FEDERAL COURT OF AUSTRALIA

Australian Building and Construction Commissioner v Huddy (No 2) [2017] FCA 1088

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| File number: | NTD 33 of 2014 |
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| Judge: | **WHITE J** |
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| Date of judgment: | 14 September 2017 |
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| Catchwords: | **INDUSTRIAL LAW** – proceedings bought against employees who stopped work during the currency of an enterprise agreement, a job delegate, a union organiser and the union – contraventions of ss 50, 417(1), 343 and 348 of the *Fair Work Act 2009* (Cth) – accessorial liability of union under ss 550 and 793 – relevant considerations in determining appropriate declarations and penalties – multiple contraventions and the operation of ss 556 and 557 – whether the Court may impose a single penalty for multiple contraventions. |
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| Legislation: | *Building and Construction Improvement Act 2005* (Cth) ss 38, 49  *Crimes Act 1914* (Cth) s 4AA  *Fair Work Act 2009* (Cth) ss 50, 343, 348, 417, 484, 490, 500, 539, 546, 550, 556, 557, 793  *Income Tax Assessment Act 1936* (Cth) s 230(1)  *Trade Practices Act 1974* (Cth) s 75B |
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| Cases cited: | *Attorney General v Tichy* (1982) 30 SASR 84  *Australian Building and Construction Commissioner v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (The Australian Paper Case) (No 2)* [2017] FCA 367  *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 53  *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113  *Australian Building and Construction Commissioner v Hanna (No 2)* [2017] FCCA 1904  *Australian Building and Construction Commissioner v Harris* [2017] FCA 733  *Australian Building and Construction Commissioner v McCullough (No 2)* [2017] FCA 295  *Australian Building and Construction Commissioner v McDermott (No 2)* [2017] FCA 797  *Australian Ophthalmic Supplies Pty Ltd v McAlary‑Smith* [2008] FCAFC 8; (2008) 165 FCR 560  *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482  *Construction, Forestry, Mining and Energy Union v Clarke* [2007] FCAFC 87; (2007) 164 IR 299  *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1213  *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 407  *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2016] FCA 413  *Director of the Fair Work Building Industry Inspectorate v Construction, Forest, Mining and Energy Union* [2016] FCA 798  *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCAFC 59; (2015) 229 FCR 331  *Director of the Fair Work Building Industry Inspectorate v Cartledge* [2014] FCA 1047  *Director of the Fair Work Building Industry Inspectorate v Ellen (The Longford Gas Plant Case)* [2016] FCA 1395  *Director of the Fair Work Building Industry Inspectorate v Robinson* [2016] FCA 525; (2016) 241 FCR 338  *Esso Australia Pty Ltd v Australian Workers’ Union* [2016] FCAFC 72; (2016) 245 FCR 39  *Finance Sector Union v Commonwealth Bank of Australia* [2005] FCA 1847; (2005) 224 ALR 467  *Hamilton v Whitehead* (1988) 166 CLR 121  *Mallan v Lee* (1949) 80 CLR 198  *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357  *Maroney v The Queen* [2003] HCA 63; (2003) 216 CLR 31  *Osland v The Queen* [1998] HCA 75; (1998) 197 CLR 316  *Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union* [2008] FCAFC 170; (2008) 171 FCR 357  *Postiglione v The Queen* [1997] HCA 26; (1996) 189 CLR 295  *Yorke v Lucas* (1985) 158 CLR 661  *Young Investments Group Pty Ltd v Mann* [2012] FCAFC 107; (2012) 293 ALR 537 |
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| Date of hearing: | 1 September 2017 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Counsel for the Applicant: | Mr I Neil SC with Mr D Chin |
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| Solicitor for the Applicant: | Clayton Utz |
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| Solicitor for the Respondents (other than the Ninth, Tenth, Thirteenth, Fifteenth, Seventeenth, Twentieth, Twenty Second, Twenty Third, Twenty Sixth, Thirty Second, Thirty Third, Forty Ninth, Fifty Sixth, Fifty Ninth, Sixty Second, Sixty Third, and Sixty Ninth Respondents): | Hall Payne Lawyers |
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| Counsel for the Ninth, Tenth, Thirteenth, Fifteenth, Seventeenth, Twentieth, Twenty Second, Twenty Third, Twenty Sixth, Thirty Second, Thirty Third, Forty Ninth, Fifty Sixth, Fifty Ninth, Sixty Second, Sixty Third, and Sixty Ninth Respondents: | Did not appear |

ORDERS

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|  | | NTD 33 of 2014 |
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| BETWEEN: | AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER  Applicant | |
| AND: | MICHAEL HUDDY  First Respondent  CRAIG TAIT  Second Respondent  CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION (and others named in the Schedule)  Third Respondent | |

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| JUDGE: | WHITE J |
| DATE OF ORDER: | 14 SEPTEMBER 2017 |

THE COURT DECLARES THAT:

1. The 2nd, 4th to 16th, 18th, 19th, 21st, 23rd to 58th and 60th to 68th Respondents each contravened s 417(1) of the *Fair Work Act 2009* (Cth) (FW Act) by engaging in industrial action on 22 October 2013 (Industrial Action) at the Ichthys Liquefied Natural Gas (LNG) Project at Blaydin Point in the Northern Territory (the Project), while they were each covered by the *Laing O'Rourke Construction Australia Pty Ltd Ichthys Onshore Construction Greenfields Agreement* (the LOR Agreement);
2. The 2nd, 4th to 9th, 11th to 16th, 18th, 19th, 21st, 23rd to 58th and 60th to 68th Respondents each contravened s 343 of the FW Act on 22 October 2013 by engaging in the Industrial Action at the Project with a proscribed intention;
3. The 2nd, 4th to 9th, 11th to 16th, 18th, 19th, 21st, 23rd to 58th and 60th to 68th Respondents each contravened s 348 of the FW Act on 22 October 2013 by engaging in the Industrial Action at the Project with a proscribed intention;
4. The 2nd, 4th to 16th, 18th, 19th, 21st, 23rd to 58th and 60th to 68th Respondents each contravened s 50 of the FW Act on 22 October 2013 at the Project by contravening a term of the LOR Agreement requiring compliance with a dispute resolution procedure;
5. The 1st Respondent (Mr Huddy) contravened s 417(1) of the FW Act on one occasion on 22 October 2013 by reason of being involved in each of the contraventions referred to in Declaration 1 above for the purposes of s 550 of the FW Act;
6. The 1st Respondent (Mr Huddy) contravened s 343 of the FW Act on 61 occasions on 22 October 2013 by reason of being involved in each of the contraventions referred to in Declaration 2 above for the purposes of s 550 of the FW Act;
7. The 1st Respondent (Mr Huddy) contravened s 348 of the FW Act on 61 occasions on 22 October 2013 by reason of being involved in each of the contraventions referred to in Declaration 3 above for the purposes of s 550 of the FW Act;
8. The 1st Respondent (Mr Huddy) contravened s 50 of the FW Act on one occasion on 22 October 2013 by reason of being involved in each of the contraventions referred to in Declaration 4 above for the purposes of s 550 of the FW Act;
9. The 1st Respondent (Mr Huddy) contravened s 500 of the FW Act by reason of having acted in an improper manner while exercising entry rights at the Project on 22 October 2013;
10. The 2nd Respondent (Mr Tait) contravened s 417(1) of the FW Act on one occasion on 22 October 2013 by reason of being involved in each of the contraventions referred to in Declaration 1 above (aside from his own) for the purposes of s 550 of the FW Act;
11. The 2nd Respondent (Mr Tait) contravened s 343 of the FW Act on 60 occasions on 22 October 2013 by reason of being involved in each of the contraventions referred to in Declaration 2 above (aside from his own) for the purposes of s 550 of the FW Act;
12. The 2nd Respondent (Mr Tait) contravened s 348 of the FW Act on 60 occasions on 22 October 2013 by reason of being involved in each of the contraventions referred to in Declaration 3 above (aside from his own) for the purposes of s 550 of the FW Act;
13. The 2nd Respondent (Mr Tait) contravened s 50 of the FW Act on one occasion on 22 October 2013 by reason of being involved in each of the contraventions referred to in Declaration 4 above (aside from his own) for the purposes of s 550 of the FW Act; and
14. The 3rd Respondent (the Construction, Forestry, Mining and Energy Union (the CFMEU)) contravened s 500 of the FW Act on 22 October 2013 by reason of being involved in the contravention referred to in Declaration 9 above for the purposes of s 550 of the FW Act.

