FEDERAL COURT OF AUSTRALIA

Director of the Fair Work Building Industry Inspectorate v Stephenson [2014] FCA 1432

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| Citation: | Director of the Fair Work Building Industry Inspectorate v Stephenson [2014] FCA 1432 |
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| Parties: | **DIRECTOR OF THE FAIR WORK BUILDING INDUSTRY INSPECTORATE v LUKE STEPHENSON, TROY SMART AND CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION**  **DIRECTOR OF THE FAIR WORK BUILDING INDUSTRY INSPECTORATE v DAVID BOLTON, ANTHONY VITLER AND CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION**  **DIRECTOR OF THE FAIR WORK BUILDING INDUSTRY INSPECTORATE v DAVID BOLTON, MICHAEL HUDDY AND CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION**  **DIRECTOR OF THE FAIR WORK BUILDING INDUSTRY INSPECTORATE v MICHAEL MCDERMOTT, LUKE STEPHENSON, ANTHONY JARRETT, ANTHONY SLOANE, BRENDAN PITT, JOHN PERKOVIC AND CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION** |
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| File numbers: | SAD 138 of 2014  SAD 139 of 2014  SAD 140 of 2014  SAD 141 of 2014 |
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| Judge: | **WHITE J** |
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| Date of judgment: | 23 December 2014 |
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| Catchwords: | **INDUSTRIAL LAW** – admitted contraventions of s 500 of the *Fair Work Act 2009* (Cth) – determination of appropriate penalties |
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| Legislation: | *Evidence Act 1995* (Cth) s 191  *Fair Work Act 2009* (Cth) ss 484, 487, 489, 500, 512, 518, 793 |
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| Cases cited: | *Alfred v Construction, Forestry, Mining and Energy Union* [2011] FCA 556  *Australian Building and Construction Commission v Construction, Forestry, Mining and Energy Union* [2012] FCA 189  *Australian Communications and Media Authority v TPG Internet Pty Ltd* [2014] FCA 382; (2014) 221 FCR 502  *Australian Competition and Consumer Commission v Energy Australia Pty Ltd* [2014] FCA 336  *Australian Competition and Consumer Commission v Mandurvit Pty Ltd* [2014] FCA 464, (2014) ATPR 42-471  *Australian Competition and Consumer Commission v Zen Telecom Pty Ltd* [2014] FCA 1049  *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8; (2008) 165 FCR 560  *Barbaro v The Queen* [2014] HCA 2; (2014) 305 ALR 323  *Cahill v Construction, Forestry, Mining and Energy Union (No 4)* [2009] FCA 1040; (2009) 189 IR 304  *Channon v The Queen* (1978) 33 FLR 433  *Director of the Fair Work Building Industry Inspectorate v Cartledge* [2014] FCA 1047  *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2013] FCA 515  *Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2013] FCA 1014  *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2014] FCA 160  *DP World Sydney Ltd v Maritime Union of Australia (No 2)* [2014] FCA 596  *Draffin v Construction, Forestry, Mining and Energy Union* [2009] FCAFC 120; (2009) 189 IR 145  *Fair Work Commission* [2014]FWC 3907  *Fair Work Ombudsman v Tiger Telco Pty Ltd (in liq)* [2012] FCA 479  *Finance Sector Union v Commonwealth Bank of Australia* [2005] FCA 1847; (2005) 224 ALR 467  *Leighton Contractors Pty Ltd v Construction, Forestry, Mining and Energy Union* (2006) 164 IR 375  *Markarian v The Queen* [2005] HCA 25, (2005) 228 CLR 357  *Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union* [2008] FCAFC 170; (2008) 171 FCR 357  *Ponzio v B & P Caelli Constructions Pty Ltd* [2007] FCAFC 65; (2007) 158 FCR 543  *R v E, AD* [2005] SASC 332; (2005) 93 SASR 20  *R v McInerney* (1986) 42 SASR 111  *R v McNamara* [2009] SASC 227; (2009) 105 SASR 38 |
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| Date of hearing: | 28 November 2014 |
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| Place: |  |
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| Division: | GENERAL DIVISION |
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| Category: | Catchwords |
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| Number of paragraphs: | 157 |
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| Counsel for the Applicant: | Mr S Doyle SC |
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| Solicitor for the Applicant: | Australian Government Solicitors |
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| Counsel for the Respondents: | Mr M Griffin QC |
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| Solicitor for the Respondents: | Lieschke & Weatherill |
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| Counsel for the Sixth Respondent in Action No SAD 141 of 2014 | Mr Y Bakri |
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| Solicitors for the Sixth Respondent in Action No SAD 141 of 2014 | Slater and Gordon Lawyers |

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| **Table of Corrections** |  |
| 26 February 2016 | In paragraph 76, “non‑contraventions” has been replaced with “contraventions”. |
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| 1 April 2016 | In paragraphs 1(a)‑(f) of the Declarations made in Action SAD 141 of 2014, the date “7 May 2014” is replaced with “1 May 2014”. |
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| 1 April 2016 | In the heading above paragraph 46, the date “7 May 2014” is replaced with “1 May 2014”. |
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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| SOUTH AUSTRALIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | SAD 138 of 2014 |

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| BETWEEN: | DIRECTOR OF THE FAIR WORK BUILDING INDUSTRY INSPECTORATE  Applicant |
| AND: | LUKE STEPHENSON  First Respondent  TROY SMART  Second Respondent  CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION  Third Respondent |

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| JUDGE: | WHITE J |
| DATE OF ORDER: | 23 DECEMBER 2014 |
| WHERE MADE: | ADELAIDE |

1. **THE COURT DECLARES THAT:**

(a) The first respondent, Luke Stephenson, contravened s 500 of the *Fair Work Act 2009* (Cth) Act (FW Act) by reason of acting in an improper manner when exercising, or seeking to exercise, rights as a permit holder in accordance with s 484 of the FW Act on 31 March 2014 at the construction project taking place at 336 Kensington Road, Leabrook (the Project).

(b) The second respondent, Troy Smart, contravened s 500 of the FW Act by reason of acting in an improper manner while exercising, or seeking to exercise, rights as a permit holder in accordance with s 484 of the FW Act on 31 March 2014 at the Project.

(c) By reason of s 793 of the FW Act, the third respondent, the Construction, Forestry, Mining and Energy Union (CFMEU), is taken to have contravened s 500 of the FW Act by the conduct of its officers constituting their respective contraventions in paras (a) to (b) hereof.

1. **THE COURT ORDERS THAT:**

(a) The first respondent pay a pecuniary penalty of $1,700 for the contravention of s 500 of the FW Act referred to in Order 1(a) hereof.

(b) The second respondent pay a pecuniary penalty of $1,000 for the contravention of s 500 of the FW Act referred to in Order 1(b) hereof.

(c) The third respondent pay a pecuniary penalty of $25,000 for the contravention of s 500 of the FW Act referred to in Order 1(c) hereof.

1. Pursuant to s 546(3) of the FW Act, the pecuniary penalties referred to in Order 2 of these Declarations and Orders be paid to the Commonwealth of Australia.

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

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| SOUTH AUSTRALIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | SAD 139 of 2014 |

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| BETWEEN: | **DIRECTOR OF THE FAIR WORK BUILDING INDUSTRY INSPECTORATE**  **Applicant** |
| AND: | **DAVID BOLTON**  **First Respondent**  **ANTHONY VITLER**  **Second Respondent**  **CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION**  **Third Respondent** |

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| JUDGE: | WHITE J |
| DATE OF ORDER: | 23 DECEMBER 2014 |
| WHERE MADE: | ADELAIDE |

1. **THE COURT DECLARES THAT:**

(a) The first respondent, David Bolton, contravened s 500 of the *Fair Work Act 2009* (Cth) Act (FW Act) by reason of acting in an improper manner when exercising, or seeking to exercise, rights as a permit holder in accordance with s 484 of the FW Act on 7 April 2014 at the Minda Homes Master Plan Stage One construction project taking place at Repton Road, Somerton Park (the Project).

(b) The second respondent, Anthony Vitler, contravened s 500 of the FW Act by reason of acting in an improper manner while exercising, or seeking to exercise, rights as a permit holder in accordance with s 484 of the FW Act on 7 April 2014 at the Project.

(c) By reason of s 793 of the FW Act, the third respondent, the Construction, Forestry, Mining and Energy Union (CFMEU), is taken to have contravened s 500 of the FW Act by the conduct of its officers constituting their respective contraventions in paras (a) to (b) hereof.

2. **THE COURT ORDERS THAT:**

(a) The first respondent pay a pecuniary penalty of $2,000 for the contravention of s 500 of the FW Act referred to in Order 1(a) hereof.

(b) The second respondent pay a pecuniary penalty of $1,100 for the contravention of s 500 of the FW Act referred to in Order 1(b) hereof.

(c) The third respondent pay a pecuniary penalty of $30,000 for the contravention of s 500 of the FW Act referred to in Order 1(c) hereof.

3. Pursuant to s 546(3) of the FW Act, the pecuniary penalties referred to in Order 2 of these Declarations and Orders be paid to the Commonwealth of Australia.

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

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| SOUTH AUSTRALIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | SAD 140 of 2014 |

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| BETWEEN: | **DIRECTOR OF THE FAIR WORK BUILDING INDUSTRY INSPECTORATE**  **Applicant** |
| AND: | **DAVID BOLTON**  **First Respondent**  **MICHAEL HUDDY**  **Second Respondent**  **CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION**  **Third Respondent** |

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| JUDGE: | WHITE J |
| DATE OF ORDER: | 23 DECEMBER 2014 |
| WHERE MADE: | ADELAIDE |

1. **THE COURT DECLARES THAT:**

(a) The first respondent, David Bolton, contravened s 500 of the *Fair Work Act 2009* (Cth) Act (FW Act) by reason of acting in an improper manner when exercising, or seeking to exercise, rights as a permit holder in accordance with s 484 of the FW Act on 31 March 2014 at the Minda Homes Master Plan Stage One construction project taking place at Repton Road, Somerton Park (the Project).

(b) The second respondent, Michael Huddy, contravened s 500 of the FW Act by reason of acting in an improper manner while exercising, or seeking to exercise, rights as a permit holder in accordance with s 484 of the FW Act on 31 March 2014 at the Project.

(c) By reason of s 793 of the FW Act, the third respondent, the Construction, Forestry, Mining and Energy Union (CFMEU), is taken to have contravened s 500 of the FW Act by the conduct of its officers constituting their respective contraventions in paras (a) to (b) hereof.

2. **THE COURT ORDERS THAT:**

(a) The first respondent pay a pecuniary penalty of $1,800 for the contravention of s 500 of the FW Act referred to in Order 1(a) hereof.

