FEDERAL COURT OF AUSTRALIA

Australian Building and Construction Commissioner v Upton (The Gorgon Project Case) (No 2) [2018] FCA 897

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| File number: |  |
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| Judge: | **BARKER J** |
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| Date of judgment: | 14 June 2018 |
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| Catchwords: | **INDUSTRIAL LAW** – where declarations made that respondents contravened sections 346(a), 348 and 500 of the *Fair Work Act 2009* (Cth) – appropriate pecuniary penalties – where only one penalty imposed in respect of the three civil penalty provisions pursuant to s 556 – where the lead contravention is intent to coerce in breach of s 348 – where penalties should reflect both specific and general deterrence – where the first respondent’s contraventions were deliberate and no contrition shown – penalty of 75% of the maximum imposed on first respondent – contravention record of second respondent regarded – where second respondent must do more to ensure its officials meet standards of the Act – penalty of 80% of maximum imposed on second respondent  |
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| Legislation: | *Fair Work Act 2009* (Cth) ss 3, 340, 342, 346(1), 348, 417(1), 421(1), 497, 500, 503, 546(1), 546(3)(a), 550(1), 556, 793, Ch 3, Pt 3-1 and Pt 3-4*Fair Work (Building Industry) Act 2012* (Cth)*Workplace Relations Act 1996* (Cth) (repealed)*Fair Work Bill 2008* (Cth) |
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| Cases cited: | *Australian Building and Construction Commissioner v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (The Australian Paper Case) (No 2)* [2017] FCA 367*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 271 IR 321; [2017] FCAFC 113*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (Castlemaine Police Station Case)* [2018] FCAFC 15*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (Perth Childrens’ Hospital Contraventions Case)* [2017] FCA 491*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Footscray Station Case)* [2017] FCA 1555*Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Nine Brisbane Sites Case) (No 3)* [2018] FCA 564*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Quest Apartments Case) (No 2)* [2018] FCA 163*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (Werribee Shopping Centre Case)* [2017] FCA 1235*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCA 1269*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCA 197*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union and Others* (2017) 249 FCR 458; [2017] FCAFC 53*Australian Building and Construction Commissioner v Huddy (No 2)* [2017] FCA 1088*Australian Building and Construction Commissioner v McCullough (No 2)* [2017] FCA 295*Australian Building and Construction Commissioner v Upton (The Gorgon Project Case)* [2017] FCA 847*Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560; [2008] FCAFC 8*Construction, Forestry, Mining and Energy Union* [2017] FWC 5824*Construction, Forestry, Mining and Energy Union v Director of the Fair Work Building Industry Inspectorate* [2017] FCA 1166*Darlaston v Parker (No 2)* (2010) 200 IR 353; [2010] FCA 1382*Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1213*Director of the Fair Work Building Industry Inspectorate v Bragdon (No 2)* [2015] FCA 998*Director of the Fair Work Building Industry Inspectorate v Cartledge* [2014] FCA 1047*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (The Mitcham Rail Case)* [2015] FCA 1173*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 226*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union and Another* (2014) 140 ALD 337; [2014] FCA 160*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union and Another (No 2)* (2015) 234 FCR 451; [2015] FCA 407*Director of the Fair Work Building Industry Inspectorate v Stephenson and Others* (2014) 146 ALD 75; [2014] FCA 1432*Director of the Fair Work Building Industry Inspectorate v Upton* [2015] FCA 672*Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2016] FCA 1225*Esso Australia Pty Ltd v Australian Workers’ Union* (2016) 245 FCR 39; [2016] FCAFC 72*Esso Australia Pty Ltd v Australian Workers’ Union (M185/2016); Australian Workers’ Union v Esso Australia Pty Ltd (M187/2016)* (2017) 350 ALR 404; [2017] HCA 54*McDonald v The Queen* (1994) 48 FCR 555; [1994] FCA 108*Pearce v The Queen* (1998) 194 CLR 610; [1998] HCA 57*Stuart-Mahoney v Construction, Forestry, Mining and Energy Union* (2008) 177 IR 61; [2008] FCA 1426*Temple v Powell* (2008) 169 FCR 169; [2008] FCA 714*The Attorney-General v Tichy* (1982) 30 SASR 84*The Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate and Others; Construction, Forestry, Mining and Energy Union and Another v Director, Fair Work Building Industry Inspectorate and Anothe*r (2015) 258 CLR 482; [2015] HCA 46*The Queen v McInerney* (1986) 42 SASR 111*Veen v The Queen (No 2)* (1988) 164 CLR 465; [1988] HCA 14*Zotos v The Queen* [2014] VSCA 324 |
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| Date of hearing: | 13 March 2018 |
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| Date of last submissions: | 20 March 2018 (First Respondent)23 March 2018 (Applicant) |
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| Registry: | Western Australia |
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| National Practice Area: |  |
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ORDERS

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|  | WAD 334 of 2016 |
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| BETWEEN: | AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONERApplicant |
| AND: | BRADLEY UPTONFirst RespondentCONSTRUCTION, FORESTRY, MINING AND ENERGY UNIONSecond Respondent |

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| JUDGE: | BARKER J |
| DATE OF ORDER: | 14 June 2018 |

THE COURT ORDERS THAT:

1. Pursuant to s 546(1) of the *Fair Work Act 2009* (Cth), there be a pecuniary penalty imposed on the first respondent for contravening s 348 of the *Fair Work Act 2009* in the sum of $8,100.
2. Pursuant to s 546(1) of the *Fair Work Act 2009* (Cth), there be a pecuniary penalty imposed on the second respondent for contravening s 348 of the *Fair Work Act 2009* in the sum of $43,200.
3. Pursuant to s 546(3)(a) of the *Fair Work Act 2009* (Cth), the pecuniary penalties be paid to the Commonwealth.

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

REASONS FOR JUDGMENT

BARKER J:

1. In *Australian Building and Construction Commissioner v Upton (The Gorgon Project Case)* [2017] FCA 847 (**liability judgment**), I made declarations of contraventions of ss 346(a), 348 and 500 of the *Fair Work Act 2009* (Cth) (**FW Act**) against each of **Mr** Bradley **Upton** and the Construction, Forestry, Mining and Energy Union (**CFMEU**). The Australian Building and Construction **Commissioner** now seeks the imposition of pecuniary penalties on each. This judgment considers what penalties are appropriate.
2. The factors that should be taken into account under the FW Act in imposing such penalties are well established and I need not repeat them here. They are considered below. However, I might observe at the outset that the principal object of such a penalty is to deter repetition by the contravener and by others who may be tempted to act similarly. See *The* ***Commonwealth*** *of Australia* ***v Director, Fair Work Building Industry Inspectorate*** *and Others; Construction, Forestry, Mining and Energy Union and Another v Director, Fair Work Building Industry Inspectorate and Another* (2015) 258 CLR 482 at [55]; [2015] HCA 46.
3. In furthering that object, the seriousness of the contravening behaviour must be regarded.
4. In this case, the maximum penalty for a contravention of the relevant civil remedy provisions is 300 penalty units for a body corporate and 60 penalty units for an individual. Given that at material times when the contraventions occurred the value of the penalty unit was $180, the maximum penalty for a contravention of each provision, in the case of each respondent, is:
* in the case of Mr Upton, $10,800; and
* in the case of the CFMEU, $54,000.
1. There is an additional issue lurking in this proceeding concerning the application of s 556 of the FW Act, which provides that:

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

1. The respondents say s 556 applies in respect of all contraventions, so that only one penalty can be imposed.
2. The Commissioner, however, submits that the true effect of s 556 is such that separate penalties ought be imposed against each of Mr Upton and the CFMEU for their breaches of each of ss 346(a), 348 and 500, because the contraventions of each provision do not involve the same “particular conduct”.
3. With those introductory observations, I will deal with the s 556 issue first; proceed to note the parties’ submissions on penalty factors and suggested outcomes; and then conclude with my assessment of the appropriate penalties.