THE COURT ORDERS THAT:

1st Respondent (Mr Huddy)

1. The 1st Respondent (Mr Huddy) pay a pecuniary penalty of $1,200 for each of the first five accessorial contraventions of s 348 (those of the 2nd, 4th, 5th, 6th and 7th Respondents) which are the subject of Declaration 6.
2. The 1st Respondent (Mr Huddy) pay a pecuniary penalty of $1,000 for each of the next five accessorial contraventions of s 348 (those of the 8th, 9th, 11th, 12th and 13th Respondents) which are the subject of Declaration 6.
3. The 1st Respondent (Mr Huddy) pay a pecuniary penalty of $500 for each of the next five accessorial contraventions of s 348 (those of the 14th, 15th, 16th, 18th and 19th Respondents) which are the subject of Declaration 6.
4. The 1st Respondent (Mr Huddy) pay a pecuniary penalty of $2,500 for the contravention of s 500 which is the subject of the Declaration 9.

2nd Respondent (Mr Tait)

1. The 2nd Respondent (Mr Tait) pay a pecuniary penalty of $1,500 for the contravention of s 348 which is the subject of Declaration 3.
2. The 2nd Respondent (Mr Tait) pay a pecuniary penalty of $1,000 for each of the first five accessorial contraventions of s 348 (those of the 4th, 5th, 6th, 7th and 8th Respondents) which are the subject of Declaration 12.
3. The 2nd Respondent (Mr Tait) pay a pecuniary penalty of $750 for each of the next five accessorial contraventions of s 348 (those of the 9th, 11th, 12th, 13th and 14th Respondents) which are the subject of the Declaration 12.
4. The 2nd Respondent (Mr Tait) pay a pecuniary penalty of $400 for each of the next five accessorial contraventions of s 348 (those of the 15th, 16th, 18th, 19th and 20th Respondents) which are the subject of Declaration 12.

3rd Respondent (the CFMEU)

1. The 3rd Respondent (the CFMEU) pay a pecuniary penalty of $25,000 for the accessorial contravention of s 500 which is the subject of the Declaration 14.

4th to 9th, 11th to 16th, 18th, 19th, 21st, 23rd to 58th and 60th to 68th Respondents

1. The 4th to 9th, 11th to 16th, 18th, 19th, 21st, 23rd to 58th and 60th to 68th Respondents each pay a pecuniary penalty of $1,500 for their contraventions of s 348 which are the subject of the Declaration 3.

10th Respondent (Mr Churchyard)

1. The 10th Respondent (Mr Churchyard) pay a pecuniary penalty of $1,200 for his contravention of s 417(1).

THE COURT FURTHER ORDERS THAT:

1. Pursuant to s 546(3) of the FW Act, each of the pecuniary penalties is to be paid to the Commonwealth of Australia.

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

REASONS FOR JUDGMENT

WHITE J:

1. On 30 June 2017, the Court published its reasons for finding that:

(a) each of the individual respondents, other than the 1st, 17th, 20th, 22nd, 59th and 69th respondents (and in the case of ss 343 and 348 of the *Fair Work Act 2009* (Cth) (the FW Act), the 10th respondent) had engaged in industrial action in contravention of s 417 of the FW Act, had engaged in action with a proscribed intention in contravention of ss 343 and 348 of the FW Act, and had not complied with a term of an enterprise agreement in contravention of s 50 of the FW Act;

(b) each of the first respondent, Mr Huddy and the second respondent, Mr Tait, had been involved in the individual respondents’ contraventions of ss 50, 343, 348 and 417 of the FW Act and had thereby, by the operation of s 550, contravened those provisions (save that Mr Tait was not an accessory to his own contraventions of those provisions);

(c) Mr Huddy had contravened s 500 of the FW Act.

These reasons were published as *Australian Building and Construction Commissioner v Huddy* [2017] FCA 739 (the principal judgment).

1. The form of the declarations to be made to give effect to the principal judgment and the question of penalties were adjourned to the second stage of the trial. This judgment concerns those matters.
2. The Court also directed on 30 June 2017 that the Commissioner’s allegation that the third respondent, Construction, Forestry, Mining and Energy Union (CFMEU) had, by reason of the conduct of Mr Huddy and the operation of s 793 of the FW Act, contravened s 500 would be addressed in the second stage of the trial. However, in the light of the decision in *Australian Building and Construction Commissioner v Harris* [2017] FCA 733 (Siopis J) and *Australian Building and Construction Commissioner v McDermott (No 2)* [2017] FCA 797 (Charlesworth J), the Commissioner no longer pursues that allegation. Instead, by an amendment to the statement of claim for which leave was granted by consent, the Commissioner alleges that the CFMEU was “involved in” Mr Huddy’s contravention of s 500, within the meaning of s 550 of the FW Act, so that it is to be taken also to have contravened that provision. The CFMEU disputes that allegation and this judgment addresses that issue also.
3. Mr Huddy was from about September 2007 until the end of June 2014 employed by the CFMEU as an organiser in the Northern Territory. His responsibilities included the organising of the CFMEU members at the Ichthys LNG Project at Blaydin Point near Darwin in the Northern Territory (the Project). Laing O’Rourke Construction Australia Pty Ltd (LOR) was one of the contractors engaged in the Project.
4. Mr Tait was at material times an employee of LOR. In July or August 2013, he had been elected as the CFMEU delegate for the LOR employees at the Project and he held that position as at 22 October 2013.
5. Each of the remaining individual respondents was an employee of LOR on 22 October 2013 and was performing work on the Project. Fifty three of the respondents (including Mr Huddy, Mr Tait and the CFMEU), were represented at the trial. I referred to these respondents in the principal judgment as the “Represented Respondents”. The Commissioner had discontinued the claims with respect to five respondents, namely, the 17th, 20th, 22nd, 59th and 69th respondents. The remaining 11 respondents (the Non‑Represented Respondents) did not participate in the trial nor in the present hearing.
6. The conduct giving rise to the contraventions is set out in some detail in the principal judgment. This judgment should be read in conjunction with the principal judgment and, to the extent that it is practical to do so, I will endeavour to avoid repetition.
7. In summary, in the principal judgment I found that, on 22 October 2013, the employees of LOR at the Project had stopped worked at about 10.45 am, after the morning smoko break, and subject to one qualification, had not returned to work until the scheduled commencement of work on the following day. The employees did so in order to apply pressure to LOR to agree to allow them to finish work each day in sufficient time so as to be at the Project site gate at 5 pm, rather than leaving their actual work site within the Project at that time. The difference between the two finishing times was about 15‑20 minutes.
8. The Commissioner alleged that this conduct contravened several provisions in the FW Act. First, he alleged that the conduct constituted the engagement by the relevant employees in industrial action in contravention of s 417(1) of the FW Act which provides:

*No industrial action*

(1) A person referred to in subsection (2) must not organise or engage in industrial action from the day on which:

(a) an enterprise agreement is approved by the FWC until its nominal expiry date has passed; or

(b) a workplace determination comes into operation until its nominal expiry date has passed;

whether or not the industrial action relates to a matter dealt with in the agreement or determination.

