s 84(1) expressly provides, even though both contraventions “are founded on the same facts”, that each can be penalised separately, cumulatively or as having occurred as part of a course of conduct. A construction of s 91 of the Act consistent with the construction that the Full Court gave to s 556 of the *Fair Work Act* would produce incoherence in the statutory scheme in the Act. That is because it would make both s 84 unworkable and s 83 inutile, despite one or more contraventions of the Act being “founded on the same facts”, when s 84(1) expressly provides for the imposition of multiple cumulative penalties for all of those contraventions. Indeed, the construction of s 556 of the *Fair Work Act* in the *Hassett Appeal* 270 FCR 290, if applied to s 91, would create an absurd result. That would create the situation that, where there was any conduct common to two or more contraventions under the Act, the width of the expression “in relation to” would result in only one penalty being capable of being ordered so that s 84 would be otiose, despite its clear words, and s 83 would have no work to do.
7. In my opinion, the purpose of s 91 is to prevent a person being exposed to two penalties in relation to the same conduct (ie: the same physical and mental elements), one for contravening a civil remedy provision of the Act, such as s 52(a), and a second for contravening a provision of a different statute, such as s 355(a) of the *Fair Work Act* (which prohibits a person organising or taking, or threatening to organise or take, any action against another person with intent to coerce that other person or a third person to employ or not employ a particular person). Both sections cover the same conduct, and so s 556 of the *Fair Work Act* and s 91 (as well as s 83(2)) of the Act operate to prevent the contravener being found liable to the imposition of more than one penalty for or in relation to the same conduct that is proscribed in different Acts (such as is intended in s 91 in respect of the overlap between s 355(a) of the *Fair Work Act* and s 52(a) of the Act) or in different sections in the Act (as is intended in s 83(2)).
8. For these reasons, the Full Court’s decision as to the construction of s 556 of the *Fair Work Act* in the *Hassett Appeal* 272 FCR 290 cannot be applied to the construction of s 91 of the Act. I am of opinion that the expressions “in relation to particular conduct” in s 91 and “in relation to the same conduct” in s 83(2) of the Act relate to two contraventions of the Act creating liability to a penalty that arise from the same legislatively proscribed conduct. But, as s 84(1) expressly provides, that Act allows “multiple contraventions… **founded on the same facts**” (emphasis added) to be penalised cumulatively, as occurred in *Parker* 270 FCR 39.
9. Importantly, the expression “a civil remedy provision” is defined in s 5 of the Act as meaning a provision that attracts a penalty for which the Act provides. Section 83 provides that a person is not liable to more than one penalty under the Act “in relation to the same conduct”. Thus, s 83 applies to multiple contraventions of a civil remedy provision proscribing the *same* *conduct* under the Act, but s 84(1) states that a person is liable to a civil remedy proceeding under the Act in respect of multiple contraventions “**founded on the** **same facts**” (emphasis added). In contrast, s 91 applies to a situation in which there is both a contravention of a civil remedy provision “in relation to particular conduct” under the Act and a contravention of *other* legislation “in relation to **that** conduct” (emphasis added) – namely, the same conduct that the legislation proscribes.

