FEDERAL COURT OF AUSTRALIA

Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Nine Brisbane Sites Appeal) [2019] FCAFC 59

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| Appeal from: | *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Nine Brisbane Sites Case) (No 3)* [2018] FCA 564  |
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| File number: | QUD 324 of 2018 |
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| Judges: | **ALLSOP CJ, GRIFFITHS AND RANGIAH JJ** |
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| Date of judgment: | 12 April 2019 |
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| Catchwords: | **INDUSTRIAL LAW –** appeal from a single judge of the Federal Court –where respondents engaged employees and subcontractors in stop-work meetings – contraventions of ss 355 and 346(b) of the *Fair Work Act 2009* (Cth) – whether respondents also contravened s 417 – whether stop-work meetings were “industrial action” when employers had agreed to or authorised union meetings under an enterprise agreement – whether s 19(2)(a) applies – proper construction of the union meeting clause in an enterprise agreement – whether s 19(2)(a) authorises agreements with respect to industrial action which could be taken for the unlawful purpose of contravening sections of Pt 3-1 – whether there is a requirement that a union meeting be for a “genuine” purpose – whether a union meeting for an unlawful purpose is a “sham” and unlawful under s 194(e) for inconsistency with s 417**INDUSTRIAL LAW** – pecuniary penalties imposed on the union through individual union officers for contraventions of s 355 and s 346(b) by sixteen strikes or stop-work meetings over nine days – whether more than one penalty should be imposed on those days in which there were multiple contraventions on multiple sites – application of s 556 for contraventions on the same date – application of course of conduct principle – deliberate, premeditated and sustained campaign of unlawful industrial behaviour orchestrated by the union – extensive and vast history of prior contraventions – involvement of senior union officers – loss found to be likely greater on the days where multiple sites affected – single penalty for each day involving multiple contraventions across multiple sites inadequate – appeal allowed in part |
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| Legislation: | *Fair Work Act 2009* (Cth) ss 3, 19, 55, 194, 228, 253, 340, 342, 343, 346, 347, 348, 354, 355, 356, 363, 406, 415, 417, 557, 793*Industrial Relations Reform Act 1993* (Cth)*Workplace Relations Act* *1996* (Cth)*Workplace Relations Amendment (Work Choices) Act 2005* (Cth)*Federal Court Rules 2011* (Cth) rr 16.08, 16.33  |
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| Cases cited: | *Amcor Limited v Construction, Forestry, Mining and Energy Union* [2005] HCA 10; 222 CLR 241*Auimatagi v Australian Building and Construction Commissioner* [2018] FCAFC 191; 363 ALR 246 *Australasian Meat Industry Employees’ Union v Mudginberri Station Pty Ltd* [1986] HCA 46; 161 CLR 98*Australian Building and Construction Commissioner v Construction Forestry, Mining and Energy Union* [2017] FCAFC 113; 254 FCR 68*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCA 157; 267 IR 130*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 53; 249 FCR 458*Australian Competition and Consumer Commission v Yazaki Corporation* [2018] FCAFC 73; 357 ALR 55*Ballarat Health Services v Health Services Union* [2012] FCAFC 79*Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Non-Indemnification Personal Payment Case)* [2018] FCAFC 97*Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2015] FCAFC 25; 230 FCR 298*Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39; 269 ALR 1*Construction, Forestry, Mining and Energy Union v Director of Fair Work Building Industry Inspectorate* [2013] FCAFC 53*Construction, Forestry, Mining and Energy Union v Williams* [2009] FCAFC 171; 262 ALR 417*Davids Distribution Pty Ltd v National Union of Workers* [1999] FCA 1108; 91 FCR 463*Health Services Union v Ballarat Health Services* [2011] FCA 1256*House v R* [1936] HCA 40; 55 CLR 499*Kucks v CSR Ltd* (1996) 66 IR 182*Royer v Western Australia* [2009] WASCA 139; 197 A Crim R 319*Shop Distributive and Allied Employees’ Association v Woolworths SA Pty Ltd* [2011] FCAFC 67*Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* [1979] HCA 51; 144 CLR 596*Toyota Motor Corporation Australia Limited v Marmara* [2014] FCAFC 84; 222 FCR 152*Transport Workers’ Union of Australia v Registered Organisations Commissioner [No 2]* [2018] FCAFC 203; 363 ALR 464*Transport Workers’ Union of Australia v Coles Supermarkets Australia Pty Ltd* [2014] FCAFC 148; 245 IR 449 |
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| Date of hearing: | 19 November 2018 |
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| Registry: | Queensland |
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| Division: | Fair Work Division |
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| National Practice Area: | Employment & Industrial Relations |
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| Category: | Catchwords |
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| Number of paragraphs: | 146 |
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| Solicitor for the Appellant: | Clayton Utz  |
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| Solicitor for the Respondents: | Hall Payne Layers  |

ORDERS

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|  | QUD 324 of 2018 |
|   |
| BETWEEN: | AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONERAppellant |
| AND: | CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNIONFirst RespondentMATTHEW PARFITTSecond RespondentJUSTIN STEELE Third RespondentKURT PAULSFourth RespondentEDWARD BLANDFifth RespondentANTONIO FLOROSixth RespondentANTHONY STOTTSeventh RespondentMICHAEL DAVISEighth Respondent |

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| JUDGES: | ALLSOP CJ, GRIFFITHS AND RANGIAH JJ |
| DATE OF ORDER: | 12 April 2019 |

THE COURT ORDERS THAT:

1. The appeal be allowed in part.
2. Orders 19, 20 and 23 of the orders of the Court made on 24 April 2018 be set aside and in lieu thereof it be ordered:

19. In respect of the conduct on 13 September 2016, the subject of Declarations 34, 35, 36, 46, 47 and 48, the First Respondent pay two pecuniary penalties of $35,000 each.

20. In respect of the conduct on 14 September 2016, the subject of Declarations 40, 41, 42, 52, 53 and 54, the First Respondent pay two pecuniary penalties of $35,000 each.

23. In respect of the conduct on 23 September 2016, the subject of Declarations 49, 50, 51, 55, 56, 57, 75, 76, 77, 78, 81, 82, 83 and 84, the First Respondent pay six pecuniary penalties of $25,000 each.

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

REASONS FOR JUDGMENT

ALLSOP CJ:

1. I have read the judgment of Rangiah J. I agree with the orders proposed. Subject to the following, I agree with his Honour’s reasons.

## The meeting clause and s 417

1. The question of the construction of the so-called Union Meeting Clause is not without difficulty. The relevant enterprise agreements that permitted employees of Hutchinson and of the relevant subcontractors to Hutchinson on the site were in the form of cl 32.9 set out at [31] in the reasons of Rangiah J. The appellant seeks to have the clause read as not applying to circumstances where the meeting was organised by the Union and its representative in order to disrupt, that is for the purpose of disrupting, work at the site.
2. One of the difficulties with the argument is that it is not clear whose purpose would destroy the capacity of the meeting to satisfy the clause. The agreed facts were plain: the Union officials and the Union were using the clause that gave a right to have a meeting for the purpose of disrupting work and putting pressure on Hutchinson. There was no agreement that that was the purpose of the employees, or any one or more of them. If the meeting was not “genuine” from the perspective of the legal liabilities of the Union (because of the purpose of the Union), was it still “genuine” from the perspective of the employees? If not, were the employees thereby engaging in “industrial action”? This would be a strange result to an employee who read the enterprise agreement and attended a meeting to which he or she was called. If so, then the meeting is “genuine” from one perspective (that of employees who did not have the impugned purpose) but not “genuine” from the perspective of the Union, a union official and, perhaps, an employee who had the disruptive purpose. Further, what of the employee who well knew of the Union’s purpose, but did not have the same purpose? The submissions of the Commissioner do not adequately deal with this complexity.
3. It may be that if the meeting clause was qualified by some requirement of genuineness it could be proved or admitted that the Union representative and one or more employees had the disruptive purpose and it could be said that there was some organising (by the Union) of some industrial action (by the employees with the impugned purpose) without the authority of the employer for the purposes of s 19(2) of the Act; but that case was not run.
4. The approach to the proper construction of enterprise agreements is the subject of many cases. The industrial context and purpose is relevant to the ascription of meaning. That is one that takes account of the statutory context and that contributes to a sensible and practical industrial result, shorn of narrow legalism and pedantry: *Amcor Limited v Construction, Forestry, Mining and Energy Union* [2005] HCA 10; 222 CLR 241 at 246–247 [2]; 270–271 [96]; and 282–283 [129]–[130]; *Kucks v CSR Ltd* (1996) 66 IR 182 at 184; and *Shop Distributive and Allied Employees’ Association v Woolworths SA Pty Ltd* [2011] FCAFC 67 at [16].
5. Part of that context is the requirement (to the extent that there is bargaining) of the bargaining representatives to meet the good faith requirements of s 228 of the *Fair Work Act 2009* (Cth) in Div 8. Another part of the context is that the approval of the agreement by the employees is a process one stage removed from the negotiated common understanding (if there be one) of the bargaining representatives and parties: *Health Services Union v Ballarat Health Services* [2011] FCA 1256 at [79], and upheld in *Ballarat Health Services v Health Services Union* [2012] FCAFC 79; *Toyota Motor Corporation Australia Limited v Marmara* [2014] FCAFC 84; 222 FCR 152 at [88]–[89]; and *Transport Workers’ Union of Australia v Coles Supermarkets Australia Pty Ltd* [2014] FCAFC 148; 245 IR 449 at [39]–[40].
6. Within this framework it may be thought to be appropriate that a construction informed by a conception of a loyalty or faithfulness to any bargain reached between the bargaining representatives and approved by the majority of employees should be given to the words of the agreement. The agreement is the product of good faith bargaining (in the statutory sense), approved by a majority of employees and by the Fair Work Commission. It is to bind even those employees who voted against it. There is every reason to think that an underlying assumption or norm that employer and employee have a duty to be faithful to the agreement will assist in informing the meaning to be given to the words of the agreement, and any implications therein. This is how the doctrine of good faith can be seen to operate – not as the support for some freestanding term of the contract capable of independent breach, but as a duty or norm of conduct that directs a court towards interpreting contracts within the proper context in which they are created, performed and enforced. The notion of faithfulness to the agreement reached (see *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* [1979] HCA 51; 144 CLR 596 at 607–608) in a context of a statutory obligation to bargain in good faith may assist in informing the proper construction of a clause designed to give union and employees the ability to meet and discuss matters of mutual or perceived industrial concern, but not to give a union or employees a weapon to coerce an employer or someone else by orchestrating serious disruption. The argument did not, however, proceed on this basis and so it is not appropriate to come to a view on the meaning of the clause informed by such considerations.
7. On the other hand, there is much to be said for the clause being read simply according to its plain terms, so that any employee participating in a meeting can be clear that he or she is not participating in industrial action, without having to be concerned with the purposes or mental states of others.
8. For these reasons, and for the reasons in the judgment of Rangiah J, s 417 was not engaged.