1. Those of the employees who were represented at the hearing admitted that their conduct constituted a contravention of s 417 and I found that those of the individual respondents who did not participate in the trial had also contravened that provision.
2. Next, the Commissioner alleged that the employees’ conduct constituted contraventions of ss 343 and 348 of the FW Act.
3. Section 343(1) provides (relevantly):

A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to:

(a) exercise or not exercise, or propose to exercise or not exercise, a workplace right; or

(b) exercise, or propose to exercise, a workplace right in a particular way.

1. Section 348 provides (relevantly):

A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to engage in industrial activity.

1. I found that each of the alleged contraventions of ss 343 and 348 was established (other than in the case of the 10th respondent). I was not satisfied that the Commissioner had established that either the first respondent, Mr Huddy, and the second respondent, Mr Tait, had “organised” the industrial action in contravention of s 343 or s 348. However, I found that each of Mr Huddy and Mr Tait had aided and abetted the contraventions by the individual respondents (save that Mr Tait could not have aided and abetted his own contraventions).
2. Next, the Commissioner alleged that the employees had contravened s 50 of the FW Act by not complying with the dispute resolution procedure contained in cl 18.2 of the applicable enterprise agreement (the LOR Agreement). Despite the denials of the Represented Respondents, I found that allegation to have been established.
3. For reasons which will become apparent, the Commissioner seeks the imposition of penalties on the employees for their contraventions of s 348 only.
4. Section 500 of the FW Act prohibits a permit holder exercising rights in accordance with Pt 3‑4 of the FW Act from intentionally hindering or obstructing any person or otherwise acting in an improper manner.
5. I found that Mr Huddy had contravened s 500 on 22 October 2013 when exercising the right of entry bestowed by s 484 of the FW Act by (relevantly) conducting the smoko meeting which went beyond the time permitted by s 490(2) of the FW Act, by remaining on site despite having been requested more than once by Ms Garland, an Employee Relations Consultant, to leave, and by reconvening a meeting of the LOR employees in the crib room after the morning break. Mr Huddy had admitted the Commissioner’s allegations and his contravention of s 500. In particular, Mr Huddy acknowledged that, instead of leaving the LOR work site at 10.30 am, he had remained at or near the LOR crib room until 4.45 pm.

## The accessorial liability of the CFMEU

1. It is convenient to address at this stage the Commissioner’s allegation that the CFMEU is also to be taken to have contravened s 500 because it had been directly or indirectly knowingly concerned in or a party to Mr Huddy’s contravention.
2. Section 550 provides:

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

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

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

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

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

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

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

As can be seen, subs (1) provides that a person who is “involved in” a contravention of a civil remedy provision is to be taken to have contravened that provision. Subsection (2) elaborates the term “involved in”.

1. The Commissioner contended that the CFMEU had been involved in Mr Huddy’s contravention of s 500 within the terms of subs (2)(c) because it had been directly or indirectly knowingly concerned in that contravention. That subsection involves two principal elements: conduct of a specified kind and a state of mind of a specified kind.
2. In order to establish that conduct and that state of mind, the Commissioner relied on s 793 of the FW Act which provides for circumstances in which the conduct and state of mind of certain persons is to be taken to be the conduct and state of mind respectively of a body corporate.
3. Section 793 provides (relevantly):

*Conduct of a body corporate*

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

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

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

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

*State of mind of a body corporate*

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

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

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

*Meaning of state of mind*

(3) The ***state of mind*** of a person includes:

(a) the knowledge, intention, opinion, belief or purpose of the person; and

(b) the person’s reasons for the intention, opinion, belief or purpose.

…

1. It was common ground that, in his activities on 22 October 2013, Mr Huddy had been an officer of the CFMEU, that he had engaged in the conduct at the LOR work site on behalf of the CFMEU, and that that conduct had been within the scope of his actual or apparent authority.
2. The Commissioner submitted that s 793(1)(a) had the effect that Mr Huddy’s conduct at the LOR work site was to be taken, for the purposes of the FW Act (which includes s 550), to have been engaged in also by the CFMEU. Likewise, he submitted that s 793(2) had the effect that the CFMEU could be taken to have had the state of mind of Mr Huddy. Accordingly, counsel submitted, the effect of s 793 in conjunction with s 550(2)(c) meant that the CFMEU was to be taken also to have contravened s 500.
3. There is some support in the authorities for the understanding that s 793 operates in conjunction with s 550 in the way for which the Commissioner contended: *McDermott* and *Australian Building and Construction Commissioner v Hanna (No 2)* [2017] FCCA 1904.
4. The CFMEU contended that ss 550 and 793 could not operate to establish a contravention by it of s 500 given that it had not undertaken any positive act to associate itself with the wrongdoing of Mr Huddy. Initially, the CFMEU also contended that s 550 requires *actual* knowledge whereas s 793 provides only for *constructive* knowledge. However, counsel for the Represented Respondents abandoned this latter contention and it is not necessary to consider it.
5. The elements of the CFMEU’s contention, as I understood them, were as follows:

(a) the terms of s 550 are relevantly identical to those of s 75B of the *Trade Practices Act 1974* (Cth) which, as the plurality noted in *Yorke v Lucas* (1985) 158 CLR 661 at 669, was derived from the criminal law and should therefore be understood as having the same meaning as the criminal law concepts to which it referred;

(b) accessorial liability is to be distinguished from direct or primary liability: see the discussion by McHugh J in *Osland v The Queen* [1998] HCA 75; (1998) 197 CLR 316 at [70]‑[71];

(c) in order to have been “knowingly concerned” in Mr Huddy’s contravention of s 500, the CFMEU must have been an intentional participant in that contravention based on actual knowledge of the essential facts constituting it: see *Construction, Forestry, Mining and Energy Union v Clarke* [2007] FCAFC 87, (2007) 164 IR 299 at [26]; *Young Investments Group Pty Ltd v Mann* [2012] FCAFC 107, (2012) 293 ALR 537 at [11];

(d) this meant that the Commissioner must show some active steps by the CFMEU having the character to which s 550(2) refers which are separate and distinct from the conduct relied upon to found the liability of Mr Huddy and, in addition, that it had the requisite state of mind. Put slightly differently, the CFMEU submitted it could not be found to be a person involved in a contravention of s 500 solely because of the acts of the principal contravenor.

1. Counsel for the Represented Respondents sought to derive support for this submission from *Mallan v Lee* (1949) 80 CLR 198. In that case, a company was charged with a contravention of s 230(1) of the *Income Tax Assessment Act 1936* (Cth) which provided (relevantly):

Any person who, or any company on whose behalf of the public officer, or a director, servant or agent of the company, in any return knowingly and wilfully understates the amount of any income or makes any misstatement affecting the liability of any person to tax or the amount of tax shall be guilty of an offence. …

1. Mr Mallan, the company’s public officer, was charged with being an accessory to the company’s contravention. The High Court held that Mr Mallan should not have been charged as an accessory but as a principal. Dixon J then said at 215‑6:

On the interpretation I have given to s. 230(1), for more than one reason s. 5 of the *Crimes Act* cannot apply to a public officer so as to make him an accessory to the offence of the company. In the first place, the public officer’s act on behalf of the company making it an offender ipso facto amounts to a substantive offence on his part under s.230(1). In the second place, the sub‑section makes him the actor, the principal, for whose guilty conduct the company is responsible vicariously. It would be an inversion of the conceptions on which the degrees of offending are founded to make the person actually committing the forbidden acts an accessory to the offence consisting in the vicarious responsibility for his acts.

1. Counsel’s argument based on *Mallan v Lee* was as follows:

Both in the present case and in *Mallan* the principal contravenor was the person who performed the contravening acts. In *Mallan*, however, he was charged as an accessory to his own contravening conduct. Here Mr Huddy has been found to have contravened as a principal. However, the applicant’s argument involves the same inversion of the degrees of offending. By legislative construct the CFMEU is taken to have engaged in Huddy’s conduct. That is, the CFMEU has performed the forbidden act. The CFMEU is either liable for performing that actus reus or it is not. In this case by virtue of the terms of s 500, the CFMEU cannot be liable as a principal offender. Therefore, without more, the CFMEU cannot be liable for that same conduct as [an accessory].