### The officials’ conduct on 25 January 2019

1. Here, the Commissioner alleged that each of Ms Mallia, Mr Kera, Michael Greenfield and Mr Byrnes participated in the events of 25 January 2019 both with the group as a whole and in separate, distinct ways, and that each individual’s separate conduct and action should create a corresponding contravention of both ss 47(1) and 52(a) by each of them.
2. Mr Kera addressed to the group and told them that they were “going to fight to the death” to have Mr Byrnes reinstated. He said that Botany Cranes had picked a fight with the Union and “we’re going to accommodate them”. He told them that Botany Cranes would “cop it straight between the eyes”; that its workers had not had a pay rise in 3.5 years, other than a $1.50 increase; that it had “double-crossed” the Union over the CFMMEU proposed EBA by refusing to sign it after agreeing to do so and that they were “going to wipe the floor” with Botany Cranes like the Union had done with WGC Cranes, after what he said was a two-week protected industrial action campaign, and Boom Logistics, after a five-week campaign (agreed facts pars 27(g) and 54). His tone and language, as recorded in the police video, was threatening and inflammatory, while asserting to his audience that it was to be “a peaceful protest”. His speech produced rousing cheers.
3. Mr Kera spoke as a senior official of the Union to the group that was already assembled. That engagement in the activities at the yard on 25 January 2019 was different to the conduct of anyone else. Of course, Mr Kera also engaged in the unlawful picket in concert with the other people in the group, and in that way contributed to its overall impact. But, his speech and later conduct in controlling the egress of persons from the yard was singular and distinct from the others.
4. Michael Greenfield addressed the group next. He thanked them for coming and said “This is the only way we are going to achieve anything”. He said that Mr Kera had “covered everything”, that Botany Cranes’ action in dismissing Mr Byrnes was “as illegal as it gets and they get away with murder and **the fucking law is stacked against us**, but **we continue to do it the way we do it**” and “**we’re not going to stop until he’s back**” (emphasis added). His admitted role as organiser was different to and distinct from that of the others present, including the other officials.
5. The agreed facts state that Michael Greenfield organised the conduct and actions that constituted organisation in his contraventions of ss 47 and 52 without specifying any particular conduct or actions to distinguish whatever else he did from the limited description of the speeches and other activities ascribed to him, Ms Mallia, Mr Kera, Mr Byrnes and the group in the events that occurred in the unlawful picket and coercive action. I infer that Michael Greenfield (and the Union) admitted that he was the person who arranged for and rallied persons, including the other officials, to attend the yard at 5:30am on 25 January 2019 to set up and carry on the unlawful picket and to pursue the coercive aim of having Mr Byrnes’ employment reinstated. That inference is the stronger because of the significant role Michael Greenfield played in the events of 30 January, 31 January and 1 February 2019.
6. Ms Mallia spoke briefly, and some content of what she said did not come over clearly in the police video because of her quieter voice and the police discussions, including organising to escort Ms Hodges into the yard, which occurred at the end of Ms Mallia’s speech and the beginning of Mr Byrnes’. Ms Mallia spoke as, and with the authority of, the branch president. She thanked and gave encouragement to the group to pursue the unlawful picket and to seek to coerce Botany Cranes to reinstate Mr Byrnes. Her involvement was, in one sense, of a lesser degree than that of Mr Kera and Michael Greenfield. But, her participation, as president, in the conduct was a powerful indication that the Union as a whole was there to demonstrate its commitment to achieving Mr Byrnes’ reinstatement by the coercive means that the two preceeding speeches had stated with unmistakable directness.
7. Mr Byrnes spoke next. He was holding a megaphone. He explained, understandably, that he was upset by the loss of his job but heartened by the show of support for him of those present. He denigrated the present management of Botany Cranes as “the worst owner … I’ve ever witnessed in my whole life in the building industry”.
8. In my opinion, pars 37 and 41 of the agreed facts produce the result that on 25 January 2019 the officials contravened both ss 47(1) and 52(a) of the Act. The conduct that constituted the contravention of each section was different, although the contraventions were founded on the same facts. The conduct constituting each official’s contravention of s 52(a) was not “subsumed” in the conduct of that person in his, her or its contravention of s 47(1). That is because each contravention involved different elements and each contravener engaged in different conduct and acts in committing his or her contraventions even though there were some common facts. And, each official’s contraventions of ss 47(1) and 52(a) was an individual, not a collective, contravention by him or her engaging in the picket: the *Queensland Children’s Hospital Appeal* 254 FCR at 84–86 [77]–[86]. I reject the contraveners’ argument that s 91 requires that only one penalty can be imposed in relation to that “particular conduct” based on the *Hassett Appeal* 272 FCR at 293–294 [14]–[19], 296 [26]. To the contrary, for the reasons I have given, I am of opinion that each of ss 47(1) and 52(a) proscribe, and therefore involve, different conduct and create liability to two penalties, not one. A person may contravene both sections “founded on the same facts”, as s 84(1) contemplates, but the contraventions relate to different proscribed conduct and are distinct. The intention and conduct necessary to contravene s 52(a) are different to that for s 47(1).
9. Mr Kera engaged in an unlawful picket, in contravention of s 47(1). Mr Kera contravened s 52(a) by his speech and other conduct that amounted to him taking the action with the intent to coerce Botany Cranes to reemploy Mr Byrnes. Mr Kera’s speech identified to the group the reasons for their actions in engaging in the unlawful picketing – namely, to let Botany Cranes know that the Union was “going to wipe the floor” with it until it capitulated to the Union’s requirements of reinstating Mr Byrnes and signing the CFMMEU proposed EBA. In so speaking, he revealed that he was well aware that what he was engaging in was not protected industrial action under the *Fair Work Act*. In my opinion, that indicated that Mr Kera knew that what he was encouraging the group to do in his speech was to take the law into its own hands. His role, and that of Ms Mallia, Michael Greenfield and Mr Byrnes, in the picket, and their coercive intent, was different to and greater than that of the other individuals present who did not address or galvanise the group into action or direct its activities.
10. Michael Greenfield’s role as organiser was self-evidently distinct from that of any of the other participants on 25 January 2019. The police video recorded his speech that endorsed Mr Kera’s remarks and, after referring to “the law” and that it was “f...ing stacked against us”, he told the group “but we continue to do it the way we do it” – namely, by engaging in and taking the action that he had organised in getting the group to gather there that morning knowing that it was not protected industrial action or otherwise lawful. Michael Greenfield spoke to the group as a senior office holder in the Union, and lent his authority to the group’s activities. He too contravened both ss 47(1) and 52(a) by his individual and distinct actions in, *first*, organising and, *secondly*, making his speech, as well as otherwise engaging in the unlawful picket and the taking of action with intent to coerce Botany Cranes to employ Mr Bynes.
11. I reject the submission of Ms Mallia and the Union that her degree of engagement in both the picket and coercion ought be characterised at the lower end of the scale of seriousness. Such a characterisation would overlook the significance of both her presence at the scene that represented the authority of her office, as president of the state branch, and her lending, as president, support to (because she did not seek to qualify or repudiate) what Mr Kera or Michael Greenfield had said immediately before she addressed the group. After all, as president, she could be presumed to be the leader and have the capacity to direct or control, or at least to have a real input into, what the Union wished to occur and how the group should behave. The fact that the president was in attendance, and spoke after Mr Kera’s and Michael Greenfield’s threatening speeches, without her offering any qualification to what each preceding speaker had identified as the Union’s, and the group’s, aims and means to achieve them, was a symbolic and powerful indicator to the group and listeners, including Botany Cranes’ personnel, that the whole Union (or, at least, the state branch) was present to enforce its will, regardless of the law, over Botany Cranes until it capitulated. For the reasons above, Ms Mallia, like Mr Kera and Michael Greenfield, contravened both ss 47(1) and 52(a) of the Act.
12. Mr Byrnes acknowledged in his speech the motivation of the picket to support him, inflamed the group with his criticism that Botany Cranes’ owner was the worst he had ever experienced in the building industry and led aggressive chanting by the group, at times using his megaphone (agreed facts par 27(l)). He obviously endorsed what was occurring, but his conduct was the least culpable of the four officials.
13. Each official engaged, or in Michael Greenfield’s case organised and engaged, in the unlawful picket by his or her separate and distinct conduct. That occurred together with his or her participation in the overall combination of acts, omissions and conduct comprising the activity at the yard that lasted many hours. That participation in the overall activity of the group by each other individual official as par 36 of the agreed facts stated formed part of his or her engagement in the contravention of s 47(1).
14. The activities of the group in the picket, including Michael Greenfield, lasted until about 4:00pm on 25 January 2019, well after the time (around 8:00am) that Mr Griffiths, Ms Hodges and other staff who were inside Botany Cranes’ premises had been allowed to leave with the assistance of the police. The chanting continued only to about 9:00am (agreed facts pars 31–34). The picket continued for longer and in a calmer manner after this time. The persons who engaged in it after 9:00am, including Mr Kera and Michael Greenfield, continued to do so with the motivations proscribed in s 47(2)(b)(i) and (ii), but the coercive impact of the speeches, chanting and aggressive behaviour during the early morning appears to have ceased around 9:00am.
15. That coercive impact was how the officials (and, through them, the Union) used the fact of the unlawful picket as their means to coerce Botany Cranes to reemploy Mr Byrnes in contravention of s 52(a). Their addresses to, and leadership of, the group in the chanting and aggressive behaviour for the period over three hours until about 9:00am constituted each of their separate contraventions of s 52(a) of the Act.

### The Union’s conduct on 25 January 2019

1. Because Michael Greenfield both organised and engaged in, on behalf of the Union, *first*, the unlawful picket, and, *secondly*, the taking of coercive action, his conduct in doing so, by force of s 94, was also engaged in by the Union accompanied by his state of mind. Thus, the Union’s conduct encompassed not only his organisation of each of the unlawful picket and coercive action, but also his engagement, with the group, in those activities as stated in the agreed facts.
2. I reject the Union’s argument that it committed only one contravention of each of ss 47(1) and 52(a) on 25 January 2019, and that only one penalty can be imposed on it because there was overall only one unlawful picket and one event constituted by the taking of coercive action comprising the same conduct. Of course, there was an overall picket, but the officials, as individuals, each engaged in (and, in Michael Greenfield’s case, organised and engaged in) it by separate conduct in contravention of s 47(1). And, by force of s 94, each of the official’s separate conduct, comprising his or her contravention, was also the conduct of the Union accompanied by his or her state of mind, and likewise a separate contravention by it, so that it is liable to four pecuniary penalties for those contraventions.
3. The combined conduct of the group in which each of the officials engaged as part of their individual contraventions of s 47(1), when attributed to the Union, is akin to it having engaged in a course of conduct or “a series of contraventions of the same or a similar character” within the meaning of s 84(1) of the Act. It would not be just or right to impose penalties on the Union in respect of that conduct, without taking account of the not insignificant overlaps in conduct consisting each of its four contraventions of s 47(1). However, each official’s conduct and state of mind in acting on behalf of the Union was that of an individual, and so was distinct from (although no doubt had much in common with) that of each other and of the group as a whole and constituted discrete contravening conduct.
4. Similarly, the four contraventions of s 52(a) by the conduct and state of mind of each of the officials on behalf of the Union attracts liability to the imposition of four separate penalties on the Union. Once again, the assessment of those penalties must be arrived at by reference to the common or overlapping circumstances of the action taken by each official, individually and on behalf of the Union, as distinct from, but also taking account of, the overall impact of their combination with the other members of the group.

