FEDERAL COURT OF AUSTRALIA

Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union [2023] FCA 36

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| File number(s): | QUD 194 of 2020 |
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| Judgment of: | **COLLIER J** |
|  |  |
| Date of judgment: | 30 January 2023 |
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| Catchwords: | **INDUSTRIAL LAW** – imposition of pecuniary penalties - whereas the respondents admitted contraventions of s 500 of the *Fair Work Act 2009* (Cth) – whereas the applicant seeks the Court make declarations as to contraventions and impose personal payment orders on individual respondents – determination of appropriate pecuniary penalty - relevance of previous contraventions by the respondents of industrial legislation – proportionality of penalty to contravening conduct – general deterrence – specific deterrence – principle of totality – principles relating to personal payment orders |
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| Legislation: | *Fair Work Act 2009* (Cth)  *Work Health and Safety Act 2011* (Qld) |
|  |  |
| Cases cited: | *Australasian Meat Industry Employees Union v Dick Stone Pty Ltd (No 2)* [2022] FCA 1263  *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (the Bruce Highway Caloundra to Sunshine Upgrade Case) (No 2)* [2019] FCA 1737  *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (the Bruce Highway Caloundra to Sunshine Upgrade Case)* [2018] FCA 553  *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157  *Australian Building and Construction Commissioner v Construction, Forestry, Maritime and Energy Union* (2018) 262 CLR 157  *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (the Toowoomba Bypass Case)* [2021] FCA 1128  *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 Construction, Forestry, Maritime, Mining and Energy Union (The Laverton North and Cheltenham Premises Case)* *(No 2)* [2019] FCA 973  *Australian Building and Construction Commissioner v Pattinson & Anor* [2022] HCA 13  *Australian Building and Construction Commissioner v Powell* [2017] FCAFC 89  *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640  *Brookfield Multiplex Engineering and Infrastructure v McDonald* [2014] FCA 389  *Commonwealth v Director, Fair Work Building Industry Inspectorate; Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482  *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Telstra Corporation Ltd* [2007] FCA 1607  *Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Botany Cranes Case) (No 4)* [2021] FCA 525  *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (the Bruce Highway Caloundra to Sunshine Upgrade Case)* [2020] FCAFC 203  *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Non-Indemnification Personal Payment Case)* (2018) 264 FCR 155  *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2016] FCA 413  *Director of the Fair Work Building Industry Inspectorate v Stephenson* [2014] FCA 1432  *Mornington Inn Pty Ltd v Jordan* (2008) 168 FCR 383  *Trade Practices Commission v CSR Ltd* (1991) ATPR 41-076 |
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| Division: | Fair Work Division |
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| Registry: | Queensland |
|  |  |
| National Practice Area: | Employment and Industrial Relations |
|  |  |
| Number of paragraphs: | 55 |
|  |  |
| Date of last submission/s: | 31 May 2022 |
|  |  |
| Date of hearing: | 7 October 2021 |
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| Counsel for the Applicant: | Ms K Slack |
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| Counsel for the Respondents: | Mr P Boncardo |
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| Solicitor for the Respondents: | Hall Payne Lawyers |

ORDERS

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|  | | QUD 194 of 2020 |
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| BETWEEN: | FAIR WORK OMBUDSMAN  Applicant | |
| AND: | CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION  First Respondent  BEAU SEIFFERT  Second Respondent  TE ARANUI ALBERT (and others named in the Schedule)  Third Respondent | |

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| order made by: | COLLIER J |
| DATE OF ORDER: | 30 January 2023 |

**PENAL NOTICE**

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| **TO: CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION, BEAU SEIFFERT, TE ARANUI ALBERT, BLAKE HYNES, SHAUN DESMOND, ANTHONY HARDING AND CRAIG DAVIDSON**  **IF YOU (BEING THE PERSON BOUND BY THIS ORDER):**  **(A) REFUSE OR NEGLECT TO DO ANY ACT WITHIN THE TIME SPECIFIED IN THIS ORDER FOR THE DOING OF THE ACT; OR**  **(B) DISOBEY THE ORDER BY DOING AN ACT WHICH THE ORDER REQUIRES YOU NOT TO DO,**  **YOU WILL BE LIABLE TO IMPRISONMENT, SEQUESTRATION OF PROPERTY OR OTHER PUNISHMENT.**  **ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANYTHING WHICH HELPS OR PERMITS YOU TO BREACH THE TERMS OF THIS ORDER MAY BE SIMILARLY PUNISHED.** |

In these orders:

(i) “**FW Act**” means the *Fair Work Act 2009* (Cth).

(ii) “**Entry permit**” means an entry permit issued by the Fair Work Commission to an official of an organisation under section 512 of the FW Act.

(iii) “**Site**” means the construction site area of the Logan Enhancement Project referred to in paragraph 9 of the Amended Statement of Claim dated 16 July 2021.

(iv) “**State or Territory OHS right**” means a right to enter premises under section 81(3) of the *Work Health and Safety Act 2011* (Qld) (**WHS Act**), being a State or Territory OHS right within the meaning of section 494(2) of the FW Act.

**THE COURT DECLARES THAT:**

***The Second Respondent – Beau Seiffert***

1. On each of 15 May 2018, 18 May 2018, 13 June 2018 and 14 June 2018, the second respondent, an employee of the first respondent acting on its behalf and within the scope of his authority within the meaning of section 793(1) of the FW Act, contravened section 500 of the FW Act when attending at and entering the Site and when exercising a State or Territory OHS right, by acting in an improper manner by:

a. failing or refusing to leave the Site when requested to do so; and

b. failing to produce his entry permit when requested to do so.