(b) The second respondent pay a pecuniary penalty of $800 for the contravention of s 500 of the FW Act referred to in Order 1(b) hereof.

(c) The third respondent pay a pecuniary penalty of $25,000 for the contravention of s 500 of the FW Act referred to in Order 1(c) hereof.

3. Pursuant to s 546(3) of the FW Act, the pecuniary penalties referred to in Order 2 of these Declarations and Orders be paid to the Commonwealth of Australia.

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

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| SOUTH AUSTRALIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | SAD 141 of 2014 |

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| BETWEEN: | **DIRECTOR OF THE FAIR WORK BUILDING INDUSTRY INSPECTORATE**  **Applicant** |
| AND: | **MICHAEL MCDERMOTT AND OTHERS NAMED IN THE SCHEDULE**  **Respondents** |

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| JUDGE: | WHITE J |
| DATE OF ORDER: | 23 DECEMBER 2014 |
| WHERE MADE: | ADELAIDE |

1. **THE COURT DECLARES THAT:**

(a) The first respondent, Michael McDermott, contravened s 500 of the *Fair Work Act 2009* (Cth) Act (FW Act) by reason of acting in an improper manner when exercising, or seeking to exercise, rights as a permit holder in accordance with s 484 of the FW Act on 1 May 2014 at construction project taking place at 122 Grenfell Street, Adelaide (the Project).

(b) The second respondent, Luke Stephenson, contravened s 500 of the FW Act by reason of acting in an improper manner while exercising, or seeking to exercise, rights as a permit holder in accordance with s 484 of the FW Act on 1 May 2014 at the Project.

(c) The third respondent, Anthony Jarrett, contravened s 500 of the FW Act by reason of acting in an improper manner while exercising, or seeking to exercise, rights as a permit holder in accordance with s 484 of the FW Act on 1 May 2014 at the Project.

(d) The fourth respondent, Anthony Sloane, contravened s 500 of the FW Act by reason of acting in an improper manner while exercising, or seeking to exercise, rights as a permit holder in accordance with s 484 of the FW Act on 1 May 2014 at the Project.

(e) The fifth respondent, Brendan Pitt, contravened s 500 of the FW Act by reason of acting in an improper manner while exercising, or seeking to exercise, rights as a permit holder in accordance with s 484 of the FW Act on 1 May 2014 at the Project.

(f) The sixth respondent, John Perkovic, contravened s 500 of the FW Act by reason of acting in an improper manner while exercising, or seeking to exercise, rights as a permit holder in accordance with s 484 of the FW Act on 1 May 2014 at the Project.

(g) By reason of s 793 of the FW Act, the seventh respondent, the Construction, Forestry, Mining and Energy Union (CFMEU), is taken to have contravened s 500 of the FW Act by the conduct of its officers constituting their respective contraventions in paras (a) to (f) hereof.

2. **THE COURT ORDERS THAT:**

(a) The first respondent pay a pecuniary penalty of $4,000 for the contravention of s 500 of the FW Act referred to in Order 1(a) hereof.

(b) The second respondent pay a pecuniary penalty of $2,300 for the contravention of s 500 of the FW Act referred to in Order 1(b) hereof.

(c) The third respondent pay a pecuniary penalty of $800 for the contravention of s 500 of the FW Act referred to in Order 1(c) hereof.

(d) The fourth respondent pay a pecuniary penalty of $1,100 for the contravention of s 500 of the FW Act referred to in Order 1(d) hereof.

(e) The fifth respondent pay a pecuniary penalty of $3,500 for the contravention of s 500 of the FW Act referred to in Order 1(e) hereof.

(f) The sixth respondent pay a pecuniary penalty of $5,000 for the contravention of s 500 of the FW Act referred to in Order 1(f) hereof.

(g) The seventh respondent pay a pecuniary penalty of $100,000 for the contravention of s 500 of the FW Act referred to in Order 1(g) hereof.

3. Pursuant to s 546(3) of the FW Act, the pecuniary penalties referred to in Order 2 of these Declarations and Orders be paid to the Commonwealth of Australia.

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

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| SOUTH AUSTRALIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | SAD 138 of 2014 |

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| BETWEEN: | DIRECTOR OF THE FAIR WORK BUILDING INDUSTRY INSPECTORATE  Applicant |
| AND: | LUKE STEPHENSON  First Respondent  TROY SMART  Second Respondent  CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION  Third Respondent |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| SOUTH AUSTRALIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | SAD 139 of 2014 |

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| BETWEEN: | **DIRECTOR OF THE FAIR WORK BUILDING INDUSTRY INSPECTORATE**  **Applicant** |
| AND: | **DAVID BOLTON**  **First Respondent**  **ANTHONY VITLER**  **Second Respondent**  **CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION**  **Third Respondent** |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| SOUTH AUSTRALIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | SAD 140 of 2014 |

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| BETWEEN: | **DIRECTOR OF THE FAIR WORK BUILDING INDUSTRY INSPECTORATE**  **Applicant** |
| AND: | **DAVID BOLTON**  **First Respondent**  **MICHAEL HUDDY**  **Second Respondent**  **CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION**  **Third Respondent** |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| SOUTH AUSTRALIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | SAD 141 of 2014 |

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| BETWEEN: | **DIRECTOR OF THE FAIR WORK BUILDING INDUSTRY INSPECTORATE**  **Applicant** |
| AND: | **MICHAEL MCDERMOTT AND OTHERS NAMED IN THE SCHEDULE**  **Respondents** |

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| JUDGE: | WHITE J |
| DATE: | 23 DECEMBER 2014 |
| PLACE: | ADELAIDE |

**REASONS FOR JUDGMENT**

1. By s 512 of the *Fair Work Act 2009* (Cth) (the FW Act), the Fair Work Commission (the FWC) may issue an entry permit to an official of a registered organisation. A permit holder may enter premises and exercise rights under the FW Act in order to investigate a suspected contravention of that Act (ss 481, 483A) or to hold discussions with the employees whose industrial interests the permit holder’s organisation is entitled to represent (s 484).
2. The manner and circumstances in which a permit holder may exercise a right of entry for these purposes are governed by a number of provisions in Ch 3 Pt 3-4, Divs 2 and 6 of the FW Act. In particular, unless the permit holders hold an exemption certificate, they must, at least 24 hours but not more than 14 days before the entry, give the occupier of the premises and in some cases any affected employer an “entry notice” which complies with s 518 (s 487). The required content of an entry notice varies according to the purpose for which the permit holder wishes to enter the premises (s 518). By s 489, permit holders are required, on request, to produce their entry permit and a copy of the applicable entry notice to the occupier of the premises and, in some cases, to any affected employer.
3. Section 500 prohibits a permit holder from intentionally hindering or obstructing others, or otherwise acting in an improper manner. It provides:

**Permit holder must not hinder or obstruct**

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

1. This decision concerns four separate occasions on which the Construction, Forestry, Mining and Energy Union (the CFMEU) and its officials contravened s 500 by acting in an improper manner. Each occasion is the subject of a separate action. In each action, the applicant (the Director) seeks declarations that each respondent contravened s 500 of the FW Act and the imposition of penalties in respect of those contraventions. Although the contraventions occurred at different building sites, occurred on three different days, involved different officials and are the subject of separate actions, it is convenient to address them all in a single judgment.
2. The Director was appointed pursuant to s 15(1) of the *Fair Work (Building Industry) Act 2012* (Cth) (the FWBI Act). He is entitled to bring each action under s 539 of the FW Act by reason of ss 59A and 59C of the FWBI Act.
3. The CFMEU is an organisation of employees registered under the *Fair Work (Registered Organisations) Act 2009* (Cth) and, by reason of s 27 of that Act, a body corporate.
4. Mr McDermott, the first respondent in Action SAD 141 of 2014, is the Assistant Secretary of the South Australian Construction and General Division of the CFMEU.
5. Each of the other personal respondents was, at relevant times, an employee organiser of the CFMEU. All personal respondents were “officials” of the CFMEU within the meaning of s 793(1) of the FW Act and each was a “building industry participant” within the meaning of s 4(1) of the FWBI Act.
6. Each of the personal respondents held an entry permit issued under s 512 of the FW Act. The CFMEU accepts that each personal respondent was, in relation to the conduct giving rise to the contraventions, acting within the scope of his actual or apparent authority. This means that the conduct of each personal respondent constituting each contravention is to be taken to be conduct of the CFMEU (s 793 of the FW Act) with the consequence that it too committed each contravention.
7. None of the respondents had given any entry notice under s 487 of the FW Act to the occupier of premises they entered, let alone an entry notice complying with s 518 in the required timeframe. It is an agreed fact that none held an exemption certificate relieving them of the obligation to provide an entry notice.
8. Subject to an aspect of Mr Perkovic’s conduct in Action No  SAD 141 of 2014 which he did not admit, each of the contraventions of s 500 is admitted by each respondent, and the parties have agreed the facts relating to the circumstances constituting each contravention. This made it unnecessary for the Court to receive evidence of those matters. I am satisfied that it is appropriate to proceed on the basis of the admissions and agreed facts: *Evidence Act 1995* (Cth), s 191. The Court did receive evidence concerning the aspect of Mr Perkovic’s conduct which he did not admit and I will make findings regarding that conduct.
9. All of the respondents acknowledged the deliberateness of their conduct constituting the contraventions.

## The first set of contraventions: 31 March 2014: Action SAD 138 of 2014

1. At relevant times in early 2014, Kennett Pty Ltd (Kennett) was the head contractor on a construction project taking place at 336 Kensington Road, Leabrook, and was the occupier of those premises (the Leabrook Site).
2. On 31 March 2014, the first and second respondents in Action SAD 138 of 2014, Mr Stephenson and Mr Smart, went to the Leabrook Site. They intended entering the premises for the purpose contemplated by s 484 of the FW Act, namely, holding discussions with employees working there whose industrial interests the CFMEU is entitled to represent.
3. Mr Stephenson and Mr Smart met Kennett’s Site Manager, Mr Agresta, and a conversation to the following effect ensued:

Stephenson: We [referring to himself and Mr Smart] want to enter the site to have a look around and chat to the guys.

Agresta: I am sorry, but as I have not received a 24 hour notice of entry form, I cannot allow you on site.

It is an agreed fact that Mr Smart did not pay close attention to this conversation but was within earshot of Mr Stephenson when Mr Agresta gave this response.

1. Mr Agresta called Kennett’s Operations Manager, Mr Allen, on his mobile phone. Mr Stephenson then requested, and was given, Mr Allen’s mobile phone number by Mr Agresta and he telephoned Mr Allen. During the course of their conversation Mr Stephenson said words to the effect:

We [referring to himself and Mr Smart] are here with Michael [Agresta], and we want to get onto site and he asked us to give you a call.

and:

We just want to go onto site.