1. In my opinion, the Represented Respondents’ submission should not be accepted. It overlooks that s 793 operates as a form of deeming provision “for the purposes of this Act”. Those purposes include s 500. Section 793(1) requires that the conduct to which it refers be taken to have been engaged in by the body corporate. In this case the conduct of Mr Huddy on 22 October 2013 is to be taken to have been the conduct of the CFMEU. Mr Huddy’s knowledge on 22 October 2013 may be taken to have been the knowledge of the CFMEU.
2. The only question then remaining is whether that conduct, with that knowledge, is sufficient to make the CFMEU a person “involved in” Mr Huddy’s contravention of s 500. That is to say, the question is whether the CFMEU’s conduct (albeit constituted by Mr Huddy’s conduct) with its knowledge of the matters constituting the elements of Mr Huddy’s contravention of s 500 (albeit constituted by Mr Huddy’s knowledge) meant that it had been knowingly concerned in, or party to, Mr Huddy’s contravention.
3. In my opinion, the statutory fictions indicate that this question should be answered in the affirmative. The CFMEU, with its separate legal personality, is deemed to have carried out the same actions as did Mr Huddy on 22 October 2013. Because Mr Huddy was exercising a right of entry pursuant to s 484, his actions constituted a contravention of s 500. As the CFMEU had no right of entry, its actions did not contravene s 500 but, together with its deemed state of mind, indicate that it was knowingly concerned in Mr Huddy’s contravention. So much is apparent from *Hamilton v Whitehead* (1988) 166 CLR 121 at 128 in which the High Court regarded as “plainly right” the submission that, because the imputed accessory was the actor in the conduct constituting the offences and had knowledge of all the material circumstances, he was “knowingly concerned” in the commission of the offences committed by the company constituted by his conduct.
4. In *McDermott*, Charlesworth J said at [121]:

Section 793 is premised on an accepted fiction that a body corporate is a separate legal entity from those who participate in it: *Salomon v A Salomon & Co Pty Ltd* [1896] UKHL 1; [1897] AC 22. Accepting that fiction, it does not matter that the deemed physical acts of the secondary participant are the same acts in fact engaged in by the primary contravener.

I respectfully agree.

1. The Represented Respondents’ submission that, by legislative construct the CFMEU had performed “the forbidden act” (the contravention of s 500) is not correct. Because it does not hold an entry permit, the CFMEU’s conduct cannot amount to an act forbidden by s 500 of the FW Act. However, that is a matter of no consequence in the consideration of its accessorial liability. A person may be involved as an accessory in a contravention by another even if the contravention is of such a nature that the accessory could not have contravened the provision as a principal: *Maroney v The Queen* [2003] HCA 63; (2003) 216 CLR 31 at [11]. In particular, an unqualified person may aid, abet, counsel, procure, induce or be involved in a contravention by a qualified person of a prohibition applicable only to the qualified person.
2. This is not a case in which the conduct of a person constituting a primary contravention by that person or by another whose liability arises from that conduct is then relied upon to establish the liability of the same person as an accessory. This means that the inversion of concepts for which Dixon J spoke in *Mallan v Lee* does not occur in this case.
3. In short, I consider that the statutory fictions established by s 793 mean that the conduct of an official of a body corporate may constitute a primary contravention by the official and accessorial conduct by the body corporate. I am satisfied that the CFMEU should be taken to have contravened s 500 by reason of it having been directly or indirectly knowingly concerned in Mr Huddy’s contravention of s 500.

## Penalties: general principles

1. By s 546(1), the Court is empowered to order a person to pay a pecuniary penalty when it is satisfied that the person has contravened a civil remedy provision. Each of s 50, s 343, s 348, s 417(1) and s 500 is such a provision.
2. By reason of ss 539(2) and 546(2) of the FW Act, the maximum penalty for a contravention of each of these provisions is 60 penalty units in the case of an individual, and 300 penalty units in the case of a body corporate, such as the CFMEU. The value of a penalty unit at 22 October 2013, as fixed pursuant to s 4AA of the *Crimes Act 1914* (Cth), was $170. Accordingly, the applicable maximum penalty for a contravention of the five provisions by an individual is $10,200 and by the CFMEU, $51,000.
3. The principles relating to the determination of appropriate penalties in circumstances like the present are relatively settled and were reviewed recently by the Full Court of this Court in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113 (*ABCC v CFMEU* [2017] FCAFC 113)at [98]‑[107]. Reference may also be made to *Director of the Fair Work Building Industry Inspectorate v Cartledge* [2014] FCA 1047 at [50]‑[54]; *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 407 at [87]‑[100] and *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1213 at [11]‑[25].
4. The Court is to determine a penalty which is proportionate to the contravening conduct and to the contravenor’s circumstances 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] (Gray J), [55] (Graham J); *Markarian v The Queen* [2005] HCA 25, (2005) 228 CLR 357 at [37], [39].
5. A number of authorities indicate that contraventions of industrial laws are to be regarded 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]; *Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union* [2008] FCAFC 170, (2008) 171 FCR 357 at [61]‑[62].
6. The authorities have identified a number of matters bearing on the assessment of the appropriate penalty in a given case:

(a) the nature and extent of the contravening conduct and the circumstances in which it occurred;

(b) the nature and extent of any loss or damage sustained as a result of the contravention;

(c) whether there has been any similar previous conduct by the contravenor;

(d) when there are multiple contraventions, whether these are to be regarded as separate and distinct or arising out of the one course of conduct;

(e) whether senior management was involved in the contravention;

(f) whether the contravenor has exhibited contrition and/or taken any corrective action;

(g) whether the contravenor cooperated with the enforcement authorities.

1. The authorities indicate that a primary purpose of the imposition of civil penalties is deterrence, both personal and general. Thus, in *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482 (*Commonwealth v DFWBII*) at [59], the plurality (French CJ, Keifel, Bell, Nettle and Gordon JJ) said in relation to civil penalties generally that they are not retributive but are “essentially deterrent or compensatory and therefore protective”. Earlier, at [24], the plurality had noted that civil penalties are part of the range of enforcement mechanisms available to regulators by which to achieve compensation, prevention and deterrence. The plurality also referred to the central role of deterrence in the fixing of civil penalties at [55]:

[W]hereas criminal penalties import notions of retribution and rehabilitation, the purpose of a civil penalty, as French J explained in *Trade Practices Commission v CSR Ltd*, is primarily if not wholly protective in promoting the public interest in compliance:

“Punishment for breaches of the criminal law traditionally involves three elements: deterrence, both general and individual, retribution and rehabilitation. Neither retribution nor rehabilitation, within the sense of the Old and New Testament moralities that imbue much of our criminal law, have any part to play in economic regulation of the kind contemplated by Pt IV [of the *Trade Practices Act*]. ... The principal, and I think probably the only, object of the penalties imposed by s 76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act.”

(Citations omitted)

See also the observations of Keane J at [102].

1. In *ABCC v CFMEU* [2017] FCAFC 113, the Full Court (Dowsett, Greenwood and Wigney JJ) said at [98] (omitting the citations):

Whereas criminal penalties import notions of retribution and rehabilitation, the purpose of a civil penalty is primarily, if not wholly, protective in promoting the public interest in compliance. The principal object of a pecuniary penalty is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene; both specific and general deterrence are important. A pecuniary penalty for a contravention of the law must be fixed with a view to ensuring that the penalty is not to be regarded by the offender or others as an acceptable cost of doing business. In relation to general deterrence, it is important to send a message that contraventions of the sort under consideration are serious and not acceptable.