***The Third Respondent - Te Aranui Albert***

2. On each of 13 June 2018 and 14 June 2018, the third respondent, an employee of the first respondent acting on its behalf and within the scope of his authority within the meaning of section 793(1) of FW Act, contravened section 500 of the FW Act when attending at and entering the Site and when exercising a State or Territory OHS right, by acting in an improper manner by:

a. failing to produce his entry permit when requested to do so; and

b. failing or refusing to leave the Site when requested to do so.

***The Fourth Respondent – Blake Hynes***

3. On each of 13 June 2018 and 14 June 2018, the fourth respondent, an employee of the first respondent acting on its behalf and within the scope of his authority within the meaning of section 793(1) of FW Act, contravened section 500 of the FW Act when attending at and entering the Site and when exercising a State or Territory OHS right, by acting in an improper manner by:

a. failing to produce his entry permit when requested to do so; and

b. failing or refusing to leave the Site when requested to do so.

***The Fifth Respondent – Shaun Desmond***

4. On 14 June 2018, the fifth respondent, an employee of the first respondent acting on its behalf and within the scope of his authority within the meaning of section 793(1) of FW Act, contravened section 500 of the FW Act when attending at and entering the Site and when exercising a State or Territory OHS right, by acting in an improper manner by:

a. failing to produce his entry permit when requested to do so; and

b. failing or refusing to leave the Site when requested to do so.

***The Sixth Respondent – Craig Davidson***

5. On 14 June 2018, the sixth respondent, an employee of the first respondent acting on its behalf and within the scope of his authority within the meaning of section 793(1) of FW Act, contravened section 500 of the FW Act when attending at and entering the Site and when exercising a State or Territory OHS right, by acting in an improper manner by:

a. failing to produce his entry permit when requested to do so; and

b. failing or refusing to leave the Site when requested to do so.

***The Seventh Respondent – Anthony Harding***

6. On 14 June 2018, the seventh respondent, an employee of the first respondent acting on its behalf and within the scope of his authority within the meaning of section 793(1) of FW Act, contravened section 500 of the FW Act when attending at and entering the Site and when exercising a State or Territory OHS right, by acting in an improper manner by:

a. failing to produce his entry permit when requested to do so; and

b. failing or refusing to leave the Site when requested to do so.

***The First Respondent – CFMMEU – accessorial liability***

7. In respect of the contraventions of section 500 of the FW Act referred to in declarations 1- 6 above, the first respondent:

a. is taken by operation of section 793(1) of the FW Act to have engaged in the conduct of each individual respondent, thereby participating in each contravention in each case;

b. is taken by operation of section 793(2) of the FW Act to have known of all of the essential facts constituting each contravention in each case;

c. was accordingly knowingly concerned in each contravention within the meaning of section 550 of that Act; and

d. thereby itself contravened section 500 of the FW Act on each occasion.

# THE COURT ORDERS THAT:

1. The first respondent pay a pecuniary penalty of $25,000 for each of the 11 contraventions as declared in declarations 1-6 above, being a total of $275,000.

2. The second respondent pay a pecuniary penalty of $6,000 in respect of each of his four contraventions of section 500 of the FW Act as declared in declaration 1 above, being a total of $24,000.

3. The third respondent pay a pecuniary penalty of $5,000 in respect of each of his two contraventions of section 500 of the FW Act as declared in declaration 2 above, being a total of $10,000.

4. The fourth respondent pay a pecuniary penalty of $6,000 in respect of each of his two contraventions of section 500 of the FW Act as declared in declaration 3 above, being a total of $12,000.

5. The fifth respondent pay a pecuniary penalty of $3,000 in respect of his contravention of section 500 of the FW Act as declared in declaration 4 above, being a total of $3,000.

6. The sixth respondent pay a pecuniary penalty of $2,000 in respect of his contravention of section 500 of the FW Act as declared in declaration 5 above, being a total of $2,000.

7. The seventh respondent pay a pecuniary penalty of $2,000 in respect of his contravention of section 500 of the FW Act as declared in declaration 6 above, being a total of $2,000.

8. The pecuniary penalties referred to in Orders 1-7 be paid to the Commonwealth of Australia within 28 days.

9. The second and fourth respondents must pay the penalties imposed upon them by the Orders 2 and 4 personally in that they not, whether before or after the payment of the penalty:

a. seek to have or encourage the first respondent in any way whatsoever, directly or indirectly, to pay to them or for their financial benefit in any way whatsoever, any money or financial benefit referable to the payment of the penalties, whether in whole or in part; and

b. accept or receive from the first respondent in any way whatsoever, any money or financial benefit referable to the payment of the penalties, whether in whole or in part.

10. There be no order as to costs.

11. These Orders be served by the applicant on:

a. the first respondent in accordance with rule 10.04 of the *Federal Court Rules 2011*; and

b. each of the second to seventh respondents in accordance with rule 10.01 of the *Federal Court Rules 2011*.

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

REASONS FOR JUDGMENT

COLLIER J

1 This proceeding is before the Court for determination of the penalties to be imposed for a number of breaches of s 500 of the *Fair Work Act 2009* (Cth)(**Fair Work Act**) committed by the respondents.

2 The second, third, fourth, fifth, sixth and seventh respondents (**individual respondents**) have conceded that relevant contraventions occurred in the manner contended by the applicant, namely as a result of their entry into premises on 15 May, 18 May, 13 June and 14 June 2018 (**relevant dates**). The first respondent has also conceded its involvement in each of the contraventions of s 500 of the Fair Work Act by the individual respondents by operation of s 550 of the Fair Work Act, and on the basis that each of the individual respondents were officials of the first respondent at the time of the relevant contraventions.

# BACKGROUND

3 The relevant contraventions of s 500 of the Fair Work Act relate to entry by the second to seventh respondents of premises associated with the Logan Enhancement Project (**Project**) on the relevant dates.

4 The purpose of the Project was “upgrading the Logan and Gateway Extension motorways south of Brisbane, including the construction of new ramps, carriageways and bridge structures, then being constructed for Transurban Queensland”.

