FEDERAL COURT OF AUSTRALIA

Fair Work Ombudsman v National Union of Workers [2019] FCA 1826

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| File number: | VID 675 of 2016 |
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| Judge: | **KERR J** |
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| Date of judgment: | 30 October 2019 |
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| Date of publication of reasons: | 7 November 2019 |
|  |  |
| Catchwords: | **INDUSTRIAL LAW –** *Fair Work Act 2009* (Cth) s 417 – number of contraventions – meaning of “organise” – single period of industrial action – two contraventions found  **INDUSTRIAL LAW –** *Fair Work Act 2009* (Cth) s 557 – course of conduct – whether two contraventions of s 417 arose out of the same course of conduct by the Respondent – no relevant course of conduct  **INDUSTRIAL LAW –** *Fair Work Act 2009* (Cth) ss 417, 421, 556 – civil double jeopardy – contravention of both s 417 and s 421 – consideration of *Australian Building and Construction Commissioner v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (the Australian Paper Case) (No 2)* [2017] FCA 367 and *Australian Building and Construction Commissioner v Upton (the Gorgon Projects Case) (No 2)* [2018] FCA 897 – judicial comity – Court not satisfied that relevant reasoning plainly wrong – Respondent only liable to pay a pecuniary penalty for contravention of first provision – contravention of second provision taken into account as aggravating factor in determining quantum of pecuniary penalty  **INDUSTRIAL LAW –** *Fair Work Act 2009* (Cth) s 355(b) admission of contravention – whether intent to coerce company not to engage “a particular independent contractor” – no basis for inferring such intent – no contravention  **INDUSTRIAL LAW –** *Fair Work Act 2009* (Cth) ss 417, 421 – penalties – general deterrence |
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| Legislation: | *Fair Work Act 2009* (Cth) ss 355, 417, 421, 556, 557 |
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| Cases cited: | *Australian Building and Construction Commissioner v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (the Australian Paper Case) (No 2*) [2017] FCA 367  *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Nine Brisbane Sites Appeal)* [2019] FCAFC 59; 286 IR 336  *Australian Building and Construction Commissioner v Hall* [2017] FCA 274; 269 IR 28  *Australian Building and Construction Commissioner v Upton (the Gorgon Projects Case) (No 2)* [2018] FCA 897  *BHP Billiton Iron Ore v National Competition Council* [2007] FCAFC 157; 162 FCR 234  *Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 407; 234 FCR 451  *Director of Fair Work Building Industry Inspectorate v Robinson* [2016] FCA 525; 241 FCR 388  *Director of Fair Work Building Inspectorate v Construction, Forestry, Mining and Energy Union (The Red and Blue Case)* [2015] FCA 1125; 254 IR 200  *IW v City of Perth* [1997] HCA 30; 191 CLR 1  *United Group Resources Proprietary Limited v Calabro (No. 7)* [2012] FCA 432; 203 FCR 247 |
|  |  |
| Date of hearing: | 29 October 2019 |
|  |  |
| Date of last submissions: | 25 October 2019 |
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| Registry: | Victoria |
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|  |  |
| National Practice Area: | Employment & Industrial Relations |
|  |  |
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ORDERS

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|  | | VID 675 of 2016 |
| BETWEEN: | FAIR WORK OMBUDSMAN  Applicant | |
| AND: | NATIONAL UNION OF WORKERS  Respondent | |

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| JUDGE: | KERR J |
| DATE OF ORDER: | 6 NOVEMBER 2019 |

**THE COURT DECLARES THAT:**

1. On 9 August 2015, the Respondent contravened section 417(1) of the *Fair Work Act 2009* (Cth) (**FW Act**) by organising the industrial action by employees of Woolstar Pty Ltd (**Woolstar**) at the Melbourne Liquor Distribution Centre in Laverton, Victoria (**MLDC**) between 10 and 11 August 2015, being:
   1. on 10 August 2015:
      1. approximately 190 Woolstar employees presenting for work but refusing to perform any work; and
      2. approximately 47 Woolstar employees failing to present for work as required; and
   2. on 11 August 2015:
      1. approximately 210 Woolstar employees presenting for work but refusing to perform any work; and
      2. approximately 55 Woolstar employees failing to present for work as required (**the first MLDC section 417 contravention**).
2. On 11 August 2015, the Respondent contravened section 417(1) of the FW Act by organising the industrial action by employees of Woolstar at the MLDC between 12 and 13 August 2015, being:
   1. on 12 August 2015:
      1. approximately 115 Woolstar employees presenting for work but refusing to perform any work; and
      2. approximately 101 Woolstar employees failing to present for work as required; and
   2. on 13 August 2015:
      1. approximately 44 Woolstar employees presenting for work but refusing to perform any work; and
      2. approximately 175 Woolstar employees failing to present for work as required (**the second MLDC section 417 contravention**)
3. The Respondent contravened section 417(1) of the FW Act by organising the industrial action by employees of Queensland Property Investments Pty Ltd (**QPI**) at the Melbourne Regional Distribution Centre in Broadmeadows, Victoria (**MRDC**) on 13 August 2015, being approximately 64 QPI employees presenting for work but refusing to perform any work (**the MRDC section 417 contravention**).
4. On 11 August 2015, the Respondent contravened section 421(1) of the FW Act by organising industrial action by employees of Woolstar referred to in declaration 2 above, at the MLDC between 12 and 13 August 2015 in contravention of an order made by the Fair Work Commission pursuant to section 418 of the FW Act on 11 August 2015.

**THE COURT ORDERS BY CONSENT THAT:**

1. The Respondent pay the sum of $101,539.50 to Woolworths Group Limited (ACN 000 014 675) (**Woolworths**) within 28 days of the date of this order, as compensation for additional delivery costs ultimately incurred by Woolworths as a result of the MLDC being inaccessible from 10 to 13 August 2015.

**THE COURT FURTHER ORDERS THAT:**

1. The Respondent pay a pecuniary penalty of $19,440 in relation to the first MLDC section 417 contravention.
2. The Respondent pay a pecuniary penalty of $34,020 in relation to the second MLDC section 417 contravention.
3. The Respondent pay a pecuniary penalty of $19,440 in relation to the MRDC section 417 contravention.
4. The Respondent pay the pecuniary penalties to the Consolidated Revenue Fund of the Commonwealth within 28 days of this order pursuant to section 564(3)(a) of the FW Act.
5. There be no order as to costs.
6. The matter is otherwise dismissed.

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

REASONS FOR JUDGMENT

(REVISED FROM THE TRANSCRIPT)

KERR J:

1. This proceeding concerns unprotected industrial action and picketing that occurred in August 2015 at two distribution centres in suburban Melbourne which form part of the supply chain for Woolworths Group Limited. The proceeding was commenced by the Fair Work Ombudsman (**FWO)** by way of a statement of claim dated 20 June 2016. The National Union of Workers (**NUW**), the Respondent to the proceeding, filed and served a defence on 8 September 2016. The Applicant, the FWO, filed and served affidavits and outlines of evidence in September 2017.

# BACKGROUND

1. On 9 October 2019, the Applicant and the Respondent agreed on an Amended Statement of Agreed Facts (**SOAF**) for the purposes of s 191 of the *Evidence Act 1995* (Cth) and for the purposes of assisting the Court in determining appropriate declarations or orders in respect of the Respondent’s admitted contraventions of the *Fair Work Act 2009* (Cth) (**Fair Work Act**).
2. Unfortunately, as will become apparent, the SOAF leaves unresolved certain contentions as between the parties, particularly as to what precisely were the number of contraventions as were admitted. Turning on the Court’s findings in respect of those unresolved points, issues potentially arise as to whether or not either or both ss 556 (civil double jeopardy) or 557 (course of conduct) of the Fair Work Act are applicable.
3. As evidence in the proceedings the Applicant read, without objection, the following five affidavits:
   1. The affidavit of Edward Martin Hall, affirmed 21 August 2019, subject to the deletion of paragraph 12 and annexure EMH1;
   2. The affidavit of Damian Michael Johnson, affirmed 26 August 2019, subject to the deletion of the last sentence of paragraph 45 and annexure DMJ13;
   3. The affidavit of Gary Stannard, affirmed 26 August 2019;
   4. The affidavit of Brett Saunders, affirmed 29 August 2019; and
   5. The affidavit of Damien Michael Johnson, affirmed 8 October 2019.
4. The Respondent read into evidence the affidavit of Belinda Jacobi, sworn 25 September 2019. That evidence was received without objection, subject to her evidence in paragraph 28 being relied on by the Court only for non-hearsay purposes.
5. It is convenient first to identify the industrial context in which this proceeding arose. Mr Johnson refers to the workplace which was principally affected by the relevant industrial action as follows:

2. I am employed by Woolworths Group Limited **(Woolworths)** as the Supply chain Manager for the Melbourne Liquor Distribution Centre **(MLDC** or **Site)** in Laverton. The MLDC is owned and operated by Woolstar Pty Ltd (Woolstar). I have been in this role since June 2015. I have been employed by Woolworths since 2000.

…

5. The MLDC is a warehouse, which is approximately 67,000 square metres. It is a facility that services approximately 1,700 Woolworths' stores, including Dan Murphy's stores, Woolworths supermarkets and BWS stores **(MLDC Stores).** The MLDC distributes liquor for Dan Murphy's and BWS stores nationwide and cigarettes for Dan Murphy's, BWS stores and Woolworths supermarkets in Victoria. The MLDC also distributes ambient grocery products (which are groceries other than fresh produce or frozen and chilled foods), confectionary and aerosols to Victorian Woolworths supermarkets.

…

9. The amount of cartons that the MLDC distributes per week varies throughout the year depending on the demand for supermarket and liquor goods at the time. In or around August each year, the amount of cartons despatched weekly is approximately 870,000 to 930,000 cartons In order to distribute these cartons, the MLDC receives approximately 500 truck deliveries each week during the month of August. Further, approximately 500 trucks leave the MLDC each week to despatch their goods to the stores.

…

11. Each of the full−time, part-time and casual employees whose employment is covered by an enterprise agreement **(Employees)** (such as the *Woolstar Pty Limited Melbourne Liquor Distribution Centre Enterprise Agreement 2014−2017* **Agreement))** work three main shifts that operate throughout the day, each with different hours. For example, full−time Employees generally work three overlapping shifts: 5.00 am to 1.00 pm, 11.30 am to 8.00 pm and 2.30 pm to 11.00 pm. Casual and part-time employees also work different staggered shifts throughout the day. The shifts are staggered in this way to manage the flow of work throughout the day.

1. The following passages from the affidavit of Mr Stannard are relevant to the second workplace affected:

2. I am currently employed by Woolworths Group Limited **(Woolworths)** as Supply Chain Manager at the Melbourne National Distribution Centre **(MNDC)** and the Melbourne Regional Distribution Centre, which is located in Broadmeadows, Victoria **(MRDC** or **Site).**

…

5. The MRDC is a distribution centre operated by Queensland Property Investments Pty Ltd **(QPI)** (a wholly owned subsidiary of Woolworths) that distributes goods to approximately 205 Woolworths stores throughout Victoria. The MRDC distributes fast moving ambient goods that stores need every day, such as Coca−Cola and Cornflakes. The MRDC does not distribute chilled produce, liquor or cigarettes. The MRDC is due to close in December 2019.

6. As at around August 2015, the QPI employed approximately 500 people to work at the Site, including permanent, part-time and casual employees **(Employees).** Up to around 250 employees may be rostered to work at the Site at any one time.

7. As at around August 2015, the MRDC operated seven days per week and had staggered morning, afternoon and night shifts. There were approximately 150 employees rostered on the day shift, 100 employees rostered on the afternoon shift and approximately six employees rostered on the night shift.

1. The following passages from the affidavit of Ms Jacobi provide relevant background as to the Respondent:

2. I am the President of the Victorian Branch of the National Union of Workers **(NUW).**  Ihave held this position since August 2018.

…

11. The NUW has coverage in the following industries: warehousing, cold storage, distribution/logistics, horticulture, the manufacture of food, pharmaceuticals, oil and rubber products and market research, among other things.

…

15. In addition to its day to day member representation and campaigning work, the NUW is active in supporting vulnerable workers in Australia and elsewhere. For example:

(a) the NUW has been active in lobbying for the introduction of labour hire licencing legislation in Victoria, Queensland and South Australia;

1. In annexure BJ2 to her affidavit, Ms Jacobi also refers to concerns that the Respondent has come to hold regarding labour hire generally. It is convenient to provide the following brief extract:

Over the last 40 years, the nature of the employer/employee relationship has changed in Australia. Where people once expected a decent job they could count on in the form of direct, ongoing permanent work, they are now faced with the prospect of a lifetime of precarious employment.

…

An increasingly common feature of the contemporary Australian workplace sees "host" employers shifting risk and responsibility by utilising labour hire agencies, contractors or by way of other mechanisms, such as franchising arrangements. This trend has been a major source of the undermining of the industrial relations system and there has been much evidence of exploitation through this model, uncovered by trade unions, the Australian media and the Fair Work Ombudsman as well as parliamentary inquiries.

The increasingly precarious nature of work in Australia does not discriminate. In the words of Job Watch, "workers across all industries, all occupations and at all levels [are] at risk of insecure work."'

1. It is uncontentious that prior to the events set out in the SOAF, the NUW had a good and cooperative relationship with Woolworths and the two entities Woolworths owned and utilised for its warehousing services as are referred to respectively above: the Melbourne Liquor Distribution Centre (**MLDC**) and the Melbourne Regional Distribution Centre (**MRDC**). It is further uncontentious that since the events that are referred to in the SOAF the NUW has resumed a generally good and cooperative relationship with both Woolstar and Queensland Property Investments Pty Ltd (**QPI**).
2. It is also uncontentious that the NUW has not previously, and nor since those events, been found to have contravened a civil penalty provision of the Fair Work Act. It is similarly uncontentious that since those events the NUW has expressed contrition for its offending conduct. In that regard I refer to [20] and [21] of Ms Jacobi’s affidavit:

20. I acknowledge that the NUW contravened sections 417(1), 421 and 355(b) of the [Fair Work] Act by reason of the conduct set out in the Statement of Agreed Facts dated 5 August 2019.

21 On behalf of the NUW, I sincerely regret that this conduct occurred and apologise for it. The NUW welcomes the current collaborative, cooperative and professional relationship that it has with each of Woolstar Pty Ltd **(Woolstar),** Queensland Property Investments Pty Ltd **(QPI)** and Woolworths.

1. Having established the relevant context, it is now convenient to set out in full the SOAF:

**Introduction**

1. This Statement of Agreed Facts **(SOAF)** is agreed between the Applicant and the Respondent, and is made for the purposes of section 191 of the *Evidence Act 1991* (Cth) and for the purposes of assisting the Court in determining appropriate declarations and orders for the Respondent's admitted contraventions of the *Fair Work Act 2009* (Cth) **(FW Act)** (the **Court Hearing).** The admissions made herein are made only for the purposes of this proceeding.

**The Applicant**

2. The Applicant is and was at all material times:

(a) statutory appointee of the Commonwealth appointed by the Governor­General by written instrument pursuant to sub-section 687(1) of the FW Act;

(b) a Fair Work Inspector pursuant to section 701 of the FW Act; and

(c) a person with standing under sub-section 539(2) of the FW Act to apply for orders in respect of contraventions of civil remedy provisions under the FW Act.

**The NUW**

3. The Respondent **(NUW),** is and at all material times was:

(a) an organisation registered pursuant to the *Fair Work (Registered Organisations) Act 2009* (Cth) **(FWRO Act);**

(b) a body corporate able to be sued in its registered name pursuant to section 27 of the FWRO Act; and

(c) an industrial association within the meaning of section 12 of the FW Act.

**Other relevant entities and persons**

***The Employers***

4. Woolstar Pty Limited (ACN 008 444 513) **(Woolstar)** is and was at all material times:

(a) a national system employer within the meaning of section 14 of the FW Act;

(b) a subsidiary of Woolworths Group Limited (ACN 000 014 675) **(Woolworths);** and

(c) the operator of the Melbourne Liquor Distribution Centre in Laverton, Victoria **(MLDC Site).**

5. Queensland Property Investments Pty Ltd (ACN 009 661 027) **(QPI)** is and was at all material times:

(a) a national system employer within the meaning of section 14 of the FW Act;

(b) a subsidiary of Woolworths; and

(c) the operator of the Melbourne Regional Distribution Centre in Broadmeadows, Victoria **(MRDC Site).**

***The Employees***

6. At all material times:

(a) Woolstar employed approximately 506 people to perform work at the MLDC Site **(Woolstar Employees);**

(b) the Woolstar Employees were members of, or persons eligible to be members of, the NUW;

(c) QPI employed approximately 6410Q people to perform work during the afternoon shift at the MRDC Site on 13 August 2015 **(QPI Employees);**

(d) the QPI Employees were members of, or persons eligible to be members of, the NUW; and

(e) the Woolstar Employees and the QPI Employees were national system employees within the meaning of section 13 of the FW Act.

**The Enterprise Agreements**

7. On 20 December 2013, the Fair Work Commission **(FWC)** approved the *Woo/star Pty Limited Melbourne Liquor Distribution Centre Enterprise* Agreement 2014-2017 **(Woolstar Agreement).**

8. At all material times, the Woolstar Agreement:

(a) covered:

(i) the Woolstar Employees in relation to their employment at the MLDC Site;

and

(ii) the **NUW;**

(b) had a nominal expiry date of 1 June 2017; and

(c) was an enterprise agreement within the meaning of that term in section 417(1 )(a) of the FW Act.

9. On 20 December 2013, the FWC approved the *National Union of Workers Queensland Property Investments Pty Ltd Melbourne Regional Distribution Centre Enterprise Agreement 2013* **(QPI Agreement).**

10. At all material times, the QPI Agreement:

(a) covered:

(i) the QPI Employees in relation to work performed at the MRDC Site; and

(ii) the NUW;

(b) had a nominal expiry date of 1 September 2017; and

(c) was an enterprise agreement within the meaning of that term in section 417(1 )(a) of the FW Act.

**Woolstar's decision to use labour hire contractor**

11. On 30 July 2015, Woolstar informed the NUW of its decision to engage casual workers through a third party labour hire agency, Chandler Macleod **(Labour Hire Decision)** by:

(a) communicating the Labour Hire Decision to the NUW verbally during a joint consultative committee meeting on 30 July 2015; and

(b) communicating the Labour Hire Decision in writing to the NUW via an email from Damian Johnson **(Johnson),** Logistics Manager of the MLDC, dated 30 July 2015.

12. At approximately 5:40 am on 31 July 2015, an email was sent between NUW organisers and industrial officers, stating that "MLDC will *be using Chandler Macleod from now on to recruit new workers ... The current workers will not be affected by this is what they are saying (sic), but it will only be a matter of time. The site is filthy. We will need to catch up about this."*

13. On or around 31 July 2015, an NUW delegate made a request by email to Johnson to hold a mass meeting with the Woolstar Employees to discuss the Labour Hire Decision. The request was denied by Johnson. On 5 August 2015 at approximately 9.00am, 10.30 am, 11.30 am and 4.00 pm, the NUW conducted meetings with some of the Woolstar Employees **(5 August Mass Meetings)** outside Gate 4 of the entrance to the MLDC Site. NUW organisers and industrial officers attended the meeting and discussed the issue of labour hire at the MLDC with Woolstar Employees.

14. On 7 August 2015, some of the Woolstar Employees including elected delegates of the NUW representing the interests of the NUW members employed by Woolstar at the MLDC Site **(MLDC Delegates)** met with NUW organisers outside Gate 4 of the MLDC Site without the authorisation or consent of Woolstar **(7 August Mass Meetings).**

15. On 7 or 8 August 2015, the NUW caused to be sent to some of the Woolstar Employees a text message inviting them to attend a meeting on 9 August 2015.

16. On 7 August 2015, the NUW caused to be posted on their official Facebook page the following:

*"This Sunday 9 August...there will be a mass meeting at Woolworths' Melbourne Liquor Distribution Centre (MLDC) in Laverton to talk about jobs workers can count on... Workers at the MLDC are fighting against the company's attempts to undermine secure jobs by introducing labour hire contractors ...”*

17. On 9 August 2015 at approximately 2.00 pm, in the Car Park outside the MLDC Site some of the Woolstar Employees met to discuss the Labour Hire Decision without the authorisation or consent of Woolstar **(9 August Mass Meeting).**

18. Officials of the NUW attended and addressed the 9 August Mass Meeting and were responsible for setting up a BBQ.

19. A number of the MLDC Delegates attended and addressed the 9 August Mass Meeting.

**10 August 2015: Picket and industrial action at the MLDC Site**

20. At or around 4.15 am on 10 August 2015, an MLDC Delegate was present at the MLDC Site and used a loud hailer to shout: *"Union power"* and *"No* labour hire".

21. From on or around 5.00 am on 10 August 2015 until approximately the early evening that day, a number of persons, which included Woolstar Employees (the Picketers) formed and attended a picket at or near various entry and exit points to the MLDC Site (the 10 August Picket).

22. During the 10 August Picket:

(a) the Picketers blocked various entrance and exit points to the MLDC Site;

(b) the Picketers prevented trucks and persons from entering or exiting the MLDC Site;

(c) a number of NUW officials and MLDC Delegates attended and participated in the picket; and

(d) Woolstar Employees who attended or left work at the MLDC Site were booed and sworn at by the Picketers.

23. The 10 August Picket had the purpose or intention of preventing Woolstar Employees who attended the MLDC Site on 10 August 2015 from entering the MLDC Site and performing work.

24. At or around 10.32 am on 10 August 2015, an employee or official of the NUW, sent an email to other officials or employees of the NUW referring to a statement being made ready for social media, such statement including:

(a) that Woolworths has suddenly decided that all new starters at the [MLDC] will be labour hire casuals; and

(b) previously, all employees - including casuals - have been directly engaged and there have been clear pathways to permanent employment for casuals. These arrangements were negotiated by NUW members.

25. Between approximately 11.15 am and 12.00 pm on 10 August 2015, a meeting was held between various management employees of Woolstar, and various NUW officials and MLDC Delegates **(10 August Meeting No. 1).**

26. At the 10 August Meeting No. 1, one of the MLDC Delgates handed a petition, which attached another signed petition against labour hire on NUW letterhead, to Johnson with two demands as follows:

"No labour hire and no retribution for employees who have stood up for their rights."

27. At or about 4.00 pm on 10 August 2015, another meeting was held between various management employees of Woolstar and various representatives of the NUW **(10 August Meeting No. 2).**

28. At the 10 August Meeting No. 2, the NUW and Woolstar discussed Woolstar's engagement of labour hire at the MLDC Site.

29. On 10 August 2015:

(a) approximately 190 Woolstar Employees who were rostered and required by Woolstar to work at the MLDC Site, presented for work but did not perform any work;

(b) approximately 47 Woolstar Employees who were rostered and required by Woolstar to work at the MLDC Site did not present for work.

30. Woolstar did not authorise or consent to the Woolstar Employees referred to in paragraph 29 not attending for work or not performing work.

31. By reason of the matters agreed at paragraphs 29 and 30 above, the Woolstar Employees referred to in paragraph 29 above engaged in industrial action on 10 August 2015 within the meaning of section 19 of the FW Act **(Woolstar 10 August 2015 industrial action).**

**11 August 2015: Picket and industrial action at the MLDC Site**

32. From on or around early in the morning on 11 August 2015 until approximately the early evening that day, the Picketers formed and attended a picket at or near various entry and exit points to the MLDC Site **(the 11 August Picket).**

33. During the 11 August Picket:

(a) the Picketers blocked various entrance and exit points to the MLDC Site;

(b) the Picketers prevented trucks and persons from entering or exiting the

MLDC Site;

(c) NUW officials and MLDC Delegates attended and participated in the picket;

and

(d) Woolstar Employees who attended or left work at the MLDC Site were booed and sworn at by the Picketers.

34. The 11 August Picket had the purpose or intention of preventing the Woolstar Employees who attended the MLDC Site on 11 August 2015 from entering the MLDC Site and performing work.

35. On 11 August 2015:

(a) approximately 210 Woolstar Employees were rostered and required by Woolstar to work at the MLDC Site, presented for work but did not perform any work;

(b) approximately 55 Woolstar Employees were rostered and required by Woolstar to work at the MLDC Site did not present for work.

36. Woolstar did not authorise or consent to the Woolstar Employees referred to in paragraph 35 not attending for work or not performing work.

37. By reason of the matters agreed at paragraphs 35 and 36 above, the Woolstar Employees referred to in paragraph 35 above engaged in industrial action on 11 August 2015 within the meaning of section 19 of the FW Act (Woolstar 11 August **2015 industrial action).**

**11 August 2015: section 418 order**

38. On 11 August 2015 at approximately 11.38 am, the FWC issued an order (Order PR570671) pursuant to sub-section 418(1) of the FW Act **(section 418 Order).**

39. The section 418 Order applied to:

(a) the **NUW;**

(b) the **MLDC** Delegates; and

(c) the Woolstar Employees.

40. The section 418 Order came into effect at approximately 11.00 am on 11 August 2015 and operated until 11.00 am on 11 September 2015.

41. The section 418 Order provided, relevantly:

(a) that the NUW and the NUW Delegates *"must not organise any industrial action involving any of the Employees"* (clause 3.1 ); and

(b) that the Woolstar Employees *"must immediately stop engaging in industrial action"* and *"not continue, or organise any industrial action during the* period of operation of [the] Order" (clause 3.2); and

(c) that for the purposes of the section 418 Order, industrial action *"means* a *failure or refusal by* [Woolstar Employees] *to attend for work or* a *failure or refusal to perform any work at all by* [Woolstar Employees] *who attend for* work".

42. On 11 August 2015, the section 418 Order was served on the NUW and the MLDC Delegates in accordance with clause 5.1 (a) of the section 418 Order including by emailing a copy of the Order to the NUW's National Office email address, addressed to the General Secretary of the NUW, Tim Kennedy at 11.48 am.

43. On 11 August 2015, the section 418 Order was served on the Woolstar Employees in accordance with paragraph 5.1 (b) of the Order by:

(a) Woolstar serving the section 418 Order on the NUW as agreed in paragraph 42 above;

(b) Woolstar placing a copy of the section 418 Order in the canteen at the MLDC Site, on the notice boards that are usually used to communicate with the Woolstar Employees, and in the gatehouse at the MLDC Site; and

(c) Woolstar placing a copy of the section 418 Order underneath the cyclone fence (which separates the MLDC Site from Leakes Road).

44. At approximately 12.12 pm on 11 August 2015, Woolstar sent a text message to all Woolstar Employees which in terms read: *"Fair Work Commission today made orders that the NUW and its members must immediately cease industrial action. Copies of the order are available at the DC main gatehouse."*

45. Between around 5.00 pm to 6.00 pm on 11 August 2015, the NUW posted a copy of the section 418 Order on its official Face book page and stated that the *"NUW and NUW members must stop organising the industrial action",* and that the action was not authorised.

46. At approximately 2.30 pm on 11 August 2015, the NUW conducted a meeting with the Woolstar Employees near gate 4 of the MLDC Site without the authorisation or consent of Woolstar **(11 August Unauthorised Meeting).**

47. At the 11 August Unauthorised Meeting:

(a) the Woolstar Employees present were informed of the section 418 Order and its contents; and

(b) NUW officials and MLDC Delegates addressed the Woolstar Employees present.

48. At or about 4.00 pm on 11 August 2015, another meeting was held between various management employees of Woolstar and various representatives of the NUW including senior elected officials from each of the National Office and Victorian Branch of the NUW **(11 August Meeting).**

49. At the 11 August Meeting, the NUW and Woolstar discussed Woolstar's engagement of labour hire at the MLDC Site.

**12 August 2015: Picket and industrial action at the MLDC Site**

50. From on or around early in the morning on 12 August 2015 until approximately the early evening that day, the Picketers formed and attended a picket at or near various entry and exit points to the MLDC Site **(the 12 August Picket).**

51. During the 12 August Picket:

(a) the Picketers blocked various entrance and exit points to the MLDC site;

(b) the Picketers prevented trucks and persons from entering or exiting the MLDC Site;

(c) NUW officials and MLDC Delegates attended and participated in the picket;

and

(d) Woolstar Employees who attended or left work at the MLDC Site were booed and sworn at by the Picketers.

52. The 12 August Picket had the purpose or intention of preventing the Woolstar Employees who attended the MLDC Site on 12 August 2015 from entering the MLDC Site and performing work.

53. On 12 August 2015:

(a) approximately 115 Woolstar Employees were rostered and required by Woolstar to work at the MLDC Site, presented for work but did not perform any work;

(b) approximately 101 Woolstar Employees were rostered and required by Woolstar to work at the MLDC Site did not present for work.

54. Woolstar did not authorise or consent to the Woolstar Employees referred to in paragraph 53 not attending for work or not performing work.

55. By reason of the matters agreed at paragraphs 53 and 54 above, the Woolstar Employees referred to in paragraph 53 above engaged in industrial action on 12 August 2015 within the meaning of that term in section 19 of the FW Act **(Woolstar 12 August 2015 industrial action).**

56. At approximately 11:00 am on 12 August 2015, a meeting was held between various management employees of Woolstar, various NUW officials, including a senior elected official from each of the National Office and Victorian Branch, and some MLDC Delegates **(12 August Meeting No. 1).**

57. At the 12 August Meeting No. 1, an NUW official said that the NUW did not want repercussions against the employees who had participated in the Picket.