1. In *Director of the Fair Work Building Industry Inspectorate v Ellen (The Longford Gas Plant Case)* [2016] FCA 1395 (*The Longford Gas Plant Case*), Tracey J said at [36]:

General deterrence emerges as a much weightier consideration. There are, literally, hundreds of thousands of employees who are covered by enterprise agreements. Many of these are engaged, like the respondents, in the construction industry. It is necessary to make plain that resort to unprotected industrial action should not be a knee-jerk (or other) response to incidents occurring in the workplace, especially when lawful avenues exist and are provided for in enterprise agreements. Contraventions of provisions such as s 417(1) must attract meaningful penalties lest the purposes served by them be undermined.

1. Finally, in *Australian Building and Construction Commissioner v McCullough (No 2)* [2017] FCA 295, Barker J spoke of the importance of deterrence in relation to multiple contraventions of s 417(1) of the FW Act as follows:

[75] The penalty, however, needs to be sufficiently large, even in the case of first time contraveners … to make it clear that industrial action outside the regulated environment of the Act, and the operation of enterprise agreements, comes at a cost. The penalty has to be sufficiently great to effect specific and general deterrence. It is, in a case such as the present, less about punishing individual contraveners and more about ensuring that employees who might be inclined to engage in industrial action for a day, part of a day or more than a day, fully appreciate that there will be a cost to doing so. That cost should not seem to be nominal.

## Section 557 of the FW Act

1. Section 557 is pertinent to the identification of the number of contraventions by Mr Huddy and Mr Tait given their multiple contraventions as accessories. It provides (relevantly):

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

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

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

…

(3) Subsection (1) does not apply to a contravention of a civil remedy provision that is committed by a person after a court has imposed a pecuniary penalty on the person for an earlier contravention of the provision.

1. It was not suggested that s 557(3) has any application in the present case.
2. The effect of s 557(1) is that two or more contraventions of a civil remedy provision listed in subs (2) are to be taken to constitute a single contravention if committed by the same person and if the contraventions arise out of a course of conduct by that person. Sections 50 and 417 are listed in s 557(2) but ss 343 and 348 are not.
3. The Commissioner accepted that the accessorial contraventions of ss 50, 343, 348 and 417 by Mr Huddy and Mr Tait arose out of a course of conduct by them within the meaning of s 557(1)(b). That being so, the Commissioner accepted that each of Mr Huddy and Mr Tait were to be taken to have committed only one contravention of s 50 and s 417. However, as ss 343 and 348 are not listed in subs (2), the Commissioner submitted that they should be regarded as having committed multiple contraventions of those provisions. I accept that submission.
4. Counsel for the Represented Respondents submitted that s 557 does not preclude the application of the “course of conduct” principle. I accept that that is so: see *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 53 (*ABCC v CFMEU* [2017] FCAFC 53) at [88]. However, as will be seen, I do not accept that means that the application of the course of conduct principle warrants by itself the imposition of a single penalty for multiple contraventions.

## Section 556 of the FW Act

1. Section 556 of the FW Act operates to confine further the number of pecuniary penalties which may be imposed. It provides (relevantly):

**Civil double jeopardy**

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

1. The effect of s 556 is to preclude the imposition of pecuniary penalties for contraventions of two or more civil remedy provisions in respect of the same “particular conduct”. Its application extends to contraventions of multiple provisions in the FW Act itself: *Esso Australia Pty Ltd v Australian Workers’ Union* [2016] FCAFC 72; (2016) 245 FCR 39 at [210] (Buchanan J with whom Siopis J agreed).
2. In *Australian Building and Construction Commissioner v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (The Australian Paper Case) (No 2)* [2017] FCA 367, Jessup J rejected a submission that s 556 operates only when the constituent elements of each contravention are the same and continued:

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

1. The Commissioner accepted that s 556 is applicable in the present case in the case of the employee respondents because the “particular conduct” constituting their contraventions of ss 50, 343, 348 and 417 was the same. This being so, he submitted that penalties should be imposed for the contraventions by the employees of s 348 of the FW Act (on the basis that it was the most serious of the four established contraventions) and that no penalty be imposed in relation to the remaining contraventions. In the case of the 10th respondent (who was found not to have contravened ss 343 and 348), the Commissioner submitted that a penalty should be imposed only for his contravention of s 417.
2. In relation to the contraventions of ss 50, 343, 348 and 417 by Mr Huddy and Mr Tait as accessories, the Commissioner accepted that s 556 had the effect that penalties could be imposed for their contraventions of only one provision. Again, the Commissioner contended that penalties should be imposed for their multiple contraventions of s 348.
3. The Represented Respondents accepted that the selection of the contravention of s 348 as the contravention for which the penalty should be imposed on the employees was appropriate. I will proceed on that basis.
4. The Represented Respondents also submitted that s 556 had a further operation in relation to the multiple accessorial contraventions of s 348 by Mr Huddy and Mr Tait. Section 556 meant, it was submitted, that only one penalty could be imposed for the multiple contraventions. The submission, as I understood it, was that once one penalty for a deemed contravention of s 348 had been imposed on Mr Huddy and Mr Tait, any further penalty would not be imposed under s 348 but under s 550 itself which would, accordingly, be “some other provision” and thereby precluded by s 556.
5. I do not accept that submission. Section 556 does not have any operation in relation to multiple contraventions of the *same* provision in the FW Act. That subject matter is addressed in s 557.
6. Furthermore, s 550 is not a civil remedy provision. Penalties are not imposed under s 550. Instead, s 550 operates to deem persons involved in the contravention by another of a civil remedy provision to have also contravened that provision. The penalty for the deemed contravention is imposed under the civil remedy provision deemed to have been contravened. This means that all the penalties imposed on Mr Huddy and Mr Tait for their contraventions of s 348 as accessories will be imposed under s 348, and that s 556 accordingly has no application to them.
7. In short, penalties may be imposed on Mr Huddy and Mr Tait for each of their accessorial contraventions of s 348.

## Summary of the contraventions for which penalties may be imposed

1. In summary, I consider that the effect of ss 556 and 557 on the contraventions which I have found proved means that penalties *may* be imposed as follows:

(a) on each of the employees (including Mr Tait) but excluding the 10th, 17th, 20th, 22nd, 59th and 69th respondents, for their contraventions of s 348 constituted by their having taken action against LOR with the intention of coercing LOR to engage in “industrial activity”;

(b) on the 10th respondent (Mr Churchyard) for his contravention of s 417(1);

(c) on Mr Huddy for:

(i) 61 contraventions of s 348 by reason of s 550;

(ii) one contravention of s 500;

(d) on Mr Tait (taking into account that he cannot be “involved in” his own contravention of s 348) for 60 contraventions of s 348 by reason of s 550;

(e) on the CFMEU for one contravention of s 500 by reason of the application of ss 550 and 793.

1. I will, however, make declarations to reflect all the contraventions established against the respondents.
2. It was not suggested that a separate penalty should be imposed on either Mr Huddy or Mr Tait in respect of their involvement in Mr Churchyard’s contravention of s 417(1).

## A single penalty for multiple contraventions?

1. Some of the submissions by the parties seemed to assume that it may be possible for the Court to impose a single penalty on Mr Huddy and Mr Tait in respect of their multiple contraventions, being an amount equivalent to the aggregate of the penalty which the Court thought appropriate, subject to any deduction on account of the totality principle.
2. In my opinion, s 546 of the FW Act does not authorise the Court to proceed in that way. Section 546 provides (relevantly):

(1) The Federal Court … may, on application, order a person to pay a pecuniary penalty that the court considers is appropriate if the court is satisfied that the person has contravened a civil remedy provision.