5 On each of the relevant dates, a number of the individual respondents entered premises associated with the Project, walked around those premises, failed to display entry permits when requested, and refused to leave those premises when asked to do so.

6 Consequently the applicant sought, by means of an amended statement of claim filed on 16 July 2021, declarations of contraventions of s 500 of the Fair Work Act by each of the respondents, and the making of pecuniary penalty orders referable to those contraventions.

7 The applicant contended, in its amended statement of claim filed on 16 July 2021, that:

(a) each of the second to seventh respondents contravened s 500 of the FW Act – the second respondent (Seiffert) on four separate occasions (15 May 2018, 18 May 2018, 13 June 2018 and 14 June 2018), the third respondent (Albert) on two occasions (13 June 2018 and 14 June 2018), the fourth respondent (Hynes) on two occasions (13 June 2018 and 14 June 2018), the fifth respondent (Desmond) on one occasion (14 June 2018), the sixth respondent (Harding) on one occasion (14 June 2018) and the seventh respondent (Davidson) on one occasion (14 June 2018); and

(b) the CFMMEU was taken to have contravened the FW Act with respect to each and every contravention by the other respondents (11 contraventions in total), by operation of s 550 of the FW Act.

8 The respondents, by their defence filed on 21 July 2021, conceded that the breaches of s 500 of the Fair Work Act alleged by the applicant occurred as pleaded. It follows that the only question before this Court was that of the appropriate penalty to be imposed for these contraventions.

9 In this context, the applicant sought the Court:

(a) make declarations of contraventions of s 500 of the FW Act by each of the respondents, as admitted in the pleadings and reflected in the Commissioner’s draft orders (Attachment A);

(b) impose appropriate pecuniary penalties upon each of the respondents for each of their contraventions of the FW Act;

(c) order that those penalties be paid to the Commonwealth of Australia within 28 days;

(d) make a personal payment order against each of the individual respondents (except for Davidson and Harding), as recorded in Attachment A; and

(e) make no order as to costs.

10 The applicant’s draft Orders giving effect to this relief were as follows:

In these orders:

(i) “**FW Act**” means the *Fair Work Act 2009* (Cth).

(ii) “**Entry permit**” means an entry permit issued by the Fair Work Commission to an official of an organisation under section 512 of the FW Act.

(iii) “**Site**” means the construction site area of the Logan Enhancement Project referred to in paragraph 9 of the Amended Statement of Claim dated 16 July 2021.

(iv) “State or Territory OHS right” means a right to enter premises under section 81(3) of the *Work Health and Safety Act 2011* (Qld) (**WHS Act**), being a State or Territory OHS right within the meaning of section 494(2) of the FW Act.

**THE COURT DECLARES THAT:**

***The Second Respondent – Beau Seiffert***

1. On each of 15 May 2018, 18 May 2018, 13 June 2018 and 14 June 2018, the second respondent, an employee of the first respondent acting on its behalf and within the scope of his authority within the meaning of section 793(1) of the FW Act, contravened section 500 of the FW Act when attending at and entering the Site and when exercising a State or Territory OHS right, by acting in an improper manner by:

a. failing or refusing to leave the Site when requested to do so; and

b. failing to produce his entry permit when requested to do so.

***The Third Respondent - Te Aranui Albert***

2. On each of 13 June 2018 and 14 June 2018, the third respondent, an employee of the first respondent acting on its behalf and within the scope of his authority within the meaning of section 793(1) of FW Act, contravened section 500 of the FW Act when attending at and entering the Site and when exercising a State or Territory OHS right, by acting in an improper manner by:

a. failing to produce his entry permit when requested to do so; and

b. failing or refusing to leave the Site when requested to do so.

***The Fourth Respondent – Blake Hynes***

3. On each of 13 June 2018 and 14 June 2018, the fourth respondent, an employee of the first respondent acting on its behalf and within the scope of his authority within the meaning of section 793(1) of FW Act, contravened section 500 of the FW Act when attending at and entering the Site and when exercising a State or Territory OHS right, by acting in an improper manner by:

a. failing to produce his entry permit when requested to do so; and

b. failing or refusing to leave the Site when requested to do so.

***The Fifth Respondent – Shaun Desmond***

4. On 14 June 2018, the fifth respondent, an employee of the first respondent acting on its behalf and within the scope of his authority within the meaning of section 793(1) of FW Act, contravened section 500 of the FW Act when attending at and entering the Site and when exercising a State or Territory OHS right, by acting in an improper manner by:

a. failing to produce his entry permit when requested to do so; and

b. failing or refusing to leave the Site when requested to do so.

***The Sixth Respondent – Craig Davidson***

5. On 14 June 2018, the sixth respondent, an employee of the first respondent acting on its behalf and within the scope of his authority within the meaning of section 793(1) of FW Act, contravened section 500 of the FW Act when attending at and entering the Site and when exercising a State or Territory OHS right, by acting in an improper manner by:

a. failing to produce his entry permit when requested to do so; and

b. failing or refusing to leave the Site when requested to do so.

***The Seventh Respondent – Anthony Harding***

6. On 14 June 2018, the seventh respondent, an employee of the first respondent acting on its behalf and within the scope of his authority within the meaning of section 793(1) of FW Act, contravened section 500 of the FW Act when attending at and entering the Site and when exercising a State or Territory OHS right, by acting in an improper manner by:

a. failing to produce his entry permit when requested to do so; and

b. failing or refusing to leave the Site when requested to do so.

***The First Respondent – CFMMEU – accessorial liability***

7. In respect of the contraventions of section 500 of the FW Act referred to in declarations 1- 6 above, the first respondent:

a. is taken by operation of section 793(1) of the FW Act to have engaged in the conduct of each individual respondent, thereby participating in each contravention in each case;

b. is taken by operation of section 793(2) of the FW Act to have known of all of the essential facts constituting each contravention in each case;

c. was accordingly knowingly concerned in each contravention within the meaning of section 550 of that Act; and

d. thereby itself contravened section 500 of the FW Act on each occasion.

