FEDERAL COURT OF AUSTRALIA

Australian Building and Construction Commissioner v Pattinson [2019] FCA 1654

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| File number: | VID 229 of 2019 |
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| Judge: | **SNADEN J** |
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| Date of judgment: | 14 October 2019 |
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| Catchwords: | **INDUSTRIAL LAW** – pecuniarypenalties – agreed contraventions – false or misleading statement about an obligation to engage in “industrial activity” – application of “no ticket, no start” philosophy – contravener knew statement was misleading, or was reckless as to that fact – analysis of the nature, gravity, character and seriousness of the contraventions – whether history of contravening conduct should inform the court’s assessment of how objectively serious the agreed contraventions were – application of “course of conduct” and “totality” principles – appropriateness of declaratory relief |
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| Legislation: | *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) ss 5, 15  *Conciliation and Arbitration Act 1904* (Cth) ss 5, 9  *Crimes Act 1914* (Cth) s 4AA  *Fair Work Act 2009* (Cth) Pt 3-1, ss 12, 336, 340, 343, 346, 347, 348, 349, 363, 500, 539, 546, 570  *Fair Work (Registered Organisations) Act* *2009* (Cth)  *Industrial Relations Act 1988*(Cth) s 170DF  *Universal Declaration of Human Rights* Art 20  *Workplace Relations Act 1996* (Cth) Pt XA, ss 298A, 298K, 298L, 298M, 298P, 298Q, 298Y, 790, 792 |
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| Cases cited: | *A & L Silvestri Pty Limited v Construction, Forestry, Mining and Energy Union* [2008] FCA 466  *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564  *Athens v Randwick City Council* (2005) 64 NSWLR 58  *Auimatagi v Australian Building and Construction Commissioner* (2018) 363 ALR 246  *Aussie Airlines Pty Ltd v Australian Airlines Ltd* (1996) 68 FCR 406  *Australian Building and Construction Commissioner v Barker* [2017] FCCA 1143  *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (“Cardigan Street Case”)* [2018] FCA 957  *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (Aldi and Altona North Case) (No 2)* [2019] FCA 1667  *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (Geelong Grammar School Case) (No 2)* [2019] FCA 1498  *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (No 2)* [2018] FCA 1968  *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (Syme Library Case) (No 2)* [2019] FCA 1555  *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Bendigo Theatre Case) (No 2)* [2018] FCA 1211  *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Laverton North and Cheltenham Premises Case) (No 2)* [2019] FCA 973  *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Nine Brisbane Sites Appeal)* (2019) 286 IR 336  *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union* [2019] FCA 468  *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 249 FCR 458  *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68  *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Quest Apartments Case) (No 2)* (2018) 358 ALR 725  *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (Werribee Shopping Centre Case)* [2017] FCA 1235  *Australian Building and Construction Commissioner v D’Arcy & Construction, Forestry, Mining and Energy Union* [2019] FCCA 563  *Australian Building and Construction Commissioner v Hassett* [2019] FCA 855  *Australian Building and Construction Commissioner v Moses & Ors* [2017] FCCA 2738  *Australian Building and Construction Commissioner v Powell* [2019] FCA 972  *Australian Building and Construction Commissioner v Yazaki Corporation* (2018) 262 FCR 243  *Australian Competition and Consumer Commission v ACN 117 372 915 Pty Limited (in liq) (formerly Advanced Medical Institute Pty Limited)* [2015] FCA 1441  *Australian Competition and Consumer Commission v Francis* (2004) 142 FCR 1  *Australian Competition and Consumer Commission v MSY Technology Pty Ltd & Ors* (2012) 201 FCR 378  *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25  *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640  *Australian Ophthalmic Supplies v McAlary-Smith* (2008) 165 FCR 560  *Bob Jane Corporation Pty Ltd v ACN 149 801 141 Pty Ltd* [2016] FCA 1129  *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482  *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Broadway on Ann Case)* [2018] FCAFC 126  *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Non-Indemnification Personal Payment Case)* (2018) 264 FCR 155  *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner* [2018] HCASL 380  *Construction, Forestry, Maritime, Mining and Energy Union v Milin Builders Pty Ltd* [2019] FCA 1070  *Construction, Forestry, Mining and Energy Union v Australian Competition and Consumer Commissioner* [2017] HCATrans 190  *Construction, Forestry, Mining and Energy Union v Stuart-Mahoney* [2011] FCA 56  *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 1462  *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2016] FCA 436  *Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union (the Hutchison Ports Appeal)* [2019] FCAFC 69  *Flight Centre Ltd v Australian Competition and Consumer Commission (No 2)* (2018) 260 FCR 68  *Hamersley Iron Pty Ltd v National Competition Council* (2008) 247 ALR 385  *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Limited (No 2)* [2017] FCAFC 99  *Markarian v The Queen* (2005) 228 CLR 357  *NW Frozen Foods v Australian Competition and Consumer Commission* (1996) 71 FCR 285  *Ogawa v Attorney-General (No 2)* [2019] FCA 1003  *Parker v Australian Building and Construction Commissioner* (2019) 365 ALR 402  *Radisich v McDonald and Construction, Forestry, Mining and Energy Union* [2012] FMCA 919  *Radisich v Molina & Ors (No 2)* [2011] FMCA 66  *Royer v Western Australia (2009)* 197 A Crim R 319  *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249  *Smith v Comcare* (2014) 64 AAR 205  *Stuart-Mahoney v Construction, Forestry, Mining and Energy Union & Anor (No 2)* [2008] FMCA 1015  *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc (No 2)* (1993) 41 FCR 89  *Trade Practices Commission v CSR Ltd* (1991) ATPR ¶41-076  *Transport Workers' Union of Australia v Registered Organised Commissioner (No 2)* (2018) 363 ALR 464  *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Limited* (2000) 200 CLR 591  *Veen v The Queen* (1979) 143 CLR 458  *Veen v The Queen (No 2)* (1988) 164 CLR 465  *Victoria International Container Terminal Ltd (t/as VICT) v Maritime Union of Australia* [2017] VSC 762  *Warramunda Village v Pryde* (2001) 105 FCR 437  *Wong v The Queen* (2001) 207 CLR 584  *Yates Property Corporation Pty Ltd v Boland* (1998) 89 FCR 78  *Yazaki Corporation & Anor v Australian Competition and Consumer Commission* [2018] HCATrans 215  Creighton B and Stewart A, *Labour Law – an introduction* (3rd ed, Federation Press, 2000) |
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| Date of hearing: | 16 July 2019 |
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| Registry: | Victoria |
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| Division: | Fair Work Division |
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| National Practice Area: | Employment & Industrial Relations |
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| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 129 |
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| Counsel for the Applicant: | Mr M J Follett |
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| Solicitor for the Applicant: | Minter Ellison |
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| Counsel for the Respondents: | Mr P Boncardo |
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| Solicitors for the Respondents: | 2 April 2019 - 24 July 2019 – Construction, Forestry, Maritime, Mining and Energy Union  From 25 July 2019 – Slater and Gordon |
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ORDERS

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|  | | VID 229 of 2019 |
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| BETWEEN: | AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER  Applicant | |
| AND: | KEVIN PATTINSON  First Respondent  CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION  Second Respondent | |

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| JUDGE: | SNADEN J |
| DATE OF ORDER: | 14 OCTOBER 2019 |

THE COURT ORDERS THAT:

1. The first respondent pay pecuniary penalties totalling $6,000.00.
2. The second respondent pay pecuniary penalties totalling $63,000.00.
3. The penalties referred to above be paid to the Commonwealth within 28 days.
4. There be no order as to costs.

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

REASONS FOR JUDGMENT

SNADEN J:

1. Article 20 of the *Universal Declaration of Human Rights* reads:
2. Everyone has the right to freedom of peaceful assembly and association.
3. No one may be compelled to belong to an association.
4. It has long been unlawful for employers operating under Australia’s federal industrial relations laws to dismiss employees on account of their membership of a union: see, for example, *Conciliation and Arbitration Act 1904* (Cth) ss 5, 9(1) and 9(3); *Industrial Relations Act 1988*(Cth), ss 170DF(1)(b) and 170DF(1)(c); *Workplace Relations Act 1996* (Cth), ss 298K(1)(a), 298L and 298M; *Fair Work Act 2009* (Cth) (hereafter, the “**FW Act**”), s 346(a). For more than a quarter of a century, it has been unlawful to do so on account of non-membership: *Industrial Relations Act* *1988* (Cth), s 170DF(1)(c) (which came into effect on 19 January 1994); *Workplace Relations Act 1996* (Cth), s 298K (which later became s 792); FW Act, s 346(a). To join or not join a union is an unremarkable incident of the right to freely associate—a right with which employees engaged under federal industrial laws in Australia are and have long been endowed.
5. It was not always so. In the first decades of Australia’s federal industrial relations system, unions and their members enjoyed privileges that, today, might outrage collective conscience. It was common, for example, for the Conciliation and Arbitration Commission to make awards in settlement of industrial disputes that contained provisions giving employment preference to union members. As recently as the early 1980s, many industrial instruments—awards or other instruments given statutory force and made by or under the auspices of statutory tribunals—required union membership as a condition of employment in the occupations or enterprises that they covered: see, for example, the *Clerks (Queensland Alumina Limited) Agreement 1980*, cl 14(a); the *Miscellaneous Workers Plaster of Paris and Gypsum Products Industry (C.S.R-Wetherill Park) Award, 1980*, cl 7; the *Theatrical Employees (Australian Opera) Award 1979*, cl 27(c); and the *Federated Miscellaneous Workers (Hardie Iplex Plastics – Altona) Award 1982*, cl 32.
6. From 1904 to 1996, federal legislation continuously conferred upon statutory bodies a power to afford union preference. In light of that history, it is hardly surprising that “‘[c]losed shop’ arrangements have historically been common in Australia”: Creighton B and Stewart A, *Labour Law – an introduction* (3rd ed, Federation Press, 2000) p 372 [12.72]. Like the “no Irish need apply” signs that found favour in the shopfronts of nineteenth century England, “no ticket, no start”—the rallying catch-cry for the philosophy that a person should be prevented from working unless licenced to do so by acquisition of a union membership “ticket”—was, in Australia, an adage once commonly and lawfully enforced, however contrary to modern sensibilities that might now seem.
7. That changed with the advent of the *Workplace Relations Act 1996* (Cth). Part XA of that statute was headed, “freedom of association”. Its objects were recorded in s 298A: in short form, they were to ensure that employers and employees were free to join or not join industrial associations. Section 298K proscribed certain conduct—including conduct involving the dismissal of an employee, the subjection of an employee to injury or detriment, or the non-engagement of prospective employees—from being engaged in for identified “prohibited reasons”. Two such reasons were that the employee (or prospective employee) in question was or was not a member of an industrial association. Other provisions within Pt XA prohibited employers from inducing employees to cancel their union membership (s 298M), prohibited unions from encouraging or coercing employers to contravene s 298K (s 298P(3)), prohibited unions from coercing employees to join (s 298Q) and voided provisions of industrial instruments that required or permitted conduct that would otherwise contravene that part (s 298Y).
8. Those protections were enlarged in late 2005 by the passage through the Commonwealth parliament of the “Work Choices” amendments to the *Workplace Relations Act 1996* (Cth). Amongst other things, those amendments (which took effect in March of the following year) included the insertion of what would become s 790(1), which outlawed the making of false or misleading representations about (amongst other things) an employee’s obligation to be or become a member of a union.
9. TheFW Act maintained all of the protections described above, with some (but, for present purposes, limited) qualification. Section 349—a provision that assumes central significance in this proceeding—prohibits a person from knowingly or recklessly making representations about (amongst other things) another person’s obligation to be or not be a union member. That section resides in Pt 3-1 of the FW Act, one of the objects of which is to “…protect freedom of association by ensuring that persons are…free to become, or not become, members of industrial associations”: FW Act, s 336(1)(b)(i).
10. For nearly a quarter of a century, the federal industrial relations system has outlawed the enforcement of the “no ticket, no start” philosophy. For the last 13 years, it has outlawed the deliberate or reckless making of misrepresentations about its application. Insofar as concerns employees and their membership of industrial associations, the federal scheme has long given and continues to give voice and legislative force to the aspiration for which Art 20 of the *Universal Declaration of Human Rights* provides: no one may be compelled to belong to an association.
11. In the Australian construction industry, though, it seems not always to work that way. Yet again, this court is asked to sit in judgment of building industry participants that have engaged in conduct consistent with the enforcement of a “no ticket, no start” philosophy. At issue is what relief that conduct should attract.
12. These reasons address that question.

# Background

1. The applicant (hereafter, the “**Commissioner**”) is the holder of a statutory office created by s 15 of the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth). He has standing to prosecute the present action. It concerns conduct that took place in September 2018 at a building construction site located in McMahons Road, Frankston, Victoria. That site (hereafter, the “**Site**”) was occupied by or otherwise under the control of Multiplex Constructions Pty Ltd (hereafter, “**Multiplex**”). Multiplex was retained as the principal contractor in charge of a project to build student accommodation for Monash University’s “Peninsula” campus (hereafter, the “**Project**”).
2. The first respondent, Mr Pattinson, was, at the time, an employee of Multiplex’s who worked at the Site in connection with the Project. As well as being a member of the second respondent (hereafter, the “**Union**”), he was also an officer of it (within the meaning attributed to that term by s 12 of the FW Act) and its delegate, or “shop steward”, at the Site.
3. The Union is a large and well-known trade union. It is registered as an “organisation” under the *Fair Work (Registered Organisations) Act* *2009* (Cth). Broadly speaking, it represents and seeks to advance the industrial interests of (amongst others) employees who perform work in the construction industry. For the purposes of the FW Act, it qualifies as an “employee organisation” (within the meaning attributed to that term by s 12 thereof).
4. Given the nature of the Project, each of the respondents qualifies for present purposes as a building industry participant (within the meaning attributed to that phrase by s 5 of the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth)).
5. In early September 2018, Sustainable Electrical and Automation Pty Ltd (hereafter, “**SEA**”) was engaged to install solar panels at the Site. On Thursday, 13 September 2018, SEA sent two employees to the Site to carry out that work. They arrived early that morning, whereupon they attended an induction session overseen by Mr Pattinson (in his capacity as a delegate of the Union’s at the Site). During the course of that session, Mr Pattinson enquired of one of the SEA employees, “Are you union? Do you have a ticket for your fees? Have you paid your fees?” or words to that effect. The SEA employee replied, “No, we’re not a union-based company so we don’t have our ticket,” or words to that effect. It is not in dispute that neither of the SEA employees was, in fact, a member of the Union.
6. Mr Pattinson then spoke to the SEA employees about their obligation to join an industrial association. The Commissioner’s amended statement of claim dated 5 June 2019 contains detailed particulars of that conversation. The respondents’ amended defence admits the effect of what was said but, as is to be expected, is silent as to whether or not the particulars are accurate. It is accepted that the effect of the discussion was that Mr Pattinson represented to each of the SEA employees that, in order to perform the work that they were at the Site to perform, they had to become a member of an industrial association (that representation is referred to, hereafter, as the “**Misrepresentation**”).
7. As the analysis by which these reasons commence makes clear, the Misrepresentation was false and/or misleading. Mr Pattinson made it knowing as much, or did so reckless as to the fact that it was. Again, it is accepted that Mr Pattinson made the remarks that he made in his capacity as an officer or delegate of the Union.
8. As a result of the exchange summarised above (including the Misrepresentation), the two SEA employees were prevented from performing any work at the Site on Thursday, 13 September 2018.
9. All of the facts recited above are the subject of admission. The Commissioner asserts and the respondents accept—and I, therefore, find—that, by making the Misrepresentation as he did with the state of mind that he had, Mr Pattinson twice contravened s 349(1) of the FW Act (once in respect of each of the two SEA employees). Likewise, it is asserted, accepted and found that Mr Pattinson’s conduct in making the Misrepresentation, and his state of mind when he did so (including that he either knew that it was false or misleading, or was reckless as to the fact that it was), are each attributable to the Union (respectively pursuant to s 363(1)(b) and 363(3)); in other words, that the Union also made the Misrepresentation, and did so knowing that it was false or misleading, or reckless as to the fact that it was. In doing so, so it is asserted, admitted and found, the Union also twice contravened s 349(1) of the FW Act.
10. By an originating application dated 12 March 2019, the Commissioner seeks relief in the nature of declarations and penalties in respect of the contraventions referred to in the preceding paragraph (hereafter and collectively, the “**Agreed Contraventions**”).

# Legislative provisions

1. Section 349 of the FW Act provides as follows:

**349 Misrepresentations**

(1) A person must not knowingly or recklessly make a false or misleading representation about either of the following:

(a) another person’s obligation to engage in industrial activity;

(b) another person’s obligation to disclose whether he or she, or a third person:

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

(ii) is or is not engaging, or has or has not engaged, in industrial activity.

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

(2) Subsection (1) does not apply if the person to whom the representation is made would not be expected to rely on it.

1. Section 347 of the FW Act identifies circumstances in which a person is to be understood to have engaged in industrial activity. Relevantly, a person engages in industrial activity if he or she becomes a member of an industrial association: FW Act, s 347(a).
2. Section 363 of the FW Act relevantly provides as follows:

**363 Actions of industrial associations**

(1) For the purposes of this Part, each of the following is taken to be action of an industrial association:

…

(b) action taken by an officer or agent of the industrial association acting in that capacity;

…

(d) action taken by a member of the industrial association who performs the function of dealing with an employer on behalf of the member and other members of the industrial association, acting in that capacity;

…

(3) If, for the purposes of this Part, it is necessary to establish the state of mind of an industrial association in relation to particular action, it is enough to show:

(a) that the action was taken by a person, or a group, referred to in paragraphs (1)(a) to (e); and

(b) that the person, or a person in the group, had that state of mind.

(4) Subsections (1) to (3) have effect despite subsections 793(1) and (2) (which deal with liabilities of bodies corporate).

# Pecuniary penalties

## General principles

1. Section 349(1) is a civil remedy provision: FW Act, s 539(1). The court has power under s 546 of the FW Act to impose upon the respondents a penalty in respect of each of the Agreed Contraventions. In the case of Mr Pattinson, it can impose a penalty in respect of each such contravention of up to 60 penalty units; in the case of the Union, up to 300 penalty units. At the time that the Agreed Contraventions occurred, a penalty unit was $210: *Crimes Act 1914* (Cth), s 4AA(1). The maximum penalty that can be imposed upon Mr Pattinson in respect of each of the two Agreed Contraventions to which he admits is $12,600.00 (or a total, for both, of $25,200.00). The maximum that can be imposed upon the Union for each of its Agreed Contraventions is $63,000.00 (or a total, for both, of $126,000.00).
2. The parties each submit that the Agreed Contraventions should attract the imposition of pecuniary penalties, although there is significant divergence as to what those penalties should be. The Commissioner contends that the Agreed Contraventions should attract penalties at or approaching the maximum in respect of the Union (that is, a total of, or near, $126,000.00), and of between $4,000.00 and $6,000.00 per contravention ($8,000.00-$12,000.00 in total) for Mr Pattinson. The respondents contend that they should attract penalties “…proportionate to contraventions that are objectively below the mid-range of seriousness.”
3. In determining what penalties are appropriate in the present case, the court’s discretion is very broad: *A & L Silvestri Pty Limited v Construction, Forestry, Mining and Energy Union* [2008] FCA 466, [6] (Gyles J). The task of assessing what amount to impose is one of “instinctive synthesis” that involves the selection of a figure that takes due account of all factors relevant to the particular case: *Wong v The Queen* (2001) 207 CLR 584, 611 [75] (Gaudron, Gummow and Hayne JJ); *Markarian v The Queen* (2005) 228 CLR 357, 373-375 [37] (Gleeson CJ, Gummow, Hayne and Callinan JJ); *Flight Centre Ltd v Australian Competition and Consumer Commission (No 2)* (2018) 260 FCR 68, 84 [55] (Allsop CJ, Davies and Wigney JJ); *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25, 36 [44] (Jagot, Yates and Bromwich JJ).
4. What those factors are will be case-specific, although the authorities are replete with recurring examples of matters to which regard has properly been had in the exercise of the broad discretion at play. In *Australian Ophthalmic Supplies v McAlary-Smith* (2008) 165 FCR 560, 580 [91] Buchanan J (with whom, in the result, Gray and Graham JJ agreed), considered those recurring factors and what was an emerging tendency to treat them as “checklists”. His Honour noted:

Checklists of this kind can be useful providing they do not become transformed into a rigid catalogue of matters for attention. At the end of the day the task of the Court is to ﬁx a penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public conﬁdence in the statutory regime which imposes the obligations.

1. The sole object to which the court must give effect in setting an appropriate penalty is to deter repetition of the conduct in respect of which it is to be imposed: *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482, 506 [55] (French CJ, Kiefel, Bell, Nettle and Gordon JJ). Deterrence, in that sense, is both specific and general—the court must strive to “…put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act”: *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68, 88 [98] (Dowsett, Greenwood and Wigney JJ); *Trade Practices Commission v CSR Ltd* (1991) ATPR ¶41-076, 52,152 (French J). In *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Non-Indemnification Personal Payment Case)* (2018) 264 FCR 155 (Allsop CJ, White and O’Callaghan JJ), the full court set the task in the following terms (at 167-168):

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

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

21 The seriousness of the contravention and other features of the conduct which may be seen as relevant to it…ﬁnd their place in understanding the degree of deterrence that is necessary to be reﬂected in the size of the penalty: *Flight Centre Ltd v Australian Competition and Consumer Commission (No 2)* [2018] FCAFC 53; 260 FCR 68 at [71].

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

1. Inherent in realising the sole objective to which its imposition is directed is a recognition that a civil penalty “…must be fixed with a view to ensuring that the penalty is not such as to be regarded by [the] offender or others as an acceptable cost of doing business”: *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249, 265 [62]-[63] (Keane CJ, Finn and Gilmour JJ)); *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640, 659 [66] (French CJ, Crennan, Bell and Keane JJ); *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 249 FCR 458, 481 [101] (Dowsett and Rares JJ, North J dissenting—hereafter, the “***Perth Airport Case***”).
2. In the present case, the Agreed Contraventions warrant the imposition of pecuniary penalties. I proceed to consider the factors most relevant to what those penalties ought to be.

## Nature, character and seriousness of the contravening conduct

1. The conduct that is at the heart of the Agreed Contraventions is not materially disputed. It comprised the making of the Misrepresentation: a single statement that Mr Pattinson made to the two SEA employees, the admitted effect of which was to indicate that they could not work at the Site unless or until they joined an industrial association. As is outlined above, there is no question that that statement was false or misleading, nor that Mr Pattinson either knew as much or was reckless as to its having that character.
2. What divides the parties is the extent to which the nature of the Agreed Contraventions, insofar as they are attributable to the Union, should be informed by the Union’s history of contravening the FW Act and its predecessors.

### Significance of the Union’s history

1. The Union’s history of prior contravention of the FW Act and its predecessors is a matter of some notoriety. The Union is a “serial offender” that has, over a long period, exhibited a willingness to contravene workplace laws in the service of its industrial objectives; and one that appears to treat the imposition of financial penalties in respect of those contraventions as little more than the cost of its preferred business model.
2. In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (Werribee Shopping Centre Case)* [2017] FCA 1235, Tracey J recorded the following observations about the Union’s efforts to enforce a “no ticket, no start” philosophy at Australian building sites:

25 The CFMEU is a large, asset rich, and well-resourced industrial organisation. It has regularly been involved in litigation in which it has been found to have contravened provisions of the [Fair Work] Act, including ss 346 and 348, which attract pecuniary penalties. See the non-exhaustive summary of coercion-related decisions involving the CFMEU between 2010 and 2015 in Jessup J’s judgment in *Australian Building and Construction Commission v Construction, Forestry, Mining and Energy Union (the Webb Dock Case)* [2017] FCA 62 at [67]. It may, therefore, be taken to be well aware of the constraints imposed upon it and its members by such provisions.

26 Despite this, it has persisted in its contravening conduct. The Commissioner has provided the Court with an analysis of such cases which demonstrates that, since about 2000, the CFMEU has been found to have breached pecuniary penalty provisions on more than 120 occasions.

27 The industry of the Commissioner has identified 15 cases, since 2000, in which the CFMEU and its officials have been found to have contravened the Act and its predecessors by engaging in misconduct with a view to maintaining “no ticket no start” regimes on building sites around the country. Penalties have been imposed by this Court, the Federal Magistrates Court and the Federal Circuit Court.

28 The present case falls into this pattern of repeated disregard for the law. To adopt the language of Mortimer J in *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2016] FCA 436 at [142]: the misconduct forms “part of a deliberate and calculated strategy by the CFMEU to engage in whatever action, and make whatever threats, it wishes, without regard to the law, and then, once a prosecution is brought, to seek to negotiate its way into a position in which the penalties for its actions can be tolerated as the price of doing its industrial business.” See also *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (Perth Children[’s] Hospital Contraventions Case)* [2017] FCA 491 at [83]-[90] (Barker J) and the authorities there cited.

1. The Commissioner provided a similar analysis in this case. What, in 2017, was 120 occasions is now in the vicinity of 150. There have been at least seven occasions on which the Union has been found to have contravened s 349 of the FW Act or its predecessor: *Radisich v McDonald and Construction, Forestry, Mining and Energy Union* [2012] FMCA 919 (Lucev FM); *Radisich v Molina & Ors (No 2)* [2011] FMCA 66 (Lucev FM); *Stuart-Mahoney v Construction, Forestry, Mining and Energy Union & Anor (No 2)* [2008] FMCA 1015 (Burchardt FM) (upheld on appeal in *Construction, Forestry, Mining and Energy Union v Stuart-Mahoney* [2011] FCA 56 (Ryan J)); *Australian Building and Construction Commissioner v D’Arcy & Construction, Forestry, Mining and Energy Union* [2019] FCCA 563 (Judge Egan); *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Quest Apartments Case) (No 2)* (2018) 358 ALR 725 (Tracey J); *Australian Building and Construction Commissioner v Moses & Ors* [2017] FCCA 2738 (Judge Jarrett); *Australian Building and Construction Commissioner v Barker* [2017] FCCA 1143 (Judge Jarrett).
2. Mr Pattinson is not in the same category. He has not previously been found to have contravened the FW Act or its predecessors. He has been a site delegate since at least 1997 and remains an officer of the Union. On any view, he is a senior participant in the Victorian construction arena. Regardless, the analysis that follows pertains primarily to the Agreed Contraventions of the Union.
3. The Commissioner submits that the Union’s history should inform the court’s assessment of the objective seriousness of its Agreed Contraventions. Because the Union has the history that it has, the Agreed Contraventions should, so the contention proceeds, be seen, objectively, to be very serious and deserving of an equally serious penalty. It submits that a penalty at or close to the maximum available would be appropriate.
4. The Union submits that its history of prior offending does not (or cannot properly) inform the nature of its conduct in the present case, nor otherwise inflate its seriousness or gravity; and so should not (or cannot properly) lead to the imposition of any penalty disproportionate to the instant contraventions. To put it another way: it maintains that the range within which the court might properly impose penalties in respect of the conduct that constitutes its Agreed Contraventions must be determined by reference to the nature, seriousness or gravity of that conduct, assessed in isolation from (and without reference to) the historical context against the backdrop of which the Union engaged in it. It is, so the contention proceeds, only once that range is identified that that historical context becomes relevant (in the sense that it informs where, within that range, an appropriate penalty lies).
5. In *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Broadway on Ann Case)* [2018] FCAFC 126 (“***Broadway on Ann***”; Tracey, Logan and Bromwich JJ), a full court of this court had occasion to consider the question that now confronts me. There, the court heard an appeal from a decision of the Federal Circuit Court of Australia (hereafter the “**FCCA**”), by which that court had imposed six maximum penalties against the Union in respect of multiple contraventions of s 500 of the FW Act. Tracey and Logan JJ, upholding (or, more accurately, reimposing) the penalties in question, both reasoned that the conduct constituting each of the contraventions, whilst primarily not itself at the most serious end of the proverbial spectrum, was nonetheless deserving of the maximum sanction because the Union’s history of contravention of the FW Act was such that nothing less would have any prospect of deterring future contraventions.
6. In separate judgments, their Honours discussed the Union’s history of statutory contravention and the inferences that arose from it, including that the Union “…has determined that its officials will not comply with the requirements of the FW Act with which it disagrees” ([23], Tracey J), that “…[t]he union simply regards itself as free to disobey the law” ([23], Tracey J) and that “in its internal governance, the CFMEU has been unable or unwilling to restrain aberrant behaviour within its Construction Division” ([84], Logan J, with whom Tracey J agreed).
7. It was, as both judges explained, at least in part because of that history that their Honours determined to accept that the maximum penalties that the FCCA had imposed were appropriate. Tracey J observed (at [27]) that the Union’s history of contravening conduct (amongst other considerations) bespoke:

…deliberate abuse of [its] privileged position as a registered organisation in the Federal industrial relations system [and emphasised] the need for general and specific deterrence to weigh most heavily in the process of instinctive synthesis in which the Court engages when determining civil penalties.

1. Logan J (with whom Tracey J agreed) tackled head on the submission that the Union in this case advances: namely that, “…although prior contraventions are relevant and justify a heavier sentence than may otherwise be imposed, ‘in the absence of statute, they cannot lead to the imposition of a penalty that is disproportionate to the gravity of the instant offence’.” His Honour observed:

69 We are bound by *Commonwealth v Director, FWBII* to recognise and give effect to a civil penalty regime the purpose of which is ensuring compliance with norms of industrial behaviour prescribed by Parliament in the public interest. To view the conduct of the CFMEU on 10 February 2015 in isolation from the past and to penalise on the basis that there have been worse cases is to fail to recognise that the conduct is but a further manifestation of a lengthy and repeated pattern of unrepentant, outlaw behaviour by the CFMEU.

…

77 Once the contraventions on the day, deplorable in themselves, are viewed in context, they are, in my view, of the worst possible kind. Common sense, to say nothing of the maintenance of the rule of law, dictates that this must be so. Each contravention well warrants the maximum penalty. Laws which may be ignored at will on the basis of a persistent, self-arrogated, alternative standard of behaviour are no laws at all, only empty aspirational statements.

…

87 …So recalcitrant is the contravening conduct charged having regard to the past history…and such is the importance of deterrence and compelling conformity with the requirements of the [FW Act] my view is that only the most condign penalisation of a cumulative maximum punishment is warranted in the circumstances of this case. I would impose that so as to bring home emphatically to the CFMEU that, in its internal governance, it must force systemic behavioural change upon its Construction Division.

1. The third member of the court in *Broadway on Ann*, Bromwich J, dissented. There was, before me, some debate about whether he did so on the point of principle presently under consideration (namely, whether or not the nature, character or seriousness of contravening conduct should be assessed having regard to any history of similar conduct). Respectfully, I think that he did; although I acknowledge the divergence of views on that score, including (as will shortly be seen) in this court.
2. From the outset, Bromwich J identified (at [93]) five points of principle concerning the imposition of civil penalties that were of particular importance to that case, namely:

(1) While any prior contravention is a factor which may be taken into account in determining quantum, it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant contravention.

(2) The maximum penalty available under statute must be reserved for the worst category of cases. However, this does not mean that a lesser penalty must be imposed because it is possible to envisage a worse case.

(3) The Federal Circuit Court and this Court should not, without giving the parties proper notice and an opportunity to be heard, disregard the submissions of the regulator and impose a penalty in excess of what the regulator seeks.

(4) While the formulation of the quantum of an appropriate penalty usually involves, in the final analysis, an “*instinctive*” synthesis of competing factors, the process leading to that synthesis is not instinctive.

(5) The outcomes arrived at by courts in prior cases can be used to help ensure reasonable consistency in the application of principle and as a yardstick for the determination of appropriate penalties.

1. As will be immediately apparent, it is the first of those five principles that is presently of interest. His Honour elaborated upon it thus (at [104]-[105] and [107]), referring in particular to the High Court’s judgment in *Veen v The Queen (No 2)* (1988) 164 CLR 465 (hereafter, “***Veen (No 2)***”):

104 In ascertaining the metes and bounds of the regard that may be had by a court to prior contraventions, the seminal statement on this topic in *Veen (No 2)* at 477 may be adapted in a form that strips away irrelevant criminal law considerations, such that it reads as follows:

… the antecedent [contravening] history of [a contravener] is a factor which may be taken into account in determining the [penalty] to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant [contravention]. To do so would be to impose a fresh penalty for past [contraventions] … . The antecedent [contravening] history is relevant, however, to show whether the instant [contravention] is an uncharacteristic aberration or whether the [contravener] has manifested in his commission of the instant [contravention] a continuing attitude of disobedience of the law. In the latter case, … deterrence … may … indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent [contravening] history when it … shows a need to impose [a] condign [civil penalty] to deter the [contravener] and other [contraveners] from committing further [contraventions] of a like kind.

105 As the High Court’s observations in *Veen (No 2)* illustrate, it is legitimate to take into account the antecedent contravening history of a contravener insofar as it may indicate that a condign civil penalty is necessary to deter the contravener and other potential contraveners from committing further contraventions of a like kind in the future. However, the penalty that is imposed must still be proportionate to the gravity of the instant contraventions, as assessed in their own terms, for to do otherwise would be to impose a fresh penalty for past contraventions.

…

107 The important principle identified in the passage from *Veen (No 2)* above is particularly relevant where there is, as in this case, a serious and sustained prior history of contraventions, and an apparent determination to continue engaging in proscribed conduct. The role of any past contraventions is to be no more than a prism through which to view the instant contravention. This enables a court to assess whether, for example, the instant contravention is an “*uncharacteristic aberration*” or whether the contravener has, by the instant conduct, manifested “*a continuing attitude of disobedience of the law*”. If the latter, as is clearly available to be concluded in this case, the heightened need for deterrence indicates that a more severe penalty is warranted for the instant contravention. Nonetheless, that penalty must still fall within the applicable range that is otherwise considered appropriate for that contravention.

1. Unlike Logan J (with whom Tracey J agreed), Bromwich J took the view that the Union’s history of contravening conduct was “no more than a prism through which to view” particular contravening conduct and was not a circumstance that should inform the court’s assessment of its seriousness (or nature or character or gravity) or its determination of the range within which a penalty should fall having regard to that assessment. It was in that sense that his Honour should, I think, be understood to have dissented not only in the result but also on that point of principle (about the significance of prior contravening conduct to the court’s assessment of the nature, gravity, seriousness or character of particular contravening conduct).
2. *Broadway on Ann* was the subject of an unsuccessful application for special leave to appeal to the High Court: *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner* [2018] HCASL 380 (Gordon and Edelman JJ).
3. Three months after *Broadway on Ann* was decided, another full court had occasion to consider the same question. In that case—*Auimatagi v Australian Building and Construction Commissioner* (2018) 363 ALR 246 (Allsop CJ, Collier and Rangiah JJ)—the court overturned a judgment of the FCCA, by which the appellants had been found to have engaged in adverse action and coercion in contravention of (respectively) ss 340 and 343 of the FW Act. The appeal succeeded on liability grounds, such that it was not strictly necessary for the court to address the issue of penalty. Nonetheless, it did so, observing (at 279-280 [176]):

…It is a fundamental principle, at the core of the judicial power to impose a penalty, that the imposition is for the contravention in question. Prior contraventions, even so many and often so serious as the Union may have engaged in in the past, is a factor which may be taken into account in determining the appropriate quantum for the contravention; it cannot be taken to lead to a penalty that is disproportionate to the gravity of the instant contravention. The maximum is for the worst category of cases. See the points of principle set out in the reasons of Bromwich J (dissenting in the result, but not in point of principle) in *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (Broadway on Ann Case)* [2018] FCAFC 126 at [93] and [102]–[110], and see *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (Non-Indemnification Personal Payment Case)* [2018] FCAFC 97 at [22].

1. I pause to note the reference there to the *Broadway on Ann* case and to Bromwich J having, therein, “dissent[ed] in the result, but not in point of principle”. For the reasons that I have already stated, that is not the way that I read his Honour’s reasoning in *Broadway on Ann*; but nothing turns on that and I needn’t say anything more about it.
2. The question of what role a contravener’s history of contravening conduct should play in the setting of a civil penalty arose once again in *Parker v Australian Building and Construction Commissioner* (2019) 365 ALR 402 (“***Parker***”; Besanko, Reeves and Bromwich JJ). There, the appellants had been found to have contravened various provisions of the FW Act, in respect of which penalties were imposed against them. They appealed, on both liability and penalty grounds. The former failed; but the latter partially succeeded. In particular, the court overturned the penalties that were imposed upon the two corporate appellants. One of them was the Union, whose history of statutory contravention has already been summarised, as it was in that case. At the trial stage, it was found to have committed (through its officers) 25 statutory contraventions, in respect of each of which it was ordered to pay the maximum available penalty. That was said to have been warranted partly on account of its long history of statutory contraventions.
3. On appeal, those penalties were reduced. Besanko and Bromwich JJ (with whom Reeves J agreed), discussing the High Court’s decision in *Veen (No 2)*, said as follows (at 508 [342]):

*Veen (No 2)* also provides valuable guidance as to the role of the maximum penalty. The High Court’s observations at 478 make it clear that the maximum penalty is reserved for contraventions falling within the worst *category* of cases for which that penalty is prescribed. This does not require characterisation as *the* worst possible case. However, a case is not in the worst category merely by reason that the contravener has a history of prior contraventions, although that history may assist in the proper characterisation of the instant contravention. Considerable caution may be required to avoid blurring this distinction.

1. Later, their Honours held (at 510 [348]):

As the above discussion of *Veen No 2* demonstrates, while the role of past conduct informs the need for deterrence, that cannot be used to change the character of the instant contravention.

1. I regret to confess some difficulty reconciling those passages. The first suggests that a contravener’s “…history may assist in the proper characterisation of the instant contravention”; yet the second makes clear that that history “…cannot be used to change the character of the instant contravention”. As counsel for the respondents urged that I should, I have understood the court to have found that it was not appropriate to take account of the contravener’s history of similar conduct when assessing the character (or, by extension, the nature, gravity or seriousness) of particular contravening conduct. That conclusion aligns with what Bromwich J held in *Broadway on Ann*; but it is difficult—I think impossible—to reconcile with the approach that the majority took in that case. *Broadway on Ann* was not referred to in *Parker*, let alone disavowed. If my analysis of Parker is correct, then, there are recent and conflicting full court authorities as to the significance of prior contraventions. One (*Broadway on Ann*) was the subject of an unsuccessful special leave application; the other (*Parker*) is more recent and is consistent with powerful statements made in *obiter* by another full court (*Auimatagi*).
2. Thus were the battle lines in this case drawn.
3. There have been at least six single-judge penalty decisions of this court that have applied the reasoning adopted in *Parker* (and by Bromwich J, in dissent or not, in *Broadway on Ann*). In *Australian Building and Construction Commissioner v Hassett* [2019] FCA 855 (“***Hassett***”), O’Callaghan J considered what penalty ought to be imposed upon the Union in respect of contraventions of s 500 of the FW Act that were committed by two of its officers (for which it accepted that it was liable as an accessory). His Honour made the following observations:

52 I next deal with the applicant’s submission that there is a difference of opinion to be discerned from some of the cases about the proper approach to the imposition of penalties, and the importance of long standing recidivism. Counsel for the applicant contended that the reasoning in two cases – *The Bendigo Theatre Case* at [73] and *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Broadway on Ann Case)* [2018] FCAFC 126 (Tracey and Logan JJ, Bromwich J dissenting), especially at [13]-[27] and [66]-[69] – is to be read as more readily permitting the imposition of maximum penalties on an irrepressible offender, which thumbs its nose at the law, and regards the payment of such penalties as a cost of doing business, without offending the fundamental rule of sentencing that courts do not punish for past contraventions in respect of which a penalty has already been imposed.

53 In my view, those cases are not to be read that way. If I am wrong about that, then, in any event, I will follow those cases which form the preponderance of authority and, in my view, correctly state the principles governing the approach that courts take in going about the task of imposing appropriate penalties on recidivist offenders. For recent and authoritative explanations of the correct principles, see *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; (2016) 340 ALR 25 at 63, [154]- [156] (Jagot, Yates and Bromwich JJ); *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Non-Indemnification Personal Payment Case)* [2018] FCAFC 97; (2018) 280 IR 28 at 41, [22] (Allsop CJ, White and O’Callaghan JJ); *Auimatagi v Australian Building and Construction Commissioner* [2018] FCAFC 191; (2019) 363 ALR 246 at 279-280, [176] (Allsop CJ, Collier and Rangiah JJ); *Parker v Australian Building and Construction Commissioner* [2019] FCAFC 56 at [339]-[342] (Besanko and Bromwich JJ, Reeves J agreeing).

54 In that regard, I will not repeat what I said in *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (No 2)* [2018] FCA 1968 at [46]-[49] and *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union* [2019] FCA 468 at [44]-[47]).

1. Both of the authorities referred to at the end of the passage above were decided in the period between the *Auimatagi* and *Parker* decisions. Although, in *Hassett*, his Honour didn’t see utility in repeating the observations that he made in those cases, there is utility in my setting them out here.
2. In the first of those authorities—*Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (No 2)* [2018] FCA 1968 (hereafter, the “***Springvale Rail Crossing Case***”)—his Honour was called upon to determine what penalties ought to be imposed in respect of contraventions of various provisions of the FW Act committed by (amongst others) the Union. The applicant, relying on *Broadway on Ann*, submitted that, “…when proper regard is had to the seriousness of the present contraventions in light of the [Union]’s approach to the law and penalties and having regard to the centrality of deterrence (both specific and general), each and every new contravention must be properly seen as sufficiently grave so as to warrant the maximum penalty available.” His Honour addressed that submission in the following terms:

46 In my view, the question of the assessment of penalties is to be approached consistently with the joint judgment of the Full Court (comprised of the Chief Justice, White J and myself) in *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Non-Indemnification Personal Payment Case)* [2018] FCAFC 97 (**The Non-Indemnification Personal Payment Case**) in particular at [22]…

47 To the extent that the submissions of the applicant suggested that the judgments of the majority in *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Broadway on Ann Case)* [2018] FCAFC 126 may be read to suggest otherwise, I respectfully disagree.

1. In *Australian Building Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union* [2019] FCA 468 (the “***Prolac Case***”)—the second of the two authorities referred to in the passage from *Hassett* reproduced above (at [55])—O’Callaghan J again was obliged to level a penalty against the Union, on that occasion for an admitted contravention of s 348 of the FW Act. Again, competing submissions were advanced as to the significance of the Union’s history. His Honour addressed those submissions in the same way that he addressed them in the *Springvale Rail Crossing Case*.
2. With respect, I agree with his Honour that there is no conflict in principle that separates what the full court said at [22] of the *Non-Indemnification Personal Payment Case* (above, [28]) from what Tracey and Logan JJ decided in *Broadway on Ann*. However, to the extent that his Honour might be understood to have held that the former is authority for the proposition that the nature (or seriousness or character or gravity) of particular contravening conduct is not informed by the historical context against which it was embarked upon, I regret that I am unable to agree. The relevant proposition stated at [22] of the *Non-Indemnification Personal Payment Case* is simply that a person ought not to be penalised twice for the same contravening conduct. If that passage stands for some broader proposition that the nature (or seriousness or character or gravity) of contravening conduct cannot fairly be informed by a contravener’s history, then it is not obviously reconcilable with what their Honours Tracey and Logan JJ decided in *Broadway on Ann*. Either way, it does not assist in navigating safe passage through what I regard as the conflict that separates *Broadway on Ann* and *Parker*.
3. Again with respect, I am also unable to agree that the views expressed by Tracey and Logan JJ in *Broadway on Ann* should not be read as “…more easily permitting the imposition of maximum penalties on an irrepressible offender, which thumbs its nose at the law…” In my view, that is the thrust of what their Honours decided.
4. I return, then, to the second of the six post-*Parker* authorities that have considered the question, namely *Australian Building and Construction Commissioner v Powell* [2019] FCA 972 (“***Powell***”). That (like *Broadway on Ann* and *Hassett*) was also a right of entry case. There, Bromberg J referred to “[t]hree Full Courts of this Court hav[ing] recently emphasised the importance of determining a penalty which is proportionate to the contravening conduct in the context of any need to take into account a contravener’s prior contraventions.” His Honour then, at [27]-[29], recited (as they are recited above) the key points of principle that emerge from each of the *Non-Indemnification Personal Payment Case*, *Auimatagi* and *Parker*. At [30], he distilled those propositions as follows (emphasis original):

The well settled principles most recently expressed in *Parker* call for a structured approach to the imposition of a penalty on a contravener with a history of contraventions, the object of which is to ensure that the contravener does not “suffer the fate of being sanctioned anew for past contraventions” (at [341]). *First*, the Court must identify the applicable range of penalties for that contravention without regard to the contravener’s prior history of contraventions. *Having done that*, the Court should then take into account that history in assessing where, within the applicable range, the penalty should fall.

1. The third of the six relevant post-*Parker* decisions is *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Laverton North and Cheltenham Premises Case) (No 2)* [2019] FCA 973 (“***Laverton North***”; Bromberg J). It was handed down on the same day as *Powell*. On the issue of present relevance, his Honour referred to and repeated the analysis that he recited in *Powell* (and which I have summarised above). His Honour did likewise in the last of the six relevant post-*Parker* decisions: *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (Aldi and Altona North Case) (No 2)* [2019] FCA 1667, [28] (“***Altona North***”; Bromberg J)
2. Respectfully, I agree with his Honour’s analysis. If *Parker* represents the law as it presently stands on the question with which I am confronted—namely whether or not the nature, character, seriousness or gravity of particular conduct should be assessed in light of the historical context against the backdrop of which it was embarked upon—then the two-stage process to which Bromberg J in *Powell* adverted is the one that I must apply. For the reasons to which I will shortly come, however, I do not consider that that *is* the present state of the law.
3. In *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (Geelong Grammar School Case) (No 2)* [2019] FCA 1498 (“***Geelong Grammar***”)—the fourth of the six post-*Parker* decisions to which reference is made above—Mortimer J imposed penalties against the Union and one of its officials for another contravention of the FW Act’s right of entry scheme. Her Honour made the following observations (at [39]-[40]):

39 …the term “recidivist” can appropriately be applied to the CFMMEU. However, the penalty imposed by the Court for the contraventions found to have occurred in this proceeding must be proportionate to the seriousness of that contravening conduct, without allowing the CFMMEU’s recidivist record to affect that assessment of the seriousness of the conduct.

40. That said, as Besanko and Bromwich JJ recognise, the extensive record of contraventions of the CFMMEU is relevant to the weight to be given to deterrence in fixing an appropriate penalty…

1. None of *Auimatagi*, the *Springvale Rail Crossing Case*, the *Prolac Case*, *Hassett,* *Parker*, *Powell*, *Laverton* *North, Altona North* or *Geelong Grammar* contains any material analysis of what Tracey and Logan JJ said in *Broadway on Ann*. In saying so, I mean only to observe that each of those cases was decided contrary to what their Honours in *Broadway on Ann* held (but, of course, consistently with other, more recent full court authority). Neither of the two full court decisions (*Auimatagi* and *Parker*) explains how (or if) it was that *Broadway on Ann* was wrong (let alone plainly so).
2. In *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (Syme Library Case) (No 2)* [2019] FCA 1555 (“***Syme***”; Wheelahan J)—the fifth of the six relevant post-Parker, single judge decisions referred to above—Wheelahan J took a slightly different view of *Parker*. Considering the significance of recidivism to the court’s assessment of the nature or seriousness of an instant contravention, his Honour observed as follows (at [96]):

I accept the submission made on behalf of the CFMEU respondents that the prior record of a contravener does not permit the imposition of a penalty that is disproportionate to the offending conduct for which the penalty is to be imposed. But [*Veen (No 2)*], the reasons of Tracey J and Logan J in the *Broadway on Ann* case, and the reasons of the members of the Court in *Parker* support the idea that past contraventions may be relevant in assessing the seriousness of the instant contraventions. A history of contraventions may affect a number of features of the instant contraventions, including whether the instant contraventions are a manifestation of a continuing attitude of disobedience to the law. For this reason, and when all the background circumstances and other features of a contravention are considered, what might in isolation and superficially be a minor contravention may take on the complexion of a much more serious contravention…

1. With respect to his Honour, I read *Parker* in a more constraining way: namely, as authority for the proposition that, when assessing the character (or nature or gravity or seriousness) of particular contravening conduct, the court must not take account of the contravener’s history of similar conduct (above, [53]). That is the interpretation of *Parker* that the respondents urge upon me. By supplementary written submissions, they suggest that “[n]othing in *Parker* supports the view articulated at [96] in [*Syme*] that past contraventions may be relevant to assessing the seriousness of the instant contravention.” Respectfully and for the reasons outlined above (at [51]-[53]), that submission is a step too far. Nonetheless, I accept the broader submission as to the proposition for which *Parker* stands as authority. It stands, I think, consistently with the construction of *Parker* that Bromberg, Mortimer and O’Callaghan JJ favoured in the cases to which I have referred above (namely, *Powell*, *Laverton North*, *Altona North*, *Geelong Grammar* and *Hassett*).
2. If that is right, the court in the present case is left in a difficult situation. Both sides acknowledge—I think properly—that Mr Pattinson’s (and, by process of attribution, the Union’s) conduct, judged independently of its context, was not at the upper end of the proverbial scale of seriousness. The Union says that, that being so, the court must fashion a penalty that aligns with that objective, contextually-independent assessment of the contravening conduct’s seriousness; and that regard must not be had to its history so as to impose a penalty that would be appropriate for something objectively more serious (or that is otherwise disproportionate to what occurred). The Commissioner, by contrast, says that the conduct cannot fairly be divorced from its context; and that the Union’s history of contravening conduct is a circumstance that places the contraventions in this case at the upper end of that scale of seriousness.
3. I say again: if my analysis of *Parker* is correct, then the court is left in a difficult situation. Whichever of the competing contentions I decide to follow, there will be full court authority that says that I’m wrong. I have, it seems to me, little option but to consider for myself which of the two competing analyses is to be preferred. For the reasons stated below, I favour—and, in this case, will apply—the reasoning of the majority in *Broadway on Ann*. Had the full court, in *Parker*, expressly impugned that reasoning as wrong (or plainly wrong), then I would have followed that latter reasoning instead, despite respectfully adhering to the view that it is wrong. However, as the reasoning of the majority in *Broadway on Ann* has not been so impugned—and represents, I think, a correct statement of the relevant law—I consider myself bound to apply it.
4. In doing so, I should attempt at least some defence of what the majority in *Broadway on Ann* held; and, by extension, some explanation for why I would respectfully prefer it over the competing analyses in the authorities to which I have referred above (including *Auimatagi* and *Parker*, as I have construed it).
5. Civil penalties have only one objective: deterrence. The court is charged, simply enough, with fashioning a penalty that serves to deter, both generally and specifically, the conduct in respect of which it is levelled.
6. If the only way to deter even the most objectively inoffensive conduct (so assessed without reference to historical context) is to impose a penalty at or approaching the maximum amount available, then the imposition of anything less would necessarily result in a failure to achieve the only object to which the imposition of civil penalties is directed. That acknowledged, it is not apparent to me how a civil penalty that is fashioned at (and not beyond) a level that is necessary in order to deter the repetition of particular conduct might ever be impugned as disproportionate to its nature or gravity (or seriousness or character). To phrase that proposition as a question: how can a penalty be disproportionate to the nature or gravity of the conduct in respect of which it is imposed if it is no more than what is necessary to achieve the only objective that its imposition is meant to achieve?
7. In *NW Frozen Foods v Australian Competition and Consumer Commission* (1996) 71 FCR 285, Burchett and Kiefel JJ (with whom, on this issue, Carr J agreed) said (at 293):

…insistence upon the deterrent quality of a penalty should be balanced by insistence that it “not be so high as to be oppressive”. Plainly, if deterrence is the object, the penalty should not be greater than is necessary to achieve this object; severity beyond that would be oppression.

1. In *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 1462 (Jessup J), the court observed (at [8]):

If contravention of a law is visited with penal outcomes which are demonstrably inadequate to achieve the purpose of the law, it might as well not be a law at all. It is in this sense, in my view, that the principle of proportionality is amply reflected in the imposition of a penalty which takes due account of the importance of specific deterrence.

1. To speak, then, of a penalty that is disproportionate to the seriousness, nature, character or gravity of particular contravening conduct is, I think, to speak merely of a penalty that is more than what the deterrence of its repetition warrants. It is that central objective—deterrence—that remains supreme.
2. In *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Bendigo Theatre Case) (No 2)* [2018] FCA 1211 (Tracey J)—a decision published on the same day as the decision in *Broadway on Ann*—the court explored the application of the criminal law concept of proportionality to the imposition of civil penalties. Tracey J observed (at [18]-[20]):

18 Another criminal sentencing provision which is of limited ongoing relevance in the civil context is the principle that “the maximum penalty prescribed for an offence is intended for cases falling within the worst category of cases for which that penalty is proscribed”: see *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 478 (Mason CJ, Brennan, Dawson and Toohey JJ). In *R v Kilic* (2016) 259 CLR 256 at 266; [2016] HCA 48 at [20] (Bell, Gageler, Keane, Nettle and Gordon JJ), the High Court said that the use of the expression “the worst category” of an offence is apt to mislead. It cautioned that “sentencing judges should avoid using the expression ‘worst category’ and instead, in those cases where it is relevant to do so, state in full whether the offence is or is not so grave as to warrant the maximum prescribed penalty.” A case may fall within this category even if it is possible to imagine an even worse incident of the offending.

19 There are difficulties in translating this principle to the civil realm. It concentrates on the gravity of a particular criminal act and seeks to compare that act with other criminal acts.

20 Given the emphasis on deterrence in the civil regime, the maximum penalty may be appropriate for a person who has repeatedly contravened the same or similar legislative provisions despite having been penalised regularly over a period of time for such misconduct. The gravity of the offending, in such cases, is to be assessed by reference to the nature and the quality of the recidivism rather than by comparison of individual instances of offending: see *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 1462 at [8] (Jessup J). Relevant matters will include the number of contraventions which have occurred over a period, whether the ongoing misconduct is the result of conscious decisions, whether the repeated contravenor has treated the payment of penalties as a cost of doing business and whether any attempt has been made to comply with the law as declared by the Court.

1. I respectfully adopt his Honour’s reasoning.
2. As can be seen from the analysis above, the authorities relevant to the present question place considerable emphasis upon the decision of the High Court in *Veen (No 2)*. The facts of that case warrant examination. Mr Veen was a brain damaged homosexual prostitute who had a history of violent offending when affected by alcohol. In 1975, he stabbed a client to death and was convicted of his manslaughter (he was charged with his murder but a jury convicted him of the lesser crime on the ground of diminished responsibility). He was sentenced to life in prison, which the High Court, by majority (Stephen, Jacobs and Murphy JJ), later reduced to 12 years: *Veen v The Queen* (1979) 143 CLR 458 (“***Veen (No 1)***”). A short time after his release from prison, he killed another sexual partner and was again charged with murder. The Crown accepted his plea of guilty to manslaughter, again on the grounds of diminished responsibility. He was again sentenced to life imprisonment, which he again appealed (including by special leave to the High Court). The High Court, by majority (Mason CJ, Brennan, Dawson and Toohey JJ), on that occasion upheld his life sentence.
3. En route to doing so, the majority in *Veen (No 2)* had occasion to consider what it referred to as the “principle of proportionality”—that is, the notion that “…a sentence should be ‘proportionate to the gravity of the offence’ unless, perhaps, the applicant’s history warrants some departure from the principle”: *Veen (No 2)*, 472 (Mason CJ, Brennan, Dawson and Toohey JJ—citing *Veen (No 1)*, 490 (Jacobs J)). That principle was described as “firmly established in this country”: *Veen (No 2)*, 472 (Mason CJ, Brennan, Dawson and Toohey JJ). At 473, the majority explained:

It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction in principle is clear between an extension merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible.

1. Later, their Honours described the following passage from the judgment of Mason J in *Veen (No 1)* as “an accurate statement of the law” (*Veen (No 2)*, 475 (Mason CJ, Brennan, Dawson and Toohey JJ)):

…there is no opposition between the imposition of a sentence of life imprisonment with the object of protecting the community and the proportionality principle. The court imposes a sentence of life imprisonment on taking account of the offender’s record, his propensity to commit violent crime, the need to protect the community and the very serious offence of which he stands convicted, imprisonment for life being a penalty appropriate to very serious manslaughter when it is attended by the additional factors to which I have referred.

[*Veen (No 1)*, 369 (Mason J)]

1. Later still, their Honours settled upon the passage recited within many of the cases that are analysed above, which I replicate with my own emphases (*Veen (No 2)*, 477 (Mason CJ, Brennan, Dawson and Toohey JJ)):

…the antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. To do so would be to impose a fresh penalty for past offences: *Director of Public Prosecutions v. Ottewell…* **The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law**. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. **It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose condign punishment** to deter the offender and other offenders from committing further offences of a like kind.

1. With respect to those who take a different view (if, indeed, that is what occurred in cases such as *Parker* and others), I do not discern from that passage any prohibition upon the court’s taking account of relevant historical context when assessing the gravity (or seriousness or nature or character) of a particular offence. To assess the gravity of an instant offence by reference to a respondent’s history of similar offending is not, by itself, to impose a fresh penalty for past offences. Nor does it, without more, involve or lead to the shaping of a penalty that is relevantly disproportionate. It merely informs what *is* proportionate; that is to say, how serious or grave the instant contravention is. The very circumstances of Mr Veen’s case illustrate the proposition: despite the similarities in his two manslaughter convictions (and despite having pleaded guilty to the latter of them), he was sentenced to 12 years’ prison for the first and life in prison for the other. The life sentence that was considered disproportionate in respect of the first conviction was permissible in respect of the second.

### Application

1. It follows, in my view, that in assessing the nature, character and seriousness (and/or gravity) of the Union’s Agreed Contraventions, regard may properly be had to its history of contravening conduct. That history is, on any view, not flattering. Many judges of this court have commented upon it: often in unambiguously scathing terms; always, it seems, to little if any avail. I do not relish the prospect of adding my name to the long list of judicial officers whose exasperated admonitions appear to have been met with studied indifference; and, perhaps on one occasion, with public dismissal as the invalid mutterings of snobbish hypocrites who “call us criminals [and] all sorts of things [and] fine us millions of dollars [despite having] probably never done a day’s work in their li[ves]”:  *Victoria International Container Terminal Ltd (t/as VICT) v Maritime Union of Australia* [2017] VSC 762, [21] (McDonald J).
2. Regardless, I should make clear that I regard the Union’s Agreed Contraventions—viewing them, as I do, against the backdrop of its sorry record of statutory contravention—as very much of the gravest, most serious kind. It is bad enough that it should so casually intrude upon rights of free association so valued by societies of conscience; much worse that it should do so, yet again, in deliberate defiance of the law that it has been told time and time again that it must obey. Its behaviour in this case—and many others before it—admits only of the following conclusions, namely that:
3. it favours a policy of “no ticket, no start” and holds that philosophy (if not the achievement of its industrial objectives more broadly) as preferable to the law of the land—see *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (Werribee Shopping Centre Case)* [2017] FCA 1235, [23], [28] (Tracey J);
4. it appears to be wholly unmoved by the prospect that it might be forced yet again to dig into its members’ “big pots of gold” in the name of “fight[ing] the good fight”—to use the terminology that features in *Victoria International Container Terminal Ltd (t/as VICT) v Maritime Union of Australia & Anor* [2017] VSC 762, [23] (McDonald J); and
5. it regards doing so as an acceptable cost of the way that it conducts its affairs—the misconduct in this case is but the latest example of the Union’s strategy “…to engage in whatever action, and make whatever threats, it wishes, without regard to the law, and then, once a prosecution is brought, to seek to negotiate its way into a position in which the penalties for its actions can be tolerated as the price of doing its industrial business”: *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2016] FCA 436, [142] (Mortimer J).
6. The position of Mr Pattinson is not as repellent. As is recorded above, Mr Pattinson has not previously been found to have contravened the FW Act or its predecessors. Unlike some of his colleagues, he is not—and, one hopes, will not soon become—a recidivist who thumbs his nose at the requirements of the law. Nonetheless, given his long-held position and rank within the Union, it is patently absurd to conclude anything other than that he did what he did out of fealty to his Union’s policy of enforcing a “no ticket, no start” regime at the construction sites over which it wields influence. That he embarked down the path that he did reflects poorly upon him.
7. Those conclusions stated, Mr Pattinson’s Agreed Contraventions were much more serious than what might otherwise call for a proverbial slap on the wrist. Mr Pattinson is merely the latest foot soldier in what seems to be the Union’s war against free association on Australian building sites. There have been others like him—the Commissioner referred to them, fairly and pithily, as “institutionalised human agents”—who, in the past, have stood ready to do as he did (and worse). One might be forgiven for doubting that there might not be others who stand ready to do similar things in the future. It is important that the penalty that is imposed upon Mr Pattinson is fashioned at a level that is sufficient to deter repetition of the conduct not only by Mr Pattinson but also by the network of other delegates and officers of the Union who might themselves be minded to enforce its anachronistic “no ticket, no start” philosophy. In *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (“Cardigan Street Case”)* [2018] FCA 957, Bromberg J observed (at [65]):

…general deterrence is of particular relevance in respect of an individual who is an office holder or employee of an organisation such as the CFMMEU. The penalty imposed should be effective as a general deterrent for any other officer or employee to engage in similar contraventions. It should demonstrate to such persons that this Court will not tolerate that conduct and that significant penalties will be imposed irrespective of whether the conduct has been condoned by others including that person’s employer.

I respectfully adopt his Honour’s observations.

## Involvement of senior officials

1. The respondents submitted that “Mr Pattinson [was] not a senior officer of the Union [and that t]here was, therefore, no involvement by any senior officers in the contravention.”
2. For the reasons already canvassed above, I reject that submission. I accept that Mr Pattinson’s conduct was his alone, in the sense that no other officials of the Union were present at the time. But that does not mean that no others were involved in it. The circumstances that prevail admit of no conclusion other than that Mr Pattinson’s conduct was but another example of a site-level delegate of the Union’s implementing its “no ticket, no start” policy at an Australian construction site. That policy has been the subject of judicial criticism on many occasions and has cost the Union and its members substantial sums of money in penalties. That it continues to be effected by the likes of Mr Pattinson can only be because those more senior in the Union’s hierarchy have endorsed it (whether expressly or by their abject failure to eliminate it).
3. The deterrent effect to which the penalties that I shall impose should be directed will take account of that apparent endorsement by the Union’s hierarchy.

## Contrition and cooperation

1. By its written outline, the Commissioner submitted:

The respondents are entitled to some discount for their admissions at a very early stage. However, there is no apology, no contrition, no remorse, no expression of regret and no submission or evidence to suggest that the [Union] has done anything, or intends to do anything, to reduce or eliminate the prospect of similar contraventions occurring in the future.

1. Respectfully, I accept all of that except for the first sentence. The respondents are entitled to expect that the court will take account of their decision not to contest their liability to the imposition of penalties. I have done so. There is no doubt that that decision has saved the time and public expense that would otherwise have been necessary had the matter proceeded to a contested trial on that question.
2. It does not, however, follow, that the respondents are automatically entitled to any “discount” of the penalties to be imposed upon them. Rather, the court should consider whether the decision not to contest that liability bespeaks contrition or some other recognition on the respondents’ part by reason of which (in either case) the court might infer that deterrence looms less large than it otherwise might.
3. The respondents submitted that their admissions “…evince[d] a willingness on their part to accept responsibility for their actions and facilitate the course of justice.” To the extent that that should be understood as nothing more than an acknowledgment that the respondents have not insisted upon what, no doubt, would have been a difficult and expensive trial, that can be accepted. But if it is advanced to suggest that there is evidence that the respondents have—and the Union, in particular, has—had any sort of epiphany, that submission is beyond ambitious. In the present case, there is nothing to suggest—and I do not accept—that the respondents’ decision to admit their conduct at an early stage reflects any sudden realisation that what they did was wrong and ought not to be repeated. On the contrary, it is far more likely a forensic acceptance of the fact that what was done was done unlawfully, and that their interests would best be served by the court’s saying so before, rather than after, large sums of Union and public money were washed away by a contested trial: see, in that vein, *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68, 102-103 [164] (Dowsett, Greenwood and Wigney JJ) and *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (“Cardigan St Case”)* [2018] FCA 957, [94] (Bromberg J). To discount the penalties that might otherwise be imposed would be to reward that adventure in self-interest.
4. In my view, the deterrent effect that the penalties to be imposed should enliven is no less pronounced on account of the admissions in this case than it would be without them. That is so for the reasons that the Commissioner identifies; but also because of what is said above (in particular at [84]) about the Union’s “no ticket, no start” policy, and its apparent and enduring indifference toward the penalties that it has repeatedly paid for its enforcement. To put it in simpler terms: the Union regards the imposition of penalties as an acceptable cost of the manner in which it chooses to operate. I do not accept that its admissions in this case—as opposed to the penalties imposed in the many that preceded it—should be understood to reflect some sudden realisation that perhaps it ought to act lawfully and ought not to insist upon the forced co-option of construction workers to its ranks. Mr Pattinson’s admissions are similarly of no moment.
5. I do not accept that either of the respondents should receive any material penalty “discount” for their admissions.

## Size, capacity and nature of the respondents

1. The Commissioner submits—and it is not obviously in doubt—that the Union is cash- and asset-rich. The respondents submit—I think fairly—that that is not, in and of itself, a consideration that should warrant a larger penalty than might otherwise be imposed upon a less wealthy individual. At issue, as always, is what level of penalty is necessary to achieve the deterrent objective that I must strive to achieve.
2. On any view, the deterrent effect of a penalty—particularly one imposed upon a recidivist offender—will generally be smaller in respect of a large and wealthy organisation than it might be in respect of a small and impecunious one. It is, then, unremarkable that the Union’s size and resources should factor into my assessment of what penalties ought to be imposed upon it.
3. There is no evidence about Mr Pattinson’s financial means. I am conscious that the penalties to be imposed upon him should not amount to an unduly crushing imposition: they should (and will) not be higher than what is reasonably necessary to deter repetition of his conduct, both by him and by others.

## Impact of the conduct

1. By their submissions, the Union and Mr Pattinson contend that (references omitted):

…the impact of the contravention was to cause [the two SEA employees] not to work on the Project on 13 September 2018. There is, however, no evidence of any economic loss suffered by [those employees], their employer or anyone else. There is also no evidence that [those employees] were in fact misled by the misrepresentation. Why the misrepresentation prevented them from working at the Project is not set out.

1. With respect, there is a distinct air of unreality to that final sentence (however true it undoubtedly is). The Commissioner’s amended statement of claim pleads—and the respondents’ amended defence admits—that “[a]s a consequence” of Pattinson’s having made the Misrepresentation, the two SEA employees were “prevented…from performing any work on the Project” on Thursday, 13 September 2018. It is apparent, then, that Mr Pattinson “prevented” the two SEA employees from performing the work that they attended at the Site to perform on that day; and that he did so by means of the Misrepresentation. It doesn’t much matter whether the two SEA employees left the Site without performing their work on that day because they believed what Mr Pattinson misrepresented to them, or because they considered that it would be futile to assert any right contrary to his indication. Either way, that prevention was a consequence of the Misrepresentation.
2. There is no evidence of any economic loss for either of the two SEA employees or their employer. It may be that there was other work at other locations to which they were usefully deployed on the day in question. It may be that there was no loss for either them or their employer. It might even be that their deployment to other work (if that occurred) was beneficial for them or their employer. It isn’t possible to know.
3. Logically, a contravention that visits losses upon others warrants assessment as more serious than one that doesn’t. I proceed upon the basis that the Misrepresentation in this case did not visit any material loss upon anybody (unlikely though that seems). In all of the circumstances, though, that is not something that looms large in my assessment of the form that appropriate penalties should assume in this case.

## Course of conduct and totality

1. The parties all accepted—and I would have found, regardless—that the two Agreed Contraventions that each of the respondents committed arose from the same course of conduct. Both arose from the single representation that Mr Pattinson made to the two SEA employees on Thursday, 13 September 2018. It is more accurate to say that they arose from the same *instance* of conduct.
2. As the circumstances here involve multiple statutory contraventions, it is necessary that the court should consider how the penalties to be imposed should be informed by application of the common law “course of conduct” (or “one transaction”) principle. Given how closely related it is to that principle, it is convenient to deal in this section also with the application of the so-called “totality” principle.
3. In *Australian Competition and Consumer Commission v Yazaki Corporation* (2018) 262 FCR 243 (“***Yazaki***”, Allsop CJ, Middleton and Robertson JJ), the court observed (at 294 [226]) that the two principles (“course of conduct” and “totality”) are “…not rules, but principles or tools to assist the Court in arriving at an appropriate penalty.” It is “…not appropriate or permissible to treat multiple contraventions as just one contravention for the purposes of determining the maximum limit dictated by the relevant legislation”: *Yazaki*, 294-295 [227] (Allsop CJ, Middleton and Robertson JJ). An application for special leave to appeal that judgment to the High Court was refused with costs: *Yazaki Corporation & Anor v Australian Competition and Consumer Commission* [2018] HCATrans 215 (Gageler, Gordon and Edelman JJ).
4. The “course of conduct” 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.

See: *Royer v Western Australia* (2009) 197 A Crim R 319, 328 [22] (Owen JA, with whom Miller JA agreed in the result, Buss JA dissenting).

1. In *Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union (the Hutchison Ports Appeal)* [2019] FCAFC 69, Rangiah J (with whom Ross J agreed in the result, Flick J dissenting) made the following observations about the “course of conduct” principle (at [181]):

The principle recognises that where there are multiple contraventions arising out of a single course of conduct, there is a danger of a contravener being punished more than once for essentially the same offending conduct. However, the principle does not involve a simplistic transposition of multiple contraventions into one contravention, or, necessarily, the imposition of only one penalty. The court’s task is to evaluate the conduct and its course and assess what penalty is, or penalties are, appropriate for the contraventions: see *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Nine Brisbane Sites Appeal)* [2019] FCAFC 59 at [10] – [12], [123] – [124] and [132]; *Transport Workers’ Union Australia v Registered Organisations Commissioner [No 2]* [2018] FCAFC 203 at [84] and [92]; and the authorities referred to therein. That *may*, but will not necessarily, result in a single penalty being imposed for multiple contraventions arising out of a course of conduct.

1. The “course of conduct” principle does not operate as a *de facto* limit on the penalties that the court may impose in respect of multiple, related contraventions and the court is not obliged to apply it if doing so would fail to reflect the seriousness of the contraventions: *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Nine Brisbane Sites Appeal)* (2019) 286 IR 336 (hereafter, “***The Nine Brisbane Sites Appeal***”), 342-343 [12] (Allsop CJ), 363-364 [124] (Rangiah J, with whom Griffiths J agreed); *Yazaki*, 106 [235] (Allsop CJ, Middleton and Robertson JJ). Nonetheless, in applying the principle, 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”: *Transport Workers’ Union of Australia v Registered Organisations Commissioner (No 2)* (2018) 363 ALR 464, 481 [91] (Allsop CJ, Collier and Rangiah JJ).
2. Applied to the present case, the total maximum penalty that might be imposed in respect of the Agreed Contraventions is, for each respondent, twice the maximum that is available for a single contravention: for the Union, $126,000.00 ($63,000.00 multiplied by two); and, for Mr Pattinson, $25,200.00 ($12,600.00 multiplied by two).
3. In the *Perth Airport Case*, this court imposed separate penalties against the Union in respect of coercive conduct engaged in by four of its officials at a large construction site in Perth. All four officials had attended at the site to coordinate a blockade, the apparent purpose of which was to secure payments that they believed were owed to some of the workers who were engaged there. Their conduct was attributed to the Union in the usual way. The trial judge held that its contraventions arose from the same course of conduct and proceeded to impose upon it a single penalty. Dowsett and Rares JJ (North J dissenting) overturned that outcome, holding (at 481 [102]):

The CFMEU can be seen to have chosen to pay penalties in preference to obeying the law. It is not entitled to any leniency in the circumstances of the conduct complained of. The legislative purpose in the Act, of creating separate contraventions and imposing pecuniary penalties on organisations, such as the CFMEU, for conduct engaged in on the one occasion by their agents, will not be served by equating multiple contraventions by a recidivist as a wholly single course of conduct. Each separate contravention by the CFMEU’s officials and organisers on 22 October 2013 had a distinct effect and impact in making the blockade of a very large site effective. The Act contemplates that the Court can fix a high price, by way of aggregated penalties, on an organisation in circumstances such as the present to deter future repetition.

1. Their Honours went on to impose upon the Union separate penalties—each set at a figure not far below the maximum available—in respect of each instance of conduct attributed to it. An application by the Union for special leave to appeal that judgment to the High Court was refused: *Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner* [2017] HCATrans 190 (Gageler and Nettle JJ).
2. This case, of course, is less factually complex than what confronted the court in the *Perth Airport Case* (or, indeed, in any of the other recent full court authorities that have considered the application of the principle in an industrial law context: *Parker, The Nine Brisbane Sites Appeal*, *Transport Workers Union of Australia v Registered Organisations Commissioner (No 2)* (2018) 363 ALR 464 (Allsop CJ, Collier and Rangiah JJ), *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68 (Dowsett, Greenwood, Wigney JJ). Here, the court is not confronted with multiple instances of conduct all said to have been part of a single course; it is, instead, confronted by a single instance of conduct, namely the making by Mr Pattinson of the Misrepresentation in the presence of the two SEA workers on Thursday, 13 September 2018.
3. It would not be appropriate to impose, in respect of that conduct, penalties totalling in excess of the maximum available for a single breach of s 349(1) of the FW Act. Doing so would necessarily involve at least a degree of double punishment. I will, instead, fashion penalties for the Agreed Contraventions at a level that accounts for the fact that they arose, in respect of both respondents, from a single statement. That said, I remain conscious that the statement was made to two people, and that the penalties to be imposed in that circumstance should, ordinarily, be greater than they might have been had the statement been made only to a single recipient: *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68, 101 [157] (Dowsett, Greenwood and Wigney JJ).
4. The so-called “totality principle”—which, as is plain, is very closely related to the course of conduct principle addressed above—requires that I ask myself, before imposing anything, whether the total of the penalties that I would impose might amount to a disproportionate response to the wrongdoing with which I am confronted.

## Penalties to be imposed

1. In light of the observations made herein, I am minded to impose upon the Union two penalties, each set at the maximum amount, $63,000.00. In light of the comments that I have made above about the “course of conduct” principle, those penalties will be reduced to the equivalent of a single maximum penalty. There is some tension in the authorities as to whether I should (or could) impose a single penalty referrable to both contraventions (as opposed to individual penalties for each contravention): *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68, 99-100 [148]-[149] (Dowsett, Greenwood and Wigney JJ); *Transport Workers Union of Australia v Registered Organisations Commissioner (No 2)* (2018) 363 ALR 464, 481 [90] (Allsop CJ, Collier and Rangiah JJ). Given that I am here dealing with only two contraventions, I am content to impose separate penalties in respect of each. Given that each contravention is, by nature and circumstance, equal to the other, each will attract for the Union a penalty in the same amount, namely $31,500.00.
2. Insofar as concerns Mr Pattinson, I am minded to impose two penalties, each set at 50 per cent of the maximum that may be imposed upon him, or $6,300.00. Again, those penalties should each be halved in light of my observations about the “course of conduct” principle: although constituting two contraventions, Mr Pattinson’s Misrepresentation should attract penalties that total 50 per cent of the maximum amount that would be available in respect of a single contravention. Accordingly, each of his Agreed Contraventions should attract a penalty of $3,150.00.
3. Having considered them in their totality, I am satisfied that penalties totalling $63,000.00 are a proportionate response to the Union’s wrongdoing and represent the best prospect that the court has of deterring its repetition. It has been said that fashioning penalties against the Union with that aim in mind might involve engagement “…in something of a fiction”: *Geelong Grammar*, [41] (Mortimer J). Be that as it may, I remain of the view that what I propose to impose against the Union represents the court’s best chance, however limited it might be, of achieving the deterrent objective to which civil penalties are directed.
4. In Mr Pattinson’s case—and in deference to the “totality principle”—I will reduce each of the penalties to be imposed upon him by $150.00 (such that each of his contraventions will attract a penalty of $3,000.00). Penalties imposed at that level are, in my view, proportionate to Mr Pattinson’s conduct, and serve as a fair deterrent against its repetition.

# Declarations

1. In addition to the imposition of penalties, the Commissioner seeks declaratory relief to “record” each of the Agreed Contraventions. By their written submissions, the respondents did not oppose that relief.
2. I recently had occasion to consider the court’s power to grant declaratory relief that does nothing more than record that a respondent’s conduct was engaged in in contravention of a statute: *Construction, Forestry, Maritime, Mining and Energy Union v Milin Builders Pty Ltd* [2019] FCA 1070, [73]-[98] (Snaden J). I do not restate the matters of principle that I there set out, save for my conclusion (at [98]):

…I accept that the court is able to grant declaratory relief as a means of marking its disapproval of conduct found to have been undertaken in breach of a statute. Alternatively, I accept that there might be circumstances where declaratory relief is appropriate to realise some broader educative or deterrent effect, or otherwise to vindicate or assist an applicant’s actions.

1. In the present case, I do not consider that an exercise of the court’s discretion to grant declaratory relief is warranted. The orders that the Commissioner seeks amount to little more than a record of what the parties have stated in their pleadings and what I, by the conclusions contained in these reasons (above, [19]), have accepted. That is not an appropriate deployment of the remedy: *Warramunda Village v Pryde* (2001) 105 FCR 437, 440 [8] (Gray, Branson and North JJ); *Australian Competition and Consumer Commission v MSY Technology Pty Ltd & Ors* (2012) 201 FCR 378, 388 [35] (Greenwood, Logan and Yates JJ).
2. There is no obvious reason why declaratory relief might serve as a record of my decision any more formally than do these reasons. The orders that the court will pronounce are not to be read in a vacuum. In *Athens v Randwick City Council* (2005) 64 NSWLR 58, Santow JA (with whom Hodgson JA and Tobias JJA agreed) observed (at 78):

The purpose of a court order is, ordinarily, to give effect to a judgment. The judgment is not some kind of penumbral context surrounding the order. Rather the judgment is the source of the order. A court order derives from its originating judgment, as a transfer of land derives from the underlying contract.

1. This court found to similar effect in *Yates Property Corporation Pty Ltd v Boland* (1998) 89 FCR 78 (Drummond, Sundberg and Finkelstein JJ). There, Drummond J (with whom Sundberg and Finkelstein JJ agreed), said (at 78-79):

It is impermissible, in my view, as well as being quite unrealistic, to attempt to read, that is, to understand an order in isolation from the context of the reasons for it being made. The Full Court of the Supreme Court of Queensland, in *Australian Energy Ltd v Lennard Oil NL (No 2)* [1988] 2 Qd R 230 held that, in interpreting an order framed in unambiguous language, regard should still be had to the reasons given by the Court for making the order because they form part of a context in which the order was made.

Other judges of this court have expressed similar views: *Hamersley Iron Pty Ltd v National Competition Council* (2008) 247 ALR 385, 399 (Weinberg J); *Smith v Comcare* (2014) 64 AAR 205, 218 (Robertson J); *Bob Jane Corporation Pty Ltd v ACN 149 801 141 Pty Ltd* [2016] FCA 1129, [13] (Moshinsky J); *Australian Competition and Consumer Commission v ACN 117 372 915 Pty Limited (in liq) (formerly Advanced Medical Institute Pty Limited)* [2015] FCA 1441, [53] (Moshinsky J).

1. Likewise, there is nothing peculiar about the penalty relief to be granted in this case that warrants some declaratory introduction or explanation. More significantly, the court’s disapproval of the respondents’ conduct—and the broader educative or deterrent effect, or vindication of the Commissioner’s action, to which an expression of that disapproval in declaratory form might give effect—is, in each case, wholly apparent from (and given effect to by) the civil penalties that I have decided to impose. As to any educative or deterrent effect or value, there was (as counsel properly recognised) nothing beyond assertion in the Commissioner’s submissions on the point, and no evidence was led to demonstrate any effect or value that declaratory relief might, in fact, realise. I intend no criticism in saying so: indeed, it is difficult to conceive of any evidence that the Commissioner might realistically have led to that end.
2. Ordinarily, it will not be appropriate to grant declaratory relief unless it can be said that there is some utility in doing so: *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 582 (Mason CJ, Dawson, Toohey and Gaudron JJ); *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Limited* (2000) 200 CLR 591, 613 [52] (Gaudron J); *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Limited (No 2)* [2017] FCAFC 99, [3] (Allsop CJ, Middleton and Davies JJ); *Australian Competition and Consumer Commission v MSY Technology Pty Ltd & Ors* (2012) 201 FCR 378, 388 [35] (Greenwood, Logan and Yates JJ); *Aussie Airlines Pty Ltd v Australian Airlines Ltd* (1996) 68 FCR 406, 414 (Lockhart J, with whom Spender and Cooper JJ agreed); *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc (No 2)* (1993) 41 FCR 89, 99 (Sheppard J); *Ogawa v Attorney-General (No 2)* [2019] FCA 1003, [50] (Logan J).
3. I am not persuaded that declarations of the kinds proposed would have any educative or deterrent effect—or indeed any relevant effect at all—beyond that of the penalty orders that I will make. Likewise, I do not accept that the Commissioner’s actions will be vindicated any more than they will be by those same penalty orders. In light of the penalties that I will impose, declaratory relief would be “totally pointless”: *Australian Competition and Consumer Commission v Francis* (2004) 142 FCR 1, 36 [110] (Gray J).
4. It follows that no declaratory relief will be granted.

# Conclusion

1. Pursuant to s 546(1) of the FW Act, the court will order that:
2. Mr Pattinson pay pecuniary penalties totalling $6,000.00—comprising two penalties of $3,000.00, one for each of his Agreed Contraventions; and
3. the Union pay pecuniary penalties totalling $63,000.00—comprising two penalties of $31,500, one for each of its Agreed Contraventions.
4. Those penalties will, in each case, be made payable to the Commonwealth within 28 days. Presumably conscious of the effect of s 570(1) of the FW Act, the Commissioner does not seek an order for costs and none will be made.

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| I certify that the preceding one hundred and twenty-nine (129) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Snaden. |

Associate:

Dated: 14 October 2019