FEDERAL COURT OF AUSTRALIA

Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (the Webb Dock case) [2017] FCA 62

|  |  |
| --- | --- |
| File number: | VID 164 of 2016 |
|  |  |
| Judge: | **JESSUP J** |
|  |  |
| Date of judgment: | 8 February 2017 |
|  |  |
| Catchwords: | **INDUSTRIAL LAW** –Construction industry – Contractors prevented from securing access to site by blockades organised by union officers – Adverse action taken against contractors because of industrial activity and to coerce them to engage in industrial activity – Agreed facts.  **INDUSTRIAL LAW** – Contraventions of civil remedy provisions – Penalties – Need for deterrence – Significance of record of previous contraventions. |
|  |  |
| Legislation: | *Fair Work Act 2009* (Cth) ss 172, 340, 341, 342, 343, 346, 347, 348, 363, 546, 793 |
|  |  |
| Cases cited: | *Alfred v Construction, Forestry, Mining and Energy Union* [2011] FCA 556  *Brookfield Multiplex Engineering and Infrastructure Pty Ltd v McDonald* [2014] FCA 389  *Brookfield Multiplex FSH Contractor Pty Limited v McDonald* [2014] FCA 359  *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2016) 326 ALR 476  *Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner* [2016] FCAFC 184  *Director of the Fair Work Building Industry Inspectorate v Cartledge* [2014] FCA 1047  *Director of the Fair Work Building Inspectorate v CFMEU* [2013] FMCA 160  *Director of the Fair Work Building Industry Inspectorate v CFMEU* [2013] FCA 515  *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2013] FCA 846  *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining & Energy Union* [2014] FCA 126  *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2014] FCA 160  *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (The Mitcham Rail Case)* [2015] FCA 1173  *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2016] FCA 436  *Director, Fair Work Building Industry Inspectorate v Cradden* [2015] FCA 614  *Gregor v Construction Forestry Mining and Energy Union* [2011] FCA 808  *Hardwick v Australian Manufacturing Workers’ Union* [2010] FCA 818  *Helal v Brookfield Multiplex Limited* [2012] FCA 653  *White v Construction Forestry Mining and Energy Union* [2011] FCA 192  *Williams v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2010] FCA 754 |
|  |  |
| Date of hearing: | 28 November 2016 |
|  |  |
| Registry: | Victoria |
|  |  |
| Division: | Fair Work Division |
|  |  |
| National Practice Area: | Employment & Industrial Relations |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 83 |
|  |  |
| Counsel for the Applicant: | Mr J Forbes |
|  |  |
| Solicitor for the Applicant: | Corrs Chambers Westgarth |
|  |  |
| Counsel for the Respondents: | Mr C Dowling |
|  |  |
| Solicitor for the Respondents: | Mr J Winters of Construction, Forestry, Mining and Energy Union |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | VID 164 of 2016 |
|  | | |
| BETWEEN: | AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER  Applicant | |
| AND: | CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION  First Respondent  JOE MYLES  Second Respondent  ADAM HALL (and others named in the Schedule)  Third Respondent | |

|  |  |
| --- | --- |
| JUDGE: | JESSUP J |
| DATE OF ORDER: | 8 February 2017 |

# THE COURT DECLARES THAT:

1. On 5 March 2015, with intent to coerce –
   1. McConnell Dowell Constructors (Aust) Pty Ltd to engage in industrial activity by complying with the lawful request of the first respondent that it make an enterprise agreement, and
   2. Coastal Steel Fixing Australia Pty Ltd to engage in industrial activity by complying with the lawful request of the first respondent that it pay its employees at the rates set out in the first respondent's pattern enterprise agreement,

the second respondent, an officer of the first respondent acting as such within the meaning of s 363(1)(b) of the *Fair Work Act 2009* (Cth), organised, coordinated, incited, participated in and controlled the conduct of crowds of people blocking entrances to the site of the Port Capacity Project – Maritime Work Package at Webb Dock East and Webb Dock West at Port Melbourne, thereby preventing access to that site by employees of the said companies, and disrupting work on that site, in contravention of s 348 of the said Act.

1. On 5 March 2015, with intent to coerce –

(a) McConnell Dowell Constructors (Aust) Pty Ltd to engage in industrial activity by complying with the lawful request of the first respondent that it make an enterprise agreement, and

(b) Coastal Steel Fixing Australia Pty Ltd to engage in industrial activity by complying with the lawful request of the first respondent that it pay its employees at the rates set out in the first respondent's pattern enterprise agreement,

the third respondent, an officer of the first respondent acting as such within the meaning of s 363(1)(b) of the *Fair Work Act 2009* (Cth), organised, coordinated, incited, participated in and controlled the conduct of crowds of people blocking entrances to the site of the Port Capacity Project – Maritime Work Package at Webb Dock East and Webb Dock West at Port Melbourne, thereby preventing access to that site by employees of the said companies, and disrupting work on that site, in contravention of s 348 of the said Act.

1. On 5 March 2015, with intent to coerce McConnell Dowell Constructors (Aust) Pty Ltd to exercise its workplace right to make an enterprise agreement, the second respondent, an officer of the first respondent acting as such within the meaning of s 363(1)(b) of the *Fair Work Act 2009* (Cth), organised, coordinated, incited, participated in and controlled the conduct of crowds of people blocking entrances to the site of the Port Capacity Project – Maritime Work Package at Webb Dock East and Webb Dock West at Port Melbourne, thereby preventing access to that site by employees of the said company, and disrupting work on that site, in contravention of s 343 of the said Act.
2. On 5 March 2015, with intent to coerce McConnell Dowell Constructors (Aust) Pty Ltd to exercise its workplace right to make an enterprise agreement, the third respondent, an officer of the first respondent acting as such within the meaning of s 363(1)(b) of the *Fair Work Act 2009* (Cth), organised, coordinated, incited, participated in and controlled the conduct of crowds of people blocking entrances to the site of the Port Capacity Project – Maritime Work Package at Webb Dock East and Webb Dock West at Port Melbourne, thereby preventing access to that site by employees of the said company, and disrupting work on that site, in contravention of s 343 of the said Act.
3. On 5 March 2015, the second respondent, an officer of the first respondent acting as such within the meaning of s 363(1)(b) of the *Fair Work Act 2009* (Cth), organised, coordinated, incited, participated in and controlled the conduct of crowds of people blocking entrances to the site of the Port Capacity Project – Maritime Work Package at Webb Dock East and Webb Dock West at Port Melbourne, thereby preventing access to that site by employees of McConnell Dowell Constructors (Aust) Pty Ltd and Coastal Steel Fixing Australia Pty Ltd, and disrupting work on that site, because –

(a) McConnell Dowell Constructors (Aust) Pty Ltd engaged in industrial activity by not complying with the lawful request of the first respondent that it make an enterprise agreement, and

(b) Coastal Steel Fixing Australia Pty Ltd engaged in industrial activity by not complying with the lawful request of the first respondent that it pay its employees at the rates set out in the first respondent's pattern enterprise agreement,

in contravention of s 346 of the said Act.

1. On 5 March 2015, the third respondent, an officer of the first respondent acting as such within the meaning of s 363(1)(b) of the *Fair Work Act 2009* (Cth), organised, coordinated, incited, participated in and controlled the conduct of crowds of people blocking entrances to the site of the Port Capacity Project – Maritime Work Package at Webb Dock East and Webb Dock West at Port Melbourne, thereby preventing access to that site by employees of McConnell Dowell Constructors (Aust) Pty Ltd and Coastal Steel Fixing Australia Pty Ltd, and disrupting work on that site, because –

(a) McConnell Dowell Constructors (Aust) Pty Ltd engaged in industrial activity by not complying with the lawful request of the first respondent that it make an enterprise agreement, and

(b) Coastal Steel Fixing Australia Pty Ltd engaged in industrial activity by not complying with the lawful request of the first respondent that it pay its employees at the rates set out in the first respondent's pattern enterprise agreement,

in contravention of s 346 of the said Act.

1. On 5 March 2015, the second respondent, an officer of the first respondent acting as such within the meaning of s 363(1)(b) of the *Fair Work Act 2009* (Cth), organised, coordinated, incited, participated in and controlled the conduct of crowds of people blocking entrances to the site of the Port Capacity Project – Maritime Work Package at Webb Dock East and Webb Dock West at Port Melbourne, thereby preventing access to that site by employees of McConnell Dowell Constructors (Aust) Pty Ltd, and disrupting work on that site, because that company did not exercise its workplace right to make an enterprise agreement, in contravention of s 340 of the said Act.
2. On 5 March 2015, the third respondent, an officer of the first respondent acting as such within the meaning of s 363(1)(b) of the *Fair Work Act 2009* (Cth), organised, coordinated, incited, participated in and controlled the conduct of crowds of people blocking entrances to the site of the Port Capacity Project – Maritime Work Package at Webb Dock East and Webb Dock West at Port Melbourne, thereby preventing access to that site by employees of McConnell Dowell Constructors (Aust) Pty Ltd, and disrupting work on that site, because that company did not exercise its workplace right to make an enterprise agreement, in contravention of s 340 of the said Act.

# THE COURT ORDERS THAT:

1. For his contravention of s 348 of the *Fair Work Act 2009* (Cth) the subject of Declaration 1 above, the second respondent pay a pecuniary penalty of $7,500.00.
2. For its contravention of s 348 of the *Fair Work Act 2009* (Cth) constituted by the actions of the second respondent referred to in Declaration 1 above, the first respondent pay a pecuniary penalty of $42,000.00.
3. For his contravention of s 348 of the *Fair Work Act 2009* (Cth) the subject of Declaration 2 above, the third respondent pay a pecuniary penalty of $4,500.00.
4. For its contravention of s 348 of the *Fair Work Act 2009* (Cth) constituted by the actions of the third respondent referred to in Declaration 2 above, the first respondent pay a pecuniary penalty of $42,000.00.
5. The said penalties be paid to the Commonwealth of Australia within 30 days.
6. The Application otherwise be dismissed.

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

REASONS FOR JUDGMENT

JESSUP J:

1. This proceeding was commenced on 19 February 2016 by the Director of the Fair Work Building Industry Inspectorate (“the Director”). He alleged that the first, second and third respondents, the Construction, Forestry, Mining and Energy Union (“the CFMEU”), Joe Myles and Adam Hall respectively, contravened ss 340, 343, 346 and 348 of the *Fair Work Act 2009* (Cth) (“the FW Act”) by conduct engaged in by Messrs Myles and Hall at the site of the Port Capacity Project – Maritime Work Package (“the Project”) at Webb Dock East and Webb Dock West at Port Melbourne (“the site”) on 5 March 2015. There are two other respondents in the proceeding, but no allegation is now pressed against them.
2. By the operation of item 19 of Sch 2 to the *Building and Construction Industry (Consequential and Transitional Provisions) Act 2016* (Cth), on 2 December 2016 the applicant, the Australian Building and Construction Commissioner, took the place of the Director as the moving party in the proceeding.
3. In order to give context to what follows, I shall commence by setting out the provisions of the FW Act upon which the Director relied.
4. Relevantly, s 340 provides as follows:

(1) A person must not take adverse action against another person:

(a) because the other person:

(i) has a workplace right; or

(ii) has, or has not, exercised a workplace right; or

(iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or

(b) to prevent the exercise of a workplace right by the other person.

1. Relevantly, s 341 provides as follows:

(1) A person has a workplace right if the person:

(a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or

(b) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; …

…

(2) Each of the following is a process or proceedings under a workplace law or workplace instrument:

…

(e) making, varying or terminating an enterprise agreement;

…

(k) any other process or proceedings under a workplace law or workplace instrument.

1. Relevantly, s 343 provides as follows:

(1) 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) exercise or not exercise, or propose to exercise or not exercise, a workplace right; or

(b) exercise, or propose to exercise, a workplace right in a particular way.

1. Section 346 provides as follows:

A person must not take adverse action against another person because the other person:

(a) is or is not, or was or was not, an officer or member of an industrial association; or

(b) engages, or has at any time engaged or proposed to engage, in industrial activity within the meaning of paragraph 347(a) or (b); or

(c) does not engage, or has at any time not engaged or proposed to not engage, in industrial activity within the meaning of paragraphs 347(c) to (g).

1. Relevantly, s 347 provides as follows:

A person ***engages in industrial activity*** if the person:

…

(b) does, or does not:

…

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

1. By item 7 in the table to s 342(1), an industrial association (as the CFMEU was), or an officer of such an association (as Messrs and Hall were), takes adverse action against a person if it, he or she –

(b) takes action that has the effect, directly or indirectly, of prejudicing the person in the person’s employment or prospective employment; or

(c) if the person is an independent contractor—takes action that has the effect, directly or indirectly, of prejudicing the independent contractor in relation to a contract for services; or ….

1. Section 348 provides as follows:

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

1. Turning to the facts, on 14 November 2016, the Director caused to be filed what was described as a Statement of Agreed Facts. Although that statement travelled beyond pure matters of fact, it represented the agreed position of the parties, and was received on that basis. What follows in paras 12-42 below is based on that statement.
2. The CFMEU is an organisation of employees registered under the *Fair Work (Registered Organisations) Act 2009* (Cth). As such, it is an “industrial association” within the meaning of the FW Act. It was also a “building association” and a “building industry participant” within the meaning of the (since replaced) *Fair Work (Building Industry) Act 2012* (Cth) (“the FWBI Act”). Mr Myles and Mr Hall are officers and employees of the CFMEU and, relevantly to the present proceeding, were acting in their capacity, and within the scope of their actual or apparent authority, as such. They are also “building industry participants” within the meaning of the FWBI Act.
3. At relevant times, McConnell Dowell Constructors (Aust) Pty Ltd (“McConnell Dowell”) was the head contractor for building works, to a value of about $400 million, in connection with the Project. In the execution of those works, McConnell Dowell was a “building industry participant” within the meaning of the FWBI Act and an “independent contractor” for the purposes of s 342 of the FW Act. On the Project, McConnell Dowell employed employees in the construction industry whose employment included building work (“the McConnell Dowell employees”). The *Building and Construction General On-site Award 2010* (“the Award”) applied to and bound McConnell Dowell in relation to those employees. There was no relevant enterprise agreement.
4. In relation to work at the site, McConnell Dowell had the right to operate its business there in accordance with the Award, the right to make, to vary or to terminate an enterprise agreement and the right not to make, not to vary or not to terminate such an agreement. They were “workplace rights” within the meaning of s 341 of the FW Act. The McConnell Dowell employees were entitled to enter the site to perform work there for pay in accordance with the Award, and were entitled to be paid in accordance with the Award. These entitlements were “workplace rights” within the meaning of s 341 of the FW Act.
5. McConnell Dowell entered into contracts for services under which it arranged for building work to be carried out in relation to the Project. One such contract was for the engagement of Coastal Steel Fixing Australia Pty Ltd (“Coastal Steel”) to perform steel fixing works at the site. In the performance of its contract with McConnell Dowell, Coastal Steel employed employees to attend at the site and to perform work there in relation to the Project (“the Coastal Steel employees”); and it was a “building industry participant” within the meaning of the FWBI Act and an “independent contractor” for the purposes of s 342 of the FW Act in that context. The Coastal Steel employees carried out building work and were “building industry participants” within the meaning of the FWBI Act. The *Coastal Steelfixing Australia Pty Ltd Enterprise Agreement 2015* (“the Coastal Steel agreement”) was a “workplace instrument” for the purposes of the FW Act. It applied to and bound Coastal Steel and the Coastal Steel employees in respect of work performed at the site.
6. In relation to work at the site, Coastal Steel had the right to operate its business there in accordance with the Coastal Steel agreement, the right to make, to vary or to terminate an enterprise agreement and the right not to make, not to vary or not to terminate such an agreement. They were “workplace rights” within the meaning of s 341 of the FW Act. The Coastal Steel employees were entitled to enter the site to perform work there for pay in accordance with the Coastal Steel agreement, and were entitled to be paid in accordance with that agreement. These entitlements were “workplace rights” within the meaning of s 341 of the FW Act.
7. Since at least early January 2015, the CFMEU, by one or more of its officials including Mr Myles, had maintained a demand that Coastal Steel pay the Coastal Steel employees who performed work at the site at rates of pay that met the levels demanded by the CFMEU as set out in the CFMEU pattern enterprise agreement (“the CFMEU Coastal Steel rates demand”). On 20 January 2015, Mr Myles telephoned Peter Nugent, Coastal Steel’s Operations Manager, and asked to meet with him to discuss pay and allowances for the Coastal Steel employees. Mr Nugent refused that request.
8. In or around mid-February 2015, Mr Myles held a meeting outside Webb Dock West at about 6.10 am, at which he said that the Coastal Steel employees should receive breaks, overtime rates and rostered days off in addition to the pay and conditions provided for in the Coastal Steel agreement. He said that the CFMEU would meet with McConnell Dowell to try to obtain these conditions. In or around late February 2015, Mr Myles held a further meeting outside Webb Dock West at about 6.10 am, at which he repeated what he had said at the meeting in mid-February.
9. The substance of the CFMEU Coastal Steel rates demand was later set out in a newsletter, the CFMEU Workers Express, published by the CFMEU on 15 March 2015, as follows:

[T]he CFMEU has been campaigning against QLD company Coastal Steel Fixing and its boss, Peter Nugent who are on that job, undercutting wages and conditions for other workers. We won’t stand by and watch workers get less than what they are entitled to under the EBA.

1. The CFMEU Coastal Steel rates demand was a lawful request made by an industrial association within the meaning of s 347(b)(iv) of the FW Act. By not complying with that demand, Coastal Steel engaged in “industrial activity” within the meaning of that section.
2. Prior to 5 March 2015, members of the CFMEU employed at the site by McConnell Dowell and Coastal Steel complained to the CFMEU about their terms and conditions of employment, and the circumstances under which they were being asked to work, including working in the rain and working for long periods without breaks. The CFMEU and Messrs Myles and Hall had maintained a demand that McConnell Dowell enter into an enterprise agreement with the CFMEU (“the CFMEU McConnell Dowell enterprise agreement demand”).
3. The CFMEU McConnell Dowell enterprise agreement demand was a lawful request made by an industrial association within the meaning of s 347(b)(iv) of the FW Act. By not complying with that demand, McConnell Dowell engaged in “industrial activity” within the meaning of that section.
4. On or before 5 March 2015, Messrs Myles and Hall both knew that Coastal Steel required its employees to perform building work at the site from 7.00 am on 5 March 2015, and that that work could not proceed as scheduled if access to the site were impeded by any blockade, protest or picket, or if those employees did not perform work, or otherwise engaged in industrial action.
5. At about 5.15 am on 5 March 2015, a crowd of about 22 people gathered in the vicinity of the entrance to Webb Dock West on Williamstown Road. One of them told Daryl Hill, McConnell Dowell’s superintendent, that the members of the crowd wanted to have a mass meeting with the workers before they started work. From about 5.45 am, that entrance was blocked by a crowd of 20-25 people, many of whom wore clothing bearing the name and insignia of the CFMEU. Mr Hall was in, or in the proximity of, the crowd, and was mingling with it and coordinating its conduct. The presence and the conduct of the crowd blocked access to Webb Dock West to the Coastal Steel employees and to any vehicle.
6. At about 5.45 am, Mr Hall told Sgt Martin O’Donoghue of Victoria Police that he (Hall) was in charge of the crowd blocking the entrance to Webb Dock West. Mr Hall and Sgt O’Donoghue had a conversation to the following effect:

O’Donoghue: Who is in charge?

Hall: I guess I am.

Mr Hall also told Sgt O’Donoghue that the CFMEU had organised the blockade because it wanted McConnell Dowell to negotiate with it, and that it intended for the blockade to prevent all vehicles from entering the site until McConnell Dowell agreed to negotiate. Mr Hall said to Sgt O’Donoghue:

The CFMEU want our own people and we want McConnell Dowell to come to the table and negotiate. What we are doing this morning is stopping all the vehicles until they come to the table and negotiate.

Mr Hall also told Sgt O’Donoghue that Mr Myles had organised the protest and provided Sgt O’Donoghue with what he said was Mr Myles’ mobile phone number.

1. By reason of the blockade at Webb Dock West, the employees of Coastal Steel who would normally have entered Webb Dock West to perform work, were not able to do so, and their work could not be commenced as scheduled at 7.00 am.
2. From about 7.30 am, the crowd at the entrance to Webb Dock West had grown to about 40 people. Mr Myles was in, or in the proximity of, the crowd, and was mingling with it and coordinating its conduct. The presence and conduct of the crowd continued to block access to Webb Dock West to the Coastal Steel employees.
3. From about 8.45 am, the crowd at the entrance to Webb Dock West had grown to about 40-50 people, some of whom wore clothing bearing the name and insignia of the CFMEU. Mr Myles was in, or in the proximity of, the crowd, and was mingling with it and coordinating its conduct. The presence and conduct of the crowd continued to block access to Webb Dock West to employees of Coastal Steel.
4. From about 9.10 am, the crowd at the entrance to Webb Dock West had dispersed, allowing access to Webb Dock West. At about 10.00 am, seven Coastal Steel employees entered Webb Dock West and commenced work.
5. By their conduct, each of Messrs Myles and Hall directed, encouraged, persuaded or procured the Coastal Steel employees not to perform work at Webb Dock West before 10.00 am on 5 March 2015.
6. From about 5.30 am on 5 March 2015, a crowd of about 20-25 people entered the site and positioned themselves at the entrance to the car park at Webb Dock East, thereby blocking access to the site through that entrance by Coastal Steel employees. From about 6.00 am, that entrance was blocked by a crowd of about 30-40 people and about 25 parked vehicles. Mr Myles was in or in the proximity of the crowd and was mingling with it, and coordinating its conduct. The presence and conduct of the crowd blocked access to the site through that entrance by Coastal Steel employees, and by all vehicles.
7. From about 6.00 am, the small access gates to Webb Dock East leading off Williamstown Road were also blocked by groups of people, some of whom wore clothing bearing the name and insignia of the CFMEU. The presence and conduct of these people blocked access to Webb Dock East by way of those gates by the Coastal Steel employees.
8. Between about 6.30 am and 6.45 am, Mr Myles told Sgt O’Donoghue that the blockade had been organised and implemented in order to pressure McConnell Dowell and/or Coastal Steel to negotiate with the CFMEU in relation to pay and conditions at the site. He said:

We are here because we want to resolve the industrial problems and award conditions and we are refusing access to the workplace to start work that day. It will all be resolved if they come to the table and negotiate.

Mr Myles told S/Sgt Brendan Van de Duim of Victoria Police that he would cause the blockade to move from the entrance to the car park at Webb Dock East to the main gate at Webb Dock East. Mr Myles then approached the crowd at that entrance, following which the crowd and vehicles that had been blocking that entrance dispersed and moved to the main gate. The presence and conduct of the crowd at the main gate continued to block access to Webb Dock East to the Coastal Steel employees, and to all vehicles.

1. At about 6.50 am, Mr Myles approached the crowd gathered at the main gate at Webb Dock East and, after he had addressed them, about 20 of them moved away from that to a point along Dockside Road. Mr Myles then addressed them, saying that the CFMEU had made a number of claims on each of McConnell Dowell and Coastal Steel relating to pay and conditions at the site, that the CFMEU wanted to pressure McConnell Dowell and Coastal Steel to negotiate with it in relation to those matters, and that the CFMEU would organise a work ban at the site preventing any further work at that day, in order to pressure McConnell Dowell and Coastal Steel to meet its demands. He then called for a vote as to whether a work ban should be implemented that day at the site.
2. When addressing the crowd on Dockside Road, Mr Myles said:

* McConnell Dowell have not come to the table and nobody’s going to work today. Meal breaks, RDOs and overtime are the main issues in dispute. Coastal is not complying with its EBA.
* The CFMEU wants McConnell Dowell to put a union person on site.
* Don’t be frightened to go home, because if McConnell Dowell and Coastal want to fight, I can have 20,000 workers here tomorrow at the drop of a hat to support you.
* What they are doing is not right, they are the only company that doesn’t have an agreement with us, we are trying to negotiate with them with no success. We know some workers are working on this project and not getting paid the union rate and they are from interstate working on this job and they are not a part of the union and this is not acceptable. The union is here to help you guys and defend your rights. Why we are here today is to put pressure on McConnell Dowell to sign an agreement with us. We are stopping work today, if you disagree with our intent they [*sic*] raise your hand. If we are all on the same page, we will see you back here tomorrow.
* McConnell Dowell haven’t signed an EBA and they won’t talk to us about it. Coastal Steel Fixing are working for a flat rate of pay and should be getting paid more, working 10 hours a day with no break. I’m not gonna ask for a show of hands who supports us, what I’m gonna do is ask for a show of hands who doesn’t support us.

1. From about 8.05 am, the crowd around the main gate at Webb Dock East began to disperse, allowing access to Webb Dock East from 8.20 am.
2. By reason of the matters referred to in paras 31-36 above, the Coastal Steel employees who would normally have entered the site to perform work on 5 March2015 did not enter the site.
3. It is admitted by Messrs Myles and Hall that, by their conduct referred to above, they took adverse action (within the meaning of s 342(1) of the FW Act) against –

* Coastal Steel because it had exercised, or had not exercised, a workplace right by not complying with the CFMEU Coastal Steel rates demand, and
* McConnell Dowell because it had exercised, or had not exercised, a workplace right by not complying with the CFMEU McConnell Dowell enterprise agreement demand.

It is admitted by Messrs Myles and Hall that their conduct in these respects was in contravention of s 340 of the FW Act.

1. It is admitted by Messrs Myles and Hall that they organised, coordinated, incited, participated in and controlled the blockades and protests at the entrances to the site on 5 March 2015. It is admitted by Mr Myles that he organised the situation by which the Coastal Steel employees did not enter the site and work there on 5 March 2015. It is admitted by Messrs Myles and Hall that they did these things –

* to disrupt the performance of work by the Coastal Steel employees with the intent to coerce Coastal Steel to exercise its workplace rights in a particular way, namely, by meeting the CFMEU Coastal Steel rates demand, and
* to disrupt the performance of work by the McConnell Dowell employees with the intent to coerce McConnell Dowell to exercise its workplace rights in a particular way, namely, by meeting the CFMEU McConnell Dowell enterprise agreement demand.

It is admitted by Messrs Myles and Hall that these things did disrupt the performance of work by the Coastal Steel employees and the McConnell Dowell employees. It is admitted by Messrs Myles and Hall that their conduct in these respects was in contravention of s 343 of the FW Act.

1. It is admitted by Messrs Myles and Hall that, by their conduct referred to above, they took adverse action (within the meaning of s 342(1) of the FW Act) against –

* Coastal Steel because it had engaged, or had not engaged, in industrial activity by not complying with the CFMEU Coastal Steel rates demand, and
* McConnell Dowell because it had engaged, or had not engaged, in industrial activity by not complying with the CFMEU McConnell Dowell enterprise agreement demand.

It is admitted by Messrs Myles and Hall that their conduct in these respects was in contravention of s 346 of the FW Act.

1. It is admitted by Messrs Myles and Hall that they engaged in the conduct referred to above with intent to coerce –

* Coastal Steel to comply with the CFMEU Coastal Steel rates demand, and
* McConnell Dowell to comply with the CFMEU McConnell Dowell enterprise agreement demand,

in contravention of s 348 of the FW Act.

1. It is admitted by the CFMEU that, by reason of ss 363(1) and 793 of the FW Act, the actions and conduct of each of Messrs Myles and Hall is taken to be the action and conduct of the CFMEU and, that each contravention of the FW Act by each of Messrs Myles and Hall was also a contravention by the CFMEU.
2. Notwithstanding the respondents’ admissions, since the Director sought the making of declarations of contravention, it will be necessary for the court to form its own view on the question whether the facts as agreed provide a basis for findings that these contraventions did occur, and if so by reference to what conduct of the respondents.
3. Commencing with s 340, I do not accept that what the agreed statement referred to as McConnell Dowell’s right “to operate its business at the site in accordance with the Award” was a “workplace right” within the meaning of s 341 of the FW Act. The Award was not placed into evidence, and no particular provision of it was drawn to my attention. It is agreed that the Award “applied to and bound” McConnell Dowell, which I take to be a reference to s 47 of the FW Act. That would not, however, be enough to warrant the conclusion that McConnell Dowell’s right to operate its business was a benefit of the Award to which it was entitled for the purposes of s 341(1)(a).
4. Neither do I accept that McConnell Dowell had the right to vary or to terminate, or the right not to vary or not to terminate, an enterprise agreement. McConnell Dowell was not covered by an enterprise agreement, in which circumstances the procedures for which Div 7 of Pt 2-4 of the FW Act provided were irrelevant to it.
5. On the other hand, I accept that McConnell Dowell was able to initiate and to participate in the making of an enterprise agreement within the meaning of s 341(1)(b) and (2)(e) of the FW Act: s 172(2). That was a workplace right.
6. In the period leading to 5 March 2015, McConnell Dowell did not initiate, and did not participate in, the making of an enterprise agreement. That is to say, it did not exercise the workplace right referred to.
7. The next question is whether Messrs Myles and Hall took adverse action against McConnell Dowell. The only provision of the FW Act that would be relevant to that question was item 7(c) in the table to s 342(1). Although the parties’ agreement did not descend to particulars, they did agree that McConnell Dowell was an “independent contractor”, and that the action taken by Messrs Myles and Hall on 5 March 2015 was adverse action against it within the meaning of s 342(1). This can only have been a reference to the action that had the effect, directly or indirectly, of prejudicing McConnell Dowell in relation to a contract for services. McConnell Dowell was a party to two such contracts, one with the Port of Melbourne Corporation and one with Coastal Steel. There is no agreement that any employee of McConnell Dowell was prevented, or dissuaded, from entering the site, but it is agreed that the respondents’ blockade had the effect of preventing all vehicles from entering the site. This was, in my view, sufficient to engage the terms of item 7(c).
8. There remains the “because” aspect of s 340(1)(a) of the FW Act. It is an agreed fact that Messrs Myles and Hall took action against McConnell Dowell on 5 March 2015 because it “engaged in industrial activity or did not engage in industrial activity by not complying with the CFMEU McConnell Dowell Enterprise agreement demand”. This is effectively the same as an agreement that the action was taken because McConnell Dowell did not exercise the workplace right of making an enterprise agreement.
9. Accordingly, I find that, on 5 March 2015, Messrs Myles and Hall took adverse action against McConnell Dowell because it did not did not exercise the workplace right of initiating, or participating in, the making of an enterprise agreement, contrary to s 340(1)(a)(ii) of the FW Act.
10. In the case of Coastal Steel, I do not accept that what the agreed statement referred to as its right “to operate its business at the site in accordance with the Coastal [Steel] … agreement” was a “workplace right” within the meaning of s 341 of the FW Act. The agreement was not placed into evidence, and no particular provision of it was drawn to my attention. It is agreed that the agreement “applied to and bound” Coastal Steel, which I take to be a reference to s 52 of the FW Act. That would not, however, be enough to warrant the conclusion that Coastal Steel’s right to operate its business was a benefit of the Coastal Steel agreement to which it was entitled for the purposes of s 341(1)(a).
11. On the other hand, I accept that Coastal Steel was able to initiate, and to participate in, the making of an enterprise agreement within the meaning of s 341(1)(b) and (2)(e) of the FW Act: s 172(2); and to initiate, and to participate in, the variation or the termination of the Coastal Steel agreement within the meaning of s 341(1)(b) and (2)(e) of the FW Act: ss 207(1) and 219(1). They were workplace rights.
12. In the period leading to 5 March 2015, Coastal Steel did not initiate, and it did not participate in, the making of an enterprise agreement, the variation of the Coastal Steel agreement or the termination of that agreement. That is to say, it did not exercise the workplace rights referred to.
13. On 5 March 2015, Messrs Myles and Hall took adverse action against Coastal Steel. It was an independent contractor with a contract to perform work at the site. The action of Messrs Myles and Hall prevented its employees from entering the site that day – or at least prevented them from doing so for a period – with the result that those employees did not perform the work that they would normally have done. As noted above, while the entrances to the site were blocked, no vehicles entered the site. By their conduct, Messrs Myles and Hall prejudiced Coastal Steel in relation to its contract with McConnell Dowell. That was adverse action within the terms of item 7(c) in the table in s 342(1) of the FW Act.
14. Turning to the reasons for that adverse action, it is agreed that it occurred “because [Coastal Steel] had exercised a workplace right or not exercised a workplace right by not complying with the CFMEU Coastal Steel Fixing Rates Demand.” The nature of that demand has been referred to in para 17 above. It was not a demand that Coastal Steel exercise, or not exercise, any of the workplace rights referred to above. It is true that, pursuant to s 361 of the FW Act, it lay upon the respondents to prove that a reason for their actions was not a reason alleged by the Director, but the Amended Statement of Claim is indistinguishable in relevant respects from the agreed statement of facts. That is to say, the Director alleged, and the parties agreed, that the respondents had taken action for a reason which would not give rise to a contravention of s 340(1).
15. Accordingly, I find that the adverse action taken by Messrs Myles and Hall against Coastal Steel on 5 March 2015 did not amount to a contravention of s 340(1) of the FW Act.
16. My findings under s 343 of the FW Act are a reflex of those made under s 340. There is no difficulty in accepting the parties’ agreement that the conduct of Messrs Myles and Hall on 5 March 2015 amounted to coercion within the meaning given to that term by authorities which are now well-known, and do not need to be rehearsed here. The intent of that coercion was to prevail upon McConnell Dowell to exercise the workplace right of initiating, or participating in, the making of an enterprise agreement, contrary to s 343 of the FW Act. In the case of Coastal Steel, it was agreed that the conduct of Messrs Myles and Hall had the intent of coercing that company to meet the CFMEU Coastal Steel Fixing Rates Demand. That did not amount to coercion to exercise, not to exercise, or to exercise in a particular way, a workplace right. It was not in contravention of s 343.
17. Turning next to s 346 of the FW Act, the first question is whether McConnell Dowell or Coastal Steel engaged, or proposed to engage, in industrial activity. As noted above (paras 20 and 22 respectively) it is agreed that, by not complying with the demands placed upon them by Messrs Myles and Hall, both of these companies did engage in industrial activity. In the case of Coastal Steel, I would add that the circumstance that the relevant demand was not for the making, variation or termination of an enterprise agreement was neither here nor there. As I have found above in the context of s 341, adverse action was taken against both companies. It is agreed, and I accept, that the action was taken because McConnell Dowell and Coastal Steel did not comply with these demands. There were, in the circumstances, contraventions of s 346.
18. My findings under s 348 of the FW Act are a reflex of those made under s 346. As noted above, the conduct of Messrs Myles and Hall clearly amounted to coercion. The intent of the conduct was to prevail upon McConnell Dowell and Coastal Steel to comply with the demands referred to, that is to say, to engage in industrial activity. Each of Messrs Myles and Hall contravened s 348 in relation to each of these companies.
19. I have no reason not to accept the parties’ agreement that the actions of Messrs Myles and Hall on 5 March 2015 were also the actions of the CFMEU, by the operation of s 363 of the FW Act, and that their states of mind were likewise attributed to the CFMEU under subs (3) of that section. Each contravention by each of Messrs Myles and Hall was, therefore, also a contravention by the CFMEU.
20. In the light of the findings set out above, what are the appropriate penalties to be imposed on the respondents under s 546 of the FW Act? The maximum penalties available to the court are, in the cases of Messrs Myles and Hall, $10,200 and, in the case of the CFMEU, $51,000.
21. The conduct of the individual respondents was intended to disrupt, and did disrupt, the work of Coastal Steel, McConnell Dowell and their employees at the site on 5 March 2015. There is no agreement as to what that work was, or would have been had it not been disrupted. Neither is there any agreement as to how many employees of each of these companies would, but for the conduct complained of, have worked on the site that day. It is agreed that, at about 10 am, seven employees of Coastal Steel entered Webb Dock West and commenced work, but a more useful statistic would have been one which informed the court of the number of employees who were unable to enter the site.
22. Save for the circumstance that work was disrupted, there is no evidence as to the consequences of the respondents’ conduct. The court does not know, for example, whether any workers lost pay as a result of being unable to work, either at all or for a time, or what impact, if any, the disruption of work had on the progress of construction activities on the site. There is no agreement as to any loss or damage that was sustained by McConnell Dowell or Coastal Steel as a result of the disruption. On the agreed facts, there is no basis upon which the court could infer that the disruption was timed to maximise the loss or inconvenience that would be visited upon either of those companies.
23. The respondents’ conduct was deliberate and wilful, in the sense that it was consciously and earnestly carried out, but also in the sense that the very point of it, I would infer, was to disrupt the work of McConnell Dowell and Coastal Steel. It is not as though they were incidentally harmed in the course of some otherwise benign activity on the part of the respondents: harming those companies was the point of the conduct (albeit that, as I have said, there is no agreement as to the extent of the harm). It might be said, of course, that the essence of the delicts under the relevant sections of the FW Act is either retribution or coercion, so, in one sense, it takes the matter no further to observe that the contraventions were deliberate and wilful. But that circumstance is, nonetheless, proper to be given its appropriate weight in fixing penalties.
24. It is now well-established that deterrence, both specific and general, is the predominant purpose of civil penalties in a statutory regime such as that of the FW Act. The CFMEU is a registered organisation of substantial size, resources and influence. Any suggestion that it did not fully understand the operation of the provisions of the Act under which the Director proceeded could not be taken seriously. Indeed, its past record of encounters with these, or similar, provisions speaks loudly of its familiarity with them. That record, to which I refer further below, justifies only one inference: that the CFMEU has done nothing, over the years, to cause its own staff to comply with the law. Indeed, the inference that the CFMEU will always prefer its own interests, whatever they may be from time to time, to compliance with the law is a compelling one. This case presented yet another instance of that pattern of behaviour. The CFMEU and its members may be grateful that the staff of the banks and other financial institutions to whom it has, I presume, entrusted its considerable assets do not take the same approach to compliance with the law.
25. It was submitted on behalf of the Director – and the respondents took no issue with the correctness of the submission – that there had been 118 separate legal proceedings where the CFMEU was found to have contravened industrial legislation or committed a civil or criminal contempt. Those proceedings were listed in a table, the earliest judgment on which was given in December 2000. The CFMEU’s record of contravention has become so extensive that it presents a challenge to convey, both accurately and comprehensively, the substance of the findings made in particular cases. In what follows in the succeeding paragraph below, I have confined myself to coercion-related decisions made in the five years before March 2015 (not thereby implying, I stress, that the period of presently relevant contraventions is limited in this way).
26. The instances, with the Director’s notes summarising the nature of the contravening conduct, follow below:

* *Williams v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2010] FCA 754

At the West Gate Bridge site, respondents authorised and organised industrial action, took action with intent to coerce John Holland to employ former employees of a subcontractor, and took action with intent to coerce John Holland and the subcontractor to make EBAs.

* *Hardwick v Australian Manufacturing Workers’ Union* [2010] FCA 818

At Patricia-Baleen Gas Plant site, various unions (including the CFMEU) and organisers took various actions (including threats, pickets and protests) with intent to coerce subcontractors at the site to enter union building agreements.

* *White v Construction Forestry Mining and Energy Union* [2011] FCA 192

Up to 9 organisers of the CFMEU were involved in or organised industrial action on 3 sites for 1 day (strikes) and 8 sites for 4 hours (car blockades and late attendance to work) with intent to coerce Abigroup to employ and allocate particular responsibilities to redundant employees.

* *Alfred v Construction, Forestry, Mining and Energy Union* [2011] FCA 556

The CFMEU through various officials established and maintained a total ban on the performance of work at the Melbourne Markets site and established and maintained a blockade of the main site entrance for some 10 days with intent to coerce Fulton Hogan to agree to make an EBA and/or terminate/vary an existing EBA.

* *Gregor v Construction Forestry Mining and Energy Union* [2011] FCA 808

The CFMEU and several officials engaged in unlawful industrial action and blockades at several building sites on several occasions. The intent of the coercion was to force Caelli to employ an OHS representative.

* *Helal v Brookfield Multiplex Limited* [2012] FCA 653

A CFMEU officer threatened to organise or take action with intent to coerce a company to employ two people as building employees. This occurred in an aggressive telephone discussion between a CFMEU officer and the company’s general manager after the company dismissed the employees for misconduct.

* *Director of the Fair Work Building Inspectorate v CFMEU* [2013] FMCA 160

A CFMEU officer threatened with assault and repeatedly abused with obscene language a building company’s site manager with intent to coerce the company to comply with his request that the site shop steward be permitted to attend site inductions.

* *Director of the Fair Work Building Industry Inspectorate v CFMEU* [2013] FCA 515

CFMEU and six representatives organised industrial action on five St Hilliers Victorian construction sites (Ararat prison, Watsonia Military Camp, Carlton apartment and social housing project, Ashwood apartment project and Canterbury housing complex) with the intent of coercing it to re-employ a delegate of the CFMEU.

* *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2013] FCA 846

Proceedings against the CFMEU, CEPU and seven union officials for taking - or threatening to take - unlawful industrial action against Watpac Construction (Qld) Pty Ltd. The action took place at three Watpac construction sites in Queensland with the intent to coerce Watpac to negotiate an EBA with the CFMEU, and not to engage subcontractors with non-union EBAs that had or did not have enterprise agreements with the union.

* *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining & Energy Union* [2014] FCA 126

CFMEU official Joseph McDonald attended the Zen Apartments constructions site on 13 September 2012 and threatened to organise a picket line unless the head contractor agreed to pay outstanding entitlements. On 17 September 2012 Joseph McDonald returned to the site and organised a picket preventing workers from entering the site

* *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2014] FCA 160

CFMEU official Michael McDermott attended the Harris Scarfe construction project and threatened to organise industrial action unless a former employee was reinstated. Each of the respondents contravened s 355 of the [FW Act] by:

(a) organising employees of BD Steel Fixing (SA) Pty Ltd to agree not to work until Mr Dominick Lewis was reinstated; and

(b) threatening that employees of BD Steel Fixing (SA) Pty Ltd would not work until Mr Lewis was reinstated,

with the intention to coerce BD Steel Fixing (SA) Pty Ltd to accede to the demand to reinstate Mr Lewis.

* *Brookfield Multiplex FSH Contractor Pty Limited v McDonald* [2014] FCA 359

CFMEU officials Mr Joseph McDonald and Graham Pallott attended the Fiona Stanley Hospital construction site and addressed a meeting of 400 workers. As a result, the workforce did not attend work at the site on 15 and 16 February 2013.

* *Brookfield Multiplex Engineering and Infrastructure Pty Ltd v McDonald* [2014] FCA 389

CFMEU officials Joseph McDonald and Walter Molina attended the Mundaring Water Treatment Plant construction site on 25 March 2013 and made demands of Brookfield Multiplex to perform a safety inspection and for workers to remain in the sheds following a safety incident on 23 March 2013. Brookfield Multiplex refused and Joseph McDonald and Walter Molina organised 150 employees to take industrial action. Joseph McDonald and Walter Molina attended the site again on 26 and 27 March 2013 engaging in coercive conduct and again organising industrial action. On 27 March 2013, Joseph McDonald was involved in a scuffle threatening employees attempting to enter the site. Joseph McDonald also admitted to organising industrial action during an earlier incident on 4 October 2012.

1. It is often said that the penalty imposed upon a person for contravention of a statutory provision should be proportionate to the nature, gravity and circumstances of the person’s contravening conduct. To the extent that one views the imposition of a penalty as a kind of punishment - and undoubtedly it does have that dimension - I agree. As one is told in the criminal context, the punishment should fit the crime. Correspondingly, to the extent that one views the imposition of a penalty as a form of deterrent, specific or general, the penalty imposed should reflect what is required to make the deterrent effective in the circumstances of the case. Where the contravener has a record such as that of the CFMEU, what Mansfield J described as “a particularly persuasive form of deterrence” is called for: *Director of the Fair Work Building Industry Inspectorate v Cartledge* [2014] FCA 1047 at [93].
2. The importance of deterrence in the determination of civil penalties has recently been re-emphasised in *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2016) 326 ALR 476, 490 [55]:

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.

With whatever measure of success only time will tell, but, in the case of the CFMEU, I should aim to fix a penalty that will be “sufficiently high to deter repetition”.

1. For the CFMEU, the case is almost wholly devoid of any mitigating circumstances. The facts of the matter as such do not present any. The only thing that might be faintly said is that the CFMEU co-operated with the Director to prepare the Statement of Agreed Facts, thereby avoiding what would have been, I was told, a costly trial. The circumstances are such, however, as to suggest that it was the avoidance of its own costs that the CFMEU had chiefly in mind when it agreed to prepare the statement. By the time of the filing of the statement on 14 November 2016, the respondents had filed their Notices of Addresses for Service, a Defence, and an Amended Defence. In addition to his pleadings, the Director had filed 7 witness statements (a total of 24 pages without annexures or attachments) and had caused 10 subpoenas to be issued. The respondents filed no witness statements. Ultimately, the Statement of Agreed Facts corresponded closely with the Director’s pleaded case.
2. As I would understand it, the CFMEU’s justification for not coming to grips with the Director’s allegations at an earlier date is that Messrs Myles and Hall claimed that it would expose them to penal liability if they assisted their employer in the preparation of a defence to those allegations. So much may be accepted, but there is, so far as I can see, no explanation of why the position ultimately adopted by the respondents, including those organisers, could not have been adopted at the time when they filed their original Defence. That *would* have amounted to useful co-operation and led to the saving of public resources. As things occurred, however, I can only describe the position taken by the CFMEU as sitting on its hands while the Director undertook the time-intensive task of preparing his evidentiary case for trial.
3. I am not disposed to view the CFMEU’s conduct of the present litigation as providing any support for a plea in mitigation. Indeed, I would associate myself with what Mortimer J said in *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2016] FCA 436 at [142]:

I also consider it relevant to note from the applicant’s table that a large proportion of the contraventions and penalties stem from agreed facts and agreed ranges of penalty. In other words, the CFMEU (and the Victoria/Tasmania Branch of its Construction and General Division) have a history of eventually admitting to contraventions. In some contexts, this might be seen as a mitigating factor. I do not see it in that way, in all of the circumstances. Rather it seems to me to be part of a deliberate and calculated strategy by the CFMEU to engage in whatever action, and make whatever threats, it wishes, without regard to the law, and then, once a prosecution is brought, to seek to negotiate its way into a position in which the penalties for its actions can be tolerated as the price of doing its industrial business.

On appeal, it was held that her Honour was justified in describing the CFMEU’s approach to litigation in these terms: *Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner* [2016] FCAFC 184 at [18] and [94].

1. In respect of the CFMEU’s contraventions of s 348 of the FW Act constituted by the conduct of Messrs Myles and Hall on 5 March 2015, I would impose a penalty of $45,000 in each case, a total of $90,000. Having regard to the association between the conduct of these two organisers, in time, place and purpose, however, I consider that a total penalty of that order would be somewhat more than would be appropriate. For that reason, the penalty to be imposed will be $42,000 in each case, a total of $84,000.
2. Section 556 of the FW Act provides as follows:

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.

Because the parties are agreed that everything relevantly done at the site on 5 March 2015 by each of Messrs Myles and Hall amounted to undifferentiated “action” by him within the meaning of ss 342(1), 343(1) and 348 of the FW Act, the effect of s 556 is that, in each case, a penalty may be imposed for the contravention of one only of ss 340, 343, 346 and 348. Correspondingly, two penalties may be imposed on the CFMEU: one in respect of the “particular conduct” of each of Messrs Myles and Hall. Having imposed penalties for contraventions of s 348, it is not open to the court to impose any further penalties upon the CFMEU.