**THE COURT ORDERS THAT:**

1. The first respondent pay a pecuniary penalty of:

a. $[insert] in respect of each of its four contraventions of section 500 of the FW Act as declared in declaration 1 above;

b. $[insert] in respect of each of its two contraventions of section 500 of the FW Act as declared in declaration 2 above;

c. $[insert] in respect of each of its two contraventions of section 500 of the FW Act as declared in declaration 3 above;

d. $[insert] in respect of its contravention of section 500 of the FW Act as declared in declaration 4 above;

e. $[insert] in respect of its contraventions of section 500 of the FW Act as declared in declaration 5 above; and

f. $[insert] in respect of its contravention of section 500 of the FW Act as declared in declaration 6 above.

2. The second respondent pay a pecuniary penalty of $[insert] in respect of each of his four contraventions of section 500 of the FW Act as declared in declaration 1 above.

3. The third respondent pay a pecuniary penalty of $[insert] in respect of each of his two contraventions of section 500 of the FW Act as declared in declaration 2 above.

4. The fourth respondent pay a pecuniary penalty of $[insert] in respect of his two contraventions of section 500 of the FW Act as declared in declaration 3 above.

5. The fifth respondent pay a pecuniary penalty of $[insert] in respect of his contravention of section 500 of the FW Act as declared in declaration 4 above.

6. The sixth respondent pay a pecuniary penalty of $[insert] in respect of each of his contravention of section 500 of the FW Act as declared in declaration 5 above.

7. The seventh respondent pay a pecuniary penalty of $[insert] in respect of his contravention of section 500 of the FW Act as declared in declaration 6 above.

8. The pecuniary penalties referred to in paragraphs 1-7 above be paid to the Commonwealth of Australia within 28 days.

9. Each of the second to fifth respondents must pay the penalties imposed upon them by the orders above personally in that they not, whether before or after the payment of the penalty:

a. seek to have or encourage the first respondent in any way whatsoever, directly or indirectly, to pay to him or for his financial benefit in any way whatsoever, any money or financial benefit referable to the payment of the penalties, whether in whole or in part; and

b. accept or receive from the first respondent in any way whatsoever, any money or financial benefit referable to the payment of the penalties, whether in whole or in part.

10. The Applicant have liberty to apply on seven days’ notice in the event that any of the preceding orders are not complied with.

11. There be no order as to costs.

**THE COURT DIRECTS THAT:**

12. The applicant serve these orders on:

a. the first respondent in accordance with rule 10.04 of the Federal Court Rules 2011; and

b. each of the second to seventh respondents in accordance with rule 10.01 of the Federal Court Rules 2011.

11 At the hearing on 7 October 2021, the applicant noted that it no longer pressed Order 10, and that the respondents had no objections to Orders 11 of 12.

# SUBMISSIONS

## Applicant’s submissions

12 The applicant submitted, in summary, as follows:

 The respondents’ contraventions of the Fair Work Act were objectively serious as they resulted from a “a concerted, coordinated industrial campaign by the CFMMEU and its officers on four separate days”, and that this conduct was an attempt “at powerful (and repeated) displays of defiance through strength in numbers”;

 The respondents’ submission that their conduct resulted from a genuine but mistaken belief as to the operation of s 81(3) of the *Work Health and Safety Act 2011* (Qld)(**WHS Act**) and “whether it gave rise to the exercise of a “State or Territory OHS right” for the purposes of s 494(2) of the FW Act” is unconvincing given the authority of *Australian Building and Construction Commissioner v Powell* [2017] FCAFC 89 to the effect that it was “always determinative of the application and operation of s 81(3) of the WHS Act”;

 This view was affirmed in *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (the Bruce Highway Caloundra to Sunshine Upgrade Case) (No 2)* [2019] FCA 1737; (2019) 292 IR 259 (Collier J); *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (the Bruce Highway Caloundra to Sunshine Upgrade Case)* [2020] FCAFC 203; (2020) 302 IR 106 (Reeves, Charlesworth and O’Callaghan JJ); special leave to appeal refused - [2021] HCASL 60 (Gordon and Edelman JJ).

 The respondents’ conduct is this respect was particularly egregious given my reliance on *Powell* in granting an interlocutory injunction in *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (the Bruce Highway Caloundra to Sunshine Upgrade Case)* [2018] FCA 553;

 All contraventions of the Fair Work Act that are the subject of this proceeding were committed by recidivist contraveners;

 The first respondent is a large, prominent and influential union with substantial resources. The first respondent has the resources to pay any penalty imposed by the Court;

 The first respondent has a significant record of prior contraventions of the Fair Work Act, and any penalty imposed should greater than an amount it considers to be an “acceptable cost of doing business”;

 Further, the individual respondents’ prior records of contravention are:

(a) Seiffert – eight contraventions of the FW Act in one proceeding;

(b) (Albert – two contraventions of the FW Act in two proceedings;

(c) Hynes – a total of five contraventions of the FW Act in two proceedings;

(d) Desmond – two contraventions of the FW Act in one proceeding;

(e) Davidson – nil; and

(f) Harding– nil.

 A number of the individual respondents have also contravened s 500 of the Fair Work Act referable to another proceeding, namely QUD785/2020 before Rangiah J, in the following terms:

(a) Seiffert – two contraventions of s 500 on 30 April 2018 and 1 May 2018;

(b) Albert – one contravention of s 500 on 1 May 2018;

(c) Hynes – three contraventions of s 500 on 1 May and twice on 2 May 2018;

(d) Desmond – two contraventions of s 500 on 2 May 2018; and

(e) Davidson – two contraventions of s 500 on 2 May 2018.

