FEDERAL COURT OF AUSTRALIA

Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Broadway on Ann Case) [2018] FCAFC 126

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| Appeal from: | *Australian Building and Construction Commissioner v Hanna (No 3)* [2017] FCCA 2519 |
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| File number: |  |
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| Judges: | **TRACEY, LOGAN AND BROMWICH JJ** |
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| Date of judgment: | 14 August 2018 |
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| Catchwords: | **INDUSTRIAL LAW** –appeal from a judgment of the Federal Circuit Court – where the primary judge had imposed civil penalties on the Construction, Forestry, Maritime, Mining and Energy Union in the maximum amounts available for six contraventions of s 500 of the *Fair Work Act 2009* (Cth) – whether the primary judge erred by failing to treat the appellant’s contraventions as arising out of a course of conduct – whether the primary judge erred by finding that the union official was the public face of the appellant – whether the primary judge erred by treating each of the six contraventions as being in the worst possible category – whether the primary judge erred by imposing a penalty that was, in all the circumstances, manifestly excessive |
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| Legislation: | *Builders Labourers’ Federation (Cancellation of Registration) Act 1986* (Cth)  *Competition and Consumer Act 2010* (Cth)  *Conciliation and Arbitration Act 1904* (Cth) ss 38, 38(d), 44, 44(1), 119  *Crimes Act 1914* (Cth) ss 4AA, 4B(3)  *Fair Work Act 2009* (Cth) Pt 3-4, ss 12, 348, 357A(1), 484, 486, 487, 500, 512, 539(1), 539(2), 540, 544, 546(1), 550, 550(1), 550(2)(c), 557, 557(1), 557(2), 793  *Fair Work (Registered Organisations) Act 2009* (Cth)  *Industrial Relations Act 1988* (Cth) s 178  *Workplace Relations Act 1996* (Cth)  *Work Health and Safety Act 2011* (Qld) |
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| Cases cited: | *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 249 FCR 458; [2017] FCAFC 53  *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Laverton North and Cheltenham Premises Case)* [2018] FCAFC 88  *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68; 271 IR 321; [2017] FCAFC 113  *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (Werribee Shopping Centre Case)* [2017] FCA 1235  *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Footscray Station Case)* [2017] FCA 1555  *Australian Building and Construction Commissioner v Hall* [2018] FCAFC 83  *Australian Building and Construction Commissioner v Hanna (No 2)* [2017] FCCA 1904  *Australian Building and Construction Commissioner v Hanna (No 3)* [2017] FCCA 2519  *Australian Building and Construction Commissioner v Hanna* [2017] FCCA 1257  *Australian Competition and Consumer Commission v The Construction, Forestry, Mining and Energy Union (No 4)* [2018] FCA 684  *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640; [2013] HCA 640  *Australian Federation of Air Pilots v Leach Aero Services Pty Ltd* [1988] AILR 388; [1988] FCA 439  *Barbaro v The Queen* (2014) 253 CLR 58; [2014] HCA 2  *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482; [2015] HCA 46  *Construction Forestry Mining and Energy Union v North Goonyella Coal Mine Pty Ltd* [2013] FCA 1444  *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner* *(The Non-Indemnification Personal Payment Case)* [2018] FCAFC 97  *Construction, Forestry, Mining and Energy Union v Cahill* (2010) 194 IR 461; [2010] FCAFC 39  *Construction, Forestry, Mining and Energy Union v Williams* (2009) 191 IR 445; [2009] FCAFC 171  *Cruz v The Queen* [2017] ACTCA 48  *Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [No 2]* [2015] FCA 1213  *Director of the Fair Work Building Industry Inspectorate v Cartledge* [2014] FCA 1047  *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 1462  *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 407  *DL v The Queen* [2018] HCA 32  *Elias v The Queen* (2013) 248 CLR 483  *Gapes v Commercial Bank of Australia Ltd* (1979) 27 ALR 87; 38 FLR 431; [1979] FCA 99  *Hili v The Queen* (2010) 242 CLR 520; [2010] HCA 45  *House v The King* (1936) 55 CLR 499  *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25  *Mill v The Queen* (1988) 166 CLR 59  *Pearce v The Queen* (1998) 194 CLR 610  *QR Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union* (2010) 204 IR 142; [2010] FCAFC 150  *R v De Simoni* (1981) 147 CLR 383  *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249; [2012] FCAFC 20  *Trade Practices Commission v CSR Ltd* (1991) ATPR 41‑076; [1990] FCA 762  *Vass v Permanent Trustee Co. Limited* (1999) 198 CLR 334  *Veen v The Queen [No 2]* (1988) 164 CLR 465  *Wong v The Queen* (2001) 207 CLR 584; [2001] HCA 64 |
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| Date of hearing: | 23 May 2018 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Counsel for the Appellant: | Mr W L Friend QC with Mr C A Massy |
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| Solicitor for the Appellant: | Hall Payne Lawyers |
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| Counsel for the Respondent: | Mr C J Murdoch QC with Ms A C Freeman |
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| Solicitor for the Respondent: | K & L Gates |

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| **Table of Corrections** |  |
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| 14 August 2018 | Order 2 in sub-section 3, the total penalty was changed from $360,000 to $306,000 |
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| 29 October 2018 | At [108], the number “487” has been changed to “478” |

ORDERS

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|  | | QUD 610 of 2017 |
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| BETWEEN: | CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION  Appellant | |
| AND: | AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER  Respondent | |

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| JUDGES: | TRACEY, LOGAN AND BROMWICH JJ |
| DATE OF ORDER: | 14 AUGUST 2018 |

THE COURT ORDERS THAT:

1. The orders of the Federal Circuit Court made on 19 October 2017 be set aside.
2. In lieu thereof, it be declared and ordered as follows:

**THE COURT DECLARES THAT:**

1. Mr David Hanna, while the holder of an entry permit issued under s 512 of the *Fair Work Act 2009* (Cth) (“the FW Act”):

(a) exercised, or attempted to exercise, his rights as a permit holder under Part 3-4 of the FW Act by entering, on 10 February 2015, the “Broadway on Ann” Project (“the Project”) site for the purpose of having discussions under s 484 of the FW Act by holding discussions with one or more employees who:

(i) performed work on the premises;

(ii) whose industrial interests Mr Hanna’s organisation, the Construction Forestry Mining and Energy Union, was entitled to represent; and

(iii) who wished to participate in those discussions;

2. In contravention of s 500 of the FW Act, on 10 February 2015, at the Project, the Second Respondent, the Construction, Forestry, Mining and Energy Union, was, pursuant to s 550 of the FW Act, involved in the contravention of s 500 by Mr Hanna who, in the exercise or attempted exercise of the rights referred to in paragraph 1 above, acted in an improper manner by:

(a) entering the Project without having given a notice of entry under s 487 of the FW Act;

(b) remaining on the premises despite requests to leave;

(c) when asked if he had a right of entry permit, responding by raising his hand with his middle finger extended and saying that he did not need one;

(d) squirting water at a person validly engaged to work on the Project, which struck the person’s face, shirt and mobile phone;

(e) stating, “Take that phone away or I’ll fucking bury it down your throat, you ask me if you want to take a picture of me, you ask me”; and

(f) using an employee’s swipe card to swipe out a number of employees engaged on the Project, the effect of which was that the occupier of the premises did not have a record of which employees had left the premises and which had not.

**AND THE COURT ORDERS THAT:**

3. Pursuant to s 546(1) of the FW Act, within 28 days, the Second Respondent pay pecuniary penalties fixed in the sum of $51,000 for each of the six contraventions set out in paragraph 2 above (totalling $306,000).

4. Pursuant to s 546(3)(a) of the FW Act, the penalties imposed on the Second Respondent be paid to the Commonwealth.

1. The appeal otherwise be dismissed.

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

REASONS FOR JUDGMENT

# TRACEY J:

1. I have had the considerable advantage of reading in draft the judgment prepared by Logan J. I agree with his Honour’s reasons and the orders which he proposes. I would add the following observations in relation to the determination of penalties to be imposed on the appellant. Like Logan J I will refer to the appellant as the CFMEU in these reasons.
2. Commonwealth industrial regulation commenced with the enactment of the *Conciliation and Arbitration Act 1904* (Cth) (“the Act”). Contraventions of some of its provisions, which created offences, attracted criminal penalties. Other contraventions were met with civil penalties. Until relatively recently, criminal offences outnumbered civil remedy provisions: see the review of authorities in *Gapes v Commercial Bank of Australia Ltd* (1979) 27 ALR 87; 38 FLR 431; [1979] FCA 99.
3. One of the provisions of the original Act was s 38. That section empowered the former Commonwealth Court of Conciliation and Arbitration to impose penalties for any breach or non-observance of any term of an order or award made under the Act: see s 38(d). Similar powers were given to Courts of summary jurisdiction in the States: see s 44(1). Sections 38 and 44, as subsequently amended and re-enacted, became s 119 of the Act and, later, s 178 of the *Industrial Relations Act 1988* (Cth).
4. Conflicting authorities emerged as to whether s 119 and similar provisions were to be treated as civil or criminal: seeA Freibergand RC McCallum, “The Enforcement of Federal Awards: Civil or Criminal Penalties?” (1979) *Australian Business Law Review* 246. That conflict was ultimately resolved in favour of the civil characterisation. During this period the courts applied similar principles when fixing penalties under s 119 and its predecessors as they did for criminal offences: see, eg, *Australian Federation of Air Pilots v Leach Aero Services Pty Ltd* [1988] AILR 388; [1988] FCA 439 (Gray J).
5. In referring to these conflicts and their consequences the plurality in the High Court in *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 at 497; [2015] HCA 46 (“the *Civil Penalties Case*”) at [17] said that:

In holding [in *Gapes*] that s 119 created a civil penalty as opposed to criminal liability and, therefore, that the applicable procedure and standard of proof were civil procedure and proof on the balance of probabilities as opposed to criminal procedure and proof beyond reasonable doubt, J B Sweeney J (with whom Smithers, Evatt, Deane and Fisher JJ agreed) observed the clear distinction that had been maintained throughout the history of the *Conciliation and Arbitration Act* between s 119 (and its predecessors) and other provisions of the Act that imposed criminal liability and criminal penalties of lesser amount. Sweeney J deduced that the legislature had quite consciously adopted the distinction and maintained it for the reason that “[c]onviction always carried a stigma ...  [A] conviction and fine even though lesser in amount than a penalty ordered to be paid would be regarded as harsher treatment”.

1. When the *Workplace Relations Act 1996* (Cth) superseded the *Industrial Relations Act 1988* (Cth), many of the provisions in the former Act which imposed criminal penalties were replaced by civil remedy provisions.
2. Having regard to this history, it was not, therefore, surprising that many of the principles which had guided the fixing of criminal penalties were adapted by the Court when fixing civil penalties. They included proportionality, consistency, avoidance of double punishment, deterrence, both personal and general, and totality (thereby avoiding oppressive or crushing penalties): see *Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [No 2]* [2015] FCA 1213 at [13]-[25] (Tracey J) .
3. These principles had become well settled by 2014: see *Director of the Fair Work Building Industry Inspectorate v Cartledge* [2014] FCA 1047 at [50] (Mansfield J).
4. Some modifications and differences in emphasis in the way in which the principles are framed have, however, followed the High Court’s decision in the *Civil Penalties Case*.
5. The predominant purpose of civil penalty provisions is deterrence, both specific and general: see the *Civil Penalties Case* at 506 [55] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).
6. The Court emphasised the pre-eminence of deterrence as a guiding principle where the fixing of civil penalties is concerned. In their joint judgment, their Honours said (at 506 [55]) that:

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*, 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.”

(Citations omitted.)

1. The comments of Keane J in the same case (at 523-524 [110]) were equally forceful:

It is because the Commissioner may, on occasion, be too pragmatic in taking such a stance that the court must exercise its function to ensure that the penalty imposed is just, bearing in mind competing considerations of principle, including that of equality before the law and the need to maintain effective deterrence to other potential contraveners. In this latter regard, in *Australian Competition and Consumer Commission v TPG Internet Pty Ltd*, French CJ, Crennan, Bell and Keane JJ approved the statement by the Full Court of the Federal Court in *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* that a civil penalty for a contravention of the law:

“must be fixed with a view to ensuring that the penalty is not such as to be regarded by [the] offender or others as an acceptable cost of doing business.”

(Citations omitted.)

1. In *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner* *(The Non-Indemnification Personal Payment Case)* [2018] FCAFC 97 the Full Court (Allsop CJ, White and O’Callaghan JJ) reflected on the implications of the *Civil Penalties Case* for the fixing of civil penalties under the *Fair Work Act 2009* (Cth) (“the FW Act”). Their Honours confirmed that criminal sentencing concepts such a retribution, denunciation and rehabilitation had no part to play in fixing civil penalties: see at [19]. They continued:

20 Relevant factors in the overall assessment of penalty were helpfully listed by French J in CSR. They have been adopted in many cases. For present purposes, they can be restated as follows: the nature, character and seriousness of the conduct; the loss and damage caused; the circumstances in which the conduct took place; the size of the contravener and its degree of power; the deliberateness of the conduct and the time over which it occurred; the degree of involvement of senior officials or management; the culture of the organisation as to compliance or contravention; and, any co-operation with the regulator and contrition.

21 The seriousness of the contravention and other features of the conduct which may be seen as relevant to it (here, the seriousness of interruption of a concrete pour, the seriousness of the threats of repetition, the deliberateness of the contravening of the Act, and the exhibited apparent sense of impunity in undertaking contravening conduct) find their place in understanding the degree of deterrence that is necessary to be reflected in the size of the penalty: *Flight Centre Ltd v Australian Competition and Consumer Commission (No 2)* [2018] FCAFC 53 at [71].

