FEDERAL COURT OF AUSTRALIA

Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union [2020] FCA 549

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| File number: | NSD 474 of 2019 |
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| Judge: | **FLICK J** |
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| Date of judgment: | 28 April 2020 |
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| Catchwords: | **INDUSTRIAL LAW** –penalties – agreement as to range – course of conduct – civil double jeopardy – totality principle  |
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| Legislation: | *Building and Construction Industry (Improving Productivity) Act* *2016* (Cth) ss 7, 46, 81, 83, 91, 417, 421*Fair Work Act* *2009* (Cth) ss 500, 546, 556*Petroleum Retail Marketing Sites Act 1980* (Cth) s 10  |
|  |  |
| Cases cited: | *Australian Building and Construction Commissioner v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (*The Australian Paper Case*) *(No 2)* [2017] FCA 367*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; (2017) 254 FCR 68 Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd (1997) 145 ALR 36 *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8, (2008) 165 FCR 560*Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46, (2015) 258 CLR 482*Community and Public Sector Union v Telstra Corporation Ltd* [2001] FCA 1364, (2001) 108 IR 228*Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The BKH Contractors Appeal)* [2020] FCAFC 9*DP World Sydney Ltd v Maritime Union of Australia (No 2)* [2014] FCA 596, (2014) 318 ALR 22*Kelly v Fitzpatrick* [2007] FCA 1080, (2007) 166 IR 14*Markarian v The Queen* [2005] HCA 25, (2005) 228 CLR 357 *Ministry for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72 *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285  |
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| Date of hearing: | 12 November 2019 |
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ORDERS

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|  | NSD 474 of 2019 |
|   |
| BETWEEN: | AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONERApplicant |
| AND: | CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNIONFirst RespondentANTHONY SLOANESecond RespondentBRENDAN HOLLThird Respondent |

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| --- | --- |
| JUDGE: | FLICK J |
| DATE OF ORDER: | 28 APRIL 2020 |

## THE COURT DECLARES THAT:

### Anthony Sloane

1. The Second Respondent, an official of the First Respondent acting in that capacity for the purposes of s 94(1)(a) of the *BCIIP Act,* contravened s 46 of the *BCIIP Act* on 20 February 2018 by organising the Westform workers to engage in unlawful industrial action constituting the Stoppage at the Project Site.

2. The Second Respondent, an official of the First Respondent acting in that capacity for the purposes of s 793(1)(a) of the *Fair Work Act*, contravened s 500 of the *Fair Work Act* on 20 February 2019 by:

* 1. hindering or obstructing each of Paul Neville, Daniel Kos, Michael Harbison and Tahir Mehmed from discharging their duties on the Project; and
	2. by one or more of each of the following, acted in an improper manner:
		1. organising the Stoppage;
		2. interrupting the pre-start meeting between Westform and the Westform workers;
		3. pursuing Pay Claim in circumstances where it had no merit;
		4. making the threat to organise the Stoppage unless the Pay Claim was resolved in favour of the Westform workers;
		5. pursuing the Pay Claim other than in accordance with the disputes procedure in cl 27 of the JJSL Agreement (which covered the Westform workers);
		6. failing to give notice of entry in accordance with s 487 of the *Fair Work Act* to Parkview, as the occupier of the premises at the Project Site, and each of Westform and JSL as an affected employer; and
		7. contrary to s 484, holding discussions with the Westform workers outside mealtimes and other breaks.

### CFMMEU

3. The First Respondent, by the conduct of the Second Respondent in the first declaration and by operation of s 94 of the *BCIIP Act*, contravened s 46 of the *BCIIP Act* on 20 February 2018 by organising the Westform workers to engage in unlawful industrial action constituting the Stoppage at the Project Site.

4. The First Respondent, by the conduct of the Westform workers in engaging in the Stoppage and by operation of s 95(1)(c)(iii) of the *BCIIP Act*, contravened s 46 of the *BCIIP Act* on 20 February 2019 by engaging in unlawful industrial action constituting the Stoppage;

5. The First Respondent, by the conduct of the Second Respondent in the second declaration and by operation of ss 793 and 550 of the *Fair Work Act*, was knowingly concerned in the Second Respondent’s contravention of s 500 and, accordingly, has itself contravened s 500 of the *Fair Work Act*.

# THE COURT ORDERS THAT:

### CFMMEU

1. The First Respondent pay to the Commonwealth of Australia a penalty of $75,000 in respect of its contravention of s 46 of the *BCIIP Act* as declared in para 3 of the Declarations.

2. The First Respondent pay to the Commonwealth of Australia a penalty of $75,000 in respect of its contravention of s 46 of the *BCIIP Act* as declared in para 4 of the Declarations.

3. The First Respondent pay to the Commonwealth of Australia a penalty of $18,000 in respect of its contravention of s 500 of the *Fair Work Act* as declared in para 5 of the Declarations.

### Anthony Sloane

4. The Second Respondent pay to the Commonwealth of Australia a penalty of $20,000 in respect of his contravention of s 46 of the *BCIIP Act* as declared in para 1 of the Declarations.

5. The Second Respondent pay to the Commonwealth of Australia a penalty of $5,000 in respect of his contravention of s 500 of the *Fair Work Act* as declared in para 2 of the Declarations.