Mr Allen responded with words to the following effect:

Michael has already explained to you that you haven’t got the notice of entry so why are you still trying to do so?

Look Luke, I have no problems with your visit, if you have your right of entry notice, then I have no dramas.

and:

You are not to go on site, give me the notice and all will be good.

1. After that conversation concluded, a conversation to the following effect occurred:

Stephenson: Regardless of Kennett’s stance, we’re going on site anyway, and if you like you can just walk us through.

Agresta: I won’t walk you through and if you enter the site you will be breaching the current laws and procedures in place.

It is an agreed fact that Mr Smart was within earshot of this conversation.

1. Mr Stephenson and Mr Smart then entered the Site and held discussions with employees who the CMFEU was entitled to represent, of a kind contemplated by s 484 of the FW Act. They remained on the Site for approximately eight minutes. They then walked around the perimeter of the Site and held discussions with employees through the Site fence, and as employees were entering the Site. This included discussions in the carpark of the Leabrook Site but it is an agreed fact that Mr Stephenson and Mr Smart did not realise at the time that the carpark formed part of the Site.
2. Each of Mr Stephenson and Mr Smart admit that, by reason of the conduct just summarised, they acted in an improper manner when exercising or seeking to exercise their rights as a permit holder. Mr Stephenson acted in an improper manner by entering the Leabrook Site despite Mr Agresta telling him that he was not permitted to do so, despite Mr Allen instructing him not to enter the Site but if he provided an entry notice he would be permitted, and despite Mr Agresta warning him that if he did enter the Site he would be in breach of “the current laws and procedures in place”. In addition, Mr Stephenson contravened s 500 by not providing any entry notice at all to Kennett, let alone a notice conforming with s 487 of the FW Act.
3. Mr Smart’s contravention arises from his entering the Site despite Mr Agresta telling him that that was not permitted and because of his failure to provide an entry notice to Kennett as required by s 487 of the FW Act.
4. The CFMEU admits that, by reason of the same matters, and by reason of s 793, it also contravened s 500 of the FW Act by each of the contraventions admitted by Mr Stephenson and Mr Smart.
5. The Director did not claim that Kennett suffered any quantifiable economic loss or damage as a result of the respondents’ contraventions. The Director noted, however, that Mr Agresta and Mr Allen were taken away from duties which they would otherwise have been performing and that employees working on the Site were distracted from their work while Mr Stephenson and Mr Smart undertook the unauthorised discussions with them.

## The second set of contraventions: 31 March 2014: Action SAD 140 of 2014

1. At material times in early 2014, Badge Constructions Pty Ltd (Badge) was the head contractor on the Minda Homes Master Plan Stage One Site at Repton Road, Somerton Park (the Somerton Park Site), and was the occupier of those premises.
2. On 31 March 2014 at about 9:15am, the respondents Bolton and Huddy went to the Somerton Park Site. On their arrival, they met an employee of Badge, Mr Nickolai. Mr Nickolai had the responsibility of monitoring the arrival and departure of persons attending the Site, but did not ask Mr Bolton and Mr Huddy to provide an entry notice or to produce their entry permit. Each signed a document described as “Sign In/Out Register” and entered the Site.
3. Between about 9:15am and 10:10am, Mr Bolton and Mr Huddy held discussions under s 484 of the FW Act with employees whose industrial interests the CFMEU was entitled to represent. It is an agreed fact that they had discussions with formwork employees in a lunchroom, commencing at about 9:30am and continuing for about 25 minutes. Part of this period was the employees’ morning smoko break (between 9:30am and 9:45am). It is also an agreed fact that the discussions which Mr Bolton and Mr Huddy had with the employees in the lunchroom related to the employees’ concerns relating to the organising of a safety committee pursuant to the *Work Health and Safety Act 2012* (SA).
4. After the discussions with the employees in the lunchroom had concluded, each of Mr Bolton and Mr Huddy were directed to leave the Site. Mr Garrard, the Senior Construction Manager employed by Badge gave two oral directions to Mr Bolton and Huddy to the effect of, “I’m instructing you to leave”. Badge’s Site Manager, Mr Barclay also gave both men a direction to the effect, “It’s time to leave, get off site”. In addition, the Senior Site Manager of Badge, Mr Melville, gave two oral directions to Mr Bolton and Mr Huddy to the effect “We need you to leave” and “No, you don’t have a right of entry for being here, we have to ask you to leave”.
5. Despite these directions from Mr Garrard, Mr Barclay and Mr Melville, Mr Bolton and Huddy remained for approximately five to 10 minutes until being escorted from the Site by Mr Barclay. Mr Bolton and Mr Huddy were on the Site for about 55 minutes in total.
6. Mr Garrard requested both Mr Bolton and Mr Huddy, pursuant to s 489 of the Act, to produce their entry permits. He was a person entitled to make the requests. Neither Mr Bolton nor Mr Huddy complied with his requests.
7. Mr Melville told Mr Bolton that Badge had not received an entry notice complying with s 518 of the Act from Mr Bolton or Mr Huddy. Mr Bolton responded with words to the effect of “I don’t need one for this, I’m just here to talk to members”.
8. Each of Mr Bolton and Mr Huddy acknowledge that they contravened s 500 of the FW Act by acting in an improper manner when exercising, or seeking to exercise, their rights as permit holders under s 484 of the FW Act. Each of Mr Bolton and Mr Huddy acted in an improper manner by reason of the following:

(a) Their refusal to produce or display an entry permit when requested to do so;

(b) Their ignoring of four directions from Badge employees to leave the Site, including a direction accompanied by a warning that they did not have a right to be on the Site;

(c) By reason of their ignoring the directions to leave, having to be escorted from the Site by Mr Barclay;

(d) Their failure to provide any entry notice at all to Badge as required by s 487 of the FW Act.

1. The CFMEU acknowledges that, by reason of the conduct of by Mr Bolton and Mr Huddy, it too contravened s 500 of the FW Act.
2. The Director did not submit that Badge suffered any quantifiable economic loss or damage as a result of the respondents’ contraventions. It noted nevertheless that Mr Melville, Mr Barclay and Mr Garrard were taken away from duties which they would otherwise have been performing if they had not had to deal with the unauthorised entries. In addition, the employees of Badge’s subcontractors who were working on the Site were distracted from their work while Mr Bolton and Mr Huddy undertook the unauthorised discussions with them.

## The third set of contraventions: 7 April 2014: Action SAD 139 of 2014

1. The third set of contraventions also occurred at the Somerton Park Site. On 7 April 2014, Mr Bolton attended with Mr Vitler. They arrived at the Somerton Park Site at about 9:13am and met Mr Nickolai.
2. Mr Nickolai asked Mr Bolton and Vitler for an entry notice or permit. Mr Bolton responded with words to the effect of “It’s all okay, you don’t need to worry about that, it’s all organised”. Neither Mr Bolton nor Mr Vitler produced an entry notice or an entry permit. As they came through the gate to the Somerton Park Site, Mr Bolton said to Mr Nickolai words to the effect of “We’ll just sign in”.
3. It is an agreed fact that Mr Bolton believed, mistakenly, at the time that an informal approach to enter on Site would suffice, namely, signing in on the Visitor’s Register and then meeting employees in the lunchroom during their smoko break.
4. After Mr Bolton and Mr Vitler had passed through the Site gate, Mr Nickolai asked Mr Bolton to produce his authority documents, namely, an entry permit or a copy of an entry notice for the entry. Mr Bolton did not produce either document and said to Mr Nickolai words to the effect of “Don’t you worry about that, you’ve done your job, I’ll do mine”. It is an agreed fact that, by this refusal, Mr Bolton failed to produce authority documents within the meaning of s 489(3) of the Act when requested to do so by Mr Nickolai on behalf of Badge.
5. Mr Bolton and Mr Vitler then signed the “Sign In/Out Register”. Mr Nickolai directed that they wait in the Safety Office while he called a Safety Officer. Mr Bolton ignored that request and walked further into the Site in the direction of the toilet/lunchroom. Mr Vitler walked to the Safety Office. Subsequently, Badge’s Site Manager, Mr Melville spoke to Mr Bolton and Mr Vitler in the lunchroom. A conversation to the following effect occurred:

Melville: We haven’t received an entry notice, and if you don’t have a notice you’ll have to leave the site.

Bolton: I just want to talk with the guys in the lunchroom during their smoko break.

Melville: Why are you doing it this way, we have no objection to union coming to the site providing the correct notice is provided to Badge.

1. Mr Bolton and Mr Vitler did not leave the Site as directed by Mr Melville. At about 9:25am, Mr Garrard, the Senior Construction Manager for Badge, asked Mr Vitler to produce his entry permit. He said words to the effect of “Are you a permit holder, and if so can you produce it, Tony?”. It is an agreed fact that Mr Vitler did not produce his entry permit and thereby failed to produce authority documents when requested to do so by Mr Garrard on behalf of Badge.
2. Shortly afterwards, at about 9:25am, Mr Garrard said to both Mr Bolton and Mr Vitler words to the effect of “As you do not have an entry permit or evidence or identification, you’ve entered the site unlawfully and I request that you now leave the site”. Mr Bolton and Mr Vitler refused to leave. Instead Mr Bolton said to Mr Garrard words to the effect that he and Mr Vitler were “going to have a talk to the boys in the lunchroom”.
3. At about 9:35am, Mr Garrard repeated to Mr Bolton, in the presence of Mr Vitler, “you’ve entered the site unlawfully, please leave”. Again, Mr Bolton and Mr Vitler did not leave the site but returned to the lunchroom where they remained until about 10:15am.
4. While on the Site between about 9:35am and 10.15am, Mr Bolton and Mr Vitler held discussions pursuant to s 484 of the FW Act with employees whose industrial interests the CFMEU was entitled to represent. The discussions took place in the Site lunchroom at various times between 9:35am and 10:15am, both during and after the morning smoko break (which took place between 9:30am and 9:45am). The discussions with the employees related to the employees’ safety concerns, relating principally to the organising of a safety committee pursuant to the *Work Health and Safety Act 2012* (SA).
5. Each of Mr Bolton and Mr Vitler acknowledged that, by reason of the summarised conduct, they contravened s 500 of the FW Act by acting in an improper manner when exercising, or seeking to exercise, rights as a permit holder. Mr Bolton acted in an improper manner by reason of the following:

(a) He refused to produce his entry permit when requested to do so;

(b) Despite the direction by Mr Nickolai to wait in the Safety Office while the Safety Officer was called, he did not do so;

(c) He ignored three directions from Badge employees to leave the Site. Two of those directions were accompanied by warning that he and Mr Vitler had entered the Site unlawfully;

(d) He failed to comply with his obligations to provide any entry notice to Badge as required by s 487 of the FW Act.