22 The overwhelming importance of deterrence as the protective purpose of the penalty does not exclude the need to determine a penalty which is proportionate to the contravening conduct. The history of contravention is to be taken into account in fixing the proper level of penalty for the proportionate response to the contravention in question. Proportionality has within it the need to characterise the seriousness of the contravention. Proportionality of penal response to a contravention assessed by reference to its seriousness and gravity is an essential characteristic of the application of the statute. The penal response is for that contravention, not earlier contraventions: *Veen v The Queen [No 2]* [1988] HCA 14; 164 CLR 465 at 477-478. Prior contraventions may reveal an apparent disregard for the Act and the need for deterrence by a penalty at a level appropriate to achieve that objective. It is to be borne in mind, however, that it is for the conduct in question that the penalty is imposed, not for prior conduct.

1. A distinction is to be drawn between the need to ensure that a contravenor is not doubly penalised for past and present misconduct and the consideration of historic misconduct for the purpose of assessing the need for specific deterrence of a recidivist organisation. As Jessup J observed in *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 1462 at [8]:

8. In giving weight to the Union’s record of contravention, as I shall do, the court is not using the present occasion to supplement the penalties imposed for different conduct on previous occasions. Rather, the court is giving appropriate recognition to what is, on any view, an important purpose of the regime of penalties for which the legislation provides: deterrence. Of all purposes, that is the most strongly linked to the public interest in compliance with the law. If contravention of a law is visited with penal outcomes which are demonstrably inadequate to achieve the purpose of the law, it might as well not be a law at all. It is in this sense, in my view, that the principle of proportionality is amply reflected in the imposition of a penalty which takes due account of the importance of specific deterrence.

1. In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 249 FCR 458; [2017] FCAFC 53 (“the *Perth Airport Case*”)Dowsett and Rares JJ (at 481 [100]-[101]) made these general observations about the need for industrial laws to be obeyed and the penal consequences of breaches:

100 In a liberal democracy, it is assumed that citizens, corporations and other organisations will comply with the law. Such compliance is not a matter of choice. The community does not accept that a citizen, corporation or other organisation may choose to break the law and simply pay the penalty. The courts certainly do not accept that proposition. Such acceptance would pose a serious threat to the rule of law upon which our society is based. It would undermine the authority of Parliament and could lead to the public perception that the judiciary is involved in a process which is pointless, if not ridiculous.

101 The Parliament’s purpose in legislating to provide that particular proscribed conduct will attract a civil penalty was to deter persons, including but not limited to trade unions or corporations, from engaging or continuing to engage in such conduct. A civil penalty would lose its utility if the person on whom it was imposed simply treated it as a cost of continuing to carry on with the very conduct that had just been penalised.

See also *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68 at 88; [2017] FCAFC 113 at [98] (Dowsett, Greenwood and Wigney JJ).

1. These principles are to be observed in the fixing of any civil penalties under the FW Act. All relevant considerations must be taken into account with a view to determining an appropriate penalty.
2. Over recent years I have become increasingly concerned about the ongoing misconduct of the CFMEU and its officials and the implications of this conduct when penalties are being determined. These misgivings have been expressed in a series of judgments.
3. In *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 407, I made the following comments:

106 The circumstances of these cases were not identical to those in the present case. They, nonetheless, bespeak a deplorable attitude, on the part of the CFMEU, to its legal obligations and the statutory processes which govern relations between unions and employers in this country. This ongoing willingness to engage in contravening conduct must weigh heavily when the need for both specific and general deterrence is brought to account.

107 The CFMEU is not to be punished again for its earlier misconduct. It is, however, to be punished more severely than it would have been had it had no adverse record or been responsible for only a few isolated incidents over a period of many years. Its continued willingness to engage in contravening conduct supports the view that earlier penalties, some of them severe, have not had a deterrent effect: cf *Veen v R (No 2)* (1988) 164 CLR 465 at 477-8.

1. In *Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [No 2]* [2015] FCA 1213 at [63] I said that:

The longer such recidivism continues the more likely it is that this consideration will carry greater weight than the principle that the maximum available penalty must be reserved for the worst possible offending.

1. More recently, in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (Werribee Shopping Centre Case)* [2017] FCA 1235 at [32], I observed that:

Having regard to the history of offending by the CFMEU to which I have referred, it may be doubted that any penalty falling within the available range for contraventions of the kind presently under consideration would be “sufficiently high to deter repetition”. Any penalty will be paid and treated as a necessary cost of enforcing the CFMEU’s demand that all workers on certain classes of construction sites be union members.

1. Again, in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Footscray Station Case)* [2017] FCA 1555 at [53], I said:

In *Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1213 at [63] I observed that the longer that the CFMEU’s recidivism continued, the greater the weight which would be accorded to specific deterrence when fixing appropriate penalties.

1. Such comments (and many others to like effect by other members of the Court and the Federal Circuit Court) over recent years have appeared in published judgments and must be taken to be well known to the officials who constitute the governing councils of the CFMEU. In many of these cases penalties have been imposed because of the failure of CFMEU officials who hold entry permits under the Act to comply with the requirements of Part 3-4 of the FW Act. They have also involved contraventions of s 500 of the FW Act in the course of these site entries.
2. The contravening conduct has continued unabated to a point where there is an irresistible inference that the CFMEU has determined that its officials will not comply with the requirements of the FW Act with which it disagrees. If this results in civil penalties being imposed they will be paid and treated as a cost of the union pursuing its industrial ends. The union simply regards itself as free to disobey the law.
3. The Court will not, lightly, decide to impose the maximum available penalty. Each case must be considered on its merits and in a principled manner.
4. The features of the present case and the context in which they arise, which, in my view, warrant the imposition of the maximum available penalties on the CFMEU, are:

* The many decisions of the Court over the past 15 years in which the CFMEU has been found liable and penalised for failures to comply with entry requirements on building sites and for the misconduct of its officials whilst exercising rights of entry on those sites.
* The failure of the CFMEU to respond to these repeated findings by acknowledging error and implementing remedial measures.
* The absence of any contrition for the earlier offending.
* The absence of any contrition for the present offending.
* The ongoing willingness of the CFMEU to pay the pecuniary penalties imposed by the Court by drawing on its considerable financial resources.
* The fact that it was a State Divisional President of the CFMEU who was found to have engaged in multiple contraventions on the site.
* The blatant and public assertion by such a senior official that he would not comply with the notice requirements imposed by the FW Act.

1. The absence of contrition does not justify the imposition of a higher penalty than might otherwise be appropriate. It is, however, relevant, in considering the extent of the CFMEU’s recidivism.
2. These considerations combine, in my view, to emphasise the objective seriousness of the CFMEU’s conduct, acting through its officials. They bespeak deliberate abuse of the CFMEU’s privileged position as a registered organisation in the Federal industrial relations system. They emphasise the need for general and specific deterrence to weigh most heavily in the process of instinctive synthesis in which the Court engages when determining civil penalties. They warrant the imposition of the penalties proposed by Logan J.

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| I certify that the preceding twenty-seven (27) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Tracey. |

Associate:

Dated: 14 August 2018

REASONS FOR JUDGMENT

# LOGAN J:

1. On 10 February 2015, at about 11.30 am, Mr David Hanna, then a Divisional President of the appellant, the Construction, Forestry, Mining and Energy Union (**CFMEU**) entered a worksite located at the corner of Commercial Road and Ann Street, Fortitude Valley, Brisbane in Queensland (**the premises**). As a result of an amalgamation, that union has since changed its name to Construction, Forestry, Maritime, Mining and Energy Union. I have retained the union’s name as at the time of the contraventions within these reasons for judgment. At that time, a project for the construction on the premises of a building known as “Broadway on Ann” was underway. The head contractor for that project was Hindmarsh Construction Australia Proprietary Limited (**Hindmarsh**). “Broadway on Ann” was to be a 15 storey residential apartment complex. Also at that time, the CFMEU was registered under the *Fair Work (Registered Organisations) Act 2009* (Cth) as an industrial association.
2. That day and apart from employees of Hindmarsh, there were on site employees of the following subcontractors - VTS Rigging Pty Ltd, Pacific Formwork (Queensland) Pty Ltd, Australian Pre-stressing Structures Pty Ltd and Top Deck Steel Fixing Pty Ltd (**Top Deck**). Of these subcontractors, the first three each had enterprise agreements made under the *Fair Work Act 2009* (Cth) (**FWA**) to which the CFMEU was a party. Top Deck’s employees were eligible for membership of the CFMEU under the rules of that union.
3. Mr Hanna was then the holder of an entry permit issued by the Fair Work Commission (**industrial commission**) pursuant to s 512 of the FWA. Such an entry permit is not in the nature of a *carte blanche* entitling the permit holder to enter premises as and when he or she thinks fit. Instead, unless the industrial commission has issued an exemption certificate for the entry, the permit holder must give notice in accordance with s 487 of the FWA of an intended entry. In context, that required that Mr Hanna give Hindmarsh, as the occupier of the premises, at least 24 hours (but not more than 14 days) notice of his intended entry. Mr Hanna gave no such notice. The industrial commission had not issued an exemption certificate for the entry. In these circumstances, the effect of s 486 of the FWA was that, though a permit holder, Mr Hanna was not authorised by that Act to enter or remain on the premises, or to exercise any other right there. To enter and remain on the premises lawfully Mr Hanna required the permission of the occupier.
4. As a result of effecting that entry and his subsequent conduct on the premises over the ensuing half an hour or so, described below, Mr Hanna, by his admission in later proceedings brought in the Federal Circuit Court by the respondent, the Australian Building and Construction Commissioner (**the** **Commissioner**) (*Australian Building and Construction Commissioner v Hanna & Anor* [2017] FCCA 1257), committed six separate contraventions of the FWA. In contested proceedings, that court later concluded, having regard to s 793 of the FWA, that, in terms of s 550(2)(c) of that Act, the CFMEU was knowingly concerned in those contraventions and therefore taken likewiseto have contravened the FWA, pursuant to s 550(1) of that Act (*Australian Building and Construction Commissioner v Hanna & Anor (No. 2)* [2017] FCCA 1904) (***Australian Building and Construction Commissioner v Hanna & Anor (No.2)***). The CFMEU does not challenge the conclusion reached by that court as to its liability. Its challenge in this appeal concerns the penalties which came, consequentially, to be imposed upon it by that court (*Australian Building and Construction Commissioner v Hanna & Anor (No. 3)* [2017] FCCA 2519).
5. The following account, based on the facts as found by the learned primary judge, discloses what happened that day after Mr Hanna entered the premises, in so far as those events are material to this appeal.
6. Shortly after Mr Hanna entered the premises, his presence was noted by Mr John Liddington, Hindmarsh’s project manager and by Mr Garry Gough, who was its site manager for the building project. They told him that he was on site illegally and that he must return to the site office immediately. Mr Hanna ignored this. He remained on the premises. He descended down some stairs to the basement level of the project. There he encountered Mr David Liebke, who was Hindmarsh’s site supervisor. Mr Liebke asked Mr Hanna what he was doing on site. Mr Hanna replied: “I’m having a meeting with my workers.” Mr Liebke asked Mr Hanna if he had a right of entry permit. At this point Mr Hanna raised his hand to Mr Liebke with his middle finger extended and said that he did not need an entry permit. Mr Liebke then asked Mr Hanna to leave the premises. Notwithstanding this, Mr Hanna remained on the premises at the basement level. He walked away from Mr Liebke and called some of the employees present from the four different subcontractors mentioned towards him. He told them that they were going to have a meeting.
7. Shortly thereafter and while Mr Hanna was still on the basement level, Mr Gough approached him. Mr Gough said to him: “You are trespassing. Why don’t we go upstairs and talk about it?” Mr Hanna replied to the effect that he had come to meet with his members. Mr Gough then said: “What are you doing here? You are here illegally. Why don’t you go through the right channels?” Mr Hanna replied: “I can do what I like.” Mr Thomas Neylon, who was Hindmarsh’s contracts manager for the project, then approached Mr Hanna with Mr Liddington. Mr Liddington again said to Mr Hanna that he was to leave the site as he did not have permission to be there and that no entry permit had been sent to Hindmarsh. Mr Hanna’s response was to the effect that he did not need to get permission to enter a building site to talk to the men with whom he had an enterprise bargaining agreement.
8. During this discussion between Mr Liddington and Mr Hanna, Mr Neylon activated the video recorder function on his mobile phone. Mr Hanna, seeing this, then moved towards Mr Neylon. Mr Hanna, who had in his hand a plastic water bottle, squirted water from the plastic water bottle at Mr Neylon. This hit Mr Neylon in the face, wet his shirt and went over his mobile phone. Mr Hanna then moved to Mr Neylon and said: “Take that phone away or I’ll fucking bury it down your throat. You ask me if you want to take a picture of me. You ask me.”
9. Mr Hanna then spoke to some of the employees who were there in the basement level of the project. This conversation was not heard by any of the persons in authority for Hindmarsh. At about 12 noon, Mr Hanna and a number of the employees left the basement level of the project and made their way out of the premises. Mr Hanna used the swipe card of one of those employees to swipe out a number of the employees through the turnstiles at the exit of the premises. That had the effect of a number of employees leaving under the one swipe card. This meant that Hindmarsh did not have a record of which employees had left the premises and which employees had not. The employees were all similarly dressed. There is no evidence that any employee in a position of authority for Hindmarsh was in any way then able to check who it was had left the site and where they were. Of this the learned primary judge, permissibly and understandably, observed at [17] “The safety aspects of such an action should be quite obvious.”
10. The employees who left in this manner with Mr Hanna were away for about 30 minutes. The employees then returned to the premises and recommenced work.
11. Section 500 of the FWA provides:

**Permit holder must not hinder or obstruct**

A permit holder exercising, or seeking to exercise, rights in accordance with this Part must not intentionally hinder or obstruct any person, or otherwise act in an improper manner.