#  The section 556 issue

1. As noted, s 556 provides:

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

1. The respondents contend that by virtue of this provision the Court can impose only one penalty in respect of one of the three civil penalty provisions and not a separate penalty in respect of each contravention.
2. In *Australian Building and Construction Commissioner v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (****The Australian Paper Case****)* ***(No 2)***[2017] FCA 367, Jessup J at [36]-[40] dealt with the application and operation of s 556. His Honour did so having just found, at [33], that a penalty of $3,500 was appropriate in respect of a contravention of s 417(1) of the FW Act [by the sixth respondent, Mr Sharp]. His Honour then turned, at [35], to the Australian Workers’ Union’s contraventions of the same provision, which his Honour considered should be met with a penalty of $20,000. At [36], he then said he needed to next consider the contraventions of s 421(1) of the FW Act. That is when s 556 became relevant.
3. His Honour said, at [36], that:

The question arises whether, having imposed a penalty on a particular respondent for his or its contravention of s 417, the court is prevented by s 556 from imposing a separate penalty for his or its contravention of s 421.

1. His Honour then, at [37], made reference to the predecessor provision of s 556 in the former ***Workplace Relations Act*** *1996* (Cth) and noted that neither that provision, nor s 556, had been the subject of any judicial examination in any context that would yield useful results for the present occasion. His Honour in particular commented that the Explanatory Memorandum for the Bill which introduced the predecessor provision, was “unrevealing” as to how the section was intended to be applied in the kind of problematic situation which confronted his Honour.
2. His Honour, at [38], observed that the problem has “two dimensions”. He said the first arises in what might be described as the simple case of two or more provisions having been contravened by the same conduct. He said that looks as though it ought to attract the operation of s 556, although counsel for the applicant before him submitted that the section operates only where the “constituent elements” of each contravention are the same. For example, industrial action taken in contravention of s 417(1) and s 421(1) did not involve the same elements, on that submission. It was contended that under s 417(1), but not under s 421(1), it was an element that the relevant enterprise agreement be within term. Under s 421(1), but not under s 417(1), it was argued, it was an element that an order by the Commission proscribing the industrial action had been made. Thus, it was contended, it could not be said that the penalty for which the FW Act provided related to the same “particular conduct” in each case.
3. His Honour considered, at [39], that it was “unlikely” that the draftsman had such a limited operation in mind when s 556 was drafted. He doubted that it was contemplated that there would be “two or more provisions which defined contravening conduct in terms that involved precisely matching elements”. He said he was not aware of any such situation and counsel for the applicant drew his attention to none.
4. In light of that analysis, Jessup J then considered, at [40], that the “better” view was as follows:

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

1. His Honour then considered the “second dimension” of the problem, as he saw it. He said this arose in the context of the case before him, because of contraventions of s 417(1) in which organisers were involved were not discrete ones which occurred on each of three days. They were “course of conduct” contraventions, the result of the operation of s 557 of the FW Act. His Honour said the “particular conduct” which gave rise to those conventions was spread over the three days. The question arose whether, at the point of considering the imposition of penalties for contraventions of s 421(1) on one of the days, the “particular conduct” to which those contraventions related had already been subject to penalty under s 417(1). In his Honour’s view, expressed at [42], the answer was in the affirmative. The conduct of the workers on the single day and the organisers’ involvement in that conduct had already been the subject of penalty under s 417(1), as part of a course of conduct. His Honour considered that was all that was required by s 556.
2. His Honour then concluded, at [43], that it followed that the imposition of penalties for the respondents’ contraventions of s 421(1) of the FW Act was “prevented” by s 556.
3. In *Australian Building and Construction Commissioner v Huddy (No 2)* [2017] FCA 1088 White J also dealt with the operation of s 556, commencing at [54].
4. At [55], his Honour said that the effect of s 556 was to “preclude” the imposition of pecuniary penalties for contraventions of two or more civil remedy provisions in respect of the same “particular conduct”. His Honour said that its application extends to contraventions of multiple provisions in the FW Act itself, referring to *Esso Australia Pty Ltd v Australian Workers’ Union* (2016) 245 FCR 39; [2016] FCAFC 72 at [210] (reversed on appeal in part but not by reference to s 556, see *Esso Australia Pty Ltd v Australian Workers’ Union (M185/2016); Australian Workers’ Union v Esso Australia Pty Ltd (M187/2016)* (2017) 350 ALR 404; [2017] HCA 54).
5. His Honour noted, at [56], that Jessup J in *The Australian Paper Case (No 2)* had rejected a submission that s 556 operated only when the “constituent elements of each contravention are the same”. White J referred to what Jessup J had said at [40], as set out above.
6. White J, however, rejected a submission that s 556 meant that only one penalty could be imposed for multiple contraventions of the same provision. His Honour said, at [61], that
s 566 does not have any operation in relation to multiple contraventions of the *same* provision in the FW Act, that being a subject matter addressed in s 557.
7. Similarly, in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (****The Quest Apartments Case****) (No 2)* [2018] FCA 163 at [23]‑[28], Tracey J, by reference to *The Australian Paper Case (No 2)* considered that s 556 is “enlivened” even if the constituent elements of the contraventions are not the same. His Honour said that:

What is critical is that the contraventions arise out of the same particular conduct by a respondent.

See also *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Nine Brisbane Sites Case) (No 3)* [2018] FCA 564 at [61]‑[64].

1. The Commissioner submits that these authorities do not stand for the proposition for which the respondents presently contend, and in the event that the Court finds that they do invites the Court to find that they are plainly wrong and should not now be followed.
2. The Commissioner submits that Jessup J failed to give due weight to the expressions “particular conduct” and “in relation to that conduct”, such that s 556 only operates where the “constituent elements” of two relevant contraventions are the same. He develops the constructional argument in the following way:
* The language of s 556 contemplates that the section will only be engaged if “particular conduct” that has caused a contravention of a civil remedy provision gives rise to the contravention of another law of the Commonwealth “in relation to that conduct”.
* Hence, the section is not engaged if the two civil remedy provisions have different elements that are required to be made out in order to establish a contravention of the applicable provisions.
* To the extent there is a different element that is required to be established before a particular contravention is made out, then it cannot be said that it is the same “particular conduct” that has triggered a liability in respect of the two civil remedy provisions.
* To give s 556 an application so that the Court is restricted to imposing only one penalty in respect of “conduct” where that conduct has different aspects or elements that trigger contraventions of two or more laws of the Commonwealth would be to give s 556 an operation that has never been recognised in respect of the common law operation of the notion of “double jeopardy”.
1. The Commissioner further develops the argument, partly by a reference to the subheading to s 556, “Civil double jeopardy” and contends that the purpose of the provision is simply to confirm that the common law principle of double jeopardy that has developed within the criminal law is also to be applied in respect of civil remedy provisions. Reference is made in this regard to the Explanatory Memorandum to the *Fair Work Bill 2008* (Cth), where, at [2187], it is said in respect of cl 556:

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

1. The Commissioner submits there is no suggestion in the Explanatory Memorandum or the Explanatory Memorandum to the predecessor of the provision in the former *Workplace Relations Act* that the double jeopardy principle developed within the criminal law is to be applied in a “broader way” than has been recognised by authority in the past.
2. The Commissioner submits that the common law principle of double jeopardy is to ensure that a person does not suffer “double punishment” for what is the same act. See Freiberg A, *Fox & Freiberg’s Sentencing: State and Federal Law in Victoria* (3rd ed, Thomson Reuters (Professional) Australia Limited, 2014) p 212; ***Pearce*** *v The Queen* (1998) 194 CLR 610; [1998] HCA 57 at [40].
3. The Commissioner submits that to the extent there is an overlap in respect of conduct that may be an element of more than one offence, that overlap should be reflected in the sentences imposed in respect of the offences in question.
4. The Commissioner says to the extent that it could be said in respect of two offences that they, as a matter of common sense (as discussed in *Pearce* at [42]) have the same features, and thus the one conduct has triggered a liability in respect of both offences, the double jeopardy principle will be applicable. It avoids double punishment.
5. The Commissioner submits, however, that if two offences, as a matter of common sense, have distinct elements it cannot be said that the one conduct has caused the contraventions of both offences. Two punishments should be imposed. Nonetheless a sentencing court will have regard to the overlap when fixing sentences and this is usually done in the criminal sphere by some allowance being made for the cumulative serving of sentences.
6. The Commissioner submits that the full criminality of conduct is what is to be punished and that objective should be seen as applicable in the operation of s 556.
7. If s 556 is construed in the manner that the respondents contend, the Commissioner says, the full wrongdoing of the contravener will not be addressed by the penalties fixed.
8. Finally, the Commissioner submits there is no reason why s 556 should be construed in a way different from the common law understanding of the double jeopardy principle, as seems to have been done in *The Australian Paper Case (No 2)*.
9. The Commissioner submits that each of ss 346(a), 348 and 500 of the FW Act have separate and distinct features that warrant the imposition of more than one penalty confined to solely one civil remedy provision.
10. The Commissioner submits s 500 is confined to conduct of a permit holder exercising rights under Pt 3-4. It is contravened if the permit holder acts “in an improper manner”. The intention of the permit holder to act in an improper manner is not a necessary element. See *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (****Castlemaine Police Station Case****)* [2018] FCAFC 15 at [55]. Furthermore, there is no requirement for any person to suffer an adverse impact as a consequence of the permit holder acting in an improper manner.
11. In contrast, the Commissioner submits s 346(a) is directed to a person taking “adverse action” because another person, as applicable in this case, is not a member of an industrial association. Central to this provision is the person having a proscribed intent when taking the action in question.
12. Furthermore, the action must come within the meaning of “adverse action” in s 342. In this case, this was found to involve taking action to prejudice a person in their employment, see s 342, Item 7(b) (liability judgment at [126]).
13. Thus, the Commissioner submits, the type of conduct that would trigger a liability under
s 500 is not the same conduct that has caused a contravention of s 346 in this proceeding. This must be the case as both sections have quite separate and distinct elements that are required to be made out.
14. In respect of s 348, the Commissioner contends the central thrust of the provision is as to the intent of the relevant person. The focus of the section is to take or threaten to take action “with the intent to coerce” the other person “to engage in industrial activity”. In this case, the relevant industrial activity was to become involved in an industrial association. This section is clearly quite distinct in its elements from s 500 and also has distinct mental elements to s 346(a).
15. The Commissioner thus submits that the Court is not prevented by the operation of s 556 from imposing separate penalties in respect of each contravention by the respondents of ss 346(a), 348 and 500 of the FW Act. In that regard the Commissioner withdraws a concession made earlier that s 556 had application in respect of s 346(a) and s 348. He contends the Court has the power to impose a separate penalty in respect of each contravention.
16. Nonetheless, the Commissioner accepts, having regard to the principle of “double punishment”, the level of overlap in respect of the contraventions should be given appropriate weight when fixing penalties in respect of these contraventions. In oral argument, the question of totality in imposing penalties was also recognised as being relevant in this regard.
17. At the penalty hearing, counsel for the CFMEU addressed the s 556 issue. Counsel for Mr Upton also made oral submissions but was given leave to supplement them with additional written submissions, which were subsequently filed.
18. The respondents, in effect, submit that the decision in *The Australian Paper Case (No 2)* was not plainly wrong and the Court should follow the decision.
19. Attention is drawn to what Jessup J said, at [40], of *The Australian Paper Case (No 2)* concerning the expression “particular conduct”, namely:

… what the person actually did, with all of its attributes and in its whole context.

1. Mr Upton further submits that the expression “in relation to particular conduct”, used in s 556, does not require limiting its application to penalty provisions with the same elements.
2. Mr Upton submits that the Commissioner fails to give sufficient weight to the ordinary grammatical meaning of the whole expression “in relation to particular conduct” when construing s 556 and contends that because of the employment of the words “in relation to” the whole phrase suggests that what is required is some connection, association, or relationship between the “particular conduct” and the imposition of a pecuniary penalty under two or more penalty provisions. Thus, the phrase “does not suggest a further examination of whether there are differing attendant/adjectival elements required to establish a contravention of those provisions”.
3. In any event, Mr Upton further submits that the expression “double jeopardy” is not always used with a single meaning, as discussed in *Pearce* at [40] and following, and it follows that the Commissioner’s submission that Jessup J’s construction of s 556 is one that has never been recognised in respect of a criminal law notion of double jeopardy is wrong.
4. The CFMEU maintains its submission that by reason of s 556 only a single penalty can be imposed on it for the three contraventions found against it.
5. Counsel for the CFMEU submits in construing s 556, the Court should be cautious of drawing inferences from the common law and from legislation in other States.
6. Counsel also submits that the Court should be careful of not falling into the trap of, in effect, describing the same conduct in a different way to come to a conclusion that a particular contravention found involves different conduct from the conduct that constituted the contravention of another provision.
7. In particular, counsel submits that the CFMEU accepted that one of the elements of the s 500 breach was that Mr Upton needed to be a permit holder. That constitutes a question of status, and not conduct, and so is not a differentiating conduct factor for the purposes of the application or non-application of s 556. By taking that approach, the Court would avoid semantics in the operation of s 556.
8. Indeed, counsel for the CFMEU submits that a sensible approach to the imposition of penalties under the FW Act requires a consideration of conduct as “part of one undifferentiated conduct”. He submits that that was the case run against the respondents.
9. In counsel’s submission, the same conduct is involved in each contravention – whether the unlawful statements which ground the contravention of s 346(a); or the unlawful statements that grounded the contravention of s 348; or the finding of acting in an improper manner in contravening s 500.
10. In counsel’s submission it would be an overly technical approach somehow to split the difference between the various elements and “put dollar values” on particular elements, rather than just looking at the conduct as a whole and imposing a single penalty, taking into account various factors that are involved in the conduct.
11. I should note at this point, that counsel for the CFMEU also dealt with the earlier submission of the Commissioner, made before the concession was withdrawn, that s 556 did apply to the imposition of penalty for contraventions of s 346(a) and s 348, and that coercion was a more serious type of contravention than others when it came to selecting the “lead” contravention. By reference to what Tracey J said in *The Quest Apartments Case*, counsel submitted that there was no authority to support the Commissioner’s proposition that a contravention of
s 348 should per se be treated as being more serious than contraventions of other provisions, and that nothing turned on such a distinction because the legislature has attached the same maximum penalties to each of s 346 and s 348. They should be treated as equally serious.
12. Counsel, however, accepted that objectively, in a particular case, some contravening conduct – including that of coercion – may be judged to be more serious than other contravening conduct.
13. While the Commissioner has contended that the holding of Jessup J in *The Australian Paper Case (No 2)* should be considered plainly wrong and not applicable in the case of the contraventions found here, I consider that what Jessup J said in that case does stand for the proposition that the respondents contend, and that it is not plainly wrong.
14. I accept that the line of argument put to me on behalf of the Commissioner was not rehearsed before Jessup J, but that does not make his Honour’s dicta and application of s 556 plainly wrong.
15. I recognise that it is open to argue that the expression “particular conduct” may require further identification of the “elements” of the conduct for which Parliament has created a civil liability offence in respect of which penalties must be imposed.
16. However, it is equally open to argue that the expression is wider than that, being “in relation to particular conduct”. I consider the use of the words “in relation to” would appear to be of some significance and to have the effect that Jessup J found s 556 has in a case such as the present.
17. In any event, if one focuses on the expression “particular conduct”, I am not satisfied that the conduct involved in the contraventions of ss 346(a), 348 and 500 in this case, is not the same particular conduct for the reasons offered by Jessup J at [40] of *The Australian Paper Case (No 2)*. It may be said therefore that the particular conduct in each of the three contraventions relates to the particular conduct of the other two.
18. I do not consider in these circumstances *The Australian Paper Case (No 2)* was plainly wrong.
19. For those reasons, I would apply s 556 in this case so that only one penalty should be imposed in respect of the three contraventions.
20. I do not accept the submission that either s 500, or s 348, or s 346(a) should in some conceptual theoretical sense be accorded priority status as the lead penalty offence. In my view, the Court should consider the seriousness of the contravening conduct and determine for itself, objectively on the facts, in respect of which contravention the primary penalty should be imposed.