1. Mr Vitler’s conduct in an improper manner was constituted of the same matters, save that he did not ignore Mr Nickolai’s direction to wait in the Safety Office.
2. The CFMEU acknowledges that it too contravened s 500 of the Act by each of the admitted contraventions of Mr Bolton and Mr Vitler.
3. As in the case of the earlier contraventions, the Director did not allege that the respondents’ contraventions caused any quantifiable economic loss but made the same point about employees having been taken away from their work, in the case of Mr Melville, Mr Barclay and Mr Garrard by reason of their dealing with the unauthorised entries, and in the case of employees of subcontractors on the site, while Mr Bolton and Mr Huddy undertook unauthorised discussions with them.

## The fourth set of contraventions: 1 May 2014: Action SAD 141 of 2014

1. In early 2014, Watpac Ltd was the head contractor on the construction of the Ibis Hotel at 122 Grenfell Street, Adelaide (the Grenfell St Site) and was the occupier of those premises.
2. At about 7:15am on 1 May 2014, six employees of the CFMEU attended at the Grenfell Street Site. They were the first to sixth respondents, Mr McDermott, Mr Stephenson, Mr Jarrett, Mr Sloane, Mr Pitt and Mr Perkovic (collectively, the CFMEU Officials).
3. Mr Kamminga was Watpac’s Site Manager. As such, he had responsibility for the day to day operations on the Site and had the authority of Watpac to permit, or not permit, as the case may be, people to enter the Site; the authority to request production for an inspection of entry permit and entry notices; and the authority to direct people to leave the Site.
4. At the time the CFMEU Officials attended at the Grenfell St Site on 1 May 2014, two Fair Work Building Industry Inspectors appointed under s 59 of the FWBI Act, Mr Flynn and Ms Peters, were also present and acting in their capacity as an Inspectors. The agreed facts do not indicate whether the presence of the two Inspectors was linked in any way to the attendance of the CFMEU Officials.
5. When the CFMEU Officials arrived at the Site, they met Mr Kamminga. They each signed the Visitors Register and then entered the Site. At the time they were signing the Register, Mr Kamminga asked the CFMEU Officials, “have you got a right of entry notice? Why are you here? Can we see your permits?” Mr McDermott responded with words to the effect of “You can’t get a right of entry”. Mr Kamminga then instructed the CFMEU Officials to leave the Site but Mr McDermott said “No”. The respondents acknowledged that in the statements just summarised Mr Kamminga was referring to an entry notice under s 487 which complied with s 518 of the FW Act and that in referring to “permits”, Mr Kamminga was referring to entry permits issued under s 512 of the FW Act.
6. After Mr McDermott indicated the refusal of the CFMEU Officials to leave, they then proceeded onto the part of the Grenfell St Site on which construction was taking place and entered the building.
7. While the CFMEU Officials were on the Site between 7:35am and 9:15am:

(e) They held discussions under s 484 of the Act with employees whose industrial interests the CFMEU was entitled to represent. Those discussions included discussions with employees of subcontractors working on the Site, including employees of Second Fix Carpentry Services and employees of Adelaide Partitions and Ceilings, in relation to enterprise bargaining agreement negotiations.

(f) The following directions were given to Mr Stephenson, Mr Jarrett and Mr Sloane to leave the Site:

(i) Mr Kamminga gave an oral direction to Mr Stephenson and Mr Jarrett to the effect of “I have to ask you to leave the Site – you’re not permitted to be on Site”; and

(ii) Mr Kamminga gave a further oral direction to Mr Stephenson, Mr Sloane and Mr Jarrett to the effect of “I have to ask you to leave the Site – you’re not permitted to be on Site”.

It is agreed that Mr Kamminga was entitled to give those directions and that none of Mr Stephenson, Mr Jarrett and Mr Sloane complied with the directions.

(g) Mr Kamminga requested Mr Stephenson, Mr Jarrett and Mr Sloane to produce their entry permits and entry notice for their entry. One request, made to Mr Stephenson and Mr Jarrett, was for “Your ROE and permits” and another request made to Mr Stephenson, Mr Sloan and Mr Jarrett was for “Your ROE and permits”. It is agreed that Mr Kamminga was entitled to make these requests on behalf of Watpac and it is further agreed that none of Mr Stephenson, Mr Jarrett and Mr Sloane complied with his requests.

(h) Mr Kamminga also requested Mr McDermott, Mr Pitt and Mr Perkovic to produce their entry permits and an entry notice. Mr Kamminga asked them for their “ROE and permits”. Mr McDermott and Mr Perkovic responded to this request by saying to Mr Kamminga words to the effect of “Fuck off”, “Fuck yourself”, and “Grow some balls”. It is agreed that none of Mr McDermott, Mr Pitt and Mr Perkovic complied with Mr Kamminga’s requests.

1. The CFMEU Officials remained on the Grenfell Street Site until about 9:15am.
2. While the CFMEU Officials were on Site, an unpleasant incident involving Mr Perkovic and Mr Flynn occurred. Unlike the CFMEU and the other CFMEU Officials, Mr Perkovic, who was separately represented at the hearing, did not make any admissions in respect of this incident. Accordingly, in the claim against Mr Perkovic the Director relied on an affidavit from Ms Peters together with video footage taken by Ms Peters of the incident. Mr Perkovic did not challenge any of this evidence. The submissions made on his behalf assumed that the Court would make findings concerning the Flynn-Perkovic incident in accordance with the video footage and Ms Peters’ affidavit.
3. On the basis of the video footage and Ms Peters’ affidavit, I make the following findings concerning the Flynn-Perkovic incident. In some respects, these findings go beyond the facts agreed between the Director and the other respondents in Action No SAD 141 of 2014. That is because of the additional evidence which the Court received.
4. Mr Perkovic approached Mr Flynn who was wearing an orange high-visibility vest and a white hard hat. His identification as an FWBI Inspector was visible on his right hand shirt pocket. Mr Perkovic went so close to Mr Flynn that their stomachs were almost touching, if not touching and, at least five times, shouted at Mr Flynn, referring to him as “you piece of shit”, “you fucking piece of shit” and as a “cunt”. Almost immediately after the incident started, Ms Peters commenced videoing. The exchange between the two men included the following:

Flynn (to the effect): You’re hindering and obstructing me in the execution of my duty.

Perkovic: Do you want a fuckin’ photo, you fuckin’ piece of shit.

Flynn: Don’t touch me, get away from me.

Perkovic: You’re just about having a heart attack. You’re shitting yellow, you piece of shit. Go fuck … brush your teeth next time, you piece of shit, alright?

You fuckin coward, I’d fuckin’ take you to school, you fuckin’ piece of shit.

1. The video shows that Mr Perkovic’s stance and manner was provocative, bullying and intimidating. It is evident that he sought to belittle and humiliate Mr Flynn who, despite Mr Perkovic’s, conduct stood his ground and did not respond in kind.
2. While the incident was occurring, Mr Pitt and Mr McDermott were also present, but to one side. When Ms Peters commenced videoing the incident, they too used their mobile phones to video the incident. Mr McDermott moved away into another room at one stage but returned just as Mr Perkovic moved away from Mr Flynn.
3. Each of Mr McDermott, Mr Stephenson, Mr Jarrett, Mr Sloane, Mr Pitt and Mr Perkovic acknowledge that they contravened s 500 of the FW Act by acting in an improper manner when exercising, or seeking to exercise, their rights as a permit holder in accordance with s 484 of the FW Act. Mr Stephenson and Mr Jarrett acted in an improper manner by reason of the following:

(a) They did not comply with three separate directions from Mr Kamminga to leave the Site;

(b) They did not comply with two separate requests by Mr Kamminga that they produce their entry permit and an entry notice;

(c) They failed to give any entry notice at all to Watpac as required by s 487 of the FW Act.

1. Mr Sloane’s action in an improper manner was essentially the same, save only that in his case he did not comply with two separate directions given by Mr Kamminga to leave the Site.
2. The action constituting an improper manner in the case of Mr Pitt comprised the following:

(a) His refusal to leave the Site after being directed to do so on one occasion by Mr Kamminga;

(b) His non-compliance with Mr Kamminga’s request to produce his entry permit and an entry notice;

(c) His failure to provide any entry notice at all as required by s 487 of the FW Act.

1. Mr McDermott’s action in an improper manner comprised the following:

(a) His refusal point blank to produce his entry permit and an entry notice when requested to do so by Mr Kamminga;

(b) His refusal to leave the Site after being directed to do so by Mr Kamminga;

(c) His conduct in continuing onto part of the Site at which construction work was taking place, without having provided Watpac with an entry notice or any other authorisation;

(d) His refusal to produce his entry permit and an entry notice when requested to do so and his rejection, in profane terms, of Mr Kamminga’s request;

(e) His failure to provide any entry notice at all to Watpac as required by s 487 of the FW Act.

1. In Mr Perkovic’s case, his exercise of his right of entry in an improper manner arose from the following:

(a) His refusal to leave the Site after being directed to do so by Mr Kamminga;

(b) His refusal, using profane language, to produce his entry permit and an entry notice when requested by Kamminga to do so;

(c) His failure to provide any entry notice at all as required by s 487 of the FW Act;

(d) His conduct in the Flynn‑Perkovic incident.

1. The CFMEU acknowledges that it contravened s 500 of the FW Act by each of the CFMEU Officials admitted contraventions.
2. As with the earlier contraventions, the Director does not contend that Watpac suffered quantifiable economic loss or damage as a result of the contraventions. It points, however, to the distraction from their scheduled duties of the senior Watpac employee and to the distraction from their work of the subcontractors working on the Site.

