FEDERAL COURT OF AUSTRALIA

Tax Practitioners Board v Hacker (No 3) [2020] FCA 1814

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| File number: | QUD 106 of 2019 |
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| Judge: | **RANGIAH J** |
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| Date of judgment: | 18 December 2020 |
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| Catchwords: | **TAXATION** – contraventions of ss 50-5(1) and 50-5(2) of the *Tax Agent Services Act 2009* (Cth) – where contraventions established – whether declaratory and injunctive relief appropriate – imposition of pecuniary penalties  **CONTEMPT OF COURT** – contempts by first and second respondent established – consideration of appropriate penalties – consideration of age and health of first respondent – where contempts were wilful and contumacious – imposition of sentence of imprisonment on first respondent – imposition of fine on second respondent  **COSTS** – whether respondents should pay whole of applicant’s costs – applicant succeeded on some issues and not others – costs apportioned  **COSTS** – whether indemnity costs are appropriate – where substantial fines and sentences of imprisonment will be imposed on respondents – costs ordered on party-and-party basis |
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| Legislation: | *Fair Work Act 2009* (Cth) s 546  *Federal Court of Australia Act 1976* (Cth) s 31  *Tax Agent Services Act 2009* (Cth) ss 2-5, 50-5, 50-10, 50-15, 50-35 and 70-5  *Federal Court Rules 2011* (Cth) rr 42.11 and 42.12 |
|  |  |
| Cases cited: | *Anchorage Capital Partners Pty Ltd v ACPA Pty Ltd (No 2)* [2018] FCAFC 112  *Australasian Meat Industry Employees’ Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98  *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157  *Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd (No 2)* (2002) 190 ALR 169; [2002] FCA 559  *Australian Competition and Consumer Commission v Dynacast (Int) Pty Ltd (formerly Phoneflasher.com Pty Ltd) ACN 001 234 642* [2007] FCA 429  *Australian Competition and Consumer Commission v Halkalia Pty Ltd (No 3)* [2017] FCA 522  *Australian Competition and Consumer Commission v INFO4PC.com Pty Ltd* (2002) 121 FCR 24  *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640  *Australian Opthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560  *Australian Securities & Investments Commission v Soust (No 2)* (2010) 78 ACSR 1; [2010] FCA 388  *Bovis Lend Lease Pty Ltd v Construction Forestry Mining and Energy Union (No 2)* [2009] FCA 650  *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd (No 3)* [2007] FCAFC 119  *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482  *Construction, Forestry, Mining and Energy Union v BHP Steel (AIS) Pty Ltd* (2003) 196 ALR 350  *Construction, Forestry, Mining and Energy Union v Cahill* (2010) 194 IR 461  *Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 4)* (2012) 225 IR 113; [2012] FCA 894  *Deputy Commissioner of Taxation v Hickey* [1999] FCA 259  *Director of Fair Work Building Industry Inspectorate v Cartledge* (No 2) [2015] FCA 851  *Dodds Family Investments Pty Ltd (formerly Solar Tint Pty Ltd) v Lane Industries Pty Ltd* (1993) 26 IPR 261  *Hughes v Western Australian Cricket Association Inc* (1986) ATPR 40–748  *Johnson v The Queen* (2004) 205 ALR 346  *Kazal v Thunder Studios Inc* *(California)* (2017) 256 FCR 90  *Kosciuszko* *Thredbo Pty Limited v ThredboNet Marketing Pty Limited (No 2)* [2013] FCA 609  *Louis Vuitton Malletier SA v Design Elegance Pty Ltd* (2006) 149 FCR 494  *Markarian v The Queen* (2005) 228 CLR 357  *Metcash Trading Limited v Bunn (No 6)* [2009] FCA 266  *Mill v The Queen* (1988) 166 CLR 59  *Minister for the Environment & Heritage v Greentree (No 3)* [2004] FCA 1317  *Mornington Inn Pty Ltd v Jordan* (2008) 168 FCR 383  *NW Frozen Foods v Australian Competition and Consumer Commission* (1996) 71 FCR 285  *Oshlack v Richmond River Council* (1998) 193 CLR 72  *Parker v Australian Building and Construction Commissioner* (2019) 270 FCR 39  *Pattinson v Australian Building and Construction Commissioner* (2020) 384 ALR 75; [2020] FCAFC 177  *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435  *Pinnacle Runway Pty Ltd v Triangl* *Ltd (No 3)* [2020] FCA 1379  *R v Smith* (1987) 44 SASR 587  *Re* *Wilcox; Ex Parte Venture Industries Pty Ltd (No 2)* (1996) 72 FCR 151  *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53  *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249  *Sydney Medical Service Co-operative Limited v Lakemba Medical Services Pty Ltd (No 2)* [2016] FCA 1188  *Tax Practitioners Board v Campbell* [2012] FCA 1153  *Tax Practitioners Board v Dedic* [2014] FCA 511  *Tax Practitioners Board v Hacker* [2020] FCA 1047  *Tax Practitioners Board v Hacker (No 2)* [2020] FCA 1048  *Tax Practitioners Board v Hinckfuss* [2013] FCA 1168  *Tax Practitioners Board v Hogan* [2012] FCA 642  *Tax Practitioners Board v HP Kolya Pty Ltd* (2015) 232 FCR 34  *Tax Practitioners Board v Lamede Group Pty Ltd* [2016] FCA 63  *Tax Practitioners Board v Munro* [2012] FCA 1338  *Tax Practitioners Board v Shanahan* [2013] FCA 764  *The State of Victoria v Sportsbet Pty Ltd (No 2)* [2012] FCAFC 174  *Trade Practices Commission v CSR Ltd* [1990] FCA 521  *Transport Workers’ Union of Australia v Registered Organisations Commissioner (No 2)* (2018) 267 FCR 40  *Vaysman v Deckers Outdoor Corporation Inc* (2011) 276 ALR 596; [2011] FCAFC 17  *Witham v Holloway* (1995) 183 CLR 525  *Wong v The Queen* (2001) 207 CLR 584 |
|  |  |
| Date of hearing: | 7 October 2020 |
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| Registry: | Queensland |
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| Division: | General Division |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Regulator and Consumer Protection |
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| Category: | Catchwords |
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| Number of paragraphs: | 174 |
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| Counsel for the Applicant: | Mr S Couper QC with Mr D Chesterman |
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| Solicitor for the Applicant: | Australian Government Solicitor |
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| Counsel for the Respondents: | Ms J Marr |
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| Solicitor for the Respondents: | Fisher Dore Lawyers |

ORDERS

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|  | | QUD 106 of 2019 |
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| BETWEEN: | TAX PRACTITIONERS BOARD  Applicant | |
| AND: | KENT SCOTT HACKER  First Respondent  ONE STOP GLOBAL STAFFING PTY LTD ACN 097 166 204  Second Respondent  NALEVIEW PTY LIMITED ACN 051 420 010  Third Respondent | |

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| JUDGE: | RANGIAH J |
| DATE OF ORDER: | 18 DECEMBER 2020 |

THE COURT DECLARES THAT:

1. The first respondent contravened s 50-5(1) or s 50-5(2) of the *Tax Agent Services Act 2009* (**the Act**) by providing tax agent services and BAS services for fee or reward while not registered to provide those services on each occasion specified in Tables 1, 2 and 3 to Appendix A of these Orders.
2. The second respondent contravened s 50-5(1) of the Act by providing tax agent services for a fee while not registered to provide those services on each occasion specified in Table 1 of Appendix A to these Orders.
3. The third respondent contravened s 50-5(1) of the Act by providing tax agent services for a fee while not registered to provide those services on each occasion specified in Table 2 of Appendix A to these Orders.
4. The first and second respondents are guilty of three contempts of this Court by reason of the matters set out in paragraphs 2(a), (b) and (c) of the Amended Statement of Charge filed 27 September 2019.
5. The first and second respondents are guilty of five contempts of this Court by reason of the matters set out in paragraphs 2(a), (b), (c), (d) and (e) of the Amended Statement of Charge filed 10 December 2019.
6. The first and second respondents are guilty of eight contempts of this Court by reason of the matters set out in paragraphs 2(a), (b), (c), (d), (e), (f), (g), and (h) of the Statement of Charge filed 23 March 2020.
7. The first and second respondents are guilty of three contempts of this Court by reason of the matters set out in paragraphs 2(a), (b) and (c) of the Statement of Charge filed 30 June 2020.
8. The first and second respondents are guilty of nine contempts of this Court by reason of the matters set out in paragraphs 6(a), (b), (c), (d), (e), (f), (g), (h) and (i) of the Statement of Charge filed 19 August 2020.

THE COURT ORDERS THAT:

1. Pursuant to s 70-5(1) of the Act, each respondent is restrained from providing or offering to provide any tax agent services (as defined in the Act) for fee or reward, unless that respondent is, at the relevant time, registered to provide those services under the Act.
2. Pursuant to s 70-5(1) of the Act, the first respondent is restrained from providing or offering to provide any BAS services (as defined in the Act) for fee or reward, unless the first respondent is, at the relevant time, registered to provide those services under the Act.
3. Pursuant to s 50-35 of the Act, the first respondent pay pecuniary penalties to the Commonwealth totalling $106,875 for the contraventions described in Order 1 above.
4. Pursuant to s 50-35 of the Act, the second respondent pay pecuniary penalties to the Commonwealth totalling $65,625 for the contraventions described in Order 2 above.
5. Pursuant to s 50-35 of the Act, the third respondent pay pecuniary penalties to the Commonwealth totalling $455,625 for the contraventions described in Order 3 above.
6. The second respondent pay a fine of $15,000 to the Commonwealth in respect of the contempts referred to in Orders 5, 6, 7 and 8, such fine to be paid by Fisher Dore Lawyers to the Commonwealth pursuant to the Irrevocable Authority dated 26 November 2019 provided by the first respondent on behalf of the second respondent.
7. The first respondent be imprisoned for a period of 14 days for each of the three contempts described in Order 5, each sentence to be served concurrently with the other sentences described in Order 5.
8. The first respondent be imprisoned for a period of one month for each of the eight contempts described in Order 6, each sentence to be served concurrently with the other sentences described in Order 6, but consecutively upon the sentences described in Order 5.
9. The first respondent be imprisoned for a period of two months for each of the three contempts described in Order 7, each sentence to be served concurrently with the other sentences described in Order 7, but consecutively upon the sentences described in Order 6.
10. The first respondent be imprisoned for a period of four months for each of the nine contempts described in Order 8, each sentence to be served concurrently with the other sentences described in Order 8, but consecutively upon the sentences described in Order 7. After the first respondent has served one month of the four months’ imprisonment, the first respondent will be released from prison and the balance will be suspended from execution subject to the condition that the first respondent will be imprisoned for at least the balance in the event that the first respondent contravenes Order 9 or Order 10 within three years of the date of these Orders.
11. A warrant issue for the committal of the first respondent to prison.
12. The warrant not be executed for a period of 35 days from the date of these Orders.
13. The respondents pay 35% of the applicant’s costs of the proceedings on a party-and-party basis.

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

APPENDIX A

**TABLE 1**

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| **No.** | **Date** | **Tax Agent Service** | **Client** |
| 1 | 12.09.2018 | 2018 Income Tax Return (ITR) | Jung, Yuri |
| 2 | 06.03.2019 | 2018 ITR | Lore, Palwinder Singh |
| 3 | 14.03.2019 | 2018 ITR | Park, Jeremy Jihyuk |
| 4 | 19.03.2019 | 2018 ITR | Shaikh, Mohammed Rizwan |
| 5 | 12.09.2018 | 2018 ITR | Wong, Wai Kam |

**TABLE 2**

| **No.** | **Date** | **Tax Agent Service** | **Client** |
| --- | --- | --- | --- |
| 1 | 15.09.2018 | 2018 ITR | Abelita, Mary Ann |
| 2 | 25.08.2015 | 2015 ITR | Anderson, Desley Frances |
| 3 | 17.08.2016 | 2016 ITR | Anderson, Desley Frances |
| 4 | 20.08.2017 | 2017 ITR | Anderson, Desley Frances |
| 5 | 25.08.2015 | 2015 ITR | Anderson, John Paul |
| 6 | 17.08.2016 | 2016 ITR | Anderson, John Paul |
| 7 | 20.08.2017 | 2017 ITR | Anderson, John Paul |
| 8 | 19.08.2016 | 2016 ITR | Arandela, Michael |
| 9 | 25.07.2017 | 2017 ITR | Arandela, Michael |
| 10 | 21.08.2018 | 2018 ITR | Arandela, Michael |
| 11 | 24.09.2018 | 2018 ITR | Becker, Ana Crolina |
| 12 | 31.07.2016 | 2016 ITR | Bergin, Julie Fay |
| 13 | 22.07.2017 | 2017 ITR | Bergin, Julie Fay |
| 14 | 13.07.2018 | 2018 ITR | Bergin, Julie Fay |
| 15 | 13.10.2017 | 2017 ITR | Camacho, Mark |
| 16 | 31.10.2018 | 2018 ITR | Camacho, Mark |
| 17 | 24.09.2018 | 2018 ITR | de Paulo, Claudemir Ferreira |
| 18 | 29.09.2018 | 2018 ITR | Ewnetu, Gebeyaw |
| 19 | 18.12.2018 | Amendments to 2018 ITR and/or voluntary disclosure form | Fitzgerald, Edelmira de Leon |
| 20 | 13.09.2018 | 2017 ITR | Giri, Nirmal |
| 21 | 13.09.2018 | 2018 ITR | Giri, Nirmal |
| 22 | 19.08.2017 | 2017 ITR | Gregas, Gary |
| 23 | 12.08.2017 | 2017 ITR | Gregas, Maricris |
| 24 | 29.09.2018 | 2018 ITR | Gregas, Maricris |
| 25 | 31.07.2016 | 2016 ITR | Harte, Leith Ann |
| 26 | 22.07.2017 | 2017 ITR | Harte, Leith Ann |
| 27 | 16.07.2018 | 2018 ITR | Harte, Leith Ann |
| 28 | 26.08.2018 | 2018 ITR | Hlawn-Maul, Sui Te |
| 29 | 20.08.2016 | 2016 ITR | Kerr, Jeffrey Scott |
| 30 | 18.08.2017 | 2017 ITR | Kerr, Jeffrey Scott |
| 31 | 28.09.2018 | 2018 ITR | Kerr, Jeffrey Scott |
| 32 | 08.07.2018 | 2018 ITR | Law, Sarath |
| 33 | 24.10.2018 | 2018 ITR | Poudel, Prakash Raj |
| 34 | 24.10.2018 | 2018 ITR | Poudel, Rukmani Adhikari |
| 35 | 11.07.2016 | 2016 ITR | Stewart, Katie Jane |
| 36 | 08.07.2017 | 2017 ITR | Stewart, Katie Jane |
| 37 | 15.09.2018 | 2018 ITR | Vulker, Suryati |

**TABLE 3**

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| --- | --- | --- | --- |
| **No.** | **Date** | **BAS Agent Service** | **Client** |
| 1 | 30.10.2017 | Business Activity Statement (BAS) for period ended 31 March 2017 | Comacho, Mark |
| 2 | 30.10.2017 | BAS for period ended 30 June 2017 | Comacho, Mark |
| 3 | 30.10.2017 | BAS for period ended 30 September 2017 | Comacho, Mark |

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

REASONS FOR JUDGMENT

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| --- | --- |
| Evidence adduced in the penalty hearing | [5] |
| Mr Hacker | [5] |
| Dr Yelland | [22] |
| Contraventions of s 50–5 of the TAS Act - Pecuniary penalties | [35] |
| The legislation and applicable principles | [35] |
| The circumstances and seriousness of the contraventions | [47] |
| Deterrence | [56] |
| Harm caused by the contraventions | [62] |
| Co-operation | [64] |
| Double punishment | [67] |
| Course of conduct | [76] |
| Penalties in other cases | [81] |
| Assessment of penalties | [92] |
| Contraventions of s 50–5 of the TAS Act – Declarations and injunctive relief | [103] |
| Contempts of Court - Penalties | [108] |
| The allegations and findings of contempt | [108] |
| The legislation and principles applicable to penalties for contempt | [123] |
| Consideration of appropriate penalties | [136] |
| Costs | [153] |

RANGIAH J:

1. In *Tax Practitioners Board v Hacker* [2020] FCA 1047, I held that the respondents had each contravened s 50–5(1) of the *Tax Agent Services Act 2009* (Cth) (**the TAS Act**) by providing unregistered tax agent services for reward. I also held that the first respondent (**Mr Hacker**) had contravened s 50–5(2) by providing unregistered BAS services for reward.
2. In *Tax Practitioners Board v Hacker (No 2)* [2020] FCA 1048, I held that Mr Hacker and the second respondent (**OSGS**) were guilty of two charges of contempt of the Court. They have since admitted a further three charges of contempt.
3. A hearing was conducted on 7 October 2020 to determine issues of penalty and other relief. The applicant seeks declaratory orders and the imposition of pecuniary penalties upon the respondents for their contraventions of the TAS Act. The applicant also seeks orders that Mr Hacker be imprisoned and OSGS be fined for their respective contempts.
4. I will proceed by first considering the evidence adduced in the penalty hearing. I will then consider the relief sought by the applicant in respect of the contraventions of the TAS Act, and then relief in respect of the contempts. I will then deal with the issue of costs.

## Evidence adduced in the penalty hearing

### Mr Hacker

1. Mr Hacker gave evidence. He deposed that he became a tax agent in 1979, but that his license lapsed in 1982/83. He has worked as an accountant in the years since then. He is now 72 years of age.
2. In his affidavit, Mr Hacker acknowledged his wrongdoing in respect of each of the contempt charges. He stated that, with the exception of the first set of contempt charges, he provided early instructions to admit the charges. He said that liability as to the first set of contempt charges was contested on the basis of a legal argument, but that he admitted the underlying conduct.
3. On 26 November 2019, Mr Hacker paid into his solicitor’s trust account the amount of $15,000 as security against the commission of further contempts on behalf of each respondent. He accepts that the $15,000 should be forfeited.
4. Mr Hacker deposed that he has no prior convictions in relation to contempt of court, and has never previously been the subject of any professional disciplinary proceedings in respect of his work as an accountant.
5. Mr Hacker annexed to his affidavit a report from Peter Perros, a neuropsychologist, dated 11 September 2020, and a report from Dr Catherine Yelland, a geriatrician, dated 15 September 2020.
6. In his report, Mr Perros noted that Mr Hacker reported that he was not depressed, anxious or stressed, and seemed untroubled by the potential penalties he faces. Mr Perros said that neuropsychological assessment had identified a subtle visuospatial disturbance and inefficient visual scanning, which could contribute to clerical errors in his work. Mr Perros said that this was not a full explanation of the offending as, for example, Mr Hacker said that he provided taxation services to at least some clients because they were struggling.
7. Mr Perros said that there was “a small chance” that Mr Hacker’s judgement was sub-optimal due to a medical condition. His testing suggested that there was an emerging picture of an age-related cognitive decline. Mr Perros said that the opinion of a geriatrician was needed to clarify whether the cognitive difficulties identified by the assessment were functional or biological in nature.
8. Under cross-examination, Mr Hacker was taken to a passage of Mr Perros’ report which stated that:

Mr Hacker reported that he had continued lodging income tax returns for clients who are themselves under financial strain and personal duress, and he bowed to pressure to make claims for deductions the clients were not entitled to or could not prove.

1. Mr Hacker accepted that he told Mr Perros that clients had pressured him into making deductions to which they were not entitled, but denied that was a lie.
2. Mr Hacker agreed that he had told Dr Yelland that he did not lodge clients’ tax returns. He accepted a proposition put to him that the contempt charges that he had admitted had, as their underlying basis, that he had lodged tax returns on behalf of taxpayers. However, that proposition was inaccurate—the basis of the contempt charges was that Mr Hacker and OSGS had prepared income tax returns, not that he had lodged them.
3. Mr Hacker was taken to a statement in his affidavit that he had never previously been the subject of any professional disciplinary proceedings in respect of his work as an accountant. Mr Hacker was shown an order dated 4 March 2020 issued by the Australian Securities and Investments Commission (**ASIC**) which disqualified him from acting as a Self-Managed Superannuation Fund (**SMSF**) auditor. When asked whether the statement in his affidavit was deliberately false, Mr Hacker said, “I will make no comment”. Later, Mr Hacker said, “I decided not to continue as an auditor. That was just a formality disqualification”.
4. When Mr Hacker was asked about whether the reason he did not display the notices as required by the Court’s order was that, “he did not like them” (as was reported by Dr Yelland), Mr Hacker did not directly answer the question. He indicated that he had displayed them in his office at the back wall, and, “then they were later put up”. Mr Hacker was asked whether he was prepared to say anything under oath which he thought might assist his cause, and he responded, “I will make no comment to that, your Honour”.
5. There is in evidence a decision of ASIC dated 4 March 2020 disqualifying Mr Hacker from being an approved SMSF auditor on the basis that he had breached independence requirements, had failed to obtain sufficient audit evidence in relation to audits he carried out and that he had failed to comply with an enforceable undertaking he had provided to the Australian Taxation Office (**ATO**) in 2011. ASIC concluded that Mr Hacker was not a fit and proper person to remain an approved SMSF auditor.
6. ASIC’s decision record indicates that as a result of a previous audit, Mr Hacker had given an enforceable undertaking to the ATO in 2011, including to use a particular audit tool, to take steps to ensure his independence, to report audit contraventions and to attend certain courses. ASIC found that he had breached a number of aspects of his undertaking.
7. I found Mr Hacker to be an unreliable witness. His answers were sometimes evasive under cross-examination and, in some respects, inconsistent with information he had given to Dr Yelland and with his own affidavit.
8. Mr Hacker did not cross-examine any of the clients who had provided affidavits in order to put to them that they had pressured him into making inflated claims for tax deductions. I am not satisfied that Mr Hacker was pressured by clients into doing so, although, as I will explain, this issue ultimately has no effect upon the penalties that will be imposed.
9. Mr Hacker has not explained why he provided unregistered tax agent services, and caused OSGS and the third respondent (**Naleview**) to do so, in contravention of s 50–5 of the TAS Act. He has not explained why he provided unregistered BAS agent services. Neither has he explained why he committed the contempts of court. The reasons can only be inferred from the available evidence.

### Dr Yelland

1. Dr Yelland’s report indicated that a normal score was demonstrated on testing Mr Hacker for mild cognitive impairment. Testing also demonstrated average intelligence, lower-than-expected scores for perceptual reasoning and visuospatial tests, mild deficits in divided attention and marked impairment on executive function tasks. A simple screening test for frontal type disorders did not indicate any significant deficit.
2. When Dr Yelland asked Mr Hacker about the implications of a criminal conviction and jail sentence and his ability to work as a company director, he appeared not to be particularly concerned. Dr Yelland recorded that when she asked Mr Hacker about his failure to display notices required by court orders, he said, “he did not like them and that a lot of his work did not relate to it”.
3. Dr Yelland concluded:

Overall, I think that this is a consistent with a frontotemporal dementia. I did not have sufficient history, either about his personal life or his business dealings, to know if there is a longer history of poor judgement and insight, but none of this is evident and it is only in recent years that he has come to the attention of the courts and the Australian taxation officer.

Frontotemporal dementia is an atypical dementia, where cognition may be well preserved or only mildly impaired as noted in the neuropsychology report. The prime symptoms of frontal type disorders are a lack of executive function i.e. being able to plan and complete a task, poor insight into behaviour and consequences, lack of understanding about the effects of behaviour and actions on others, and often indifferent about offence or harm which may be caused. There can be disinhibited or antisocial behaviour. It is a progressive, degenerative condition, that may take several forms. The behavioural variant is usually increasingly evident over the years. The diagnosis is made by a combination of clinical history, including collateral from family or other informants, examination and neuropsychology testing. Investigations may support but not prove the diagnosis.

…

In summary, the recent decline in professional behaviour, and lack of insight and remorse are consistent with a developing frontotemporal dementia. With respect to the question of the effects of a jail term on Mr Hacker’s health, he is otherwise healthy, and has no other medical conditions, so the impact would be similar to that of such a sentence for any other 71-year-old man with no experience of the corrective services system.

(Errors in the original.)

1. Under cross-examination, Dr Yelland said, “I have assessed him as possibly having frontotemporal dementia”. In relation to her assumption that there had been a recent decline in Mr Hacker’s professional behaviour, Dr Yelland was asked whether, had she been told that the ATO found in 2011 that Mr Hacker was not a fit and proper person by reason of misconduct to be an approved auditor of superannuation schemes, that would have had an effect upon her approach to the report. Dr Yelland indicated that such information may have had an effect, as frontotemporal dementia is a progressive degenerative condition, and she would have anticipated more decline over a period of nine years. Dr Yelland said that the most useful diagnostic tool for frontotemporal dementia is often the passage of time as it is a degenerative condition.
2. Dr Yelland had obtained an MRI scan since providing her report which indicated that there was some atrophy of the brain and non-specific white matter changes which can occur with ageing, and a SPECT scan showed that an early dementia disorder is a possibility.
3. Under re-examination, Dr Yelland explained that the frontal lobes control behaviour (executive functions) and are responsible for judgement and insight. Those matters can be affected if there is frontal lobe damage. She said that the results of neuropsychology testing, “is in keeping with a frontotemporal dementia”. Dr Yelland also said that frontotemporal dementia may affect understanding of risk. Dr Yelland also said that the apparent disregard of consequences or lack of remorse are typical of frontal lobe disorders. She said that Mr Hacker seemed to be quite dismissive of the consequences of the contraventions and contempts for him.
4. I permitted the applicant to ask further questions of Dr Yelland, as some of the questions asked in re-examination had not arisen out of cross-examination. When it was put that the conclusion she had reached in her report did not amount to a diagnosis of frontotemporal dementia, Dr Yelland said:

It amounts to what I’m calling, in medical terms, a provisional diagnosis. It isn’t the kind of condition that any of us would be able to say with absolute certainty on the basis of one assessment and the investigations that I’ve done, but it is definitely that. It is a possibility. It is likely, actually. I would probably go a little bit further to say I think that that’s quite likely to be frontotemporal dementia, but time will tell.

1. On questioning by the Court, Dr Yelland accepted that it is possible for someone of Mr Hacker’s age to have a lack of remorse and a lack of insight into his conduct without having frontotemporal dementia. That may be as a result of personality type.
2. I do not accept Dr Yelland’s evidence that Mr Hacker is “likely” or “quite likely” to have frontotemporal lobe damage. Initially Dr Yelland merely said that this was a possible diagnosis. It was not until near the end of her oral evidence that she suggested that it was a “likely” or “quite likely” diagnosis. She did not explain why her opinion had changed in the course of giving evidence.
3. In her evidence, Dr Yelland accepted that if disciplinary proceedings were taken against Mr Hacker in 2011, that would be against a diagnosis of frontotemporal lobe damage, since she would have expected a more significant deterioration over the nine years since then. The proposition put to Dr Yelland in cross-examination that Mr Hacker was found in 2011 not to be a fit and proper person by reason of misconduct to be an approved auditor of superannuation schemes was inaccurate, as that did not occur until 2020.
4. However, the evidence does establish that in 2011, Mr Hacker was required to give the ATO an enforceable undertaking in respect of his work as an SMSF auditor, so it is apparent that his work and professional conduct was unsatisfactory at that time. That is inconsistent with Dr Yelland’s assumptions in her report that there was a, “recent decline in professional behaviour”, and that, “it is only in recent years that he has come to the attention of...the [ATO]”. Dr Yelland’s view that she would have expected a more significant deterioration over the nine years since 2011 if Mr Hacker has frontotemporal dementia can be applied in light of that evidence of unsatisfactory professional behaviour.
5. Another basis for Dr Yelland’s opinion was Mr Hacker’s apparent lack of concern about the consequences and lack of insight into his behaviour. However, she accepted in oral evidence that this could simply be a product of his personality, rather than frontotemporal lobe damage.
6. I am not satisfied that Mr Hacker has frontotemporal lobe damage. While Mr Perros detected some disturbance that could contribute to clerical errors, the contraventions and contempts involved deliberate conduct, rather than clerical errors. I am not satisfied that Mr Hacker’s conduct in relation to the contraventions of the TAS Act or his contempts was caused or contributed to by cognitive or neurological defects.

## Contraventions of s 50–5 of the TAS Act - Pecuniary penalties

### The legislation and applicable principles

1. Section 50-35 of the TAS Act provides:

*Application for order*

(1) Within 4 years after you contravene a civil penalty provision, the Board may apply on behalf of the Commonwealth to the \*Federal Court for an order that you pay the Commonwealth a pecuniary penalty.

*Court may order you to pay pecuniary penalty*

(2) If the \*Federal Court is satisfied that you have contravened a civil penalty provision, the Federal Court may order you to pay to the Commonwealth, for each contravention, the pecuniary penalty that the Federal Court determines is appropriate (but not more than the maximum amount specified for the provision).

*Conduct contravening more than one civil penalty provision*

(3) If conduct contravenes 2 or more civil penalty provisions of this Act, proceedings may be instituted against you in relation to the contravention of any one or more of those provisions. However, you are not liable to more than one pecuniary penalty in respect of the same conduct.

1. The maximum penalty for a contravention of ss 50-5(1) and (2) of the TAS Act is 250 penalty units for an individual; and 1,250 penalty units for a body corporate. A penalty unit was $180 prior to 1 July 2017 and $210 after that date. Therefore, the maximum penalty for one contravention was $45,000 for an individual and $225,000 for a company prior to 1 July 2017; and $52,500 for an individual and $262,500 for a company after that date.
2. In *Markarian v The Queen* (2005) 228 CLR 357 it was held at [31] that:

…careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick.

1. The principal object of imposing pecuniary penalties is to ensure compliance with the law by deterring future contraventions: *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 at [55]. Deterrence is, “specific deterrence of the contravener and, by his or her example, general deterrence of other would-be contraveners”: *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157 at [116].
2. The Court must put a price on contravention which is sufficiently high to deter repetition of the conduct by the respondent and other would-be contraveners: *Trade Practices Commission v CSR Ltd* [1990] FCA 521 at [40]–[42]. A penalty, “must be fixed with a view to ensuring that the penalty is not such as to be regarded … as an acceptable cost of doing business”: *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249 at [62]–[63], cited in *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 at [66].
3. The task of the Court in assessing a penalty is one of “instinctive synthesis”, arriving at a single result through a weighing of all relevant factors, rather than starting from a predetermined figure and making adjustments for each separate factor: *Wong v The Queen* (2001) 207 CLR 584 at [75]; *Pattinson v Australian Building and Construction Commissioner* (2020) 384 ALR 75; [2020] FCAFC 177 at [112].
4. Section 50–35(2) of the TAS Act gives the Court a discretion to order that a contravener pay a pecuniary penalty that the Court, “determines is appropriate”. In *Pattinson*, the Full Court considered s 546(1) of the *Fair Work Act 2009* (Cth), which provides that a person may be ordered to pay a pecuniary penalty the Court “considers is appropriate” if the Court is satisfied that the person has contravened a civil remedy provision. The plurality observed at [98]:

The court’s task is to determine and impose a penalty that it considers “appropriate” if it is satisfied that a person upon whom the penalty is to be imposed has contravened a civil remedy provision. That task is to be undertaken in the light of the object or purpose of the imposition: the promotion of the public interest in compliance with the provision of the statute in question, by deterrence, specific and general. It is clear that the object of deterrence is directed to the subject contravention. That is, it is the deterring of contraventions of the kind before the court to which regard must be had in fixing the penalty that is considered appropriate, by reference to the frame of reference or yardstick provided by the maximum penalty as set by Parliament. Thus, it will always be important to understand the nature, character and full context of the contravening.

1. In *Pattinson*, the plurality stated at [104]:

…[O]ne sees a *notion* of proportionality within the task set out in s 546. That task, of course, is the imposing of an “appropriate” penalty for the instant contravention to serve the object of deterrence from repetition of like contravening in the future. Proportionality and appropriateness are thus intimately related. Proportionality is not a free-standing principle separate from the requirement of what is “appropriate”, rather it is part of that assessment which will necessarily involve examining the nature of the contravention, and all factors that rationally bear on the assessment of the need for deterrence in all the circumstances.

1. The plurality also observed at [109]:

The process is whole and discretionary, and evaluative in character, to which objective aspects of the contravention and what might be called the subjective characteristics of the contravenor, indeed all considerations that rationally touch on or inform deterrence, are relevant.

1. Where there are multiple contraventions of the same provision, in some circumstances the “course of conduct” principle may be applied to ensure that the offender is not punished more than once for essentially the same criminality: *Construction, Forestry, Mining and Energy Union v Cahill* (2010) 194 IR 461 at [39]. However, that phrase should not simplistically be adopted to transfer multiple contraventions into one contravention, or, necessarily, to impose one penalty by reference to one maximum amount; the task is to evaluate the conduct and its course and assess what penalty is, or penalties are, appropriate for the contraventions: *Transport Workers’ Union of Australia v Registered Organisations Commissioner (No 2)* (2018) 267 FCR 40 at [84]–[91].
2. The totality principle operates as a “final check”to ensure that the penalties to be imposed on a wrongdoer, considered as a whole, are, “just and appropriate”: *Mill v The Queen* (1988) 166 CLR 59 at 62–63; *Johnson v The Queen* (2004) 205 ALR 346 at [3]–[5] and [18]–[35].
3. In *Australian Opthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560, Buchanan J explained at [102]:

The totality principle is a guide to sentencing practice. It must be adapted to the circumstances. It is designed to avoid injustice in the overall result. It is not a principle which suggests that a penalty should necessarily be reduced from an aggregate total fixed for multiple offences. Rather, it involves a final check to ensure that a total or aggregate penalty is not, in all the circumstances, excessive…

### The circumstances and seriousness of the contraventions

1. Mr Hacker is the sole director of OSGS. Naleview is the holder of the single share in OSGS. Mr Hacker is a director of Naleview, together with one other person. Mr Hacker holds half of Naleview’s shares, while the other director holds the other half. The other director has not participated in the management of, or received any benefit from, Naleview since 2000. Mr Hacker effectively controls both OSGS and Naleview.
2. OSGS operated from an office in Brisbane City, and Naleview operated from an office in Stafford in the northern suburbs of Brisbane. Mr Hacker would consult with clients who attended the offices and would prepare and lodge their income tax returns online. The clients who attended the Brisbane City office would pay OSGS, and those who attended the Stafford office would pay Naleview, a fee for Mr Hacker’s services. None of OSGS, Naleview or Mr Hacker were registered as tax agents under the TAS Act.
3. I held that OSGS and Mr Hacker engaged in five contraventions of s 50–5(1) of the TAS Act between September 2018 and March 2019 by providing unregistered tax agent services to five different clients. Four of the customers were charged $132 by OSGS, and the fifth was charged $187. OSGS received $715 in total for these services.
4. I held that Naleview and Mr Hacker engaged in 37 contraventions of s 50–5(1) of the TAS Act between August 2015 and December 2018 by providing unregistered tax agent services to 20 different clients. Naleview charged either $110 or $121 for each of these services, except on three instances when it was paid $55, $176 and $242. Naleview received $4,015 in total for those services.
5. I held that Mr Hacker engaged in three contraventions of s 50–5(2) of the TAS Act on 13 October 2017 by providing unregistered BAS services to a client. The client was charged $50 for each of these services.
6. I am satisfied that the contraventions of s 50–5(1) of the TAS Act occurred in the context of OSGS and Naleview each carrying on a business of providing tax agent services for a fee.
7. The contraventions must be seen in the context of previous warnings given to Mr Hacker. On 11 February 2013, the applicant wrote to Mr Hacker in his capacity as a director of Naleview advising that provision of tax agent services for reward whilst unregistered under the TAS Act was unlawful. Two years later, on 23 January 2015, and again on 4 February 2015, the applicant sent further correspondence to Mr Hacker notifying him that as he was not a registered tax agent, he may be engaging in conduct prohibited by the TAS Act. This correspondence, which Mr Hacker admits receiving, put him on notice of the unlawfulness of providing unregistered tax agent services. However, Mr Hacker, OSGS and Naleview proceeded to provide the services that I have found contravened s 50-5 of the TAS Act.
8. Mr Hacker has not directly provided any explanation for why he, OSGS and Naleview engaged in the contravening conduct. In his affidavit sworn on 18 September 2020, he states that his own liability in respect of the first contempt charge was, “contested on the basis of a legal argument”, but he does not assert that he believed that he was not contravening the TAS Act by providing the services.
9. I find that Mr Hacker deliberately engaged in the relevant conduct, and caused OSGS and Naleview to do so, understanding that he, OSGS and Naleview were contravening the TAS Act. I infer that OSGS and Naleview engaged in that conduct in the course of conducting businesses that profited from the payment of fees by clients for Mr Hacker’s services. These matters make the contraventions very serious.

### Deterrence

1. The respondents’ contraventions should attract penalties which will serve as a strong deterrent to others from providing tax agent services and BAS services for fee or reward to members of the public while unregistered.
2. The object described in s 2-5 of the TAS Act is to ensure that tax agent services are provided to the public in accordance with appropriate standards of professional and ethical conduct. This is achieved by, among other things, establishing a national board to register tax agents and BAS agents, introducing a Code of Professional Conduct and providing for sanctions to discipline registered tax agents and BAS agents.
3. Those who provide tax agent services for fee or reward while unregistered seek to avoid compliance with some or all of the requirements and standards required of registered tax agents under the TAS Act, which include being a fit and proper person, having the prescribed qualifications, training and experience and maintaining professional indemnity insurance. Unregistered agents endanger the taxation and financial affairs of taxpayers and also pose risks to the integrity of the taxation system.
4. Strong penalties are required to deter those who may view the requirement of registration as optional. There is an obvious and real temptation for unethical and unprofessional people to provide unregistered tax agent and BAS services for profit. The penalties must therefore be imposed at a level which will signal that contraventions will not pay. At the same time, it must be remembered that the penalties must be limited to what is proportional and appropriate for the contraventions committed.
5. Mr Hacker denied all the allegations of contraventions made against him. OSGS and Naleview admitted some contraventions in the face of a strong case against them and denied others that were ultimately proved. The respondents were entitled to defend the allegations and cannot be criticised or punished for doing so. However, I am unable to infer that the respondents are remorseful, as might have been the case if they had admitted all the allegations. In addition, Mr Hacker’s and OSGS’s lack of remorse is demonstrated by the fact that they continued to offend even well after the proceedings were commenced.
6. Specific deterrence is a significant factor where, as here, the contraventions involve deliberate wrongdoing, numerous contraventions over a sustained period of time and a lack of remorse: see, for example, *Australian Ophthalmic Supplies* at [16]–[17]; *Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 4)* (2012) 225 IR 113; [2012] FCA 894 at [32] and [37]; *Australian Securities & Investments Commission v Soust (No 2)* (2010) 78 ACSR 1; [2010] FCA 388 at [34]–[39], [65]–[66], [71] and [93].

### Harm caused by the contraventions

1. The applicant submits that the harm caused by the respondents to clients, by including improperly claimed tax deductions in their tax returns resulting in the imposition of administrative penalties by the ATO, should be taken into account. It is submitted that their conduct has demonstrably harmed the financial interests of his clients, was designed to cheat the Commonwealth out of tax revenue, and increased the burden on the ATO of assessing his clients’ income tax returns. The applicant submits that this conduct deserves strong disapproval.
2. However, it must be remembered that the respondents are being sentenced only for providing unregistered tax agent services, and, in Mr Hacker’s case, by also providing unregistered BAS services, in contravention of s 50-5 of the TAS Act. Under s 50-35(2), the Court may order payment of the pecuniary penalty that the Court determines is appropriate if the Court is satisfied that a person has contravened a civil penalty provision. The respondents’ contraventions are based only upon the fact of having provided the services for fee or reward while unregistered, not upon incompetence or fraudulent conduct in providing those services. It would not be appropriate to impose a penalty for consequences that are outside the scope or reach of the particular provision that is contravened. In my opinion, it is not appropriate to determine penalties based upon harm caused to clients resulting from the provision of the tax agent services.

### Co-operation

1. Co-operation with authorities in the course of investigations and subsequent proceedings will be a mitigating factor that may reduce the penalty that would otherwise be imposed. The reduction reflects the fact that such co-operation:

(a) can be evidence of contrition and an acceptance of responsibility;

(b) increases the likelihood of co-operation in a way that furthers the object of the legislation;

(c) frees up the regulator’s resources, thereby increasing the likelihood that other contraveners will be detected and brought to justice; and

(d) reflects a willingness to facilitate the course of justice.

(See *NW Frozen Foods v Australian Competition and Consumer Commission* (1996) 71 FCR 285 at 293–294; *Mornington Inn Pty Ltd v Jordan* (2008) 168 FCR 383 at [73]–[74].)

1. I have rejected any suggestion that the respondents have demonstrated contrition. However, I accept that OSGS and Naleview have cooperated to some extent in a way that reflected a willingness to facilitate the course of justice and has saved the regulator’s resources to some extent. OSGS and Naleview admitted a number of contraventions, although they denied others that were ultimately proved. The admissions were made in the face of a strong case against them, supported by affidavits from each of the relevant clients. I accept that they are to be given some credit for their admissions.
2. While Mr Hacker submits that he should also be given credit for his admission of a number of facts and for the fact that he did not challenge clients’ evidence, any such credit should be very limited. The admissions were made after much of the evidence had already been gathered and in the face of a strong case against him.

### Double punishment

1. The respondents submit that s 50-35(3) of the TAS Act is applicable. Section 50–35(3) provides that:

If conduct contravenes 2 or more civil penalty provisions of this Act, proceedings may be instituted against you in relation to the contravention of any one or more of those provisions. However, you are not liable to more than one pecuniary penalty in respect of the same conduct.

1. The respondents argue that in respect of each contravention of s 50-5(1), Mr Hacker’s conduct constituted, at the same time, a contravention of the provision by both Mr Hacker and the relevant corporate respondent. In each instance, a single act constituted two contraventions. The respondents submit that under s 50-35(3), a penalty may be imposed against Mr Hacker, or the relevant corporate respondent, but not both. They submit that otherwise a sanction would be imposed twice for the same conduct.
2. I reject the construction of s 50-35(3) contended for by the respondent. The first sentence of the provision applies where, “conduct contravenes 2 or more civil penalty provisions of this Act”, and allows proceedings to be instituted against the contravener, “in relation to the contravention of any one or more of those provisions”. The opening of the second sentence with the word “However” qualifies the first sentence. The words, “you are not liable to more than one pecuniary penalty in respect of the same conduct”, do not have a free-standing operation, but only apply such that the contravener is not liable to more than one pecuniary penalty where the same conduct constitutes a contravention of two or more civil penalty provisions. Further, the second sentence does not mean that where the conduct of a person has the consequence that both the person and another entity contravene a civil penalty provision, they are not each liable to a pecuniary penalty.
3. However, there are other reasons for accepting the respondents’ submission that the imposition of two penalties for the same conduct risks double punishment of Mr Hacker for the same conduct. Mr Hacker is a shareholder in Naleview and, through Naleview, is an ultimate beneficial owner of the share in OSGS. To impose a penalty on Naleview or OSGS would effectively impose a penalty on Mr Hacker.
4. In *Parker v Australian Building and Construction Commissioner* (2019) 270 FCR 39, Besanko and Bromwich JJ held:

250 In the criminal law context, including *Hamilton v Whitehead* itself, direct liability often results in but a single sanction actually being sought and imposed per contravention: Mr Whitehead was charged with being knowingly concerned in six offences under s 169 of the former *Companies (Western Australia) Code*, but the company was not charged with those offences, but was charged with other offences. A choice was made to sanction that conduct in the hands of the individual as accessory, but not the company as well as principal. Sometimes there is no choice but to only sanction one, because, for example, the company has ceased to trade, so that charging the individual by whom the company offended on a *Hamilton v Whitehead* basis is the only option.

251 The approach of the Commissioner, while legally available, has an element of overkill, especially in the context of totality and deterrence. That is not to say that there will not be cases in which seeking dual sanctions will be appropriate, but this is not such a case. In the present circumstances, there is little or no additional deterrent value to be had in imposing further sanctions on the eight individual respondents, which is the dominant purpose, if not sole purpose, in imposing such sanctions. However, this is a relevant circumstance when considering the response to the penalty appeal in relation to the s 50 contravention in the hands of the CFMEU as a result of the conduct of the eight individual appellants, apart from Mr Reeves. The appropriate outcome is therefore to uphold this ground of cross-appeal, make declarations of contravention on the part of those eight individual respondents, but decline to impose any further penalty upon those appellants.

1. The present situation also has some analogy with the course of conduct principle. In *Cahill* the plurality held at [39]:

As the passages in *Williams* 262 ALR 417 explain, a “course of conduct” or the “one transaction principle” is not a concept peculiar to the industrial context. It is a concept which arises in the criminal context generally and one which may be relevant to the proper exercise of the sentencing discretion. The principle recognises that where there is an interrelationship between the *legal and factual elements of two or more offences* for which an offender has been charged, care must be taken to ensure that the offender is not punished twice for what is essentially the same criminality…

1. Although this passage applies to two or more offences committed by the same offender, its rationale that an offender should not be punished twice for what is essentially the same “criminality” applies where, as here, the same conduct constitutes a contravention by both a person and a company, and the person has a substantial ownership interest in the corporate entity. In such a case, penalising the company effectively penalises the person, so that a separate penalty upon the person risks double punishment: see *Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd (No 2)* (2002) 190 ALR 169; [2002] FCA 559 at [45].
2. Double punishment can be avoided by either imposing a penalty on the corporate respondent or the person but not both, or by assessing a penalty for each of the corporate respondent and the person and reducing both to an appropriate level. The respondents submit pecuniary penalties should be imposed only upon OSGS and Naleview, and not Mr Hacker. However, in circumstances where the conduct was actually carried out by Mr Hacker and there is a particular need to deter him, as well as the corporate respondents, from such conduct in the future, he should not be allowed to escape a penalty being imposed directly upon him. Therefore, I propose to adopt the second approach.
3. It has been held that the overall penalty imposed should be no less than if the company had been the sole contravener, and the overall penalty should reflect the fact that both the individual and company had contravened the Act: *Minister for the Environment & Heritage v Greentree (No 3)* [2004] FCA 1317, at [77]–[78].

### Course of conduct

1. I do not understand the respondents to submit that Naleview’s, OSGS’s and Mr Hacker’s contraventions should all be regarded as occurring in an individual course of conduct referrable respectively to each of them. I would not have accepted any such submission as the contraventions generally involved separate tax returns, on separate dates, to separate clients, for separate fees. It was not a single course of substantially the same contravening conduct, but a series of distinct transactions each involving its own contravening conduct.
2. However, the respondents submit that certain of Naleview’s contraventions (and, correspondingly, Mr Hacker’s contraventions) should be grouped together as part of a single course of conduct. Those groups of contraventions are:

* The tax agent services provided to Desley Frances Anderson and John Paul Anderson on 25 August 2015, 17 August 2016 and 20 August 2017. Mr and Mrs Anderson are married. They attended Naleview’s office together and services were provided during those attendances. They were paid for as part of the same transaction.
* The tax agent services provided to Ana Crolina Becker and Claudemir Ferreira de Paulo on 24 September 2018. Ms Becker and Mr de Paulo are married. They attended Naleview’s office together and services were provided during those attendances. They were paid for in the same transaction.
* The tax agent services provided to Julie Fay Bergin and Leith Ann Harte on 31 July 2016, 22 July 2017 and 13 July 2018. Both clients attended Naleview’s office at the same time for the purpose of Mr Hacker assisting with their tax returns, except that Ms Harte did not attend on 13 July 2018, instead attending on 16 July 2018.
* The tax agent services and BAS services provided to Mark Camacho on 13 October 2017. All of these services were provided to Mr Camacho during the same appointment.
* The tax agent services provided to Nirmal Giri on 13 September 2018 in respect of his 2017 and 2018 tax returns. These services were provided during the same appointment and were paid for as one transaction.
* The tax agent services provided to Prakash Raj Poudel and Rukmani Adhikari Poudel on 24 October 2018. Mr and Mrs Poudel are married. They attended Naleview’s office together and services were provided during those attendances. They were paid for in the same transaction.

1. As to the first, second, third and sixth sets of contraventions, even though these clients were married or attended together, they were distinct clients who were provided tax agent services in respect of their individual tax returns and were charged a fee for those separate services. I do not accept that the contraventions involved substantially the same contravening conduct. I do not accept that these contraventions arose within the same course of conduct.
2. The position is different with the four contraventions in respect of Mr Comacho. The tax agent services and BAS services were provided to the same client at the same appointment. However, the services involved contraventions of different provisions of the TAS Act. I find that the three contraventions involving the provision of BAS services to Mr Comacho arose from a single course of conduct, while the one contravention involving the provision of tax agent services does not arise from the same course of conduct.
3. I also find that the two contraventions in respect of Mr Giri arose within a single course of conduct.

### Penalties in other cases

1. There are a handful of other decisions where the Court has imposed penalties on an individual for contraventions of ss 50-5(1) or (2) of the TAS Act, namely *Tax Practitioners Board v Dedic* [2014] FCA 511; *Tax Practitioners Board v Shanahan* [2013] FCA 764; *Tax Practitioners Board v Hinckfuss* [2013] FCA 1168; *Tax Practitioners Board v Hogan* [2012] FCA 642; *Tax Practitioners Board v Campbell* [2012] FCA 1153; and *Tax Practitioners Board v Munro* [2012] FCA 1338. In two cases penalties have been imposed on an individual and a body corporate: *Tax Practitioners Board v Lamede Group Pty Ltd* [2016] FCA 63; and *Tax Practitioners Board v HP Kolya Pty Ltd* (2015) 232 FCR 34.
2. The Full Court has emphasised that, although similar contraventions should incur similar penalties, the differing circumstances of individual cases means that a penalty in an earlier case cannot dictate the penalty in a later case: see for example *NW Frozen Foods* at 295–6; *Australian Ophthalmic Supplies* at [12]–[14], [56]–[57] and [87].
3. The applicant contends that *Kolya* is “relatively comparable”. Mr Kolya and his company were found to have provided tax agent services and BAS agent services to members of the public in contravention of ss 50-5(1) and (2) of the TAS Act. The company contravened s 50-5(1) of the TAS Act on 32 occasions and s 50-5(2) on one occasion, and Mr Kolya contravened s 50-5(1) on eight occasions and s 50-5(2) on one occasion. Justice Foster imposed penalties of $750,000 upon the company and $150,000 upon Mr Kolya.
4. The applicant accepts that a distinguishing feature is that Mr Kolya was found to have advertised tax agent services on two occasions in contravention of s 50-10(1) of the TAS Act. There are other substantial differences, including that the Court found that Mr Kolya knew that he was engaging in conduct which he had been prohibited from undertaking by various decisions of courts and tribunals; he had prepared over 1,800 tax returns over a decade; he was well aware of the likely harm that the continued conduct of his business was likely to cause; and he engaged in misleading conduct by representing that he was entitled to use a tax agent number and that he was operating under the auspices of H&R Block Ltd.
5. At the time of the contraventions in *Kolya* the value of a penalty unit was $110 (it is now $210). In arriving at the penalties, Foster J summarised the circumstances as follows:

[80] In the present case, there is an urgent and strong imperative to impose penalties which will, once and for all, bring home to Mr Kolya that he can no longer flout the regulatory requirements embodied in the TAS Act for his own commercial benefit. He is the principal perpetrator of the contravening conduct. He is the person who has caused HP Kolya to contravene the TAS Act. To date, he has been a recalcitrant contravenor who has repeatedly and persistently ignored the prohibition on providing tax agent services and BAS services and advertising the same on persons who are not registered tax agents or BAS agents. Not only has he shut his eyes to the obvious over a lengthy period, but he has taken steps of an artificial kind designed to prolong his opportunities for commercial gain while contesting the legitimate and valid concerns of the Board. He has actively engaged in conduct which is diametrically opposed to the object of the TAS Act. In so doing, he has caused significant harm to ordinary members of the public who were entitled to assume when dealing with him that he had the necessary qualifications and competence to perform the tasks which he undertook to perform for them. In addition, he has shown no contrition for his conduct and has failed to cooperate with the Board. He does not accept that he has done the wrong thing. He shows no remorse or contrition. Rather, he has persisted, even to the end of the case, in his argument that his registration as a migration agent is sufficient for him to justify his providing tax agent services and BAS services.

[81] This case requires a strong response from the Court both in order to specifically deter Mr Kolya and also to make clear to others who may be minded to replicate his conduct that they should think very carefully before doing so because the penalties which will be imposed if caught will be significant.

1. The applicant submits that many features of this summary are also apparent in this case against Mr Hacker and his companies, and the same “strong response” from the Court is appropriate here.
2. I have described the factual distinctions between *Kolya* and the present case. I do not accept that *Kolya* provides a useful comparator.
3. The respondents submit that a more appropriate comparator is *Shanahan*, a case which involved 47 contraventions of s 50-5(1) and two contraventions of s 50-5(2). Mr Shanahan had also misrepresented to his clients that he was a registered tax agent in breach of s 50-15. Mr Shanahan admitted to each of these contraventions. The contraventions occurred over a period of two years and one month, and Mr Shanahan earned at least $6,269 for 36 of the contraventions. A total pecuniary penalty of $30,000 was imposed for all of the contraventions, which did not distinguish between the penalty applicable to the s 50-5(1) contraventions and the s 50-5(2) contraventions. The penalty that was originally agreed by the parties was $45,000, but Rares J was not satisfied that the contravener had the capacity to pay it and the parties ultimately agreed upon $30,000. The applicable penalty unit rate at the time was $110. Justice Rares was satisfied that the contravener fully appreciated his wrongdoing, its gravity and its inappropriateness, and was mindful that the contraventions occurred during a period of great personal stress in his life, where he was not only supporting his own family, but two employees who were working for him. His Honour found that the contravener had expressed genuine contrition and remorse, and was not likely to contravene again.
4. I do not accept that *Shanahan* provides an appropriate comparator. The circumstances in that case of the contravener’s admissions of the contraventions, his inability to pay a substantial penalty, his remorse, the absence of any pressing need for specific deterrence in that case and agreement as to the penalty are absent in this case. It must also be noted that the penalty of $30,000 was imposed upon an individual, not a company.
5. A fairly recent decision considering the imposition of penalties on an individual and body corporate pursuant to ss 50–5(1) and 50–5(2) is *Lamede*. On 51 occasions over a period of three years either Lamede Group or Ms Amede provided unregistered tax agent services for a fee in contravention of s 50-5(1), and on five occasions Lamede Group advertised the availability of tax agent services in contravention of s 50–10(1). The contraventions were admitted. The applicant conceded that most of the contraventions arose in a single course of conduct, and, as I read the case, Dowsett J accepted that proposition. His Honour considered it was most unlikely that the respondents would engage in any business in the future or that they would engage in any future contravention. The amounts received for the transactions varied between $100 and $200. The applicable penalty unit rate varied between $110 and $170 during the period when the contraventions occurred. His Honour considered each of the offences to be at the lower end of any scale of seriousness, but that it was a circumstance of aggravation that the conduct extended over a period of two years. Ms Amede had a limited capacity to pay a fine, although his Honour did not, “fully accept the proposition that an offender’s capacity to pay any pecuniary penalty is of less importance than the need for a pecuniary penalty of appropriate deterrent value”. His Honour assessed penalties totalling $77,500 against the company (including $6,000 for the advertising contraventions) and $4,000 against Ms Amede.
6. There are obvious differences between *Lamede* and the present case. *Lamede* does not provide a particularly useful point of comparison.

### Assessment of penalties

1. The maximum penalty for one contravention of s 50–5(1) and (2) of the TAS Act was $45,000 for an individual and $225,000 for a company prior to 1 July 2017, and $52,500 for an individual and $262,500 for a company after that date.
2. OSGS engaged in five contraventions of s 50-5(1) of the TAS Act and Mr Hacker engaged in corresponding contraventions. Naleview engaged in 37 contraventions and Mr Hacker engaged in corresponding contraventions. Mr Hacker also engaged in three contraventions of s 50–5(2) by providing unregistered BAS services.
3. OSGS’s contraventions each occurred after 1 July 2017. Nine of Naleview’s contraventions occurred before 1 July 2017, and the remainder occurred after that date.
4. OSGS is liable to a maximum of five penalties of $262,500. I have found that the two contraventions by Naleview and Mr Hacker in respect of Mr Giri should be regarded as arising from a single course of conduct. I consider that a single penalty is adequate for that course of conduct. Therefore, Naleview is liable to a maximum of 36 penalties, consisting of nine penalties of $225,000 and 27 penalties of $262,500.
5. I have found that the three contraventions by Mr Hacker by the provision of BAS services to Mr Comacho arose in the same course of conduct. Mr Hacker is liable to a maximum of 42 penalties, consisting of nine penalties of $45,000 and 32 penalties of $52,500 in respect of providing unregistered tax agent services, and one penalty of $52,500 for providing unregistered BAS services.
6. The contraventions were deliberate and motivated by profit. I regard them as serious. I take into account the degree of cooperation with the regulator.
7. Apart from the lower maximum penalty before 1 July 2017, I do not consider that there is any sufficient basis for distinguishing the contraventions from each other in terms of penalty.
8. There is little evidence about the capacity of the respondents to pay penalties, except that Mr Hacker told Dr Yelland that he estimated that he has assets of $1-2 million. The respondents have not suggested that they lack capacity to pay penalties.
9. I consider that a penalty for each contravention should be assessed at around 10% of the maximum. This provides a penalty of $22,500 before 1 July 2017 and $26,250 after that date for each provision of unregistered tax agent services by the corporate respondents. It also provides a penalty of $4,500 before 1 July 2017 and $5,250 after that date for each provision of unregistered tax agent services and BAS services by Mr Hacker. As the fees for each income tax return generally ranged between $110 and $132, the penalties assessed are adequate and sufficient to make it clear that providing tax agent services for fee or reward when unregistered will not pay.
10. I have discussed the need to avoid double punishment given that Mr Hacker’s conduct on each occasion resulted in a contravention by both himself and either OSGS or Naleview and that Mr Hacker will ultimately be affected personally by penalties against the companies. I consider that double punishment can be best avoided by reducing the penalties for the corporate respondents and Mr Hacker to half of those that would otherwise have been imposed. This has the effect of distributing the penalties between Mr Hacker and the corporate respondents, but taking into account that the maximum penalty for a corporation is higher than for an individual.
11. On this basis, I will assess five penalties of $13,125 upon OSGS, a total of $65,625. I will assess nine penalties of $11,250 and 27 penalties of $13,125 upon Naleview, a total of $455,625. I will assess nine penalties of $2,250 and 33 penalties of $2,625 upon Mr Hacker, a total of $106,875.
12. It is necessary to consider the totality of the penalties assessed. In my opinion, that exercise does not reveal the total penalties to be excessive.

## Contraventions of s 50–5 of the TAS Act – Declarations and injunctive relief

1. The applicant seeks declaratory and permanent injunctive relief against the respondents.
2. The respondents do not oppose the granting of declaratory relief, but submit the declarations should reflect the fact that a number of the contraventions of OSGS and Naleview were established on the basis of their admissions.
3. In *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53, the plurality held at [89] that declarations should indicate the gist of the findings made concerning the contravening conduct. The respondents’ submission that the declarations should also reflect the evidentiary basis upon which the findings were made is not supported by authority. I reject that submission.
4. The respondents do not oppose a grant of permanent injunctive relief. I accept that such relief is appropriate.
5. I will make declaratory and injunctive orders substantially in the form contended for by the applicant.

## Contempts of Court - Penalties

### The allegations and findings of contempt

1. On 12 February 2019, the applicant filed an Originating Application commencing the principal proceedings against the respondents for contraventions of s 50–5 of the TAS Act (**the Contravention Proceedings**). The Originating Application also sought interlocutory injunctions restraining the respondents from providing tax agent services or BAS services for fee or reward.
2. On 1 March 2019, I dismissed the application for interlocutory injunctions upon the giving of the following undertaking by the respondents:

On a without admissions basis, until further order of the court or final disposition of this proceeding, each respondent (and in the case of the first respondent, either personally or on behalf of another entity) will not provide tax agent services within the meaning of s 90–5 of the *Tax Agent Services Act 2009* (Cth) or BAS services within the meaning of s 90–10 of the *Tax Agent Services Act 2009* (Cth) for fee or reward to any person or entity with the exception of those entities in respect of which the first respondent holds an officer position (being either director, company secretary and/or public officer), and, for the avoidance of any doubt, the undertaking does not prohibit the first respondent from receiving a fee or reward in respect of his officer role for those entities.

(Emphasis added.)

1. On 17 June 2019, the applicant filed an interlocutory application and Statement of Charge (as was required under rr 42.11(1) and 42.12(a) of the *Federal Court Rules 2011* (Cth)) alleging that Mr Hacker and OSGS had breached their undertaking, and seeking the imposition of penalties upon them for contempt of court. An Amended Statement of Charge filed on 27 September 2019 alleged that Mr Hacker and OSGS committed contempts of court on three occasions by breaching the undertaking of 1 March 2019 as follows:

(a) on 6 March 2019, preparing a 2018 Income Tax Return (**ITR**) for Palwinder Lore for $132;

(b) on 13 March 2019, preparing a 2018 ITR for Jeremy Park for $132;

(c) on 18 March 2019, preparing a 2018 ITR for Mohammed Rizwan Shaikh for $132.

1. Each breach was alleged to be a separate contempt. The application was accompanied by affidavits of the taxpayers involved in the transactions. On 1 July 2019, OSGS admitted the allegations, but they were denied by Mr Hacker. In *Tax Practitioners Board v Hacker (No 2)*, I found the allegations of contempt to be proven against both Mr Hacker and OSGS (**the First Contempts**).
2. By a further interlocutory application and Statement of Charge filed on 13 November 2019, the applicant alleged that Mr Hacker and OSGS committed contempts of court on five occasions by breaching the undertaking of 1 March 2019 as follows:

(a) on 6 September 2019, preparing a 2019 ITR for Hyuna Kim for $132;

(b) on 20 September 2019, preparing a 2019 ITR for Rosemary Amali Delwala for $132;

(c) on 24 September 2019, preparing 2017, 2018 and 2019 ITRs for John Melvin Claveria for $396;

(d) on 24 September 2019, preparing a 2019 ITR for Thi Cam Giang Pham for $132;

(e) on 25 September 2019, preparing a 2019 ITR for Tri Huu Le for $180.

1. Each breach was alleged to be a separate contempt. The application was accompanied by affidavits of the taxpayers involved. On 10 February 2020, Mr Hacker and OSGS admitted the contempts. I formally made findings in *Tax Practitioners Board v Hacker (No 2)*, that the contempts were proven against Mr Hacker and OSGS (**the Second Contempts**).
2. On 26 November 2019, upon the provision of an irrevocable authority by the respondents, I adjourned the hearing of the principal proceedings and the applicant’s interlocutory application in respect of the First and Second Contempts. Mr Hacker, on behalf of himself and in his capacity as director of OSGS and Naleview, provided an irrevocable authority to authorise and direct his solicitors to hold $15,000 and transfer all or part of that sum to the Court or the applicant in accordance with any order or direction in these proceedings. The authority was intended to provide a security against further contraventions of the undertaking.
3. On 13 February 2020, I reserved judgment in respect of the allegations of contravention of s 50–5 of the TAS Act and the First and Second Contempts. After I had reserved judgment, three further proceedings for contempt were brought.
4. On 23 March 2020, the applicant filed an interlocutory application and Statement of Charge alleging that Mr Hacker and OSGS committed contempts of court on eight occasions by breaching the undertaking of 1 March 2019 as follows:

(a) on 3 September 2019, preparing a 2019 ITR for Braulio Omanbac Bahan for $352;

(b) on 3 September 2019, preparing a 2019 ITR for Carol Bahan for $352;

(c) on 27 September 2019, preparing a 2019 ITR for Darrien Murphy for $132;

(d) on 29 November 2019, preparing a 2019 ITR for Sarah Debesay Tagg for $132;

(e) on 2 December 2019, preparing a 2019 ITR for Jared Michael Tagg for $132;

(f) on 6 January 2020, preparing a 2019 ITR for Emily Louise Martin for $132;

(g) on 26 February 2020, preparing a 2019 ITR for Dawni Jose for $132;

(h) on 26 February 2020, preparing a 2019 ITR for Nisha George for $132.

1. Each breach was alleged to be a separate contempt. The application was accompanied by affidavits of the taxpayers involved. On 6 April 2020, Mr Hacker and OSGS admitted the contempts. I find those contempts to have been proven (**the Third Contempts**).
2. On 30 June 2020, the applicant filed a further interlocutory application and Statement of Charge alleging that Mr Hacker and OSGS committed contempts of court on three occasions by breaching the undertaking of 1 March 2019 as follows:

(a) on 8 April 2020, preparing a 2019 ITR for Rose Jaguru for $132;

(b) on 17 April 2020, preparing a 2019 ITR for Lissy Palliyan Anthony for $130;

(c) on 22 April 2020, preparing a 2019 ITR for Ramandeep Singh Deol for $132.

1. Each breach was alleged to be a separate contempt. The application was accompanied by affidavits of the taxpayers involved. On 10 July 2020, Mr Hacker and OSGS admitted the contempts. I find those contempts to have been proven (**the Fourth Contempts**).
2. On 10 July 2020, I also ordered, by consent, that:

Within 3 business days of the date of this order, and subject to the applicant providing the notices to the first respondent within 2 business days of the date of the order, the first respondent publishes or causes to be published notices in the form and terms of Annexure A to this order, by ensuring that:

(a) a notice in A2 size is affixed in a prominent place to the front door of the office at Suite 6, Level 17, 141 Queen Street, Brisbane QLD 4000; and

(b) a notice in A2 size is affixed in a prominent place to, or otherwise displayed in a prominent place on, the reception counter at the office at Suite 6, Level 17, 141 Queen Street, Brisbane.

1. On 19 August 2020, the applicant filed yet another interlocutory application and Statement of Charge. It was alleged that Mr Hacker failed to comply with the order made on 10 July 2020. It was also alleged that Mr Hacker and OSGS committed contempts of court on nine occasions by breaching the undertaking of 1 March 2019 as follows:

(a) on 20 May 2019, preparing a 2018 ITR for Mohammad Rahimi for $132;

(b) on 8 August 2019, preparing a 2019 ITR for Irish Dela Pena for $132;

(c) on 13 July 2020, preparing a 2020 ITR for Bahaa Okbi for $187;

(d) on 13 July 2020, preparing a 2020 ITR for Hamideh Gharekhanian for $132;

(e) on 14 July 2020, preparing a 2019 ITR for Mohammad Rahimi for $220;

(f) on 15 July 2020, preparing a 2019 ITR for Irish Dela Pena for $132;

(g) on 17 July 2020, preparing a 2020 ITR for Catherine James for $132;

(h) on 17 July 2020, preparing a 2020 ITR for Jeffrey Rice for 132;

(i) on 20 July 2020 preparing a 2020 ITR for Stephen Magot for $132.

1. Each breach was alleged to be a separate contempt. The application was accompanied by affidavits of the taxpayers involved. On 1 September 2020, Mr Hacker and OSGS admitted the contempts. I find those contempts to have been proven (**the Fifth Contempts**).

### The legislation and principles applicable to penalties for contempt

1. Section 31 of the *Federal Court of Australia Act 1976* (Cth) confers upon the Federal Court of Australia the same power to punish for contempt as is possessed by the High Court of Australia to punish for contempts of the High Court.
2. A sentence for contempt is punitive, to vindicate the authority of the court: see *Australian Competition and Consumer Commission v INFO4PC.com Pty Ltd* (2002) 121 FCR 24 at [141].In *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435, McHugh J observed at [88]:

…In considering the appropriateness or otherwise of a sentence imposed for a contempt of court, it must always be borne in mind that the jurisdiction to commit for contempt exists so that the authority of the courts of law can be maintained. If breaches of the orders of the courts were regarded as of little moment, respect for and observance of the law would inevitably deteriorate and, ultimately, pose a threat to social order.

1. The Court has a wide range of penalties available to it: *Sydney Medical Service Co-operative Limited v Lakemba Medical Services Pty Ltd (No 2)* [2016] FCA 1188 at [14]. The Court has a discretion to impose a prison sentence, to fine, to make costs orders or to punish by any combination of such alternatives: *Deputy Commissioner of Taxation v Hickey* [1999] FCA 259 at [34].
2. The Court also has the power to suspend on condition any sentence of imprisonment it might impose in respect of a contempt: *Australian Competition and Consumer Commission v INFO4PC.com Pty Ltd* at [138]. A sentence of imprisonment may be partially suspended upon conditions: see *Australian Competition and Consumer Commission v Halkalia Pty Ltd (No 3)* [2017] FCA 522 at [174].
3. In *Director of Fair Work Building Industry Inspectorate v Cartledge* (No 2) [2015] FCA 851 Mansfield J at [6] summarised a number of considerations relevant to the determination of an appropriate penalty for contempt of court:

* the contemnor’s personal circumstances;
* the nature and circumstances of the contempt;
* the effect of the contempt on the administration of justice;
* the contemnor’s culpability;
* the need to deter the contemnor and others from repeating contempt;
* the absence or presence of a prior conviction for contempt;
* the contemnor’s financial means; and
* whether the contemnor has exhibited general contrition and made a full and ample apology.

(See also *Bovis Lend Lease Pty Ltd v Construction Forestry Mining and Energy Union (No 2)* [2009] FCA 650 at [6]; *Australasian Meat Industry Employees’ Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98; *Construction, Forestry, Mining and Energy Union v BHP Steel (AIS) Pty Ltd* (2003) 196 ALR 350 (***CFMEU v BHP***); *Louis Vuitton Malletier SA v Design Elegance Pty Ltd* (2006) 149 FCR 494 at 501–502.)

1. Imprisonment for contempt is a penalty of last resort. As expressed by Gray J in *Vaysman v Deckers Outdoor Corporation Inc* (2011) 276 ALR 596; [2011] FCAFC 17 at [54]:

In any sentencing process, imprisonment is to be regarded as the penalty of last resort. Any period of deprivation of liberty is a drastic imposition on anyone. The value the law places on liberty is very high. It is incumbent on a sentencing judge to determine first whether any alternative to imprisonment would be appropriate.

1. *Vaysman* involved an appeal against the severity of the custodial sentences imposed on a contemnor. Mr Vaysman had been found guilty of ten charges of contempt of court and was sentenced concurrently to a maximum term of 18 months imprisonment, to be suspended after six months. On appeal, that sentence was unanimously held to be manifestly excessive.
2. Justices Gray, Besanko and Bromberg delivered separate judgments. However, their Honours agreed that the age and state of health of Mr Vaysman were relevant mitigating factors. Justice Gray observed at [55]:

A sentence of imprisonment for a 74 year old man with a previously unblemished record would be a rare thing. A sentence of 18 months’ imprisonment imposed on such a person, coupled with an order requiring him actually to serve 6 months of that term, could only be the result of contempt of court of an extremely serious kind, having regard to the person’s conduct and to its impact on the public. The appellant’s conduct that led to the findings that he was guilty of contempt on the 10 charges fell far short of such a degree of seriousness. Although characterised as deliberate, the conduct itself was not of sufficient gravity to justify such a sentence.

1. Justice Besanko (with whom Bromberg J agreed on this issue) also considered Mr Vaysman’s age and health to be significant factors. His Honour referred to the following extract from *R v Smith* (1987) 44 SASR 587 at 589:

The state of health of an offender is always relevant to the consideration of the appropriate sentence for the offender. The Courts, however, must be cautious as to the influence which they allow this factor to have upon the sentencing process. Ill health cannot be allowed to become a licence to commit a crime, nor can offenders generally expect to escape punishment because of the condition of their health. It is the responsibility of the Correctional Services authorities to provide appropriate care and treatment for sick prisoners. Generally speaking ill health will be a factor tending to mitigate punishment only when it appears that imprisonment will be a greater burden on the offender by reason of his state of health or when there is a serious risk of imprisonment having a gravely adverse effect on the offender’s health.

1. On the question of whether imprisonment will be a greater burden on the offender by reason of his age and state of health, Besanko J observed at [126]–[127]:

126 First, I do not think that the burden must be “particularly onerous” … before ill health becomes relevant. It may be of less significance if it is not particularly onerous, but it is still relevant if it would impose a greater burden on the appellant.

127 Secondly, the appellant’s age and state of health were relevant to the sentence of imprisonment and not just the determination of the period he should spend in prison. That may not be so in some cases but it seems to me that this is a case where it was relevant to both issues.

1. In *Australian Competition and Consumer Commission v Halkalia Pty Ltd (No 3)*, when sentencing the contemnor for “willful and contumacious” contempt, Tracey J at [160]–[162] took into account the contemnor’s age and state of health, as well as the possible exacerbating effect of his concerns for his wife’s health in his absence.
2. The Court has a wide discretion in determining the length and conditions of any term of imprisonment imposed. However, it was emphasised by Gray J in *Vaysman* at [49] that:

…restraint is appropriate in imposing sentences of imprisonment for contempt of court involving contravention of, or failure to comply with, orders of the Court. The authority of a court can be brought into disrepute, rather than enhanced, by too great a tendency to punish severely in cases that do not warrant severity.

1. In deciding the appropriate amount of any fine, the Court will ordinarily take into account the contemnor’s financial means: *Australian Competition and Consumer Commission v Dynacast (Int) Pty Ltd (formerly Phoneflasher.com Pty Ltd) ACN 001 234 642* [2007] FCA 429 at [84].

### Consideration of appropriate penalties

1. The applicant accepts that there should be no punishment of Mr Hacker and OSGS in respect of the First Contempts, since pecuniary penalties will be imposed upon them in respect of the corresponding contraventions of s 50-5 of the TAS Act. However, the applicant submits that in respect of the remaining contraventions, a fine of $15,000 should be imposed on OSGS (which is the amount held in Mr Hacker’s solicitor’s trust account as a “surety” pursuant to the irrevocable authority of 26 November 2019), and Mr Hacker should be sentenced to 9 months imprisonment.
2. Mr Hacker and OSGS submit that they have not engaged in separate conduct and should not separately be penalised for the same conduct. They submit that a fine imposed on OSGS alone will have an adverse effect upon Mr Hacker as a shareholder, and that is a sufficient penalty for both. They submit, in the alternative, that if a term of imprisonment is to be imposed upon Mr Hacker, it should be limited and wholly suspended.
3. In my opinion, the conduct of Mr Hacker and OSGS demonstrates blatant indifference to the undertakings they offered to, and which were accepted by, the Court. Each contempt was committed in wilful and flagrant disregard of their undertaking. The breaches were contumacious, and are criminal contempts: cf *Witham v Holloway* (1995) 183 CLR 525 at 538–539. Apart from the assertion of frontotemporal lobe damage which I have rejected, no explanation or excuse has been offered. Each contempt can only be described as very serious.
4. The contempts generally followed a pattern. Mr Hacker and OSGS would be caught out by the applicant providing unregistered tax agent services for fee or reward in contravention of the undertaking; the applicant would commence proceedings for contempt; Mr Hacker and/or OSGS would admit the contempts; then they would promptly commit further breaches of the undertaking. The admissions acknowledged the contempts, but the contempts continued. In view of this pattern of conduct, I regard each contempt as progressively more serious.
5. Substantial weight must be given to the objects of general and specific deterrence. Those who provide undertakings to the Court should be left in no doubt that non-compliance will have appropriate consequences. In this case, specific deterrence is particularly important given the number and pattern of contempts committed by Mr Hacker and OSGS.
6. Mr Hacker does not have specific health problems that would make a sentence of imprisonment particularly onerous. However, I accept that any man of his age is likely to be in a deteriorating physical condition, and that imprisonment will be more onerous for him than it would for a younger man.
7. Mr Hacker is the sole provider for his household. His wife of 38 years suffers from arthritis and does not work. Any custodial sentence will impact, not only upon Mr Hacker’s own welfare, but that of his wife.
8. Mr Hacker and OSGS have no previous history of contempts of court.
9. In respect of the aspect of the Fifth Contempts that Mr Hacker and OSGS failed to fix a notice in a prominent place to the front door at OSGS’s office, I take into account that some effort was made to fix a sign displaying the requisite notice to the front door, although the sign was A4 size and not A2 size as required. The contempt would have been even more serious if no sign at all had been affixed.
10. I take into account that OSGS made early admissions of all of its contempts, and that Mr Hacker did so in respect of all but the First Contempts. The early admissions do not demonstrate remorse since Mr Hacker and OSGS would promptly breach the undertaking again (except after the Fifth Contempts). However, the admissions do have a utilitarian value which must be recognised.
11. I accept that no punishment should be imposed upon Mr Hacker or OSGS for the First Contempts, since the provisions of unregistered tax agent services which constitute the breaches of the undertaking have also been pursued as contraventions of s 50-5 of the TAS Act and pecuniary penalties will be imposed in respect of those contraventions.
12. It is also necessary to be careful not to impose double punishment upon Mr Hacker in circumstances where both OSGS and Mr Hacker breached the undertaking through the same acts, and where a fine imposed upon OSGS will impact upon Mr Hacker. Taking that matter into account, I will impose a single fine of $15,000 upon OSGS in respect of all of its contempts, other than the First Contempts.
13. In respect of the Second to Fifth Contempts committed by Mr Hacker, I consider that the only appropriate penalties are terms of imprisonment. I will, however, impose lesser terms of imprisonment than would otherwise have been imposed to take into account the fine of $15,000 imposed on OSGS.
14. In respect of the Second Contempts, I will impose a sentence of 14 days’ imprisonment upon Mr Hacker for each contempt. Those sentences will be served concurrently.
15. In respect of the Third Contempts, I will impose a sentence of one months’ imprisonment for each contempt. Those sentences will be served concurrently with each other, but cumulatively upon the sentences for the Second Contempts.
16. In respect of the Fourth Contempts, I will impose a sentence of two months’ imprisonment for each contempt. Those sentences will be served concurrently with each other, but cumulatively upon the sentences for the Third Contempts.
17. In respect of the Fifth Contempts, I will impose a sentence of four months’ imprisonment for each contempt. Those sentences will be served concurrently with each other, but cumulatively upon the sentences for the Fourth Contempts. The sentences for the Fifth Contempts will be suspended after Mr Hacker has served one month of the four months’ imprisonment, but the remainder of the sentence will be served in the event that he breaches the injunction which I have indicated I will grant within a period of three years from his release from prison.

## Costs

1. The applicant seeks an order that the respondents pay its costs of the Contravention Proceedings and the five proceedings for contempt of court (**the Contempt Proceedings**). The applicant submits that the costs of the Contempt Proceedings should be ordered on an indemnity basis.
2. The respondents oppose any order for costs in respect of the Contravention Proceedings on the basis that the applicant failed in respect of almost 3,000 contraventions alleged against the respondents, and ultimately succeeded only in respect of 45 contraventions. The respondents also submit that there is no general principle that costs are awarded on an indemnity basis for contempt and, further, in respect of the Second to Fifth Contempts, liability was admitted at an early stage.
3. In reply, the applicant submits that this is not an instance of an applicant conducting a case inappropriately so as to disentitle it from being compensated for its costs. It submits that in respect of the Contempt Proceedings, the applicant is entitled to be reimbursed for its costs on an indemnity basis because it should never have had to bring contempt charges at all. It submits that the early admissions of guilt limited the legal costs, but that does not mean that the applicant should not have the legal costs which it has incurred on an indemnity basis.
4. In *Tax Practitioners Board v Hacker*, I noted that there were two categories of contraventions alleged by the applicant. The first consisted of allegations where clients had provided affidavits deposing as to provision of tax agent services by Mr Hacker and payment for those services to either Naleview or OSGS (**the Affidavit Allegations**). The second consisted of allegations that Mr Hacker and OSGS provided approximately 3,000 tax agent services described in a Schedule A to the Further Amended Statement of Claim (**the Schedule A Allegations**). In respect of the latter category, the applicant sought to have the Court draw an inference that those services were provided in contravention of s 50–5, rather than being proved by direct evidence.
5. OSGS admitted five of the Affidavit Allegations, but contested the remaining one. Naleview admitted 33 of the Affidavit Allegations, but disputed four. Mr Hacker denied all of the Affidavit Allegations. The respondents denied all of the Schedule A Allegations.
6. At the commencement of the second day of the trial, the applicant’s lawyers discovered that the wrong transactions had been included in Schedule A. The applicant accepted that it could not succeed on the basis of the Schedule A Allegations and withdrew reliance upon them. The applicant sought leave to file a Second Further Amended Statement of Claim containing the correct transactions. However, I refused the application for leave to amend.
7. The applicant ultimately succeeded against OSGS in respect of all five of the Affidavit Allegations. The applicant succeeded against Naleview in respect of 37 of the Affidavit Allegations. The applicant succeeded in proving 45 Affidavit Allegations against Mr Hacker, all of which had been denied.
8. Costs ordinarily follow the event: *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [67] and [120]–[122]. However, success or failure on separate issues may lead the Court to apportion costs: see *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd (No 3)* [2007] FCAFC 119 at [11]; *Hughes v Western Australian Cricket Association Inc* (1986) ATPR 40–748 at 48,136; *Dodds Family Investments Pty Ltd (formerly Solar Tint Pty Ltd) v Lane Industries Pty Ltd* (1993) 26 IPR 261 at 271–272; *The State of Victoria v Sportsbet Pty Ltd (No 2)* [2012] FCAFC 174 at [6]–[8]. Ultimately, the Court is required to determine the appropriate order in the interests of justice: *Kosciuszko* *Thredbo Pty Limited v ThredboNet Marketing Pty Limited (No 2)* [2013] FCA 609 at [11].
9. In the Contravention Proceedings, the applicant has had only partial success. It failed in respect of a very substantial part of its case concerning the nearly 3,000 Schedule A Allegations. In my opinion, the clear delineation between the two categories of allegations, the failure of the applicant in respect of one of those categories and the significance of the failure makes it appropriate to depart from the ordinary position as to costs. I am inclined to order that there be no order as to the costs of the Contravention Proceedings.
10. However, the position is complicated by the Contempt Proceedings. There were five separate interlocutory applications alleging contempts of court against Mr Hacker and OSGS. The first two applications were dealt with at the end of the trial of the Contravention Proceedings. Subsequently, the issues of relief in respect of the proven contraventions of s 50-5 of the TAS Act and all the Contempt Proceedings were dealt with at the same hearing. There is, therefore, a substantial overlap between costs incurred by the applicant in respect of the Contravention Proceedings and the Contempt Proceedings.
11. I consider that the costs of the Contravention Proceedings and the Contempt Proceedings are best dealt with by taking a broad brush approach as to the respective contributions they must have made to the overall costs incurred by the applicant. Taking into account the relative success and failure of the applicant in the Contravention Proceedings and the extent of the overlap with the Contempt Proceedings, I propose to order that Mr Hacker and OSGS pay 35% of the applicant’s costs of the Contravention Proceedings and the Contempt Proceedings. The position is different with Naleview, as there were no allegations of contempt against Naleview. There should be no order for costs between the applicant and Naleview.
12. I do not accept the applicant’s contention that the respondents should pay the applicant’s costs of the Contempt Proceedings on an indemnity basis.
13. Indemnity costs may be awarded where there is some special or unusual feature in the case justifying a departure from the ordinary rule that party-and-party costs be paid: see, for example, *Anchorage Capital Partners Pty Ltd v ACPA Pty Ltd (No 2)* [2018] FCAFC 112 at [5]; *Re* *Wilcox; Ex Parte Venture Industries Pty Ltd (No 2)* (1996) 72 FCR 151 at 152; *Pinnacle Runway Pty Ltd v Triangl* *Ltd (No 3)* [2020] FCA 1379 at [39].
14. In *Re Wilcox*, Black CJ stated at 152:

…it is well established that the starting point for any consideration of an application for indemnity costs is that in the ordinary case costs will follow the event and the Court will order the unsuccessful party to pay the costs of the successful party, on a party and party basis, a basis which will fall short of complete indemnity. Nevertheless the court has an absolute and unfettered jurisdiction in awarding costs, although that discretion must be exercised judicially. So, indemnity costs may properly be awarded where there is some special or unusual feature in the case justifying the Court exercising its discretion in that way…

1. In *Kazal v Thunder Studios Inc* *(California)* (2017) 256 FCR 90, the Full Court observed at [192]–[195]:

192 A common consequence of success by a person bringing contempt proceedings is an indemnity costs order. Katzmann J in *Kazal v Thunder Studios Inc (California)* [2017] FCA 238 at [90] helpfully referred to *Connect TV Pty Ltd v All Rounder Investments Pty Ltd (No 4)* [2013] FCA 393 at [43] per Tracey J, and *Infa-Secure Pty Ltd v Crocker (No 2)* (2016) 338 ALR 586 (*Infa-Secure*) at [44] per Reeves J. Her Honour observed that in Victoria and in Queensland it seems to be the “common or usual practice” to award indemnity costs in contempt cases, referring to *Deputy Commissioner of Taxation v Gashi* (2011) 85 ATR 262 at [20] per Dixon J and the abovementioned case of *Infa-Secure*.

193 Katzmann J also pointed out that in *National Australia Bank Ltd v Juric (No 2)* [2001] VSC 398 at [70] Gillard J explained:

[I]t has been recognised for many, many years in contempt cases, that a litigant who must come to court in order to enforce an order which has been breached by contempt, or to have a person dealt with [for] contempt, should not be out of pocket.

194 Katzmann J pointed out that Moore J took a different view in *Construction, Forestry, Mining and Energy Union v BHP Steel (AIS) Pty Ltd* (2003) 196 ALR 350 at [6], based on a number of cases in this Court. Moore J observed (emphasis added by Katzmann J):

There has been limited judicial consideration of what principles (if any) govern the ordering of indemnity costs in contempt cases. It is at least clear, following *McIntyre v Perkes* (1988) 15 NSWLR 417 (see Samuels JA at 424-8 and Rodgers AJA at 434-6) (which involved a comprehensive review of the authorities including some suggesting the existence of a rule), that **there is no general principle or rule of law in contempt cases that a successful applicant or successful prosecutor is routinely awarded costs on an indemnity basis**: see also to the same effect in this court, *Adlam v Noack* [1999] FCA 1606; BC9907694 per Mansfield J at [29], *LED Builders Pty Ltd v Eagle Homes Pty Ltd* [1999] FCA 1213; BC9905513 per Lindgren J at [64]-[65]. Indeed as is the conventional practice in most cases, costs are routinely awarded in contempt cases on a party and party basis. In *McIntyre v Perkes* (1988) 15 NSWLR 417 Samuels JA (at 424 and 428) relevantly said:

The respondent, however, submitted that the judge had erred in failing to apply “the normal rule which in cases where an intentional contempt of Court is proved on an application by a private prosecutor is for costs to be ordered on a basis calculated substantially to indemnify the prosecutor”. …

In my opinion this survey, no doubt not exhaustive but reasonably extensive, of the textbooks and cases does not reveal any rule of law or any established practice binding upon the judge in this case and requiring him to make one of the orders for which the respondent contended.

195 There is no doubt that this Court has a discretion to award indemnity costs to a party bringing contempt proceedings. In many contempt cases there will be powerful discretionary considerations favouring the award of indemnity costs. If there is a variable practice in that regard, this is a case falling within the category for which an indemnity costs order would be entirely appropriate. No express reason was advanced in this case for departing from the at least common approach of awarding costs on an indemnity basis…

1. In *CFMEU v BHP*, Moore J also held:

[13] In the present matter I consider that it is appropriate to take into account when determining the penalty, the significant burden likely to have been imposed by the indemnity costs order of the primary judge, which has not been varied as a result of this appeal.

1. In *CFMEU v BHP*, Tamberlin and Goldberg JJ stated:

[53] We have read the observations of Moore J concerning the appropriateness of taking the costs order into account when fixing a penalty. In the light of the authorities referred to by his Honour, we accept that in exercising the wide discretion given as to the amount of any penalty, the consideration that indemnity costs have been awarded is a relevant matter to take into account. Nevertheless, given the underlying principle that disobedience to court orders must be discouraged, in a case such as the present, simply to impose a minimal penalty on the basis that indemnity costs have been ordered, may be perceived to downplay the significance of the contempt.

1. In *Metcash Trading Limited v Bunn (No 6)* [2009] FCA 266, Finn J held at [16]:

16 As is well accepted, the power to award costs in all proceedings is discretionary. Nonetheless, as is occasionally observed, it is “common or usual practice” to order that the contemnor pay costs on an indemnity basis: see eg *Concrete Constructions Pty Ltd v Plumbers and Gasfitters Employees’ Union (No 2)* (1987) 15 FCR 64 at 86-87. However, there is no general principle or rule of law in contempt cases to this effect: see *Construction, Forestry, Mining and Energy Union v BHP Steel (AIS) Pty Ltd* (2003) 196 ALR 350 at [6]; and see generally Dal Pont, *Law of Costs* (2nd ed, 2009) at [16.65]. As was observed by Moore J in the *BHP Steel* case at [8] “in a significant number of cases where indemnity costs have been awarded in contempt proceedings, there is a link between the award of indemnity costs and the penalty for contempt. Costs can be explicitly awarded in substitution for or in lieu of a monetary or other penalty”. In the present matter as I have indicated I intend to impose what I regard as being a reasonable and adequate pecuniary penalty. I take that matter into account in my consideration of an appropriate costs order.

1. These authorities demonstrate that:

(1) While it is common for an order to be made that the contemnor pay costs on an indemnity basis, there is no general principle or rule of law in contempt cases to that effect.

(2) It is relevant to take into account the burden of indemnity costs when considering the appropriate punishment for contempt.

(3) It is relevant to take into account the penalty imposed for contempt in determining the appropriate costs order.

1. Substantial sentences of imprisonment will be imposed upon Mr Hacker and a fine of $15,000 imposed on OSGS. That is relevant to the determination of the appropriate costs order. I consider that the applicant’s costs should be paid on a party-and-party basis.
2. The costs orders will be that Mr Hacker and OSGS pay 35% of the applicant’s costs of the Contravention Proceedings and the Contempt Proceedings on a party-and-party basis, and that there be no orders as to costs as between the applicant and Naleview.

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| I certify that the preceding one hundred and seventy-four (174) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rangiah. |

Associate:

Dated: 18 December 2020