## Penalty and course of conduct

1. I agree with the judgment of Rangiah J that the learned primary judge erred in drawing from her conclusion that on each of the nine days of industrial disruption there was a single course of conduct that a single penalty should be imposed on each day – that is, that only one maximum penalty was available where there were multiple contraventions that constituted a single course of conduct. This is the same error discerned in the primary judge’s reasoning and approach in *Australian Competition and Consumer Commission v Yazaki Corporation* [2018] FCAFC 73; 357 ALR 55 at 108 [241].
2. But that error, in my view, had its genesis in the task that the primary judge set herself immediately antecedently. Her Honour asked whether there was a single course of conduct as if (in the absence of the relevant operation of a provision such as s 557 of the Act) there were a single thing or conception of “a course of conduct”. As the Full Court said in *Transport Workers’ Union of Australia v Registered Organisations Commissioner [No 2]* [2018] FCAFC 203; 363 ALR 464 *(****TWU v ROC****)* at [91]:

… Absent the relevant application of a provision such as s 557(1) of the *Fair Work Act*, the task is to evaluate the considerations informing the contraventions (factual and legal) in order to impose appropriate penal relief that does not punish twice for the same conduct. To use a phrase such as “a course of conduct” may imply that there is such an abstracted concept to be found, and once found it implies a single contravention or a single maximum penalty. That is the danger of the phrase. Rather, it is necessary (in the absence of a statutory enquiry such as in s 557(1)) to examine all the conduct and enquire how its course and its explanation factually and legally informs the imposition of penal orders, in particular to avoid double punishment. We see nothing in *Williams* or *The Agreed Penalties Case* that was intended to displace the need to consider the statute in question and to recognise that the object of the course of conduct principle is to avoid double punishment.

1. The danger in the use of the phrase identified by the Full Court in *TWU v ROC* occurred here: in finding a single course of conduct, the primary judge confined the penal response to one determined by reference to one maximum penalty. The preferable enquiry, conformable with the purpose of the principle and with what was said in *TWU v ROC* is “to examine all the conduct and enquire how its course and its explanation factually and legally informs the imposition of penal orders, in particular to avoid double punishment.” This enquiry may involve the finding of factual and legal overlap and interrelationship among the contraventions. A conclusion that there is such an interrelationship or overlap, and so, to use the expression, a course of conduct, does not mark the end of the enquiry, but the beginning of one: How, given the nature of the interrelationship or overlap, should that affect the proper fixing of penalties for the found contraventions so as to avoid multiple punishment for the same offending?

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| I certify that the preceding twelve (12) numbered paragraph is a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop. |

Associate:

Dated: 12 April 2019

REASONS FOR JUDGMENT

GRIFFITHS J:

1. I have had the advantage of reading the draft reasons of judgment of both the Chief Justice and Rangiah J. I agree with those reasons and with the orders proposed by Rangiah J.

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| I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment herein of the Honourable Justice Griffiths. |

Associate:

Dated: 12 April 2019

REASONS FOR JUDGMENT

RANGIAH J:

1. This is an appeal against a judgment of a single judge of this Court. The judgment was concerned with a series of strikes and stop-work meetings in August and September 2016 at nine construction sites in Brisbane operated by J Hutchinson Pty Ltd trading as Hutchinson Builders (**Hutchinson**).
2. The appellant (**the Commissioner**) alleged that by organising the strikes and stop-work meetings, the respondents contravened ss 346(b), 355, and 417 of the *Fair Work Act 2009* (Cth) (**the Act**). The respondents admitted the allegations, with the exception that they denied that the stop-work meetings involved contraventions of s 417.
3. The primary judge was required to decide whether the respondents had contravened s 417 of the Act by organising the stop-work meetings, and to determine pecuniary penalties for their contraventions of ss 346(b), 355 and 417. Her Honour held that the stop-work meetings did not involve contraventions of s 417 of the Act. Her Honour proceeded to impose nine penalties on the first respondent in respect of the admitted contraventions, totalling $432,000.
4. In the appeal, the Commissioner contends that the primary judge erred by, *firstly*, holding that the respondent had not contravened s 417 of the Act, and, *secondly*, failing to impose adequate penalties.
5. I will proceed by describing the facts of the case, the relevant provisions of the Act, the findings of the primary judge and the submissions made by the parties, before considering those submissions.

## Facts

1. The facts were not in dispute before the primary judge. The case proceeded on the basis of the respondents’ admission of the facts alleged in the Commissioner’s further amended statement of claim. The following summary is taken principally from the primary judge’s reasons for judgment.
2. The seven individual respondents were organisers for the first respondent (**the Union**). The Union was engaged in a campaign to force Hutchinson to only engage subcontractors who had enterprise agreements with the Union. The respondents organised the strikes and stop-work meetings as part of that campaign. Both employees of Hutchinson and employees of subcontractors were involved in the strikes and stop-work meetings. For the reasons identified at [33] below, references to ‘employees’ in this judgment are to both employees of Hutchinson and employees of subcontractors.
3. The details of the strikes and stop-work meetings are as follows:
4. 25 August 2016: strike action taken for the day at Hutchinson’s Hercules site (approximately 21 employees ceased work) (organiser – the second respondent, Mr Parfitt);
5. 7 September 2016: strike action taken for the day at Hutchinson’s Ivy site which caused a concrete pour to be disrupted (approximately 73 employees ceased work) (organiser – the third respondent, Mr Steele);
6. 13 September 2016: strike action taken for the day at Hutchinson’s Newstead site (approximately 112 employees ceased work) (organiser – the fourth respondent, Mr Pauls);
7. 13 September 2016: strike action taken for the day at Hutchinson’s Hercules site (approximately 27 employees ceased work) (organiser – the second respondent, Mr Parfitt);
8. 14 September 2016: strike action taken for the day at Hutchinson’s Ivy site which caused a concrete pour to be cancelled (approximately 71 employees ceased work) (organiser – the third respondent, Mr Steele);
9. 14 September 2016: strike action taken for the day at Hutchinson’s Wharf Street site (approximately 26 employees ceased work) (organiser – the fifth respondent, Mr Bland);
10. 15 September 2016: strike action taken for the day at Hutchinson’s Opera Site (approximately 52 employees ceased work) (organiser – the third respondent, Mr Steele);
11. 21 September 2016: stop work meetings at Hutchinson’s Ivy site which caused a concrete pour to be cancelled (approximately 16 employees ceased work) (organiser – the third respondent, Mr Steele);
12. 23 September 2016: stop work meeting at Hutchinson’s South Point A site which caused a concrete pour to be cancelled (approximately 23 employees ceased work) (organiser – the eighth respondent, Mr Davis);
13. 23 September 2016: strike action taken for the day at Hutchinson’s Spire site which caused a concrete pour to be cancelled (approximately 22 employees ceased work) (organiser – the fourth respondent, Mr Pauls);
14. 23 September 2016: two stop work meetings totalling three-and-a half hours Hutchinson’s Skytower site (unknown number of employees ceased work) (organiser – the fifth respondent, Mr Bland);
15. 23 September 2016: strike action for the day at Hutchinson’s Hercules site (approximately 27 employees ceased work) (organiser – the sixth respondent, Mr Floro);
16. 23 September 2016: stop work meeting at Hutchinson’s Newstead site which caused a concrete pour to be cancelled (approximately 15 employees ceased work) (organiser – the seventh respondent, Mr Stott);
17. 23 September 2016: stop work meetings at Hutchinson’s Opera site which caused a concrete pour to be cancelled (approximately 12 employees ceased work) (organiser – the third respondent, Mr Steele);
18. 26 September 2016: strike action taken for the day at Hutchinson’s Illumina site (approximately 11 employees ceased work) (organiser – the sixth respondent, Mr Floro); and
19. 27 September 2016: stop work meeting at Hutchinson’s Illumina site which delayed the start of work (approximately 8 employees ceased work) (organiser – the sixth respondent, Mr Floro).
20. The evidence is vague as to what occurred on 23 September 2016. However, based on the submissions of the parties, it seems to be agreed that on that date, four out of the six events involved the cancellation of concrete pours. For that reason, the cancellation of concrete pours has been attributed to four of those events as best as possible.
21. The primary judge and the parties referred to the stop-work meetings as “**stoppages**”, and it is convenient to adopt that term. In those circumstances in which there were multiple stop-work meetings held on the same day in the same location, the meetings were collectively referred to as one stoppage.
22. The respective individual respondents admitted they had contravened ss 355, 346(b) and 417 of the Act by organising the strikes. The Union admitted contraventions of the same provisions by the operation of ss 363 and 793 and the common law principles of vicarious liability.
23. The respective individual respondents admitted they had contravened ss 346(b) and 355 of the Act by organising the stoppages, and the Union also admitted contraventions of those provisions, but they denied that the stoppages involved contraventions of s 417. The respondents contended that they had not organised “industrial action” within the meaning of that expression in s 417, as the employers of the employees who participated in the stoppages had agreed to the stoppages. The respondents relied upon clauses in enterprise agreements that permitted employees of Hutchinson and the subcontractors to attend Union meetings and Union activities during working hours.
24. The primary judge identified the issues for determination as:
* Whether the stoppages could not constitute a breach of s 417 of the Act because of the applicable union meeting clauses in the relevant enterprise agreements.
* The appropriate penalties to be imposed on the respondents in respect of their breaches of the Act.
1. The primary judge described the first of these issues as “**the reserved issue**”, and it is convenient to adopt that term.
2. The allegations pleaded and admitted in respect of the stoppage at the Hutchinson Ivy site on 21 September 2016 were as follows:

**21 September 2016 – Ivy Site – the First Stoppage – concrete pour cancelled**

65. On 21 September 2016:

(a) a concrete pour was scheduled to occur at the Ivy Site, which was to last for 8.5 hours;

(b) by reason of (a) above, present at the Ivy Site on 21 September 2016 were:

(i) approximately 12 Sub-contractor Employees of Sartor Concrete (**Sartor Concreters**); and

(ii) approximately four Sub-contractor Employees of Specialised Concrete Pumping (**Specialised Pumpies**), together the Annexure H Employees

66. On 21 September 2016 at approximately 6.35 am, Steele entered the Ivy Site and said to Mitchel Smith words to the effect of “*you need to pull up your [concrete] pour mate, I want to talk to the concrete labour and then after that speak to the concreters*”.

67. Steele:

(a) met with the Specialised Pumpies from approximately 6.45am to 8.45am (**Pumpies Meeting**);

(b) met with the Sartor Concreters from approximately 7.30am to 9.30am (**Concreters Meeting**).

68. Further, due to Steele’s direction between:

(a) 6.45am and 7.30am, the Sartor Concreters also did not perform any work; and

(b) 8.45am and 9.30am, the Specialised Pumpies also did not perform any work.

69. At approximately 9.30am, Steele left the Ivy Site.

70. Steele organised the Pumpies Meeting, the Concreters Meeting and the stoppages referred to in paragraph 68 (together the **First Stoppage**) in order to disrupt work at the Ivy Site.

71. For reasons that included the First Stoppage, Hutchinson cancelled the concrete pour scheduled for that day.

1. The pleading concerning the other stoppages followed a similar pattern. It is unnecessary to set out all the allegations. It is enough to note that in respect of each stoppage, it was pleaded and admitted that one of the individual respondents met with employees at the site, the employees did not perform any work during the period of the meeting and that the stoppage was organised in order to disrupt work at the relevant Hutchinson site.
2. Hutchinson’s employees participated in three of the stoppages. Employees of various subcontractors engaged by Hutchinson participated in each of the stoppages, excluding the Skytower stoppage.
3. The Union was covered by the *J Hutchinson Pty Ltd t/a Hutchinson Builders and CFMEU Union Collective Agreement 2015–2019* and by enterprise agreements with the subcontractors whose employees participated in the stoppages (collectively **the Enterprise Agreements**). The Enterprise Agreements each contained a clause (**the** **Union Meeting Clause**) to the following effect:

32.9 The Employer agrees to Employees attending Union meetings or participating in Union activities during working hours and that the Employees shall be entitled to receive payment for attendance at those meetings / activities provided that:

(a) the Union provides the Employer with written notice of the intention to hold the meeting / undertake the activities prior to commencement;

(b) the duration of the meeting / activities is two hours or less (the duration of the meeting / activities may be extended beyond two hours by way of agreement between the Union and the Company). Authority to grant extension by the Employer rests with the General Manager or their nominee;

(c) up to two meetings / activities of up to two hours each may be held per shift, either consecutively or separately, provided that notice is given in accordance with clause 32.9(a) above.

1. In respect of the stoppages, the primary judge found it was not in dispute that:
* the stoppages occurred;
* a notice of the intention to hold a meeting was given prior to each of the stoppages;
* each stoppage did not exceed two hours;
* at the direction of the relevant individual respondents, employees did not perform any work during the relevant stoppages;
* the stoppages were organised by the individual respondents:
	+ in order to disrupt work at the site;
	+ with the intent to coerce Hutchinson to engage particular independent contractors, and thus contravened s 355 of the Act;
	+ because Hutchinson was engaging in industrial activity, and thus contravened s 346(b) of the Act;
* at all relevant times, the Union and the employees involved in the stoppages were covered by enterprise agreements for which the nominal expiry dates had not passed;
* in organising the stoppages, the respondents were acting in their individual capacities as officials of the Union; and
* the technical requirements of the Union Meeting Clause were met in all instances.
1. It may be observed that in *Auimatagi v Australian Building and Construction Commissioner* [2018] FCAFC 191; 363 ALR 246, where the employees of subcontractors took action against the principal contractor (not their employer), the Full Court held at 261–262 [88]–[91] that there was no “industrial action” within s 19 of the Act. In order to come within subss (a)–(c) of s 19(1), the “action” must be taken by an employee against their employer. However, the respondents have not submitted they should be relieved from their implicit concession at first instance that the action taken by the employees of subcontractors would, apart from s 19(2)(a), be “industrial action”.

## Legislation

1. Section 194 of the Act provides, relevantly:

**194 Meaning of *unlawful term***

A term of an enterprise agreement is an ***unlawful term*** if it is:

…

(e) a term that is inconsistent with a provision of Part 3–3 (which deals with industrial action); or

1. Section 253 of the Act provides, relevantly:

**253 Terms of an enterprise agreement that are of no effect**

(1) A term of an enterprise agreement has no effect to the extent that:

..

(b) it is an unlawful term; or

…

1. Chapter 3 of the Act has the heading “Rights and responsibilities of employees, employers, organisations etc.”. This case is principally concerned with Pt 3-1, which has the heading “General protections”, and Pt 3-3, which has the heading “Industrial action”.
2. Part 3-3 of the Act, consists of ss 406–477. Section 406 provides a guide to Pt 3-3, which, relevantly, is in the following terms:

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| This Part deals mainly with industrial action by national system employees and national system employers.Division 2 sets out when industrial action for a proposed enterprise agreement is protected industrial action. No action lies under any law in force in a State or Territory in relation to protected industrial action except in certain circumstances.Division 3 provides that industrial action must not be organised or engaged in by certain persons before the nominal expiry date of an enterprise agreement or workplace determination has passed.Division 4 provides for the FWC to make orders, in certain circumstances, that industrial action stop, not occur or not be organised for a specified period.…Division 8 establishes the process that will allow employees to choose, by means of a fair and democratic secret ballot, whether to authorise protected industrial action for a proposed enterprise agreement.Division 9 sets out restrictions about payments to employees relating to periods of industrial action.... |

1. It may be seen that Pt 3-3 is concerned with “industrial action”. That term is central to each Division of Pt 3-3. It is defined in s 19 of the Act as follows:

(1) ***Industrial action*** means action of any of the following kinds:

(a) the performance of work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work;

(b) a ban, limitation or restriction on the performance of work by an employee or on the acceptance of or offering for work by an employee;

(c) 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;

(d) the lockout of employees from their employment by the employer of the employees.

…

(2) However, ***industrial action*** does not include the following:

(a) action by employees that is authorised or agreed to by the employer of the employees;

(b) action by an employer that is authorised or agreed to by, or on behalf of, employees of the employer;

…

1. Section 417 of the Act provides:

**417 Industrial action must not be organised or engaged in before nominal expiry date of enterprise agreement etc.**

*No industrial action*

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

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

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

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

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

(2) The persons are:

(a) an employer, employee, or employee organisation, who is covered by the agreement or determination; or

(b) an officer of an employee organisation that is covered by the agreement or determination, acting in that capacity.

*Injunctions and other orders*

(3) If a person contravenes subsection (1), the Federal Court or Federal Circuit Court may do either or both of the following:

(a) grant an injunction under this subsection;

(b) make any other order under subsection 545(1);

that the court considers necessary to stop, or remedy the effects of, the contravention.

…

1. Section 346 provides, relevantly:

**346 Protection**

A person must not take adverse action against another person because the other person:

(a) is or is not, or was or was not, an officer or member of an industrial association; or

(b) engages, or has at any time engaged or proposed to engage, in industrial activity within the meaning of paragraph 347(a) or (b); or

(c) does not engage, or has at any time not engaged or proposed to not engage, in industrial activity within the meaning of paragraphs 347(c) to (g).

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

1. The expression “adverse action” is defined in s 342 of the Act. In relation to action by an employee against an employer, the phrase refers to the employee ceasing work in the service of the employer or taking industrial action against the employer.
2. Section 347 defines “industrial activity”. Under that provision, a person engages in “industrial activity” if the person, inter alia, becomes an officer or member of an industrial association; or organises a lawful activity, or an unlawful activity, on behalf of an industrial association; or takes part in industrial action.
3. Section 355 is found in Pt 3-1, Div 5, entitled “Other protections”. That section provides:

**355 Coercion—allocation of duties etc. to particular person**

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 particular employee or independent contractor; or

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

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

## Judgment of the primary judge

### The reserved issue

1. Before the primary judge, the Union submitted that the stoppages could not amount to “industrial action” within s 19 of the Act because they were authorised or agreed to by the relevant employer under the Union Meeting Clause; and were therefore excluded from that definition by s 19(2). The Union submitted that if conduct cannot be classified as “industrial action”, the conduct is not regulated by, and cannot be inconsistent with, Pt 3-3; and a clause in an enterprise agreement authorising such conduct is therefore not made unlawful by s 194(e) of the Act.
2. The Commissioner submitted that the Union Meeting Clause was not engaged because the stoppages did not involve “genuine meetings”, and were “sham meetings”. The Commissioner submitted that the Union’s contention that the stoppages did not constitute industrial action because they were authorised by the Enterprise Agreements was inconsistent with the admissions that the various stoppages were taken for the purpose of disrupting work and involved contraventions of ss 346(b) and 355 of the Act. The Commissioner submitted that stoppages taken for such an unlawful purpose were inconsistent with Pt 3-3 of the Act. The Commissioner submitted that, accordingly, if the Union Meeting Clause purported to allow stoppages taken for such a purpose to occur, it was inconsistent with Pt 3-3 and was an unlawful term pursuant to s 194(e) of the Act.
3. The primary judge rejected the Commissioner’s contention that the stoppages where “sham meetings”, finding that there was no evidence supporting any finding that the meetings were “shams”. Her Honour held that the Union Meeting Clause was engaged. In the course of making that finding, her Honour noted that it was common ground that proper notices had been given before the stoppages occurred, and referred to evidence from various Hutchinson site managers acknowledging that meetings were conducted with the individual respondents. It should be noted that in the appeal, it was accepted by the respondents that the affidavits of the Hutchinson managers to which her Honour referred were not read and were not, therefore, part of the evidence.
4. The primary judge turned to the Commissioner’s argument that the Union’s construction of the Union Meeting Clause would make the term inconsistent with Pt 3-3 and make the clause an unlawful term within s 194(e). Her Honour considered that the Commissioner’s submission raised a prospectively circular argument. The Commissioner’s position was, in effect, that s 194(e) precludes the operation of s 19(2)(a) where the conduct purportedly authorised by the enterprise agreement was otherwise inconsistent with s 417, because otherwise relying on s 19(2)(a) to remove the contravening conduct from the meaning of “industrial action” would be inconsistent with the overall regulatory scheme of the Act. Her Honour rejected that argument as being contrary to the plain language and purpose of s 19(2)(a) of the Act.
5. Her Honour did not accept the Commissioner’s submission that his proposed construction of the Union Meeting Clause was necessary to achieve a sensible industrial outcome that operated fairly to both parties. Her Honour considered that s 19(2)(a) of the Act is expressed in unqualified terms and contemplates authorisation or agreement by the employer of action by the employees without restriction on the nature (including potential unlawfulness) of the actions of the employees. Her Honour said there is nothing in ss 19(1) or 19(2)(a) of the Act which confines conduct that may be authorised only to lawful activities.
6. The primary judge considered that, on its face, the Union Meeting Clause does not undermine the policy and scheme of the Act and is not inconsistent with Pt 3-3. Her Honour said that it may be that the object of the Union in conducting certain meetings or promoting certain activities is contrary to provisions of the Act. However, her Honour considered that this was secondary to the operation of the clause, rather than required by the clause. The Union Meeting Clause set out the agreement of the employer, where certain conditions are met, to employees attending Union meetings or participating in Union activities during working hours. Her Honour considered that it was an unwarranted strain on the language of the clause to construe it by reading in purposes or objectives not specifically contemplated.
7. Her Honour observed that if the employers wished to qualify the conduct of the employees by reference to the consequences of the conduct, it was open to the parties specifically so to agree. Her Honour considered that the interpretation advanced by the Commissioner sought to import extraneous qualifications into language agreed by the parties and subverted the purpose of s 19(2)(a) in allowing the parties to reach their own agreement upon what the employer may authorise or agree to. Her Honour relied on the observation of Reeves J in the *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCA 157; 267 IR 130 (***the Carrara Case***) that the Court is not permitted to redraft the terms of an enterprise agreement to achieve the outcome identified by the Commissioner.
8. The primary judge held that the stoppages were authorised by the terms of the enterprise agreements, and that, by the operation of s 19(2)(a), they were not “industrial action”. Her Honour considered that the plain language of the Union Meeting Clause encompassed conduct of the nature of the stoppages. The employers had agreed to employees attending Union meetings and participating in Union activities during working hours provided the conditions specified in the clause were met. Her Honour held that the respondents did not contravene s 417 of the Act by organising the stoppages.

#### **Penalty**

1. The primary judge then proceeded to consider the appropriate penalties for the admitted contraventions of ss 355, 346(b) and 417 of the Act. Those were contraventions of ss 355, 346(b) and 417 in respect of the ten strikes and contraventions of ss 355 and 346(b) in respect of the six stoppages.
2. Her Honour noted that the maximum penalty for a single contravention of each of those provisions was $54,000 for a body corporate and $10,800 for an individual. Her Honour found that the maximum number of penalties that could be imposed upon the Union was 16.
3. The primary judge proceeded to consider the factors relevant to the number and amounts of the penalties that ought to be imposed. Her Honour noted that there was extensive commonality in the circumstances of each contravention, notwithstanding the separate conduct of the individual respondents. Her Honour described the conduct of the individual respondents as amounting to a deliberate, premeditated and sustained campaign of unlawful and industrial behaviour orchestrated by the Union, including elements of intimidation, threat and coercion. The timing of the disruptions at the various sites was such that eight concrete pours were cancelled. On any given day, somewhere between three and 136 subcontractor employees were affected. Her Honour inferred that the respondents intended that loss be suffered by Hutchinson, as well as subcontractors, and that consequential loss was suffered.
4. The primary judge referred to the Union’s extensive history of prior contraventions of industrial laws. Her Honour described the number of legal proceedings involving the Union as “vast”. Her Honour accepted that the Union’s history demonstrated a strong need for specific deterrence.
5. The primary judge noted that there had been no expression of contrition by any of the respondents, but that they had co-operated by making admissions of the allegations in the pleadings. That co-operation had spared the need for a contested trial, other than in respect of the reserved issue, which had been resolved in the respondents’ favour.
6. Her Honour found that the level of co-ordination of action across the various Hutchinson sites over the month long period indicated the involvement of more senior officers of the Union.
7. The primary judge considered the extent to which the actions of the respondents constituted a single course of conduct. Her Honour’s reasoning upon this issue was brief, but her Honour noted that the various stoppages and strikes were referrable to a campaign that the Union had conducted against Hutchinson across various sites. Her Honour considered that the actions of the Union were orchestrated to take place on particular dates to cause maximum disruption on those dates. Her Honour found that the conduct of the Union on each of the nine dates on which the contraventions occurred, each constituted “a single course of conduct”, namely on 25 August and on 7, 13, 14, 15, 21, 23, 26 and 27 September 2016.
8. The primary judge concluded that the penalties for the Union should be in the high range. Her Honour considered that it was appropriate to impose a penalty of $48,000 upon the Union for each of the nine courses of conduct, totalling $432,000. Her Honour also imposed penalties ranging from $5,000 to $30,000 upon the seven individual respondents.

## Grounds of appeal

1. The amended notice of appeal contains fourteen grounds of appeal. The first ten grounds concern the primary judge’s findings upon the reserved issue. The remaining four grounds concern the primary judge’s approach to the imposition of penalties.
2. The grounds of appeal concerning the reserved issue deal with three main matters:
3. Whether the primary judge erred by deciding that the stoppages were “Union meetings” within the Union Meeting Clause, despite the stoppages being taken for the purpose of disrupting work and involving contraventions of a provision of Pt 3-1 of the Act.
4. Whether the primary judge erred in failing to find that the Union Meeting Clause would be an “unlawful term” within s 194(e) of the Act if it permitted action to be taken for the purpose of disrupting work in contravention of a provision of Pt 3-1 of the Act.
5. Whether her Honour erred in failing to find that each stoppage was a “sham” Union meeting, as opposed to a “genuine” Union meeting.
6. The grounds of appeal concerning penalty also deal with three matters:
7. Whether the primary judge erred by finding that the multiple contraventions that occurred on 13, 14 and 23 September 2016 arose in a course of conduct occurring on each of those dates respectively.
8. Whether her Honour erred by regarding the Court as bound to impose only a single penalty for each course of conduct.
9. Whether each of the penalties imposed on the Union was manifestly inadequate.

### Submissions

### The reserved issue

1. It is convenient to begin with the submissions of the Union and the other respondents. The Union submits that for there to be a contravention of s 417(1) of the Act, a relevant person must organise or engage in “industrial action”, but that s 19(2)(a) specifically excludes from that definition “such action by employees that is authorised or agreed to by the employer of the employees”.
2. The Union submits that under the Union Meeting Clause, Hutchinson and the subcontractor employers agreed to employees attending Union meetings and participating in Union activities during working hours. It submits that accordingly, the cessation of work during the stoppages was not “industrial action” within s 417(1) of the Act. The Union relies upon the judgment of Reeves J in the *Carrara Case* in which his Honour considered a clause in identical terms to cl 32.9 of the Enterprise Agreements. His Honour held that attending Union meetings did not fall within the definition of “industrial action” even though the purpose of the meetings was to delay and disrupt the ordinary progress of work.
3. The Commissioner submits that it was an error for the primary judge to hold that merely because the stoppages met the formal requirements of the Union Meeting Clause, they were authorised by the employer and s 19(2)(a) of the Act was engaged. The Commissioner submits that on her Honour’s construction of the clause, stoppages are permitted for the purpose of disruption of the work in contravention of ss 346(b) and 355 of the Act. The Commissioner submits that such a construction is not available on a plain reading of the clause. He submits that the notice be in respect of a “genuine” Union meeting.
4. The Commissioner submits that upon the primary judge’s construction of the Union Meeting Clause, the clause would be inconsistent with s 417(1) of the Act and, pursuant to s 194(e), would be unlawful. The Commissioner points out that the Explanatory Memorandum for the *Fair Work Bill 2008* (Cth) gave the example “that a term that purported to authorise or allow industrial action prior to the nominal expiry date of the agreement would be an unlawful term”. The Commissioner submits that the primary judge’s construction would allow the respondents to use the Union Meeting Clause as a device to suggest that what was otherwise industrial action in contravention of s 417 is permissible. The Commissioner submits that this is the very type of clause that s 194(e) is directed to render unlawful, as is confirmed by the Explanatory Memorandum.
5. The Commissioner submits that the fact that the employers agreed to the Union Meeting Clause does not assist the Union. He submits that the operation as found by her Honour could not have been contemplated by the parties at the time that the Enterprise Agreements were made.
6. The Commissioner submits that the *Carrara Case* was wrongly decided and wrongly applied the principles applicable to the construction of common law commercial contracts which require terms to be construed to give effect to their presumed commercial purpose. He submits that the primary judge’s approach is contradicted by the context in which enterprise agreements are negotiated, including the threat that employees and their union representatives may take industrial action and inflict economic hardship upon an employer unless they submit to the terms of the enterprise agreement. He submits that there is the ever-present threat of economic damage to a business by industrial action that may cause an employer to agree to terms that it would otherwise prefer not to agree to.
7. The Commissioner submits that the *Carrara Case* failed to deal with s 194(e) of the Act and its impact on the question of construction (although in fairness to Reeves J, it should be acknowledged that the Commissioner had not raised that provision before his Honour).
8. The Commissioner submits that the Union’s construction gives rise to a situation where meeting clauses and other devices can be contrived so that the standing “authorisation” given by an employer can be used to circumvent the operation of s 417 and disrupt work, thereby undermining the intention of the legislature.
9. The Commissioner submits that the construction contended for by the Union does not generate a sensible industrial outcome, nor operate fairly towards both parties. He submits that, rather, it would allow the Union to deliberately disrupt work on a building site while mandating that the employer pay employees for such a disruption. The Commissioner submits that the absurdity of this outcome is compounded by the fact that, even though the Union admits that it organised the stoppages intending to contravene ss 346(b) and 355 of the Act, it could still bring a claim against the employer for breaching a term of the enterprise agreement if it refused to pay the employees during the periods of disruption.
10. The Commissioner submits that the primary judge erroneously found that the stoppages came within the description of “Union meetings”. He submits that her Honour ought to have found that the stoppages were “sham” meetings, in circumstances where the Union had admitted that the stoppages were taken to cause a disruption of work and involved an unlawful purpose. The Commissioner submits that the respondents did not advance any case where the purpose of the stoppage was in fact to hold meetings where the Union actually intended to discuss industrial issues with its members.
11. The Commissioner also submits that the primary judge erred by referring to the content of nine affidavits to determine whether the stoppages came within the meaning of the term “Union meeting” when such affidavits did not form part of the evidence.
12. In response to the Commissioner’s arguments, the Union submits that there may be many clauses of an enterprise agreement that restrict or limit an employer’s ability to require employees to work. It submits the fact that rights might be exercised under such clauses in a way which would otherwise result in contravention of the Act does not render the clauses themselves inconsistent with the Act. The Union submits that the definition of “industrial action” expressly excludes stoppages which are agreed or authorised by the employer, and, accordingly, the Union Meeting Clause does not permit the taking of “industrial action” in contravention of Pt 3-3 of the Act. They submit that the clause, therefore, cannot be inconsistent with Pt 3-3.
13. The Union submits that the primary judge correctly found that the Commissioner’s approach involves introducing extraneous words into the agreement reached by the parties. They submit that the Commissioner has not justified, by reference to the text of the Act or the Enterprise Agreements, why such an approach is necessary.
14. The Union also submits that the primary judge was correct to find that the stoppages were genuine meetings for the purpose of the Union Meeting Clause and were not sham meetings. It submits that the pleadings establish that the meetings actually occurred and that the procedural requirements of the Union Meeting Clause were met. The Union submits that there is no evidential basis to contend that what occurred during the meetings was not a genuine meeting where Union matters were discussed.
15. The Union accepts that the primary judge had regard to affidavits filed that were not read at the hearing. However, it submits that the error was immaterial because those affidavits did not take her Honour beyond the facts established by the pleadings.
16. The Union submits that a theme of the Commissioner’s submissions is that if the primary judge’s construction were correct, that would permit the respondent to organise stoppages of work which would go unpunished. The Union submits that this overlooks Pt 3-1, which restricts such conduct, including by ss 346(b) and 355.

### Penalty

1. The Commissioner submits that the primary judge fell into error in the approach taken by her Honour to the assessment of penalties. The Commissioner submits that contrary to the finding of the primary judge, the Union did not engage in a single course of conduct on each of the dates when there were multiple contraventions (13, 14 and 23 September 2016). There were multiple strikes, involving multiple sites, multiple Union officials and multiple admitted contraventions. The Commissioner submits that the accumulation of these factors magnified the overall impact and effectiveness of the Union’s campaign. The Commissioner submits that while there may have been some overlap in respect of these contraventions, they should not have been treated as single courses of conduct.
2. The Commissioner next submits that, assuming the single course of conduct findings were correct, the primary judge misapplied the principles in respect of the imposition of penalties by approaching the task as though only one maximum penalty was available to be imposed for all contraventions that came within a single course of conduct. The Commissioner submits that the primary judge impermissibly failed to impose individual penalties on the Union for each relevant contravention. He submits that the primary judge instead “rolled up” a collection of contraventions and imposed one penalty and in doing so, her Honour fell into error.
3. Finally, the Commissioner submits that the primary judge imposed a penalty that was manifestly inadequate. The Commissioner submits that the overall penalty of $432,000 is manifestly inadequate taking into account the number of strikes, the extent of the stoppages, the fact that these occurred over multiple sites over multiple days and involved multiple Union officials and multiple admitted contraventions and considering the overall impact and effectiveness of the Union’s campaign.
4. The Union submits that it is axiomatic that a union can only act through human agents and that, despite the multiplicity of agents, all the relevant conduct is regarded as the conduct of the Union. The Union submits that it was open to her Honour to treat its conduct on each particular day as a course of conduct because it may be inferred that a single decision had been taken by the Union to engage in conduct for a particular purpose. They submit that each of the contraventions were connected by that common purpose.
5. The Union submits that the primary judge did not regard herself as limited to applying a maximum of one penalty once her Honour had decided to treat the contraventions as a single course of conduct.
6. The Union submits that the penalties imposed by the primary judge were not manifestly inadequate.

## Consideration

### The reserved issue

1. The Commissioner alleges that the respondents contravened s 417 of the Act by organising the stoppages that took place at six Hutchinson sites on 21, 23 and 27 September 2016. The stoppages involved meetings between Union officials and employees of Hutchinson or subcontractors or both. The discussion that follows, insofar as it deals with the actions of the employees of subcontractors, should be read in light of *Auimatagi* (discussed at [33]).
2. Section 417(1) of the Act provides, relevantly, that an officer of a union “must not organise or engage in industrial action” until the nominal expiry date of an enterprise agreement has passed. The reserved issue was, in effect, whether the stoppages were “industrial action”. If they were not, then the respondents’ organisation of the stoppages did not contravene s 417. The respondents cannot be found to have contravened the provision by organising something that did not happen.
3. The expression “industrial action” is defined in s 19 of the Act. It is not in dispute that the employees’ failure or refusal to perform work during the stoppages was action of a kind described in s 19(1). The issue is whether s 19(2)(a) operates to exclude the stoppages because they were actions “authorised or agreed to by the employer of the employees”.
4. The Union contends that under the Union Meeting Clause in the Enterprise Agreements, the employers authorised or agreed to the actions comprising the stoppages. The Commissioner argues that the stoppages were not meetings of a kind authorised under the Union Meeting Clause. That makes it necessary to understand what is meant by the expression “Union Meetings” in the clause.
5. The construction of a clause of an enterprise agreement must begin with its words. The Union Meeting Clause provides that, “The Employer agrees to Employees attending Union meetings or participating in Union activities during working hours…”. The clause goes on to place three provisos (requiring provision of prior written notice and limiting the duration and frequency of the meetings or activities) upon the employer’s agreement. Under the clause, the employer implicitly agrees to employees stopping work while attending “Union meetings” or participating in “Union activities”. The employer thereby agrees to employees taking action that would otherwise fall within s 19(1) (as, at least, a ban on work, or failure or refusal to attend for work).
6. The parties depart upon the meaning of “Union meetings” in the Union Meeting Clause. The Union submits that a meeting is a “Union meeting” so long as it is with a Union official and the subject matter of the meeting is connected with the Union’s purposes and objects. However, the Commissioner submits that a “Union meeting” is qualified by a requirement that the meeting be “genuine” and not a “sham”. While there is some ambiguity about the Commissioner’s use of these expressions, his submission is ultimately that a meeting organised by the Union for the *purpose* of disrupting the employer’s work in contravention of provisions such as ss 346 or 355 of the Act, is not a “genuine Union meeting” of the type contemplated by the clause. The Commissioner submits that an implication of genuineness is required, *firstly*, on a plain reading of the provision, *secondly*,because if such a requirement were not imported, the clause would be inconsistent with s 417 and be invalid, *thirdly*, because to read it otherwise would create absurd outcomes and, *fourthly*, by the Explanatory Memorandum. These submissions are interconnected.
7. The Commissioner’s submission that a plain reading of the Union Meeting Clause requires that the Union meeting must be “genuine” cannot be accepted. The reading of the clause as requiring a “genuine” Union meeting involves the implication of a word or a concept that is not expressly stated. While it may be that such an implication is open, there is no requirement that Union meetings be “genuine” on a plain or literal reading of the provision.
8. The Commissioner’s next submission is that if the clause is read such that a “Union meeting” encompasses a meeting organised for the purpose of disrupting the employer’s work in contravention of provisions of Pt 3-1, such as ss 346 and 355, the clause would be inconsistent with s 417 and would be unlawful and of no effect. The submission continues that in order to save the clause, it should be read such that a Union meeting must be a “genuine Union meeting”, in the sense that the meeting must be one that does not have such a purpose. Consideration of the submission requires construction of s 417 in the context of other provisions of the Act, including s 194(e) and Pt 3-1.
9. Section 194(e) of the Act provides that, “a term of an enterprise agreement is an ***unlawful term*** if it is…a term that is inconsistent with a provision of Pt 3-3 (which deals with industrial action)”. Section 417 is a provision of Pt 3-3.
10. The question is whether a term of an enterprise agreement under which an employer agrees to employees attending meetings that may be used for the *purpose* of disrupting the employer’s work in contravention of provisions of Pt 3-1 is inconsistent with s 417. The language of s 417 suggests no such inconsistency. There can be no contravention of s 417 unless there has been “industrial action”. The definition of “industrial action” in s 19 specifically excludes action that is authorised or agreed to by the employer. Section 19(2) is not, on the face of it, limited to action not taken for purposes that would contravene Pt 3-1. It is necessary, however, to consider whether the statutory context leads to a different construction.
11. Since s 194(e) of the Act is concerned with inconsistency with Pt 3-3, the scheme of Pt 3-3 should be considered. Under s 3(f), an object of the Act is “achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action”. This object is reflected in Pt 3-3, as well as some provisions of Pt 3-1. Part 3-3 establishes a scheme that allows industrial action to be taken in the course of collective bargaining for enterprise agreements, but regulates such action. This involves a number of interrelated components. It is unnecessary for present purposes to describe each of these, but an important component is that under s 415, “protected industrial action” is, subject to limited exceptions, immune from action under State or Territory law. Until the *Industrial Relations Reform Act 1993* (Cth), there was no right to strike in Australia, and those who engaged in industrial action were liable to actions in tort, contract and under statute: see, for example, *Australasian Meat Industry Employees’ Union v Mudginberri Station Pty Ltd* [1986] HCA 46; 161 CLR 98*.* The *Industrial Relations Reform Act 1993* (Cth) was part of a broader shift in Australian industrial relations from a system of conciliation and arbitration towards collective bargaining at an enterprise level: see McCrystal S, *The Right to Strike in Australia* (The Federation Press, 2010) p 74. The *Workplace Relations Act* *1996* (Cth) extended the protected industrial action provisions, but introduced another important component into the scheme, namely restrictions upon the timing of protected action so that it could only be taken after the nominal expiry date of an existing agreement. Access to protected action was restricted under the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), but then expanded under the current Act. What has been consistent across these legislative regimes is the facilitation of agreements at an enterprise level through collective bargaining, underpinned by a balance between permitting industrial action and regulation of such action, including restrictions upon its timing.
12. Part 3-3 of the Act allows industrial action to be taken during bargaining for an enterprise agreement, but provides a measure of control and certainty over such action. Those who wish to take protected industrial action for a proposed enterprise agreement can do so in the knowledge that generally no suit lies against them. On the other hand, industrial action that contravenes s 417 is unprotected, and can be dealt with by remedies provided for under s 545 of the Act and the general law. However, the protection against industrial action for employers offered by s 417 of the Act is limited, reflecting the balance inherent in the statutory scheme. The provision applies only to particular action (“industrial action”), taken by particular persons, within a particular time-frame. It is not a broad-ranging protection against *any* industrial disputation or disruption.
13. The definition of “industrial action” is cast in wide terms in s 19(1) of the Act. That is because it attempts to catch the full range of ways to disrupt work that human ingenuity may devise, including strikes, lock-outs, boycotts, bans, go-slows and work-to-rule. However, that width is cut back by the terms of s 19(2). Relevantly, s 19(2)(a) excludes from the definition, “action by employees that is authorised or agreed to by the employer of the employees”.
14. The evident reason for this exclusion is that otherwise many actions authorised under an enterprise agreement, or separately agreed to by an employer, would be unlawful “industrial action” under s 417. In the absence of s 19(2)(a), any refusal or failure to work by an employee would be caught by s 19(1), even where that refusal is authorised under an enterprise agreement, or another agreement. Under s 55, an enterprise agreement may include the National Employment Standards or supplement them. An enterprise agreement can be expected to set out, for example, maximum weekly hours of work and provisions for annual, personal/carer’s and long-service leave, including provisions that may be more beneficial for employees than the National Employment Standards. A refusal by an employee to work more than the maximum hours or to work within a period of leave would literally fall within s 19(1), as a ban, limitation or restriction on the performance of work, or a failure or refusal to attend for work. However, since the employer has agreed to the employee’s refusal to work beyond the maximum hours or within a period of leave, that refusal is excluded by s 19(2)(a) from the definition of “industrial action”.
15. 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].
16. The Commissioner’s submission is that if a clause of an enterprise agreement permits an employee to take action for the *purpose* of disrupting work in contravention of a provision in Pt 3-1, the clause would be inconsistent with s 417. However, because s 417 is concerned only with *effect*, and *not purpose*, there is no such inconsistency.
17. That is not to say that the exercise of rights under an enterprise agreement for the purpose of disrupting an employer’s rights will necessarily be without legal consequence. In contrast to s 417 of the Act, many of the general protections provisions of Pt 3-1 focus upon the purpose, intent or motivation of the actor. For example, s 346 provides that a person must not take adverse action against a person “because” the other person, inter alia, has engaged in industrial activity. Under s 355, a person must not, inter alia, organise or take any action against another person “with intent” to coerce the other person to engage or not engage a particular independent contractor. The intent or motivation of the actor is also relevant under other provisions of Pt 3-1, including ss 340, 343, 348 and 354, that may be engaged when work is disrupted.
18. The Pt 3-1 provisions do not depend upon the taking of “industrial action”. For example, a contravention of s 346(b) depends upon there being “adverse action” and “industrial activity”. The former is defined in s 342, the latter in s 347. Each of those expressions encompasses, but does not necessarily require, the taking of “industrial action”. Section 355 operates upon “action” to coerce a person into doing or not doing certain things. There may be contravention of s 346(b) or s 355 without any contravention of s 417, or contravention of s 417 without any contravention of s 346(b) or s 355. The provisions are not co-dependent. These matters emphasise that the balance that Pt 3-3 promotes can be maintained without resorting to the rather artificial construction contended for by the Commissioner.
19. The Commissioner submits that a conclusion that a term of an enterprise agreement may be used for the purpose of disrupting the employer’s work in contravention of Pt 3-1 without contravening s 417 would produce absurd results, or would not generate a sensible industrial outcome. The Commissioner points to the absurdity of an employer being able to agree to action being taken for the purpose of disrupting the employer’s work. The Commissioner submits that the legislature could not have intended to exclude actions taken with such a purpose from the reach of s 417.
20. However, a clause cannot be included in an enterprise agreement without the agreement of the employer. An enterprise agreement is likely to contain many unexceptional clauses, including those dealing with maximum hours of work and leave, which will result in disruption to work. The employer necessarily accepts such disruption by agreeing to such a clause. It may be possible for employees or a union to use, or abuse, such a clause for the purpose of disrupting work, but there are protections for the employer built into Pt 3-1, including ss 346 and 355. No provision of an enterprise agreement can circumvent those protections: a clause that has the effect of permitting or purporting to permit a contravention of Pt 3-1, is an “objectionable” term under s 194(b) and, under s 356, has no effect. Therefore, when an employer agrees to a clause that is capable of being used for the purpose of causing disruption to work, the risk of disruption taken by the employer is limited to such action as is not unlawful under Pt 3-1. It is not necessary to construe s 417 in the way contended for by the Commissioner to produce a sensible industrial outcome.
21. The Explanatory Memorandum does not advance the Commissioner’s argument. It states that “a term that purported to authorise or allow industrial action prior to the nominal expiry date of the agreement would be an unlawful term”. That statement overlooks the definition of “industrial action” and is circular because s 19(2)(a) of the Act excludes from the definition, action that is authorised or agreed by the employer. The Explanatory Memorandum is inconsistent with s 417 of the Act.
22. For these reasons, the Commissioner’s submission that a “Union meeting” under the Union Meeting Clause of the Enterprise Agreements is qualified by a requirement that the meeting be “genuine”, in the sense that a meeting organised by the Union must not be for the *purpose* of disrupting the employer’s work in contravention of Pt 3-1, cannot be accepted.
23. The Union’s submission that a meeting is a “Union meeting” under the Union Meeting Clause of the Enterprise Agreements if it is with a Union official and the subject matter of the meeting is connected with the Union’s purposes and objects should be accepted. The amended statement of claim alleged, and it was admitted, that each of the stoppages involved employees meeting with a Union official. It was common ground that the stoppages were organised as part of a campaign to have Hutchinson engage only those subcontractors who had enterprise agreements with the Union. It must be inferred that it was a purpose and object of the Union to enter enterprise agreements with the employers of its members and the stoppages were designed to further that purpose or object. The stoppages were each a “Union meeting” within the Union Meeting Clause. The fact that they were organised for the purpose of disrupting Hutchinson’s work in contravention of ss 346 and 355 does not affect that conclusion. Since the employers authorised or agreed to the stoppages, they were not “industrial action” within s 19 and the respondents’ organisation of the stoppages did not contravene s 417 of the Act.
24. It should be noted that the respondents’ organisation of the stoppages for the purpose of disrupting work contravened ss 346(b) and 355 of the Act, as the respondents admitted. Their organisation of the strikes contravened s 417, as well as ss 346(b) and 355, since the strikes were not authorised or agreed to by the employers.
25. The Union made an alternative submission that even if the stoppages were not “Union Meetings”, they were “Union activities”. That submission does not seem to have been made before the primary judge and it is unnecessary to consider it, except to say that, similarly, there is no implied requirement that the “Union activities” must not be for the purpose of disrupting the employer’s work in contravention of Pt 3-1.
26. The primary judge was correct to hold that the respondents had not contravened s 417 of the Act by organising the stoppages. It follows that I also agree with the outcome of the *Carrara Case*.
27. The Commissioner also argues that the primary judge erred by relying upon nine affidavits that had not been read when her Honour found at [23] that it was “common ground that proper notices of the meetings were given, the Stoppages occurred, and union meetings were held”. It can be accepted that it was an error to rely upon those affidavits.
28. However, it was pleaded by the Commissioner, and admitted by the respondents, that the stoppages had occurred and meetings with union officials had been held. The respondents pleaded in their further amended defence that the meetings were authorised by the employers pursuant to the Union Meeting Clause, necessarily asserting that proper notices had been given in accordance with that clause. The Commissioner’s amended reply denied that the meetings were so authorised and asserted that the Union Meeting Clause, on its proper construction, did not authorise a non-genuine meeting; but did not assert that proper notices had not been given. Rule 16.33 of the *Federal Court Rules 2011* (Cth) provides that if a respondent files a defence and the applicant “wants to plead a matter of fact or point of law of the kind mentioned in rule 16.08, the applicant must file a reply”. Rule 16.08 provides that in a pleading subsequent to a statement of claim, a party must expressly plead a matter of fact or point of law that, inter alia, might take a party by surprise if not expressly pleaded. In the absence of any pleading that proper notices had not been given, the respondents and the primary judge were entitled to infer that this was not a matter in dispute. Therefore, her Honour’s error in relying upon affidavits that had not been read was immaterial.

### Penalty

1. The primary judge was required to sentence the Union for its contraventions of ss 346(b), 355 and 417 of the Act in relation to the strikes, and ss 346(b) and 355 in relation to the stoppages.
2. The industrial action took place on nine days in August and September 2016. There were 16 events of industrial disruption on those days. On six days there was a single strike or stoppage. However, on both 13 and 14 September, there were two strikes, and on 23 September, there were two strikes and four stoppages. The Commissioner’s grounds of appeal upon penalty focus upon the penalties imposed upon the Union in respect of the contraventions on those three days.
3. On 13 September 2016, Mr Pauls organised a strike at the Newstead site for the day. On the same day, Mr Parfitt organised a strike at the Hercules site for the day.
4. On 14 September 2016, Mr Steele organised a strike for the day at the Ivy site. On the same day, Mr Bland organised a strike for the day at the Wharf Street site.
5. On 23 September 2016, Mr Pauls organised a strike for the day at the Spire site and Mr Floro organised a strike for the day at the Hercules site. On the same day, Mr Davis organised a stoppage at the South Point A site, Mr Bland organised two stop work meetings (treated as one stoppage and one contravention in the pleadings) at the Skytower site, Mr Stott organised a stoppage at the Newstead site and Mr Steele organised a stoppage at the Opera site.
6. On 13 September 2016, approximately 139 employees ceased work. On 14 September, approximately 97 employees ceased work. On 23 September, at least 99 employees ceased work.
7. Under ss 363 and 793 of the Act, the actions taken by the individual respondents, as officers of the Union, are taken to be actions of the Union. The parties did not submit that s 557 of the Act applied. However, the primary judge found that s 556 applied such that a maximum of two penalties could be imposed for the Union’s contraventions on each of 13 and 14 September, and a maximum of six penalties for the contraventions on 23 September. There could only be one penalty for each of the remaining six days.
8. The primary judge found that the actions of the Union on each of the nine days amounted to a single course of conduct. Her Honour imposed nine penalties of $48,000 upon the Union for its actions on the nine days. The total of the penalties was $432,000.
9. The Commissioner’s grounds of appeal allege, firstly, that the primary judge erred by finding that the multiple contraventions on each of 13, 14 and 23 September arose in a single course of conduct. The Commissioner’s second ground is that her Honour erred by regarding herself as bound to impose only a single penalty for each such course of conduct even though that course consisted of multiple contraventions. The Commissioner’s third ground is that each of the penalties for the Union is manifestly inadequate.
10. The primary judge’s reasons for finding that the Union’s contraventions arose within “a single course of conduct” on each day and for imposing same penalty for each course of conduct were briefly stated:

80 In relation to the CFMMEU, the various stoppages and strike actions were referable to the campaign it had conducted against Hutchinson across various sites. Upon examination of this conduct it is in my view apparent that the actions of the CFMMEU, through its officials and employees, was orchestrated to take place on particular dates to cause maximum disruption on those dates. To that extent, I consider that the conduct of the CFMMEU on each particular date was a single course of conduct…

81 Consistently with this approach, I consider that the conduct of the individual respondents was referable to their actions on particular dates…

**Conclusion**

82 Insofar as concerns the contraventions by the CFMMEU, I conclude that the penalties for contraventions should be in the high range. I note that the CFMMEU does not dispute this. I note the co-operation by the CFMMEU and take this into consideration, however I also consider that considerations of specific deterrence are of high importance in this case. In the circumstances I consider it appropriate to impose a penalty of $48,000 for each of the nine courses of conduct, totalling $432,000.

1. The course of conduct (or one transaction) principle under the general law has been stated in a variety of ways. A useful exposition of the principle was given by Owen JA in *Royer v Western Australia* [2009] WASCA 139; 197 A Crim R 319 at 328 [22]:

… At its heart, the one transaction principle recognises that, where there is an interrelationship between the legal and factual elements of two or more offences with which an offender has been charged, care needs to be taken so that the offender is not punished twice (or more often) for what is essentially the same criminality. The interrelationship may be legal, in the sense that it arises from the elements of the crimes. It may also be factual, because of a temporal or geographical link or the presence of other circumstances compelling the conclusion that the crimes arise out of substantially the same act, omission or occurrences.

1. In *Transport Workers’ Union of Australia v Registered Organisations’ Commissioner [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:
2. 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.
3. 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.
4. The principle cannot, of itself, operate as a *de facto* limit on the penalty to be imposed.
5. 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.
6. The application and utility of the principle must be tailored to the circumstances.
7. A judge is not obliged to apply the principle if the resulting penalty fails to reflect the seriousness of contraventions.
8. The task is to evaluate the conduct and its course and assess what penalty is, or penalties are, appropriate for the contraventions.
9. 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.

[see *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Non-Indemnification Personal Payment Case)* [2018] FCAFC 97 at [31]; *Australian Competition and Consumer Commission v Yazaki Corporation* [2018] FCAFC 73; 357 ALR 55 at [231]–[236]; *Construction, Forestry, Mining and Energy Union v Williams* [2009] FCAFC 171; 262 ALR 417 at [16]–[19]; *Australian Building and Construction Commissioner v Construction Forestry, Mining and Energy Union* [2017] FCAFC 113; 254 FCR 68 at [148].]

1. The sentencing task of the primary judge required the exercise of a judicial discretion. Her Honour was required to determine the appropriate penalty having regard to all the relevant objective and subjective circumstances. Many of the issues that fell to be decided along the way, such as whether there was a risk of double punishment and the level of penalty that would avoid that risk, were themselves discretionary elements involved in the sentencing discretion. In *House v R* [1936] HCA 40; 55 CLR 499, Dixon, Evatt and McTiernan JJ explained the principles upon which an appellate court will interfere with a discretionary judgment, at 504–505:

It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance.

1. In this case, the primary judge decided that the Union’s contraventions on 13, 14 and 23 September 2016 should be treated as arising within “a single course of conduct” on each day. Her Honour apparently reached that conclusion because each contravention was referable to the single campaign the Union was conducting. In other words, the contraventions had the single purpose of coercing Hutchinson into engaging only subcontractors that had enterprise agreements with the Union. The Commissioner submits that the primary judge was wrong to decide that there was a single course of conduct on each day.
2. However, the Commissioner has not submitted that her Honour acted upon a wrong principle or made some other error of law or of fact. In *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39; 269 ALR 1, Middleton and Gordon JJ observed at 12 [39] that, “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”. But in this case, there was more than bare identity of motive. That multiple actions were taken on the same day, against the same business and with the same motive, provided a basis for her Honour’s conclusion, and it cannot be held that the conclusion was unreasonable or otherwise fell within the ambit of appealable error as described in *House v R*. The Commissioner’s submission simply expresses disagreement with the conclusion, and provides no basis to set aside her Honour’s exercise of discretion.
3. The Commissioner next submits that the primary judge erred by approaching the sentencing task as though only one maximum penalty was available to be imposed for the multiple contraventions that her Honour had found to come within a single course of conduct. The Commissioner points out that it was open to her Honour to impose up to two penalties for the Union’s contraventions on both 13 and 14 September and up to six penalties for the contraventions on 23 September. However, her Honour imposed only one penalty for each date. Her Honour concluded that “it was appropriate” to impose a penalty of $48,000 for each date, but did not explain why that was so.
4. There were two strikes and four stoppages at six different sites on 23 September 2016. There were two strikes on each of 13 and 14 September at two different sites. The scale of the industrial action on the three days and disruption was significantly greater than for the other days. For example, the scale of the industrial disruption on 23 September, where the two strikes were taken for a whole day, the four stoppages lasted up to two hours each and at least 99 employees ceased work, can be contrasted with 21 September, where there was a single stoppage lasting up to two hours and approximately 16 employees ceased work. Yet a single penalty of $48,000 for the contraventions on 23 September and a single penalty of the same amount for the contravention on 21 September was imposed upon the Union. Intuitively, the same penalty for significantly more serious, widespread, concerted and disruptive conduct seems anomalous.
5. The Union submits that the uniformity of the penalties may reflect a scaling-up of the penalties for the single contravention days such that the total penalty is intended to reflect the totality of the conduct over the course of the month. However, there is no hint of that type of reasoning in the primary judge’s reasons, and that submission cannot be accepted.
6. The primary judge’s reasons set out a finding that the contraventions on each of the nine days of industrial disruption arose in a single course of conduct, and then proceed, without further reasoning of any significance, to the conclusion that the same penalty should be imposed for each day. The proximity of these findings in her Honour’s reasons, and the absence of relevant interposed reasoning, suggests that they are linked. Her Honour did not otherwise explain why it was appropriate to impose the same penalty. Having regard to the absence of any other explanation and the extent of the disparity in the scale and seriousness of the industrial action on the three relevant days compared to the other days, it should be inferred that her Honour’s approach was that only one maximum penalty was available where there were multiple contraventions that constituted what her Honour had found to be a single course of conduct.
7. The course of conduct principle exists to ensure that where that conduct results in more than one contravention, an offender is not punished more than once for what is effectively the same offending conduct. A finding that multiple contraventions are connected by a single course of conduct raises a question as to what is the appropriate penalty for those contraventions that avoids double punishment, but does not answer that question. The question is answered by evaluating the conduct and its course and assessing what penalty is, or what penalties are, appropriate for the contraventions. It was an error for the primary judge to take the approach that only a single penalty up to the statutory maximum for one contravention was available for multiple contraventions arising within a single course of conduct.
8. Having found error in the approach of the primary judge, it is necessary to resentence for the contraventions occurring on 13, 14 and 23 September 2016. It was not suggested that there should be any resentencing for the contraventions on the other dates. Nor was it suggested that the Court should depart from the factual findings made by her Honour.
9. The admissions and evidence before the Court regarding the contraventions on 13, 14 and 23 September 2016 are limited in scope, and have been described above at [21], [28]–[30] and [114]–[118]. I accept the Commissioner’s submission that the overall conduct involved a deliberate, premeditated and sustained campaign of unlawful industrial behaviour orchestrated by the Union, including elements of intimidation, threat and coercion. In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 53; 249 FCR 458, in the context of assessing penalty, Dowsett and Rares JJ held at 475–476 [78]–[80], that where a site had been blockaded so work could not be performed, and where that action was intended to injure a party, substantive loss to someone was an inevitable consequence. I adopt the primary judge’s finding that the Union intended that loss be suffered, and infer that loss must have been suffered by someone. It is not possible to identify the loss or to quantify it, other than to say that it is likely to have been greater on the days when multiple sites were affected. The Union points out that it reached a settlement with Hutchinson, but the terms of settlement are not before the Court, and it cannot be assumed that no loss was suffered by anyone.
10. The Union’s history of prior contraventions was described in a schedule placed by the Commissioner before the primary judge, although it was not before this Court. However, the primary judge described that history as “extensive” and “vast”. That description was not disputed by the Union. That history was reflected in the fact that the individual penalties imposed by her Honour were close to the maximum amount for one penalty.
11. It is necessary to give substantial weight to the objects of general and specific deterrence.
12. It is also necessary to take into account, as the primary judge found, that senior officers of the Union orchestrated the campaign against Hutchinson.
13. While there has been no expression of contrition, the Union cooperated by making admissions, obviating the need for a contested trial, other than in respect of the reserved issue which was resolved in the Union’s favour.
14. The maximum number of penalties available to be imposed for the contraventions on each of 13 and 14 September is two, and for 23 September 2016, is six. A single penalty up to the maximum for each of those dates is inadequate, having regard to the legal and factual seriousness of each contravention, the extent of the disruptions, the loss caused and the number of contraventions. On the other hand, to impose the maximum number of penalties at the maximum amount would be to punish the Union excessively in circumstances where the contraventions involved substantially similar action taken for the same purpose on the same day. However, the penalties must also take into account that, factually and legally, the multiple contraventions committed on the same day were separate offences with separate factual and legal consequences.
15. It is appropriate to impose two penalties for the contraventions on 13 September 2016 and two penalties for the contraventions on 14 September of $35,000 each. It is appropriate to impose six penalties for the contraventions on 23 September 2016 of $25,000 each. These penalties may be compared to the maximum of $54,000 able to be imposed for each contravention.
16. The total of the penalties proposed to be imposed upon the Union in respect of its contraventions on the nine days is $578,000. Applying the totality principle, a total penalty of that magnitude is not excessive given the overall extent and seriousness of the contravening conduct.
17. The Commissioner accepted in argument that if more than one penalty were imposed in respect of the contraventions on each of 13, 14 and 23 September 2016, his final ground—that the penalties imposed by the primary judge were manifestly inadequate—would fall away.
18. The appeal should be allowed in part. Orders 19, 20 and 23 should be set aside.
19. Order 19 should be replaced by an order that, “In respect of the conduct on 13 September 2016, the subject of Declarations 34, 35, 36, 46, 47 and 48, the First Respondent pay two pecuniary penalties of $35,000 each.”
20. Order 20 should be replaced by an order that, “In respect of the conduct on 14 September 2016, the subject of Declarations 40, 41, 42, 52, 53 and 54, the First Respondent pay two pecuniary penalties of $35,000 each.”
21. Order 23 should be replaced by an order that, “In respect of the conduct on 23 September 2016, the subject of Declarations 49, 50, 51, 55, 56, 57, 75, 76, 77, 78, 81, 82, 83 and 84, the First Respondent pay six pecuniary penalties of $25,000 each.”

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| I certify that the preceding one hundred and thirty-three (133) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rangiah. |

Associate:

Dated: 12 April 2019