## The relevant maximum penalties

1. Section 500 of the FW Act is a civil remedy provision. The relevant maximum penalty in the case of a body corporate is 300 penalty units and for an individual, 60 penalty units (ss 546 and 539(2) of the FW Act). The value of the penalty units is $170.00 (*Crimes Act 1914* (Cth), s 4AA(1)).
2. Accordingly, the maximum penalty in the case of each contravention of s 500 by the CFMEU is $51,000.00 and, in the case of each of the individual respondents, $10,200.00.
3. In relation to each matter, the Director made submissions as to the range of penalties which would be appropriate. Further, in the case of the CFMEU, the Director made submissions as to the application of the totality principle. Counsel for the respondents submitted in each case that the penalty range proposed by the Director was too high. Accordingly, this is not a case in which the parties request the Court to give effect to the penalties upon which they have agreed.
4. In *Barbaro v The Queen* [2014] HCA 2; (2014) 305 ALR 323, the majority of the High Court held that, in the context of criminal proceedings, the prosecution should not be permitted to make a submission to a sentencing judge as to the specific penalty, or the range of penalties, which would be appropriate in the case. There is a question as to whether the *Barbaro* principle is applicable in penalty proceedings. That question is presently the subject of a reserved judgment of the Full Court. Counsel for the Director drew attention to a number of decisions of judges at first instance since *Barbaro* in which applicants for the imposition of a penalty have been permitted to make submissions as to an appropriate range of penalties: *Australian Competition and Consumer Commission v Energy Australia Pty Ltd* [2014] FCA 336 at [140]-[150]; *Australian Communications and Media Authority v TPG Internet Pty Ltd* [2014] FCA 382, (2014) 221 FCR 502 at [89]-[93]; *Tax Practitioners’ Board v Dedic* [2014] FCA 511 at [3]; *Australian Competition and Consumer Commission v Mandurvit Pty Ltd* [2014] FCA 464, (2014) ATPR 42-471 at [37]-[80]; *DP World Sydney Ltd v Maritime Union of Australia (No 2)* [2014] FCA 596 at [23]; and *Australian Competition and Consumer Commission v Zen Telecom Pty Ltd* [2014] FCA 1049 at [69]-[71].
5. In the present case, none of the respondents submitted that it was inappropriate for the Director to make submissions as to the appropriate range of penalties.
6. Given that the matter is the subject of a reserved Full Court judgment, I do not consider it desirable to be passing comment on the proper approach in this judgment. I indicate that, given all parties made submissions on the quantum of the appropriate penalties, I have had regard to those submissions in the same way as considering the other submissions. I have found those submissions useful but they are of course not decisive.

## Relevant principles

1. The principles applied by this Court in determining the appropriate penalty have been settled in a number of cases and need not be repeated in these reasons. It is sufficient to refer to *Stuart-Mahoney v CFMEU* [2008] FCA 1426, [2008] 177 IR 61 at [40]; *Temple v Powell* [2008] FCA 714, (2008) 169 FCR 169 at [56]-[78]; and *Cahill v CFMEU* *(No 4)* [2009] FCA 1040, (2009) 189 IR 304 at [9]-[10]. The Courts now tend to regard contraventions of industrial laws more seriously than may have been the case generally in the past: *Finance Sector Union v Commonwealth Bank of Australia* [2005] FCA 1847, (2005) 224 ALR 467 at [72]; and *Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union* [2008] FCAFC 170, (2008) 171 FCR 357 at [61]-[62].
2. Several matters have been identified in the authorities as relevant to the assessment of penalty:

(a) The nature and the extent of the conduct which lead to the breaches.

(b) The circumstances in which that relevant conduct took place;

(c) The nature and extent of any loss or damage sustained as a result of the breaches;

(d) Whether there has been similar previous conduct by the respondent;

(e) Whether the breaches were properly distinct or arose out of the one course of conduct;

(f) The size of the business enterprise involved;

(g) Whether or not the breaches were deliberate;

(h) Whether senior management was involved in the breaches;

(i) Whether the party committing the breaches exhibited contrition;

(j) Whether the party committing the breaches has taken corrective action;

(k) Whether the party committing the breaches cooperated with the enforcement authorities;

(l) The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and

(m) The need for specific and general deterrence.

Several of these matters are pertinent in the present case.

1. The Court is to determine an appropriate penalty in each case by a process of instinctive synthesis after taking into account all relevant factors: *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8; (2008) 165 FCR 560 at [27], [55]; *Markarian v The Queen* [2005] HCA 25, (2005) 228 CLR 357 at [37]‑[39].
2. The need for deterrence, both personal and in general, is usually a prominent consideration in the determination of a penalty: *Ponzio v B & P Caelli Constructions Pty Ltd* [2007] FCAFC 65, (2007) 158 FCR 543 at [93]; *Leighton Contractors Pty Ltd v CFMEU* [2006] WASC 317, (2006) 164 IR 375 at [74]; *Draffin v CFMEU*  [2009] FCAFC 120, (2009) 189 IR 145 at [89]; and *Alfred v CFMEU* [2011] FCA 556 at [89]-[91]. The element of deterrence is particularly important in the present case because of the CFMEU’s long record of non-compliance with industrial legislation.

## The CFMEU record

1. The Director provided a schedule of the occasions on which the CFMEU has been dealt with by Courts for contraventions of industrial legislation. It is fair to describe the CFMEU record as dismal.
2. Since 1999, the CFMEU has had penalties imposed on it by a Court on numerous occasions. Many of the Court decisions involved multiple contraventions. Of particular relevance presently is that before 1 March 2014, the CFMEU and/or its employees have been dealt with for contraventions of right of entry provisions on 13 occasions, involving some 40 separate contraventions. In addition, since the subject contraventions, Mansfield J in *Director of the Fair Work Building Industry Inspectorate v Cartledge* [2014] FCA 1047 (delivered on 2 October 2014) (*DFWBI v Cartledge*), imposed penalties on the CFMEU and its employees in respect of seven different contraventions of s 500 of the FW Act committed on 19 and 20 March 2014. The record indicates an attitude of indifference by the CFMEU to compliance with the requirements of the legislation regarding the exercise of rights of entry. It also indicates that deterrence must be a prominent consideration in the fixing of penalties in the present cases.
3. In *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2014] FCA 160, I referred to several of the authorities bearing upon the significance of prior contraventions. It is not necessary to repeat now what I said then, other than to note the explanation by King CJ in *R v McInerney* (1986) 42 SASR 111 at 113:

... Offences committed prior to sentence for the offence under consideration may affect the sentence in two ways. They may diminish or abrogate any leniency by reason of good character. They may, moreover, lead to a greater sentence than would otherwise be imposed, although within the proper limits indicated by the facts of the immediate crime, for the purpose of personal deterrence; the prisoner’s record may indicate that greater punishment is needed to protect the public by deterring him from further crime. Where the other offences have been committed before the commission of the immediate offence, their relevance is clear in the generality of cases. The offender has committed the offence not as a first offender but as a person whose character is affected by previous offending. He must be sentenced against the background of his record ... The effect of the prior offences is more cogent if they have been the subject of conviction before the immediate offence. In such cases, the offender has committed the immediate offence notwithstanding the formal judgment and condemnation of the law in respect of the earlier offences and notwithstanding the warning as to the future which the conviction experience implies.

These principles are applicable in the present case.

## Alteration of existing practice

1. Before turning to the position of each of the respondents in the four actions, I refer to some particular matters which are common to all.
2. Mr Griffin QC, who appeared with Mr Dolphin for all of the respondents other than Mr Perkovic, submitted that, prior to the events giving rise to the respective contraventions, an informal practice had developed at a number of building sites pursuant to which the CFMEU and its officials had not been required to comply strictly with the terms of the FW Act when exercising a right of entry. The informal practice had its origins, he submitted, in the good working relationships which had existed between the CFMEU and its organisers, on the one hand, and a large number of builders, on the other. In particular, by virtue of the informal practice, the CFMEU officials had not been required to comply strictly with the 24 hour minimum notice requirement.
3. The submission was, in effect, that the contraventions in question presently were to be understood in this context.
4. Mr Griffin QC submitted that there had been a change of practice at the beginning of 2014 at a number of building sites at which the CFMEU organisers had been accustomed to acting in accordance with the informal practice. He submitted that, although the individual CFMEU organisers had initially been resistant to the change, they and the CFMEU now accepted that there had been an attitudinal change by builders and that the previous informal practices were no longer acceptable. It seemed to be implicit in this submission that, although being aware of the change in attitude of builders, the CFMEU and its officials had for a time refused to recognise it.
5. Counsel for the Director pointed out that this submission was not based on any evidence before the Court, and that no prior notice of reliance on the asserted informal practice had been given. In those circumstances, the Director acknowledged only that there may have been a level of informality on some occasions in the past at certain sites in relation to the exercise of rights of entry, but did not accept that such informal practices had applied at any of the sites at which the admitted contraventions had occurred.
6. In the criminal jurisdiction, sentencing Courts are often permitted to act on evidence and submissions which have not been proved in accordance with the rules of evidence. This Court is not empowered in cases of the present kind to receive evidence, in the absence of consent from the opposing party, other than in accordance with the rules of evidence. In these circumstances, it is appropriate to proceed on the basis acknowledged by the Director, namely, that the informal practice to which Mr Griffin referred had existed at some sites on some occasions. However, subject to one exception, the evidence did not indicate that it had existed at the Leabrook, Somerton Park or Grenfell St Sites in question in this case.
7. I also note that the decision of Mansfield J in *DFWBI v Cartledge* concerned the unlawful exercise on 20 March 2014 by four CFMEU officials of their right of entry at a building site in Flinders Street, Adelaide. Those contraventions occurred some 11 days before the first of the contraventions which are the subject of the present proceedings. The experience on 20 March 2014 should have alerted the CFMEU and the others involved in those contraventions of the need for careful attention to compliance with the statutory requirements in relation to the exercise of rights of entry.