…

*Determining amount of pecuniary penalty*

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

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

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

…

1. A corresponding submission was recently considered by the Full Court in *ABCC v CFMEU* [2017] FCAFC 113 in relation to s 49 of the *Building and Construction Improvement Act 2005* (Cth) (the BCI Act) which is in terms relevantly identical to s 546. The Full Court held that s 49 of the BCI Act did not authorise the Court to impose a single penalty for multiple contraventions of s 38 of the BCI Act, at [125]‑[126]. The Full Court also endorsed the following statement in *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2016] FCA 413 (*DFWBII v CFMEU*) at [50] in relation to the construction of s 546(1) and (2) of the FW Act:

The terminology of subs (1) suggests that, when the Court is satisfied that a person has contravened a civil remedy provision, it is to exercise a discretionary judgment as to whether to order the payment of a pecuniary penalty. It indicates, however, that when the Court decides to impose a pecuniary penalty it does so in respect of the particular contravention which the Court has found established. That is to say, each contravention is to have its own penalty. This impression is confirmed by the terms of subs (2) which fixes the maximum penalty which may be imposed by reference to that applicable to an individual contravention.

1. The Full Court noted that there have been some cases in which single penalties have been imposed for multiple contraventions of civil penalty provisions. It regarded those decisions as reflecting a pragmatic approach to the imposition of penalties taking into account the position taken jointly by the parties in the pleadings, statement of agreed facts and submissions. It concluded, however, at [148] that neither the course of conduct principle nor the totality principle, properly considered and applied, permitted, let alone required, the Court to impose a single penalty in respect of multiple contraventions of a pecuniary penalty provision. The Full Court then continued at [148]:

There is no doubt that, in an appropriate case involving multiple contraventions, the Court should consider whether the multiple contraventions arose from a course or separate courses of conduct. If the contraventions arose out of a course of conduct, the penalties imposed in relation to the contraventions should generally reflect that fact, otherwise there is a risk that the respondent will be doubly punished in respect of the relevant acts or omissions that make up the multiple contraventions. That is not to say that the Court can impose a single penalty in respect of each course of conduct. Likewise, there is no doubt that in an appropriate case involving multiple contraventions, the Court should, after fixing separate penalties for the contraventions, consider whether the aggregate penalty is excessive. If the aggregate is found to be excessive, the penalties should be adjusted so as to avoid that outcome. That is not to say that the Court can fix a single penalty for the multiple contraventions.

1. Section 557 of the FW Act seems particularly pertinent in the present context. That section indicates that the legislature has considered the circumstances in which multiple contraventions may be taken to constitute a single contravention and, therefore, a single penalty imposed. The terms of s 557 impliedly exclude the possibility of a single penalty being imposed for multiple contraventions in other circumstances. In particular, a finding that two or more contraventions occurred in a single course of conduct does not of itself authorise the imposition of a single penalty for those contraventions.
2. I also note that in *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCAFC 59; (2015) 229 FCR 331, the Full Court noted at [43] that, absent statutory authority to do so, the application of the totality principle does not authorise a sentencing court to impose a single global sentence for multiple offences and held that the same applied with respect to the imposition of civil penalties under the BCI Act.

## Relevant considerations

1. Strictly speaking, penalties should be imposed on the individual respondents having regard to the Court’s assessment of their individual culpabilities and circumstances. However, neither counsel submitted that it was necessary in the circumstances of this case to distinguish between the employee respondents. Further, counsel for the Represented Respondents did not adduce evidence of, or make submissions concerning, the individual financial and other circumstances of the Represented Respondents. In short, counsel for the Commissioner contended, and counsel for the Represented Respondents accepted, that penalties in the same amounts could be imposed on all of the employee respondents.
2. It is appropriate to commence by noting some general matters regarding the imposition of penalties for a contravention of s 348.
3. Section 348 is contained in Div 4 of Pt 3‑1 of the FW Act. Looked at generally, the purpose of Div 4 is to prohibit activities which would detract from the orderly conduct of industrial affairs. Section 348 is an important element of that scheme. It proscribes actions taken with the intention of coercing another to engage in “industrial activity”. That term is defined very broadly. In the present case, the employees contravened s 348 by taking action (which was of itself unlawful) to cause LOR to comply with the “request” that it change the finishing time.
4. In *ABCC v CFMEU* [2017] FCAFC 53 at [73], Dowsett and Rares JJ said of s 348:

The legislative prohibition in s 348 is designed to proscribe the use of industrial action to coerce someone else into, among other things, complying with a request whether it is lawful or not. The purpose of s 348 is to make the act of coercion itself unlawful, regardless of its motivation. The lawfulness of a request, the fulfilment of which the person seeks to achieve by taking coercive action, is an element of a contravention of s 348 and cannot be treated as, in any way, mitigating the seriousness of that contravention.

1. Counsel for the Commissioner emphasised that the employees knew at the time that they engaged in the industrial action that it was a form of unlawful activity. Mr Huddy had told them as much. Further, on my findings, most of the employees knew LOR’s reasons for maintaining that it was entitled to have its employees continue at its worksite until 5 pm see [354] in the principal judgment. The Commissioner emphasised that each of the individual employees (other than the 10th respondent) had taken the industrial action with a view to coercing LOR to provide a satisfactory response to their demands that it change its position on the time at which the buses departed from the LOR worksite. The element of coercion means that the respondents’ conduct must be regarded seriously.
2. The Commissioner also emphasised that the employees had engaged in the industrial action even though the LOR Agreement, by which they were covered, contained a dispute resolution procedure prohibiting the taking of industrial action and requiring the parties to participate in an orderly process for the resolution of industrial disputes.
3. At the time the work stoppage commenced, it was to be of indefinite duration and it continued in fact throughout the remainder of the working day on 22 October 2013. Further, the work stoppage came to an end only after the intervention of the Fair Work Commission (the FWC).
4. The Commissioner did not lead evidence that the work stoppage had in fact caused loss and damage to LOR or to its principal. Nevertheless, I am willing to infer that the employees’ conduct did cause some disruption and loss. As some of the employees who gave evidence indicated, it was the loss of productivity on the day which the workers hoped would be a cause of pressure to LOR. Further, I accept the evidence of Mr Nicholls, LOR’s Civil Construction Manager, that LOR had intended that its employees would on 22 October 2013 carry out a number of tasks including steel fixing, forming, preparation for concrete pours, earthworks and the associated activities which support those tasks. Like Charlesworth J in *Director of the Fair Work Building Industry Inspectorate v Robinson* [2016] FCA 525; (2016) 241 FCR 338 at [39], I consider that the Court does not require actual evidence of economic loss in order to conclude that the employees’ activities did have that effect.
5. I take into account, however, that a one day cessation of work in the context of such a large and prolonged undertaking as the Project may not, in the overall scheme of things, have been productive of significant economic loss and that LOR was in any event spared the wage expense for 22 October 2013. Further, it is apparent that some time would have been lost in any event on 22 October 2013 by reason of the electrical storm occurring in the afternoon. Further still, as Barker J observed in *Director of the Fair Work Building Industry Inspectorate v Construction, Forest, Mining and Energy Union* [2016] FCA 798 at [68] “unless there is further evidence led as to the extent of harm suffered, in terms of particular financial loss or damage, the Court should not assume that the harm disclosed was extensive.”
6. It was not suggested that any of the individual respondents has any record of contraventions before 22 October 2013. Mr Huddy has been found to have contravened provisions of the FW Act on subsequent occasions but they are not to be taken into account in the determination of penalty in his case.
7. The Commissioner emphasised that none of the employees has made any expression of contrition or regret. While it was true that the represented individual employees had admitted their contraventions of s 417 and are entitled to some credit on that account, no corresponding credit can be given in respect of the contraventions of ss 50, 343 and 348 which they had disputed. I will take into account, however, that the manner of the conduct of the trial by the Represented Respondents facilitated its expeditious conduct.
8. Counsel for the Represented Respondents emphasised a number of matters by way of mitigation. The first was that the work stoppage related to the grievance of the employees concerning their daily finishing time and, in particular, that they were being treated differently from the employees of other contractors who were subject to the same terms and conditions of employment. Counsel did not suggest that the existence of the grievance justified the conduct of the employees but submitted that it went to the assessment of the culpability of their conduct. That is to say, their conduct should be regarded as less culpable than would have been appropriate had it been engaged in capriciously or for the purpose of demonstrating industrial strength or if it had been timed so as to maximise the economic damage to LOR. I accept that this is a relevant circumstance but characterise this consideration somewhat differently than did counsel. In my assessment, the basis for the conduct of the employees is not mitigatory: instead, it indicates that their conduct is not marked by particular circumstances of aggravation.
9. In the same vein, I take into account that the work stoppage appears to have occurred as a result of a spontaneous decision, and without planning or premeditation.
10. Counsel also pointed to the fact that the stoppage did not have the effect of overbearing LOR’s will in respect of the bus departure time as it did not lead to any change in those times. I also accept that there is no suggestion that the conduct was repeated subsequently. However, I do not regard these matters as mitigatory. The circumstance that the industrial action was unsuccessful does not mitigate the employees’ culpability in engaging in that conduct. The absence of any repetition of the conduct indicates only that the employees have, since 22 October 2013, complied with the law, and their conduct in doing so cannot be regarded as mitigatory of their conduct on 22 October 2013. I accept, however, that the absence of any subsequent contravention does bear on the extent to which the penalties imposed need reflect personal deterrence.
11. It is to the credit of some of the employees that, after the sounding of the “Yellow Alert” warning of the approaching electrical storm, a number of them returned to their workplaces for about 30 minutes in order to make them safe. They did so in accordance with normal practice on the issue of a Yellow Alert. In doing so, the employees demonstrated some consideration for the interests of LOR despite their participation in the stoppage. The evidence did not identify the particular employees who engaged in this activity and, as noted above, the Court was not asked to distinguish between the employee respondents in relation to penalty.