1. Section 550 of the FWA, mentioned above, provides:

**Involvement in contravention treated in same way as actual contravention**

1. A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.

Note: If a person (the involved person) is taken under this subsection to have contravened a civil remedy provision, the involved person’s contravention may be a serious contravention (see subsection 557A(5A)). Serious contraventions attract higher maximum penalties (see subsection 539(2)).

(2) A person is involved in a contravention of a civil remedy provision if, and only if, the person:

(a) has aided, abetted, counselled or procured the contravention; or

(b) has induced the contravention, whether by threats or promises or otherwise; or

(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or

(d) has conspired with others to effect the contravention.

1. By s 546(1) of the FWA, the Federal Circuit Court shares with this Court and any “eligible State or Territory court” a jurisdiction to order, on application, a person to pay a pecuniary penalty that “the Court” considers is appropriate if the Court is satisfied that the person has contravened a civil remedy provision. The term “civil remedy provision” is defined, by s 539(1) of the FWA, to be a provision referred to in column 1 of an item in the table in s 539(2). Also specified in that table, in columns 2, 3 and 4 respectively, are the relevant applicants (subject to ss 540 and 544 and Subdivision B of Division 1 of Chapter 4 of the FWA), the relevant courts and the maximum penalties in relation to a contravention or proposed contravention of a provision itemised in column 1. Suffice it to say, s 500 is one of the itemised provisions (Item 25) with the related, specified maximum penalty being 60 penalty units. For the purposes of the FWA, a “penalty unit” has the meaning given by s 4AA of the *Crimes Act 1914* (Cth) (**Crimes Act**) (s 12, “Dictionary”, FWA). At the time of the contraventions, s 4AA of the Crimes Act valued a penalty unit at $170. However, that amount was increased by a factor of 5 if, as here, the offender was a body corporate: s 4B(3), Crimes Act. Thus, by a process of statutorily ordained mathematics (60x170x5) the maximum penalty applicable to each contravention in this case was $51,000. The learned primary judge imposed that maximum penalty on the CFMEU in respect of each of the six contraventions. That yielded a total penalty of $306,000.
2. The formal order made by the Federal Circuit Court was deficient in translating the intent of the learned primary judge, evident from his Honour’s reasons for judgement, into the record of the court below. The order does specify the total penalty but does not specify either the particular contraventions concerned or the amount of the penalty imposed in respect of each contravention. This appears to be an unintended slip, occasioned by an omission to insert or otherwise make reference to declarations made when, in *Australian Building and Construction Commissioner v Hanna & Anor (No.2)*, his Honour found that the CFMEU was taken to have committed six contraventions. The declarations made at that time were as follows:
3. That in the exercise or attempted exercise of purported rights under s 484 FWA by Mr Hanna, pursuant to s 550(1) of the FWA, the second respondent engaged in an improper manner by:
   1. entering the Project without having given a notice of entry under s 487 of the FWA;
   2. remaining on the premises despite requests to leave;
   3. when asked if he had a right of entry permit, responded by raising his hand with his middle finger extended and saying that he did not need one;
   4. squirted water at a person validly engaged to work on the Project, which struck the person's face, shirt and mobile phone;
   5. stating “Take that phone away or I’ll fucking bury it down your throat, you ask me if you want to take a picture of me, you ask me”; and
   6. using an employee’s swipe card to swipe out a number of employees engaged on the Project, the effect of which was that the occupier of the premises did not have a record of which employees had left the premises and which had not.

The CFMEU was the second respondent.

1. Whatever might be the fate of this proceeding, the parties are at one in acknowledging that the slip identified required the making of a corrective order by the Court.
2. The CFMEU contends that the learned primary judge was in error in imposing the maximum penalty upon it in respect of the six contraventions. Given this, it submits that it is both necessary and appropriate that this Court re-exercise the sentencing discretion.
3. It is not necessary to set out, much less individually address, each of the ten pleaded grounds of appeal. That is because, with commendable forensic discernment, counsel for the CFMEU distilled from them four subjects of controversy in relation to the judgement below. Counsel identified these as:
   1. an alleged error in concluding that course of conduct considerations were not applicable to the imposition of penalty in the circumstances;
   2. an alleged error in the description of Mr Hanna as the public face of the CFMEU;
   3. an alleged error in the characterising of the contraventions as in the worst possible category; and
   4. whether the penalty imposed was, both individually and in total, was manifestly excessive.

## Were course of conduct considerations irrelevant?

1. Subsection 557(1) of the FWA provides:

**Course of conduct**

(1) For the purposes of this Part, 2 or more contraventions of a civil remedy provision referred to in subsection (2) are, subject to subsection (3), taken to constitute a single contravention if:

(a) the contraventions are committed by the same person; and

(b) the contraventions arose out of a course of conduct by the person.

It is not necessary to set out s 557(2). Suffice it to say, of the civil remedy provisions to which it refers, s 500 is not amongst them.

1. The absence of reference to s 500 in the catalogue of civil remedy provisions in s 557(2) of the FWA moved the learned primary judge to conclude that, in relation to the imposition of penalties, contraventions of that section could not be dealt with as if they were a single contravention. His Honour cited the maxim at [36] “*expressio unius est exclusio alterius*” in support of this conclusion, regarding s 557 as akin to a code excluding by implication any ability to take single course of conduct considerations into account in respect of civil remedy provision contraventions which had not been expressly specified. In relation to the effect of a code, his Honour also drew an analogy with the exclusion of common law procedural fairness principles in respect of certain types of review conducted under the *Migration Act 1958* (Cth) (**Migration Act**) by the Administrative Appeals Tribunal (**the Tribunal**).
2. The difficulty about drawing any such analogy is that, where, in relation to the Tribunal, it is intended that specified requirements operate to the exclusion of common law procedural fairness principles, the Migration Act expressly states this: see s 357A(1) of that Act. In contrast, neither in s 557 itself, nor elsewhere in the FWA is there such an express exclusion in relation to course of conduct considerations in relation to the imposition of penalties. So any such operation would have to arise by necessary implication.
3. If the subject were free from authority, it is, with respect, by no means impossible to see how the maxim cited by the learned primary judge might form part of a chain of reasoning which supported the conclusion reached by his Honour. But there are contrary indications within s 557 and the subject is not one free from authority, as was correctly highlighted in the submissions made on behalf of the CFMEU. And that authority is expressly to the contrary of his Honour’s conclusion. In their joint judgement in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 249 FCR 358, at [88], Dowsett and Rares JJ stated:

88 In our opinion, s 557 did not cover the field and did not exclude the common law principle of taking into account, when imposing a penalty, whether the conduct complained of constituted a single course of conduct. However, s 557 provided a legislative indication that certain forms of concerted industrial action, such as multiple contraventions of ss 417(1) and 434, would be deemed, only in the case of a first contravention by the person, to be a single contravention. That contrasted with the legislative purpose of treating one contravention of s 348 differently from ones to which s 557 applied. The Parliament appears to have intended that multiple contraventions of s 348, in what, in other circumstances (such as those covered by s 557), might be treated as a course of conduct, would not necessarily attract any sentencing leniency.

1. Earlier judgements of the Full Court have proceeded on the basis that it was permissible to take into account in the imposition of penalty that particular contraventions constituted a single course of conduct: *Construction, Forestry, Mining and Energy Union v Williams* (2009) 191 IR 445 at [29]-[31] and to do so notwithstanding the absence of specification of the contraventions concerned in s 557: *QR Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union* (2010) 204 IR 142 at [49] per Keane CJ and Marshall J. *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 271 IR 321 at [111]-[115] (***Childrens’ Hospital case***), which was handed down by the Full Court not long before the learned primary judge dealt with the present case, confirms that this sentencing consideration may permissibly be taken into account even if s 557 of the FWA is inapplicable.
2. The Commissioner sought to ameliorate this evident error of principle by the primary judge by submitting that the course of conduct principle is a “tool of analysis” which a court “is not compelled to utilise”: *Construction, Forestry, Mining and Energy Union v Cahill* (2010) 194 IR 461 at [42] (***Cahill***); *Childrens’ Hospital case* at [148]. So much may readily be accepted. But the primary judge did not acknowledge the potential and permissible application of the principle and hold that the circumstances of the present case were such that it ought not to be applied. His Honour held that the single course of conduct principle was expressly excluded from his consideration. This constituted an error of legal principle.
3. Each of the parties correctly acknowledged that the imposition of a penalty for a contravention of the FWA entails the exercise of a judicial discretion such that, in the exercise of appellate jurisdiction, this Court would only interfere if persuaded that the exercise of that discretion was attended with one or more of the errors described in *House v The King* (1936) 55 CLR 499 at 505.
4. This error is itself a sufficient basis for this Court itself to determine, in the re-exercise of the sentencing discretion, what is the appropriate penalty in respect of the six contraventions. That means that it is no longer necessary to consider whether the penalty imposed was the learned primary judge was manifestly excessive for the task must be conducted afresh. That does not mean that each of the other two subjects advanced for consideration by the CFMEU is thereby rendered irrelevant, only that they fall now for consideration in the context of the re-exercising of the sentencing discretion.

## The public face of the CFMEU

1. In the course of his sentencing remarks, the primary judge made the following observations (at [46]-[48]) in relation to Mr Hanna and to the position which he held on 10 February 2015 within the CFMEU:

46. While it has been submitted by the CFMEU that Mr Hanna, as President, did not hold the reins of the union, because the CFMEU rules vest that power in the secretary, Mr Hanna was certainly the public face of the CFMEU in Queensland.

47. For any of the persons at the “Broadway on Ann” site that day, it would be easy to surmise that the appearance of Mr Hanna had the full and unequivocal support of the CFMEU behind it. For those people, it is easily surmised that they would think that there was no one higher in the CFMEU than Mr Hanna.

48. For Mr Hanna to have acted in this most abhorrent way, would have been very concerning to those affected. To them, these were not the actions of some over-exuberant maverick from the CFMEU; …

1. In its submissions, the CFMEU was critical of the findings made in this passage. It submitted, by reference to *Vass v Permanent Trustee Co. Limited* (1999) 198 CLR 334 at [56], that these findings were antithetical to the exercise of judicial power by the application of law to facts in that his Honour had imposed penalty on it on bases that were neither agreed nor determined by reference to the evidence in the case. It accepted that whether there was an error of this kind became unnecessary to decide if, because of an error of principle in relation to the course of conduct consideration, it fell to this Court to exercise the sentencing discretion in any event. Even so, it is incumbent in resentencing to observe the requirement that any sentence be based on facts which are either agreed or otherwise evidenced. And facts may be found by inferences reasonably open from other evidence.
2. That Mr Hanna then held the office of Divisional President was not controversial. It is obvious from the passage just quoted that his Honour was well aware that the rules of the CFMEU vested executive power in its Secretary, not in the Divisional President. So am I. Divisional President is hardly an empty title. It is a senior office within the CFMEU. A body corporate such as the CFMEU acts via its human agents. On 10 February 2015, at these premises, in the presence of both management staff and workers, it acted via Mr Hanna in the manner described above. Further, Mr Hanna’s authority was not merely titular as derived from the rules of the CFMEU. It is a necessary inference from the facts which I have already recited that, in practice, he had sufficient gravitas on site as an official of the CFMEU for a numerous but indeterminate group of workers to walk off the premises when requested by him and to remain away from their work for about half an hour.

## What sentence ought to be imposed?

1. In *Elias v The Queen* (2013) 248 CLR 483 at [27] (***Elias v The Queen***), French CJ, Hayne, Kiefel, Bell and Keane JJ observed:

The suggestion that the court’s sentencing discretion is subject to constraint requires examination. Plainly enough, the “constraint” on the court's discretion that is said to arise from the exercise of the prosecutorial discretion is the maximum penalty for the offence charged. The maximum penalty is one of many factors that bear on the ultimate discretionary determination of the sentence for the offence. It represents the legislature’s assessment of the seriousness of the offence and for this reason provides a sentencing yardstick. Commonly the maximum penalty invites comparison between the case with which the court is dealing and cases falling within the category of the “worst case”. As explained in *Markarian v The Queen*, for these reasons careful attention is almost always required to the maximum penalty. However, this is not to suggest that consideration of the maximum penalty will necessarily play a decisive role in the final determination. As also explained in *Markarian*, in some instances – as where the maximum sentence was fixed at a very high level in the nineteenth century – reference to it may be of little relevance. As this Court has explained on more than one occasion, the factors bearing on the determination of sentence will frequently pull in different directions. It is the duty of the judge to balance often incommensurable factors and to arrive at a sentence that is just in all of the circumstances. The administration of the criminal law involves individualised justice, the attainment of which is acknowledged to involve the exercise of a wide sentencing discretion. It is wrong to suggest that the court is constrained, by reason of the maximum penalty, to impose an inappropriately severe sentence on an offender for the offence for which he or she has been convicted.

1. These observations were made in relation to sentencing in respect of criminal offences. As will be seen by reference to other High Court authority, not all of the considerations pertinent to such sentencing translate to sentencing in civil proceedings for the imposition of pecuniary penalties in respect of respect of statutory contraventions. But these particular observations in *Elias v The Queen* are not amongst those rendered irrelevant by the nature of the present proceeding. That the maximum penalty for each contravention is $51,000 with a total maximum of $306,000 being open is relevant. Individually and collectively they provide a sentencing “yardstick”. It would though be quite wrong to base any individual or total penalty order on a view that the yardstick itself is inadequate and so come to fix penalties unwarranted by the circumstances of a particular case measured against that yardstick. The prescription of maximum penalties is a matter for Parliament, not the courts. If, by reason of the change in the value of money over time or, relevantly for example, changing patterns of industrial behaviour, maximum penalties once considered adequate are judicially believed to have a diminished deterrent quality, it is not for a court to impose a maximum penalty in circumstances which do not warrant the same because of that belief.
2. Authoritative statements as to the nature and purpose of civil penalty regimes are to found in two recent judgements of the High Court, *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 (***Commonwealth v Director, FWBII***) and *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 (***ACCC v TPG Internet***).
3. In *Commonwealth v Director, FWBII*, at [24], it was stated by French CJ, Kiefel, Bell, Nettle and Gordon JJ in their joint judgement:

In essence, civil penalty provisions are included as part of a statutory regime involving a specialist industry or activity regulator or a department or Minister of State of the Commonwealth (the regulator) with the statutory function of securing compliance with provisions of the regime that have the statutory purpose of protecting or advancing particular aspects of the public interest. Typically, the legislation provides for a range of enforcement mechanisms, including injunctions, compensation orders, disqualification orders and civil penalties, with or, as in the BCII Act, without criminal offences.

[Footnote references omitted]

1. In context, that s 500 forms part of the FWA manifests a value judgement by Parliament that there is a public interest in the field of industrial relations in the prevention of particular behaviours. The penalisation of a contravention of that provision has as its purpose the securing of compliance with that prevention.
2. As to compliance and a fundamental difference between criminal and civil penalty proceedings, it was also stated in the joint judgement in *Commonwealth v Director, FWBII*, at [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*, 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.

[Footnote references omitted]

1. In *ACCC v TPG Internet*, at [66], French CJ, Crennan, Bell and Keane JJ approved the statement by the Full Court in *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249 at 265 [62]-[63] that a civil penalty for a contravention of the law:

… must be fixed with a view to ensuring that the penalty is not such as to be regarded by [the] offender or others as an acceptable cost of doing business.

1. That statement, in my view, is just as applicable to the activities of a registered industrial association as it is to bodies corporate which carry on business with a view to profit. No less than in relation to activities in the marketplace regulated by the *Competition and Consumer Act 2010* (Cth), penalties for contraventions of conduct proscribed by the FWA must be “sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act”. They must be fixed so as to ensure that the amount of the penalty is not regarded by the contravenor, in this case the CFMEU, or others, as an acceptable cost of doing industrial business. These considerations loom large in the present case in relation to the imposition of penalty. As it happens and notwithstanding the error noted, it is also evident that this they did with the learned primary judge (reasons for judgement, paras 75 to 77).
2. The learned primary judge made reference (at para 50) to the past history of contraventions of the FWA by the CFMEU. The submissions made to him on behalf of the Commissioner included a table of occasions over the past decade in which civil penalty sanctions had been imposed on the CFMEU. His Honour (ibid) described the approximately 120 occasions thus recorded as “astounding”. He added: “It is no understatement to describe the CFMEU as the most recidivist corporate offender in Australian history.” It is not clear to me what the evidentiary foundation for the latter observation was.
3. A similar tabulation was annexed to the Commissioner’ submissions on the appeal. A study of the table for the purpose of resentencing does though provoke concurrence with his Honour’s description of the penal history as “astounding” but more than that. It is disgraceful and shameful.
4. The CFMEU did not contest the accuracy of this tabulation. Further, it acknowledged that it had contravened s 500 of the FWA on previous occasions. By way of counterpoint, it submitted, with reference to *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 477-478 (***Veen No 2***)that, although prior contraventions are relevant and justify a heavier sentence than may otherwise be imposed, “in the absence of statute, they cannot lead to the imposition of a penalty that is disproportionate to the gravity of the instant offence”. That submission took up sentiments voiced by the Full Court in *Childrens’ Hospital case* at [160].
5. That sentencing principle derived from those authorities and that submission, while relevant, conceals as much as it reveals about what is the appropriate sentence in the circumstances of this case. So, too, do the CFMEU’s submissions directed to demonstrating that these contraventions were not of the worst possible type and therefore did not warrant the imposition individually, much less in total, of maximum penalties. After all, it was submitted, each entry without a permit will give rise to a contravention. How could this be viewed as of the worst kind? Further, what followed afterwards was a course of conduct which, in its final outcome, only resulted in a half hour’s loss of work.
6. In assessing gravity and proportionality there is another passage in *Veen No 2*, at 477, which is particularly pertinent, given the CFMEU’s history of contraventions and the nature of Mr Hanna’s conduct on 10 February 2015:

*The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted.* It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and other offenders from committing further offences of a like kind. Counsel for the applicant submitted that antecedent criminal history was relevant only to a prisoner's claim for leniency. That is not and has never been the approach of the courts in this country and it would be at odds with the community's understanding of what is relevant to the assessment of criminal penalties.

[Emphasis added]

1. We are bound by *Commonwealth v Director, FWBII* to recognise and give effect to a civil penalty regime the purpose of which is ensuring compliance with norms of industrial behaviour prescribed by Parliament in the public interest. To view the conduct of the CFMEU on 10 February 2015 in isolation from the past and to penalise on the basis that there have been worse cases is to fail to recognise that the conduct is but a further manifestation of a lengthy and repeated pattern of unrepentant, outlaw behaviour by the CFMEU.
2. All of the features of unrepentant, outlaw behaviour are present in Mr Hanna’s conduct on 10 February 2015. The statement which he made to Mr Gough: “I can do what I like.” is pregnant with these features, as is each other of his studied refusals to leave the site when requested. These refusals were reinforced by a contemptuous gesture (the ‘single finger salute’) and by what the learned primary judge rightly concluded was conduct which might equally have been charged under the criminal law as an assault (the squirting of water).
3. Further, Mr Hanna’s swiping out of workers from the premises under the one card was not just contemptuous of Hindmarsh’s responsibility, as occupier, for entry to and egress from the premises. It was also subversive of the responsibilities under the *Work Health and Safety Act 2011* (Qld) of Hindmarsh as the person in control of the premises and employer of some of the workers there and of the subcontractors who had employees there. Necessarily, the method of exit which he employed rendered it impossible, without stopping for a roll call, to identify who remained on the premises and what tasks could or could not still safely be undertaken by remaining staff. There is no evidence as to whether this measure was taken. It rather looks as if the pragmatic alternative of stopping work altogether was determined upon by Hindmarsh and its subcontractors. But the point for present purposes is that the conduct was subversive of workplace health and safety responsibilities, responsibilities of the very kind with which, historically and legitimately, trade unions have been deeply concerned in the interests of workers.
4. There is a course of conduct evident in Mr Hanna’s conduct on 10 February 2015. It is relevant to recognise this but it does not necessarily follow that this is a mitigating factor. Section 500 of the FWA contains no qualification that the need for advance notice to be given is inapplicable to an industrial association where that association has members on a site or is a party to an industrial instrument governing workers on a site. Inferentially from his statements and behaviours, it is more likely than not that Mr Hanna was aware of this but did not accept that this law should bind the CFMEU or him in this way. Were there any doubt about this, the belief of Hindmarsh as to the illegal nature of his presence was drawn to his attention on several occasions. He did not just decline an offer extended to him on behalf of Hindmarsh to discuss that subject. He treated that offer with contempt and then with what, in law, was “improper conduct” the relevant particulars of which constituted an assault.
5. What occurred then in a compressed period was more likely than not a studied entry to the premises without the giving of notice. This was followed by a repeated persistence in presence on the premises notwithstanding opportunities to discuss the same and directions to leave, accompanied by foul gestures and language, refutation that the law applied to him, and an assault and culminating in a subversion of a workplace health and safety obligation. As noted, it is accepted that the CFMEU’s conduct, via Mr Hanna, constituted six separate contraventions. But what is revealed by those contraventions is an escalating series of events, at any time during the course of which it was within the remit of Mr Hanna to acknowledge the error of his ways, seek some reasonable accommodation or leave. In short, the CFMEU, via Mr Hanna, had a choice on several occasions on 10 February 2015 at the premises to abide by s 500 of the FWA. Its deliberate choice was completely and pithily summed up in Mr Hanna’s words: “I can do what I like.”
6. As mentioned above, the Commissioner made reference and relied upon the following passage in *Cahill*, at [42]:

A Court is not compelled to utilise the principle because, as Owen JA said in *Royer v Western Australia* [2009] WASCA 139 at [28], “[d]iscretionary judgments require the weighing of elements, not the formulation of adjustable rules or benchmarks”. The exercise of the sentencing discretion does not fall to be exercised in a vacuum. It is a matter of judgment to be exercised according to the facts of each case and having regard to conflicting sentencing objectives: see McHugh J in *AB v The Queen* (1999) 198 CLR 111 at [14]. For the same reasons, and contrary to the appellants' submissions, even if offences are properly characterised as arising from the one transaction or a single course of conduct, a judge is not obliged to apply concurrent terms if the resulting effective term fails to reflect the degree of criminality involved.

1. The Commissioner did so in the first instance in an endeavour, which I have rejected, to justify the conclusion below as to the irrelevancy of the course of conduct principle. But the observations are pertinent in the context of re-exercising the sentencing discretion. The features of Mr Hanna’s conduct on 10 February 2015 do not, in my view, warrant the penal ameliorating consequence that can in other cases attend identification of a course of conduct. To approach penalisation otherwise would yield a penalty which in no way reflects, when the purpose of a civil penalty regime is understood, the gravity of what occurred that day and its manifestation of the prior history revealed by the tabulation of defiance by the CFMEU of industrial law norms. Recently and after a detailed analysis of pertinent authority, Middleton J observed, in *Australian Competition and Consumer Commission v The Construction, Forestry, Mining and Energy Union (No 4)* [2018] FCA 684 at [48]:

… concerted campaign by a union may explain the conduct of its officials but it does not in itself provide the requisite inter-relationship between the contraventions to necessarily warrant the application of the single course of conduct principle.

1. The same can be and in this case is true in respect of a concerted series of events on a particular day.
2. Once the contraventions on the day, deplorable in themselves, are viewed in context, they are, in my view, of the worst possible kind. Common sense, to say nothing of the maintenance of the rule of law, dictates that this must be so. Each contravention well warrants the maximum penalty. Laws which may be ignored at will on the basis of a persistent, self-arrogated, alternative standard of behaviour are no laws at all, only empty aspirational statements.
3. That the contravening conduct concerned was undertaken by a senior official of the CFMEU is an aggravating factor. Other aggravating factors are the loss of project work time and the subversion of workplace health and safety dimension of one of the contraventions. Neither of these should be trivialised but it is the repetition of behaviour contemptuous of the requirements of the FWA which is the major consideration. Of course that the CFMEU ultimately came to concede the contraventions is a mitigating factor but the worth of this is much diminished by an absence of contrition. The Commissioner submitted, given the admissions which Mr Hanna made, that the CFMEU would be found responsible for his actions had an element of inevitability about it. Even so, I accept, unreservedly, that the CFMEU is not to be penalised for contesting the operation in law of the deemed liability provisions of the FWA.
4. The Commissioner sought to defend the overall level of penalty imposed by the primary judge. The range promoted by the CFMEU ($45,000 to $48,000 for the first contravention and no penalties in respect of the remaining five contraventions) was, in the overall circumstances of this case, at odds with the purpose of the civil penalty regime as stated in *Commonwealth v Director, FWBII*.
5. One way, perhaps the best way, given that this appeal concerns what is the appropriate penalty to impose in the overall circumstances of this case on a trade union, of understanding just how grave is what occurred on 10 February 2015, is to reflect on what might be the consequence of lengthy, repeated, aberrant violation by an employer or registered employer organisation of other industrial law norms. In *Construction Forestry Mining and Energy Union v North Goonyella Coal Mine Pty Ltd* [2013] FCA 1444 (***CFMEU v North Goonyella Coal Mine***) I had occasion to penalise a subsidiary of a major mining company for taking adverse action against employees on the basis of trade union activity or the exercise of a workplace right. In that case, I made reference to and took into account the history of trade unionism. I regarded it as an aggravating factor that the conduct of the respondent was adverse to those who chose to be members of a trade union the existence of which and place in our industrial relations system was recognised by law in the public interest. In that case, the employer had come to see the error of its ways, which was a mitigating factor. Imagine though if the circumstances of the case had revealed that particular conduct charged were but the latest manifestation of a decade long history of studied such adverse action, notwithstanding repeated penalisation. Imagine also if there were no contrition and if the particular adverse action charged had been accompanied by foul abuse by management of the workers concerned and improper conduct amounting to an assault when a worker asserted his lawful right to belong to a trade union. Would anything other than the most condign penalisation suffice so as to deter repetition and compel adherence to a law enacted in the public interest?
6. As it happens, the CFMEU was the applicant in *CFMEU v North Goonyella Coal Mine*. That it undertook that role in the vindication of an industrial law norm offers an example of the benefits that can be conferred on workers by trade union membership and related collective action. In that case, far from outlaw behaviour, the CFMEU commendably served a public interest by drawing contraventions of the FWA to the Court’s and thus the public’s attention.
7. *CFMEU v North Goonyella Coal Mine* also offers a reminder that it is an over-simplification to regard the CFMEU in all of its other manifestations as a rogue, outlaw industrial association. That case emanated from the union’s Mining Division. Defence of workplace rights apart, the records of the Court disclose there are many other examples of cases brought by the CFMEU for the construction of industrial instruments of one sort or another. Such litigation is not subversive of the rule of law in industrial matters but deeply deferential to, and respectful of, the rule of law. Overwhelmingly, what the present case and those set out in the tabulation reveal is that the rogue, outlaw tendency in the CFMEU is to be found in its Construction Division.
8. One of the features of Australian industrial relations over the past quarter century or so has been an acceleration in the amalgamation of trade unions: see J Buchanan, *Union Amalgamations as a Basis for Union Renewal in Australia: Insights from Unfinished Business* (2003) Volume 2, Just Labour, 54 at 57, Table 1. One of the undoubted benefits of this accelerated amalgamation, borne out by the composition of the mix of cases in the Court’s Fair Work Division, has been a decline in cases having their origin in demarcation disputes. Buchanan, at 58-59, referring to the Communications, Electrical and Plumbing Union, noted a history of occupational allegiance manifested by a persistence of identity within that union of the former Electrical Trades Union. The present case and those in the tabulation provoke, strongly, the thought that there is a persistence within the CFMEU of the former *Australian Building Construction Employees’ and Builders Labourers’ Federation* (**the BLF**). That thought is hardly novel. Systemic unlawful conduct with historic precedent in the activities of the BLF is one feature of the CFMEU remarked upon in the report of the Royal Commission into *Trade Union Governance and Corruption*, Volume 5, Chapter 8 (see paras 1 to 3).
9. That the contravening conduct charged was that of a senior official and but another manifestation of a lengthy history of unlawful conduct revealed by the tabulation inferentially suggests that, in its internal governance, the CFMEU has been unable or unwilling to restrain aberrant behaviour within its Construction Division.
10. When the BLF was a separate, federally registered industrial association, a past lengthy history of unlawful conduct led ultimately to its deregistration by Parliament: *Builders Labourers’ Federation (Cancellation of Registration) Act 1986* (Cth). Amalgamation and the concentration of unlawful conduct in the Construction Division undoubtedly makes the subject of deregistration more complex but an organisation which manifests an inability by its internal governance to rein in aberrant behaviour cannot expect to remain registered in its existing form.
11. As it is, deregistration is not the subject of the present proceeding but a recollection of history underscores why it is that deterrence and compliance with statutory obligations are so overwhelmingly important in the fixing of penalties in the present case.
12. Approaching the subject of penalisation afresh and for all of the reasons given, I consider that the maximum penalty in respect of each contravention is warranted in the circumstances of this case. Being of this view, I have, in deference to the totality principle, asked myself whether, in total, such an overall penalty would be a disproportionate response in the overall circumstances of the case? So recalcitrant is the contravening conduct charged having regard to the past history in the tabulation and such is the importance of deterrence and compelling conformity with the requirements of the FWA my view is that only the most condign penalisation of a cumulative maximum punishment is warranted in the circumstances of this case. I would impose that so as to bring home emphatically to the CFMEU that, in its internal governance, it must force systemic behavioural change upon its Construction Division. That penalisation is necessary but it can be viewed as a cruel necessity. The cruel element is that there is an opportunity cost in the payment of the total penalty in terms of other activities, beneficial to members, to which the union’s funds might otherwise be deployed. It is to be hoped that the realisation of that promotes change in the internal governance of the CFMEU.
13. In determining that a cumulative maximum penalty is apt, I record that I am well aware that this exceeds the amount of penalty for which the Commissioner contended in the original jurisdiction. On appeal, that became a fall-back position for the Commissioner. But, existence of error of principle or not, it was the cumulative maximum which became the penalty for which the Commissioner primarily contended on appeal and it was that case which the CFMEU met. It did not submit that, on reconsideration, the Court was confined to the maximum for which the Commissioner had originally contended in the court below. Further, for the reasons given above, in considering the subject of penalty afresh, I am convinced that only a cumulative maximum penalty is apt in the circumstances of the present case.
14. In the result then, approaching the matter afresh, I would impose individual penalties of $51,000 for each contravention resulting in a total amount payable of $306,000. The orders made by the Federal Circuit Court require correction so as correctly to reflect the outcome in that court. Given the conclusion which I have reached in the exercise afresh of the sentencing decision, it follows that, subject to that correction, I would dismiss the appeal.

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| I certify that the preceding sixty-two (62) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Logan. |

Associate:

Dated: 14 August 2018

REASONS FOR JUDGMENT

# BROMWICH J:

1. I have had the benefit of reading and considering the reasons of Logan J in draft. I agree with his Honour that the primary judge erred in proceeding upon the basis that there was no power to treat the contraventions in this case as arising from of a course of conduct. I therefore agree that there is a sufficient basis for this Court to intervene and determine for itself the penalty that is appropriate. However, I take a different view as to the gravity of the contraventions and the penalty that should be imposed.
2. In part, I am led to a different conclusion as to the appropriate penalty to be imposed because I do not accept that it was open to the primary judge to characterise all of the contraventions as being in the worst category so as to permit or warrant the imposition of the maximum penalty for five of the six contraventions. For reasons that will be explained, that characterisation involved further error by his Honour. Moreover, I have also formed the view that the Court should exercise the power to treat some of the contraventions as arising from a single course of conduct by the appellant. I therefore do not consider it to be appropriate to impose separate penalties for each of the first five contraventions.
3. In all of the circumstances, five of the six maximum penalties of $51,000 that were imposed by the primary judge should be set aside and reduced penalties imposed, leading to an overall total penalty of $96,000 instead of $306,000. I would allow the appeal to that extent and reimpose penalties accordingly.

## Points of principle

1. There are five points of principle concerning the imposition of civil penalties that are of particular importance to this case. They are as follows:
2. While any prior contravention is a factor which may be taken into account in determining quantum, it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant contravention.
3. The maximum penalty available under statute must be reserved for the worst category of cases. However, this does not mean that a lesser penalty must be imposed because it is possible to envisage a worse case.
4. The Federal Circuit Court and this Court should not, without giving the parties proper notice and an opportunity to be heard, disregard the submissions of the regulator and impose a penalty in excess of what the regulator seeks.
5. While the formulation of the quantum of an appropriate penalty usually involves, in the final analysis, an “*instinctive*” synthesis of competing factors, the process leading to that synthesis is not instinctive.
6. The outcomes arrived at by courts in prior cases can be used to help ensure reasonable consistency in the application of principle and as a yardstick for the determination of appropriate penalties.
7. Each principle is addressed in turn below. Before doing so, however, it is desirable to outline the role that criminal sentencing cases may play in developing civil penalty jurisprudence.

### Criminal sentencing cases and civil penalty jurisprudence

1. The principles listed above, and considered in more detail below, are largely derived from criminal sentencing law, assisted by broader concepts of procedural fairness. There are fundamental differences between the criminal context and the civil penalty context, particularly in terms of rationale and procedure. Nonetheless, the long history of criminal sentencing law provides much that is useful if applied carefully and in a way that is mindful of the important limits to the analogy between the two areas.
2. It is convenient to mention first the similarities between the task of imposing a criminal sentence and the task of imposing a civil penalty. As was pointed out in *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25 at [44], the dominant common feature is that “*determining both a sentence and a civil penalty usually involves … a difficult and complex process of multi-factorial decision-making, where the result is arrived at by a process of ‘instinctive synthesis’, addressing many conﬂicting and contradictory considerations*”, citing ***Wong*** *v The Queen* [2001] HCA 64; 207 CLR 584 at [74]–[76].
3. It may also be seen that, in both contexts, a court is required to arrive at a penalty response that is proportionate to the offence or contravention. This is an essential aspect of applying the relevant statute, and cannot be excluded in a civil penalty context: *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (****The Non-Indemnification Personal Payment Case****)* [2018] FCAFC 97 at [22].
4. However, the fundamental differences between the two areas must not be forgotten. A criminal prosecution is aimed at securing a criminal conviction, whereas “*a civil penalty proceeding is precisely calculated to avoid the notion of criminality as such*”: *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482 (***civil penalty case***) at [54]. A statute that provides for civil penalty proceedings therefore eschews the application of criminal practice and procedure: *civil penalty case* at [62]. The applicable procedure and standard of proof are civil procedure and proof on the balance of probabilities, as opposed to criminal procedure and proof beyond reasonable doubt.
5. Moreover, punishment in the course of criminal sentencing has traditionally involved deterrence, both specific and general, retribution and rehabilitation: *Trade Practices Commission v* ***CSR Ltd*** (1991) ATPR 41-076 per French J at 52,152, quoted with approval in the *civil penalty case* at [55]. By contrast, “*the purpose of a civil penalty … is primarily if not wholly protective in promoting the public interest in compliance*”: *civil penalty case* at [55]. The High Court endorsed French J’s observation in *CSR Ltd* that the principal, and probably the only, object of civil penalties 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*”. Thus, deterrence rules supreme as the means by which the objective of compliance is to be achieved in civil penalty cases. However, as the discussion below demonstrates, it is deterrence by reference to the instant contravention that is required.
6. It follows from the above that care must be taken insofar as a principle derived from the criminal law is sought to be applied in a civil penalty context. That may only be done where the reasoning underlying the principle is apposite. The criminal courts have developed a number of principles to approach the sentencing task over many years. These include the principles pertaining to course of conduct, totality, proportionality and the role of the maximum penalty. Provided that a weather eye is kept on the dominant consideration that is the objective of deterrence, there is no reason why these principles cannot readily be adapted and applied in a civil penalty context as a valuable means of assessing whether the penalty to be imposed is an appropriate consequence overall for the instant contravening conduct.
7. Assessment of the gravity of the contravention must always be carried out by reference to the legislative context in question and the particular requirement or prohibition that has been breached.

### First principle: the penalty must not be disproportionate to the instant contravention

1. While a court imposing a civil penalty is entitled to have regard to prior contraventions in the exercise of the discretion, it is not to give that history such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant contravention: *Veen v The Queen* *[No 2]* (1988) 164 CLR 465 (***Veen (No 2)***)at 477. This reflects the fundamental principle, drawn from the criminal law, that a court should impose a penalty that is “*proportionate to the gravity of the offence*”, or, as in the present context, that is proportionate to the gravity of the contravention.
2. The principles supporting the application of proportionality to the imposition of civil penalties generally are also supported by the statutory regime for civil penalties under the *Fair Work Act 2009* (Cth) (***FW Act***). Section 546(1) of the *FW Act* expressly provides for what would otherwise likely be implicit, namely, for the court to fix an “*appropriate*” penalty for a contravention within a prescribed maximum. A civil penalty that is not proportionate cannot properly be regarded as appropriate and therefore cannot meet the statutory requirement of s 546(1) of the *FW Act*.
3. In ascertaining the metes and bounds of the regard that may be had by a court to prior contraventions, the seminal statement on this topic in *Veen (No 2)*at 477 may be adapted in a form that strips away irrelevant criminal law considerations, such that it reads as follows:

… the antecedent [contravening] history of [a contravener] is a factor which may be taken into account in determining the [penalty] to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant [contravention]. To do so would be to impose a fresh penalty for past [contraventions] … . The antecedent [contravening] history is relevant, however, to show whether the instant [contravention] is an uncharacteristic aberration or whether the [contravener] has manifested in his commission of the instant [contravention] a continuing attitude of disobedience of the law. In the latter case, … deterrence … may … indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent [contravening] history when it … shows a need to impose [a] condign [civil penalty] to deter the [contravener] and other [contraveners] from committing further [contraventions] of a like kind.

1. As the High Court’s observations in *Veen (No 2)* illustrate, it is legitimate to take into account the antecedent contravening history of a contravener insofar as it may indicate that a condign civil penalty is necessary to deter the contravener and other potential contraveners from committing further contraventions of a like kind in the future. However, the penalty that is imposed must still be proportionate to the gravity of the instant contraventions, as assessed in their own terms, for to do otherwise would be to impose a fresh penalty for past contraventions.
2. The Full Court in *The Non-Indemnification Personal Payment Case* at [22] observed:

The overwhelming importance of deterrence as the protective purpose of the penalty does not exclude the need to determine a penalty which is proportionate to the contravening conduct. The history of contravention is to be taken into account in fixing the proper level of penalty for the proportionate response to the contravention in question. Proportionality has within it the need to characterise the seriousness of the contravention. Proportionality of penal response to a contravention assessed by reference to its seriousness and gravity is an essential characteristic of the application of the statute. The penal response is for that contravention, not earlier contraventions: *Veen v The Queen [No 2]* [1988] HCA 14; 164 CLR 465 at 477-478. Prior contraventions may reveal an apparent disregard for the Act and the need for deterrence by a penalty at a level appropriate to achieve that objective. It is to be borne in mind, however, that it is for the conduct in question that the penalty is imposed, not for prior conduct.

1. The important principle identified in the passage from *Veen (No 2)* above is particularly relevant where there is, as in this case, a serious and sustained prior history of contraventions, and an apparent determination to continue engaging in proscribed conduct. The role of any past contraventions is to be no more than a prism through which to view the instant contravention. This enables a court to assess whether, for example, the instant contravention is an “*uncharacteristic aberration*” or whether the contravener has, by the instant conduct, manifested “*a continuing attitude of disobedience of the law*”. If the latter, as is clearly available to be concluded in this case, the heightened need for deterrence indicates that a more severe penalty is warranted for the instant contravention. Nonetheless, that penalty must still fall within the applicable range that is otherwise considered appropriate for that contravention.

### Second principle: the maximum penalty is to be reserved for the worst category of cases

1. *Veen (No 2)* also provides valuable guidance as to the role of the maximum penalty provided by the statute. The High Court’s observations at 478, adjusted for use in civil penalty proceedings, were as follows:

… the maximum penalty prescribed for [a contravention] is intended for cases falling within the worst category of cases for which that penalty is prescribed: *Ibbs v The Queen* [(1987) 163 CLR 447 at pp 451-452]. That does not mean that a lesser penalty must be imposed if it be possible to envisage a worse case; ingenuity can always conjure up a case of greater heinousness. … [Imposition of] the maximum penalty offends this principle only if the case is recognizably outside the worst category.

1. Thus, the maximum penalty is reserved for contraventions falling within the worst *category* of cases for which that penalty is prescribed. This does not require characterisation as *the* worst possible case. However, a case is not in the worst category merely by reason that the contravener has a history of prior contraventions, although that history may assist in the proper characterisation of the instant contravention. Considerable caution may be required to avoid blurring this vital distinction. This is especially so when, as in this case, past contraventions are many in number, extend over a protracted period of time and the legislature has not seen fit to provide greater penalties for second and subsequent contraventions.
2. Of course, the maximum penalty that has been legislated will demand careful attention in a civil penalty setting as much as in a criminal setting. This is no more than what is demanded by proper construction of the statute. As was observed by the majority in ***Markarian*** *v The Queen* [2005] HCA 25; 228 CLR 357 at [31]:

It follows that careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick.

### Third principle: the regulator’s submissions as to the top of the appropriate penalty range should not be disregarded without giving the parties notice and an opportunity to be heard

1. The High Court has made it clear that a regulator’s submissions should be treated as a relevant consideration: *civil penalty case* at [64]; cf ***Barbaro*** *v The Queen* [2014] HCA 2; 253 CLR 58 at [7]. A regulator such as the Commissioner is not a disinterested party. To the contrary, the statutory powers, duties and functions attaching to the regulatory role compel a legitimate keen interest in the outcome of proceedings of this kind. Unlike a criminal prosecutor, a regulator is not precluded from making submissions about the appropriate penalty range. *Barbaro*, which ordinarily denies a prosecutor any right to express a view as to what the final result should be, was expressly found not to apply to civil penalty cases by the High Court in the *civil penalty case* at [1], [46] per French CJ, Kiefel, Bell, Nettle and Gordon JJ; at [78] per Gageler J; and at [104] per Keane J.
2. The protective purpose of imposing a civil penalty is achieved by the expected impact of the quantum of the penalty imposed. It may safely be assumed that a respondent’s penalty submissions are fashioned with an overall view to achieving the regulatory objective. Considerations beyond the instant case may be taken into account. These may include, for example, the need for general deterrence, as might be informed by the regulator’s awareness of the prevalence of contravening conduct within a given industry. As the High Court has observed, it is to be expected that the regulator will be in a position to offer informed submissions as to the effects of a contravention on the industry in question and the level or range of penalty necessary to achieve compliance: see *civil penalty case* at [60]. It is also “*consistent with the purposes of civil penalty regimes … that the regulator take an active role in attempting to achieve the penalty which the regulator considers to be appropriate and thus that the regulator’s submissions as to the terms and quantum of a civil penalty be treated as a relevant consideration*”: *civil penalty case* at [64].
3. It should also be observed that in civil penalty proceedings, as in other civil proceedings, “*there is generally very considerable scope for the parties to agree on the facts and upon consequences*” of the instant contravention: *civil penalty case* at [57]. If so agreed, a court may make orders to give effect to the agreement reached: *civil penalty case* at [57], [60]. However, whether there is agreement or not, a court cannot abdicate its function to ensure that the civil penalty ultimately imposed is appropriate for the instant contravention.
4. Given that the High Court has made it clear that a regulator’s submissions should be treated as a relevant consideration, a contravener should be entitled, in the ordinary course, to proceed upon the basis of responding to what the regulator has sought. There are also other good reasons for the Court to adopt this approach, having regard to the adversarial nature of civil proceedings. As the plurality observed in the *civil penalty case* at [53]:

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 sentencing.

1. In a separate judgment in the *civil penalty case*, Gageler J observed at [103] that:

In proceedings under s 49 of the BCII Act, as indeed in any civil proceedings, it is the right and duty of the plaintiff to mark out the extent of its claim against the defendant. The plaintiff’s claim establishes the scope of the controversy to be resolved by the judgment of the court. When a plaintiff asserts a claim to the grant of a particular remedy, it is not proffering an opinion on a matter of fact or law; it is stating the basis on which a controversy between it and the defendant may be quelled by the exercise of judicial power.

1. It follows that, in the case of a penalty proposed by a regulator without the agreement of a contravener, as a matter of judicial restraint and overall fairness to a contravener in knowing what is sought against them and being able to respond (including deciding whether to respond), a court should generally not exceed the top of the range of penalties proposed by the regulator. If such a departure is contemplated by a court, the parties, and especially the contravener, should be given an opportunity to be heard as to why the regulator’s proposed maximum should not be exceeded: see, by analogy, *DL v The Queen* [2018] HCA 32 at [39]. This is not least because, even in the absence of agreement as to penalty, there may have been other agreements between the regulator and the contravener, including as to facts that would not be disputed, giving rise to the range that was put forward.

### Fourth principle: instinctive synthesis only applies to the last stage of penalty imposition

1. All relevant factors having been considered, the quantum of a civil penalty, unless agreed, may be formulated using the process of “*instinctive synthesis*” described in ***Wong***at [74]-[76] and in *Markarian* at [35]-[39]. On occasion, however, that process can be applied with an excessive emphasis on its “*instinctive*” aspect. To do so is a mistake, not least because it tends to suggest that the entire process of penalty determination is instinctive. It is not.
2. The adjudication of a contested civil penalty case as to what the appropriate sanction should be entails a proper evaluation of all the relevant objective and subjective circumstances, and of the essential features of the proscription being sanctioned, including the maximum penalty available for the worst category of contravention. Particular attention may be, and usually is, required to be given to any circumstances of aggravation or mitigation, such as features of the conduct, individual circumstances and any relevant state of mind. As part of this, past conduct or contraventions may assist in better understanding how the current contravention is to be viewed, but the sanction must be being imposed for what is currently before the court, for the reasons outlined above at [102]-[107].
3. It is also a regular feature of civil penalty proceedings that a court may consider whether multiple contraventions should be found to have arisen from a course of conduct and treated accordingly, or whether, having arrived at a quantum of penalties for multiple contraventions, the court should make any adjustment to ensure that the penalties are appropriate having regard to the totality of the contravening behaviour. What these approaches reflect is that the ultimate penalty should be a proportionate penalty response to the overall level of wrongdoing.
4. It is only when the entire evaluative process has been carried out that the competing considerations are able and required to be weighed and balanced to arrive at the final numerical result. The final step is inevitably instinctive in some way because it involves a synthesis of competing, offsetting and qualifying considerations that ordinarily do not, if at all, readily lend themselves to a simple process of addition and subtraction.
5. A mathematical approach to arriving at the quantum of a civil penalty, especially the use of percentages of a maximum penalty, may involve departing from principle if this masks the vice of failing to take into account the many competing and sometimes contradictory elements that may bear upon determination of the appropriate penalty to impose: cf *Wong* at [75]. The term “*instinctive synthesis*” must not be used to “*cloak the task … in some mystery*”, but rather to make it clear that a court is called upon to reach a single penalty which “*balances many different and conflicting features*”: see *Wong* at [75]. A court must engage with all of this to “*distil an answer which reflects human behaviour in … monetary units*” to advance, in this context, the primary objective of deterrence: see *Wong* at [77]. However the final figure is arrived at, it cannot absolve the court of the duty and obligation to engage with all of the constituent parts to which the final, instinctive, part of the process may be applied. It is only that last stage that is permitted to be instinctive.
6. The instinctive aspect of the process may, and often will, include the application of totality principles. The totality principles described in ***Mill*** *v The Queen* (1988) 166 CLR 59 are apposite in the civil penalties context, albeit that they arose in that case in the course of adjusting an overall gaol term, such that they require suitable adjustment to move away from the language of criminal offences. Relevantly, the High Court in *Mill*, at 63, approved of and quoted from a passage from Thomas, *Principles of Sentencing*, 2nd ed. (1979) at pp 56-57, which included the following (with adjustments):

The [totality] principle has been stated many times in various forms: ‘when a number of [contraventions] are being dealt with and specific [penalties] in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong’; ‘when ... cases of multiplicity of [contraventions] come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the [contravening] behaviour and ask itself what is the appropriate [penalty] for all the [contraventions].

### Fifth principle: the outcome in prior cases can be used to help ensure reasonable consistency in the application of principle and as a yardstick for penalty determination

1. One of the difficulties in developing guidelines for the imposition of consistent civil penalties is created by the endorsement of agreed penalties by the *civil penalty case*, of a kind that are not permitted in criminal sentencing following *Barbaro*. It is a difficulty of a practical nature, arising from the desirable outcome of reducing contested litigation on the penalty that should be imposed, thereby freeing the regulator’s resources for other cases. However, it means that there is less scope for a body of comparative penalty cases to be developed. Nonetheless, it is to be hoped that over time, sufficient cases will be contested, or even if agreed, explained, to provide guidance by way of yardsticks. As I make reference below to the penalty that has been imposed by the Full Court in a recent case, it is desirable to set out the limited basis upon which such prior decisions can be used, based again on well-developed criminal sentencing cases.
2. In *Cruz v The Queen; R v Cruz* [2017] ACTCA 48, the principles emerging from key High Court cases on the use of comparative sentences were set out as follows (at [72]-[74]):

In *Wong v The Queen* [2001] HCA 64; 207 CLR 584 (***Wong***), the plurality (Gaudron, Gummow and Hayne JJ) observed at [59] that:

recording what sentences have been imposed in other cases is useful if, but only if, accompanied by an articulation of what are to be seen as the unifying principles which those disparate sentences may reveal. The production of bare statistics about sentences that have been passed tells the judge who is about to pass sentence on an offender very little that is useful if the sentencing judge is not also told **why** those sentences were fixed as they were.

(emphasis in original)

The same observation may be made about reliance upon sentences imposed in other cases advanced in support of a sentence appeal brought by either party.

In *Hili v The Queen* [2010] HCA 45; 242 CLR 520, the above quote from *Wong* was reproduced after the following passage at [54] (footnotes omitted):

In *Director of Public Prosecutions (Cth) v De La Rosa*, Simpson J accurately identified the proper use of information about sentences that have been passed in other cases. As her Honour pointed out, a history of sentencing can establish a range of sentences that have in fact been imposed. That history does not establish that the range is the correct range, or that the upper or lower limits to the range are the correct upper and lower limits. As her Honour said: “Sentencing patterns are, of course, of considerable significance in that they result from the application of the accumulated experience and wisdom of first instance judges and of appellate courts.” But the range of sentences that have been imposed in the past does not fix “the boundaries within which future judges must, or even ought, to sentence”. Past sentences “are no more than historical statements of what has happened in the past. They can, and should, provide guidance to sentencing judges, and to appellate courts, and stand as a yardstick against which to examine a proposed sentence” (emphasis added). When considering past sentences, “it is only by examination of the whole of the circumstances that have given rise to the sentence that ‘unifying principles’ may be discerned”.

In *R v Pham* [2015] HCA 39; 256 CLR 550, the relevant principles for the assessment of sentences were conveniently restated as follows at [28] (omitting footnotes):

(1) Consistency in sentencing means that like cases are to be treated alike and different cases are to be treated differently.

(2) The consistency that is sought is consistency in the application of the relevant legal principles.

(3) Consistency in sentencing for federal offenders is to be achieved through the work of intermediate appellate courts.

(4) Such consistency is not synonymous with numerical equivalence and it is incapable of mathematical expression or expression in tabular form.

(5) For that and other reasons, presentation in the form of numerical tables, bar charts and graphs of sentences passed on federal offenders in other cases is unhelpful and should be avoided.

(6) When considering the sufficiency of a sentence imposed on a federal offender at first instance, an intermediate appellate court should follow the decisions of other intermediate appellate courts unless convinced that there is a compelling reason not to do so.

(7) Appellate intervention on the ground of manifest excessiveness or inadequacy is not warranted unless, having regard to all of the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that have been imposed in comparable cases, the appellate court is driven to conclude that there must have been some misapplication of principle.

1. The plurality in *Hili v The Queen* [2010] HCA 45; 242 CLR 520 also endorsed, at [47], an important aspect of the dissenting judgment of Gleeson CJ in *Wong* as follows:

As Gleeson CJ pointed out, in *Wong v The Queen* [(2001) 207 CLR 584 at 591 [6]]:

“All discretionary decision-making carries with it the probability of some degree of inconsistency. But there are limits beyond which such inconsistency itself constitutes a form of injustice. The outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case. Like cases should be treated in like manner. The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, reasonable consistency.”

1. The same general approach should be taken in a civil penalty context. Consideration of penalties imposed in prior cases may assist in the important task of ensuring that there is consistency in the application of the relevant legal principles and that, so far as is reasonably possible, like cases are treated alike and different cases are treated differently.

## Before the primary judge

1. The contraventions in this case arose from acts that were committed by Mr Hanna: *Australian Building and Construction Commissioner v Hanna & Anor* [2017] FCCA 1257. Each contravention was against s 500 of the *FW Act*, which provides as follows (notes omitted):

**500 Permit holder must not hinder or obstruct**

A permit holder exercising, or seeking to exercise, rights in accordance with this Part must not intentionally hinder or obstruct any person, or otherwise act in an improper manner.

1. The terms of s 500 warrant closer consideration. The primary explicit proscription is against a permit holder intentionally hindering or obstructing any person where the permit holder is exercising or seeking to exercise rights in accordance with Part 3-4 of the *FW Act*: see *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (****The Laverton North and Cheltenham Premises Case****)* [2018] FCAFC 88at [84] as to how this proscription is to be understood. Also proscribed is otherwise acting in an improper manner, which was the pleaded allegation made against both Mr Hanna and, through his conduct, the appellant. That was also the way in which the declarations were expressed, as reproduced at [133] below.
2. The proscription against acting in an improper manner has a protean quality insofar as it is apt to apply to a broad range of conduct. The seriousness or gravity of an “*improper manner*” contravention must be considered in light of the primary focus in s 500 on conduct that has the character of *intentionally* hindering or obstructing any person.
3. It is very well established in the criminal law that a person cannot be sentenced for a more serious offence than the one they have been charged with: *R v De Simoni* (1981) 147 CLR 383 at 392. Gibbs CJ, with whom Mason and Murphy JJ agreed, said the following, expressing a fundamental principle that has been endorsed in criminal sentencing ever since:

It is not only in cases in which the offence has been accompanied by circumstances of aggravation that a trial judge may be required, in sentencing, to take an artificially restricted view of the facts. This will be so also in cases where the jury’s verdict is inconsistent with the view of the facts that the judge himself has formed, for the judge cannot act on a view of the facts which conflicts with the jury’s verdict. However, where the Crown has charged the offender with, or has accepted a plea of guilty to, an offence less serious than the facts warrant, it cannot rely, or ask the judge to rely, on the facts that would have rendered the offender liable to a more serious penalty.

1. A parallel concept applies to civil proceedings and cannot have less force when it comes to penalty imposition. In *Australian Building and Construction Commissioner v Hall* [2018] FCAFC 83, it was stated at [49]-[50]:

One of the main purposes of pleadings is to define the issues in dispute with sufficient clarity to enable the opposite party to understand the case he or she has to meet and to provide him or her with an adequate opportunity to prepare to meet that case: see *Dare v Pulham* (1982) 148 CLR 658 at 664 (Murphy, Wilson, Brennan, Deane and Dawson JJ). A concomitant of this principle is that a party is not entitled to depart from his or her pleaded case except if the parties have both deliberately chosen to conduct the dispute on a different basis. That principle was expressed in *Banque Commerciale S.A., En Liquidation v Akhil Holdings Limited* (1990) 169 CLR 279 at 286–287 in the joint judgment of Mason CJ and Gaudron J as follows:

The function of pleadings is to state with sufficient clarity the case that must be met: *Gould and Birbeck and Bacon v Mount Oxide Mines Ltd (In Liquidation)* [(1916) 22 CLR 490], per Isaacs and Rich JJ at 517. In this way, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision. *The rule that, in general, relief is confined to that available on the pleadings secures a party’s right to this basic requirement of procedural fairness. Accordingly, the circumstances in which a case may be decided on a basis different from that disclosed by the pleadings are limited to those in which the parties have deliberately chosen some different basis for the determination of their respective rights and liabilities.* See, e.g., *Brown v Dunn* [(1893) 6 R 76]; *Mount Oxide Mines* [(1916) 22 CLR 490 at 517-518].

(Emphasis added.)

In our view, these observations apply with even more force in a proceeding such as this where declarations of contravention of the FWA were sought against the respondents and civil penalties were sought to be imposed on them. Faced with those serious consequences, the respondents were entitled to be told clearly and precisely in the Commissioner’s ASOC what case it was they had to meet and, unless they deliberately chose to allow the case to be conducted on a different basis, to direct their evidence and arguments to that case and that case alone. Plainly, this latter exception did not permit the Commissioner to make a significant addition to, or departure from, the pleaded case, in counsel’s opening or closing submissions and then seek to justify that course by pointing to the respondents’ failure to object as evidence of their acquiescence in that course. If that were the test, this departure from the basic requirements of procedural fairness would not occur by the deliberate choice of the party entitled to fair notice but rather at the self-serving behest of his or her opponent. If such an approach were permitted, the requirement to give fair notice would be made redundant, trial by ambush would become a legitimate tactic, and the issues in dispute at trial would become a movable feast. As well, the ability of a trial judge to manage the trial to ensure it fairly addressed the issues in dispute would be significantly eroded, if not entirely destroyed. So, too, would be the capacity of the trial judge to identify the issues he or she needed to decide.

1. There is no evidence in this case that the appellant in any way acquiesced to the contraventions being characterised as more serious than was pleaded, let alone as having any unpleaded element of aggravation. Importantly, the Commissioner did not allege by his pleading that any of the conduct went beyond the proscription of acting in an improper manner, although facts were pleaded to indicate what gave the conduct its improper character. No pleaded allegation was made of hindering or obstructing any person, let alone of doing so intentionally: see [41]‑[48] of the amended statement of claim. The appellant, being liable for the conduct of Mr Hanna engaged in on its behalf, was required to meet the case that was pleaded against it, rather than some more serious case that could have been brought, but was not.
2. In the primary judge’s prior liability decision, *Australian Building and Construction Commissioner v Hanna & Anor (No. 2)* [2017] FCCA 1904, his Honour, applying s 793 of the *FW Act*, found that the appellant was liable for the actions of Mr Hanna. His Honour made the following declarations, which were in conformity with the Commissioner’s pleaded case:

That in the exercise or attempted exercise of purported rights under s.484 *Fair Work Act 2009* (Cth) (“FW Act”) by Mr Hanna, pursuant to s.550(1) of the FW Act, the Second Respondent engaged in an improper manner by:

(a) entering the Project without having given a notice of entry under s.487 of the FW Act;

(b) remaining on the premises despite requests to leave;

(c) when asked if he had a right of entry permit, responded by raising his hand with his middle finger extended and saying that he did not need one;

(d) squirted water at a person validly engaged to work on the Project, which struck the person’s face, shirt and mobile phone;

(e) stating “Take that phone away or I’ll fucking bury it down your throat, you ask me if you want to take a picture of me, you ask me”; and

(f) using an employee’s swipe card to swipe out a number of employees engaged on the Project, the effect of which was that the occupier of the premises did not have a record of which employees had left the premises and which had not.

1. In the penalty judgment that is the subject of this appeal, the primary judge identified the six contraventions as follows, again using the language in s 500 of acting in an improper manner, without anything more:

20. The first contravention is that, by being in the premises without invitation and without having given a notice of entry, the CFMEU has acted in an improper manner.

21. The second contravention is that the CFMEU ignored the requests of Mr Livingston, Mr Gough and Mr Libke to leave the premises.

22. The third contravention is constituted by the CFMEU behaving improperly by the squirting of water at Mr Neylan.

23. The fourth contravention is the verbal abuse by the CFMEU to Mr Neylan when the CFMEU said to Mr Neylan that the CFMEU would “*fucking bury the phone*” down Mr Neylan’s throat.

24. The fifth contravention was the CFMEU, through Mr Hanna, raising the middle finger in an obscene gesture when asked by Mr Libke to give him the permission notice that he had from Hindmarsh.

25. The sixth contravention was that the CFMEU using the swipe card in such a manner that Hindmarsh did not have a proper record of who was in the construction site and who was not.

1. Before the primary judge, the Commissioner made various submissions as to grouping of the contraventions and the proposed range of penalties. Those submissions, which again did not go beyond the language in s 500 of acting in an improper manner or the pleaded case, were as follows:

**3. Number of contraventions of the Second Respondent**

3.1 Mr Hanna and the CFMEU committed 6 contraventions of s.500. These are detailed at paragraphs 41 to 46 of the Statement of Claim as follows:

|  |  |
| --- | --- |
| Contravention 1 | Entering the premises without invitation and without a notice of entry |
| Contravention 2 | Remaining on the premises despite being requested to leave |
| Contravention 3 | Squirting water at Mr Neylon |
| Contravention 4 | Verbally abusing Mr Neylon |
| Contravention 5 | Raising his hand with his middle finger extended and raised to Mr Liebke in response to Mr Liebke’s request as to whether he had an entry permit |
| Contravention 6 | Using one swipe card to swipe out all workers who exited the project |

...

**5. Recommended penalty and totality**

5.1 The Applicant submits that the contraventions are serious and that, taken individually, the following percentages of the maximum ought to be imposed for each contravention:

(1) Contravention 1: 80 – 90%;

(2) Contravention 2: 80 – 90%;

(3) Contravention 3: 90 – 100%

(4) Contravention 4: 90 – 100%

(5) Contravention 5: 90 – 100%

(6) Contravention 6: 90 – 100%.

5.2 However, applying the totality principle to these contraventions, the Applicant submits that considering the interrelatedness between them it is appropriate to consider them as falling into three distinct groups. The proposed grouping is as follows:

(1) Contraventions 1 and 2 – Failure to comply with right of entry requirements

(2) Contraventions 3, 4 and 5 – Abusive and insulting behaviour towards site staff

(3) Contraventions 6 – Disruptive conduct and organising industrial action

5.3 The Applicant submits that applying the totality principle in this way the final penalty for each group of contraventions ought to be as follows:

|  |  |  |
| --- | --- | --- |
| **Contravention** | **Contravention Description** | **Proposed Penalty** |
| Group 1 | Entering premises without a notice of entry | a total of $40,800-$45,900 |
|  | Remaining on the premises despite requests to leave |
| Group 2 | Squirting water at Mr Neylon | a total of $45,900-$51,000 |
|  | Verbally abusing Mr Neylon |
|  | Raising his hand with his middle finger extended and raised to Mr Liebke in response to Mr Liebke’s request as to whether he had an entry permit |
| Group 3 | Use of one swipe card to swipe out all workers who exited the project | A total of $45,900- $51,000 |

5.4 The total of the final penalties would therefore be between $132,600 and $147,900.

5.5 The Applicant submits the above penalty ranges are appropriate, considering the strong need for specific deterrence with regard to the CFMEU.

1. The primary judge summarised the facts at [4]-[17] and succinctly stated them at [20]-[25], as reproduced at [134] above.
2. In the result, the primary judge considered that his Honour did not have the power to treat the separate contraventions as constituting a single course of conduct. As has been explained by Logan J, this was an error. In the circumstances, that error was more than technical. It fundamentally affected the proper assessment of the collective effect of the six contraventions and the degree of overlap between them. While the primary judge was not necessarily bound to apply the course of conduct principle, the need for its application was difficult to avoid without very clear reasoning, especially given that the Commissioner submitted in writing that it should be applied. The appellant was entitled to proceed upon the basis that, if this submission was not going to be accepted by his Honour, the appellant would be given the opportunity to be heard on such a proposed course.
3. Having concluded erroneously that his Honour had no power to treat the contraventions as arising from a single course of conduct, the primary judge then commenced to assess the contraventions as follows:

47. For any of the persons at the “Broadway on Ann” site that day, it would be easy to surmise that the appearance of Mr Hanna had the full and unequivocal support of the CFMEU of the CFMEU behind it. For those people, it is easily surmised that they would think that there was no one higher in the CFMEU than Mr Hanna.

48. For Mr Hanna to have acted in this most abhorrent way, would have been very concerning to those affected. To them, these were not the actions of some over-exuberant maverick from the CFMEU; these were the actions of the President himself. And even though Mr Hanna is no longer associated with the CFMEU, there has been no condemnation, or even apology, for the actions of Mr Hanna on this day from the CFMEU.

1. At [52], his Honour observed that, “*in assessing the gravamen of each contravention by the CFMEU, it must be borne in mind that the previous history of the CFMEU does put these contraventions into a category that defies easy comparison*”.
2. After referring to the prior contravention history of the appellant, his Honour continued as follows:

56. The submission was made that the offending behaviour of Mr Hanna (and the CFMEU), whilst serious, was of short duration and did not pose any actual safety concerns. It was submitted that there was no loss or damage afforded to the contractor, Hindmarsh. It was also submitted that there was co-operation afforded by the CFMEU.

57. The offending may have been of short duration but that does not derogate at all from how serious these contraventions are. I do consider that there was a safety concern because there had been no arrangements made for Mr Hanna to visit the construction site and, as such, there would necessarily have been a risk to safety posed. I have already mentioned how using the swipe card was a very big risk to safety. It was more good fortune than good management that there was no actual safety incident that occurred.

58. In the end, the contractor, Hindmarsh, lost over 30 minutes of productivity when Mr Hanna (and the CFMEU) led the workers off the site. This is not a significant loss by any means, but it cannot be said that there was no loss. I could not find any true measure of co-operation on the part of the CFMEU.

…

62. It is trite to note that the presence of Mr Hanna at that site did compromise the safety of the very workers he is supposedly trying to protect.

63. It may have been expected that there would be righteous condemnation of any person compromising safety on the work site coming from a union that purportedly exists to ensure safety on worksites. The silence from the CFMEU, however, has been deafening.

64. There has been no remorse from the CFMEU. There has been no evidence of the CFMEU training any of its officers as to the provisions of the FW Act to ensure that such abominable behaviour is not undertaken by any of its representatives ever again.

65. Given the nature of the contraventions, the recidivist nature of the CFMEU, the lack of acknowledgement of any wrong doing, the lack of any remedial action and the need to deter this kind of behaviour, I can see no reason to ameliorate any of the penalties that I will impose on the CFMEU.

1. Based on the foregoing, the primary judge categorised the contraventions as follows:

66. For the President of the CFMEU to simply walk on to a construction site without notice is a blatant disregard for the provisions of the FW Act and an obvious hazard for safety. To my mind, in all the circumstances, this contravention is in the worst category.