## Contrition and cooperation

1. Mr Griffin QC said that he was instructed by each of the personal respondents for whom he appeared (ie, all of the personal respondents other than Mr Perkovic) to express their individual contrition for the conduct which had given rise to the contraventions. There were no expressions of contrition by either the CFMEU or Mr Perkovic.
2. The contrition of a person who has contravened a civil remedy provision is important and is to be welcomed. Contrition is a recognised circumstance of mitigation, but its absence is not a matter of aggravation. When oral expressions of contrition are accompanied by action, they warrant greater weight than mere bare assertions. Greater weight will also usually be given when contrition is manifest early.
3. In the present case, Mr Griffin’s submission was the first expression of contrition made by the individual respondents for whom he appeared. However, Mr Griffin submitted that the sincerity of the respondents’ attitude was evident in the additional training which each had undertaken, or had arranged to undertake, in relation to the manner of exercise of their right of entry. That training had been, or was to be, provided by a member of a legal firm retained by the CFMEU. Mr Griffin submitted that Mr Bolton and Mr McDermott had undergone such training on 16 May 2014, Mr Stephenson on 3 July 2014 and Mr Smart, Mr Vitler, Mr Sloane and Pitt were to undertake it on 18 December 2014. In addition, Mr Bolton and Mr McDermott were to attend the training session on 18 December 2014. Mr Huddy and Mr Jarrett have resigned from the CFMEU and no longer hold entry permits. That appears to explain why they also are not undergoing the training.
4. Mr Griffin referred to some of the training undertaken, or to be undertaken, by the CFMEU officials as “retraining” but, apart from indicating that the initial training had been provided by the Australian Council of Trade Unions, was unable to provide any information about it.
5. There are some difficulties in assessing the weight to be given for present purposes to the respondents’ undertaking of training. First, it is not clear whether the individual respondents have undertaken, or will undertake, the training voluntarily or are doing so only because of a direction from the CFMEU. Secondly, it is not clear whether the training undertaken by Mr Bolton and Mr McDermott on 16 May 2014 had been organised before or after the conduct giving rise to the contraventions. If the latter, it may be consistent with the expression of contrition. If the former, it would be difficult to attach much weight at all to that circumstance and, in fact, it may make their conduct in the contraventions more culpable.
6. On the question of whether the participation in the training sessions was truly voluntary, counsel for the Director drew attention to the decision of O’Callaghan SDP on 13 June 2014 in the FWC, reported with the citation *Fair Work Commission* [2014]FWC 3907. The proceedings in the FWC, which had apparently been protracted, concerned issues arising from the exercise of rights of entry by CFMEU organisers at building projects in South Australia of Lend Lease Building Contractors Pty Ltd, Hansen Yuncken Pty Ltd and Hindmarsh Contractors Pty Ltd. However, the decision of O’Callaghan SDP concerned only Lend Lease Building Contractors. As I understand it, O’Callaghan SDP made an order suspending the right of entry of CFMEU officials to all Lend Lease constructions sites in South Australia until the CFMEU had demonstrated that its officials had undergone “a right of entry training program”. O’Callaghan SDP said that the CFMEU did not have to demonstrate that six of its officials had undergone such a program because he was satisfied that they had already done so (on 16 May 2014). Those six officials included Mr McDermott, Mr Bolton and Mr Pitt.
7. Counsel for the Director contended that, in considering the weight to be attached for present purposes to the participation in training programs, the Court should take into account that the proceedings in the FWC and the orders made by O’Callaghan SDP on 13 June 2014 may explain the participation (or proposed participation) of at least some of the respondents in those programs, with the consequence that it could not be regarded as entirely voluntary.
8. I intend to accept the expressions of contrition as sincere and to treat the participation of the individual respondents in training programs as mitigatory. However, the weight to be attached to these matters is diminished by the lateness with which the contrition has been expressed and by the matters to which I have referred above.
9. For the reasons given earlier, neither the CFMEU nor Mr Perkovic are entitled to credit on account of their contrition.
10. Each of the respondents is entitled to some credit for their conduct in relation to the proceedings. At the Court ordered mediation, they reached agreement with the Director on the facts relating to their contraventions, and have acknowledged the contraventions. They have thereby saved the necessity for trials. I regard this as an indication of their willingness to facilitate the course of justice and will reflect this in the penalties to be imposed. That credit cannot be so much in the case of Mr Perkovic because he did not admit his conduct in the Flynn-Perkovic incident.

## Maximum sentence, proportionality and “parsimony”

1. Counsel for Mr Perkovic referred to three sentencing principles to which the Court should have regard. First, the principle of proportionality, pursuant to which the penalty imposed should not exceed that which is commensurate with the contravention; secondly, the principle that the maximum penalty should be reserved for the worst type of contraventions; thirdly, the principle that the Court should impose the minimum punishment consistent with the purpose for which the penalty is being imposed. Counsel referred to this latter principle as “the principle of parsimony”.
2. The first two principles are not controversial and need not be elaborated. In relation to the third, counsel referred to the decisions of Bromberg J in *Australian Building and Construction Commission v Construction, Forestry, Mining and Energy Union* [2012] FCA 189 at [23] and in *Fair Work Ombudsman v Tiger Telco Pty Ltd (in liq)* [2012] FCA 479 at [20] and to the decision of Gordon J in *Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2013] FCA 1014 at [48]‑[55]. In the *ABCC* and *Tiger Telco* cases, Bromberg J referred to the principle as requiring a sentencing Court to ensure that it imposes the minimum term consistent with the attainment of the relevant purposes of sentences. Bromberg J cited the well-known passage in the reasons of Bowen CJ, Muirhead and Evatt JJ in *R v Valentini* (1980) 48 FLR 416 at 420:

The task of a sentencing judge is not an easy one. He is invested with a discretion which entails the balancing of the often competing alternatives of sentencing. It has been said many times that the dominant theme in sentencing is to provide protection to society. To achieve this, the sentencing judge must balance retribution – in the sense of the infliction of a just punishment to express the moral outrage of the community: deterrence – of the particular offender and others in the community who may consider similar action: and rehabilitation – ensuring that the sentence imposed is consistent, if possible, with the offender’s returning to society as a contributing member. This delicate process is often complicated by the need to have regard for a uniform and national approach to sentencing, “a consistent correlation”, while looking to society – with whose moral outrage and protection the judge is immediately concerned and the individual offender himself. *The judge must ensure that he imposes the minimum term consistent with the attainment of the relevant purposes of sentencing taking care that he punishes only for the crime or crimes before him.*

(Emphasis added)

It is the proposition in the last sentence which, in some jurisdictions, is described as the principle of parsimony. That proposition reflects the underlying purpose for which criminal sanctions are imposed. As Brennan J observed in *Channon v The Queen* (1978) 33 FLR 433 at 487, “criminal sanctions are purposive, and they are not inflicted judicially except for the purpose of protecting society; nor to an extent beyond what is necessary to achieve that purpose”.

1. A passage in the judgment of Napier CJ in *Webb v O’Sullivan* [1952] SASR 65 at 66 is often cited as an early statement of the principle. In relation to a sentence for the offence of driving a motor vehicle while under the influence of alcohol, Napier CJ said:

In cases of this kind, where the discretion of the Court is so much at large, I think that it is a mistake to have any rule of thumb. The Courts should endeavour to make the punishment fit the crime, and the circumstances of the offender, as nearly as may be. Our first concern is the protection of the public, but, subject to that, the Court should lean towards mercy. We ought not to award the maximum which the offence will warrant, but rather the minimum which is consistent with a due regard for the public interest.

As can be seen from these authorities, the common law principle has a dual aspect: a sentencing Court should impose the minimum sentence appropriate to achieve the purposes for which the sentence is being imposed, and should not impose any more severe sentence. Put more shortly, a sentence should be no less and no more than is appropriate.

1. Counsel for Mr Perkovic submitted, in effect, that the so called principle of parsimony should be applied by analogy in the present context. However, in this respect, the reasons of Gordon J in the *CFMEU* case ([2013] FCA 1014) are pertinent. Her Honour considered that account should be taken of the differences in the task of a Court imposing a civil penalty, on the one hand, and a Court sentencing for a criminal offence, on the other. In the latter, the liberty of the subject is often at risk: the sentencing process is usually governed by detailed statutory provisions; and a range of sentencing options is usually available. Those considerations, which have informed the development of the principle, are not present in the present context. Gordon J then continued:

[55] The task of the sentencer under the BCII Act is sufficiently described as fixing a penalty that is just in all the circumstances. Separate reference to notions of parsimony has the capacity to mislead if it distracts from the need to fix the just and appropriate penalty. It has the capacity to mislead because the reference to “parsimony” means different things in different contexts. In the current context, the common law principle (the selection of the least severe sentencing option open to a sentencer which achieves the purpose or purposes of punishment in the case and therefore achieves the ultimate aim of protecting society) adds little, if anything, to the task of the sentencer under the BCII Act of fixing a penalty that is just and appropriate in all the circumstances.

As can be seen, Gordon J thought it appropriate to describe the task of the Court in the present context as being that of fixing a penalty which is “just in all the circumstances”.

1. Approaching the fixation of penalty in this manner does not seem to be relevantly different from the task of a sentencing Court outlined above, namely, imposing no more than the minimum sentence that is necessary and appropriate to achieve the purposes for which the penalty is being imposed. It has to be recognised, however, that the determination of an appropriate penalty involves a discretionary judgment and that there is no single amount in any case which will be the only appropriate penalty which may be imposed.
2. In the present matters, I consider that the Court should impose penalties which are appropriate having regard to the circumstances of the contraventions and of the individual respondents. Those penalties should not exceed the amounts necessary to achieve the purposes for which the penalties are being imposed.

## Declarations

1. In addition to seeking the imposition of penalties, the Director also asked the Court to make declarations with respect to the respective contraventions. In relation to Mr Smart’s contravention at the Leabrook Site on 31 March 2014, Mr Griffin QC submitted that the making of a declaration would be sufficient as a denunciation of the conduct and that the imposition of a pecuniary penalty was unnecessary. I understood Mr Griffin to make the same submission with respect to the contraventions of Mr Huddy and Mr Vitler at the Somerton Park Site on 31 March 2014 and 7 April 2014 respectively and in respect of the contraventions of Mr Jarrett and Mr Sloane at the Grenfell St Site on 1 May 2014.
2. Counsel for Mr Perkovic, on the other hand, submitted that a declaration of his client’s contravention would have no utility and that a pecuniary penalty only should be imposed. Counsel did not elaborate that submission, saying only that a declaration in Mr Perkovic’s case would not take the matter any further.
3. In my opinion, it is appropriate to make the declarations sought by the Director in each case. The making of a declaration in cases like the present serves a number of purposes. First and perhaps foremost, it is a formal record of the adjudication of the charged contravention, and thus comprises a formal and public declaration that the person engaged in the charged conduct. As such, it forms part of the community’s denunciation and censure of the conduct. Secondly, the prospect that a declaration will be made has by itself a deterrent effect. Thirdly, the making of a declaration operates as a vindication of the regulator’s actions.
4. For these reasons, I reject the submissions of counsel for Mr Perkovic on this topic.
5. There may be cases in which the Court may consider that the grant of a declaration without more may be a sufficient penalty. That may be appropriate, for example, if the contravention in question is trivial or if there are significant extenuating circumstances. However, circumstances of that kind do not exist in relation to any of the respondents. As already noted, each of the respondents’ contraventions occurred against the background of the CFMEU’s significant history of contraventions. It is obvious that deterrence must play a significant role in the determination of each action. For that reason, I consider that, in addition to the declarations, monetary penalties should also be imposed.