#### **Times for payment**

6. The penalties in Orders 1 to 5 above are payable to the Commonwealth of Australia within 28 days.

## AND THE COURT ORDERS THAT:

7. There be no orders as to costs.

8. The proceedings are otherwise dismissed.

### Definitions

1. In these Declarations and Orders:

* 1. ***BCIIP Act*** means the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth);
	2. ***Fair Work Act*** means the *Fair Work Act 2009* (Cth);
	3. **JJSL Agreement** means the *JJSL Labourforce Pty Ltd/CFMEU Collective Agreement 2017 – 2018*
	4. **Parkview** means Parkview Constructions Pty Ltd, which was the principal contractor on the Project.
	5. **Pay Claim** means the pay dispute between Westform and its workers regarding payment for one hours pay on 10 February 2018, which was lost due to inclement weather;
	6. **Project** means the Mezzo Stage 2 Project and **Project Site** means 87 Bay Street, Glebe, New South Wales
	7. **Stoppage** means the failure or refusal by the Westform workers to carry out work on the Project between approximately 7.30am and 10.30am on 20 February 2019;
	8. **Westform** means Westform Formwork Contractors Pty Ltd, a subcontractor to Parkview on the Project.
	9. **Westform** **workers** means the workers employed by JJSL Labourforce Pty Ltd who were supplied to Westform to carry out work on the Project.

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

REASONS FOR JUDGMENT

FLICK J:

1. Early in the morning on 20 February 2018 two members of the Construction, Forestry, Maritime, Mining and Energy Union (the “CFMMEU”) entered a building site at Glebe. They demanded entry in respect to what was said to be a pay dispute.
2. The two CFMMEU members addressed workers and disrupted a pre‑work meeting. Work on the site was stopped for about three hours and involved some 25 individual workers.
3. Proceedings were commenced in this Court in March 2019 by the Australian Building and Construction Commissioner (the “Commissioner”). The Respondents were the CFMMEU and the two Union members, Messrs Anthony Sloane and Brendan Holl. It was alleged that the conduct that took place on 20 February 2018 was in contravention of:
* section 500 of the *Fair Work Act* *2009* (Cth) (the “*Fair Work Act*”); and
* section 46 of the *Building and Construction Industry (Improving Productivity) Act* *2016* (Cth) (the “*Building Industry Act*”).
1. The proceeding against the Third Respondent, Mr Holl, has been resolved.
2. The CFMMEU and Mr Sloane have admitted the contraventions alleged. A *Statement of Agreed Facts* was filed in May 2019. A *Further Statement of Agreed Facts* was filed in September 2019.
3. The issue now to be resolved is the quantum of the penalties to be imposed. Agreement has been reached as to the appropriate range of penalties. It is concluded that penalties should be imposed as agreed, albeit at the very upper limit of the agreed range.

### The statutory provisions

1. The provisions of both the *Fair Work Act* and the *Building Industry Act* should be set forth. But, for present purposes, it is sufficient to merely set forth the terms in which these provisions are expressed.
2. Although the facts that occurred on 20 February 2018 gave rise to contraventions of both Acts, the terms in which each statutory provision are expressed is different.
3. Of considerable importance are those provisions of both Acts which address the circumstances in which penalties should not be imposed where conduct has also been found to constitute a contravention of another Commonwealth statute.

#### The Fair Work Act

1. The statutory source of the power to impose a penalty for a contravention of a civil remedy provision of the *Fair Work Act* is s 546.
2. Section 500 of the *Fair Work Act* provides as follows:

**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 556 provides as follows:

**Civil double jeopardy**

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

…

#### The Building Industry Act

1. The statutory source of the power to impose a penalty for a contravention of a civil remedy provision is to be found in s 81 of the *Building Industry Act,* with the maximum pecuniary penalties for “*Grade A*” and “*Grade B*” civil remedy provisions set out at s 81(2)(a) and (2)(b) respectively.
2. Section 46 of this Act provides as follows:

**Unlawful industrial action prohibited**

A person must not organise or engage in unlawful industrial action.

…

“*Industrial action*” is relevantly defined in s 7(1) as follows:

**Meaning of *industrial action***

(1) ***Industrial action*** is action of any of the following kinds:

…

(c) a failure or refusal:

(i) by employees to attend work, where that work is building work; or

(ii) to perform any building work at all by employees who attend work, where that work is building work;

…

Section 7(2) goes on to define what the phrase “*industrial action*” does not include.

1. Section 83 of the *Building Industry Act* provides as follows:

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

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

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

1. Section 91 provides as follows:

**Civil double jeopardy**

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

### The facts giving rise to the contraventions

1. As set forth in the *Further Statement of Agreed Facts*, there was agreement as follows:

**C. Events of 20 February 2018**

11. On 20 February 2018:

a. Sloane and Brendan Holl (**Holl**) attended the Project Site at about 6.40am;

b. when there, Sloane said to Harbison [Site Manager of the Project Site] words to the effect that “There was a problem with the Westform boys not getting paid for a Saturday two weeks ago” and that “I want to talk to the guys”;

c. shortly after 7.00am, upon being asked by Kos [Formwork Supervisor on the Project Site] what Westform had done wrong, Holl (addressing the claim for payment for inclement weather) said to Harbison and Kos words to the effect that “It’s fine that they sat in the sheds, but they should have been paid for the time they were in the shed”;

d. Harbison offered to gather the Westform workers at a park directly across the road from the Project prior to their commencement of work for the day, but Holl indicated he and Sloane wanted to see the workers on the Site;

e. Harbison requested to inspect Sloane’s and Holl’s entry permits;

f. each of Sloane and Holl produced a Federal entry permit and a State entry permit for inspection; and

g. Harbison subsequently escorted them onto the Project Site, proceeding to Level One of the Project Site.