# Nature and extent of the conduct and circumstances in which contraventions occurred

1. The Commissioner makes the following submissions in relation to this factor:
* There are many aggravating indicia in any analysis of the conduct of the respondents.
* Mr Upton attended the project in the exercise of entry rights on 3 December 2015 and gave an address at a meeting – which was found to be a “rant” or a “spray” (liability judgment [92]) – to approximately 50 to 60 employees of various contractors (liability judgment [94]).
* Contrary to the manner in which Mr Upton tried to describe in his evidence, he spoke at that meeting in an “aggressive manner” (liability judgment [92]).
* Mr Upton attended the meeting displeased with what he understood to be as many as 90 members of the CFMEU resigning from the union after an enterprise bargaining agreement had been achieved (liability judgment [92]). The threats thereafter made by Mr Upton at the meeting must therefore be viewed in this context as having had a level of pre-meditation. The meeting was not merely a report-back on what Mr Upton had apparently unexpectedly earlier learned at a night shift meeting, despite how Mr Upton sought to portray it in his evidence (liability judgment [87]).
* The Court found that Mr Upton addressed the meeting for about 10 minutes and said the following words, or words of the following substance (liability judgment [98]-[100] and [102])
	1. “The fucking 90 dog cunts that resigned from the union the day after we fucking signed the EBA after we got the conditions we got now, this is a fucking union site. If you don’t fucking like it, fuck off somewhere else. We got you these conditions, we know who you are. We’re going to put your names on the back of the toilet doors” (as to this statement, the Court found that Upton did not make the statement which was alleged, “we’re going to do standover tactics next year to let everyone know who you fucking dog cunts are”: liability judgment [101]);
	2. “If you’re not in the union, you can fuck off somewhere else. This is a fucking union site, we have other union sites starting up next year and if you’re not in the union, you can fuck off too, you are not welcome.”;
	3. repeatedly, the words, “fucking dog cunts”;
	4. “We fought for these conditions, and if you don’t want to be in the union, go somewhere else, you are not welcome”; and
	5. repeatedly, the words, “This is a union site”.
* The threats made by Mr Upton were found to constitute “adverse action” as contemplated by the FW Act because it was a threat against a non-union employee, such as Mr Keevers. The threat had the effect of directly or indirectly prejudicing non‑union employees in their employment (liability judgment [125]-[126]). That effect was found to be “real and substantial” (liability judgment [127]) and caused Mr Keevers to feel emotional harm or distress (liability judgment [126]).
* The conduct engaged in by Mr Upton included the making of threats that were “plainly intimidating” (liability judgment [128]) and coercive. The Court found that the threats:

… including as to names being put on toilet doors of non-union employees, and the insistent demands that the Gorgon Project was a union site, and that the union would, in the future, have other union sites, such that non-union labour would not be welcome there, negated choice as to whether or not a presently un-unionised employee should, or should not, join the union ….

[Liability judgment [144].]

* The threats were found by the Court to be unconscionable and left the non-unionised employees at the meeting with no real choice at all as to whether they should, or should not, join the union (liability judgment [144]).
* Recently, in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union and Others* (2017) 249 FCR 458; [2017] FCAFC 53, Dowsett and Rares JJ made the following observation in respect of contraventions that involve coercion (at [97]):

… It is important to recognise that coercion is a particularly serious form of industrial (mis)conduct ....

* These observations were applied by Reeves J in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy* *Union* **[2017] FCA 1269** at [32]. The observations are also apposite in this case.
* In *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2016] FCA 1225, Collier J, at [79], also noted that “coercion in itself is a serious allegation, representing unlawful conduct fundamentally contrary to the object of the FW Act in s 3 to promote cooperative and productive workplace relations in Australia”. The actions of Mr Upton should be considered in light of these comments.
* The conduct engaged in by Mr Upton also breached the standards of conduct that would be expected of a union organiser by reasonable persons with relevant knowledge of the duties of an organiser (liability judgment [171]).
* By his actions, Mr Upton demonstrated disregard for and contempt towards the rule of law, the provisions and objectives of the FW Act and the privileged rights of permit holders.
1. Mr Upton, by contrast, submits that:
* A fair characterisation of his contravening conduct, by reference to the various findings of the Court, was that it was in the nature of a threat (contained in a “spray” or “rant”) to put the names of non-unionised workers on the backs of toilet doors and that such workers should join a union or not work (or would not be welcome to work) on unionised sites (liability judgment at [128], [144]) albeit accompanied by other abusive language, and that one of those workers felt intimidated (in the sense of feeling emotional harm and distress). The result should be that the conduct is assessed towards the low to middle of the range of seriousness, and that the penalty imposed takes that into account.
* The contravening conduct occurred over the course of 10 minutes at the most.
* There was a complete absence of any economic loss or damage, and no stoppage of work.
* The level of intimidation (or emotional harm or distress) experience by Mr Keevers did not go beyond the immediate meeting at which Mr Upton spoke.
* The findings of fact by the Court do not support any particular level of pre‑meditation by Mr Upton; the Court did not find that he was aware of the number of resignations from the union before he went to Barrow Island for the meeting (liability judgment at [93]). Mr Upton submits that there is no reason that this factor should have any particular upward effect on the assessment of an appropriate penalty.
1. Mr Upton further submits that the Court would be led into error if it considered that a contravention of s 348 by its very nature is more serious than penalty provisions for which the Parliament has set a maximum penalty at the same level. He contends such an approach would be contrary to principle and the penalty regime established by the FW Act.
2. He agrees, however, that the conduct by which he was found to have contravened the FW Act fell well below standards of conduct expected of a union organiser.
3. But, he submits there was no evidence or finding by the Court that he acted with contempt for the rule of law and such a finding should not lightly be made – unless it is considered to be a proposition that applies to every person who contravenes a law.
4. The CFMEU submits that:
* The conduct founding the contraventions in this case is less serious than that found in other cases. Particularly, the conduct in this case was limited in duration (liability judgment [98]), involved only a single employee of the CFMEU, was seemingly unplanned by the CFMEU (Mr Keevers’ affidavit [8], liability judgment [93]), and did not form part of any concerted industrial disputation engaged in by the CFMEU.
* In relation to the specific impact of Mr Upton’s conduct, there is no evidence that Mr Upton’s conduct caused distress to any individuals other than Mr Keevers, despite several dozen additional people being in attendance at the meeting. As noted in the liability judgment at [104]:

The relatively amazing thing about these proceedings is that there were some 50 or 60 persons in attendance at the crib room meeting. However, only three of them – Mr Keevers, Mr Tawhai and Mr Upton – finishing up giving evidence to the Court about what was actually said and happened at the meeting.

* Furthermore, while the Court accepted at [126] of the liability judgment that Mr Upton’s conduct “caused Mr Keevers to feel emotional harm or distress”, the evidence suggests that the distress caused was limited. Mr Keevers describes his reaction to Mr Upton’s conduct in relatively bland terms as simply feeling “intimidated” (Mr Keevers’ affidavit [3]) and he did not complain of any “ongoing concern” in the complaint form (Mr Keevers’ affidavit, Annexure DCK-1).

# Nature and extent of loss and damage

1. The Commissioner makes the following point in relation to this factor:
* The Commissioner does not submit that any quantifiable economic loss or damage was caused by the unlawful conduct, and nor was any stoppage of work experienced.
1. Mr Upton submits the absence of such factors is relevant in assessing the relative seriousness of his contravening conduct in comparison with the full range of contraventions, including those that do cause loss, damage and stoppages of work. He says that reinforces the proper conclusion that the conduct be assessed towards the low to middle of the range of seriousness, and that the penalty imposed take that into account.
2. The CFMEU also notes there is no evidence that any economic loss or damage was caused by Mr Upton’s conduct.

# Whether or not the contraventions were deliberate

1. The Commissioner makes the following submissions in relation to this factor:
* Mr Upton’s conduct was deliberate and aimed at applying unlawful coercive pressure on the non-union employees at the meeting.
* The s 348 and s 346(a) contraventions were found to be undertaken with the relevant coercive, or otherwise unlawful, intent.
* The s 500 contravention involved a carefully planned union meeting which required Mr Upton to travel to the project (which was a remote location), and be the key speaker at the meeting together with other union representatives (liability judgment [84]-[85]).
1. Mr Upton notes the Court did not find that he was aware of the number of resignations from the union before he went to Barrow Island for the meeting (liability judgment [93]). Mr Upton submits that there is no reason that this factor should cause any particular “upward effect” on the assessment of an appropriate penalty.
2. The CFMEU submits that:
* There is no evidence that Mr Upton’s contraventions were planned with the knowledge of, or endorsed by, any other officials or employees of the CFMEU.
* Its contravention is purely a result of the legal fictions set out in s 550(1) and s 793 of the FW Act.
* This factor could have little or no effect on the penalty imposed on the CFMEU.