## Penalties in Action SAD 138 of 2014: the Leabrook Site

1. The conduct of Mr Stephenson and Mr Smart on 31 March 2014 indicates an indifference by them to the restrictions on the exercise of their rights of entry. Their attitude indicated a determination to enter the Site in defiance of the lawful directions of Mr Agresta and Mr Allen that they were not to do so.
2. However, I accept that Mr Stephenson and Smart were on the Leabrook Site for a period of only about eight minutes and there is no suggestion of them hindering or obstructing operations while they were on the Site. I accept that they wished to enter the Leabrook Site for the purpose recognised by s 484 of the FW Act, namely, to hold discussions with employees where industrial interests the CFMEU is entitled to represent.
3. It is apparent that the penalties imposed in the past have not caused the CFMEU and its officials to comply with the requirements of the FW Act and cognate legislation.
4. Mr Stephenson was employed as an organiser by the CFMEU. He had also contravened s 500 of the FW Act on 20 March 2014, only 11 days beforehand. The circumstances of that contravention are described in *DFWBI v Cartledge*. Mansfield J imposed a penalty of $600.00 in respect of that contravention by Mr Stephenson. He has since resigned from employment with the CFMEU so personal deterrence may not be so important in his case.
5. Mr Smart is employed by the CFMEU as an organiser in Western Australia. In late March 2014, he came to South Australia to assist the South Australian Branch of the CFMEU. The 31 March 2014 was his first day at work in this State. The agreed facts indicate that his role was more passive than that of Mr Stephenson and to that extent less culpable. There is no suggestion in his case that he had contravened s 500 on a previous occasion.
6. In my opinion, a penalty of $1,700.00 is appropriate in the case of Mr Stephenson and a penalty of $1,000.00 in the case of Mr Smart. A higher penalty is appropriate in the case of Mr Stephenson having regard to his previous contravention and to his greater culpability in the contraventions on 31 March.
7. In the case of the CFMEU, I consider it appropriate to fix a single penalty in respect of its contraventions constituted by the conduct of Mr Stephenson and Mr Smart. In fixing that penalty, the previous record of the CFMEU indicates, as I have said, that deterrence must be a very prominent consideration. I also note that it has not made any expression of contrition although, subject to what I have said earlier, it is entitled to some credit in respect of the retraining which it has arranged for its officials and its cooperation in relation to these proceedings. I fix a single penalty of $25,000.00 in the case of the CFMEU in respect of its contraventions constituted by the conduct of Mr Stephenson and Mr Smart on 31 March 2014.

## Penalties in Action SAD 140 of 2014: the Somerton Park Site: 31 March 2014

1. The agreed facts in relation to the events at the Somerton Park Site on 31 March 2014 provide some support for the submission of Mr Griffin QC regarding an informal practice. When Mr Bolton and Mr Huddy first attended the Site, Mr Nickolai did not object to them entering nor to their signing the Sign In/Out Register. It was only after their discussion with employees in the lunchroom during their smoko break that senior Badge employees instructed them to leave. Although Mr Bolton and Mr Huddy ignored those instructions, they remained on the Site for another five to ten minutes only. There was an element of defiance in Mr Bolton’s statement to Mr Melville that he did not need an entry notice, but that defiance occurred towards the end of the period during which the two men were on the Site.
2. Mr Bolton is employed as an organiser by the CFMEU in its South Australian Branch. He had contravened s 500 on one previous occasion, namely, on 20 March 2014, the circumstances of which are described in *DFWBI v Cartledge*. Mansfield J imposed a penalty of $4,000.00 on Mr Bolton in respect of that contravention. The circumstances of the contravention on 20 March 2014 were more egregious than those on 31 March 2014 and, on that occasion, Mr Bolton’s contravention was aggravated by his false statement that he was proposing to enter the Site in relation to a safety matter.
3. Although the present contravention is a later contravention, the circumstances in which it occurred indicate to my mind that a lesser penalty than that imposed by Mansfield J is appropriate. The penalty range suggested by the Director for Mr Bolton indicates that he too recognises that that is appropriate. I accept that, while Mr Bolton and Mr Huddy defied the instructions given to them to leave, their conduct was not aggressive, abusive or intimidating.
4. Mr Huddy has previously worked as an organiser for the CFMEU in its Queensland/Northern Territory Branch. However, on 31 March 2014, he was working on secondment to the South Australian Branch of the CFMEU. I accept that his role in the incident was more passive than that of Mr Bolton. I also accept that he has since resigned as an organiser with the CFMEU. That explains why he has not undertaken the retraining with respect to the exercise of rights of entry. I accept that the circumstance that he is no longer employed as an organiser by the CFMEU diminishes, to an extent, the need for personal deterrence.
5. In the case of Mr Bolton I impose a penalty of $1,800.00 and, in the case of Mr Huddy, a penalty of $800.00.
6. It is appropriate to impose a single penalty in respect of the contraventions of the CFMEU constituted by the conduct of each of Mr Bolton and Mr Huddy. The considerations to which I referred earlier in relation to the CFMEU are pertinent in relation to these contraventions also. I impose a penalty of $25,000.00 in respect of these contraventions, as they occurred simultaneously with the contraventions at the Leabrook Site.

## Penalties in Action SAD 139 of 2014: the Somerton Park Site: 7 April 2014

1. These contraventions occurred only one week after the previous contraventions at the Somerton Park Site. The conduct of Mr Bolton, in particular, on this occasion was more culpable. First, the CFMEU and, in particular, Mr Bolton knew from the experience one week previously that Badge was insisting on compliance with the conditions for the exercise of the right of entry. Secondly, on this occasion Mr Nickolai asked for their entry notice or permit when they first attended, but Mr Bolton brushed him off. In addition, there was an element of defiance in Mr Bolton’s response when requested to produce the entry permit or an entry notice by Mr Nickolai, as he dismissed that request with words to the effect “don’t you worry about that, you’ve done your job, I’ll do mine”.
2. The defiance continued when Mr Melville, the Badge Site Manager, spoke to Mr Bolton and Mr Vitler. They ignored several instructions to leave the Site. Further still, Mr Bolton misled Mr Nickolai when he asked for a notice or permit when he responded “it’s all okay, you don’t need to worry about that, it’s all organised”. In making that statement, Mr Bolton intended to give the impression, or at least was reckless as to whether the impression was given, that his entry onto the Site was authorised under the FW Act when that was not so.
3. It is however an agreed fact that Mr Bolton’s belief, at the time he and Mr Vitler entered through the gate, was that an informal approach to enter on Site would be sufficient, namely, that it would be sufficient for them to sign in Vistors’ Register and then proceed to meet employees in the lunchroom during their smoko break. Even so, it must have become apparent to Mr Bolton and Mr Vitler very soon afterwards that that belief was erroneous. I accept that Mr Bolton’s interaction with Mr Nickolai, Mr Melville and Mr Garrard was not aggressive and did not involve abuse or intimidation. This was Mr Bolton’s third contravention of s 500 within a period of three weeks. He had had the opportunity to reflect upon the wrongfulness of his actions. Accordingly, his conduct on 7 April 2014 after he had entered the Somerton Park Site seems to evidence a deliberate persistence by him in unlawful conduct.
4. The conduct of Mr Bolton and Mr Vitler has to be assessed against the background of the significant record of the CFMEU in not complying with provisions in industrial legislation.
5. Ordinarily, Mr Vitler works for the CFMEU as an organiser in the Australian Capital Territory. He was seconded to work in South Australia for a short period in April 2014. The visit to the Somerton Park Site on 7 April 2014 occurred on his first day of working in South Australia. I accept that he was not aware of the events which had taken place involving Mr Bolton at that Site on 31 March 2014. It is evident that he played a more passive role and, to that extent, his conduct is less culpable. Unlike Mr Bolton, he does not have a record of previous contraventions of s 500.
6. In Mr Bolton’s case I impose a penalty of $2,000.00 and in Mr Vitler’s case a penalty of $1,100.00.
7. In relation to the CFMEU, I impose a single penalty of $30,000.00. This penalty is higher than those imposed in respect of the contraventions on 31 March because of the increased culpability resulting from the persistence in unlawful conduct. Considerations of deterrence must be particularly prominent in its case.