58. On or around 12 August 2015, the NUW posted on its official Facebook page the following:

"After several meetings with management today at Woolworths Liquor in Laverton, workers have resolved to stay overnight. The workers are seeking a fair resolution tomorrow morning, which will protect secured jobs at MLDC from the implementation of labour hire and provide for a respectful return to work. Stay tuned for updates on secured jobs at Woolworths sites nation wide."

59. At approximately 6:32 pm, a senior elected official from the NUW National Office sent to Woolstar an email attaching a document entitled *"Principles of Labour Hire Engagement (Potential Solution)",* which set out the NUW's position on how Woolstar should engage labour hire.

60. At or about 6:55 pm on 12 August 2015, a senior elected NUW official from the Victorian Branch sent an email to an NUW employee, asking for an urgent text message to be sent to Woolstar Employees which read: *"Compulsory Mass Meeting* 9.00am Thursday 12° August. Please be there. NUW."

61. At or about 9:15 pm on 12 August 2015, a meeting was held between various management employees of Woolstar and various representatives of the NUW, including a senior elected official from each of the National Office and Victorian Branch, and some MLDC Delegates **(12 August Meeting No. 2).**

62. At the 12 August Meeting No. 2, a senior elected NUW official said that the position of some the Woolstar Employees was that they would go back to work if Woolstar made a commitment that there would be no ramifications for them and if Woolstar agreed not to use labour hire.

**13 August 2015: Picket and industrial action at the MLDC Site**

63. From on or around early in the morning on 13 August 2015 until approximately the early evening that day, the Picketers formed and attended a picket at or near various entry and exit points to the MLDC Site **(13 August Picket).**

64. During the 13 August Picket:

(a) the Picketers blocked various entrance and exit points to the MLDC Site;

(b) the Picketers prevented trucks and persons from entering or exiting the MLDC Site;

(c) NUW officials, including a senior elected official from the National Office, attended and participated in the picket; and

(d) Woolstar Employees who attended or left work at the MLDC Site were booed and sworn at by the Picketers.

65. The 13 August Picket had the purpose or intention of preventing the Woolstar Employees who attended the MLDC Site on 13 August 2015 from entering the MLDC Site and performing work.

66. On 13 August 2015:

(a) approximately 44 Woolstar Employees who were rostered and required by Woolstar to work at the MLDC Site, presented for work but did not perform any work; and

(b) approximately 175 Woolstar Employees who were rostered and required by Woolstar to work at the MLDC Site did not present for work.

67. Woolstar did not authorise or consent to the Woolstar Employees referred to in paragraph 66 above not attending for work or not performing work.

68. By reason of the matters agreed at paragraphs 66 and 67 above, the Woolstar Employees referred to in paragraph 66 above engaged in industrial action on 13 August 2015 within the meaning of that term in section 19 of the FW Act **(Woolstar 13 August 2015 industrial action).**

69. On 13 August 2015, a meeting was held between senior management representatives of Woolstar and NUW officials, including three senior elected officials from the National Office and Victorian Branch, and various MLDC Delegates **(13 August Meeting).**

70. At the 13 August Meeting, the NUW and Woolstar reached proposed terms for an agreement on Woolstar's use of labour hire **(Proposed Labour Hire Agreement)** and in relation to the disciplinary action that would be taken against the Woolstar Employees who had participated in the industrial action at the MLDC Site. The Proposed Labour Hire Agreement was to be put to the NUW's members at the MLDC for their consideration.

71. The Proposed Labour Hire Agreement, in its terms, placed restrictions on the circumstances in which Woolstar could engage labour hire contractors to provide labour at the MLDC Site.

72. At approximately 2.04 pm on 13 August 2015, the NUW sent the following text message to those of its members who were Woolstar Employees asking them to attend a mass meeting to consider the Proposed Labour Hire Agreement: *"Meeting at MLDC for all NUW members to vote on proposal. Attendance is a must. NUW'.*

73. At approximately 4.45 pm on 13 August 2015, the NUW conducted a meeting with the Woolstar Employees outside of gate 5 to the MLDC Site **(13 August Mass Meeting).**

74. NUW officials, including two senior elected NUW officials from the National Office, attended the 13 August Mass Meeting and addressed the Woolstar Employees present.

75. During the 13 August Mass Meeting:

(a) the Proposed Labour Hire Agreement was explained to the Woolstar Employees in attendance; and

(b) the NUW members present in attendance voted in favour of a return to work.

**Picketing and industrial action at the MRDC**

***12 August 2015***

76. On or about the morning of 12 August 2015, unidentified persons outside the MRDC Site handed out a flyer **(12 August Flyer)** to QPI Employees that stated as follows:

"*On strike for job security. Management at the giant Melbourne Liquor Distribution Centre has announced that all new workers will be employed as labour hire casuals. MLDC supplies Woolworths outlets such as Dan Murphy's and BWS.*

*In response, hundreds of workers have launched a snap strike and picket. Long term labour hire introduces another source of job insecurity for the MLDC workforce - which is already 50% casual. Labour hire workers are forced to work harder, and will therefore have more injuries, lifting heavy boxes of liquor.*

*Workers are disgusted that management lied to them about plans to introduce agency casuals during the last enterprise agreement, negotiated last year. Workers know that our ultimate weapon to make big companies respect us, is to withdraw our labour.*

*Visit the picket - Interchange Road, off Leakes Road, Laverton. Support your fellow workers."*

**13 August 2015**

77. On 13 August 2015 at approximately 2.30 pm, an NUW official conducted and/or addressed a meeting outside the MRDC Site with some of the QPI Employees. Without the authorisation or consent of QPI.

78. At approximately 3:00 pm, approximately 30-40 QPI Employees (MRDC Picketers) formed and attended a picket at or near various entry and exit points at the MRDC Site (13 August MRDC Picket).

79. At approximately 4.00 pm, an NUW official conducted and/or addressed a meeting outside the MRDC Site with one or more QPI Employees who had just finished the day shift at that site.

80. During the 13 August MRDC Picket:

(a) the MRDC Picketers shouted, "NUW, nothing *in, nothing out"* or words to that effect;

(b) the MRDC Picketers prevented trucks and persons from entering or exiting the MRDC Site.

81. The 13 August MRDC Picket had the purpose or intention of preventing QPI Employees rostered on the afternoon shift from entering the MLDC Site and performing work.

82. On 13 August 2015:

(a) approximately 64 QPI Employees who were required by QPI to perform work on the afternoon shift at the MRDC Site, presented for work but did not perform any work; and

(b) QPI did not authorise or consent to the QPI Employees referred to in paragraph 82(a) above not attending for work or not performing work.

83. By reason of the matters agreed at paragraph 82 above, the QPI Employees referred to in paragraph 82 above, engaged in industrial action on 13 August 2015 within the meaning of section 19 of the FW Act **(QPI 13 August industrial action).**

84. At approximately 5:00 pm on 13 August 2015, management representatives of QPI met with NUW officials during which:

(a) an NUW official said that the reason for the strike was the behaviour of management and that the *"people on the floor"* are not happy;

(b) following a private telephone conversation with a senior elected NUW official, an NUW official said to QPI representatives words to the effect that he would encourage the NUW's members to return to work provided there were no repercussions for any of them.

**Evening of 13 August 2015: Woolstar Employees and QPI Employees return to work**

85. On 13 August 2015:

(a) at approximately 8.30pm the Woolstar Employees returned to work; and

(b) at approximately 7.00pm, the QPI Employees returned to work.

**Final agreement between Woolstar and the NUW in relation to labour hire**

86. In or around late November 2015 and early December 2015, Woolstar and the NUW entered into a written agreement concerning the use of labour hire at the MLDC entitled *"Woolworths Limited and National Union of Workers Agreement concerning supplementary Jabour at Melbourne Liquor Distribution Centre"* (Final Labour Hire Agreement) which was signed by Woolstar on 23 November 2015 and signed by the NUW on 8 December 2015.

87. The Final Labour Hire Agreement provided as follows:

(a) "Woolworths Ltd and the NUW (the parties) agree that the provisions in this document, together with any provisions in the Enterprise Agreement, will regulate how supplementary labour engaged through a third party (labour hire) is utilised at MLDC. The document includes the following:

(b) use of labour hire will be limited to the Peak Season;

(c) labour hire can also be used during other periods of the year as identified by MLDC management and agreed with the NUW. The NUW cannot unreasonably withhold agreement;

(d) the labour hire provider is to be selected from a list of Woolworths Preferred Suppliers with prior consultation with the JGC; and

(e) the labour hire provider will be required to distribute hours in a fair, equitable and transparent manner."

**Admitted Contraventions of the FW Act**

88. The NUW admits it organised each of:

(a) the Woolstar 10 August 2015 Industrial Action;

(b) the 10 August Picket;

(c) the Woolstar 11 August 2015 Industrial Action;

(d) the 11 August Picket;

(e) the Woolstar 12 August 2015 Industrial Action;

(f) the 12 August Picket;

(g) the Woolstar 13 August 2015 Industrial Action;

(h) the 13 August Picket;

(i) the QPI 13 August 2015 Industrial Action; and

(j) the 13 August MRDC Picket.

89. The NUW admits that:

(a) it organised the industrial action referred to in subparagraphs 88(a), 88(c), 88(e), 88(g) and 88(i) above, in contravention of section 417(1) of the FW Act;

(b) the industrial action referred to in subparagraphs 88(e) and 88(g) above constituted industrial action within the meaning of the section 18 Order; and

(c) it organised the industrial action referred to in subparagraphs 88(e) and 88(g) above, in contravention of the section 418 Order and therefore section 421 of the FW Act.

90. The organisation by the NUW of:

(a) the Woolstar 10 August 2015 Industrial Action;

(b) the 10 August Picket;

(c) the Woolstar 11 August 2015 Industrial Action;

(d) the 11 August Picket;

(e) the Woolstar 12 August 2015 Industrial Action;

(f) the 12 August Picket;

(g) the Woolstar 13 August 2015 Industrial Action;

(h) the 13 August Picket;

(i) the QPI 13 August 2015 Industrial Action; and

(j) the 13 August MRDC Picket,

amounted to the NUW taking or organising action within the meaning of section 355 of the FW Act **(the NUW Action).**

91. The NUW Action was intended to coerce Woolstar into not engaging Chandler Macleod to provide labour hire to the MLDC Site, in contravention of sub-section 355(b) of the FW Act.

**Number of Contraventions**

92. The Parties have not agreed on the number of contraventions of sections 417(1) and 421 of the FW Act are established by the conduct admitted in this SOAF. The Parties will make submissions on this issue at the Court Hearing.

93. The Parties agree that the conduct admitted in this SOAF establishes a single contravention of section 355(b) of the FW Act.

**Loss and damage suffered by Woolstar and QPI**

94. By reason of each of the:

(a) the Woolstar 10 August 2015 Industrial Action;

{b) the 10 August Picket;

(c) the Woolstar 11 August 2015 Industrial Action;

{d) the 11 August Picket;

(e) the Woolstar 12 August 2015 Industrial Action;

(f) the 12 August Picket;

(g) the Woolstar 13 August 2015 Industrial Action;

(h) the 13 August Picket;

(i) the QPI 13 August 2015 Industrial Action; and

(j) the 13 August MRDC Picket,

Woolworths suffered loss and damage.

95. The parties agree that the loss and damage suffered by Woolworths is at least $101,593.50. This amount represents approximately the additional delivery costs Woolstar and QPI incurred as a result of the MLDC being inaccessible from 10 to 13 August 2015.

96. Woolworths has advised the parties that it is prepared to accept $101,593.50 in satisfaction of its loss and damage.

# NUMBER OF CONTRAVENTIONS

1. Immediately it will be seen, for reasons as to which the Court can only speculate, and perhaps as a result of strategic compromise, that there is tension between what is stated at [88] and [89] of the SOAF. The nature of that tension, inter alia, is the contrast between the admission by the NUW that it had organised each of the 10 occurrences particularised in [88] and the more limited admissions it makes of having organised industrial action in contravention of s 417(1) of the Fair Work Act in [89]. That that tension exists by design is clear, having regard to the terms of [92] of the SOAF:

92. The Parties have not agreed on the number of contraventions of sections 417(1) and 421 of the FW Act are established by the conduct admitted in this SOAF. The Parties will make submissions on this issue at the Court Hearing.

1. I turn now to the parties’ submissions with respect to the number of contraventions of ss 417 and 421 of the Fair Work Act which the NUW is to be found to have committed.

## Applicant’s Submissions

1. The Applicant’s submissions are as follows:

73. Each of the contraventions of section 417 (on 10, 11, 12 and 13 August 2015 at MLDC and on 13 August 2015 at the MRDC) and section 421 (on 12 and 13 August 2015 at the MLDC) were separate and distinct for the following reasons:

(a) on each of the four days, a different number of Woolstar Employees and/or QPI Employees engaged in the industrial action;

(b) on each of the four days meetings were held between NUW officials and management employees of Woolstar and/or QPI in an attempt to resolve the underlying industrial dispute:

i. on 10 August 2015, meetings were held at the MLDC at around 11:15am and at around 4pm;

ii. on 11 August 2015, a meeting was held at the MLDC at around 4pm;

iii. on 12 August 2015, meetings was held at the MLDC at around 11am and at around 9:15pm; and

iv. on 13 August 2015, meetings were at the MLDC and at the MRDC.

Following these meetings, the industrial action continued the next day. It can be inferred that following the unsuccessful resolution of the underlying industrial dispute at the meetings, a conscious decision was made by the NUW to continue to organise the industrial action and pickets; and

(c) the MRDC Industrial Action occurred at a different place and time to the industrial action at the MLDC. Further, the NUW organiser at the MRDC was a different NUW official to the NUW organiser at the MLDC.

(Footnotes omitted)

1. I interpolate that it is uncontentious that the isolated industrial action organised by the NUW on 13 August 2017 and which affected the MRDC should be found to have been a single contravention of s 417(1) of the Fair Work Act. It is so admitted.

## Respondent’s Submissions

1. The Respondent’s written submissions as to the number of contraventions as relate to the events that occurred at the MLDC are as follows:

16. Section 417 prohibits a person from “organising” or “engaging” in industrial action during the nominal term of an enterprise agreement. It is an agreed fact that the NUW “organised” the industrial action which was engaged in by the employees of Woolstar at the MLDC.

17. In order to determine the number of contraventions the Court should consider the meaning of the term “organising” in s.417 and then apply this meaning to the facts before the Court to determine whether the facts make out a single act of organising industrial action and thus a single contravention, or alternatively four separate and distinct acts of organising industrial action and thus four contraventions.

18. A key factual inquiry that must be undertaken is whether there has been a single period of industrial action. If there has been a single period, as a matter of logic there cannot have been four separate and distinct acts of organising in respect of that single period of action.

19. In *Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543* Jessup J at [136] made the following observations about industrial action that occurs over more than one day:

*Whether particular industrial action occurs during a single period, or during separate periods, will also be a question of fact. For my own part, I do not regard it as self-evident that every day upon which industrial action occurs should be regarded as a separate "period". In the present case, for example, I consider that an employee who stopped work on 5 August 2003 and did not resume work until 10.00 am on 6 August 2003 should be regarded as having engaged in industrial action during one period only. If that period were broken by a period during which the employee performed work normally, there would then have been two periods of industrial action. However, as I have said, what matters is not the number of periods, but the number of payments.*

20. In *ABCC v AMWU* (The Australian Paper Case) (No 2) [2017] FCA 367 Jessup J was required to determine whether a strike that commenced on 27 March 2014 and continued until 31 March 2014 constituted a single contravention of s.417 or whether each day should be regarded as a separate contravention. At [3] his Honour held as follows:

*Commencing with s 417(1), the statutory prohibition is upon engaging in industrial action, that is to say (in the context of the present case), upon engaging in a failure or refusal to perform work. Each of the relevant employees of BMC and JBA did so engage from the normal time of recommencing work after the meal break on 27 March 2014 until the resolution of the dispute on 31 March 2014. It was submitted on behalf of the applicant that each day should be regarded as a separate contravention, but I cannot appreciate why this should be so. My reasons of 1 March 2017 do not contain, and would not sustain, a finding that there was a discrete episode of industrial action, separate from any other, on any of 27, 28 and 31 March 2017. From 1.30 pm on 27arch 2017 until the resolution of the dispute on 31 March 2017, there was no period during which normal work was performed such as might mark off, as it were, separate periods of industrial action. In this regard, although the statutory context is not in complete alignment, my thinking has not changed from that which I expressed in Ponzio v B & P Caelli Constructions Pty Ltd [2007] FCAFC65; (2007) 158 FCR 543, 566-567 [136].*

21. In *Director of the* *FWBII v Robinson and Others* (2016) 241 FCR 338 Charlesworth J considered whether a union had by “organising” industrial action committed two separate contraventions of s.417 or a single contravention of the provision. Her Honour at [53] observed as follows:

*In reaching my conclusion that the CFMEU committed only one contravention, I have given the word “organise” in s 417 of the FW Act a meaning that encompasses the concept of “marshalling” or “rallying”, which may inherently involve a number of discrete acts directed at achieving cohesiveness in a result (in this case, a single episode of industrial action). The CFMEU, as a body corporate, organised one instance of industrial action, albeit through the conduct of two human actors.*

22. It is submitted that in the present matter it is evident there was “a discrete episode” (to adopt Jessup J’s words) or a “single episode” (to adopt Charlesworth J’s words) of industrial action at the MLDC. It is uncontroversial that there was no period during the Strike when any normal work was performed which would “mark off” separate periods of industrial action on each day. As such there was a single period of industrial action. Because there was a single period of industrial action it flows that there could have only been one act of organising that industrial action.

23. In the event that contrary to the NUW’s submission, the Court was to find that each day was a separate period of industrial action this would not change the net result. The facts before the Court are not capable of sustaining a finding that the NUW separately organised each day of the industrial action at the MLDC.

24. The Applicant submits that “*on each of the four days, a different number of Woolstar Employees and/or QPI Employees engaged in the industrial action.*” This submission is a distraction and is of no consequence. It matters not that different employees may have been on strike on different days. What does matter is the conduct (open on the facts before the Court) which the NUW engaged in when “organising” the single episode of industrial action in contravention of the provision.

25. The Applicant also relies on the fact that there were meetings between the NUW and management employees on each of 10, 11, 12 and 13 August 2015 and that following these meetings the industrial action continued. The Applicant then proceeds to make the ambitious submission that “*it can be inferred that following the unsuccessful resolution of the underlying industrial dispute at the meetings, a conscious decision was made by the NUW to continue to organise the industrial action and pickets.*”

26. This submission is misguided and should be rejected for the following reasons.

27. The inference that the Applicant asks the Court to draw is simply not open to be drawn. Also, it must also be kept in mind that as the proceeding is a civil remedy proceeding the requisite standard set forth in s.140(2) of the *Evidence Act 1995* (Cth) and *Briginshaw* applies and the Court is not able to find contraventions on the basis of mere “*indirect inferences*.” The Applicant has failed to discharge its onus that the facts establish the four separate contraventions.

28. Further, the reference to a “conscious decision” indicates a misunderstanding of the accepted meaning of the terms “organise”. It is insufficient for the Applicant to establish that the NUW had a state of mind that the strike ought to continue. Rather it must prove that the NUW engaged in separate positive acts to “marshal” or “rally” the employees to take further discrete periods of industrial action at the MLDC and that these discreet acts were aimed at achieving separate periods of industrial action as opposed to “*achieving* *cohesiveness in a result”.*

(Footnotes omitted).

## Applicant’s Reply Submissions

1. The Applicant’s reply submissions respond to those propositions as follows:

3. *First*, the Respondent has already admitted that it organised industrial action at the MLDC on each of 10, 11, 12 and 13 August 2015. It is inconsistent with the Respondent’s admissions in the SOAF for the Respondent to now submit that it organised a “single episode” or a “discrete episode” of industrial action at the MLDC from 10 to 13 August 2015.

4. *Second*, in assessing the number of contraventions of section 417 of the FW Act, the focus should not just be on the term “*organise*”, rather, on the entire section. Section 417 is a prohibition on taking industrial action from the day on which an enterprise agreement is approved by the Fair Work Commission until its nominal expiry date has passed. Two observations may be made about this provision. The first is that the period in relation to which the industrial action is engaged in or organised is critical, as it will only be unlawful if the industrial action is taken between two specific dates, that is, the date the agreement is approved and the date on which the nominal expiry day passes. Second, section 19(1)(c) of the FW Act defines industrial action, relevantly, as a failure or refusal by employees to attend for work, or a failure or refusal to perform any work at all by employees who attend for work. This definition requires attention to be given to whether employees attended for work on a particular day and, if they did attend for work on that day, whether they performed any work that day. These two features of section 417 bespeak of a legislative intention that each separate day that industrial action is engaged in, or organised, is a separate contravention of that provision.

5. *Third*, the Respondent alleges that the facts before the Court are not capable of sustaining a finding that the Respondent separately organised each day of industrial action at the MLDC. Further, it is alleged that there is no evidence of any meetings between the Respondent and its members prior to the commencement of the shifts, or at the end of each shift, on the relevant days of industrial action. This submission must be rejected. The Respondent conducted meetings with the Woolstar employees on 9 August 2015, at 2.30pm on 11 August 2015, and at approximately 4.45pm on 13 August 2015.

6. Further, on 12 August 2015, the Respondent posted on its official Facebook page *“After several meetings with management today at Woolworths Liquor at Laverton, workers have resolved to stay overnight. The workers are seeking a fair resolution tomorrow morning, which will protect secure jobs at MLDC from the implementation of labour hire and provide for a respectful return to work.* ***Stay tuned for updates on secure jobs at Woolworths sites nationwide****”* (emphasis added). This post, along with the meetings and the Respondent’s presence on the picket on each of the days, establishes that the Respondent was actively organising the industrial action on each day.

7. It is not necessary for the Applicant to lead all the evidence about whether the Respondent organised industrial action on a particular day. It may be possible to infer that a person has organised industrial action from the surrounding circumstances, and the inference is easier to draw when there is a failure to call evidence to rebut the inference. Where a respondent wishes to rely upon a submission that its contraventions have resulted from a course of conduct, then, unless there is clear and unequivocal evidence in the applicant’s case of such a course of conduct, it is incumbent upon the respondent to lead evidence in support of such a submission before the Court could be satisfied that this was the case. The Respondent has not led any evidence about its involvement in organising the industrial action (beyond its admissions in the SOAF).

8. *Fourth*, the decision in *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543 does not assist the Respondent. That case was about the number of contraventions of the then section 187AA of the *Workplace Relations Act 1996* (Cth). That provision provided that an employer “*must not make a payment to an employee in relation to* ***a period during which*** *the employee engaged, or engages, in industrial action*” (emphasis added). This language differs from that in section 417, which simply provides that a person must not organise or engage in industrial action during a particular timeframe. Similarly, the decision in *ABCC v AMWU (The Australian Paper Case) (No 2)* [2017] FCA 367 can be distinguished on its facts. Firstly, there was no admission in that case that the respondent union had organised industrial action on each day. Further, there was no evidence in that case that union officials had been involved in pickets on each of the separate days that constituted part of the organisation of the industrial action. Further, the respondent union officials in the *Australian Paper Case* gave evidence about their involvement in the events the subject of the section 417 contravention.

(Footnotes omitted).

1. In oral submissions on behalf of the FWO, Mr Felman of counsel submitted that the Respondent was wrong to have fastened exclusively on the word “organise” as controlling the meaning of the relevant text:

MR FELMAN: [T]he submission of the Respondent, your Honour, fastens on the word “organise” and they say there was just one act of organisation. So we say there are four reasons, your Honour, why that submission of the Respondent ought not be accepted and [why] on each day there was industrial action, on each day that there was a picket that was a separate contravention of section 417. The first is a point I’ve already made and I’ve understood what your Honour has said in response, which is the Respondent has admitted that it organised industrial action on each of those days in the statement of agreed facts at paragraph 88. I understand what your Honour thinks about that…

HIS HONOUR: Well, I just say it’s not decisive.

MR FELMAN: It’s not. And what I’m saying is that there are a number of factors and I’m going to take your Honour through them. That’s one. I agree that it’s not decisive, but it’s a powerful consideration given that that is an admission. Ultimately, it’s a matter for your Honour, but it is a powerful consideration.

1. Mr Felman referred also to the text of s 417 as follows:

MR FELMAN: So the next point we make is, when one looks at section 417, because my friend fastens on the term “organise”, you’ve got to look at the whole section, your Honour. Section 417:

*A person referred to in subsection (2) –*

which everyone I think in this case agrees includes the union –

*must not organise or engage in industrial action from the day on which an enterprise agreement is approved by the Commission until its nominal expiry date has passed.*

Two observations may be made about section 417, your Honour. The first is that the period in relation to which the industrial action is engaged or organised is critical, because it’s only unlawful if it’s between two very specific single days: the day that it comes into operation and the day that the nominal expiry date expires.

1. Mr Felman then submitted that as the NUW had not called evidence to negative it having been responsible for undertaking organisation preceding each day of industrial action, such an inference might be more readily drawn:

It’s possible to infer that a person has organised industrial action and we say, in this case, on each day, from the surrounding circumstances, and the inference is easier to draw when there’s a failure to call evidence to rebut the inference. Now, the authority for that proposition, your Honour, is dealt with at footnote 9 of our reply submissions, and it is relevantly *United Group Resources v Calabro* *(No 5)* [2011] FCA 1408 at paragraphs 74 to 77.

1. Mr Bakri, counsel representing the NUW, did not resile from the union’s admission that it had organised the relevant events. However, he submitted that it had done so only in the lead up to the commencement of industrial action on 10 August 2015:

MR BAKRI: Then, the next relevant meeting is on 7 August. That’s paragraph 14. And then, following on from that, on 9 August – this is paragraph 17, there’s a further meeting at which the NUW addresses – at which Woolstar employees meet to discuss the labour hire decision. And officials of the NUW attended that meeting. So relevantly, and there’s some significance in this, that’s the day before the commencement of the industrial action. That’s paragraph 17 …

The finding that’s open, your Honour, which I submit you should make, is that the industrial action was organised prior to the 10th, and it was either organised on the 9th, or a combination of 5, 7 and 9 August, prior to the commencement of the action, which is inherently logical. So turning back to paragraph 20 onwards, your Honour, on 10 August there was no meeting. Then on 11 August, which is the second day of the strike, there was a meeting. But that meeting didn’t occur at the start of the day. It occurred in the afternoon at approximately 2.30 pm. And this is referred to in paragraph 46.

1. In reference to those submissions, the Court raised with Mr Bakri whether or not it might be open to make a finding that the conduct of the NUW in conducting a second mass meeting on 11 August 2015 in the afternoon might permit the Court to infer, by reason of that conduct, that the union had undertaken a second act of organisation premised on it recommending to the members that the strike should from that point also continue indefinitely into the future, notwithstanding an order of the Fair Work Commission directing it not to take such action having been made. Mr Bakri acknowledged that it would be open to the Court to find there was a further act of organising by the NUW on 11 August 2015. However, he maintained that the preferable or safer finding for the Court to make would be that there had been only one act of organising: that which occurred prior to the commencement of the industrial action, either on 9 August 2015 or in the course of the meetings on 5, 7 and 9 August 2015 combined.
2. In his oral reply submissions, Mr Felman however drew the Court’s attention to the terms of [89(c)] of the SOAF. He submitted there was an apparent logical inconsistency between that admission, given that the NUW could not have been aware of the existence of the orders of the Fair Work Commission at the time Mr Bakri relied on as the single event of organisation, and the NUW’s admission that it organised later industrial action in contravention of the Fair Work Commission’s orders. Self-evidently, that admission and the logical inconsistency compels the conclusion that the NUW contravened s 417(1) at least on two occasions.

## Consideration

1. I turn now to the findings I should make regarding the number of contraventions of s 417(1) of the Fair Work Act. It is convenient first to set out the terms of that provision:

417 – Industrial Action Must Not Be Organised or Engaged in Before Nominal Expiry Date of Enterprise Agreement etc

(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. Insofar as the term “organise” is utilised, it is plainly used in contradistinction to “engage in”. A union can “organise” the taking of industrial action, but it will generally be the workers who “engage in” the industrial action. It is not contended by the FWO that the NUW is, or might be, liable by reason of it having engaged in the industrial action.
2. Insofar as what is comprehended by the term “organise”, I proceed on the basis of what Charlesworth J stated in *Fair Work Building Industrial Inspectorate v Robinson* [2016] FCA 525; 241 FCR 338 (***Robinson***) at [52]-[53]:

52. The Director’s pleaded case referred to the “Yarrawonga Industrial Action” and the “Airport Industrial Action” to delineate between the organising conduct of each individual respondent. However, on examining the CFMEU’s conduct as a whole, I find that it organised a single instance of industrial action, namely, the O’Rourke employees’ refusal to attend work on 19 June 2014. On one view of the facts, it might be said that there were two physical acts of organisation conceived of as the Yarrawonga meeting and the Airport meeting, which were, I accept, separated in place, although not in time. The necessity to conduct the meetings at two places arose, however, from the fortuitous circumstance that some of the O’Rourke employees to whom the CFMEU’s organising conduct was directed parked their vehicles at the Yarrawonga Park and Ride facility while others parked their vehicles at the Airport Park and Ride facility.

53. In reaching my conclusion that the CFMEU committed only one contravention, I have given the word “organise” in s 417 of the FW Act a meaning that encompasses the concept of “marshalling” or “rallying”, which may inherently involve a number of discrete acts directed at achieving cohesiveness in a result (in this case, a single episode of industrial action). The CFMEU, as a body corporate, organised one instance of industrial action, albeit through the conduct of two human actors.

1. In order to understand the operation of the provision, it is also appropriate to refer to the reasoning of Rangiah J in *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Nine Brisbane Sites Appeal)* [2019] FCAFC 59; 286 IR 336 (***Nine Brisbane Sites Appeal***) at [99]:

99. Section 417 of the Act is contravened when a relevant person “organises or engages in” industrial action within the relevant period. The expression “industrial action” is defined in s 19 by its *effect* upon work or the performance of work. For example, under subs (a), it includes performance of work in a manner different to which it is customarily performed; under subs (b), a ban, limitation or restriction on the performance of work; and, under subs (c), a failure or refusal to attend or perform work. It follows that a contravention of s 417 depends upon the *effect* ofan action that is organised or engaged. The *purpose* of the action is irrelevant under s 417. So, for example, even where industrial action is organised as a response to unlawful conduct by an employer, there will be a contravention of the provision: see *Construction, Forestry, Mining and Energy Union v Director of Fair Work Building Industry Inspectorate* [2013] FCAFC 53 at [20]. A person may breach s 417 without having the purpose of disrupting work. On the other hand, a person who organises or engages in action with the purpose of the disrupting work does not contravene the provision if the action does not have that effect: see *Davids Distribution Pty Ltd v National Union of Workers* [1999] FCA 1108; 91 FCR 463 at 486 [52]; *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2015] FCAFC 25; 230 FCR 298 at 325–326 [142]–[148].

1. On that understanding of what is comprehended within the meaning of “to organise”, I reject Mr Bakri’s submission that if there is only a single period of industrial action then as a matter of logic, there cannot be two, three, four or more separate and distinct instances of “organising” during that single period of time. Self-evidently, it is possible that an instance of industrial action organised by a union might flag and be thought to require further acts of organisation to sustain it. If there had been evidence before the Court that there had been further separate and independent acts of further organisation directed at encouraging those undertaking the industrial action to hold firm and continue their conduct, I see no reason why in those circumstances the Court should not have found that there had been several distinct contraventions of s 417(1) notwithstanding that there was only a single period of industrial action.
2. However, I also reject Mr Felman’s submission that, in the absence of any other evidence, the Court is entitled to make findings of contravention on the basis that the NUW failed to call evidence to negate the inference, contended for by the FWO, that there must have been further acts of organisation. It is far from implausible that with three days available for prior planning, the NUW had been successful in organising industrial action not merely for a single day, but for an ongoing period, potentially until the management of Woolstar reconsidered its decision to hire contract labour. It is not suggested by the FWO that those engaging in the industrial action were unmotivated to that end.
3. The burden of proving the facts necessary to establish a contravention of a civil penalty provision rests squarely on the party asserting the breach. In that regard I refer to what Flick J said in *Australian Building and Construction Commissioner v Hall* [2017] FCA 274; 269 IR 28 at [18]-[20]:

18 First, when making findings of fact, due regard must be had to the gravity of the matters alleged: *Evidence Act*, s 140(2). Section 140 provides as follows:

**Civil proceedings - standard of proof**

(1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.

(2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:

(a) the nature of the cause of action or defence; and

(b) the nature of the subject-matter of the proceeding; and

(c) the gravity of the matters alleged.

The contraventions alleged by the Director have to take into account the fact that the contraventions alleged are contraventions of civil remedy provisions of the *Fair Work Act*. They are, accordingly, properly to be regarded as “*quasi-criminal*”: *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd (No 3)* [2002] FCA 1294 at [53], (2002) ATPR ¶41-901 at 45,414 per Goldberg J; *BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* [2013] FCA 1291 at [68] to [69], (2013) 239 IR 363 at 388 to 389 per Collier J.

19 The standard of proof referred to in s 140(2) is a re-statement of the standard of proof referred to by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336: *Liquor Hospitality and Miscellaneous Union v Arnotts Biscuits Ltd* [2010] FCA 770 at [13],(2010) 188 FCR 221 at 225 per Logan J. When commenting upon the evidence required in a petition for divorce on the ground of adultery under the *Marriage Act* *1928* (Vic), Dixon J in *Briginshaw* observed (at 362):

But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

See also: (1938) 60 CLR 336 at 347 per Latham CJ. See also: Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Competition and Consumer Commission [2007] FCAFC 132 at [29] to [32], (2007) 162 FCR 466 at 479 to 480 per Weinberg, Bennett and Rares JJ; Darlaston v Parker [2010] FCA 771 at [17], (2010) 189 FCR 1 at 6 to 7 per Flick J.

20 All such findings of fact as have been made in respect to the Director’s allegations as to contraventions have been made against the standard imposed by s 140(2) of the *Evidence Act.*  Findings as to a contravention of the *Fair Work Act* are not findings lightly to be made.

1. Having regard to the evidence before the Court, I accept Mr Bakri’s submission that - with one exception - the materials adduced by the FWO provide too frail a foundation to entitle the Court to draw the inference that there were additional (daily) acts of organisation. None of the circumstances pointed to prove that to be so. For example, the attendance of union delegates at the pickets relied upon by the FWO in that regard is equally consistent with their having been there simply as a manifestation of what the NUW had earlier organised.
2. The one - and in my view, greatly significant - exception is in respect of what may be inferred from the conduct of the NUW in conducting a mass meeting of the Woolstar workers on the afternoon of 11 August 2015. As the SOAF records by way of formal admissions:

41. The section 418 Order provided, relevantly:

(a) that the NUW and the NUW Delegates *"must not organise any industrial action involving any of the Employees" (* clause 3.1 ); and

(b) that the Woolstar Employees *"must immediately stop engaging in industrial action"* and *"not continue, or organise any industrial action during the* period of operation of [the] Order" (clause 3.2); and

(c) that for the purposes of the section 418 Order, industrial action *"means* a *failure or refusal by* [Woolstar Employees] *to attend for work or* a *failure or refusal to perform any work at all by* [Woolstar Employees] *who attend for* work"….

And,

…

47. At the 11 August Unauthorised Meeting:

(a) the Woolstar Employees present were informed of the section 418 Order and its contents; and

(b) NUW officials and MLDC Delegates addressed the Woolstar Employees present.

1. As Mr Bakri acknowledged, it is open to the Court to infer that at the 11 August meeting the NUW again marshalled and rallied the employees so prompting them to continue their industrial action into the future for an indefinite period: notwithstanding and despite the Fair Work Commission’s order that it not do so. Given the NUW’s admission at [89(c)] of the SOAF, such a finding is inevitable.
2. However, I am not satisfied to the requisite degree that it is open to the Court to find that the FWO has proven that the NUW contravened s 417(1) beyond those two instances.
3. The second contravention of s 417(1) which occurred on 11 August was a further single contravention, albeit the conduct it encouraged ultimately resulted in the industrial action at the MLDC continuing for a further two and a half days. There is no evidence in the materials before the Court of any conduct by the NUW that is capable of establishing further breaches.
4. I accept, therefore, and find as proven, that there were two contraventions by the NUW of s 417(1) of the Fair Work Act.

# COURSE OF CONDUCT

1. Mr Bakri, however, submits that by reason of s 557 of the Fair Work Act, the NUW is liable only for a single contravention. Section 557 provides as follows:

(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.

(2) The civil remedy provisions are the following:

(a) subsection 44(1) (which deals with contraventions of the National Employment Standards);

(b) section 45 (which deals with contraventions of modern awards);

(c) section 50 (which deals with contraventions of enterprise agreements);

(d) section 280 (which deals with contraventions of workplace determinations);

(e) section 293 (which deals with contraventions of national minimum wage orders);

(f) section 305 (which deals with contraventions of equal remuneration orders);

(g) subsection 323(1) (which deals with methods and frequency of payment);

(h) subsection 323(3) (which deals with methods of payment specified in modern awards or enterprise agreements);

(i) subsection 325(1) (which deals with unreasonable requirements on employees to spend or pay amounts);

(ia) subsection 325(1A) (which deals with unreasonable requirements on prospective employees to spend or pay amounts);

(j) subsection 417(1) (which deals with industrial action before the nominal expiry date of an enterprise agreement etc.);

(k) subsection 421(1) (which deals with contraventions of orders in relation to industrial action);

(l) section 434 (which deals with contraventions of Ministerial directions in relation to industrial action);

(m) subsection 530(4) (which deals with notifying Centrelink of certain proposed dismissals);

(n) subsections 535(1), (2) and (4) (which deal with employer obligations in relation to employee records);

(o) subsections 536(1), (2) and (3) (which deal with employer obligations in relation to pay slips);

(p) subsection 745(1) (which deals with contraventions of the extended parental leave provisions);

(q) section 760 (which deals with contraventions of the extended notice of termination provisions);

(r) subsection 785(4) (which deals with notifying Centrelink of certain proposed terminations);

(s) any other civil remedy provisions prescribed by the regulations.

(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. In respect of that contention, the FWO submits as follows:

75. Section 557 does not ‘cover the field’ when imposing a penalty under the FW Act. The Court can still, if appropriate, apply the common law “*course of conduct*” or “*one transaction*” principles. The proper approach to the role of the “*course of conduct*” or “*one transaction*” principles in assessing penalty was recently set out by a Full Court of the Federal Court in *ABCC v CFMMEU (the First Nine Brisbane Sites Appeal)* [2019] FCAFC 59. In that case, Rangiah J summarised the principles at [124] as follows:

*In* Transport Workers’ Union of Australia v Registered Organisations’ Commissione*r* [No 2*] [2018] FCAFC 203; 363 ALR 464 at [84]–[91], the Full Court, referring to other judgments of the Full Court, considered the application of the course of conduct principle in the assessment of pecuniary penalties. The principles include the following:*

*(1) The purpose of the common law course of conduct principle is to ensure that, having regard to the circumstances (factual and legal), a party is not penalised more than once for the same conduct.*

*(2) That phrase should not simplistically be adopted to transfer multiple contraventions into one contravention, or, necessarily, to impose one penalty by reference to one maximum amount.*

*(3) The principle cannot, of itself, operate as a de facto limit on the penalty to be imposed.*

*(4) The application of the principle must be informed by the particular legislative provisions relevant to the proceedings. In particular, weight must be given to the fact that the legislature has deliberately and explicitly created separate contraventions for each relevant action.*

*(5) The application and utility of the principle must be tailored to the circumstances.*

*(6) A judge is not obliged to apply the principle if the resulting penalty fails to reflect the seriousness of contraventions.*

*(7) The task is to evaluate the conduct and its course and assess what penalty is, or penalties are, appropriate for the contraventions.*

*(8) It is necessary to examine all the conduct and enquire how its course and its explanation factually and legally informs the imposition of penalties, in order to avoid double punishment.”*

76. As set out above, even if the Court concludes that the contraventions did arise out of a single course of conduct, the application of the principle is a tool of analysis which the Court is not compelled to use. Ultimately, it is a matter of the Court’s discretion as to whether it applies the principle.88

77. Further, the course of conduct principle at common law does not permit the Court to impose a single penalty in respect of multiple contraventions of a pecuniary penalty provision. Each contravention attracts a separate penalty.89

78. In this matter, by reason of the factual differences between the conduct which occurred on each day (as discussed above), each contravention of sections 417, 421 and 355(b) are distinct and separate contraventions that did not arise out of a single course of conduct.

(Footnotes omitted).

1. The Respondent submits as follows:

53. The test as to whether or not conduct is engaged in as a course of conduct is as discussed in *Mornington Inn Pty Ltd v Jordan* (2008) 171 IR 455 at [41]-[55]; Construction, Forestry, Mining and Energy Union v Williams (2009) 191 IR 445 at [14] and following, and in Construction, Forestry, Mining and Energy Union v Cahill (2010)194 IR 461 at [35]-[47] (***CFMEU v Cahill***).

54. In *CFMEU v Cahill* at [39] Middleton and Gordon JJ observed that:

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

…

56. It is submitted that given the interrelationship between the factual and legal elements of the four s.417 contraventions which occurred at the MLDC on 10 to 13 August 2015, the course of conduct rule in s.557 and under the common law operates so that only a single declaration and a single penalty may be imposed in respect of these contraventions. In support of this submission the NUW refers to and relies on the submissions set out above at paragraphs 18 to 30 above.

## Consideration

1. In my opinion, the Applicant’s submissions at [75] to [78] proceed on a misapprehension of the reasoning of the Full Court of the Federal Court in the *Nine Brisbane Sites Appeal*. In that case, the Court was addressing a quite different factual circumstance. It was one in which the offending party had a significant history of contraventions of various civil penalty provisions of the Fair Work Act. For that reason, and in those circumstances, s 557(3) of the Fair Work Act operated to disqualify that union from the benefit of s 557(1). The Court nonetheless, had regard to what might be called common law “one transaction” principles.
2. It is only in that narrow sense that it might be said that s 557 of the Fair Work Act does not cover the field. It is wrong to read the *Nine Brisbane Sites Appeal* as standing for the proposition that where s 557(1) applies, the Court has available to it a residual choice as to whether it will apply the statutory language or the principles that might otherwise apply pursuant to the general law. That is made clear in the judgment of the Chief Justice at [9] and [11]. It is also reflected in Rangiah J’s judgment.
3. In the present case, because the NUW is, in colloquial language, an industrial cleanskin (i.e. it has no prior history of any relevant contraventions) s 557(3) does not operate to disapply s 557(1).
4. The critical question, therefore, is whether the operation of that provision which turns on whether the two contraventions “arose out of a course of conduct” is engaged on the facts of this case. That question is not without some difficulty. However, before turning to its resolution I note that it is uncontentious that the contraventions of civil penalty provisions which are to be taken to constitute a single contravention for the purposes of s 557(1) if they arose out of a course of conduct include contraventions of s 417(1) (see s 557(2)(j)). I also take it to be uncontentious that s 557(1)(a) is satisfied in the facts of the present case. The two contraventions were undoubtedly committed by the same person: the NUW.
5. The ultimate question on which this issue turns, then, is whether or not what the NUW did by way of its organisation on the relevant two occasions can properly be characterised as having arisen out of a course of conduct by it. Ultimately that is a question of fact.
6. In this instance, the correct lens of analysis as to whether or not the two contraventions of s 417(1) “arose out of a course of conduct” may be identified by reference to the NUW’s own characterisation of the relevant events.
7. The NUW’s case was that there was only a single contravention of s 417(1) involving it organising industrial action involving the MLDC. On the NUW’s case, that organisation occurred before any industrial action commenced on 10 August 2015 and there was no daily additional organisation of industrial action over the several days of the strike. I have generally accepted that analysis, subject to excepting from that proposition that on the afternoon of 11 August 2015, in the aftermath of the Fair Work Commission ordering that the industrial action cease and the NUW take no step to organise further industrial action, the NUW committed a second contravention.
8. Having regard to the manner in which the NUW put its own case, and my rejection of it insofar as the second contravention is concerned, I do not think it open for the Court to find that the second contravention “arose out of a course of conduct”. Rather, the second contravention was distinct. It was of a different character. It occurred in quite different temporal and legal circumstances.
9. In my view, properly construed, there was relevantly no course of conduct out of which both contraventions arose such that each of those contraventions, by reason of the operation of s 557(1), are to be taken to constitute a single contravention.

# THE SECTION 421 CONTRAVENTION

1. The Court is also entitled to find that the NUW contravened s 421 of the Fair Work Act on 11 August 2015.
2. Section 421 is as follows:

**421 Contravening an order etc.**

*Contravening orders*

1. A person to whom an order under section 418, 419 or 420 applies must not contravene a term of the order.

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

(2)  However, a person is not required to comply with an order if:

(a) the order is an order under section 418, or an order under section 420 that relates to an application for an order under section 418; and

(b) the industrial action to which the order relates is, or would be, protected industrial action.

*Injunctions*

(3) The Federal Court or Federal Circuit Court may grant an injunction, under this subsection, on such terms as the court considers appropriate if:

(a) a person referred to in column 2 of item 15 of the table in subsection 539(2) has applied for the injunction; and

(b)  the court is satisfied that another person to whom the order applies has contravened, or proposes to contravene, a term of the order.

Note: Section 539 deals with applications for orders in relation to contraventions of civil remedy provisions.

*No other orders*

(4) Section 545 (which deals with orders that a court can make if a person has contravened etc. a civil remedy provision) does not apply to a contravention of a term of the order.

1. The NUW contravened s 421(1) when it organised industrial action involving the employees of Woolstar on 11 August 2015, contrary to an order of the Fair Work Commission that it not do so. The nature of that order is referred to at [41] of the SOAF as follows:

41. The section 418 Order provided, relevantly:

(a) that the NUW and the NUW Delegates *"must not organise any industrial* action involving any of the Employees" ( clause 3.1 ); and

(b) that the Woolstar Employees "must immediately stop engaging in industrial action" and "not continue, or organise any industrial action during the period of operation of [the] Order" (clause 3.2); and

(c) that for the purposes of the section 418 Order, industrial action *"means* a failure or refusal by [Woolstar Employees] to attend for work or a failure or *refusal to perform any work at all by* [Woolstar Employees] *who attend for* work".

1. The NUW admits it organised that industrial action in violation of the Fair Work Commission’s order. The resultant contravention of s 421 is established by the same evidence as establishes the NUW’s second contravention of s 417(1). It is not in dispute that the NUW was served with notice of that order and proceeded in awareness of it.
2. However, for the reasons as I have given with respect to the alleged further daily contraventions of s 417(1) as I have declined to find proven, I am not satisfied that the FWO has established more than a single contravention of that provision of the Fair Work Act.

# CIVIL DOUBLE JEOPARDY

1. The above conclusions next direct attention to the issue of how the Fair Work Act requires the NUW’s contravention of s 421 to be dealt with.
2. Mr Bakri submits, given the same conduct constituted both a contravention of s 417(1) and s 421, that having regard to the provisions of s 556 of the Fair Work Act, the latter cannot be made subject to a separate penalty. Mr Bakri submits that the result for which he contends is required by the decision of Jessup J 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 (***Australian Paper***) in which his Honour, in rejecting a submission that s 556 would not apply in such a circumstance, held at [40]:

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. Mr Felman accepts that unless I were to find that in coming to that conclusion Jessup J was plainly wrong, I should, having regard to the principle of comity, follow that decision.
2. Mr Felman further acknowledges that in *Australian Building and Construction Commissioner v Upton (the Gorgon Projects Case) (No 2)* [2018] FCA 897 (***Gorgon Projects***) Barker J rejected that that his Honour should so conclude.
3. Barker J reasoned as follows:

58. While the Commissioner has contended that the holding of Jessup J in *The Australian Paper Case (No 2)* should be considered plainly wrong and not applicable in the case of the contraventions found here, I consider that what Jessup J said in that case does stand for the proposition that the respondents contend, and that it is not plainly wrong.

59. I accept that the line of argument put to me on behalf of the Commissioner was not rehearsed before Jessup J, but that does not make his Honour’s dicta and application of s 556 plainly wrong.

60. I recognise that it is open to argue that the expression “particular conduct” may require further identification of the “elements” of the conduct for which Parliament has created a civil liability offence in respect of which penalties must be imposed.

61. However, it is equally open to argue that the expression is wider than that, being “in relation to particular conduct”. I consider the use of the words “in relation to” would appear to be of some significance and to have the effect that Jessup J found s 556 has in a case such as the present.

62. In any event, if one focuses on the expression “particular conduct”, I am not satisfied that the conduct involved in the contraventions of ss 346(a), 348 and 500 in this case, is not the same particular conduct for the reasons offered by Jessup J at [40] of *The Australian Paper Case (No 2)*. It may be said therefore that the particular conduct in each of the three contraventions relates to the particular conduct of the other two.

63. I do not consider in these circumstances *The Australian Paper Case (No 2)* was plainly wrong.

64. For those reasons, I would apply s 556 in this case so that only one penalty should be imposed in respect of the three contraventions.

1. Mr Felman nonetheless submits that I should find that, by reason of their Honours not having proper regard to the principles of the common law applying to double jeopardy, the reasoning in both cases is plainly wrong. He submits that the construction of the statute held to apply in those cases fails to properly punish an offender for the full criminality of their contravening conduct.
2. That short summary of Mr Felman’s submissions fails to do justice to the arguments of the Applicant. I set out the FWO’s case as advanced at [83] to [95] of the Applicant’s written submissions:

83. The current state of authorities on the application of section 556 is reflected in the observations of Justice Jessup in *ABCC v AMWU (the Australian Paper case)* [2017] FCA 367 at [36]-[48]. In particular, his Honour said at [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.”*

84. Justice Jessup went on to say that “particular conduct” did not include any mental element in respect of such conduct (at [45]-[46]).

85. On those authorities, the FWO accepts that section 556 would operate such that the Court could only impose one penalty on the NUW for its contraventions of section 417 and 421 on 12 August and one penalty for its contraventions of sections 417 and 421 on 13 August 2015.

86. However, the FWO submits that the *Australian Paper case* and the authorities adopting the approach set out by Justice Jessup are plainly wrong and this Court ought not follow them. This is so for the following reasons.

*The approach in Australian Paper is inconsistent with the principle of double jeopardy at common law*

87. The approach of Jessup J is inconsistent with the intent of section 556. Consistent with the sub-heading of section 556, “*Civil double jeopardy*”, the purpose of the provision is to confirm that the common law principles of double jeopardy that have developed within the criminal law over time are also to be applied in respect of civil remedy provisions.

88. This purpose is confirmed in the Explanatory Memorandum to the *Fair Work Bill 2008*, where at [2187], the Explanatory Memorandum in respect of clause 556 states:

*“This clause applies the double jeopardy* ***principle*** *to pecuniary penalties under the Bill. Under the clause, where a person is ordered to pay a pecuniary penalty under the Bill in relation to* ***particular conduct****, that person is not liable to pay a pecuniary penalty under another law of the Commonwealth relation to the* ***same*** *conduct.” (emphasis added)*

89. There is no suggestion in the Explanatory Memorandum, or in any Explanatory Memorandum to the predecessor of this provision, that the double jeopardy principle as legislated in section 556 was to operate in a more far-reaching way than the way the double jeopardy principle has developed by the authorities in the past. The common law principle of double jeopardy is to ensure that a person does not suffer “double punishment” for what is the same act.94 Thus, to the extent there is an overlap in respect of conduct that is an element of more than one offence, that overlap should be reflected in the sentences imposed.

90. To the extent it could be said in respect of two offences that, as a matter of common sense, they have the same features and thus, the one conduct has triggered a liability in respect of two offences, the double jeopardy principle will be applicable. The result is that only one punishment should be imposed to avoid a person otherwise receiving *“double punishment”*.

91. If two offences, however, as a matter of common sense, have a distinct element or elements, it cannot be said that the one conduct has caused the contravention of both offences. In such circumstances, two punishments are entitled to be imposed .Of course, the sentencing court would nevertheless have regard to the overlap when fixing sentences. This is usually done in the criminal sphere by some allowance for the cumulative serving of sentences.

92. In the *Australian Paper* case, Jessup J does not appear to have considered whether his construction sat within or outside the normal parameters of the double jeopardy principle as recognised at common law. To some degree, his Honour’s approach to the task of construction was done in a vacuum, ignoring the statement in the Explanatory Memorandum –that the intent of section 556 was to simply introduce the principle of double jeopardy into the FW Act, and ignoring the deep level of case law that has examined the principle of double jeopardy, and the purpose that sits behind such a principle.

*The approach in Australian Paper does not properly punish the full criminality of the contravening conduct*

93. The approach in the *Australian Paper* case does not properly punish the full criminality of the contravening conduct. At all times, the central purpose of sentencing should be that the **full criminality** of the conduct is punished. The notion of double jeopardy has developed at common law in a sense as a tool to ensure that a person’s full criminality is punished and no more. The notion of double jeopardy is there to ensure a person does not in truth suffer *“****double punishment****”* for the same wrongdoing.

94. Section 556 should be construed so as to ensure that the fundamental tenet of fixing penalties, namely, that the **full wrong doing** of the contravener is properly punished by the penalties that are fixed, should not be defeated by the operation of section 556. Under the current construction adopted in the *Australian Paper case*, it is so defeated.

95. The dangers of the broad approach in the *Australian Paper Case* are only underlined by the fact that Jessup J excluded any matters of intent from what would come within the notion of *“particular conduct”*. As a consequence, in the *Australian Paper Case*, the taking of industrial action in defiance of an order of the Commission did not receive a discrete penalty. In this sense, it could not be said that the full wrongdoing of the contravener was punished by way of penalties.

(Footnotes omitted).

1. The submission was further developed in the Applicant’s reply submissions at [9]-[10]:

9. The Respondent alleges that the Applicant fails to address the meaning of “*plainly wrong*” in the context of its submission on section 556 of the FW Act. In this respect, the Applicant refers to paragraph 86 of its submissions, which includes a reference to the same case and passage (*BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2007) 162 FCR 234 at [83] (***BHP***)) referred to at paragraph 47 of the Respondent’s Submissions. At [85] and [86] in *BHP*, Greenwood J goes on to observe that:

*The difficulty however lies in preserving that degree of important flexibility necessary to enable a judge to do justice between the parties to a controversy inherent in a dispositive adjudication of that controversy when a judge is persuaded that an earlier authority is wrong (apart from illustrations of the kind above) balanced with the importance of consistency and certainty in the administration of the law. The question is always a matter of careful judgment.*

*The circumstances which might properly lead to a departure from an earlier authority will necessarily vary according to the content of the case and the issues and therefore no prescriptive rules ought to be formulated. However, the point of equilibrium in that balance might be reached by recognising the required emphasis necessary in concluding that an earlier authority is “plainly wrong” or “clearly wrong”. In cases where a party advised and represented by experienced senior counsel properly discharging the duty owed to the Court urges upon the Court the merits of the reasoning of the authority in the resolution of the immediate case, it would be difficult to conclude that the authority is “plainly wrong”…*

10. The Applicant’s Primary Submissions squarely set out why the Applicant says that the approach to section 556 in the *Australian Paper Case* is “*plainly wrong*”. The circumstances that caused the dispositive adjudication of the controversy in the *Australian Paper Case* to miscarry was the failure by Justice Jessup, with respect, to assess the facts underlying the contraventions of sections 417 and 421 of the FW Act in accordance with the principles of double jeopardy at common law. The Respondent argues that the *Australian Paper Case* is not plainly wrong. On a proper construction of section 556, this submission must be rejected.

(Footnotes omitted).

## Consideration

1. In my view, the correctness or otherwise of the proposition advanced on behalf of the FWO must be determined at a higher level of judicial authority. That is because I am unpersuaded that that the reasoning of Jessup and Barker JJ – reasoning which Mr Felman accepts represents the current state of authority – is plainly wrong.
2. Indeed, while I would not suggest the contrary is unarguable, for my part, I am disposed to think that their Honours are correct. However, in the end that is of no consequence. What is of consequence is that I am satisfied the reasoning in *Australian Paper* and *Gorgon Projects* is not subject to any transparent error or flaw such as would entitle me as a judge at first instance to conclude that I should not follow their Honours. In that regard I am satisfied that I will be acting consistently with the principles articulated by Greenwood J, with whom Sundberg J agreed, in *BHP Billiton Iron Ore v National Competition Council* [2007] FCAFC 157; 162 FCR 234 at [88]-[89]:

[88] Judges of this Court “should follow an earlier decision of another judge unless of the view that it is plainly wrong” (*Hicks v Minister for Immigration and* *Multicultural and Indigenous Affairs* [2003] FCA 757 at [75], per French J (a case in which the earlier authority exhibited a failure to have regard to a relevant definitional section of an Act although the ultimate construction was found to be correct)); *Takapana Investments Pty Ltd v Teco Information Systems Company Ltd* (1998) 82 FCR 25 at 32 per Goldberg J (“I consider as a matter ofjudicial comity I should follow earlier decisions of single judges of this courtunless I am satisfied the decision is clearly wrong” — a refusal to follow earlierreasoning found to be in tension with a decision of the High Court); *Towney v Minister for Land and Water Conservation* (NSW) (1997) 76 FCR 401 at 412per Sackville J (adopting a test of departure if satisfied the earlier decision is“clearly wrong”); Esso Australia Resources Ltd v Federal Commissioner of *Taxation* (1997) 37 ATR 470 at 474; 150 ALR 117 at 121 per Foster J (adoptinga test of “I should follow the earlier decisions unless I am persuaded to thecontrary” — a case where High Court authority ought to have been followed inan earlier determination); *La Macchia v Minister for Primary Industries and Energy* (1992) 110 ALR 201 at 204 per Burchett J (adopting the statement inHalsbury (4th ed) Vol 26, para 580 that “a judge of first instance will as a matterof judicial comity usually follow the decision of another judge of first instanceunless he is convinced that the judgment was wrong”).

[89] Burchett J further observed that as an expression of a usual or general rule,the following statement of Rogers J in *Hamilton Island Enterprises Pty Ltd v Federal Commissioner of Taxation* [1982] 1 NSWLR 113 at 119 is consistentwith the proposition I have quoted from Halsbury: “In my view it is of cardinalimportance in the proper administration of justice that single judges of StateSupreme Courts in exercise of Federal jurisdiction should strive for uniformityin the interpretation of Commonwealth legislation. Unless I were of the viewthat the decision of another judge of coordinate authority was clearly wrong, Iwould follow his decision”; see also: Bank of Western Australia Ltd v Federal *Commissioner of Taxation* (1994) 55 FCR 233 at 255 per Lindgren J; *Bradley v Armstrong* (1981) 55 FLR 355 at 356 and 361 per Fox J and Connor J; *Re Rothercroft Pty Ltd* (1986) 4 NSWLR 673 at 679 per Kearney J; *Deputy Commissioner of Taxation v Access Finance Corporation Pty Ltd* (1987) 8NSWLR 557 at 558 per Samuels JA; *Magman International Pty Ltd v Westpac Banking Corporation* (1991) 32 FCR 1 at 20 per Hill J; *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492 perMason CJ, Brennan, Dawson, Toohey and Gaudron JJ; *Nezovic v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 190 at[52] per French J observing “where questions of law and in particular statutoryconstruction are concerned, the view that a judge who has taken one view of thelaw or a statute is ‘clearly wrong’ is not likely to be adopted having regard tothe choices that so often confront the courts particularly in the area of statutoryconstruction”; *Marr v Australian Telecommunications Corporation* (1991) 34FCR 82 at 85 per Hill J; and *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 81 ALJR 1107.

1. For those reasons I will give effect to s 556 of the Fair Work Act as it has been construed by Jessup J in *Australian Paper* and Barker J in *Gorgon Projects*. Should this issue become the subject of appellate review, the oral exchanges that occurred in the illuminating discussions between counsel and the bench in oral argument – and I acknowledge Mr Felman’s skill in the articulation of those arguments – will be available on the transcript.
2. Because the Court will order the NUW to pay a pecuniary penalty under s 417(1) of the Fair Work Act, having regard to s 556 of that Act the NUW is not liable to pay a pecuniary penalty under s 421.
3. However, I accept Mr Felman’s contingent submission that in determining the penalty for the s 417(1) contravention, I am entitled to take into account that the seriousness of the NUW’s conduct is aggravated because it simultaneously breached two provisions of the Fair Work Act, notwithstanding that a penalty may be imposed only in respect of one: *United Group Resources Proprietary Limited v Calabro (No. 7)* [2012] FCA 432; 203 FCR 247 per McKerracher J at [84]:

84. Imposing a single penalty on a respondent under s 38 of the [*Building and Construction Industry Improvement Act 2005* (Cth)], the Court has regard to the overall conduct of each individual respondent including the fact that the industrial action in which the respondent engaged in contravention of s 38 of the BCII Act also constituted one or two contraventions of the FW Act. A similar approach was taken by Burchett J in *Trade Practices Commission v TNT Australia Pty Ltd (Express Freight case)* [1995] ATPR 41-375 at [20] in which his Honour held that it was appropriate to select certain only of the contraventions for the imposition of penalties, taking into others into account, but not imposing separate penalties in respect of them. A similar approach was also taken by Mansfield J in *Australian Competition and Consumer Commission v Rural Press Ltd* [2001] ATPR 41-833 at [16]-[17] and Finkelstein J in *ABB Transmission and Distribution Ltd (No 2)* at [38].

# SUMMARY

1. Having regard to the above, I proceed on the basis that the conduct of the NUW between 10 and 13 August 2015 involved a contravention of s 417(1) on two occasions with respect to the MLDC, and on one occasion with respect to the MRDC. I also proceed on the basis that on 11 August 2015, the NUW contravened s 421 of the Fair Work Act, but that by reason of the operation of s 556 it is not liable to pay a separate pecuniary penalty in respect of that contravention.

# SECTION 355

1. Before turning to the question of quantum of pecuniary penalties, I acknowledge that the SOAF also refers to an admitted single contravention of s 355(b) of the Fair Work Act by the NUW. However, notwithstanding that admission, I am not persuaded that the evidence before the Court permits it to conclude that the essential elements of a contravention of that provision have been made out. Section 355 is in the following terms:

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) employ, or not employ, a particular person; or

(b) engage, or not engage, a particular independent contractor; or

(c) allocate, or not allocate, particular duties or responsibilities to a articular employee or independent contractor; or

(d) designate a particular employee or independent contractor as having, or not having, particular duties or responsibilities.

1. The relevant facts recorded in the SOAF are as follows:

11. On 30 July 2015, Woolstar informed the NUW of its decision to engage casual workers through a third party labour hire agency, Chandler Macleod **(Labour Hire Decision)** by:

(a) communicating the Labour Hire Decision to the NUW verbally during a joint consultative committee meeting on 30 July 2015; and

(b) communicating the Labour Hire Decision in writing to the NUW via an email from Damian Johnson **(Johnson),** Logistics Manager of the MLDC, dated 30 July 2015.

12. At approximately 5:40 am on 31 July 2015, an email was sent between NUW organisers and industrial officers, stating that "MLDC will *be using Chandler Macleod from now on to recruit new workers ... The current workers will not be affected by this is what they are saying (sic), but it will only be a matter of time. The site is filthy. We will need to catch up about this."*

13. On or around 31 July 2015, an NUW delegate made a request by email to Johnson to hold a mass meeting with the Woolstar Employees to discuss the Labour Hire Decision. The request was denied by Johnson. On 5 August 2015 at approximately 9.00am, 10.30 am, 11.30 am and 4.00 pm, the NUW conducted meetings with some of the Woolstar Employees **(5 August Mass Meetings)** outside Gate 4 of the entrance to the MLDC Site. NUW organisers and industrial officers attended the meeting and discussed the issue of labour hire at the MLDC with Woolstar Employees.

…

16. On 7 August 2015, the NUW caused to be posted on their official Facebook page the following:

*"This Sunday 9th August.. .there will be a mass meeting at Woolworths' Melbourne Liquor Distribution Centre (MLDC) in Laverton to talk about jobs workers can count on... Workers at the MLDC are fighting against the company's attempts to undermine secure jobs by introducing labour hire contractors ... "*

…

20. At or around 4.15 am on 10 August 2015, an MLDC Delegate was present at the MLDC Site and used a loud hailer to shout: *"Union power"* and *"No labour* *hire".*

…

26. At the 10 August Meeting No. 1, one of the MLDC Delgates handed a petition, which attached another signed petition against labour hire on NUW letterhead, to Johnson with two demands as follows:

*"No labour hire and no retribution for employees who have stood up for their rights."*

...

28. At the 10 August Meeting No. 2, the NUW and Woolstar discussed Woolstar's engagement of labour hire at the MLDC Site.

…

58. On or around 12 August 2015, the NUW posted on its official Facebook page the following:

*"After several meetings with management today at Woolworths Liquor in Laverton, workers have resolved to stay overnight. The workers are seeking a fair resolution tomorrow morning, which will protect secured jobs at MLDC from the implementation of labour hire and provide for a respectful return to work. Stay tuned for updates on secured jobs at Woolworths sites nation wide."*

…

62. At the 12 August Meeting No. 2, a senior elected NUW official said that the position of some the Woolstar Employees was that they would go back to work if Woolstar made a commitment that there would be no ramifications for them and if Woolstar agreed not to use labour hire.

…

70. At the 13 August Meeting, the NUW and Woolstar reached proposed terms for an agreement on Woolstar's use of labour hire **(Proposed Labour Hire Agreement)** and in relation to the disciplinary action that would be taken against the Woolstar Employees who had participated in the industrial action at the MLDC Site. The Proposed Labour Hire Agreement was to be put to the NUW's members at the MLDC for their consideration.

71. The Proposed Labour Hire Agreement, in its terms, placed restrictions on the circumstances in which Woolstar could engage labour hire contractors to provide labour at the MLDC Site.

…

76. On or about the morning of 12 August 2015, unidentified persons outside the MRDC Site handed out a flyer **(12 August Flyer)** to QPI Employees that stated as follows:

*"On strike for job security. Management at the giant Melbourne Liquor Distribution Centre has announced that all new workers will be employed as labour hire casuals. MLDC supplies Woolworths outlets such as Dan Murphy's and BWS.*

*In response, hundreds of workers have launched a snap strike and picket. Long term labour hire introduces another source of job insecurity for the MLDC workforce - which is already 50% casual. Labour hire workers are forced to work harder, and will therefore have more injuries, lifting heavy boxes of liquor.*

*Workers are disgusted that management lied to them about plans to introduce agency casuals during the last enterprise agreement, negotiated last year. Workers know that our ultimate weapon to make big companies respect us, is to withdraw our labour.*

*Visit the picket - Interchange Road, off Leakes Road, Laverton. Support your fellow workers."*

…

78. At approximately 3:00 pm, approximately 30-40 QPI Employees **(MRDC Picketers)** formed and attended a picket at or near various entry and exit points at the MRDC Site **(13 August MRDC Picket).**

**…**

87. The Final Labour Hire Agreement provided as follows:

(a) "Woolworths Ltd and the NUW (the parties) agree that the provisions in this document, together with any provisions in the Enterprise Agreement, will regulate how supplementary labour engaged through a third party (labour hire) is utilised at MLDC. The document includes the following:

(b) use of labour hire will be limited to the Peak Season;

(c) labour hire can also be used during other periods of the year as identified by MLDC management and agreed with the NUW. The NUW cannot unreasonably withhold agreement;

(d) the labour hire provider is to be selected from a list of Woolworths Preferred Suppliers with prior consultation with the JGC; and

(e) the labour hire provider will be required to distribute hours in a fair, equitable and transparent manner."

1. Having regard to those agreed facts, in my view it is not possible to conclude the action taken by the NUW was organised with the intent to coerce Woolstar to “engage or not engage” a particular independent contractor within the meaning of s 355(b) of the Fair Work Act. Rather what is unquestionably revealed is that the conduct of the NUW, assuming it was intended to coerce Woolstar, reflected an intention on the NUW’s part to coerce that company not to engage independent contractors at all.
2. Mr Felman did not press a submission that those facts could establish that the NUW sought to coerce Woolstar with the intention that it not engage Chandler Macleod, as opposed to any other particular independent contractor which might potentially be available to provide labour hire to the company. Mr Felman, however, submitted that that circumstance was not material. He submitted that s 355(b) was not limited to operating in circumstances where a person is intending to coerce a company to choose one contractor rather than another. It also operated in circumstances when a company’s decision to engage or not engage a contractor at all was the object of coercion.
3. Mr Felman submitted:

…that the use of the word “particular”, in my submission, does not limit section 355(b) to a comparison of two contractors.

All it does is it indicates that there needs to be a specific contractor in mind as opposed to just a general idea of contractors. So, for example, it wouldn’t be enough if the NUW … intended to coerce [the company] to not engage ... subcontractors – a subcontractor to provide casual labour at all, just full stop. You’ve got to – because of the word particular, you’ve got to identify a particular subcontractor, which in this case there has been in Chandler Macleod. But … the use of the word “particular” doesn’t mean it has to be one over the other. And we have, in the short time available, dug up an online Macquarie Dictionary definition of the word “particular”, which I can hand up a copy of, your Honour.

HIS HONOUR: Yes.

MR FELMAN: You will see there’s a number of definitions. The first:

*Relating to some one person, thing, group, rather than to others or all.*

And that would be the definition that we would say is apposite, but, of course, the third definition is the definition that your Honour seems to have been referring to, which is:

*Distinguished or different from others –*

as in, for example, another contractor. But, in my submission, this definition encompasses both scenarios, not just the one. The third point, your Honour, is that the explanatory memorandum to the bill – and I can hand up a copy of the relevant extract – supports our position. Paragraphs 1443 to 1444, your Honour, you will see it says:

*Clause 355 is intended to prevent persons from being coerced to make certain employment or management related decisions.*

Then it sets out basically what the clause says. And then the example:

*For example, clause 355 prohibits an industrial association from organising industrial action against a head contractor with intent to coerce the head contractor to engage a specific employee as a site delegate or a safety officer.*

There’s no mention … there of “as distinct from another employee who is in that particular role”. It just simply says you can’t coerce someone to engage someone.

1. In my view, the FWO’s submissions are unpersuasive and cannot be accepted. The cases Mr Felman cited in support (*Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 407; 234 FCR 451 and *Director of Fair Work Building Inspectorate v Construction, Forestry, Mining and Energy Union (The Red and Blue Case)* [2015] FCA 1125; 254 IR 200)each refer to an instance where the CFMEU brought pressure to bear on an employer to employ a particular person favoured by the union from amongst a potentially larger field of employees, with the intent that that particular person be engaged to fill a particular role. The prohibited conduct thus fell squarely within the terms of s 355(b) of the Fair Work Act, however it might be understood.
2. By contrast, I am unable to discern anything in the facts of this case that would permit me to conclude that the admitted intent to coerce of the NUW was that of pressuring Woolstar not to employ a particular independent contractor to be supplied by Chandler Macleod. The intent was rather to coerce Woolstar not to engage any independent contractors at all. The independent contractors potentially to be supplied by Chandler Macleod are not identified in the SOAF, and nothing suggests any relevant animus directed towards their particular engagements. That is equally true even if it is possible to characterise Chandler McLeod itself as the relevant “particular independent contractor”. Nothing suggests that had Woolstar sought to engage another supplier of contract labour the NUW’s response would have differed. The union’s intent was not that Chandler McLeod as a supplier of contract labour not be engaged, but that no such supplier should be.
3. I accept the submission that Mr Felman advances that s 355 of the Fair Work Act has a protective purpose and is to be given a broad and beneficent construction. In that regard, Mr Felman cited *IW v City of Perth* [1997] HCA 30; 191 CLR 1. However, as the outcome of that case itself reveals, the existence of a protective purpose cannot prevail over the text of a statute where it constricts the scope of the operation of a provision in a specific regard. In the present case the statute requires a specific intent to be proven. In my view, the specific intent provided for in s 355 must be proven and to proceed on any other basis would be inconsistent with the structure and text of the provision read as a whole.
4. To accept the submission advanced on behalf of the FWO would require the Court effectively to rewrite the provision of s 355(b) of the Fair Work Act so as to excise (or give no effect to) an express element of the proscribed specific intent. I reject the proposition that I am entitled to do so.
5. Both the Applicant and the Respondent accepted that if I were to come to that conclusion the Court would be required to decline to find that the pleaded contravention established, notwithstanding the Respondent’s admissions in the SOAF. That must be correct. The Court cannot lend itself to making declarations and findings of civil contraventions unless it is satisfied that the elements of a contravention of a civil penalty provision of the Fair Work Act have been established. I am not so satisfied. I so decline.

# PENALTIES

1. I turn finally to the question of penalties. There is no disagreement between the parties as to the principles that apply. They are conveniently summarised at [38] and [39] of the Applicant’s submissions:

38. The Court should apply the relevant penalty unit in force at the time the contraventions occurred. The contraventions in this matter occurred in the period from 10 to 13 August 2015. At all relevant times after 31 July 2015, a penalty unit was defined as $180. Accordingly, the maximum penalty which the Court may impose upon the NUW for each contravention of the FW Act ($54,000 each).