 The first respondent is also a respondent in proceeding QUD785/2020, and “has admitted to having contravened the FW Act with respect to each and every contravention by the individual respondents (totalling 18 contraventions, 10 of which are attributed to the above named individual respondents) by operation of s 550 of the FW Act”;

 Previous contraventions of industrial laws by separate branches of the first respondent or in different states, are not irrelevant to the consideration of an appropriate penalty;

 Contravening conduct is normalised within the first respondent, and pecuniary penalties imposed close to the statutory maximum have little or no effect on this conduct;

 Any penalty imposed should serve as a general, and specific, deterrent;

 The respondents are entitled to some discount for their admission of contraventions at an early stage in proceedings;

 Any penalties imposed by the Court on the individual respondents should act as a general deterrent to other officers and delegates of the first respondent;

 Any penalties imposed on the individual respondents should act as a specific deterrent for future contraventions of the Fair Work Act by them;

 The course of conduct principles do not reduce the number of contraventions, permit the imposition of one penalty, or require the consideration of multiple contraventions in the course of conduct as attracting one maximum penalty;

 The application of these principles is discretionary, and they should not be applied in matters involving repeat contraveners, such as the first respondent, and a number of the individual respondents;

 Given the contraventions by the respondents occurred on four separate days, it cannot be said that they occurred in any single course of conduct;

 The totality principle requires this Court to examine each individual penalty to be imposed, and may amend them if the “total aggregate penalty is disproportionate to the wrongdoing of the relevant respondent, viewed in its totality”;

 While required to consider totality, the Court need not reduce any penalty as this is a discretionary exercise;

 Each contravention of the Fair Work Act should be viewed separately and distinctly, and there is no reason to reduce any penalty imposed on the basis of totality;

 Significant penalties, “towards the maximum” should be imposed on the first respondent and on the second and fourth respondent;

 High range penalties are appropriate for the third and fifth respondents, in the range of $7,000 to $10,000 per contravention given their previous records;

 Mid-range penalties should be imposed on the sixth and seventh respondents, in the range of $5,000 to $7,000 per contravention given they have no prior history of contraventions;

 The applicant seeks personal payment orders be imposed on all respondents, aside from the sixth and seventh respondents, and the form of the orders sought is in accordance with the observations of the plurality in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157 at [115], [129] and [132]; *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Non-Indemnification Personal Payment Case)* (2018) 264 FCR 155 (***NIPP case***);

 Issues referable to enforcement in this context do not justify not making personal payment orders, and to not do so would not result in any deterrence, either general or specific per *Australian Building and Construction Commissioner v Construction, Forestry, Maritime and Energy Union* (2018) 262 CLR 157 at [47]-[48] and [131]-[132]; *NIPP* *case*;

## Respondents’ submissions

13 The respondents contended that their admitted contraventions of s 500 of the Fair Work Act fall at the “lowest end of the spectrum of seriousness”. In support of this contention, the respondents submitted, in summary, as follows:

 The applicant erroneously submitted that contraventions of recidivist contraveners are serious on that basis, which is at odds with the approach adopted in Full Court in *Pattinson v ABCC* (2020) 384 ALR 75 on the basis that the imposition of penalties has the purpose of deterring contraventions “the kind of which are before the Court”;

 This matter also determined that the principle of proportionality applies in the context of a civil penalty. As Allsop CJ, White and Wigney JJ noted at [62]:

The maximum penalty is not just a limit on power, it provides a statutory indication of the punishment for the worst type of case, by reference to which the assessment of the proportionate penalty for other offending can be made, according to the will of Parliament.

 A history of contraventions does not, in and of itself and in the absence of proper analysis or explanation, increase the severity of subsequent contraventions: *Pattinson* at [194];

 A contravener’s recidivism cannot be “deployed to permit the imposition of a penalty at or near the maximum, without any real evaluation of the objective characteristics of the contravention”: *Pattinson* at [195];

 The Court should have regard to a number of relevant factors in deciding an appropriate penalty, per *NIPP case* at [20], including:

the nature, character and seriousness of the conduct; any loss and damage caused; the circumstances in which the conduct took place; the deliberateness of the conduct and the time over which it occurred; the impact or consequences of the contravention; and the degree of involvement of senior officials

 Factors referable to the circumstances of a respondent include its size (if a company) and financial position, prior contravening conduct, corrective action taken, contrition and remorse and cooperation and assistance referable to the regulator;

 The fact that a contravener is a corporation does not, in and of itself, justify the imposition of a higher penalty;

 At the time of the contravening conduct, the individual respondents were exercising their rights under s 81(3) of the WHS Act for the purposes of attending discussions to resolve safety concerns. This is significant given “…the conduct was not aggravated by being arbitrary or capricious nor was it engaged in for some entirely self-interested purpose” per *Brookfield Multiplex Engineering and Infrastructure v McDonald* [2014] FCA 389, and removes the need for personal deterrence as a relevant consideration per *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Adelaide Airport Case)* [2021] FCA 951;

 The respondents’ contraventions did not hinder or obstruct any person, nor has it been asserted that the improper conduct of the respondents was engaged in intentionally;

 Contraventions of s 500 of the Fair Work Act must be placed on a spectrum of seriousness so as to impose the proper penalty per *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Laverton North and Cheltenham Premises Case)* *(No 2)* [2019] FCA 973;

 The respondents “have not acquiesced to the contraventions being characterised as any more serious than what has been pleaded, nor as having any un-pleaded elements of aggravation”;

 Certain contentions made by the applicant have no evidentiary basis, namely:

 The respondents’ contraventions arose from a “concerted, coordinated industrial campaign”;

 That the respondents’ entries are similar to other cases;

 Breaches of Part 3-4 of the Fair Work Act are condoned by the senior management of the first respondent;

 Unlawful conduct is normalised within the first respondent;