## Penalties in Action SAD 141 of 2014: the Grenfell Street Site: 1 May 2014

1. The contraventions which occurred on 1 May 2014 are the most serious of the contraventions in the four proceedings. The very number of CFMEU organisers attending the Grenfell St Site on 1 May 2014 suggests coordinated and strategic action by the CFMEU resulting in deliberate contraventions of s 500.
2. Mr McDermott was at the time the Assistant Secretary of the Construction and General Division of the CFMEU in South Australia. As such, he was one of the most senior officials of the CFMEU in South Australia. It is evident that he took a lead role in the conduct of the organisers on 1 May 2014.
3. Mr McDermott refused to produce a right of entry when requested to do so, refused to leave the Site after being requested to do so, went onto that part of the Site at which construction was taking place without any authorisation to do, and, when requested to produce his entry permit and an entry notice, refused in a profane and abusive manner.
4. Counsel for the Director submitted that account should also be taken of Mr McDermott’s failure to intervene during the Flynn-Perkovic incident to restrain Mr Perkovic or to indicate that he did not support Mr Perkovic’s conduct, even though he held a position in the CFMEU which was senior to Mr Perkovic. Although I consider that those submissions have some force, I have decided for two reasons that these aspects of Mr McDermott’s conduct should not be regarded as adding to his culpability. First, during at least part of the incident, Mr McDermott, like Ms Peters, used his mobile phone to make a video recording of the incident. The making of the record served a useful purpose as it militated against the possibility of later disputes about precisely what had occurred. Secondly, it is apparent from Ms Peters’ video that Mr McDermott was not present for the whole of the incident as at one stage he moved into another room. I also take into account that the time occupied by the incident was quite short which meant that he had limited opportunities in which to intervene.
5. Mr McDermott has contravened industrial legislation on one previous occasion. In *Director of the Fair Work Building Industry Inspectorate v McDermott* [2014] FCA 160, the Court imposed a penalty of $1,320.00 on Mr McDermott in respect of his coercive conduct, in contravention of s 355 of the FW Act.
6. Mr Stephenson’s contravention on 1 May 2014 resulted from his conduct in not complying with three separate directions from Mr Kamminga to leave the Site, his non‑compliance with two separate requests made by Mr Kamminga that he produce his entry permit and an entry notice, and his failure to provide an entry notice to Watpac, as required by s 487 of the FW Act, as least 24 hours before his entry.
7. I have referred to Mr Stephenson’s personal circumstances earlier in these reasons and need not repeat them. His contravention on 1 May 2014 was the third contravention of s 500 by him in a period of six weeks. This indicates a degree of persistence by him in unlawful conduct. On the other hand, the element of personal deterrence in his case is not so prominent given that he is no longer employed by the CFMEU and (it is assumed) no longer the holder of an entry permit.
8. Mr Jarrett, who was an organiser, contravened s 500 of the FW Act on 1 May 2014 in the same way as did Mr Stephenson. He has no previous record of contravention and has since resigned employment with the CFMEU altogether. Personal deterrence is accordingly less important in his case.
9. Mr Sloane contravened s 500 of the FW Act at the Grenfell Street Site in the same way as did Mr Stephenson and Mr Jarrett. This was his first contravention of s 500.
10. Mr Sloane is ordinarily employed by the CFMEU in New South Wales as an organiser. He was in South Australia on 1 May 2014 to assist the South Australia Branch of the CFMEU. His role in the contraventions was more passive than that of Mr McDermott and Mr Perkovic in particular. He has no previous contraventions of s 500.
11. Mr Pitt contravened s 500 of the FW Act on 1 May 2014 in the same manner as did Messrs Stephenson, Jarrett and Sloane. He is employed by the CFMEU as an organiser.
12. Mr Pitt has contravened industrial legislation on three previous occasions for which penalties have been imposed. First, in September 2011 he engaged in coercive conduct in contravention of s 43(1)(a) of the former *Building and Construction Industry Improvement Act 2005* (Cth) for which the Court imposed a penalty of $3,000.00: *Director of the Fair Work Building Industry Inspectorate v CFMEU* [2013] FCA 515. The second and third were contraventions of s 500 of the FW Act on each of 19 and 20 March 2014 for which Mansfield J imposed penalties of $6,000.00 and $3,000.00 respectively: *DFWBI v Cartledge* at [97]. This means that no lenience can be extended to Mr Pitt on account of a previous good record and his offending on 1 May 2014 is all the more culpable by reason of his earlier offending.
13. Mr Pitt was present throughout the Flynn-Perkovic incident. He made no attempt to intervene. Instead, like Mr McDermott, he used his mobile phone to make a video tape of the incident.
14. Counsel for the Director submitted that Mr Pitt’s conduct too was to be assessed in the light of the circumstance that he did not intervene. For the reasons which I gave earlier in relation to Mr McDermott, I do not propose to act on that submission.
15. Mr Perkovic is employed by the CFMEU as an organiser. He has no previous record of contraventions.
16. Even without the Flynn-Perkovic incident, his contraventions have to be regarded seriously. Mr Perkovic’s conduct in the Flynn-Perkovic incident was particularly egregious. He instigated the incident and engaged in sustained intimidatory and abusive conduct towards Mr Flynn. It must have been obvious to Mr Perkovic that Mr Flynn was an Inspector appointed by the Director and present on the Site in that capacity. Mr Perkovic attempted to belittle, humiliate and intimidate Mr Flynn. He is not entitled to any credit because those attempts were unsuccessful. It is on the contrary to Mr Flynn’s credit that he stood his ground and did not respond in kind. Mr Perkovic created circumstances which could easily have developed into something more serious.
17. Counsel for Mr Perkovic submitted that the Court should not deal with Mr Perkovic on the basis that a physical assault occurred. I accept that that is so in the sense that the evidence does not establish actual physical contact between Mr Perkovic and Mr Flynn. However, Mr Perkovic positioned himself so closely to Mr Flynn during the incident as to attempt physical intimidation. I do not accept the submission of counsel for Mr Perkovic that Mr Flynn moved during the incident so as to position himself more closely to Mr Perkovic. Mr Flynn did no more than move his feet without altering his position relative to Mr Perkovic.
18. In the criminal sentencing context, assaults against members of the police force and others in involved in law enforcement are regarded as serious criminal offences warranting severe penalties. The Courts recognise that they should do what they can to protect those who, like police officers, are engaged in the protection of the community itself. Those who attack persons involved in law enforcement cannot, in the absence of exceptional circumstances, expect leniency. Deterrence is a major consideration: see *R v McNamara* [2009] SASC 227; (2009) 105 SASR 38 at [31].
19. In my opinion, similar considerations should inform the fixing of penalty in relation to conduct in contravention of s 500 of the FW Act which is directed to a FWBI Inspector. Inspectors appointed under s 59 of the FWBI Act have the same functions and powers as a Fair Work Inspector, but those functions and powers may be exercised only in relation to a “building matter” (s 59C) The powers of Fair Work Inspectors are governed by Ch 5 Pt 5-2 Div 3 of the FW Act. They may be exercised for a number of purposes but, in particular, in determining whether there has been compliance with the FW Act, the FWBI Act or with an industrial instrument. Inspectors should be able to discharge their duties without harassment, bullying or intimidation from anyone, let alone from persons who are present on a site only in the exercise of a right of entry granted for a limited purpose.
20. These considerations should be reflected in the penalty fixed in respect of Mr Perkovic.
21. I note again that there has been no expression of contrition or remorse by Mr Perkovic. He is entitled to some credit for his acknowledgment of his contravention and his willingness to facilitate the course of justice. However, the credit which can be given on account of this is diminished by the circumstance that he did not admit his conduct in the Flynn-Perkovic incident.
22. I impose the following penalties:

* Mr McDermott: $4,000.00;
* Mr Stephenson: $2,300.00;
* Mr Jarrett: $800.00;
* Mr Sloan: $1,100.00;
* Mr Pitt: $3,500.00;
* Mr Perkovic: $5,000.00.

1. In relation to the CFMEU, I consider it appropriate to impose a single penalty in respect of each of its six contraventions. On that basis I impose a penalty of $100,000.00. That is a significantly larger penalty than imposed in respect of the contraventions on 31 March 2014 and 7 April 2014. I consider that to be appropriate having regard in particular to the greater number of contraventions on 1 May 2014, the fact that those contraventions occurred after the contraventions on 31 March and 7 April 2014, the involvement of one of the CFMEU’s more senior officers (Mr McDermott), the longer time that the CFMEU officials were on the Grenfell St Site, the manner in which Mr McDermott and Mr Perkovic responded to Mr Kamminga’s requests, and, finally, the egregious conduct of Mr Perkovic.
2. Counsel for the respondent submitted that the Court should apply the totality principle so as to reduce the penalties imposed on Mr Stephenson, Mr Bolton and the CFMEU itself because they faced penalties for multiple contraventions.
3. The totality principle reflects a number of slightly different considerations. Doyle CJ referred to these considerations in *R v E, AD* [2005] SASC 332; (2005) 93 SASR 20 at [37]-[38]:

[37] The totality principle has been stated in terms that reflect slightly different aspects. The first aspect is that when an offender is sentenced for a number of offences, the court must ensure that “the aggregation of the sentences appropriate for each offence is a just and appropriate measure of the total criminality involved”: Postiglione v R (1997) 189 CLR 295 at 307–308 McHugh J. The other aspect is that sometimes, although the individual terms of imprisonment imposed in respect of each of a number of offences will be appropriate, the aggregate of all of those sentences will become so “crushing” as to call for some reduction in the aggregate: see King CJ in R v Rossi (1988) 142 LSJS 451, cited by McHugh J in Postiglione at 308. I refer also to the remarks of Kirby J on this point in Postiglione at 340–341. As these statements of the principle indicate, it is a general principle that requires the court to assess the overall criminality involved, and to do so by reference to the aggregate sentence to be imposed.

[38] In recent times there has been at tendency for the totality principle to be invoked, almost routinely, in support of a complaint that a sentence is excessive. Ordinarily, if a judge or magistrate imposing sentence has imposed a sentence appropriate for each offence under consideration, there will be no reason to consider the totality principle. The sentences imposed will be the appropriate sentences for the offending conduct. In its nature the totality principle involves what might be called a final check or consideration, intended to ensure that in the course of aggregating penalties the court has not arrived at an aggregate that is disproportionate to the seriousness of the offending conduct taken as a whole, so as to impose a sentence which is, in the circumstances, so crushing as to call for intervention on the grounds of mercy. Care must be taken in using the concept of a crushing sentence. Not uncommonly, for particularly serious crimes, a sentence that is crushing in its effect must be imposed. The use of that term does not imply that when a very heavy sentence is called for, it is appropriate for the court to reduce it simply because to the offender the sentence may be crushing. At the end of the day if that is what is called for, that is the sentence that must be imposed.

1. I consider that the approach to the application of the principle of totality discussed by Doyle CJ in *R v E, AD* is applicable in the present circumstance. In the case of Mr Stephenson and Mr Bolton, I have imposed penalties in respect of their respective contraventions which are appropriate. There is no basis upon which the Court can conclude that those penalties will be “so crushing” as to call for some reduction in the aggregate. None of the respondents provided any evidence at all as to their individual financial circumstances or as to the likely impact on them of the penalties proposed by the Director. That being so it is very difficult for the Court to conclude that the aggregate of the sentences would be crushing. Nor do I consider that the aggregate of the penalties imposed on Mr Stephenson and Mr Bolton can be regarded as disproportionate to their overall culpability.
2. In relation to the CFMEU, I also consider that there is no scope for application of the principle of totality. I have, in respect of each set of contraventions, fixed a single penalty having regard to the overall culpability of the CFMEU in respect of those contraventions. That of itself leaves little scope for the application of the principle of totality in relation to each of the penalties so fixed. The aggregate of the penalties is not disproportionate, especially given the demonstrated requirement for deterrence to be a prominent consideration in the case of the CFMEU.
3. Further, there is no basis upon which the Court could regard the aggregate of the individual penalties as being so crushing as to call for some reduction. The CFMEU has not presented any evidence at all regarding its financial circumstances or as to the impact on it of penalties of the kind proposed by the Director. There is accordingly, no basis upon which the Court could conclude that the aggregate of the penalties will be crushing.

## Conclusion

1. In summary, I impose the following penalties:

* Action No 138 of 2014:

○ Mr Stephenson: $1,700.00

○ Mr Smart: $1,000.00

○ CFMEU: $25,000.00

* Action No 139 of 2014:

○ Mr Bolton: $2,000.00

○ Mr Vitler: $1,100.00

○ CFMEU: $30,000.00

* Action No 140 of 2014:

○ Mr Bolton: $1,800.00

○ Mr Huddy: $800.00

○ CFMEU: $25,000.00

* Action No 141 of 2014:

○ Mr McDermott: $4,000.00

○ Mr Stephenson: $2,300.00

○ Mr Jarrett: $800.00

○ Mr Sloan: $1,100.00

○ Mr Pitt: $3,500.00

○ Mr Perkovic: $5,000.00

○ CFMEU: $100,000.00

1. Each of these penalties is to be paid to the Commonwealth.
2. In addition, there will be declarations as to the contraventions by each respondent.

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| I certify that the preceding one hundred and fifty-seven (157) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice White. |

Associate:

Dated: 23 December 2014

# sCHEDULE

# SAD 141 of 2014

Second Respondent: LUKE STEPHENSON

Third Respondent: ANTHONY JARRETT

Fourth Respondent: ANTHONY SLOANE

Fifth Respondent: BRENDAN PITT

Sixth Respondent: JOHN PERKOVIC

Seventh Respondent: CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION