Federal Court of Australia

Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Morphettville Park Case) [2021] FCA 1640

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| File number: |  |
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| Judgment of: | **WHITE J** |
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| Date of judgment: | 23 December 2021 |
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| Catchwords: | **INDUSTRIAL LAW** – admitted contravention of s 500 of the *Fair Work Act 2009* (Cth) – determination of penalties – relevant considerations in determining appropriate penalties – issued declarations – penalties imposed. |
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| Legislation: | *Crimes Act 1914* (Cth) s 4AA  *Fair Work Act 2009* (Cth) ss 500, 512, 546, 550, 793  *Fair Work (Registered Organisations) Act 2009* (Cth) s 27  *Work Health and Safety Act 2012* (SA) ss 116, 134 |
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| Cases cited: | *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Adelaide Airport Case)* [2021] FCA 951  *Australian Building and Construction Commissioner v Menon* [2020] FCA 1418  *Australian Competition and Consumer Commission v Yellow Page Marketing BV (No 2)* [2011] FCA 352; (2011) 195 FCR 1  *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Broadway on Ann Case)* [2018] FCAFC 126; (2018) 265 FCR 208  *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Non‑Indemnification Personal Payment Case)* [2018] FCAFC 97; (2018) 264 FCR 155  *Pattinson v Australian Building and Construction Commissioner* [2020] FCAFC 177; (2020) 384 ALR 75  *R v Byrnes* [1995] HCA 1; (1995) 183 CLR 501 |
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| Division: | Fair Work Division |
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| Registry: | South Australia |
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| National Practice Area: | Employment and Industrial Relations |
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| Number of paragraphs: | 51 |
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| Date of hearing: | Determined on the papers |
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| Counsel for the Applicant: | Mr D Chin SC |
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| Solicitor for the Applicant: | MinterEllison |
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| Counsel for the Respondents: | Mr P Boncardo |
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| Solicitor for the Respondents: | Construction, Forestry, Maritime, Mining and Energy Union |

ORDERS

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|  | | SAD 152 of 2020 |
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| BETWEEN: | AUSTRALIAN BUILDING AND CONSUTRUCTION COMMISSIONER  Applicant | |
| AND: | CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION  First Respondent  MICHAEL JACKSON  Second Respondent | |

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| order made by: | WHITE J |
| DATE OF ORDER: | 23 DECEMBER 2021 |

THE COURT DECLARES THAT:

1. On 14 February 2020, while inspecting a construction site at the Morphettville Park Sports Club, Dunbar Avenue, Morphettville in the State of South Australia, and while exercising rights in accordance with Pt 3-4 of the *Fair Work Act 2009* (Cth) (FW Act), the Second Respondent contravened s 500 of the FW Act by acting in an aggressive and abusive manner during a discussion with a worker performing work as a cladder and during a discussion with the Project Manager (Jackson’s Contravention).
2. The First Respondent is taken to have contravened s 500 of the FW Act in that, by operation of ss 793 and 550 of the FW Act, it was involved in Jackson’s Contravention (CFMMEU’s Contravention).

THE COURT ORDERS THAT:

1. The Second Respondent pay a pecuniary penalty in respect of Jackson’s Contravention in the amount of $2,500.
2. The First Respondent pay a pecuniary penalty in respect of the CFMMEU’s Contravention in the amount of $27,500.
3. The pecuniary penalties imposed on the Respondents under Orders 1 and 2 above, be paid to the Commonwealth of Australia within 28 days.

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

REASONS FOR JUDGMENT

WHITE J:

1. The second respondent in these proceedings (Mr Michael Jackson) was in February 2020 an organiser employed by the first respondent (the CFMMEU).
2. The CFMMEU and Mr Jackson admit that, by reason of the conduct of Mr Jackson on 14 February 2020, they each contravened s 500 of the *Fair Work Act 2009* (Cth) (the FW Act) at a building site at Morphettville Park in South Australia. They also admit that it is appropriate for the Court to issue declarations with respect to their contraventions and to impose pecuniary penalties on them, pursuant to s 546 of the FW Act. Accordingly, this judgment concerns only the relief to which the Australian Building and Construction Commissioner (the Commissioner) is entitled.