 Section 557 of the Fair Work Act does not apply to the respondents’ contraventions of s 500 of the Fair Work Act, but the course of conduct principle may be applicable;

 In instances of multiple contraventions forming a course of conduct, “the Court should give consideration to moderating the penalties that would otherwise be imposed for each separate contravention to avoid double punishment and ensure that the penalty does not transcend the objective seriousness of the contraventions”;

 It is irrelevant for the purposes of making such an assessment that a contravener is recidivist or has a substantial prior record of contravention;

 The principle of totality requires that the penalties imposed for each separate contravention do not result in an aggregate penalty that is excessive;

 It is relevant to determining the appropriate penalty to be imposed how and when a court has dealt with past contravening conduct: *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2016] FCA 413 at [25];

 An honest or reasonable belief may act as a mitigating factor referable to the penalty to be imposed: *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Telstra Corporation Ltd* [2007] FCA 1607;

 This is particularly pertinent to the contraventions of the individual respondents given that, as already outlined, they has mistaken understanding that s 81(3) of the WHS Act did not create a State or Territory OHS right;

 The contraventions that occurred on 15 and 18 May 2018 did not result in any economic loss and were predicated on an honest but mistaken belief by the respondents. Similarly the contraventions that occurred on 13 and 14 June 2018 were predicated on an honest but mistaken belief by the respondents

 The first respondent has taken corrective action since these contraventions occurred, namely issuing a directive about s 81(3) of the WHS Act, which was reinforced at a meeting of its officials;

 Only the second and third respondents continue to act as officials of the first respondent;

 The respondents’ admission that the contraventions occurred in the manner pleaded by the applicant occurred early in the proceeding; and

 A lack of contrition is not an aggravating factor in relation to the imposition of an appropriate penalty: *Director of the Fair Work Building Industry Inspectorate v Stephenson* [2014] FCA 1432 at [87].

## Additional submissions

14 On 3 May 2022 I made Orders by consent facilitating the parties making submissions referable to the impact of *Australian Building and Construction Commissioner v Pattinson & Anor* [2022] HCA 13 (***Pattinson No 2***) on this proceeding.

15 Accordingly, submissions were received from the both the applicant and the respondents. For the most part, those submissions were used to bolster the existing submissions of the parties. Consequently, I do not intend to address them in substantial detail.

# CONSIDERATION

16 The purpose of imposing a civil penalty under the Fair Work Act “is primarily, if not solely, the promotion of the public interest in compliance with the provisions of the Act by the deterrence of further contraventions of the Act”: *Pattinson No 2* at [9].

17 This purpose is to be achieved by a mixture of “imposing penalties that are sufficiently high to deter the wrongdoer from engaging in “contraventions of a like kind” (specific deterrence) and to deter others who might be tempted to contravene (general deterrence)”: *Australasian Meat Industry Employees Union v Dick Stone Pty Ltd (No 2)* [2022] FCA 1263 at [25].

18 The penalty to be imposed for each contravention should be “no more and no less than is necessary for that purpose”: *Commonwealth v Director, Fair Work Building Industry Inspectorate; Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 at [55] (French CJ, Kiefel, Bell, Nettle and Gordon JJ), citing *Trade Practices Commission v CSR Ltd* (1991) ATPR 41-076 at 52, 152 (French J).

19 As the plurality observed in *Pattinson No 2* at [9], an appropriate penalty is one which is “no more than might be considered to be reasonably necessary to deter further contraventions of a like kind …”. In this sense, the statutory maximum penalty provided under the Fair Work Act is not solely reserved for the most serious or blatant contraventions. As the plurality noted in *Pattinson No 2* at [10], there must be:

…some reasonable relationship between the theoretical maximum and the final penalty imposed. That relationship is established where the maximum penalty does not exceed what is reasonably necessary to achieve the purpose of s 546: the deterrence of future contraventions of a like kind by the contravenor and by others.

20 Their Honours went on to note that there is scope for the imposition of the maximum penalty even in instances where the relevant contraventions are not the most serious of their kind. The plurality in *Pattinson No 2* stated at [46]:

It is important to recall that an “appropriate” penalty is one that strikes a reasonable balance between oppressive severity and the need for deterrence in respect of the particular case. A contravention may be a “one-off” result of inadvertence by the contravenor rather than the latest instance of the contravenor’s pursuit of a strategy of deliberate recalcitrance in order to have its way. There may also be cases, for example, where a contravention has occurred through ignorance of the law … or where the official responsible for a deliberate breach has been disciplined ... In such cases, a modest penalty, if any, may reasonably be thought to be sufficient to provide effective deterrence against further contraventions.

21 In determining the appropriate penalty to be imposed against a contravener, there is no “legal checklist” or “rigid catalogue” to be applied: *Pattinson* at [19]. As Katzmann J noted in *Dick Stone No 2* at [32], relevant factors that may be considered include:

the nature and extent of the contravening conduct and the circumstances in which it took place; the nature and extent of loss or damage; whether the conduct was deliberate; the period over which the conduct extended; whether senior management was involved; whether the contraventions are truly distinct or arose out of the one course of conduct; whether the contravener has previously engaged in similar conduct; the size of the contravening company; the existence and extent of any contrition and corrective action; and whether the company has a corporate culture conductive to compliance. See, for example, *TPC v CSR* at 52, 152–3 (French J); *Kelly v Fitzpatrick* [2007] FCA 1080; 166 IR 14 (Tracey J) at [14].

22 Her Honour went on to observe at [33]:

Some of these factors will weigh in favour of a heavy penalty, some will pull in the opposite direction. A court might consider it “appropriate to impose only a moderate penalty” where those responsible for a contravention of the Act express “genuine remorse” or the conduct is unlikely to recur because of changes implemented by the contravenor: *Pattinson* at [47].

23 Any penalty imposed must be sufficient so as to not amount to an “acceptable cost of doing business” for the contravener: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 at [66]. The imposition of a small penalty against a well-resourced contravener is unlikely to be sufficient: *Pattinson No 2* at [60]. The impost of a penalty should be substantial enough so as to be “viewed by the contravener and others as an economically irrational choice” referable to future contraventions”: *Pattinson No 2* at [66].

24 In the context of contraventions occurring in a course of conduct, Katzmann J observed in *Dick Stone No 2* at [34]-[35]:

34. The question whether particular contraventions arise out of a course of conduct is not determined exclusively by s 557 of the FW Act. It is well established that s 557 is not a code and the common law course of conduct principle continues to apply. That principle was described by the Full Court in *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39; 194 IR 461; 269 ALR 1 at [39] in the following way:

**The principle recognises that where there is an interrelationship between the legal and factual elements of two or more offences for which an offender has been charged, care must be taken to ensure that the offender is not punished twice for what is essentially the same criminality.** That requires careful identification of what is “the same criminality” and that is necessarily a factually specific enquiry. Bare identity of motive for commission of separate offences will seldom suffice to establish the same criminality in separate and distinct offending acts or omissions.

35. **But the principle is neither a rigid rule of law nor “a straitjacket, denying a judge the capacity to craft a result that properly reflects the conduct in question even if the course of conduct principle does squarely apply”.** Rather, it is a guide to the exercise of judicial discretion. See *Parker v Australian Building and Construction Commissioner* (2019) 270 FCR 39 at [273]-[274] (Besanko and Bromwich JJ). **The fact that two or more contraventions may be part of a single course of conduct does not limit “the penal response” to a single maximum penalty**: *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union* (The Nine Brisbane Sites Appeal) (2019) 269 FCR 262 at [12] (Allsop CJ).

(emphasis added)

25 In circumstances where multiple contraventions are to be penalised, it is necessary to ensure that, as a final step, the sum of the penalty is “not unjust or out of proportion to the circumstances of the case”: *Mornington Inn Pty Ltd v Jordan* (2008) 168 FCR 383 at [42].

## Appropriate penalties

26 I turn now to determining the appropriate penalties to be imposed on each of the respondents for their contraventions of s 500 of the Fair Work Act.

### Nature of the contraventions

27 The nature of the relevant contraventions on the part of the respondents are clear from the applicant’s statement of claim filed on 16 July 2021. I have already outlined those contraventions at [10] above. The respondents, in their defence filed on 21 July 2021, accept that the contraventions as pleaded by the applicant occurred.

28 As I have already noted, the first respondent accepted that it had breached s 500 of the Fair Work Act on each of the relevant dates by operation of s 550 of the Fair Work Act, and on the basis that each of the individual respondents were officials of the first respondent at the time of the relevant contraventions.

### Circumstances in which the contraventions occurred

29 The respondents’ contraventions occurred on 15 May, 18 May, 13 June and 14 June 2018 when the individual respondents entered premises associated with the Project. As I outlined at [3]-[5] above, after entering those premises the individual respondents walked around, failed to display entry permits when requested, and refused to leave those premises when asked.

### Circumstances of the contraveners

30 The first respondent is a large and well-resourced union organisation. The first respondent also undoubtedly has the capacity to pay any penalty imposed by this Court. I am satisfied that the first respondent has a substantial record of contravening the Fair Work Act, as evidenced by the numerous authorities referred to me by the parties in this proceeding

31 The individual respondents were, at the time of the contraventions, officials of the first respondent. Similarly, a number of the individual respondents have a not inconsiderable record of previous contraventions of the Fair Work Act. As the respondent outlined, the individual respondents’ records of previous contraventions were:

(a) Seiffert – eight contraventions of the FW Act in one proceeding

(b) Albert – two contraventions of the FW Act in two proceedings;

(c) Hynes – a total of five contraventions of the FW Act in two proceedings;

(d) Desmond – two contraventions of the FW Act in one proceeding;

(e) Davidson – nil; and

(f) Harding– nil.

### Cooperation

32 The respondents’ admissions were made at an early stage of the proceedings. In doing so the applicant was not required to serve evidence. It also avoided a potentially lengthy trial, saving the time of both the Court and the applicant, as well significant public funds. The respondents submitted that the significant amendments to the amended statement of claim revealed a commitment to cooperation and compromise resulting in the resolution of this case. In my view this is a reasonable inference to draw.

33 As Rangiah J observed in the *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (the Toowoomba Bypass Case)* [2021] FCA 1128 at [92], the respondents’ cooperation warrants reduction of the penalties that would otherwise be imposed.

## What amount of penalty should be imposed?

34 The maximum penalty for a contravention of s 500 of the Fair Work Act is:

 60 penalty units for each of the second to seventh respondents; and

 300 penalty units for the CFMMEU.

35 At the time of the contravening conduct, the value of a penalty unit was $210.00. Accordingly:

 the maximum penalty that might be imposed for each contravention by the individual respondents is $12,600; and,

 the maximum penalty that can be imposed for each contravention by the CFMMEU is $63,000

36 The applicant submitted that a penalty towards the statutory maximum should be imposed on the second and fourth respondents. The applicant further submitted that lower high-range penalties should be imposed on the third and fifth respondents ($7,000-$10,000) for each contravention, and mid-range penalties should be imposed on the sixth and seventh ($5,000-$7,000) respondents for each contravention given they have no prior history of contraventions.

37 The respondents submitted that a penalty in the amount of $10,000-$15,000 was appropriate for the first respondent for each contravention, and a penalty in the amount of $1,000-$2,500 were appropriate for each contravention of the individual respondents.