12. There, from about 7.15am on 20 February 2018, the Westform workers had attended the daily pre-start meeting to discuss the work to be undertaken on that day.

13. During the daily pre-start meeting:

a. Sloane and Holl entered and made their way to the front of the group of Westform workers and started to address the workers;

b. After 5 minutes, Kos said words to the effect that “Guys, it’s 7.30am, we need to go to work, there’s plenty of work to do. Go to your areas”;

c. Holl responded by indicating (among other things) that he and Sloane were still talking to the employees;

d. Some of the Westform workers appeared agitated or frustrated and some of them yelled things such as: “let them finish.”

e. Harbison said words to the effect that “That’s fine, but you can’t just stand here. I’ve got trades working in this area and I need you to move out of the area”;

f. Harbison suggested that they move to the lunch room, located on Basement Level Two;

g. Sloane agreed and Sloane said to the Westform workers words to the effect of “Alright, everyone, let’s go down to the lunchroom”; and

h. the Westform workers, along with Sloane and Holl, went to the lunch room.

14. After the daily pre-start meeting, 25 of the Westform workers (who were each members of the CFMMEU):

a. failed or refused to perform work from 7.30am;

b. did not comply with the direction given by Kos pleaded at **paragraph 12(b) of the SOC (paragraph 13(b) above)** to start work; and

c. instead, as directed by Sloane, moved to the lunch room at the Project Site.

15. At about 8.00am on 20 February 2018, Kos and Neville entered the lunch room, where the Westform workers, Sloane and Holl were present; and

a. Sloane told Neville that:

i. there was a pay dispute between Westform and its workers regarding payment for one hour on 10 February 2018, which was lost due to inclement weather (**Pay Claim**); and

ii. Westform was behind in payment of entitlements for the Westform workers; and

iii. the Westform workers would not return to work until the problem was fixed;

b. Sloan then said words to the effect that “You need to go upstairs and make a call to get this fixed. You can call the police, the ABCC or even God, but I will not be moving from this site until the payments I’ve requested have been paid. I’m going to park myself here on the job and cause issues for Westform if you don’t fix this”;

c. Neville said words to the effect that “Why didn’t you contact me or the office if you had an issue with payments? You should of called me first because I manage the company”;

d. Sloane said words to the effect “go upstairs to call Westform and get the matter fixed”; Neville said words to the effect that “Guys, the site is open and you are expected to go to work. You are breaking the law by staying in here and not returning to work and you are exposing yourselves to large fines. Also, you will not be paid for the time you spend sitting in here”;

e. Neville said words to the effect that “Boys, your entitlements are up to date as per the EBA. You don’t have a legitimate pay dispute. You can’t just sit here in the sheds; you should be upstairs working. You are breaking the law by being here”; and

f. despite the direction given by Neville, 25 of the Westform workers continued to fail or refuse to perform their duties.

16. Sometime after 8.00am on 20 February 2018, Mehmed entered the lunchroom and asked Sloane why the Westform workers were “sitting in the shed”, and:

a. Sloane said words to the effect that “Westform have underpaid the boys an hour for sitting in the sheds last week because it was raining”;

b. upon being urged by Mehmed to get the Westform workers to return to work and to go to the office to go through the issues and get it resolved, Sloane said words to the effect that “this has come from above my head. The boys aren’t going back to work but this can easily be resolved if Paul Tilocca gives Robbie Kera [CFMMEU official] a call”; and

c. upon being asked ty Mehmed, Sloane said that “no one is going back until I hear back from Kera”.

17. At approximately 10.30am on 20 February 2018, Holl approached the entry to the Project Site on Wentworth Point Road and told Mehmed and Giuseppe Armicida, Safety Coordinator and Union Delegate at Westform, words to the effect that “I got a call from Michael Greenfield, I believe it’s all been resolved. I’m going to talk to the guys in the shed and then they can all go back to work.”

18. Shortly after 10.30am, Sloane and Holl held a meeting with the Westform workers and, after the meeting concluded, the Westform workers returned to work at about 10.45am.

19. The entry onto the Project Site on 20 February 2018 by Sloane was for the purpose of:

a. holding discussions with one or more of the Westform workers who were performing work on the Project Site; and

b. pursing the Pay Claim on behalf of Westform workers, who worked on 10 February 2018.

(emphasis in original)

1. The *Further Statement of Agreed Facts* goes on to set forth the admissions made, including admissions that the *Stoppage* was not protected industrial action and that the 25 Westform workers who engaged in the *Stoppage* engaged in unlawful industrial action. It was further admitted that by reason of those workers who were members of the CFMMEU the Union itself engaged in industrial action in contravention of s 46 of the *Building Industry Act*.

### The assessment of penalties – the maximum & agreement as to the range

1. The parties to the present dispute are in agreement as to the range within which penalties should be imposed. However, the Respondent did not agree as to how the range of those penalties was broken down based on each contravention as set out in the Applicant’s submissions.
2. But for the operation of s 556 of the *Fair Work Act,* and considered in isolation from the contraventions of the *Building Industry Act*, in the case of the contraventions of s 500 of the *Fair Work Act* it is agreed that the maximum penalties and the range within which the parties have agreed that an appropriate penalty may be ordered is as follows:

|  |  |  |
| --- | --- | --- |
|  | ***Maximum penalty*** | ***Range*** |
| CFMMEU | $63,000 | $10,000 to $18,000 |
| Sloane | $12,600 | $2,500 to $5,000 |
| **Total** | **$75,600** | **$12,500 to $23,000** |

1. But for the operation of s 91 of the *Building Industry Act* and considered in isolation from the contraventions of the *Fair Work Act*, in the case of the contraventions of s 46 of the *Building Industry Act* it is agreed that the maximum penalties and the range within which the parties have agreed that an appropriate penalty may be ordered is as follows:

|  |  |  |
| --- | --- | --- |
|  | ***Maximum penalty*** | ***Range*** |
| CFMMEU – two contraventions |  |  |
| 1. Sloane’s actions in organising the stoppage | $210,000 |  $58,000 to $75,000 |
| 2. Engaging in the Stoppage by the Westform workers | $210,000 |  $58,000 to $75,000 |
| Sloane  | $42,000 |  $12,500 to $20,000 |
| **Total**  | **$462,000** | **$128,500 to $170,000** |

1. When the contraventions of both Acts are considered, the parties are in further agreement that orders should be made for the payment of penalties by both the CFMMEU and Mr Sloane as follows:

|  |  |  |
| --- | --- | --- |
|  | ***Maximum*** | ***Range*** |
| CFMMEU  | $483,000 | $126,000 to $168,000 |
| Sloane | $54,600 | $15,000 to $25,000 |

1. Within this range, it is concluded that:
* the Court can give effect to an agreement of the parties as to the appropriate range within which penalties may be ordered.

It is further concluded that the Court should give effect to the agreement and that a penalty should be imposed in respect to:

* the CFMMEU in the sum of $168,000 – being an amount of about 35% of the maximum; and
* Mr Sloane in the sum of $25,000 – being an amount of about 46% of the maximum.

These sums, it is to be noted, are at the very upper limit of the range as agreed between the parties.

### Giving effect to the agreement of the parties

1. This Court can give effect to an agreement between the parties as to the range within which penalties may be ordered. It may do so if the Court is satisfied that it is “*appropriate in the circumstances*” to do so: *Ministry for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72 at [51] (“*Mobil Oil*”). Branson, Sackville and Gyles JJ there considered an admitted contravention by Mobil Oil of s 10 of the *Petroleum Retail Marketing Sites Act 1980* (Cth). Their Honours referred to the earlier decision of the Full Court of this Court in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 (“*NW Frozen Foods*”) and continued:

 [51] The following propositions emerge from the reasoning in *NW Frozen Food*s:

(i) It is the responsibility of the Court to determine the appropriate penalty to be imposed under s 76 of the [*Trade Practices*] *Act* in respect of a contravention of the [*Trade Practices*] *Act*.

(ii) Determining the *quantum* of a penalty is not an exact science. Within a permissible range, the courts have acknowledged that a particular figure cannot necessarily be said to be more appropriate than another.

(iii) There is a public interest in promoting settlement of litigation, particularly where it is likely to be lengthy. Accordingly, when the regulator and contravenor have reached agreement, they may present to the Court a statement of facts and opinions as to the effect of those facts, together with joint submissions as to the appropriate penalty to be imposed.

(iv) The view of the regulator, as a specialist body, is a relevant, but not determinative consideration on the question of penalty. In particular, the views of the regulator on matters within its expertise (such as the ACCC’s views as to the deterrent effect of a proposed penalty in a given market) will usually be given greater weight than its views on more “subjective” matters.

(v) In determining whether the proposed penalty is appropriate, the Court examines all the circumstances of the case. Where the parties have put forward an agreed statement of facts, the Court may act on that statement if it is appropriate to do so.

(vi) Where the parties have jointly proposed a penalty, it will not be useful to investigate whether the Court would have arrived at that precise figure in the absence of agreement. The question is whether that figure is, in the Court’s view, appropriate in the circumstances of the case. In answering that question, the Court will not reject the agreed figure simply because it would have been disposed to select some other figure. It will be appropriate if within the permissible range.

1. When considering whether an agreed penalty or an agreed range of penalties is appropriate the Court is thus required to “*form its own view*” and does not act as a “*rubber stamp*” to an agreement reached: *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46, (2015) 258 CLR 482 at 497 to 498. French CJ, Kiefel, Bell, Nettle and Gordon JJ there summarised the position as follows:

[31] ... Contrary ... to the supposed danger of the court being perceived as a “rubber stamp” for agreed penalty submissions, *NW Frozen Foods* required the court always to form its own view about the appropriate range of penalties. Finally, there would be little advantage in limiting parties to an agreed range as opposed to an agreed figure. A better way of reinforcing the court’s responsibility to determine an appropriate penalty was for the court to scrutinise the material presented to it carefully and satisfy itself that it was sufficient to determine whether the agreed penalty was appropriate.

[32] By way of explication, the Full Court added five observations, in substance as follows:

(1) As noted in *Allied Mills* and *NW Frozen Foods*, the rationale for giving weight to a joint submission on penalty rests on the saving in resources for the regulator and the court, the likelihood that a negotiated resolution will include measures designed to promote competition and the ability of the regulator to use the savings to increase the likelihood of other contraveners being detected and brought before the courts.

(2) *NW Frozen Foods* does not mean that a court must commence its reasoning with the penalty proposed by the parties and then limit itself to a consideration of whether the penalty proposed is within the range of permissible penalties. That is one option, but another is to begin with an independent assessment of the appropriate range of penalties and then compare it with the proposed penalty.

...

(footnotes omitted)

Their Honours went on to further conclude in relevant part (at 507 to 508):

[58] ... There is, however, no reason in principle or practice why civil penalty proceedings should be treated as an exception. Subject to the court being sufficiently persuaded of the accuracy of the parties’ agreement as to facts and consequences, and that the penalty which the parties propose is *an* appropriate remedy in the circumstances thus revealed, it is consistent with principle and ... highly desirable in practice for the court to accept the parties’ proposal and therefore impose the proposed penalty ...

[59] ... Once it is understood that civil penalties are not retributive, but like most other civil remedies essentially deterrent or compensatory and therefore protective, there is nothing odd or exceptionable about a court approving an agreed settlement of a civil proceeding which involves the public interest; provided of course that the court is persuaded that the settlement is appropriate.

### The appropriateness of the range as agreed?

1. When considering the “*appropriateness*” of the range of penalties as agreed between the parties, the two starting points forever remain:
* the fact that the maximum penalty prescribed remains a “*yardstick*” against which the process of assessment is to proceed (cf. *Markarian v The Queen* [2005] HCA 25 at [30] to [31], (2005) 228 CLR 357 at 37 per Gleeson CJ, Gummow, Hayne and Callinan JJ); and
* the fact that the primary purpose of any imposition of penalties is deterrence (cf. *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46 at [55], (2015) 258 CLR 482 at 506 per French CJ, Kiefel, Bell, Nettle and Gordon JJ; *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113 at [98] to [99]; (2017) 254 FCR 68 at 88 per Dowsett, Greenwood and Wigney JJ (“*ABCC v CFMEU*”)).

Within that general framework, the process of quantifying an appropriate penalty is not an “*exact science*” but rather a process of “*instinctive synthesis*”: *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 at [27] to [28], and [55] and [78], (2008) 165 FCR 560 at 567 to 568 per Gray J, 572 and 577 per Graham J. It nevertheless remains a process guided by a consideration of a number of well-accepted factors. In *Kelly v Fitzpatrick* [2007] FCA 1080 at [14], (2007) 166 IR 14 at 18 to 19 (“*Kelly v Fitzpatrick*”), Tracey J was called upon to quantify penalties for admitted contraventions of the *Transport Workers Award 1998* and in doing so adopted the following as a “*non-exhaustive range of considerations*” to be taken into account:

* the nature and extent of the conduct which led to the breaches;
* the circumstances in which that conduct took place;
* the nature and extent of any loss or damage sustained as a result of the breaches;
* whether there had been similar previous conduct by the respondent;
* whether the breaches were properly distinct or arose out of the one course of conduct;
* the size of the business enterprise involved;
* whether or not the breaches were deliberate;
* whether senior management was involved in the breaches;
* whether the party committing the breach had exhibited contrition;
* whether the party committing the breach had taken corrective action;
* whether the party committing the breach had cooperated with the enforcement authorities;
* the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and
* the need for specific and general deterrence.

It was common ground that these principles are equally as applicable in the assessment of penalties under both the *Fair Work Act* (cf. *DP World Sydney Ltd v Maritime Union of Australia (No 2)* [2014] FCA 596 at [20] to [22], (2014) 318 ALR 22 at 27 to 29 per Flick J) and the *Building Industry Act*.

1. When considering whether an agreed range of penalties is “*appropriate*” it is respectfully not necessary to consider each of those factors as identified by Tracey J in *Kelly v Fitzpatrick* in the same degree of detail as would be required in the absence of agreement. But they remain a useful checklist – albeit not an exhaustive checklist – of the considerations to be taken into account.
2. As expressed at the outset of the hearing, the “*instinctive*” assessment as to the range agreed between the parties in the present case was considered to be at a level lower than that which would otherwise be considered “*appropriate*”. The conduct giving rise to the contraventions was engaged in by a senior officer of the CFMMEU and arose in a context which it may be assumed occasioned some disruption to a workforce on a significant building site. Notwithstanding the fact that Counsel for the Respondents took some umbrage at the CFMMEU being characterised as a “*recidivist*”, that characterisation is apt. And Mr Sloane, an officer of that Union, has also been found to have personally committed a number of contraventions of the *Fair Work Act*. He, too, was not a Respondent unknown to the Court as a person who on other occasions has been found to have deliberately exceeded his powers of entry as a union official. Where the primary purpose in imposing penalties is both specific and general deterrence, it was “*instinctively*” considered that a penalty within the range propounded would not achieve the objective of deterrence, especially specific deterrence.
3. But that initial “*instinctive*” assessment has been tempered by the agreement on the part of the Commissioner as to the range otherwise considered to be “*appropriate*”. Albeit the agreement reflecting initially a range of penalties that would otherwise have been considered too low, the range was not outside that which others could reasonably consider to be appropriate. Albeit not “*determinative*” (cf. *Mobil Oil* at [51(iv)]), the Commissioner’s assessment that the agreed range sufficiently promotes the primary objective of “*deterrence*” is persuasive. So, too, is the fact that there is a public interest in promoting settlement of litigation. Although it may well have been the case that the Court could have imposed a higher penalty than that agreed, such a process of analysis is not “*useful*” in the circumstances of the present case.
4. It has nevertheless been concluded that the penalties to be imposed should be at the very maximum of that agreed when attention is given, albeit not in any detailed manner, to such considerations as:
* the size and nature of the CFMMEU;
* the fact that the CFMMEU has repeatedly engaged in comparable conduct in the past;
* the fact that Mr Sloane has also engaged in comparable conduct in the past;
* the fact that it is admitted that the dispute regarding payment was a pay claim without merit; and
* the fact that neither the CFMMEU nor Mr Sloane have expressed any regret or remorse for having engaged in the conduct now in issue.

### Double jeopardy

1. Although Counsel for the Commissioner and Counsel for the Respondents not surprisingly advanced competing submissions as to where within the range agreed the “*appropriate*” penalty otherwise was to be fixed, the fundamental difference between the parties in the present proceeding centred on the application of s 556 of the *Fair Work Act* and s 91 of the *Building Industry Act*.
2. The Commissioner contends that neither section precludes the imposition of a penalty as against both Mr Sloane and the CFMMEU because the “*particular conduct*” which is the subject of the s 500 contravention of the *Fair Work Act* and the conduct the subject of the contravention of s 46 of the *Building Industry Act* are different. But the Commissioner further contends that the “*totality principle*” applies in order to ensure that the overall penalties to be imposed are just and appropriate.
3. With reference to the *Further Statement of Agreed Facts* the Commissioner contends that what would be necessary to make out a contravention of s 500 of the *Fair Work Act*:
* would not involve the proof of any fact going to the “*engagement*” of Mr Sloane in any of the conduct pursued on 20 February 2018, which would be necessary for proof of contravention of s 46 of the *Building Industry Act*, but only proof of those facts exposing Mr Sloane as having “*organised*” that conduct; and
* would involve proof of those facts going to (for example) the request made of Mr Sloane and his production of his entry permit and proof of those facts (in particular) going to his improper purpose in seeking entry to the site – those facts including, for example, the matters set forth in the *Further Statement of Agreed Facts* at paras [11(e) and (f)] and [19].

That difference in respect to those facts which would not be necessary to establish a contravention of s 500 and those additional facts which *would* be necessary to prove that contravention is such that, in the Commissioner’s submission, the present case is taken outside of the reach of either s 556 of the *Fair Work Act* or s 91 of the *Building Industry Act*.

1. The CFMMEU and Mr Sloane jointly contend that the sections do apply, such that penalties can be imposed for either the s 500 contravention of the *Fair Work Act* or for the contraventions of s 46 of the *Building Industry Act* – but not both. The facts common to both contraventions are such as to bring the case within the statutory expression “*in relation to particular conduct*” as that phrase is employed in both s 556 of the *Fair Work Act* and s 91 of the *Building Industry Act*.
2. The submission of the Commissioner, it is respectfully concluded, prevails.
3. In *Australian Building and Construction Commissioner v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (*The Australian Paper Case*) *(No 2)* [2017] FCA 367 at [39]-[40], Jessup J rejected a construction of s 556 that confined the operation of that section to those cases where the statutory provisions giving rise to the multiple contraventions “*involved precisely matching elements*”. His Honour concluded that “…*the reference to ‘particular conduct’ in s 556 is to what the person actually did, with all of its attributes and in its whole context*…”. There in issue were contraventions of ss 417 and 421 of the *Fair Work Act.* In reaching his conclusions, his Honour reasoned as follows:

[36] … The question arises whether, having imposed a penalty on a particular respondent for his or its contravention of s 417, the court is prevented by s 556 from imposing a separate penalty for his or its contravention of s 421.

[37] The predecessor to this provision was introduced into the *Workplace Relations Act 1996* (Cth) by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), but neither that predecessor nor s 556 itself has, it seems, been the subject of any judicial examination in any context that would yield useful results for the present occasion. The relevant passage in the Explanatory Memorandum for the Bill which became the Act of 2005 is unrevealing as to how the section was intended to be applied in the kind of problematic situation which now confronts the court.

[38] The problem has two dimensions. The first arises in what I shall describe as the simple case of two or more provisions having been contravened by the same conduct. That looks as though it ought to attract the operation of s 556, but counsel for the applicant submitted that the section operates only where the constituent elements of each contravention are the same. For example, in the matter which is presently under consideration — industrial action taken in contravention of ss 417(1) and 421(1) — the elements were not the same. Under s 417(1), but not under s 421(1), it was an element that the relevant enterprise agreement be within term. Under s 421(1), but not under s 417(1), it was an element that an order by the Commission proscribing the industrial action have been made. It was submitted that, in this sense, it could not be said that the penalty for which the FW Act provided related to the same “particular conduct” in each case.

[39] I think it unlikely that the draftsman had such a limited operation in mind when s 556 was on the drawing board. I doubt that he or she would have contemplated that there were, either in the FW Act as such or in that Act and in another law of the Commonwealth, two or more provisions which defined contravening conduct in terms that involved precisely matching elements. I am not aware of any such situation, and counsel for the applicant drew my attention to none. It is hard to imagine why the legislature would double up with identical legislation in the way that would be required to provide a setting for the viability of this submission on behalf of the applicant.

[40] The better view is that the reference to “particular conduct” in s 556 is to what the person actually did, with all of its attributes and in its whole context. If that conduct gives rise to liability to penalty under two or more provisions, the section is, in my view, engaged. In the present case, the conduct of the workers who took the industrial action attracted liability under s 417(1) and under s 421(1). It is true that, additionally to that conduct, there were adjectival elements the presence of which were necessary ingredients of the provisions respectively, and that these elements differed as between the two (the in-term agreement under s 417(1) and the Commission’s order under s 421(1)), but, as it happened, both were in fact present on 31 March 2014 and both gave legal consequences to what the workers actually did. In my view, s 556 would stand in the way of penalties being imposed on the workers themselves under both sections, and the same applies where others, such as the organisers, were deemed to have contravened because of their involvement in that very conduct.

See also: *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The BKH Contractors Appeal)* [2020] FCAFC 9 at [32] to [38] per Reeves, Rangiah and Bromwich JJ.

1. On the facts of the present case, it is not merely because a contravention of s 500 of the *Fair Work* involves the proof of facts different to those necessary to prove a contravention of s 46 of the *Building Industry Act –* and hence different constituent elements for each contravention – that takes the facts outside the operation of s 556 of the *Fair Work Act* and s 91 of the *Building Industry Act*. Section 500, it is respectfully considered, is directed at fundamentally different conduct to that embraced by s 46 of the *Building Industry Act* – the former is directed to prohibiting a person exercising a right of entry from hindering or obstructing others; the latter is directed to organising or engaging in unlawful industrial action.

### Over-lapping conduct & inter-related contraventions

1. The Respondents are thus unable to bring themselves within the ambit of either s 556 of the *Fair Work Act* or s 91 of the *Building Industry Act*.
2. They have contravened provisions in both Acts. Although the constituent elements of the contraventions may well differ one from the other, the contraventions by the Respondents arise in substance out of the actions taken by Messrs Sloane and Holl when entering the premises on 20 February 2018.
3. Absent statutory authority, it is not permissible for a single penalty to be imposed in respect of multiple or separate contraventions.
4. Yet the common law has long set itself against punishing a person twice for essentially the same conduct. The common law relevantly has two “*tools of analysis*” whereby this objective can be achieved: *ABCC v CFMEU* [2017] FCAFC 113 at [111]-[121], (2017) 254 FCR 68 at 91 to 94. Applying earlier decisions to the same effect, Dowsett, Greenwood and Wigney JJ there described these two tools as being:
* the “*course of conduct principle*”; and
* the “*totality principle*”.

Their Honours there described as follows the separate operation of these two principles:

[117] The totality principle is sometimes confused or conflated with the course of conduct principle. That is perhaps not surprising because application of the totality principle may again result in a court adjusting what would otherwise have been consecutive or cumulative sentences to sentences that are wholly or partially concurrent. The proper approach, however, is to first consider the course of conduct principle and determine whether the sentences should be consecutive, or wholly or partly concurrent. Once that is done, the Court should then review the aggregate sentence to ensure that it is just
and appropriate. That may require a further adjustment of the sentences: either by ordering further concurrency or, if appropriate, lowering the individual sentences below what would otherwise be appropriate.

…

[119] Once again, the important point to emphasise is that, in the criminal sentencing context, application of the totality principle does not authorise or permit the sentencing court to impose a single sentence for multiple offences. That has been made clear in a number of cases…

[120] Like the course of conduct principle, the totality principle has been picked up and applied in the context of civil pecuniary penalty proceedings…

(citations omitted)

Their Honours went on to endorse the following summary of principle by Goldberg J in Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd (1997) 145 ALR 36 at 53 (“*Safeway Stores*”), which described as follows the totality principle:

The totality principle is designed to ensure that overall an appropriate sentence or penalty is appropriate and that the sum of the penalties imposed for several contraventions does not result in the total of the penalties exceeding what is proper having regard to the totality of the contravening conduct involved: *McDonald v R* (1994) 48 FCR 555; 120 ALR 629. But that does not mean that a court should commence by determining an overall penalty and then dividing it among the various contraventions. Rather the totality principle involves a final overall consideration of the sum of the penalties determined. In *Mill v R* (1988) 166 CLR 59; 83 ALR 1 the High Court accepted the following statement as correctly describing the totality principle:

The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is “just and appropriate”. The principle has been stated many times in various forms: “when a number of offences are being dealt with and specific punishments 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 offences 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 criminal behaviour and ask itself what is the appropriate sentence for all the offences”.

1. In *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8, (2008) 165 FCR 560 the Full Court addressed a departure in principle as expressed by Goldberg J in *Safeway Stores* and an earlier exposition by Finkelstein J in *Community and Public Sector Union v Telstra Corporation Ltd* [2001] FCA 1364 at [7], (2001) 108 IR 228 at 230. Graham J summarised the principle as follows (at 575):

[66] The totality principle is designed to ensure that the aggregate of the penalties imposed is not such as to be oppressive or crushing…

(citation omitted)

Justice Buchanan concluded (at 583):

[102] The totality principle is a guide to sentencing practice. It must be adapted to the circumstances. It is designed to avoid injustice in the overall result. It is not a principle which suggests that a penalty should necessarily be reduced from an aggregate total fixed for multiple offences. Rather, it involves a final check to ensure that a total or aggregate penalty is not, in all the circumstances, excessive. It may not be. …

1. The totality principle thus operates as a “*final check*” upon the penalty to be imposed. The quantum of the final penalty is not to be calculated simply by arithmetical aggregation of the sum of the individual penalties that each contravention may attract. As a “*final check*” the Court should conduct a “*final overall consideration*” of the offending conduct in order to ensure that the final penalty is just and appropriate, having regard to the totality of the contravening conduct.
2. On the facts of the present case, the Commissioner submits – and the Court accepts – that the course of conduct principle applies such that:
* the CFMMEU should not be punished potentially 25 times for each of the 25 workers engaged in the contraventions of s 46 of the *Building Industry Act*; and
* Mr Sloane’s and the CFMMEU’s contraventions of s 500 of the *Fair Work Act* should be treated as one contravention by each of them.
1. It is further concluded that the totality principle should be applied as a “*final check*” on the penalties to be imposed. Although the conduct the subject of the contraventions of the two Acts falls outside of the phrase “*particular conduct*” as used in both ss 556 and 91, applying an aggregate penalty for each of the contraventions would be manifestly “*excessive*”.

## CONCLUSIONS

1. It is concluded that it is appropriate to make orders imposing penalties within the range as agreed between the parties, albeit at the very upper limit of that which has been agreed.
2. It is further concluded that neither s 556 of the *Fair Work Act* nor s 91 of the *Building Industry Act* preclude the imposition of separate penalties in respect to the contraventions of both Acts. An aggregated penalty for each contravention, however, would not take into account the extent to which the conduct falls within the course of conduct principle. And such an aggregated penalty would be manifestly excessive.
3. It has ultimately been concluded that penalties should be imposed against the CFMMEU in the sum of $168,000 and against Mr Sloane in the sum of $25,000.
4. The declaratory relief should also be in the form as agreed.

## THE COURT DECLARES THAT:

### Anthony Sloane

1. The Second Respondent, an official of the First Respondent acting in that capacity for the purposes of s 94(1)(a) of the *BCIIP Act*, contravened s 46 of the *BCIIP Act* on 20 February 2018 by organising the Westform workers to engage in unlawful industrial action constituting the Stoppage at the Project Site.

2. The Second Respondent, an official of the First Respondent acting in that capacity for the purposes of s 793(1)(a) of the *Fair Work Act*, contravened s 500 of the *Fair Work Act* on 20 February 2019 by:

* 1. hindering or obstructing each of Paul Neville, Daniel Kos, Michael Harbison and Tahir Mehmed from discharging their duties on the Project; and
	2. by one or more of each of the following, acted in an improper manner:
		1. organising the Stoppage;
		2. interrupting the pre-start meeting between Westform and the Westform workers;
		3. pursuing Pay Claim in circumstances where it had no merit;
		4. making the threat to organise the Stoppage unless the Pay Claim was resolved in favour of the Westform workers;
		5. pursuing the Pay Claim other than in accordance with the disputes procedure in cl 27 of the JJSL Agreement (which covered the Westform workers);
		6. failing to give notice of entry in accordance with s 487 of the *Fair Work Act* to Parkview, as the occupier of the premises at the Project Site, and each of Westform and JSL as an affected employer; and
		7. contrary to s 484, holding discussions with the Westform workers outside mealtimes and other breaks.

### CFMMEU

3. The First Respondent, by the conduct of the Second Respondent in the first declaration and by operation of s 94 of the *BCIIP Act*, contravened s 46 of the *BCIIP Act* on 20 February 2018 by organising the Westform workers to engage in unlawful industrial action constituting the Stoppage at the Project Site.

4. The First Respondent, by the conduct of the Westform workers in engaging in the Stoppage and by operation of s 95(1)(c)(iii) of the *BCIIP Act*, contravened s 46 of the *BCIIP Act* on 20 February 2019 by engaging in unlawful industrial action constituting the Stoppage;

5. The First Respondent, by the conduct of the Second Respondent in the second declaration and by operation of ss 793 and 550 of the *Fair Work Act*, was knowingly concerned in the Second Respondent’s contravention of s 500 and, accordingly, has itself contravened s 500 of the *Fair Work Act*.

## THE COURT ORDERS THAT:

### CFMMEU

1. The First Respondent pay to the Commonwealth of Australia a penalty of $75,000 in respect of its contravention of s 46 of the *BCIIP Act* as declared in para 3 of the Declarations.

2. The First Respondent pay to the Commonwealth of Australia a penalty of $75,000 in respect of its contravention of s 46 of the *BCIIP Act* as declared in para 4 of the Declarations.

3. The First Respondent pay to the Commonwealth of Australia a penalty of $18,000 in respect of its contravention of s 500 of the *Fair Work Act* as declared in para 5 of the Declarations.

### Anthony Sloane

4. The Second Respondent pay to the Commonwealth of Australia a penalty of $20,000 in respect of his contravention of s 46 of the *BCIIP Act* as declared in para 1 of the Declarations.

5. The Second Respondent pay to the Commonwealth of Australia a penalty of $5,000 in respect of his contravention of s 500 of the *Fair Work Act* as declared in para 2 of the Declarations.

#### **Times for payment**

6. The penalties in Orders 1 to 5 above are payable to the Commonwealth of Australia within 28 days.

## AND THE COURT ORDERS THAT:

7. There be no orders as to costs.

8. The proceedings are otherwise dismissed.

### Definitions

1. In these Declarations and Orders:

* 1. ***BCIIP Act*** means the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth);
	2. ***Fair Work Act*** means the *Fair Work Act 2009* (Cth);
	3. **JJSL Agreement** means the *JJSL Labourforce Pty Ltd/CFMEU Collective Agreement 2017 – 2018*
	4. **Parkview** means Parkview Constructions Pty Ltd, which was the principal contractor on the Project.
	5. **Pay Claim** means the pay dispute between Westform and its workers regarding payment for one hours pay on 10 February 2018, which was lost due to inclement weather;
	6. **Project** means the Mezzo Stage 2 Project and **Project Site** means 87 Bay Street, Glebe, New South Wales
	7. **Stoppage** means the failure or refusal by the Westform workers to carry out work on the Project between approximately 7.30am and 10.30am on 20 February 2019;
	8. **Westform** means Westform Formwork Contractors Pty Ltd, a subcontractor to Parkview on the Project.
	9. **Westform** **workers** means the workers employed by JJSL Labourforce Pty Ltd who were supplied to Westform to carry out work on the Project.

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| --- |
| I certify that the preceding forty-nine (49) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Flick. |

Associate:

Dated: 28 April 2020