## Statutory provisions

1. Section 500 of the FW Act proscribes certain conduct by permit holders in the exercise of rights of entry under Pt 3‑4 of the FW Act. It also encompasses the manner of the exercise of rights of entry granted by the occupational health and safety legislation of the States and Territories (in South Australia the *Work Health and Safety Act 2012* (SA) (the WHS Act)). Section 500 provides:

**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.

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

…

1. There are two provisions in the FW Act which bear on the liability of the CFMMEU. First, s 793(1) provides for circumstances in which the conduct of an officer or employee of a body corporate will be taken to be conduct of the body corporate itself. Section 793 provides (relevantly):

**793 Liability of bodies corporate**

*Conduct of a body corporate*

(1) Any conduct engaged in on behalf of a body corporate:

(a) by an officer, employee or agent (an ***official***) of the body within the scope of his or her actual or apparent authority; or

(b) by any other person at the direction or with the consent or agreement (whether express or implied) of an official of the body, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the official;

is taken, for the purposes of this Act and the procedural rules, to have been engaged in also by the body.

*State of mind of a body corporate*

(2) If, for the purposes of this Act or the procedural rules, it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is enough to show:

(a) that the conduct was engaged in by a person referred to in paragraph (1)(a) or (b); and

(b) that the person had that state of mind.

…

1. The CFMMEU admits that, by reason of its registration as an organisation pursuant to s 27 of the *Fair Work (Registered Organisations) Act 2009* (Cth), it is a body corporate to which s 793 applies.
2. Secondly, s 550 provides for accessorial liability:

**550 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.

## The statutory context

1. In *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Adelaide Airport Case)* [2021] FCA 951, I outlined at [18]‑[41] the scheme of rights established under the WHS Act, the scheme of rights established under Pt 3‑4 of the FW Act and the role of s 500 in that scheme. I refer to what I said in those paragraphs, without repeating them in these reasons.

## The Court’s power

1. Section 546 of the FW Act vests the Court with power to impose pecuniary penalties on those who contravene a civil remedy provision. It provides (relevantly):

**546 Pecuniary penalty orders**

(1) The Federal Court … may, on application, order 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.

…

*Determining amount of pecuniary penalty*

(2) The pecuniary penalty must not be more than:

(a) if the person is an individual—the maximum number of penalty units referred to in the relevant item in column 4 of the table in subsection 539(2); or

(b) if the person is a body corporate—5 times the maximum number of penalty units referred to in the relevant item in column 4 of the table in subsection 539(2).

*Payment of penalty*

(3) The court may order that the pecuniary penalty, or a part of the penalty, be paid to:

(a) the Commonwealth; or

(b) a particular organisation; or

(c) a particular person.

…

1. A penalty unit is defined in s 4AA of the *Crimes Act 1914* (Cth) and, at the time of the contravening conduct under consideration in this case, was $210 per unit. Accordingly, the maximum penalty which may be imposed for the contravention by Mr Jackson is $12,600. The maximum penalty which may be imposed on the CFMMEU for its contravention is $63,000.

## The contravening conduct

1. In 2020, Sarah Constructions Pty Ltd (Sarah) was engaged by the City of Marion as the construction contractor in redevelopment works at the Morphettville Park Sports Club at Dunbar Avenue in Morphettville in South Australia (the Site). Mr Mark Cramp was Sarah’s Project Manager at the Site.
2. Sarah had subcontracted cladding work to SA Construct Pty Ltd (SA Construct). It had engaged Mr Matthew Dezen to work at the Site as a cladder.
3. On 14 February 2020 at 12.10 pm, Mr Jackson and another CFMMEU organiser (Mr Savage) entered the Site. When doing so, they provided Mr Cramp with an entry notice under s 119 of the WHS Act, signed by Mr Jackson. The notice identified three suspected contraventions of the WHS Act:

(i) Edge protection;

(ii) Access and egress through site; and

(iii) Section 19 duty of care.