## Mr Huddy’s contravention of s 500

1. A number of decisions of the Court have addressed the purpose of s 500 in the scheme established by the FW Act for the exercise of rights of entry. The decisions have also identified matters bearing upon the fixation of a proper penalty for a contravention of s 500. I venture to refer in this respect to my own decision in *DFWBII v CFMEU* at [39]‑[47] and will not repeat what I said there.
2. A number of features aggravate Mr Huddy’s contravention on 22 October 2013. It was prolonged (extending from about 10.30 am to about 4.45 pm). In addition, the contravention was deliberate and blatant. Mr Huddy knew that his conduct constituted a contravention of s 500 and yet chose to continue regardless. Further, he was dismissive of the requests of Ms Garland and of security staff that he leave the site.
3. On the other hand, I accept that Mr Huddy’s conduct was not marked by other aggravating features: his contravention was not planned or premeditated as is seen some cases; there is no suggestion that Mr Huddy’s conduct in contravention of s 500 added to the disruption or inconvenience experienced by LOR or others on 22 October 2013; there is no suggestion that Mr Huddy spoke abusively to the LOR personnel with whom he was dealing; and it is to his credit that in these proceedings he acknowledged from the outset his contravention of s 500.
4. Counsel for the Represented Respondents did not provide the Court with any information regarding Mr Huddy’s personal circumstances to be taken into account in the assessment of penalty in this case, although I note that he is no longer employed as an organiser by the CFMEU.

## The contravention of the CFMEU

1. In several decisions, this Court has spoken of the CFMEU’s appalling record of contraventions of civil penalty provisions in the FW Act. It is apparent that the CFMEU chooses to ignore and, on occasion, to defy, the law as and when it chooses.
2. Substantial penalties have been imposed on the CFMEU for contraventions of s 500 in the past. However, I take into account that the conduct for many of the contraventions giving rise to the imposition of the penalties occurred after 22 October 2013 and the CFMEU is not, by the penalty imposed in this case, to be penalised again for its later contraventions. It means only that the Court cannot extend any lenience to the CFMEU by reason of it having demonstrated a willingness to comply with the law. Nevertheless, the Schedule of previous contraventions provided by the Commissioner indicates six previous contraventions by the CFMEU of s 500, as at 22 October 2013.
3. As with the case of Mr Huddy, I take into account that the contravention of s 500 on 22 October 2013 was not planned or premeditated. Instead, the contravention appears to have occurred as a result of Mr Huddy’s reaction to the spontaneous conduct of the LOR employees during the smoko meeting.
4. Counsel for the Represented Respondents did not urge on the Court any other matter of mitigation on behalf of the CFMEU.

## Fixing the penalties

1. Taking into account all the considerations I have mentioned and, in particular, the seriousness of the contraventions of s 348 and the importance of deterrence, I consider that the penalties for the contraventions by the individual employees, including Mr Tait, should be fixed at $1,500.
2. In the case of the 10th respondent (Mr Churchyard), a penalty is to be imposed for his contravention of s 417(1). I consider that a penalty of $1,200 is appropriate in his case. This is less than that imposed on the other employee respondents because the absence of the element of intent to coerce makes his contravention less serious.
3. In the case of Mr Huddy’s and Mr Tait’s multiple contraventions of s 348 as accessories, the position is more complex. Here, account must be taken of the fact that, in substance, it is the same conduct of Mr Huddy and Mr Tait which constituted their respective aiding and abetting of the contraventions of the individual employees. This means that particular care must be taken to avoid double punishment.
4. That does not mean that a penalty should be imposed as though for a single contravention. To do so would not take account of the fact that Mr Huddy and Mr Tait aided and abetted 61 and 60 contraventions of s 348 respectively and not just a single contravention.
5. In the context of sentencing for multiple offences and imposing civil penalties for multiple contraventions, the passage from the judgment of Wells J in *Attorney General v Tichy* (1982) 30 SASR 84 at 92‑3 has been frequently cited and has been influential. It is not necessary for present purposes to repeat the quotation of the passage in full. It is sufficient to note that Wells J emphasised that a sentence should be imposed in a practical way (and not dictated by form) so that an offender is sentenced for what, viewing the circumstances broadly and reasonably, is the offender’s criminal conduct. Wells J concluded the passage in *Tichy* by saying:

What must be done is to use the various tools of analysis to mould a just sentence for the conduct of which the prisoner has been guilty. Where there are truly two or more incursions into criminal conduct, consecutive sentences will generally be appropriate. Where, whatever the number of technically identifiable offences committed, the prisoner was truly engaged upon one multi‑faceted course of criminal conduct, the judge is likely to find concurrent sentences just and convenient.