### Characterising the conduct on 25 January 2019

1. Individuals can engage in a picket, or take coercive action, in different ways. For example, one picketer might use physical violence while the rest of a large group refrains from such conduct. In such a situation, each person is engaged in the picket, but their engagement is qualitatively different and comprises distinctive conduct. That is not to deny that, overall, there is still one picket, but it is necessary to recognise, contrary to the contraveners’ argument, that the contribution of individuals to the activity can vary in a substantive way and s 47(1) of the Act imposes individual liability on each person who engages in an unlawful picket: the *Queensland Children’s Hospital Appeal* 254 FCR 68 (see [46]–[47] above).
2. There may be a gradation of seriousness, in the ordinary course, between a person who engages in an unlawful picket or takes action to coerce another, in contravention of ss 47(1) or 52, in comparison to a person who organises either activity, though this need not always be so. Each case necessarily must be decided in its factual context. At the more extreme end, a threat to kill conveyed by one or more persons unless the person threatened signed a contract is a form of undue pressure or coercion, as graphically illustrated by the facts in *Barton v Armstrong* [1976] AC 104 at 120D. However, many other human behaviours are capable of creating a coercive impact of varying degrees of seriousness. We have all experienced ourselves, or as observers, or through the shared experiences of persons we know, bullying and harassing conduct. As in this proceeding, a large group of about 50 individuals, mostly comprising apparently strong, physically well-built males blocking or controlling what would otherwise be free entry to and egress from premises while aggressively chanting self-promoting slogans and pumping fists in the air, is calculated to instil fear into persons who are within or wish to enter those premises.
3. The Parliament enacted provisions such as ss 47, 52 and 54 of the Act to address the illegitimate use of coercion and undue pressure in the building and construction industry by employers, employees and both interests’ representative bodies, such as trade associations and trade unions. The Parliament acted in the context that it had already established, through the *Fair Work Act* and the Fair Work Commission, some similar prohibitions in that enactment as in the Act (like s 355 of the *Fair Work Act* and s 52 of the Act) and an independent mechanism for the formulation and enforcement of fair and transparent workplace standards, including terms and conditions of employment and the ability of that Commission to settle disputes impartially.
4. There is a substantive difference in the elements of conduct constituting a contravention of s 47(1) of the Act, on the one hand, and ss 52(a) and 54(1), on the other. Indeed, the Parliament placed these sections in different parts of the Act; s 47 is in Ch 5 that is headed “Unlawful action” and ss 52 and 54 are in Ch 6 that is headed “Coercion, discrimination and unenforceable agreements”. Coercion is a behaviour that involves the exertion of illegitimate, unlawful or improper force or compulsion on a person with the intention of causing its subject to act as the person exerting the force or compulsion desires. Coercion, like undue pressure, is a behaviour that goes beyond what is legitimate or proper in interactions between people, as the authorities dealing with unlawful duress recognise.
5. Lawful, hard negotiating, or the exploitation of another’s weak negotiation positon (for example, because they are in breach of a contract or without sufficient resources), is not the same as the over-reach by a party with a stronger position to negate the subject’s choice that crosses the boundary between lawful and unlawful or unconscientious conduct. The identification of that boundary will sometimes require a value judgment by a court, such as that in the divergent judicial appraisals of the facts in *Barton* [1976] AC 104.
6. In *Esso Australia Pty Ltd v Australian Workers’ Union* (2017) 263 CLR 551 at 585 [61], Kiefel CJ, Keane, Nettle and Edelman JJ, with whom Gageler J agreed (at 587–588 [65]) noted that, as the law presently is, coercion within the meaning of s 343 of the *Fair Work Act* is action that, *first*, is unlawful, illegitimate or unconscionable, *secondly*, the person organising, taking or threatening the action intended, by doing so, to negate the other person’s choice, and, *thirdly*, the alleged contravener has actual knowledge of circumstances that makes his or her conduct unlawful. They held that it was unnecessary that the alleged contravener correctly appreciates the legal nature of the action he or she organised, threatened or took. The expression “undue pressure” is descriptive of conduct of a similar nature that, like coercion, goes beyond legitimate pressure of a lawful industrial or workplace interaction, negotiation or dealing: *Esso* 263 CLR at 585 [61]. The statutory expression “undue pressure” is apt to proscribe pressure that is illegitimate, such as would amount to economic duress, excessive, unjustifiable, improper or unreasonable, given the industrial context.
7. Unlike coercion or undue pressure, an unlawful picket, as defined in s 47(2) of the Act, does not necessarily consist of conduct that is calculated to negate the choice of its subject, albeit that the purpose of the picket is designed to urge such a choice. For the purposes of s 47(2)(a), an unlawful picket consists of physical acts that have, or are intended to have, the effect of preventing free access to or egress from a building site or ancillary site (as defined). And, as happened on 25 January 2019, a picket can be conducted continuously or for a period, so as to amount to coercive behaviour (as s 47(2)(b)(iii) envisages). The proscribed motivations for an unlawful picket in s 47(2)(b)(i) and (ii) relate to *advancing* or *supporting* the picketers’ claims or industrial objectives. Conduct to advance or support a claim or industrial objective by blockading access or egress, can be engaged in without menace, such as parking cars, or peacefully standing, in front of the entry or exit to a site, or through more egregious conduct. The means by which the picket is conducted may vary in nature and degree and can, but need not necessarily, include coercive conduct or be action that is otherwise unlawful. The choice of means is that of those who organise or engage in the picket.
8. Here, the admissions in the agreed facts are important in the characterisation of the conduct comprising the contraventions of each of ss 47(1) and 52(a) on 25 January 2019. *First*, in pars 36–38 of the agreed facts, the contraveners admitted that their individual conduct comprising the picket:

|  |  |
| --- | --- |
| (1) | * had the purpose of preventing or restricting (proscribed in s 47(2)(a)(i)), * had the direct effect of preventing or restricting (proscribed in s 47(2)(a)(ii)), and * would reasonably be expected to intimidate (as proscribed in s 47(2)(a)(ii)   a person accessing or leaving Botany Cranes’ yard, and |
| (2) | was motivated by the purpose of   * supporting or advancing claims against Botany Cranes in respect of employment by it of employees, namely, the reinstatement of Mr Byrnes (as proscribed in s 47(2)(b)(i)), and * advancing industrial objectives of the Union, namely, the making of the CFMMEU proposed EBA (as proscribed in s 47(2)(b)(ii)). |

1. None of that admitted conduct constituting the picket as unlawful involved coercing Botany Cranes to reinstate Mr Byrnes, even though seeking his reinstatement was one of two motivations for the blockade.
2. *Secondly*, in pars 39–41 of the agreed facts, the contraveners admitted that their individual conduct contravened s 52(a) by taking action, being their conduct that constituted an unlawful picket within the meaning of s 47, against, and with the intent to coerce, Botany Cranes to employ Mr Byrnes as a building employee. In other words, the contraveners admitted that their conduct comprising the picket was the *means* by which they had taken action to coerce Botany Cranes to reinstate Mr Byrnes.
3. The conduct of the contraveners in organising (in the case of Michael Greenfield and the Union) and engaging in the picket, in itself, contravened s 47(1) because the conduct of each contravener in it had the physical and mental elements necessary to, and that did, establish each of the criteria in s 47(2)(a) and (b)(i) and (ii). Their conduct in organising or engaging in the coercion contravened s 52(a) because it had the physical element of the *fact* of the unlawful picket, and the mental element of using it to coerce Botany Cranes to employ Mr Byrnes. In other words, the contraveners used the picket (which in itself contravened s 47(1)) to coerce Botany Cranes, and so committed a separate and, in the circumstances, more serious contravention (of s 52(a)) with that additional conduct, namely the intention to negate Botany Cranes’ choice, knowing that they had no lawful basis for doing so.

## Principles as to the fixing of a civil penalty

1. The key principles for the fixing of a civil penalty are clear; yet, there has been an efflorescence of case law on the subject that has led to parties citing a plethora of authority on applications such as this. Here, the Parliament prescribed, in s 81(6) of the Act, the mandatory relevant considerations for the imposition of a penalty under s 81(1)(a). Those considerations are to take into account, as one might expect in a statute requiring a judicial evaluation of the penalty that a court is to impose, “all relevant matters”, including: the nature and extent of the contravention, as well as any loss or damage suffered because of it; the circumstances in which it took place; and whether the person has previously been found by a court to have engaged in any similar conduct.
2. In *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 at 505–506 [53]–[55] (and see too at 507–508 [59]), French CJ, Kiefel, Bell, Nettle and Gordon JJ said:

Civil penalty proceedings are civil proceedings and therefore an adversarial contest in which the issues and scope of possible relief are largely framed and limited as the parties may choose, the standard of proof is upon the balance of probabilities and the respondent is denied most of the procedural protections of an accused in criminal proceedings.