1. It is an agreed fact that Mr Jackson and Mr Savage had made observations before entering the Site which led them to suspect that Sarah had, in relation to “relevant workers” within the meaning of s 116 of the WHS Act, contravened, or was contravening, its obligations:
2. under s 19(1) of the WHS Act to ensure, so far as reasonably practicable, the health and safety of workers engaged or caused to be engaged by it while those workers were at work on the Site;
3. under s 19(3) of the WHS Act to ensure so far as reasonably practicable, the provision and maintenance of work environment without risks to health and safety and the provision and maintenance of safe systems of work;
4. under s 40 of the WHS Regulations to, amongst other things, ensure so far as reasonably practicable that the layout of the Site allowed, and was maintained to allow, persons to enter and exit and move about without risks to health and safety under normal working conditions and in an emergency.
5. Mr Cramp permitted the entry of Mr Jackson and Mr Savage onto the Site and they signed the Visitors’ Register as requested by him.
6. While inspecting some scaffolding, Mr Jackson had the following conversation with Mr Dezen:

Jackson: Who built this? This platform ladder is too high.

Dezen: What’s the matter with the scaffold?

Jackson: You should know that. It’s your job. If you don’t, you’re an idiot.

Dezen: That’s not how you should speak to people.

Jackson: I’ll speak to you however the fuck I want.

Dezen: I wouldn’t want you representing me on site.

1. Mr Dezen then said words to the effect that Mr Savage was conducting himself appropriately and that Mr Jackson should behave in the same way. The conversation then continued:

Jackson: You keep going, you’ll never work in South Australia again.

It is an agreed fact that, as Mr Jackson spoke these last words to Mr Dezen, he moved towards him.

1. Shortly afterwards, while inspecting the perimeter of a building at the Site, the following interchange occurred between Mr Jackson and Mr Cramp:

Jackson: What’s your fucking role here? Who runs the show on this Site? The safety is bad.

Cramp: I’ll look into all the things you’ve identified. You know you can catch more bees with honey than you do with vinegar.

1. It is an agreed fact that, during his respective interchanges with Mr Dezen and Mr Cramp, Mr Jackson had spoken in an aggressive fashion. However, it is also an agreed fact that, apart from the manner in which Mr Jackson had spoken to Mr Dezen and Mr Cramp, he and Mr Savage had conducted their enquiries into the suspected contraventions in an appropriate manner and without incident or complaint from representatives of Sarah or of SA Construct. In particular, it is an agreed fact that, throughout the entry on the Site, Mr Savage had behaved in a “professional [and] amicable” manner and as a “gentleman”.
2. The Commissioner alleges, and the respondents accept, that Mr Jackson’s conduct had been improper because, in addition to his aggression, he had been abusive (by calling Mr Dezen “an idiot”, by telling Mr Dezen that he would speak to him “however the fuck I want” and by asking Mr Cramp “what’s your fucking role here?”).
3. The Commissioner also alleges, and the respondents accept, that Mr Jackson’s conduct towards Mr Dezen had involved a threat to his future employment prospects (“you keep going, you’ll never work in South Australia again”) and that Mr Jackson had reinforced the threat by simultaneously moving towards Mr Dezen.
4. The Commissioner’s claim in short is that Mr Jackson’s conduct was improper because of his aggression, because of his abusive language and because of the threat which he had made to Mr Dezen. The Commissioner contends, and the respondents do not dispute, that by acting in this manner in the exercise of his statutory right to enter the premises, Mr Jackson had fallen below the standard of conduct to be expected of a person in his position by “reasonable persons with knowledge of the duties, powers and authority of the position and the circumstances of the case”: *R v Byrnes* [1995] HCA 1; (1995) 183 CLR 501 at 514‑5.
5. As noted at the commencement of these reasons, Mr Jackson admits that he had acted in an improper manner for the purposes of s 500 of the FW Act.
6. The CFMMEU admits that, by virtue of s 793(1) of the FW Act, it is to be taken to have engaged in the same conduct as did Mr Jackson and that, by virtue of s 793(2) it had the same state of mind as did Mr Jackson. The CFMMEU thereby acknowledges that it was “knowingly concerned”, within the meaning of s 550(2)(c) of the FW Act, in Mr Jackson’s contravention of s 500 and that, by s 550(1) of the FW Act, it is also taken to have contravened s 500.

## Declarations

1. The Commissioner submitted that the Court should issue declarations as to the contraventions of Mr Jackson and the CFMMEU. The respondents agree that it is appropriate for the Court to make the declarations although they make one short point concerning the form of the declarations proposed by the Commissioner.
2. In *Australian Competition and Consumer Commission v Yellow Page Marketing BV (No 2)* [2011] FCA 352; (2011) 195 FCR 1 at [67]‑[68], Gordon J said that the matters bearing upon the exercise of the discretion to grant or refuse a declaration include consideration of whether the declaration would have any utility, whether the proceeding involves a matter of public interest, whether the circumstances call for the Court’s disapproval of the contravening conduct; and whether the declarations contains appropriate and adequate particulars of how and why the conduct in question is a contravention of the relevant legislation. These considerations are pertinent presently.
3. A number of matters support the making of declarations proposed by the ABCC. Declarations are appropriate in cases like the present which proceed on the basis of formal admissions rather than on the basis of findings following a trial, as the declarations identify succinctly the conduct for which the Court is imposing the penalties: *Australian Building and Construction Commissioner v Menon* [2020] FCA 1418.
4. It is common for declarations to be made in circumstances of the present kind. In addition to providing a formal pronouncement by the Court of the nature of the contraventions found, they indicate the basis for the pecuniary penalties which are imposed and stand as a statement of the Court’s denunciation of the contravening conduct.
5. Accordingly, I will make the declarations proposed by the Commissioner (with one minor modification).

## The penalties

### Applicable principles

1. In *The Adelaide Airport Case*, I referred to a number of principles bearing upon the fixation of appropriate penalties. I incorporate by reference what I said in [103]‑[112].

### The pursuit of a legitimate industrial purpose

1. Several of the respondents’ submissions emphasised that Mr Jackson and Mr Savage had entered the Site on 14 February 2020 for the legitimate purpose of investigating suspected breaches of the WHS Act. They submitted that that circumstance was relevant to the assessment of the objective seriousness of the contraventionnoting, in particular, that neither of the organisers had been on the Site “for some ulterior or extraneous purpose”.
2. In *The Adelaide Airport Case*, at [122]‑[129], I expressed the view that, while the purpose for which the organisers enter a site is relevant to an assessment of the context in which contraventions occur, the circumstance that they reasonably suspected that there were matters of safety concern which should be addressed is not a mitigatory matter. I incorporate by reference what I then said on this topic and add that it is the manner in which Mr Jackson chose to conduct himself while pursuing his legitimate purpose which constitute the contraventions to be considered.

### The character of the conduct

1. Apart from their agreement of facts with the Commissioner for the purposes of the imposition of penalties, neither the CFMMEU nor Mr Jackson has provided any evidence in the proceeding. It is difficult therefore to identify any matter mitigating the seriousness of Mr Jackson’s conduct. His conduct was unprovoked, unnecessary and involved a form of abuse of the statutory right of entry granted to him. Contrary to the submissions of the respondents, Mr Jackson’s conduct has to be regarded as intentional. It was certainly not accidental or involuntary.
2. Mr Jackson’s conduct was foolish, as counsel for the respondents submitted, but that is not a mitigatory matter. Counsel also characterised Mr Jackson’s conduct as “spontaneous” but there is no evidence to support that conclusion.
3. In my view, the penalties should be imposed on the basis that Mr Jackson chose, in the absence of any provocation, to act aggressively, to use abusive language and to make a threat.
4. I accept that Mr Jackson’s conduct occurred over a relatively short period.
5. Counsel for the respondents drew attention to the fact that s 500 may be contravened in two ways: by intentionally hindering or intentionally obstructing any person while exercising a right of entry. He submitted, by reference to the dissenting judgment of Bromwich J in *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Broadway on Ann Case)* [2018] FCAFC 126; (2018) 265 FCR 208 at [128]‑[132], that the intentional hindering or intentional obstruction of a person was the more serious form of conduct proscribed by s 500.
6. For the reasons which I gave at [130]‑[132] of *The Adelaide Airport Case*, I decline to act on the basis of the distinction which counsel proposed. In my view, the proper course for the Court is to assess the gravity of the instant contraventions having regard to their own circumstances.