38 Central to the respondents’ reasoning that lower penalties should be imposed than those sought by the applicant is that, they submitted, the individual respondents were under a mistaken belief that as to whether s 81(3) of the WHS Act created a State or Territory OHS right for the purposes of s 494(2) of the Fair Work Act. It is on this basis that the individual respondents, it was submitted, entered the premises on the relevant dates. The respondents further submitted that, as they were not aware that this belief was mistaken, and accordingly their conduct would not be repeated, no need existed for specific deterrence imposing penalties against them.

39 Nevertheless, as the applicant noted, no evidence was adduced from the individual respondents to substantiate these claims. It follows that they must be given little weight.

40 Further, it should be noted that *Australian Building and Construction Commissioner v Powell* [2017] FCAFC 89, which was decided well before the contraventions in this proceeding, was already determinative of the operation of s 81(3) of the WHS Act. I relied on *Powell* in issuing an interlocutory injunction in *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (the Bruce Highway Caloundra to Sunshine Upgrade Case)* [2018] FCA 553 where I stated, at [18]:

…there is a *prima facie* case before the Court that the production of an entry permit in the circumstances contemplated by the proposed relief may be ***necessary*** under the relevant Queensland legislation in light of the decision of the Full Court of the Federal Court in *Australian Building and Construction Commissioner v Powell* [2017] FCAFC 89; (2017) 251 FCR 470 suggests. In any event, I also note that six of the seven individual respondents have an entry permit – the production by them of those permits is scarcely a hardship to either them or the CFMMEU.

41 I published my reasons *Bruce Highway Caloundra to Sunshine Upgrade Case* on 20 April 2018, some three weeks prior to the first contravention by the individual respondents. It necessarily follows that the individual respondents, and the first respondent, had been put on notice that there was a strong chance that their views referable to s 81(3) of the WHS Act were erroneous prior to the subsequent contravening conduct.

42 Insofar as appears from the final form of the amended statement of claim, the entries by the respondents on to the premises were for limited periods. There is some evidence of economic loss to the principal contractor on the project where the contraventions occurred.

43 Further, while plainly issues of deterrence are of key importance in the context of assessment of appropriate penalty, I also note that :

 The circumstances which led to the contravening in the present matter no longer exist, and the first respondent now accepts that its construction of s 81(3) of the WHS Act was incorrect, and has informed its members of the same; and

 It does not appear to be in dispute that only the second and third respondents continue to act as officials of the first respondent.

44 Overall I am satisfied that penalties in the mid-range are appropriate.

## Personal payment orders

45 In the context of personal payment orders, Rares J observed in Australian Building and *Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Botany Cranes Case) (No 4)* [2021] FCA 525:

23 I am of opinion that it is wrong in principle to regard a non-indemnification or personal payment order as distinct or different from the actual imposition of a civil pecuniary penalty. **The power to impose the penalty includes the power to make a non-indemnification or personal payment order to achieve the object of that remedy created by the Parliament – namely, deterrence. There can be no prejudice to the individual whose contravention of the law warrants the imposition of a civil pecuniary penalty that the Court, of its own motion, imposes also a non-indemnification or personal payment order on him or her in order to avoid the penalty having no impact on the actual contravener because of an expectation that his or her employer, or a third party, would otherwise pay the penalty.**

24 A non-indemnification or personal payment order is a means of achieving deterrence. I reject Mr Byrnes’ argument based on Rangiah J’s refusal to allow the Commissioner to amend the originating application to seek a non-indemnification or personal payment order. In my opinion, such an order necessarily, if impliedly, is sought in any claim for a civil pecuniary penalty, namely a penalty fashioned so as to be effective to achieve the statutory purpose of deterrence. The Non-Indemnification Case 262 CLR 157 determined that the power to order a pecuniary penalty carries implicitly with it the power to ensure that its ‘sting or burden’ is effective. Thus, a non-indemnification or personal payment order is part and parcel of the penalty, not distinct from it or a matter requiring specific pleading.

(emphasis added)

46 Given the record of previous contraventions of the second and fourth respondents, I am of the opinion that the imposition of personal payment orders against them is appropriate to act as a deterrent against further contraventions of the Fair Work Act by them, in addition to a general deterrent. Given the third and fifth respondents have a limited history of prior contraventions of the Fair Work Act, and the sixth and seventh respondents have no prior history of contraventions, I do not consider it necessary to impose personal payment orders against them.

# CONCLUSION

47 I am not persuaded that, in considering the appropriate penalties to be imposed, the contraventions of the individual respondents occurred as part of a single course of conduct. I reach this conclusion, *inter alia*, on the basis that the contraventions occurred on four separate dates. This is plainly a conclusion that is open for me to reach: see, for example, *the Toowoomba Bypass Case.*

48 Taking into account principles of totality, and consideration of the total penalties to be imposed on each respondent, I consider the imposition of the following penalties to be appropriate in the circumstances.

49 On the first respondent, a penalty of $25,000 for each of the 11 contraventions, being a total of $275,000.

50 On the second respondent, a penalty of $6,000 for each of the four contraventions, being a total of $24,000, to be paid personally;

51 On the third respondent, a penalty of $5,000 for the two contraventions, being a total of $10,000;

52 On the fourth respondent, a penalty of $6,000 for the two contraventions, being a total of $12,000, to be paid personally;

53 On the fifth respondent, a penalty of $3,000 for the one contravention, being a total of $3,000;

54 On the sixth respondent, a penalty of $2,000 for the one contravention, being a total of $2,000; and

55 On the seventh respondent, a penalty of $2,000 for the one contravention, being a total of $2,000.

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| I certify that the preceding fifty-five (55) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Collier. |

Associate:

Dated: 30 January 2023

SCHEDULE OF PARTIES

|  |  |
| --- | --- |
|  | QUD 194 of 2020 |
| Respondents |  |
| Fourth Respondent: | BLAKE HYNES |
| Fifth Respondent: | SHAUN DESMOND |
| Sixth Respondent: | ANTHONY HARDING |
| Seventh Respondent: | CRAIG DAVIDSON |