Granted, both kinds of proceeding are or may be instituted by an agent of the state in order to establish a contravention of the general law and in order to obtain the imposition of an appropriate penalty. But 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.**”

(emphasis added, footnotes omitted)

1. Thus, when imposing a civil penalty, the Court is concerned to achieve the purpose of deterrence of further contraventions of the statutory norm, both specifically, in the case of the person being penalised, and generally, in establishing an awareness of the consequences of contravention of the Act in persons in the sector of the community in which the contravention occurred.
2. The parliamentary purpose of employing civil penalties to regulate and deter particular behaviours included the need to take into account the mandatory relevant consideration prescribed in s 81(6)(d), namely, the person’s prior record of engaging in similar conduct. This was reflected in the main object of the Act, in s 3, which provided:

**3 Main object of this Act**

(1)  The main object of this Act is to provide an improved workplace relations framework for building work to ensure that building work is carried out fairly, efficiently and productively, without distinction between interests of building industry participants, and for the benefit of all building industry participants and for the benefit of the Australian economy as a whole.

(2)  **This Act aims to achieve its main object by the following means**:

(a)  improving the bargaining framework so as to further encourage genuine bargaining at the workplace level;

(b)  **promoting respect for the rule of law;**

(c)  **ensuring respect for the rights of building industry participants**;

(d)  **ensuring that building industry participants are accountable for their unlawful conduct;**

(e)  providing effective means for investigating and enforcing this Act, designated building laws (to the extent that those laws relate to building work) and the Building Code;

(f)  improving work health and safety in building work;

(g)  encouraging the pursuit of high levels of employment in the building industry, including by encouraging youth employment with an emphasis on engaging apprentices;

(h)  providing assistance and advice to building industry participants in connection with their rights and obligations under this Act, designated building laws and the Building Code.

(emphasis added)

1. The Parliament created liability to the imposition of civil penalties for contraventions of the Act as a means of achieving the main object, identified in s 3(2)(b), (c) and (d), of deterring industrial behaviours that contravene the statutory norms.
2. Each of ss 47, 52 and 54 establish a statutory norm of behaviour that makes particular forms of coercive behaviour unlawful and subject to the imposition of significant civil penalties. In effect, such behaviour involves a person organising or engaging in the exertion of power over another by either, a group of individuals comprising a picket or, the making of an intimidatory threat. Both forms of behaviour involve action that does or attempts to overbear, by the use of bullying or “standover” tactics, its target from acting as he, she or it would otherwise act.
3. The quantum of the penalty, or, where there is more than one penalty to be imposed, penalties in total, must reflect the overall seriousness of the contraventions so as to achieve specific and general deterrence. But, the overall quantum of any penalty or penalties must not be so high as to be oppressive. The quantum of the penalty or penalties must be such as to achieve the purpose of the statutory object of deterrence and be proportionate in respect of the current contravention(s): cf *Pattinson v Australian Building and Construction Commissioner* (2020) 384 ALR 75 at 104–106 [100]–[104] per Allsop CJ, White and Wigney JJ.
4. A person’s past judicial record of similar contravening behaviour cannot be used, of itself, to increase what is a fair, proportionate and just penalty. Rather, the past contraventions are relevant to the extent that they relate to what is necessary to achieve an appropriate deterrent effect by the penalty to be imposed as reflected in the current contravention: see the *Perth Airport Appeal* 249 FCR at 480–481 [91], [98]–[102].
5. A contravention of a minor or insignificant character by a recidivist is unlikely to warrant the imposition of the maximum penalty but, depending on the circumstances, may well justify the imposition on that person of a higher penalty, calculated to achieve specific deterrence, than a penalty imposed on a person with no prior history who engaged in the same conduct or took the same action in contravention of the law: see *Pattinson* 384 ALR at 132 [180] per Allsop CJ, White and Wigney JJ.
6. The Union is a serial recidivist in such contravening behaviours. Indeed, during the picket on 25 January 2019, one chant graphically conveyed the nature of the behaviour, and its aggression. One person yelled on a megaphone “Union” and obtained the unified refrain “Power”, adding during the chanting “fists in the air” that those present then accompanied by thrusting raised fists in the air. There could have been no doubt about the intimidatory intent directed towards Botany Cranes of those combining in the picket outside its yard and premises and their conduct, including as manifested in their aggressive chants and gestures.

### The history of prior contraventions – s 81(6)(d)

#### The officials’ prior history of contraventions

1. Neither Ms Mallia nor Mr Byrnes has any prior history of contravening conduct of a kind similar to that which occurred on 25 January 2019.
2. Mr Kera’s and Michael Greenfield’s last contraventions occurred in 2014 and 2015 when the former did so on two occasions and the latter on one occasion, as Flick J found in both *Australian Building and Construction Commissioner v Parker (No 2)* (2017) 270 IR 165 (affirmed in *Parker v Australian Building and Constructions Commissioner* (2019) 270 FCR 39) and *Australian Building and Construction Commissioner v Construction, Forestry, Mining, and Energy Union (The BKH Contractors Case) (No 2)* [2018] FCA 1563 (affirmed (2020) 274 FCR 19).
3. Those contraventions involved:

* Mr Kera and Michael Greenfield organising or engaging on 24 and 25 July 2014 in industrial action, in contravention of s 417 of the *Fair Work Act*, and Mr Kera engaging in acts of coercion, in contravention of ss 348 and 355 of the *Fair Work Act*. On 13 September 2017, Flick J imposed one penalty on Michael Greenfield of $3,000 and five separate penalties of $8,250, totalling $41,250, on Mr Kera: *Parker (No 2)* (2019) 270 IR 165: affirmed 270 FCR 39 (the penalties are set out at 270 FCR at 94 [151]),
* Mr Kera engaging in contraventions of s 343 and 340 of the *Fair Work Act* for coercion against the BHK group of companies and adverse action. On 18 October 2018, Flick J imposed penalties of $20,000 on him: the *BHK Contractors Case* [2018] FCA 1563: affirmed 274 FCR 19.

1. It is significant that the penalties that Flick J imposed in 2017 and 2018 were very recent in relation to the time of Mr Kera’s and Michael Greenfield’s contraventions in this proceeding.
2. There was no evidence that any of the officials could not pay any penalty if one were imposed with a non-indemnification order. None of the officials or the Union has expressed any contrition or remorse despite the egregious (with the possible exception of Ms Mallia and Mr Byrnes) nature of their contraventions.
3. After the contraventions the subject of this proceeding, Judge Manousaridis decided *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (No 7)* [2020] FCCA 351 (the *Second Barangaroo Case*). There, Mr Kera arranged a blockade at the Barangaroo project in February 2015, and he and Michael Greenfield participated in the blockade and other behaviours in contravention of s 343 of the *Fair Work Act*. I have had no regard to this instance of contravening conduct in fixing any penalty below as his Honour made those findings and orders after the present contraventions occurred.