### The CFMMEU as a recidivist contravenor

1. Counsel for the Commissioner noted, and the CFMMEU did not contest, that it has contravened industrial legislation approximately 170 separate cases since about 2000, with most of the cases involving findings of multiple contraventions. There have been 43 proceedings in that period with a total of 282 contraventions of s 500 or its predecessor. Many of the contraventions have occurred because CFMMEU permit holders acted improperly by making threats, by acting aggressively, or by using abusive language.
2. In *The Adelaide Airport Case*, I referred to matters indicating that the CFMMEU is a recidivist contravenor and to some of the issues arising from that circumstance, at [133]‑[137].
3. As the Full Court noted in *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Non‑Indemnification Personal Payment Case)* [2018] FCAFC 97; (2018) 264 FCR 155 at [23]:

… It is difficult, if not impossible, not to come to the conclusion that the Union is prepared, when it suits it, to contravene the Act and, as here, seek to coerce employers to comply with its demands. Without evidence to the contrary, it is a natural inference that those officials of the Union … tolerate and facilitate this attitude and approach of contraventions of the Act at the choice and will of the Union.

1. Contrary to the submissions of the Commissioner, I propose to take account of the CFMMEU’s long history of prior contraventions in the manner discussed by the Full Court in *Pattinson v Australian Building and Construction Commissioner* [2020] FCAFC 177; (2020) 384 ALR 75.

### Discretionary matters

1. It is the case that Mr Jackson’s conduct did not result in any economic loss to SA Construct or to Sarah and that the site inspection was otherwise conducted in an appropriate manner. These circumstances mean that the contraventions are not aggravated but they do not have the corresponding effect of being mitigatory.
2. The respondents are entitled to credit on account of their cooperation in the proceedings. I record that following a mediation at a relatively early stage in the proceedings, the parties reached an agreement which led to the respective admissions of liability. Moreover, the parties sensibly agreed that the Court could resolve the matter on the basis of written submissions without there being the necessity for an oral hearing. I take into account, to the respondents’ credit, this cooperation in the orderly resolution of the matter. The respondents’ cooperation has meant that both the Commissioner and the Court have been spared a trial on both the liability and penalty aspects of the matter.
3. It is an agreed fact that Mr Jackson ceased employment with the CFMMEU on about 18 February 2021 and returned the entry permits issued to him under s 512 of the FW Act and s 134 of the WHS Act on or about 21 February 2021. Furthermore, Mr Jackson has no intention of seeking to hold permits under s 512 or s 134 again or even of being employed by a union again.
4. I agree that these circumstances make specific deterrence less important in the case of Mr Jackson than would otherwise have been the case but do not accept that it is not relevant at all. Mr Jackson’s circumstances may easily change in the future.
5. It is to Mr Jackson’s credit that he has no record of prior contraventions of industrial legislation.
6. Neither Mr Jackson nor the CFMMEU have made any expression of contrition or regret. The CFMMEU has not provided any evidence of action taken by it with a view to ensuring that there will not be a repetition of conduct of this kind again.
7. The Commissioner submitted that a penalty in the “mid range” should be imposed on Mr Jackson and that a penalty in the “high to near maximum” range should be imposed on the CFMMEU. Counsel accepted, however, that if the Court proceeded on the basis of the decision in *Pattinson v ABCC*, a penalty in the “mid range” was appropriate for the CFMMEU.

### Imposition of penalties

1. In my view, having regard to all the matters mentioned above, a penalty of $2,500 is appropriate for Mr Jackson’s contravention, and that is the penalty I impose.
2. In the case of the CFMMEU, a penalty of $27,500 is appropriate, and that is the penalty I impose.
3. The penalties are to be paid to the Commonwealth within 28 days.

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| I certify that the preceding fifty-one (51) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice White. |

Associate:

Dated: 23 December 2021