1. In a pecuniary penalty regime such as that applicable under the FW Act, penalties cannot be made cumulative or concurrent. However, the same effect can be achieved by the Court imposing a reduced penalty, or no penalty at all, in respect of some contraventions. That is the approach which I consider it proper to adopt in the present case. That is to say, I consider that penalties should be imposed on Mr Huddy and Mr Tait for their multiple contraventions of s 348 as accessories by imposing penalties for some of the contraventions, reduced penalties for later contraventions, and no penalties at all in respect of the remaining contraventions. By this means, the Court will indicate the penalties which it considers appropriate for the contraventions considered by themselves but then avoid the infliction of double punishment. It will also allow account to be taken of the prospect that the intended deterrent effect will be achieved by the earlier penalties and, accordingly, to the reduced need for penalties to be imposed in respect of other contraventions in order to achieve the same effect.
2. Applying that approach, I impose penalties on Mr Huddy as follows. In respect of his accessorial liability for the first five contraventions (the contraventions of the 2nd, 4th, 5th, 6th and 7th respondents), penalties of $1,200 each. These amounts are less than those imposed on the individual employees to reflect Mr Huddy’s reduced culpability (he was not a principal contravenor and he did not instigate the conduct). In respect of the next five contraventions as an accessory (involving the 8th, 9th, 11th, 12th and 13th respondents), penalties of $1,000 each. In respect of the next five contraventions (involving the 14th, 15th, 16th, 18th and 19th respondents), penalties of $500. The total of these penalties is $13,500. As I consider that penalties of this order reflect appropriately Mr Huddy’s culpability for his involvement as an accessory, I will not impose penalties for his remaining contraventions in that capacity.
3. In the case of Mr Tait, I impose penalties as follows. In the case of the first five contraventions as an accessory (involving the 4th, 5th, 6th, 7th and 8th respondents), I impose penalties of $1,000 each. In the case of the next five contraventions as an accessory (involving the 9th, 11th, 12th, 13th and 14th respondents), I impose penalties of $750 each. In the case of the next five contraventions as an accessory (involving the 15th, 16th, 18th, 19th and 20th respondents), I impose penalties of $400 each. The total of these penalties is $10,750.
4. The rationale for the penalties imposed on Mr Tait is the same as that applicable in the case of Mr Huddy but I have fixed lower penalties his case to take account of his reduced culpability compared with Mr Huddy (who was a paid organiser), the fact that a penalty has been imposed on him for his own contraventions of s 348, and of the fact that he was involved in one less contravention as an accessory than was Mr Huddy. As I consider that the penalties imposed on Mr Tait achieve the purposes of the imposition of penalties, I will not impose any further penalties on him for his contraventions as an accessory.
5. In respect of Mr Huddy’s contravention of s 500, I impose a penalty of $2,500.
6. In respect of the CFMEU’s accessorial contravention of s 500, I impose a penalty of $25,000. This penalty takes account in particular of the maximum penalty applicable in the case of the CFMEU ($51,000), the CFMEU’s record of contraventions of s 500 as at 22 October 2013, and the seriousness of the contravention.
7. In relation to the penalties imposed on Mr Huddy and Mr Tait, I have considered whether considerations of totality should require some moderation of the overall penalty imposed on them. A reduction of this kind would be appropriate if the aggregation of the penalties is not a “just and appropriate measure” of their total culpability or if those penalties would be crushing: *Postiglione v The Queen* [1997] HCA 26; (1996) 189 CLR 295 at 307‑8.
8. I consider that no reduction for the totality principle is warranted. I have endeavoured in the fixation of the penalties to impose amounts which are a proper measure of the culpability of Mr Huddy and Mr Tait.

## Summary and declarations

1. I will issue declarations in the form proposed by the Commissioner. Those declarations are set out at the commencement of these reasons. In addition, I impose penalties as follows:

(a) on each of the employees (including Mr Tait but excluding the 10th, 17th, 20th, 22nd, 59th and 69th Respondents) for their contraventions of s 348, a penalty of $1,500;

(b) on the 10th Respondent (Mr Churchyard), a penalty of $1,200 for his contravention of s 417(1);

(c) on Mr Huddy for his accessorial contraventions of s 348 in respect of the 2nd, 4th, 5th, 6th and 7th Respondents, penalties of $1,200 each; for his accessorial contraventions of s 348 in respect of the 8th, 9th, 11th, 12th and 13th Respondents, penalties of $1,000 each; for his accessorial contraventions in respect of the 14th, 15th, 16th, 18th and 19th Respondents, penalties of $500 each, with no further penalties imposed for his accessorial contraventions of s 348;

(d) on Mr Tait for his accessorial contraventions involving the 4th, 5th, 6th, 7th and 8th Respondents, penalties of $1,000 each; for his accessorial contraventions of s 348 involving the 9th, 11th, 12th, 13th and 14th Respondents, penalties of $750 each; and for his accessorial contraventions involving the 15th, 16th, 18th, 19th and 20th Respondents, penalties of $400 each with no further penalties imposed for his accessorial contraventions of s 348;

(e) on Mr Huddy for his contravention of s 500, a penalty of $2,500;

(f) on the CFMEU for its accessorial contravention of s 500, a penalty of $25,000.

1. Each of the penalties is to be paid to the Commonwealth.
2. Having regard to the terms of s 570 of the FW Act, there is to be no order as to costs of the proceedings.

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| I certify that the preceding one hundred and eleven (111) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice White. |

Associate:

Dated: 14 September 2017

SCHEDULE OF PARTIES

|  |  |
| --- | --- |
|  | NTD 33 of 2014 |
| Respondents |  |
| Fourth Respondent: | STEVAN ALLAN |
| Fifth Respondent | RICHARD ALLEY |
| Sixth Respondent | QUENTIN BARTLETT |
| Seventh Respondent | CORINNE BOYD |
| Eighth Respondent | DAVID BRIGHT |
| Ninth Respondent | OLIVER CANUTE |
| Tenth Respondent | GLYNN CHURCHYARD |
| Eleventh Respondent | DESMOND COLLINS |
| Twelfth Respondent | WADE COUZENS |
| Thirteenth Respondent | STUART CROFT |
| Fourteenth Respondent | NATHAN CROSSEN |
| Fifteenth Respondent | CARL DAWSON |
| Sixteenth Respondent | LIAM DAY |
| Seventeenth Respondent | MATTHEW DE-NITTIS |
| Eighteenth Respondent | CARL DELANEY |
| Nineteenth Respondent | COLE DIEDRICH |
| Twentieth Respondent | GREGORY DUFTY |
| Twenty First Respondent | MICHAEL ELLIOT |
| Twenty Second Respondent | CHRIS FOWLES |
| Twenty Third Respondent | ANTHONY GIANNONE |
| Twenty Fourth Respondent | CLINT GIBBINGS |
| Twenty Fifth Respondent | JOHN GILDER |
| Twenty Sixth Respondent | KENT GRACE |
| Twenty Seventh Respondent | BRETT GRIFFITHS |
| Twenty Eighth Respondent | KARL HANLEY |
| Twenty Ninth Respondent | JORDAN HANSON |
| Thirtieth Respondent | GREG HINES |
| Thirty First Respondent | MATT HORE |
| Thirty Second Respondent | JARROD JACKSON |
| Thirty Third Respondent | GAVAN JAMES |
| Thirty Fourth Respondent | GARTH KENT |
| Thirty Fifth Respondent | MATTHEW KERRIGAN |
| Thirty Sixth Respondent | ANDREAS KIRCHHOF |
| Thirty Seventh Respondent | PHILL LANDRIGAN |
| Thirty Eighth Respondent | STEVEN LOWE |
| Thirty Ninth Respondent | CHRISTOPHER LYND |
| Fortieth Respondent | RUSSELL MAVIN |
| Forty First Respondent | TIMOTHY MCCARTHY |
| Forty Second Respondent | JASON MOODY |
| Forty Third Respondent | SCOTT MORSE |
| Forty Fourth Respondent | RAPHAEL MOUAURI |
| Forty Fifth Respondent | DERICK MULHALL |
| Forty Sixth Respondent | GARY MULLINS |
| Forty Seventh Respondent | CIAN MURPHY |
| Forty Eighth Respondent | NOLA NGATA |
| Forty Ninth Respondent | BERNARD NIKI |
| Fiftieth Respondent | NOOVAO NOOVAO |
| Fifty First Respondent | ASHLEY OWEN |
| Fifty Second Respondent | DIMITRIOS PANATOS |
| Fifty Third Respondent | EPHRAIM PIITI |
| Fifty Fourth Respondent | WAYNE ROSSITER |
| Fifty Fifth Respondent | MICHAEL RYAN |
| Fifty Sixth Respondent | CHRISTOPHER SMITH |
| Fifty Seventh Respondent | SEAN SMITH |
| Fifty Eighth Respondent | MICHAEL SOUL |
| Fifty Ninth Respondent | KRIS STEELE |
| Sixtieth Respondent | DANIEL SUBOTIC |
| Sixty First Respondent | MITCHELL SUTCLIFFE |
| Sixty Second Respondent | BENJAMIN TEUDET |
| Sixty Third Respondent | SARON THOMASSON |
| Sixty Fourth Respondent | BENJAMIN TITO |
| Sixty Fifth Respondent | TOU UNIUA |
| Sixty Sixth Respondent | JADE WATSON |
| Sixty Seventh Respondent | MICHAEL WEEKS |
| Sixty Eighth Respondent | BRENDAN WEISS |
| Sixty Ninth Respondent | NATHAN WHITFIELD |