67. For Mr Hanna to refuse the authorised direction to leave the area and report to this site office displays flagrant disregard for the proper running of a construction site. To my mind, in all the circumstances, this contravention is also in the worst category.

68. When Mr Hanna was asked to show his authorisation, he extended his middle finger in an obscene gesture and ignored the request explaining that he did not have to comply with the law. For someone in his position to act in such an atrocious manner puts this contravention, in all the circumstances, also in the worst category.

69. When Mr Hanna saw that one of the officials have the “audacity” to film him, the reaction of Mr Hanna was to squirt water at him. Such conduct amounts to an assault under s.245 of the Queensland Criminal Code. Given the horrendous way in in which Mr Hanna was conducting himself, it is unsurprising that an officer wished to film the actions of Mr Hanna. For Mr Hanna to react by assaulting this officer, in all the circumstances, puts this contravention also into the worst category.

70. The threat that Mr Hanna made to that official could also constitute a criminal offence pursuant to s.359 of the Queensland Criminal Code. That officer was lawfully entitled to do what he was doing and for Mr Hanna to make the very vile threat that he did, in all the circumstances, puts this contravention also into the worst category.

71. The using of one person’s “swipe card” to have a large number of workers leave the site compromises safety as I have previously described in these reasons. For the President of a union, that supposedly exists to protect workers on a construction site, to behave in such an irresponsible and dangerous manner, in all the circumstances, also puts this contravention into the worst category.

1. In light of these conclusions, his Honour imposed the maximum pecuniary penalty available for each contravention, being $51,000. The total of the penalties imposed for the six contraventions was $306,000. With the exception of the sixth contravention involving the swipe card, it is not readily apparent why, rhetorical flourishes to one side, each individual contravention was in the worst category.

## Consideration

### Application of the course of conduct principle

1. The Commissioner, in his written submissions before the primary judge that are reproduced at [135] above, fairly and properly grouped the first and second contraventions and the third to fifth contraventions to reflect the similarities and differences between the underlying conduct. There were clear overlaps between what occurred, as the Commissioner effectively and properly conceded in his written submissions before the primary judge. If that submission was to be put to one side, there at least needed to be a clear and defensible reason given for doing so. Such reasoning is either absent or inadequate in his Honour’s reasons.
2. The primary judge considered that even if his Honour was wrong about the course of conduct principle applying, his Honour nonetheless did not see any basis to group the contraventions. His Honour observed that “*each of the contraventions were deliberate independent actions which were totally unnecessary and were not corollaries of each other*”. On appeal, the Commissioner defends this conclusion. In my view, that position cannot be sustained.
3. The primary judge was not bound to treat multiple contraventions as a single contravention. However, consideration of whether that approach should be taken, where relevant, is necessarily an important part of the Court’s task of ensuring that the penalties fit the level of wrongdoing. As was pointed out in *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39; 194 IR 461 at [12], the course of conduct principle recognises that where there is an interrelationship between the legal and factual elements of two or more civil penalty provisions, care must be taken to ensure that the contravener is not penalised twice for what is essentially the same wrongdoing: see also *Pearce v The Queen* (1998) 194 CLR 610 at [40]. Accordingly, while the determination of a civil penalty is ultimately a discretionary exercise, a failure, without a proper basis, to apply the course of conduct principle may cause or contribute to error in the outcome.
4. In this case, an essential interrelationship between the six contraventions is that they all occurred within the space of half an hour and arose out of a single illegal entry to a building site. All six contraventions were against the same provision. All had the element of an illegal presence, by reason that Mr Hanna, being a permit holder, did not have permission and did not give notice in order to be lawfully on the building site. That factual element was the same and was present for all six contraventions. As already observed, there was no pleaded allegation of hindering or obstructing any person, let alone of doing so intentionally. Such a characterisation was not necessarily or inevitably available and was at least contestable for the first two contraventions, if not for the first five contraventions. If such a finding was to have been relied upon either by the Commissioner or the primary judge, it was required to have been pleaded or otherwise acquiesced to by the appellant, neither of which occurred. The form of the pleading necessarily informs the way in which a case is conducted in response, including as to what is contested factually.
5. As to the first and second contraventions, there is a clear interrelationship between these contraventions that justifies them being treated as arising out of a single course of conduct. A clear reason would be required not to do so. The first contravention was a bare unlawful entry to the site. The conduct underlying the second contravention of ignoring requests to leave the premises involved a continuation of the first contravention, albeit with a greater measure of direct defiance.
6. As to the third, fourth and fifth contraventions, there is a clear interrelationship between these contraventions, including a close proximity in location, time and character, that justifies them being treated as arising out of a single course of conduct, as the Commissioner did in his written submissions. All of the contraventions involved conduct taking place while remaining illegally on the site. Together, they comprised what may be described as a course of conduct involving three improper responses by Mr Hanna to challenges to his presence on the premises, an effective assertion of a right to do as he pleased and conduct in accordance with that assertion. In my view, it would be artificial to take an atomised view of that behaviour such that each constituent action is found to represent discrete wrongdoing. This is especially so if the maximum penalty is imposed in respect of each contravention, with no adjustment made for totality.
7. As to the sixth contravention, I am satisfied that the subject conduct is sufficiently distinct so as not to warrant grouping with any other contravention.
8. Given the conclusions reached above as to the application of the course of conduct principle in this case, and because there was a significant measure of interrelationship between the legal and factual elements of the various contraventions, it follows that the imposition of the maximum penalty for each of the first five contraventions unavoidably entails a significant degree of separate punishment for what is essentially the same wrongdoing. I therefore respectfully disagree with Logan J that the maximum penalty should be reimposed for the first five contraventions. I am also necessarily of the view that the penalties imposed by the primary judge were manifestly excessive. I separately reach that conclusion because I consider that it was not open to the primary judge to regard any but the sixth contravention as being in the worst category. The reasons for reaching that conclusion are as follows.

### Characterisation of the contraventions

1. The first two contraventions entailed no more than being present illegally and refusing to leave when asked. The conduct giving rise to the third to fifth contraventions was, viewed either separately or collectively, a distinct escalation of the first two contraventions.
2. The third to fifth contraventions were doubtless unpleasant, and were a manifest abuse of the permit system. However, they comprised conduct whilst there, rather than the conduct in being there, which is what made these contraventions distinct from the first two contraventions. That was the way in which those three contraventions were pleaded. Individually, each was still at the lower range of objective seriousness. Collectively, they did rise somewhat higher than the first two contraventions. However, even collectively, it is impossible to see how they could properly be characterised as being in the most serious category. That is so notwithstanding that none of the contraventions were, in the language of *Veen (No 2),* an “*uncharacteristic aberration*”, but, rather, were conduct manifesting “*a continuing attitude of disobedience of the law*”. Cast in the light of that attitude of disobedience, the third to fifth contraventions may be regarded as rising, in combination, to somewhere in the middle of the range of objective seriousness.
3. The conduct giving rise to the sixth contravention was the most serious. Not only were workers effectively smuggled off the site, but there was a potentially serious safety issue if anything happened at the site, such as might require an evacuation. The sixth contravention, although far from the worst possible to envisage, could properly be regarded as being in the worst category because of the subversion, while illegally on the site, of an inherently important purpose of having a swipe card system, being to record, in real time, who was on the site at any given point in time.
4. The only reasonably available explanation for the primary judge viewing all six contraventions as being in the worst category is that his Honour evidently considered it acceptable to use the appellant’s past contravention history to give them that character. In doing so, his Honour imposed fresh penalties for past contraventions. That error is particularly apparent at [79], where his Honour stated:

… The deterrent aspect of the pecuniary penalty system is not having the desired effect. The CFMEU has not changed its attitude in any meaningful way. The Court can only impose the maximum penalty in an attempt to fulfil its duty and deter the CFMEU from acting in the nefarious way in which it does.

1. His Honour characterised all of the contraventions as being in the “*worst category*”, which was his Honour’s justification for the imposition of the maximum available penalty. In my view, however, the first five of those contraventions are recognisably outside of that category.

### Disregard of the Commissioner’s submissions below

1. The Commissioner’s submissions before the primary judge, reproduced in part at [135] above, presented a severe view of the appellant’s conduct in relation to the six contraventions on 10 February 2015. In all of the circumstances, that required careful consideration as to whether the penalties the Commissioner was seeking were warranted. It required even more careful consideration if those submissions were not to be accepted, not because they sought too severe an outcome, but, rather, because they sought, in the evident view of the primary judge, such an inadequate outcome that more than double the regulator’s proposed upper end of the range of appropriate penalties was required to be imposed. Yet there is nothing to suggest that there was anything, let alone anything of significance, that the Commissioner overlooked or otherwise failed to address. His Honour did not refer to what the Commissioner proposed, let alone find any aspect of what was submitted unacceptable.
2. If the Commissioner’s submissions were to be rejected by the primary judge, at the very least the reasons for doing so needed to be clearly stated. That did not happen. The need for such reasons is especially potent given the views of the High Court that a regulator’s submissions on penalty are a relevant consideration in the exercise of the discretion, and are a weighty consideration as to the level of penalty that the regulator considers is necessary to meet the objective of deterrence. The Commissioner’s submissions in that regard were not to be lightly overlooked. They carefully analysed the conduct involved in the present contraventions, and included a 94-page table setting out 129 prior contraventions by the appellant in considerable detail.

## The penalties that should be imposed

1. In *The Non-Indemnification Personal Payment Case*, the Full Court imposed civil penalties in respect of contraventions of s 348 of the *FW Act* upon remittal from the High Court. In that case, a concrete pour was interrupted by a blockade. A large quantity of concrete was spoilt and had to be dumped. This was the first contravention. The conduct was characterised as being extremely serious, involving actual loss and damage. Further conduct of a like kind was threatened to take place the next day, but did not take place. This was the second contravention. The conduct was characterised as serious but less serious than the first contravention.
2. The contravention provisions were quite different from those in this case, but the maximum penalties were the same for both the individual union official and for the union. The penalties imposed were as follows:
3. In respect of the first contravention:
   1. for the union official, $8,500 out of a possible maximum of $10,200; and
   2. for the union, $46,000 out of a possible maximum of $51,000.
4. In respect of the second contravention with the same maximum penalties:
   1. $4,000 for the union official; and
   2. $25,000 for the union.
5. I consider that *The Non-Indemnification Personal Payment Case* provides a yardstick for the appropriate penalty to be imposed in this case. The penalty imposed for the second contravention in that case had a reasonable degree of comparison and thus yardstick value in respect of the first to fifth contraventions in this case, which involved serious contraventions falling short of the most serious category. I similarly consider that the penalty imposed for the first contravention in that case was a useful yardstick for the sixth contravention in this case, because each involved a reasonably flagrant breach of the proscription. Those yardsticks are taken into account below as part of the process of instinctive synthesis in arriving at the final monetary penalties to be imposed.
6. The most severe maximum penalties proposed by the Commissioner before the primary judge, still totalling $147,900, were the most that should have been imposed, at least in the absence of the parties having been given notice and an opportunity to be heard. However, even that level of penalty would be manifestly excessive for the first five contraventions, and would have been a very heavy sanction for the sixth contravention. In particular, I am unable to accept the figures that were suggested by the Commissioner in his written submissions, reproduced at [135] above, by way of percentages of the maximum for each of the individual contraventions.
7. The penalties that should be imposed, and the reasons for imposing them, are as follows.
8. The first and second contraventions, in the context of the many prior contraventions of the appellant, may be viewed as deliberate conduct in overt defiance of the law, but as not entailing the more serious elements of hindering or obstructing. Those contraventions are to be viewed as requiring a condign penalty to deter repetition. Taken on their own, each warrants a penalty of $10,000 when viewed in light of the prior contraventions and the “*continuing attitude of disobedience of the law*” that they manifest. There needs to be a degree of totality adjustment due to the relationship between the two contraventions and the grouping that should take place. The appropriate combined penalty is $15,000 in light of those considerations.
9. As discussed above, the third to fifth contraventions in combination rise to the mid-level of objective seriousness when viewed in light of the prior contraventions and the “*continuing attitude of disobedience of the law*” that they manifest. So considered, each warrants a penalty of $15,000. There needs to be a degree of totality adjustment due to the relationship between the three contraventions and the course of conduct grouping that should take place. The appropriate combined penalty is accordingly $30,000.
10. For the sixth contravention, while worse contraventions can be envisaged, this can properly be characterised as being in the worst category and therefore permits and warrants the imposition of the maximum penalty of $51,000. While the contravention was not pleaded as one of intentionally hindering or obstructing the usual operation of the workplace, the protean quality of acting in an improper manner can, and in this case does, permit a view that it is no less serious than conduct that might be pleaded as intentionally hindering or obstructing. In the context of the prior contraventions, it may properly be regarded as requiring the maximum deterrence.
11. The overall penalties that should be imposed therefore add up to a total of $96,000. This is, on any view, a very substantial penalty for contraventions that took place in a half-hour period and were not shown to have caused any actual loss or damage. While the primary judge referred to a loss of productivity for 30 minutes, it is not apparent how that conclusion was reached, nor what it meant.

## Conclusion

1. By reason of the various issues addressed above, I am of the view that the primary judge erred not only in the manner described by Logan J, but also by imposing penalties that were manifestly excessive in all of the circumstances. I consider that the appeal should be allowed. The penalties for the first to fifth contraventions should be set aside, and, in lieu thereof, reduced penalties should be imposed in accordance with the figures arrived at above. The maximum penalty for the sixth contravention should be reimposed.

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| I certify that the preceding seventy-eight (78) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromwich. |

Associate:

Dated: 14 August 2018