#### The Union’s prior contraventions

1. The Union had a history of 172 contraventions between 2002 and July 2020, albeit that the branch and its officials accounted for only 14 of those. In the *Constitution Place Case* (2020) 299 IR at 268–269 [157]–[160], Katzmann J acknowledged that the ACT divisional branch had a relatively better contravention history than branches in other States and Territories.
2. However, as her Honour pointed out, a branch and its officials are part of the Union as a whole. It is the body registered under the *Fair Work (Registered Organisations) Act*,and its history of contraventions of industrial law is appalling. That history reflects an embedded culture throughout the organisation of conscious and often, as here, flagrant breaches of the law. The officials were senior officers of the Union. Each of Mr Kera and Michael Greenfield acknowledged, in his speech on 25 January 2019, that the conduct they were inciting was not protected industrial action (under ss 413–416A of the *Fair Work Act*), unlike what appears to have occurred with WGC Cranes and Boom Logistics. Michael Greenfield said, in relation to Mr Byrnes’ dismissal and entitlement to reinstatement, that “the law is f...ing stacked against us”. But, he (and the Union) did not care about that because “we continue to do it the way we do it”, by engaging in the unlawful picket and coercion that he organised. The officials were intent, as Mr Kera said, on the Union “wiping the floor” with Botany Cranes by using “Union power”.
3. The past pecuniary penalties obviously had no deterrent effect on the Union, Mr Kera or Michael Greenfield. As Keane, Nettle and Gordon JJ remarked in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157 (the *Non-Indemnification Case*) at 203 [131], the Union is “well-known to the court for its contumacious disregard of court orders”. And, in the *Perth Airport Appeal* 249 FCR at 481 [102], Dowsett and Rares JJ said in 2017 that “The CFMEU can be seen to have chosen to pay penalties in preference to obeying the law”. That attitude of the Union continued to apply when the present contraventions occurred.
4. The history of the Union’s contraventions cannot be gainsaid or dissected into its own internal organisations. As I have said, that history evinces an embedded culture, within the Union as a whole, of defying the rule of law as enacted by the Parliament. This raises the question of what is the appropriate penalty that will deter the Union, and recidivist senior officials, from contravening in the future?
5. The Union is well-resourced and financially substantial, as is the branch. In pecuniary penalty proceedings, the Union frequently does what occurred in this proceeding; namely, agree facts so that the Court can impose penalties without requiring witnesses, including not only the persons adversely affected by contravening conduct but also the officials and members of the Union who engaged in that conduct, to give evidence. I accept that this has a benefit in avoiding the persons affected by the contravening conduct from having to give evidence in Court. But, in this case, that benefit occurred only after extensive interlocutory processes, in circumstances where, as the agreed facts, including the subpoenaed police video, revealed, there was no real prospect of a defence to the allegations of the contraventions on 25 January 2019, except perhaps as to the identity of the organiser, given what appeared to be Mr Kera’s role.

### Penalties for the contraventions on 25 January 2019

1. The more serious of the two contraventions on 25 January 2019 was the coercion, and I will impose penalties for the respective contravention of s 52(a) by each of the officials before imposing penalties on them for the contravention of s 47(1).
2. The motivation of the picket, to advance the Union’s objective of compelling Botany Cranes to agree to the CFMMEU proposed EBA, can be seen as part of the context of a long running dispute. That motivation was interrelated with the other motivation, namely, to support the Union’s claim for Mr Byrnes’ reinstatement. However, the Union knew, as Mr Kera’s and Michael Greenfield’s speeches demonstrate, that coercion, in contravention of s 52(a), was its preferred and, possibly, essential means of getting Mr Byrnes reinstated because they perceived that he had no legal avenue that was likely to be capable of achieving that result. In Michael Greenfield’s words, “the f…king law is stacked against us”. And, as the Union’s subsequent conduct on 30 January 2019 showed, Mr Byrnes’ reinstatement was its first priority.
3. As I have explained, the Union and the officials employed the picket as a means to coerce Botany Cranes to reinstate Mr Byrnes in contravention of s 52(a). The text message that the Union sent on 24 January 2019 shows that the conduct on 25 January 2019 was planned to rally its members at Botany Cranes’ yard the next day to protest against Mr Byrnes’ dismissal (agreed facts par 23). I infer that the additional motivation for the picket, to support or advance the Union’s objective to have Botany Cranes agree to the CFMMEU proposed EBA, was secondary (but not unimportant) to the purpose of coercing the company to reinstate Mr Byrnes.
4. The contraveners admitted that the picket had an additional and significant motivation separate from the intention of the coercion in contravening s 52(a), namely, of not only seeking Mr Byrnes’ reinstatement to his former employment with Botany Cranes (as proscribed in ss 47(2)(b)(i) and 52(a)), but also advancing the Union’s industrial objectives of causing that company to agree to the CFMMEU proposed EBA (as proscribed in s 47(2)(b)(ii)). However, the picket was used by the Union to ensure that, unless it capitulated to its demand to reinstate Mr Byrnes, Botany Cranes could not conduct its business on that day, since no cranes or other vehicles or staff could enter or leave the yard freely without police assistance or Michael Greenfield’s agreement.
5. I accept the contraveners’ argument that the picket involved no physical violence and that they and the group appeared to conform with police requirements. But, I reject the contraveners’ argument that Ms Hodges’ reaction was subjective and not intentionally caused by the conduct of the group. When she arrived at work, she was confronted by the group picketing during the speeches of Michael Greenfield and Ms Mallia. She heard those speeches, abuse (albeit not directed at her) (recorded in pars 27(k), 29(b) and (c) of the agreed facts) and then had to pass through the group during its chanting and aggressive behaviour. The conduct of the group caused Ms Hodges to be fearful when she arrived and to seek police assistance to enter the yard in order to go to her place of work. This caused her to tell Ms Canin, the receptionist, not to attend work for fear of her also being intimidated and distressed by the conduct of the group.
6. In my opinion, Ms Hodges’ reaction was that of a person who felt intimidated accessing or leaving the yard and Botany Cranes’ premises, and whom the contraveners, or a reasonable person in their position, would have expected to have had such a reaction to their behaviour in engaging in (and, in Michael Greenfield’s case, organising) the unlawful picket. The conduct of the group also involved its members telling a mechanic employed by Botany Cranes, Mr Hall, on his arrival for work, that he could not enter the yard and nor could anyone else, so that he did not attend work. The actions and behaviour of the group also caused the police to advise Mr Griffiths that the picketers would not allow any cranes to leave the yard and that, although staff and management could leave, the police ought escort them, for their own safety, due to the presence and conduct of the group. That caused Mr Griffiths to form the view, obviously intended by the contraveners, that cranes could not leave the yard safely, the office should be closed for the day and the employees then at work should leave.
7. The unlawful picket was not a festive picnic. The point of that conduct was to make, as it did, a stark demonstration of the reality of the picketers’ chant “Union – Power”. Later, Michael Greenfield again evinced the power that the group was exercising by his fiat “Let them go” before they acted, as recorded in the police video. Indeed, as vehicles left the yard about two hours after Ms Hodges’ arrival, some picketers yelled out “scum”, some made monkey noises and Michael Greenfield led more chanting. The police perception about the nature of the behaviour that the group exhibited showed that Ms Hodges’ reaction was not an idiosyncratic or over-sensitive one. The police concern for the safety of Mr Griffiths and his staff evinced the intimidatory effect of the conduct and action that Michael Greenfield had organised and in which the officials, and through them, the Union, engaged.
8. A threat can be stronger than its execution, as a chess adage states. The fear of what the person making the threat might do may cause the victim to envisage far worse consequences than the perpetrator intends or can carry out. So much is recognised in the legal distinction between the *actus reus* for an assault, on the one hand, and a battery on the other; the first requires only the creation of a fear of battery, which can be a fear of much worse occurring to the victim than he or she would experience from an act of battery of a much lesser degree (eg. an ineffective or deflected punch in contrast to a “king hit”), while the second requires both fear and some physical contact. The conduct of the picketers, as depicted in the police video and recorded in the agreed facts, while not physically violent, was intimidatory and confronting. It was not a mere peaceful protest. The aggressive language that Mr Kera used, which Michael Greenfield endorsed, and Ms Mallia and Mr Byrnes also approved, was indicative of intimidation through the contraveners’ stated intention of “wiping the floor” with Botany Cranes.
9. Accordingly, it is necessary to fix substantial penalties for each contravener’s contravention of ss 47(1) and 52(a) on 25 January 2019, taking into account the circumstances that some of the same conduct was involved in each and having regard to all other relevant matters.

### Should part of the penalties be ordered to be paid to third parties?

1. On 25 January 2019, as a matter of common sense and experience, Botany Cranes would have had fixed overheads and other costs that its lost revenue of $31,723.50 for the day would have covered. It also lost the potential to have earned a profit from the balance of the lost revenue. Even if it could have earned that revenue by performing the cancelled or postponed jobs later, it may not have been able to take on additional work on those days. It is neither possible nor necessary to fix a precise sum to measure any loss that Botany Cranes suffered as a result of the disruption that the contraventions caused because the Commissioner has not sought any compensation for it under s 81(1)(b). However, s 81(5) authorises the Court to order that part of the penalty that a defendant should pay, instead be paid as a penalty (not compensation) to another person. The power in s 81(1)(a) to impose a pecuniary penalty to which s 81(5) is directed is different to the power conferred in s 81(1)(b), to order that the defendant in addition pay compensation. I consider that, as the Commissioner sought in final address, in the circumstances it is appropriate to order, under s 81(5) that, as part of the penalties imposed on it for its contravention of s 47(1) on 25 January 2019, the Union pay $30,000 as a pecuniary penalty to Botany Cranes.
2. The parties did not raise any question of a payment under s 81(5) to Ms Hodges or the police. Ms Hodges suffered distress and upset by reason of what occurred through the unlawful conduct that the Union orchestrated. The police had to attend in considerable numbers. They are a public resource that had to be diverted from their other activities because the Union indicated that it would engage in a protest that, it was safe to infer, would involve unlawful picketing. The Commonwealth did not, but the State did, incur the expense in providing police to protect persons and property from the reasonably apprehended possibility of trouble occurring were they not deployed to keep the peace.
3. There are no express limitations on the power under s 81(5) to order payment to another person. In my opinion it conferred power on the Court to order payment of part of a penalty to persons such as Botany Cranes, Ms Hodges and the police, adversely affected by contravening conduct to receive part of the penalty: *Owners of The Ship ‘Shin Kobe Maru’ v Empire Shipping Company Inc* (1994) 181 CLR 404 at 421 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ. Each of those persons fell within the definition of “authorised applicant” in s 5 of the Act (being “a person affected by the contravention”) who had a right to apply for an order under s 81(1). Such a course is consistent with the history of legislation providing for a civil penalty as a means to deter conduct in breach of the law, as Weinberg, Bennett and Rares JJ explained in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union v Australian Competition and Consumer Commissions* (2007) 162 FCR 466 at 477–479 [19]–[28]. I will give the parties the opportunity to make submissions as to whether I should make any order under s 81(5) in respect of a payment of part of the penalty I will impose on the Union for its contraventions on 25 January 2019 to Ms Hodges and or the police.

## The contraventions on 30 January 2019

1. The next working day after 25 January 2019 was 30 January 2019. The agreed facts set out what occurred on 30 January 2019 in pars 42–50. Those facts demonstrated that Michael Greenfield threatened to organise or take action against Botany Cranes with intent to coerce it into employing Mr Byrnes in contravention of s 52(a) of the Act. The threat was menacing, calculated and shameful. It was nothing less than industrial thuggery, as the admissions by Michael Greenfield and the Union recorded in pars 50–51 of the agreed facts make plain.
2. Having demonstrated how coercive and intimidating the Union could be on 25 January 2019, Michael Greenfield told Mr Griffiths on 30 January 2019 that worse was in store for him and his company unless Botany Cranes capitulated to the Union’s demand that Mr Byrnes be reinstated. That circumstance evinced that Michael Greenfield and the Union had no regard or respect for the rule of law, genuine bargaining at the workplace or respect for the rights of building industry participants, such as Botany Cranes: see ss 3(2)(b)–(d) and 81(6)(c) of the Act. He told Mr Griffiths on 30 January 2019 that the Union would agree to his terms for the new enterprise agreement, would withdraw the appeal to the Full Bench of the Fair Work Commission and that “Everything against you will cease”. It is obvious that was, at the very least, inaccurate, given what Michael Greenfield said the next day (see par 53 of the agreed facts).
3. A severe penalty is necessary to deter any risk of future repetition of such conduct and to ensure that Michael Greenfield and the Union be accountable for their unlawful conduct, as contemplated in the terms of the object of the Act in s 3(2)(d).

## The contraventions on 31 January and 1 February 2019

1. In the two day period between 31 January and 1 February 2019, Michael Greenfield and the Union contravened s 54(1) of the Act by taking action with intent to apply undue pressure to Botany Cranes to agree to make or approve the CFMMEU proposed EBA (agreed facts pars 53–55).
2. On 31 January 2019, Michael Greenfield repudiated what he had told Mr Griffiths the previous day and brazenly threatened Botany Cranes if it were not willing to capitulate to the Union’s terms. Michael Greenfield returned the next day, making plain the Union’s *modus operandi* when he said “If you sign the [CFMMEU proposed] EBA we will leave your sites alone”. Eventually, Mr Griffiths signed that document on 12 February 2019.
3. The Union argued that “undue pressure” was a lesser form of proscribed behaviour in s 54(1) than coercion. I reject that argument. The Act does not create such a gradation. Nor does common experience: *Barton* [1976] AC at 120D–F; *Esso* 263 CLR at 585 [61]: see [84]–[88] above.
4. Fear, however created, is a powerful motivator. The maximum penalty for a contravention of s 54(1) is the same for conduct amounting to coercion as for conduct amounting to undue pressure. Each is an alternate form of unlawful behaviour. Michael Greenfield’s statement on 31 January 2019 to Mr Griffiths “If I were you, I’d fuckin’ sign it”, his threat “… what do you think will happen to you?”, followed up the next day by “If you sign the EBA we will leave your sites alone” were not idle chit chat. They were overbearing threats, intended to be so, and they worked. There is no mitigating that illegitimate intimidation by the making of fine distinctions between the two forms of unlawful behaviour that s 54(1) proscribed.
5. Michael Greenfield admitted that, in contravention of s 54(1), he had organised or taken action against Botany Cranes on 31 January and 1 February 2019 with intent to apply undue pressure on it to agree to make or approve a building enterprise agreement. The pressure was unlawful, illegitimate and unconscionable. Once again, his conduct and intention were also those of the Union by force of s 94(1). The behaviour exhibited the same lamentable factors that I described in [127] above in respect of the conduct on 30 January 2019. Likewise, these contraventions of s 54(1) call for a severe penalty in order to achieve specific and general deterrence.