1. Turning to the circumstances of the individual respondents, I have been referred to four occasions on which Mr Myles has been penalised for his involvement in contraventions of coercion-related legislation. Ordered according to date of judgment, those occasions, with the Director’s notes summarising the nature of the contravening conduct, were as follows:

* Director of the Fair Work Building Industry Inspectorate v CFMEU [2013] FCA 846

The action took place at three Watpac construction sites in Queensland with the intent to coerce Watpac to negotiate an EBA with the CFMEU, and not to engage subcontractors with non-union EBAs that had or did not have enterprise agreements with the union. Myles, as well as other union officials, were found to have induced, counselled, procured and organised the Watpac employees not to commence work as scheduled.

* *Director, Fair Work Building Industry Inspectorate v Cradden* [2015] FCA 614

In March 2012, Grocon Constructors Queensland Pty Ltd was the managing contractor of a Queensland Government Housing project at South Brisbane known as the Common Ground Project. Between 13 March 2012 and 21 March 2012, the CFMEU engaged in activities to coerce Grocon to agree to make a building enterprise agreement. The individual respondents, who were at the time either officers of the CFMEU or, in one case, a CFMEU delegate, were the persons who, on behalf of the CFMEU, engaged in that coercive action. The action involved:

(a) the parking of vehicles in a work zone on Hope Street to obstruct access to the Common Ground Project site;

(b) the placing of a CFMEU van on Hope Street and gathering around a barbecue under an awning attached to that van such that there was a practical impediment to entry to the site; and

(c) upsetting, intimidating, abusing, and threatening sundry Grocon employees and subcontractors and their employees who sought access to the Common Ground Project site.

* *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (The Mitcham Rail Case)* [2015] FCA 1173

On 1 August 2013, CFMEU official Joseph Myles threatened that if John Holland, the principal contractor responsible for construction at the Mitcham train station (the Project) did not comply with his request to employ or otherwise engage a worker on the Project as a CFMEU delegate, Mr Myles would organise a large number of people to occupy the entrance to the site of the Project and stop or prevent building works being carried out at the site. On 22 August 2013, Mr Myles directed, advised, counselled, encouraged, induced, incited or procured the employees of John Holland’s subcontractors not to work at the site that day; advised, counselled, encouraged, induced, incited or procured managers of the subcontractors to direct their employees not to work at the site until the CFMEU’s dispute with John Holland was resolved; and threatened the managing director of a John Holland subcontractor that if the subcontractor’s employees presented for work at the site the following day, the subcontractor’s company would not have a job in Melbourne.

* *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2016] FCA 436

On 16 May 2013, CFMEU official Joseph Myles organised approximately 20 persons with approximately 9 vehicles to blockade vehicular access to the Maribyrnong River Project construction site, threatened to stop a concrete pour on the following day and threatened to conduct a war against the Project and prevent the pouring of any concrete with the intent of coercing John Holland and Abigroup to appoint a CFMEU delegate to the Project.

1. Although the judgments in three of the above proceedings post-dated the conduct of Mr Myles of which complaint is made in the present case, in each instance the proceeding had been commenced before that conduct occurred. Dealing with an analogous situation in *Cradden*, Logan J said ([2015] FCA 614 at [23]-[24]):

23 At the time when he engaged in the conduct which I have described, Mr Myles had engaged already in other conduct which was later found to be in contravention of applicable industrial legislation; see *Director, Fair Work Building Industry Inspectorate v Myles & Ors* [2014] FCCA 1429 at [31] to [38], conduct which saw him fined $4,950 in respect of contraventions of s 500 of the *Fair Work Act 2009* (Cth) (Fair Work Act), that occurred in February 2010; see also *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2013] FCA 846 in which a penalty of $99,000 was imposed on the CFMEU for breaches of s 44 and s 43 of the BCII Act referrable to the actions, amongst others, of Mr Myles.

24 The court cases concerning those actions were not finalised until after Mr Myles’ conduct in 2012 but the contravening conduct concerned occurred before the events in question in this case. I have no evidence from Mr Myles, or for that matter, any of the other individual respondents which would enable in mitigation a view to be formed that prior to the outcomes in those other cases, Mr Myles honestly and reasonably formed a view that particular actions on his part were justified or excused at law. I do not see that the fact that the contraventions were found by judicial pronouncement afterwards means that I should now regard Mr Myles as someone who does not have a propensity to engage in contravening conduct. Nor, for the reason given, do I regard him as someone who had a particular belief, mistaken but honest, from which he was shaken by later judicial pronouncement as to the lawfulness of earlier behaviours.

I agree with his Honour’s assessment that subsequent findings in a proceeding which commenced prior to the occasion of the instant conduct may be taken into account. They demonstrate, at least, that the commencement of a proceeding, drawing attention to the requirements of the law in the most impactful way, has been ineffective in causing the person concerned to observe those requirements.

1. Mr Hall has not previously been penalised for contravention of an industrial law.
2. In respects other than their prior records, I would apply to Messrs Myles and Hall what I have said above in relation to the CFMEU, and to the contraventions on 5 March 2015 generally.
3. In respect of Mr Myles’ contraventions of s 348 of the FW Act on 5 March 2015, I would impose a penalty of $7,500.
4. In respect of Mr Hall’s contraventions of s 348 of the FW Act on 5 March 2015, I would impose a penalty of $4,500.
5. As noted above in the context of the CFMEU, the penalties imposed for these contraventions of s 348 of the FW Act have the result that Messrs Myles and Hall may not be penalised, for the same conduct, under ss 340, 343 or 346.
6. It remains only to consider the declarations sought by the Director. Generally, where the nature of the contravention for which a penalty is being imposed appears sufficiently from the order imposing the penalty, there is, in my view, little point in declaring, additionally, that the conduct in question was a contravention of the section concerned. However, since (by s 556) the court is not permitted, in relation to any one instance of conduct, to impose a penalty in respect of the contravention of more than one provision of the FW Act, the Director submitted, and I accept, that each contravention which has been found to have occurred should be the subject of the formal record.
7. It was submitted on behalf of the Director that there should be a declaration to reflect each of the four contraventions of each of Mr Myles and Mr Hall (ie four declarations in respect of each of them) and, in every case, a declaration reflecting the CFMEU’s corresponding contravention brought about by the deeming effect of ss 363(1)(b) of the FW Act (a total of eight declarations). I accept the first part of this submission, but not the second. The fact of each contravention by the CFMEU may, in my view, be sufficiently recorded by inclusion in the relevant declaration of contravention by the relevant organiser of the words “an officer of the first respondent acting as such within the meaning of s 363(1)(b) of the *Fair Work Act 2009* (Cth)”.

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

Associate:

Dated: 8 February 2017

SCHEDULE OF PARTIES

|  |  |
| --- | --- |
|  |  |
| Respondents |  |
| Fourth Respondent: | DREW MCDONALD |
| Fifth Respondent: | THEO THEODOROU |