39. The Court’s power to determine whether a penalty is to be imposed in respect of any contravention of the FW Act, and if so the quantum of the penalty, is discretionary. The principles to be applied by the Court when exercising this discretion were recently set out by a Full Court of the Federal Court in *CFMMEU v ABCC (The Non-Indemnification Case)* (2018) 264 FCR 155. In that case, the Court said, at [19]-[22]:

*“19. It is unnecessary to engage in any extended discussion of principle. Of particular significance is the recognition that deterrence (general and specific) is the principal and indeed only object of the imposition of a penalty – to put a price on contravention that is sufficiently high to deter repetition by the contravener and others who might be tempted to contravene the Act:. French J in Trade Practices Commission v CSR Ltd [1990] FCA 762; (1991) ATPR 41-076 at 52,152, cited by the plurality in Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate (Civil Penalties Case) [2015] HCA 46; 258 CLR 482 at 506 [55]. Retribution, denunciation and rehabilitation have no part to play.*

*20. Relevant factors in the overall assessment of penalty were helpfully listed by French J in CSR. They have been adopted in many cases. For present purposes, they can be restated as follows: the nature, character and seriousness of the conduct; the loss and damage caused; the circumstances in which the conduct took place; the size of the contravener and its degree of power; the deliberateness of the conduct and the time over which it occurred; the degree of involvement of senior officials or management; the culture of the organisation as to compliance or contravention; and, any co-operation with the regulator and contrition.*

*21. The seriousness of the contravention and other features of the conduct which may be seen as relevant to it (here, the seriousness of interruption of a concrete pour, the seriousness of the threats of repetition, the deliberateness of the contravening of the Act, and the exhibited apparent sense of impunity in undertaking contravening conduct) find their place in understanding the degree of deterrence that is necessary to be reflected in the size of the penalty: Flight Centre Ltd v Australian Competition and Consumer Commission (No 2) [2018] FCAFC 53 at [71].*

*22. The overwhelming importance of deterrence as the protective purpose of the penalty does not exclude the need to determine a penalty which is proportionate to the contravening conduct. The history of contravention is to be taken into account in fixing the proper level of penalty for the proportionate response to the contravention in question. Proportionality has within it the need to characterise the seriousness of the contravention. Proportionality of penal response to a contravention assessed by reference to its seriousness and gravity is an essential characteristic of the application of the statute. The penal response is for that contravention, not earlier contraventions: Veen v The Queen [No 2] [1988] HCA 14; 164 CLR 465 at 477-478. Prior contraventions may reveal an apparent disregard for the Act and the need for deterrence by a penalty at a level appropriate to achieve that objective. It is to be borne in mind, however, that it is for the conduct in question that the penalty is imposed, not for prior conduct.”*

(Footnotes omitted).

1. Subject to necessary adjustments in respect to the number of offences, I accept the FWO’s analysis of the objective seriousness of the relevant conduct of the NUW as set out below:

41. The NUW took deliberate and calculated conduct in organising industrial action over a period of four days, at two separate sites in contravention of section 417 of the FW Act. Further, the NUW continued to organise industrial action at the MLDC in defiance of a section 418 order made by the FWC, thereby contravening section 421 of the FW Act. These contraventions are objectively serious.

…

43. At the time the industrial action was organised, the NUW was aware of, and had in fact previously used, lawful means to resolve disputes with Woolstar and QPI pursuant to the disputes procedures under the relevant enterprise agreements. For example, on 7 August 2015, the NUW was represented at a FWC hearing with respect to an application the NUW made pursuant to the dispute resolution procedure under the QPI Agreement. Among other things, that dispute was about increased use of causal employees by QPI at the MRDC.

…

45. While the admitted contraventions took place at two Woolworths sites, the disruption caused by the industrial action and pickets at the MLDC affected the broader Woolworths supply chain. For example, Mr Johnson gives evidence that in order to attempt to mitigate the impact of the industrial action and pickets, distribution centres in Adelaide, Sydney and Wodonga and an additional distribution centre in Melbourne were required to make alternative distribution arrangements. It is also Mr Johnson’s evidence that he has never experienced a disruption of the level caused by the industrial action and pickets in close to 10 years management experience with Woolworths. The extent of the admitted contraventions at the MLDC should therefore be viewed as significant.

(Footnotes omitted).

1. I also accept what the FWO submits as the relevant facts as to the size and financial circumstances of the NUW:

53. The NUW is a large organisation with between 50,000 to 70,000 members, operating nationally across a range of industries. It has a significant role in the national industrial relations framework. Pursuant to its Financial Reports for the financial year ending 30 June 2018:

(a) the Victorian Branch of the NUW enjoyed revenue of $13,960,135 and held net assets in the amount of $36,273,127; and

(b) the National Office of the NUW enjoyed revenue of $10,233,822 held net assets of $9,106,744.

(Footnotes omitted).

1. There are two particular acknowledgments that the FWO makes that are significant in the NUW’s favour.
2. First, the FWO acknowledges that the NUW has never before or since the relevant events been the subject of any findings of contravention of the Commonwealth workplace laws.
3. Second, the FWO acknowledges that the NUW ultimately co-operated in assisting with the bringing of these proceedings to a conclusion. In that regard, however, Mr Felman qualifies that acknowledgment by noting that the relevant cooperation occurred some three years after the proceedings commenced, and submits that any discount in overall penalty should accordingly be limited to the range of 10 per cent. I agree.
4. The FWO also acknowledges that in respect of the financial losses incurred, the company has agreed to accept $101,593.50 as compensation in satisfaction of that loss. That circumstance. Mr Felman submits, does not mitigate the objective seriousness of the offences but removes a factor that otherwise would aggravate it. Again I agree.
5. As to deterrence, the FWO submits as follows:

61. In order to be useful as a general deterrent, a penalty *“should be of a kind that it would be likely to act as a deterrent in preventing similar contraventions by like−minded persons or organisations”*. Offenders of industrial legislation should not regard the penalty as *“the cost of doing business.”*

(Footnote omitted).

1. Having regard to those submissions, the FWO submitted a schedule proposing a range of penalties. The suggested penalties ranged from a proposed 40 percent of the maximum for the half-day stoppage that occurred at the MRDC to 70 percent for the organisation offences.
2. By contrast, Mr Bakri places emphasis on the NUW’s previously unblemished record; its contrition; its reestablishment of effective working relationships with the relevant Woolworths entities; and the initial circumstances in which the dispute arose, which included a substantial change in workplace arrangements being announced without any prior consultation with staff or the union. He proposes penalties in the range of 10 to 20 per cent of the available maximum for the NUW’s offending.

## Consideration

1. All of the factors to which Mr Felman and Mr Bakri referred the Court are relevant. However, the setting of appropriate penalties cannot be done in some mathematical way pursuant to a formula as the reasoning of Charlesworth J in *Robinson*  at [63]-[69] helpfully reminds:

63 On an appeal brought by the Commonwealth, the High Court in *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 90 ALJR 113; 326 ALR 476 made a footnoted reference to the above passage of the Full Court’s reasons. The majority (French CJ, Kiefel, Bell, Nettle and Gordon JJ) said (at [55], original footnote included):

[55] No less importantly, whereas 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.

FN75: *Trade Practices Commission v CSR Ltd* [1991] ATPR 41-076 at 52,152; cf *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* (2015) 229 FCR 331 at [65]-[67].

64. The majority went on to say (at [59]) that “civil penalties are not retributive, but like most other civil remedies essentially deterrent or compensatory and therefore protective”.

65. Although the High Court was there referring to the purpose of civil penalties generally, the case before it concerned the imposition of civil penalties for unlawful industrial action in contravention of the *Building and Construction Industry Improvement Act 2005* (Cth), which establishes a regime with substantially the same objectives as those of the FW Act. The statutory context is relevantly the same as that in the matter before me.

**The role of proportionality in a non-retributive context**

66. Once it is accepted that civil penalties are not retributive, concepts of proportionality should not be applied for the purposes of serving broader objectives of punishment in the sense described in *R v Hunter* (1984) 36 SASR 101 at 103 (King CJ) (applied by Lander J in *Ponzio* (at [93])):

The basic concepts of justice which underlie the criminal law require that the punishment be fairly proportionate to the crime in accordance with the prevailing standards of punishment. Only when it meets that criterion can a sentence satisfy the sense of justice of the community which is expected in the criminal law and in the practice of the courts in applying the criminal law.

67. Proportionality is nonetheless a critical objective in exercising the discretion conferred by s 546 of the FW Act. That is because the degree of seriousness of a contravention is relevant to ascertain “the assessment of a penalty of appropriate deterrent value”: *CSR* at [42]. A penalty of appropriate deterrent value is one that recognises that the maximum penalties prescribed in the statute are appropriately imposed in cases where the need for deterrence is the most pronounced. There remains, in addition, a discretion not to impose a penalty at all if the statutory purpose of deterrence would not be served by the imposition of one.

68. The seriousness of the conduct constituting the contravention is an important indicator of the need for deterrence in a particular case, but is not the sole indicator. Consistent with the reasoning of French J (as he then was) in *CSR*, in all cases it is proportionality in relation to the need for deterrence that must be achieved, having regard to all relevant circumstances, including the objective seriousness of the contravention before the Court.

69. It should also be recognised that penalties fixed for a deterrent purpose are intended to have an attitudinal effect: dissuasion. It is for this reason that my assessment of the seriousness of the conduct of the respondents places appropriate emphasis on the mental attitudes accompanying their physical acts.

1. For the reasons advanced by Mr Bakri, I proceed on the basis that this is not a case in which factors relating to specific deterrence loom large, if at all, as a material consideration in setting the appropriate penalties. I accept that the NUW has no previous contraventions. I accept there has been effective reconciliation between it and the Woolworth entities. It may be a less than perfect relationship, as the FWO submits, but I do not take the FWO to have suggested that the relationship is other than entirely acceptable from an industrial relations perspective. I accept that the NUW has apologised for its conduct. The NUW has not contravened any provision of the Fair Work Act since. If the only relevant consideration in setting a pecuniary penalty were specific deterrence, this might be the kind of rare case as Charlesworth J refers to where no penalty at all would be required.
2. However, that is not the only relevant consideration. With respect to general deterrence, the position is quite different. I have accepted the FWO’s submissions as to the objective seriousness of the NUW’s conduct (see above at [80]). In my view, the range of penalties proposed by Mr Bakri between 10 and 20 per cent of the available maximum are too low as to be within the permissible range of pecuniary penalties that should be imposed in the circumstances of this matter.
3. The parties are agreed that for a corporate body such as the NUW the relevant maximum pecuniary penalty for each contravention is 300 penalty units. That equates to $54,000.00, as a penalty unit was defined as $180.00 at the time of the relevant events.

### The first organising contravention

1. Even accepting Mr Bakri’s submission that I am entitled to take into account the circumstances in which the first contravention arose (namely that the decision of Woolstar to use contract labour came as a shock and without notice, and in circumstances in which the staff at the MLDC represented by the NUW might be expected to be greatly concerned) the NUW must be understood to have wilfully and knowingly organised industrial action during the currency of its existing industrial agreement. I infer that it did so in order to place pressure on Woolstar, to encourage it to reconsider its decision to employ labour hire casuals. On the NUW’s own case that industrial action was intended to persist into the indefinite future.
2. However, notwithstanding the objective seriousness of what was done I take it as uncontentious that the maximum penalty is to be reserved for the worst of offences including where an offender has acquired a history of contemptuous disregard for the law.
3. In my view, the objective seriousness of the relevant conduct warrants a pecuniary penalty twice that of the 20 percent of the maximum which was proposed by Mr Bakri: notwithstanding that it is the NUW’s first contravention. In reaching that conclusion I have taken into account that the starting position is that there should be a discount by reason of the NUW’s cooperation. I conclude that a pecuniary penalty of 40 percent of the maximum is appropriate.

### The second organising contravention

1. The objective circumstances of the second contravention of s 417(1) are significantly more concerning. That act of organisation was engaged in in defiance of an order of the Fair Work Commission. As I have earlier noted, it is not contentious that the NUW was aware of that order and I am satisfied that it knew that it could have pursued alternative avenues, including in the Fair Work Commission, in response to the company’s actions.
2. While only one penalty can be imposed, for the reasons I have given earlier, I proceed on the basis that in assessing the appropriate penalty for that second contravention, I am entitled to take into account that the same act of organisation also constituted a contravention of s 421 of the Fair Work Act.
3. In those circumstances, notwithstanding that the NUW has otherwise an unblemished record, I will, having regard to considerations of general deterrence, impose a financial penalty of 70 percent of the maximum. That which was organised was intended to continue into the indefinite future and was only brought to an end when the company ultimately agreed to a settlement with the union.

### The QPI contravention

1. With respect to the single contravention of s 417(1) of the Fair Work Act relating to the MRDC owned by QPI, I would impose a financial penalty of 40 percent of the maximum, consistent with that sought by the FWO. While I accept that that organisation led to industrial action of only a half day’s duration, it occurred after the Fair Work Commission had made orders, and in the knowledge that negotiations were significantly advanced with Woolstar. In that circumstance it might be inferred, and I infer, that that industrial action was intended to convey to Woolworths, the owner of both of the Woolstar and QPI companies, that unless the Woolstar dispute was settled on terms acceptable to the NUWs, there was a risk of a wider flow on of consequences.
2. In reaching my conclusions, I have taken into account the 10 percent discount for the NWU’s limited cooperation.

## Summary of conclusions on pecuniary penalties

1. I impose a financial penalty in respect of the organisation of industrial action occurring between 10 and 11 August of $19,440.00 (40% of the maximum).
2. As to the conduct of the NUW in organising industrial action in the course of a mass meeting held on the afternoon of 11 August, which continued until late on 13 August, I impose a financial penalty of $34,020.00 (70% of the maximum).
3. I impose a financial penalty in respect of the NUW’s organisation of industrial action affecting QP on 13 August of $19,440.00 (40% of the maximum).
4. I find that a contravention of s 421(1) of the Fair Work Act by the NUW has been established, but I make no orders in relation to a financial penalty having regard to the provisions of s 556 of the Fair Work Act.
5. Together, those penalties sum to $72,900.00. I am satisfied that the totality principle does not require any adjustments.

## Other orders and declarations

1. I also make an order by consent for compensation in the terms proposed by the NUW which has been agreed as a proper measure of the company’s loss.
2. The parties were agreed that it would also be appropriate that the Court make declarations. I gave leave to file agreed terms of proposed declarations having regard to my reasons. The parties have done so. I am satisfied that the declarations they have proposed are appropriate to make and I do so.
3. There will be no order as to costs.

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| I certify that the preceding one hundred and eight (108) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Kerr. |

Associate:

Dated: 7 November 2019