## The penalties to be imposed

1. The contraventions over the four days were distinct. Nonetheless, they also formed part of an overall course of conduct commencing with what occurred on 25 January 2019. The pair of each contravener’s contraventions of ss 47(1) and 52(a) on 25 January 2019 occurred in a course of conduct. The reason why the latter contraventions of ss 52(a) and 54(1) between 30 January and 1 Feburary 2019 are, in particular, a course of conduct (extending from the 25 January 2019 ones) is that each involved Michael Greenfield and the Union continuing deliberately to eschew the use of any lawful means of redress that they knew were available. *First*, on 30 January 2019, Michael Greenfield, acting on behalf of the Union, coerced Botany Cranes to reinstate Mr Byrnes in circumstances where there had been ample time for reflection after the more proximate (but still planned) reaction to Mr Byrnes’ dismissal on 25 January 2019. Instead of applying to the Fair Work Commission or a court for a remedy under the *Fair Work Act* for any alleged wrongful dismissal of Mr Byrnes (if there were a genuine basis to assert such a claim, about which there is no evidence other than Michael Greenfield’s emphatic statement on that topic that the law was “stacked against us”), on 30 January 2019, the Union, through Michael Greenfield and the threat from the gathered, but then passive, group outside, coerced Mr Griffiths and obtained his reinstatement.
2. *Secondly*, on 31 January and 1 February 2019, the Union, again through Michael Greenfield, deliberately set out to achieve, through the use of unlawful pressure, the object sought in the Union’s appeal to the Full Bench of the Fair Work Commission (in which the decision had been reserved after the hearing on 24 January 2019). Thus, the undue pressure applied, in contravention of s 54(1), sought to achieve, unlawfully, a result for which there was a mechanism provided in the *Fair Work Act*.
3. Each of the later contravention of s 52(a) and the contravention of s 54(1) involved Michael Greenfield and the Union once again taking the law into their own hands. They were experienced and knowledgeable participants in the system established under the *Fair Work Act* to regulate disputes the subject of those contraventions, and knew the difference between the lawful courses that they avoided taking and the unlawful bullying that they employed. They chose the unlawful means, in Mr Kera’s words that Michael Greenfield endorsed on 25 January 2019, that they were “going to wipe the floor with Botany Cranes”, and in the latter’s words on the same occasion, continuing “to do it the way we do it” and “we’re not going to stop until he’s [Mr Byrnes] back”. This deliberate, persistent and flagrantly unlawful conduct by a senior official and the Union, which is a serial contravener, cannot be tolerated in our democratic society. It is a threat to the rule of law, as Dowsett and Rares JJ explained in the *Perth Airport Case* 249 FCR at 481 [98]–[102].

### The penalties

#### Ms Mallia

1. In my opinion, Ms Mallia’s conduct on 25 January 2019 has to be viewed having regard to her position of leadership and authority in the branch and the Union. She lent her status to the unlawful picket and coercion that occurred on 25 January 2019. I have taken into account that, in committing those two contraventions, Ms Mallia has no prior contravening history.
2. But, she succumbed to what is obviously the embedded culture in the Union. That culture treats the laws enacted by the Parliament as irrelevant to what the Union and its officials feel free to do in breach of them. The Union regards any penalty as a mere price of its doing business. It is essential that persons in the senior leadership of the Union, such as Ms Mallia, and its members generally, be deterred from engaging in such behaviour. The price of contravention must be set so high that persons who might feel emboldened by the toxic culture, revealed in the Union’s history of defiance of the law, know that the Court will exercise its powers to deter them and any others who might contemplate doing so in the future.
3. I will impose a penalty of $15,000 for Ms Mallia’s contravention of s 52(a) and a penalty of $5,000 for her contravention of s 47(1), making a total of $20,000.

#### Mr Byrnes

1. I have taken into account that Mr Byrnes had lost his job and had no prior contravening history. He was a junior agent of the Union and could be expected to be deferential to how its senior office holders (like Ms Mallia, Mr Kera and Michael Greenfield) behaved and reacted to industrial situations within the Union’s culture. Mr Byrnes was not in a leadership role in the Union but, nonetheless, what he did was obviously outside the law. He had a significant role in speaking to the group and later leading some of the aggressive chanting.
2. In all of the circumstances, I will impose a penalty of $3,500 on Mr Byrnes for his contravention of s 52(a) and $1,500 for his contravention of s 47(1), making a total of $5,000.

#### Mr Kera

1. I have had regard to Mr Kera’s contravening history. The less severe penalties available under the *Fair Work Act* for coercive conduct that Flick J imposed on him, *first*, on 13 September 2017 totalling $41,250 and, *secondly*, as proximately as 18 October 2018, being $20,000, obviously enough had no deterrent effect on Mr Kera. He is remorseless and a recidivist. His conduct on 25 January 2019 was redolent of the intention to bring to bear very significant coercion of Botany Cranes by his menacing threats to “wipe the floor” with it. And, as the two recent previous penalty proceedings showed, this behaviour appears to be his way of operating, no doubt within the culture of the Union. That behaviour is unacceptable.
2. It is essential that he, as a senior office holder of the status of assistant secretary of the branch, and others, be deterred from engaging in such behaviour again and that the message be given loudly and clearly that the Court will not tolerate such flagrant, conscious defiance of the law. I will impose a penalty of $35,000 for Mr Kera’s contravention of s 52(a) and $12,500 for his contravention of s 47(1), making a total of $47,500.

#### Michael Greenfield

1. Michael Greenfield’s prior contravening history is not as significant as that of Mr Kera. It consists of a penalty of $3,000 for engaging in coercive conduct that Flick J imposed under the *Fair Work Act* on 13 September 2017. However, Michael Greenfield’s conduct over the week between 25 January and 1 February 2019, in committing four contraventions, calls for significant general and specific deterrence.
2. On 25 January 2019, Michael Greenfield organised, as well as engaged in, the unlawful picket and the taking of action against Botany Cranes with intent to coerce it, having had the benefit of a lenient penalty under the *Fair Work Act* for his previous act of coercion. That penalty did not deter him when dealing with Botany Cranes. As assistant secretary of the branch, he is a senior leader in the Union. He espoused to the group, in his speech on 25 January 2019, that what was happening reflected the Union’s culture, namely, regardless of the law, “**We continue to do it** **the way we do it”** (emphasis added). And, between 30 January and 1 February 2019, Michael Greenfield was a consummate exponent of “the way we do it”, namely by the Union using industrial thuggery, or in the language of the Act, undue pressure, at every turn.
3. The conduct of industrial relationships must occur, as the object of the Act in s 3(1) specifies, in “an improved workplace relations framework for building work to ensure that building work is carried out fairly, effectively and productively without distinction between interests of building industry participates, and for the benefit of **all** building industry participants and for the benefit of the Australian economy as a whole” (emphasis added).
4. Coercion, undue pressure and other forms of industrial bullying have no place in our society. Michael Greenfield’s behaviour over the week beginning 25 January 2019 was shocking. He felt and ruthlessly exercised power – “Union power” – no doubt emboldened by the Union’s long history of, and deep pockets to fund its, defiance of the laws made by the Parliament to prohibit such bullying behaviour. It is necessary that he, and others in similar positions, be deterred from engaging in such conduct in the future.
5. Michael Greenfield’s organisation of, and engagement in, the coercive action and unlawful picket on 25 January 2019 were serious and intimidatory, as he intended them to be. In imposing penalties on him, I have also taken into account the totality of the penalties for the four contraventions involved as well, of course, as all relevant matters including that his prior history was not on the same scale as Mr Kera’s. In all the circumstances, I will impose a penalty of $25,000 for his contravention of s 52(a) and $10,000 for his contravention of s 47(1) on 25 January 2019.
6. Michael Greenfield’s contravention of s 52(a) on 30 January 2019 was an escalation of his earlier conduct in contravening s 52(a). However, it did not include conduct that had the purpose of coercing or intimidating Botany Cranes to agree to the CFMMEU proposed EBA and nor did it proceed beyond the real and present threat of a further picket. Nonetheless, it evinced calculated menace. I will impose a penalty of $30,000 for that conduct.
7. His contravention of s 54(1) on 31 January and 1 February 2019 involved a further increase in the intensity of his and the Union’s bullying tactics. The conduct extended over two days and again involved the calculated menace reflected in his speech on 25 January 2019, namely: “the f…king law is stacked against us, but we continue to do it the way we do it”. It is essential that the Union stop doing “it”, namely using coercion and undue, unlawful, illegitimate and unconscionable pressure to impose its will. Here, the Full Bench of the Fair Work Commission, on 24 January 2019, had reserved its decision in the Union’s appeal about whether Botany Cranes had agreed to the CFMMEU proposed EBA so that it should be approved. The Union did not want to run the risk of losing that appeal, so it resorted to applying undue pressure to compel Botany Carnes to bend to its will and avoid a lawful and fair resolution of the dispute. This conduct cannot be tolerated in our society. It strikes at the heart of the rule of law. I will impose a penalty of $35,000 on Michael Greenfield for that conduct. The total of penalties against him amounts to $100,000.