# Whether any Respondent has exhibited contrition

1. The Commissioner makes the following points in relation to this factor:
* There has been no contrition exhibited by either Mr Upton or the CFMEU.
* Far from being contrite, even while giving evidence, Mr Upton sought to downplay the seriousness of his conduct. In large part, the Court rejected Mr Upton’s evidence, finding him to be an extremely unconvincing witness in relation to the critical meeting, the role he played in it, and how he conducted himself and what he said (liability judgment at [105]).
1. Mr Upton:
* agrees that he has not provided the Court with any evidence of contrition;
* says that the Commissioner has unfairly mischaracterised the Court’s findings at [105] of the liability judgment, where the Court said, “In the event, I have not found him to be an extremely convincing witness …”, rather than finding he was extremely unconvincing; and
* submits that this factor should be treated as neutral in assessing his appropriate penalty.
1. The CFMEU:
* Does not contend that there is any evidence of contrition, corrective action or cooperation.
* Nonetheless, says that while a lack of cooperation may mean that there is no factor in mitigation, it is not an aggravating factor that could lead to the imposition of a penalty that is higher than that which is otherwise appropriate.

# Whether the Respondents have taken any corrective action

1. The Commissioner makes the following point in relation to this factor:
* There is no evidence that either Mr Upton or the CFMEU has taken any corrective action to mitigate against the effects of the unlawful conduct.
1. Mr Upton agrees that he has not provided the Court with any evidence of corrective action, but says this should not have any particular upward effect in assessing appropriate penalty.

# Whether the Respondents have cooperated with enforcement agencies

1. The Commissioner makes the following points in relation to this factor:
* Neither Mr Upton nor the CFMEU demonstrated any cooperation with enforcement agencies throughout this proceeding.
* To the contrary, Mr Upton and the CFMEU denied all matters of factual and legal controversy throughout this proceeding.
* The Commissioner was put to proof at trial on all matters, requiring the devotion of significant resources.
* The Commissioner accepts, however, that the fact that the respondents defended the application does not automatically lead to a finding of aggravation producing a higher penalty (*Australian Building and Construction Commissioner v McCullough (No 2)* [2017] FCA 295 at [64]).
1. Mr Upton submits the fact of his defence (and reliance on the penalty privilege) should not have any particular upward effect in assessing the appropriate penalty.

# Size and status of the CFMEU

1. The Commissioner makes the following submissions in relation to this factor:
* The CFMEU is a large, prominent and influential national union. It is cash and asset rich. There is no evidence of incapacity to pay.
* Each contravention involved the attendance of a CFMEU union official. This Court recently observed in *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* **[2015] FCA 226** (in the context of a contempt of court by the CFMEU):

28. The CFMEU is registered as an organisation pursuant to the *Fair Work (Registered Organisations) Act 2009* (Cth). As a registered organisation it is a recognised participant in the national industrial relations system which is governed by the Act. Under the legislation it derives benefits and incurs responsibility.

29. The CFMEU is organised nationally with a series of divisions and those divisions are further divided into State based branches. It is the Union’s Construction and General Division Victoria – Tasmania Divisional Branch which had administrative responsibility for the events which have given rise to these charges.

30. The size and nature of the organisation is a relevant factor in the assessment of an appropriate penalty: see *Construction, Forestry, Mining and Energy Union v BHP Steel (AIS) Pty Ltd* (2003) 196 ALR 350 at 358. This is because, generally, a failure to comply with an injunction or an undertaking which binds a large and powerful entity will be more likely to have an adverse impact on the public interest in the effective administration of justice than will a similar contravention by an individual engaged in private litigation. *Moreover, an organisation which is accorded a favourable status under a legislative regime bears broader responsibility than does a private individual: statutory recognition and advantage carry with them responsibility to other participants in the industrial relations systems and to the wider community. That responsibility requires adherence to the rule of law and to dispute resolution procedures prescribed by legislation and enterprise agreements.* (Emphasis added.)

* The Commissioner does not submit that senior management of the CFMEU was involved in the contraventions.
1. Mr Upton does not make any submission in relation to this consideration as it does not affect him.
2. The CFMEU submits:
* There is no evidence that any senior officials of the CFMEU were involved in the contraventions.
* The size of the CFMEU does not of itself justify a higher penalty than might otherwise be imposed. See *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 271 IR 321; [2017] FCAFC 113 at [105].

# Previous relevant contraventions

1. The Commissioner makes the following submissions in relation to this factor:
* When taking into account as a relevant factor whether there are any previous contraventions of industrial legislation, it is necessary to have regard to the way in which prior contraventions can be relevant to the evaluation of the appropriate penalty.
* An absence of any prior contraventions can mitigate what would otherwise be an appropriate penalty.
* On the other hand, a history of prior contraventions may be relevant in two ways (see [2015] FCA 226 and *Director of the Fair Work Building Industry Inspectorate v* ***Stephenson*** *and Others* (2014) 146 ALD 75; [2014] FCA 1432 at [78]):
	1. first, it deprives the contravener of the mitigation that would follow from a clean record; and
	2. secondly, similar previous conduct may demonstrate that:
		1. a respondent has a history of engaging in the particular conduct in question;
		2. the penalties previously imposed were insufficient to deter the respondent from re-engaging in that conduct; and
		3. the respondent has failed to take adequate steps to prevent further contraventions.
* Prior offences involving conduct of a different character to that engaged in any of these proceedings, will still be of relevance. As White J observed in *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union and Another* (2014) 140 ALD 337 at [53]‑[54]; [2014] FCA 160:

Even where the previous offending involved conduct of a different character, it may still be relevant to sentencing. Depending upon the circumstances, *a history of previous convictions may indicate an attitude of defiance of, or indifference to, compliance with the law. In either case, considerations of personal deterrence will usually be important in the sentencing process*.

…

What is important is the *quality of the conduct* in each case and its *relevance to the norms of industrial behaviour* which the current legislation seeks to establish or support. (Emphasis added.)

* Annexure 2 to the Commissioner’s written submissions comprises a table entitled “Prior Penalties and Declarations under Industrial Laws against Building Industry Associations and Other Participants” (the **contraventions table**). This table details the penalties imposed for contraventions of industrial law against the CFMEU.
* The Commissioner has colour coded the cases in the contraventions table to identify those cases in which:
	1. there were similar contraventions to the current contraventions (cases highlighted in red);
	2. a penalty was agreed between the parties (cases highlighted in green); and
	3. the Court undertook the task of assessing and fixing a penalty independent of an agreed penalty or range of penalties being provided by the parties (cases highlighted in orange).
1. In relation to the CFMEU, the Commissioner submits:
* The contraventions table discloses the CFMEU’s extensive history of prior contraventions of industrial laws. This table lists a vast number of separate legal proceedings where the CFMEU was found to have contravened industrial legislation or committed a contempt.
* The extensive list of prior contraventions is relevant to the assessment of the level of penalty that is necessary for deterrence. See, for example,***Temple*** *v Powell* (2008) 169 FCR 169 at [64]; [2008] FCA 714. The CFMEU is “an incorrigible recidivist” (*Zotos v The Queen* [2014] VSCA 324 at [47]). The penalties imposed in the past have evidently not caused the CFMEU or its officials to amend their conduct in line with the lawful standards imposed by industrial legislation.
* In *Director of the Fair Work Building Industry Inspectorate v* ***Cartledge*** [2014] FCA 1047 at [93], citing *Temple* at [64], Mansfield J observed: “I consider that the CFMEU’s record of contraventions ... demonstrates that a particularly persuasive form of … deterrence against similar misconduct in the future is appropriate”. The Court imposed a penalty of $30,000 against the CFMEU for its officials’ two contraventions of s 500 of the FW Act on 19 March 2014 and $100,000 for five contraventions of s 500 on 20 March 2014.
* Justice Flick in *Director of the Fair Work Building Industry Inspectorate v* ***Bragdon*** *(No 2)* [2015] FCA 998, referred to the observations expressed by White J in *Stephenson*, when he stated at [77] that:

Of particular relevance presently is that before 1 March 2014, the CFMEU and/or its employees have been dealt with for contraventions of right of entry provisions on 13 occasions, involving some 40 separate contraventions. In addition, since the subject contraventions, Mansfield J in *Director of the Fair Work Building Inspectorate v Cartledge* [2014] FCA 1047 (delivered on
2 October 2014), … imposed penalties on the CFMEU and its employees in respect of seven different contraventions of s 500 of the FW Act committed on 19 and 20 March 2014. *The record indicates an attitude of indifference by the CFMEU to compliance with the requirements of the legislation regarding the exercise of rights of entry. It also indicates that deterrence must be a prominent consideration in the fixing of penalties in the present cases*. (Emphasis added.)

* In *Bragdon*, the Court imposed a penalty of $225,000 against the CFMEU for two contraventions of s 497 of the FW Act, five contraventions of s 500 and four contraventions of s 503. This case was subsequently overturned on liability.
* In *Director of the Fair Work Building Industry Inspectorate v* *Construction, Forestry, Mining and Energy Union and Another (No 2)* (2015) 234 FCR 451; [2015] FCA 407, Tracey J made the following recent observations:

106. The circumstances of these cases were not identical to those in the present case. They, nonetheless, bespeak a deplorable attitude, on the part of the CFMEU, to its legal obligations and the statutory processes which govern relations between unions and employers in this country. This ongoing willingness to engage in contravening conduct must weigh heavily when the need for both specific and general deterrence is brought to account.

107. The CFMEU is not to be punished again for its earlier misconduct. It is, however, to be punished more severely than it would have been had it had no adverse record or been responsible for only a few isolated incidents over a period of many years. Its continued willingness to engage in contravening conduct supports the view that earlier penalties, some of them severe, have not had a deterrent effect: cf *Veen v R (No 2)* (1988) 164 CLR 465 at 477-8.

* Justice Tracey also observed in *Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1213 at [63] that:

The longer such recidivism continues the more likely it is that this consideration will carry greater weight than the principle that the maximum available penalty must be reserved for the worst possible offending.

* In *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (****The Mitcham Rail Case****)* [2015] FCA 1173 at [29],
Jessup J, when referring to the prior contraventions of the CFMEU and its officials, also observed:

The pattern of contravention which emerges from material such as this has been the subject of comment by the court on a number of occasions. The schedule paints, one would have to say, a depressing picture. But it is more than that. I am bound to say that the conduct referred to in the schedule bespeaks an organisational culture in which contraventions of the law have become normalised.

* More recently, in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (Werribee Shopping Centre Case)* [2017] FCA 1235 at [32], Tracey J observed that:

Having regard to the history of offending by the CFMEU to which I have referred, it may be doubted that any penalty falling within the available range for contraventions of the kind presently under consideration would be ‘sufficiently high to deter repetition’. Any penalty will be paid and treated as a necessary cost of enforcing the CFMEU’s demand that all workers on certain classes of construction sites be union members.

* Even more recently, in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Footscray Station Case)* [2017] FCA 1555 at [53], Tracey J said:

In *Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1213 at [63] I observed that the longer that the CFMEU’s recidivism continued, the greater the weight which would be accorded to specific deterrence when fixing appropriate penalties.

* The fact the CFMEU has continued to repeatedly act in contravention of industrial laws is directly relevant to both specific and general deterrence in this case and the warranting of substantial penalties.
1. In relation to Mr Upton, the Commissioner submits:
* Mr Upton has been found in *Director of the Fair Work Building Industry Inspectorate v* ***Upton* [2015] FCA 672** to have contravened industrial legislation – relevantly, s 500 of the FW Act on two separate occasions. The conduct engaged in by Mr Upton in that case bears a striking similarity to the established facts in this proceeding.
* Mr Upton was found in *Upton* [2015] FCA 672 to have contravened s 500 of the FW Act on 8 October 2012 and 13 February 2013 while exercising entry rights at the Wheatstone liquefied natural gas project in Western Australia.
* In relation to the contravention committed on 8 October 2012, Gilmour J found, at [29], it was a serious contravention “which could so easily have resulted in actual violence”.
* Mr Upton’s conduct in that case was found, at [28], to be “deplorable particularly so for someone acting in … official capacity” with the language used found to be “racially tainted abusive language” and, at [29], to have a “particularly nasty racist overtone”.
* On 30 November 2015 (just three days prior to the conduct engaged in by Mr Upton at the project), Mr Upton was declared to have taken adverse action in contravention of s 340 of the FW Act on 25 January 2013. Mr Upton’s conduct involved standing with other CFMEU officers at the front of the entrance to the New Children’s Hospital project in Nedlands in a manner designed to discourage employees from entering the site in the knowledge that unless he or others stood aside, no employee could enter the site. By reason of that conduct, employees were prevented and dissuaded from entering the site (see order of Barker J made on 30 November 2015 in WAD16/2014).
* As a consequence of his contravention referred to above, a pecuniary penalty in the sum of $3,500 was imposed against Mr Upton in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (****Perth Childrens’ Hospital Contraventions Case****)* [2017] FCA 491.
* The Commissioner notes that on 6 November 2017, the Fair Work Commission in *Construction, Forestry, Mining and Energy Union* [2017] FWC 5824, dismissed an application by the CFMEU under s 512 of the FW Act for an entry permit to be issued to Mr Upton. In reaching this decision, the Commission had regard to the decisions in *Upton* [2015] FCA 672, the *Perth Childrens’ Hospital Contraventions Case* and the liability judgment in this proceeding.
* As a consequence of this decision, Mr Upton is now no longer the holder of an entry permit.
* This should have no impact on the penalty to be imposed by the Court. It is not relevant to contraventions of Pt 3-1 of the FW Act for an individual to be the holder of an entry permit. It follows that specific deterrence still looms large in relation to Mr Upton.
1. Mr Upton submits that the following matters are relevant to the consideration of the level of penalty against him:
* Similar prior relevant conduct may be taken into account in assessing penalty, but it cannot be given such weight as to lead to the imposition of a penalty that is disproportionate to the gravity of the instant contravention: ***Veen*** *v The Queen (No 2)* (1988) 164 CLR 465 at 477; [1988] HCA 14 (Mason CJ, Brennan, Dawson and Toohey JJ).
* Similar previous conduct may demonstrate that a respondent has a history of engaging in the particular conduct in question, that the penalties previously imposed were insufficient to deter the respondent from re-engaging in that conduct and that the respondent has failed to take adequate steps to prevent further contraventions: *Veen* at 477; ***Stuart-Mahoney*** *v Construction, Forestry, Mining and Energy Union* (2008) 177 IR 61 at [44]; [2008] FCA 1426. Such considerations do not apply in relation to Mr Upton.
* A respondent is not to be punished again for the prior conduct. Prior conduct may diminish leniency by reason of good character, having an upward effect on penalty, albeit within the proper limits indicated by the circumstances of the immediately contravening conduct: *The Queen v McInerney* (1986) 42 SASR 111 at 113
(King CJ).
* Whether previous misconduct is relevant to fixing a penalty is a question of logic: *Temple* at [63].
* The quality of the conduct and its relevance to the industrial behaviour which the instant legislation seeks to address is determinative, not whether the prior conduct arose under different legislation or different provisions of the instant legislation: for example, *Stuart-Mahoney* at [46].
1. Mr Upton says further:
* that his personal relevant prior contraventions are not at a level that indicates an attitude of defiance, or indifference, to complying with the law;
* the contraventions table, referring as it does to contraventions by the CFMEU, should not be used in assessing the appropriate penalty for him personally;
* penalties should be proportionate to the conduct and seriousness of it; and
* the fact that he no longer holds a right of entry permit will reduce the relative need for specific deterrence because it reduces the likelihood of him contravening s 500 of the FW Act in the future.
1. The CFMEU:
* Notes the Commissioner has annexed to his submissions a table that purports to accurately set out the contraventions of various industrial statutes committed by the CFMEU since 2000.
* Accepts that its record of prior contraventions is substantial. However, the CFMEU reiterates the submissions made above to the effect that prior relevant conduct cannot operate so as to increase the penalty above that which is proportionate to the contravening conduct.
* Questions the utility of the contraventions table and says it appears that, rather than focusing on the critical task at hand, being a consideration of the particular conduct founding the contraventions, the Commissioner seeks to use the weight of an aide memoire (the contents of which would require oppressive time and resources to verify) to impermissibly increase the penalties to be imposed upon the CFMEU. The Court should resist such an approach.
* Submits that the Court should further be cautious in adopting the hyperbole urged by the Commissioner in relation to the CFMEU’s record where the officeholder representing the Commissioner at the time these proceedings were commenced, Nigel Hadgkiss, has been found by this Court in other proceedings to have:
	1. contravened “a law he was required to police” (see *Construction, Forestry, Mining and Energy Union v Director of the Fair Work Building Industry Inspectorate* [2017] FCA 1166 at [43]); and
	2. adopted a “partisan approach” during investigative processes (to this effect see *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCA 197 at [148]. The CFMEU submits this finding was described by the Full Court as “unnecessary”, but was not disturbed on appeal: *Castlemaine Police Station Case*.

# Specific and general deterrence

1. The Commissioner makes the following submissions in relation to this factor:
* Given the decision of the High Court in *Commonwealth v Director, Fair Work Building Industry Inspectorate*, deterrence is the primary, if not the only, objective in fixing penalties for civil contraventions.
* In terms of ensuring that the objective of deterrence is achieved with respect to a recidivist offender, the Full Federal Court in *Australian Competition and Consumer Commission v High Adventure Pty Limited* [2005] FCAFC 247 (Heerey, Finkelstein and Allsop JJ (as he then was)) observed, at [11], as follows:

As the cases to which the judge was referred show, the principal, if not the sole, purpose for the imposition of penalties for a contravention of the antitrust provisions in Part IV is deterrence, both specific and general. This rule is so well entrenched that citation of authority is unnecessary. Moreover, as deterrence (especially general deterrence) is the primary purpose lying behind the penalty regime, *there inevitably will be cases where the penalty that must be imposed will be higher, perhaps even considerably higher, than the penalty that would otherwise be imposed on a particular offender if one were to have regard only to the circumstances of that offender*. In some cases the penalty may be so high that the offender will become insolvent. *That possibility must not prevent the Court from doing its duty for otherwise the important object of general deterrence will be undermined*.
(Emphasis added.)

* As Reeves J recently observed in [2017] FCA 1269 at [45] in deciding that it was necessary to impose the maximum available penalty against the CFMEU:

… the history of contraventions by the CFMEU … requires a penalty that forces it to stop using such coercive conduct as a business model and the resulting penalty as a cost of doing business.

* This statement of principle resonates loudly in this case. It is plain that the CFMEU regards pecuniary penalties under industrial legislation as the mere cost of doing business (*The Mitcham Rail Case* at [29]). Past penalties have had limited (if any) effect on the CFMEU in terms of changing its behaviour. These considerations are critical in terms of the fixing of penalties in this case.
1. Mr Upton:
	1. accepts the deterrence relevance of a penalty; and
	2. notes that the Commissioner’s submissions appear directed towards the CFMEU.
2. Mr Upton submits that even where specific deterrence is a significant factor, any penalty must still be proportionate to the nature and extent of any breach, the circumstances in which the conduct took place and the nature and extent of any loss of damage sustained as a result. See *Veen* at 477.
3. The CFMEU accepts that the penalty must be sufficient to deter it from engaging in any further contraventions. The CFMEU further accepts that the penalty must achieve the objective of general deterrence.
4. However, the CFMEU submits that:
* the penalty must nonetheless be proportionate to the gravity of the contravening conduct (*The Attorney-General v Tichy* (1982) 30 SASR 84 at 92-93); and
* whether the penalty is consistent with penalties imposed in other, similar matters commonly operates as a final check on the penalty (***Australian Ophthalmic Supplies*** *Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 at [56]; [2008] FCAFC 8).

# The totality principle

1. The Commissioner makes the following points in relation to this factor:
* When imposing penalties for multiple contraventions the Court must also take into account the totality principle. See in this regard, *Australian Ophthalmic Supplies* at [23].
* The totality principle requires that, after the Court has fixed a penalty appropriate for each individual contravention, the Court considers whether the total of those penalties is appropriate for the total contravening conduct (*Australian Ophthalmic Supplies* at [23], [96]-[97]; *Cartledge* at [59]; *Stephenson* at [151]).
* Taking account of the relevant principles and the admitted conduct, the penalties set out in the penalty table are appropriate and within the permissible range (see below).
1. Mr Upton submits:
* that because (by operation of s 556 of the FW Act) only one penalty should be imposed in this matter, the totality principle is not relevant; and
* the totality principle is designed to ensure that the sum of the penalties imposed for multiple contraventions does not result in the total of the penalties exceeding what is proper having regard to the totality of the contravening conduct involved. See *Darlaston v Parker (No 2)* (2010) 200 IR 353 at [16]; [2010] FCA 1382, citing *McDonald v The Queen* (1994) 48 FCR 555; [1994] FCA 108.

# Penalty recommendations

1. The Commissioner submits that the following penalties should be imposed:

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| --- | --- | --- | --- | --- |
|  | **Contravention(s)/Action** | **Maximum Penalty** | **Suggested Penalty Range** | **Percentage of Maximum Penalty** |
| **Mr Upton** |
| 1. | s 346(a) | $10,800 | $4,320–$4,860 | 40–45% |
| 2. | s 348 | $10,800 | $4,320–$4,860 | 40–45% |
| 3. | s 500 | $10,800 | $8,100–$8,640 | 75–80% |
| **CFMEU** |
| 4. | s 346(a) | $54,000 | $24,300–$27,000 | 45–50% |
| 5. | s 348 | $54,000 | $24,300–$27,000 | 45–50% |
| 6. | s 500 | $54,000 | $45,900–$48,600 | 85–90% |

1. As to the suggested penalty in the case of Mr Upton’s breach of s 346(a), the Commissioner says the lower percentage proposed is a reflection of the significant overlap involving the s 346(a) and s 348 contraventions.
2. A similar point is made by the Commissioner in relation to the suggested penalty to be imposed on the CFMEU for its breach of s 346(a).
3. A similar point is also made in respect of the proposed penalty to be imposed on the respondents in respect of the breach of s 348.
4. The penalties proposed reflect the Commissioner’s submission that there should be separate penalties imposed on the respondents for the contraventions of each of the relevant provisions of the FW Act. The latter submission I have not accepted. The primary penalty submissions nonetheless remain relevant and I take them into account.
5. On behalf of Mr Upton, it is submitted that an appropriate assessment of the penalty in his case would be in the range of 30‑40% of maximum, namely, between $3,240 and $4,320.
6. Mr Upton submits that s 556 of the FW Act operates to prevent a separate penalty being imposed in relation to the contravention of s 500.
7. Mr Upton’s submissions reflect a difference of view between Mr Upton and the Commissioner as to the seriousness that should be accorded to the conduct constituting his contraventions of the FW Act.
8. Mr Upton submits:
	1. a fair characterisation of his contravening conduct should result in it being assessed at the low to middle of the range of seriousness;
	2. the contravening conduct occurred over the course of 10 minutes at the most;
	3. there was a complete absence of any economic loss or damage, and no stoppage of work;
	4. the level of intimidation (or emotional harm or distress) experienced by Mr Keevers did not appear to go beyond the immediate meeting at which Mr Upton spoke; and
	5. to the extent they are relevant to penalty, his prior contraventions do not disclose any particularly strong need for specific deterrence.
9. Mr Upton submits that the Court should not be distracted from a proper assessment of the penalty to be imposed upon him by the Commissioner’s “voluminous and largely irrelevant” materials relating to the CFMEU.
10. The CFMEU submits that, applying instinctive synthesis, and having regard to the principles of proportionality, consistency, and deterrence, the Court should impose a penalty of $32,400 on the CFMEU having regard to the usual penalty factors.
11. The CFMEU contends:
* A single penalty should be imposed for its contraventions of ss 346(a), 348 and 500.
* A single penalty of $32,400, or 60% of the maximum penalty available, should be imposed upon it.
* The circumstances of this matter concerning the CFMEU are less serious than other matters set out in the contraventions table in that:
	1. Mr Upton’s conduct was not part of concerted industrial disputation, in pursuit of any industrial claim, or for any personal gain;
	2. Mr Upton was not accompanied by any other officials of the CFMEU, including delegates;
	3. Mr Upton’s conduct occurred during one meeting on a single day, and did not form part of a pattern of coercive behaviour; and
	4. there is no evidence that Mr Upton’s conduct was planned by the CFMEU; indeed, there is evidence that his conduct was prompted by concerns raised by members at an earlier meeting.
* The Court should not accept the submissions made by the Commissioner at [28] to [30] to the effect that “coercion” contraventions of the FW Act are more serious than other types of contraventions. The Parliament has prescribed the same penalty for contraventions of ss 346(a), 348 and 500 of the FW Act. The issue in determining penalty is the nature of the conduct, not the type or number of overlapping contraventions.
* A total penalty of $32,400 is proportionate to the CFMEU’s overall conduct, satisfies the totality principle, and is sufficiently high to achieve specific and general deterrence.

# Consideration of penalties

1. The conduct of Mr Upton that has resulted in the contraventions of ss 346(a), 348 and 500 is essentially the same. As I found in the liability judgment, and is highlighted by the Commissioner’s submissions, Mr Upton’s behaviour and conduct at the meeting of employees on 3 December 2015 was quite appalling. While I have not found that he went to the Gorgon Project site knowing that a number of former union members had ceased their membership of the CFMEU following the successful completion of the enterprise agreement, having apparently found that out at the night shift meeting before the morning meeting, Mr Upton plainly did not hold back in expressing his displeasure when addressing the employees at the meeting.
2. I do not need to repeat the language that he used. It was foul. It was calculated to send a strong message to all employees, whether members of the CFMEU and other unions, or not, that continued membership of unions was essential to obtaining continued employment on sites such as the Gorgon Project.
3. The language used was intended to intimidate employees into accepting that they must be union members if they wanted work.
4. Telling employees that their names might be put on the back of toilet doors was particularly intimidatory. It was well understood that such action may lead to retribution against an individual so named.
5. It is common, it seems, for some members of unions to believe that any manner of foul language or intimidatory conduct is par for the course at a union meeting. There is no particular reason why this should be so. It does not automatically have to follow that a good argument for persons to become and remain members of a union, for all the compelling reasons why unionism has been and is important in Australia, must be accompanied by the sort of appalling conduct that Mr Upton engaged in on this occasion. It is precisely that sort of conduct that gives unions and union representatives a bad name.
6. Mr Upton’s conduct here constitutes the taking of adverse action against another person because the other person is not a member of an industrial association, conduct proscribed by s 346(a). The same conduct relevantly constitutes a threat to take action against another with an intent to coerce the other person to engage in industrial activity – namely, to be or remain a member of a union, conduct proscribed by s 348. The same conduct also contravenes s 500, because Mr Upton was a permit holder, exercising rights under Pt3-4 of Ch 3 of the FW Act, who acted in an improper manner.
7. While there was not extensive evidence from persons who felt threatened by Mr Upton’s conduct, I have found that Mr Keevers was intimidated by what was said. I have pointed out that he made a complaint soon after the meeting about Mr Upton’s conduct to management.
8. No matter how one looks at it, Mr Upton’s conduct breached the standards expected of a union organiser by reasonable persons with relevant knowledge of the duties of an organiser. There is no warrant or excuse for the sort of behaviour that Mr Upton engaged in.
9. It may be that such union behaviour goes down well amongst some of the hierarchy and rank and file of a union, but it is not conduct that reasonable people in the community who have some understanding of the role and importance of unions expect of a responsible union official.
10. While Mr Upton, in his submissions, has accepted that his conduct was in the nature of a “spray” or “rant”, that he used abusive language, and that one worker felt intimidated, on his behalf it is submitted that the result should be a penalty that reflects a contravention in the low to middle range of seriousness.
11. I do not consider that his conduct should be considered in a low to middle range. It is in the middle range and above.
12. Nor does the fact that the contravening conduct occurred in the course of 10 minutes or so reduce its seriousness. A time factor may be relevant in some cases, but each case must be considered on its own. Mr Upton had a lot to say in a short period of time in delivering a very blunt and intimidatory message to his audience.
13. It was not one of those occasions where what Mr Upton had to say was meant to cause any economic loss or damage to any person, or stoppage of work. Rather, it was all about intimidating non‑union labour and coercing them to join the union and remaining a member.
14. In the circumstances, I consider the lead contravention for the purpose of imposing penalties, in this case, is the breach of s 348, the intent to coerce contravention. The other two contraventions flow from that intent.
15. So far as the question of whether the contraventions were deliberate is concerned, I have no doubt that they were. While I have not found, as noted, that Mr Upton arrived at the Gorgon Project planning to engage in the particular conduct in question, plainly enough he was motivated to do so after the nightshift meeting preceding the meeting in question. He knew exactly what he was doing.
16. I accept, however, so far as the CFMEU is concerned, there is no evidence that it had any knowledge of or endorsed how Mr Upton conducted himself on the day. However, it has to be said that the CFMEU, given its history of involvement in industrial disputation and prior contraventions, has to take responsibility for the conduct of its officials and surely, at one point or another, must begin to take positive steps to educate its officials not to contravene the law and as to proper standards of conduct.
17. That leads me to the further observation that neither Mr Upton nor the CFMEU has shown any particular contrition in relation to Mr Upton’s behaviour. Indeed, at trial, Mr Upton did his best to put the most benign construction on his behaviour – a construction I have rejected.
18. There is no evidence that any corrective action has been taken, either by Mr Upton or the CFMEU. As I say, it really is time where large and influential unions such as the CFMEU, like any other responsible entity in Australia that has been found responsible for contraventions of a regulatory system, acknowledge misconduct and take positive steps to correct it in the public interest. There is no evidence of any such corrective action in this case.
19. Nor is there any particular evidence of cooperation with the Commissioner in relation to the enforcement action taken here. Given that Mr Upton defended the proceedings, that is not surprising. That was his entitlement. I do not place any particular emphasis on his lack of cooperation. The question of cooperation is relevant where a party has acknowledged contravention and the Court is asked to give some credit for doing so in the imposition of a penalty.
20. Mr Upton is a union official. The CFMEU is a very large and influential organisation in Australia. There is considerable evidence before the Court, set out in great detail in the submissions of the Commissioner, as to its past misdeeds and contraventions of industrial legislation. I take that into account.
21. Mr Upton has, on two separate occasions prior to the date of these events, been found in contravention of the FW Act. On each occasion, he was a union organiser. I have set out the Commissioner’s submissions about that above.
22. I also note the relevant submissions made on Mr Upton’s behalf in this regard, which I generally accept, in the sense that Mr Upton is not to be punished again for what he has done in the past. But I do not accept the tenor of the subsequent submissions made on his behalf, that his contravening conduct is not at a level that indicates an attitude of defiance or indifference to complying with the law. In my view, his conduct entirely reflects such an attitude.
23. I broadly accept the CFMEU’s submission that the Court must focus on particular contraventions at hand, for which it has liability under the FW Act. As I have observed above, the CFMEU is large and influential union in Australia. It knows, or at least is taken to know, the rules under which industrial organisation occurs in this country. It has the responsibility for ensuring that its representatives, such as Mr Upton, comply with the law and know exactly what standards of behaviour are expected of them. It is obliged to do more than is evident in this case in ensuring that its organisers conduct themselves properly.
24. In the result, I consider that there should be a penalty imposed on the respondents that reflects both specific deterrence and general deterrence considerations. In other words, Mr Upton must receive a penalty that communicates directly to him the complete inappropriateness of his conduct in question. Similarly, the CFMEU must be the subject of a penalty that reminds it, yet again, of its responsibilities as a major union in this country. The penalties should send a message that subsequent or like contraventions will be met with increasingly higher penalties.
25. The actual amount of the penalties here, of course, must reflect the maximum penalty available under the FW Act, and the requirements of s 556 of the FW Act.
26. In respect of Mr Upton, I consider that, for the breach of s 348, a penalty more than the mid-range should be imposed, equivalent to around 75% of the maximum, namely $8,100.
27. In respect of the CFMEU, I accept, on this occasion, the general thrust of the submissions made on behalf of the CFMEU, but subject to the observations I have made that the CFMEU must do more to ensure that its officials meet the standards and expectations for the behaviour of a union embodied in the FW Act. I do not accept that 60% of the maximum penalty, however, suggested by the CFMEU is appropriate and would, having regard to the contravention record of the CFMEU, impose a single penalty of 80% of the maximum available on this occasion, namely, the sum of $43,200.
28. As in the case of Mr Upton, I impose the penalty on the CFMEU for its contravention of s 348.
29. Because of the finding I have made in relation to the operation of s 556 in a case such as the present, penalties are not imposed in respect of the contraventions of the other provisions.
30. The parties agree that all penalties should be paid to the Commonwealth as authorised by s 546(3)(a) of the FW Act.
31. The orders to be made appear in the orders page above.

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| I certify that the preceding one hundred and forty-three (143) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Barker. |

Associate:

Dated: 14 June 2018