#### Non-indemnification orders

1. In my opinion, it is necessary to impose a non-indemnification order for each of the penalties I will impose on the officials so as to ensure specific and general deterrence: the *Non-Indemnification Case* 262 CLR at 196–197 [118]–[120], 203–204 [133] per Keane, Nettle and Gordon JJ; see too the *Constitution Place Case* 299 IR at 278 [210]. In Ms Mallia’s and Mr Kera’s cases, they should have to pay all of the penalties personally. In Michael Greenfield’s case, I will make a non-indemnification order that he personally pay $65,000 so as to ensure that he is deterred in the future from engaging in such contraventions of the law.
2. The Commissioner did not seek a non-indemnification order in respect of Mr Byrnes. However, having considered the position, and subject to what may emerge in the submissions that I will receive, my provisional view is that I should impose such an order on him for at least some of the penalty so as to achieve a real measure of deterrence and to convey to Mr Byrnes and others that if they contravene the law, they personally will have to pay the penalties for doing so. I will allow Mr Byrnes and the Commissioner the opportunity to make submissions on this issue.

#### The Union

1. As I have noted above, the Union is insouciant to its obligation to obey the law. Its conduct, through its three senior officials in this proceeding, displayed utter contempt for the rule of law. Its accounts in evidence show that it has the financial resources to pay most penalties the Court might impose. Its conduct here demonstrates that the culture of the Union, and its senior officials, is simply “might is right” or “Union – power”. That conduct has no place in our society. Over 170 prior decisions of courts imposing penalties on it and its officials did not deter the Union from attempting, by unlawful coercion and improper pressure, to “wipe the floor” with Botany Cranes until the company capitulated to the Union’s demands to reinstate Mr Byrnes and sign the CFMMEU proposed EBA.
2. As I have explained, the eight contraventions of the officials on 25 January 2019 created eight contraventions by the Union on that occasion (being four for each of ss 47(1) and 52(a)). The conduct that s 94 attributed to the Union was that of Michael Greenfield, as the organiser, and that of each of the other three officials who separately contravened ss 47(1) and 52(a) on 25 January 2019. I have taken into account in arriving at the penalties to be imposed on the Union that much of the conduct of the officials in the unlawful picket overlapped between themselves and the group. However, each of Ms Mallia, Mr Kera and Michael Greenfield acted with its full authority. Their separate speeches expressed their combined intentions, as the voices of the Union, to coerce Botany Cranes to reinstate Mr Bynes by attempting to “wipe the floor” with it, regardless of the law. In imposing the penalties on the Union, I have had regard to all relevant matters, the existence of a course of conduct, the totality and proportionality of the amounts. Its conduct here was protracted over four days, planned, deliberate, knowingly unlawful and clearly uninfluenced by past penalties or any deterrent effect they might have had.
3. In *L Vogel & Sons Pty Ltd v Anderson* (1967–1968) 120 CLR 157, Kitto J, as the trial judge, and Taylor, Menzies and Owen JJ in upholding him on appeal, discussed the principles to be applied when the Parliament establishes a particularly severe penalty or set of penalties for contravention of the law. The case concerned a customs prosecution (which was an action for civil penalties) for the recovery of pecuniary penalties against persons who had engaged systemically in numerous fraudulent practices over a substantial period (at 167). The Full Court approved Kitto J’s reasoning and application of principle (at 168). The *Customs Act 1901* (Cth) at the time prescribed maximum penalties, relevantly of the greater of $200 or $400 (depending on the provision contravened) or three times the value of the goods on which duty was evaded. In the event, Kitto J applied the latter penalty. He said (120 CLR at 164):

Not only are the defendants **guilty of a sustained course of conscious wrongdoing, but the offences are in a field in which punishments for deliberate offences must be severe**. The Customs laws represent the judgment of Parliament upon an important aspect of the economic organization of the community, and the object of the penal provisions is to make that judgment as effective as possible… No doubt ordinary conceptions of honesty and of civic responsibility suffice to ensure a great deal of fair dealing with the Customs, **but for some people little seems to matter but fear of the consequences of discovery. The *Customs Act* makes those consequences potentially drastic. It is for the courts to make them, in suitable cases, drastic in fact, for otherwise traders who are not saved by qualms of conscience from willingness to defraud their fellow citizens may weigh the profits they hope for against the penalties they have cause to fear and find the gamble worthwhile**.

(emphasis added)

1. Here, the Act sets severe penalties for contraventions of provisions including ss 47(1), 52(a) and 54(1). It makes the consequences, particularly of multiple contraventions, drastic so as to encourage or cause participants in the building industry to obey the law and have resort to the Fair Work Commission, the courts and other lawful measures available under the *Fair Work Act* or elsewhere to resolve any disputes or differences.
2. The Union is not prepared to abide by the law. Its conduct, being the conduct of its three senior officers, and Mr Byrnes (that ss 94 and 95 deem relevantly to be also the Union’s) on 25 January 2019 was in flagrant breach of ss 47(1) and 52(a) of the Act. The penalties to be imposed must be “drastic”, as Kitto J said in *Vogel* 120 CLR at 164, for a person, such as the Union, which seemingly cannot be deterred from engaging deliberately in contravening conduct that the Parliament has proscribed.
3. In my opinion, the Union will only be deterred from further contraventions of the very serious nature of those that occurred on 25 January 2019 of the Act by a severe, if not drastic, penalty. As the prior history of contraventions of each Mr Kera, Michael Greenfield and the Union showed, coercion is one of the Union’s tools of trade (which Mr Kera and Michael Greenfield employed, even after each was penalised for doing so). None of the contraveners expressed any contrition, let alone a recognition of the need not to repeat the contravening conduct. The Union, with its history of contraventions, is not prepared to acknowledge to the Court or the community that what it did on 25 January 2019 was inexcusable and unacceptable.
4. Here, the maximum penalty for the Union’s conduct on 25 January 2019 is $1.68 million. I have had regard to the significant circumstance that the Union’s contraventions on 25 January 2019 formed a series of contraventions of the same or a similar character and, so, occurred as part of a course of conduct for the purposes of s 84 of the Act. There was a degree of overlap in the contravening conduct of each of the officials acting on its behalf that, by force of ss 94 and 95, was also the Union’s conduct and their states of mind. However, in the circumstances, each of the officials’ conduct added to the cumulative effects of both the coercion applied to Botany Cranes in contravention of s 52(a) and the unlawful picket in contravention of s 47(1), so that a penalty greater than the sum of two penalties ($420,000) is necessary to deter the Union from continuing with its behaviour and consistent culture of using coercion and undue pressure to obtain the outcomes it seeks. I am of opinion that a single penalty of $500,000 should be imposed pursuant to s 84(1) for the Union’s contraventions of ss 52(a) and s 47(1) on 25 January 2019 in order to deter it from further conduct of the kind the subject of the contraventions. I will order that $30,000 of that be paid to Botany Cranes.
5. I consider that a penalty of $175,000 should be imposed for the Union’s contravention of s 52(a) on 30 January 2019 and a further $175,000 for its contravention of s 54(1) on 31 January to 1 February 2019. The total penalties for the Union amount to $850,000.
6. The Union must also pay the Commissioner’s costs in the agreed sum of $133,000.
7. I will allow the parties to make further submissions as to the form of final orders and whether I should order any part of the penalty of $500,000 in [160] be paid to Ms Hodges or the police, and whether I should make any non-indemnification order against Mr Byrnes.

|  |
| --- |
| I certify that the preceding one hundred and sixty-three (163) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Rares. |

Associate:

Dated: 22 April 2021

SCHEDULE OF PARTIES

|  |  |
| --- | --- |
|  | NSD 574 of 2019 |
| Respondents |  |
| Fifth Respondent: | RITA MALLIA |
| Seventh Respondent: | HOWARD BYRNES |