FEDERAL COURT OF AUSTRALIA

Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining And Energy Union (The Springvale Rail Crossing Removal Case) [2018] FCA 1968

File number(s):	VID 195 of 2016
Judge(s):	**O'CALLAGHAN J**
Date of judgment:	7 December 2018
Catchwords:	**INDUSTRIAL LAW** – contraventions of ss 348, 417(1), 494(1) and 500 of *Fair Work Act 2009* (Cth) – making of orders as to penalty – personal payment order – form of personal payment order – consideration of proportionality principle
Legislation:	*Crimes Act 1914* (Cth), s 4AA *Fair Work Act 2009* (Cth), ss 348, 355, 417(1), 494(1), 500, 557 *Occupational Health and Safety Act 2004* (Vic), ss 58, 70
Cases cited:	*Australian Building and Construction Commissioner v Powell* (2017) 251 FCR 470 *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25 *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Broadway on Ann Case)* [2018] FCAFC 126 *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Non-Indemnification Personal Payment Case*) [2018] FCAFC 97 *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Non-Indemnification Personal Payment Case) (No 2)* [2018] FCAFC 117
Date of hearing:	19 November 2018

Registry:	Victoria
Division:	Fair Work Division
National Practice Area:	Employment & Industrial Relations
Category:	Catchwords
Number of paragraphs:	74
Counsel for the Applicant:	Mr M J Follett
Solicitor for the Applicant:	Minter Ellison
Counsel for the Respondents:	Ms S Kelly
Solicitor for the Respondents:	CFMMEU - Legal Branch

ORDERS

VID 195 of 2016

BETWEEN:	**AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER** Applicant
AND:	**CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION** First Respondent
	JOSEPH MYLES Second Respondent
JUDGE:	**O'CALLAGHAN J**
DATE OF ORDER:	**7 DECEMBER 2018**

PENAL NOTICE

TO: THE CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION AND JOSEPH MYLES

IF YOU (BEING THE PERSON BOUND BY THIS ORDER):

(A) REFUSE OR NEGLECT TO DO ANY ACT WITHIN THE TIME SPECIFIED IN THIS ORDER FOR THE DOING OF THE ACT; OR

(B) DISOBEY THE ORDER BY DOING AN ACT WHICH THE ORDER REQUIRES YOU NOT TO DO,

YOU WILL BE LIABLE TO IMPRISONMENT, SEQUESTRATION OF PROPERTY OR OTHER PUNISHMENT.

ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANYTHING WHICH HELPS OR PERMITS YOU TO BREACH THE TERMS OF THIS ORDER MAY BE SIMILARLY PUNISHED.

In these declarations:

(1) "**BBA**" means Balfour Beatty Australia Pty Ltd.

(2) "**FW Act**" means the Fair Work Act 2009 (Cth).

(3) "**McDow**" means McConnell Dowell Constructors (Aust) Pty Ltd.

(4) "**OPT**" means Oak Park (Tullamarine) Pty Ltd.

(5) "**Oz Fixing**" means Oz Fixing Pty Ltd.

(6) "**Project**" means the Springvale Rail Crossing Removal Project.

(7) "**Rigweld**" means Rigweld Holdings Pty Ltd.

(8) "**Site**" means the Project construction site at and around the existing intersections of Springvale Road, Queens Avenue, Lightwood Road and Sandown Road.

THE COURT DECLARES THAT:

1. On 19 June 2013, the second respondent, an officer of the first respondent for the purposes of section 363(1)(b) of the FW Act, contravened section 355 of that Act when he threatened to organise a "blue" and pickets outside the gate to the Site, with intent to coerce McDow and/or BBA to not engage a particular independent contractor on the Project, namely Clifton Formwork (Vic) Pty Ltd.

2. On 19 June 2013, by the conduct of the second respondent referred to in the previous declaration and the operation of sections 363(1)(b) and 363(3) of the FW Act, the first respondent engaged in the said conduct with the said state of mind, thereby itself contravening section 355 of that Act.

3. On 6 February 2014, the second respondent, an officer of the first respondent for the purposes of section 363(1)(b) of the FW Act, contravened section 348 of that Act when he counselled various employees of OPT and Oz Fixing to engage in industrial action by remaining in the Site sheds and failing or refusing to perform any work, with intent to coerce McDow and/or OPT to comply with a lawful request of the first respondent to organise for employees of OPT and Oz Fixing to attend a CFMMEU manual handling training course.

4. On 6 February 2014, by the conduct of the second respondent referred to in the previous declaration and the operation of sections 363(1)(b) and 363(3) of the FW Act, the first respondent engaged in the said conduct with the said state of mind, thereby itself contravening section 348 of that Act.

5. On 6 February 2014, the second respondent, an employee of the first respondent acting on its behalf and within the scope of his authority within the meaning of section 793(1) of the FW Act, by counselling various employees of OPT and Oz Fixing to engage in industrial action before the enterprise agreements by which they were covered had reached their nominal expiry dates, was within the meaning of section 550 of the FW

Act, involved in contraventions of section 417(1) of that Act by the said employees of OPT and Oz Fixing, thereby himself contravening section 417(1) of that Act.

6. On 6 February 2014, by the conduct of the second respondent referred to in the previous declaration and the operation of sections 793(1) and (2) of the FW Act, the first respondent engaged in the said conduct with the said state of mind, thereby itself contravening section 417(1) of that Act.

7. On 6 February 2014, the second respondent, a permit holder within the meaning of the FW Act and an employee of the first respondent acting on its behalf and within the scope of his authority within the meaning of section 793(1) of that Act, by exercising or seeking to exercise the right under section 484 of the FW Act to enter the Site for the purpose of holding discussions with various employees of OPT and Oz Fixing without giving an entry notice for the intended entry pursuant to section 487(1) of that Act, acted in an improper manner and thereby contravened section 500 of that Act.

8. In respect of the second respondent's contravention of section 500 of the FW Act referred to in the previous declaration, the first respondent:

   (a) engaged in the second respondent's conduct by operation of section 793(1) of that Act and thereby participated in that contravention;

   (b) is taken by operation of section 793(2) of that Act, to have known of all of the essential facts constituting that contravention;

   (c) was accordingly knowingly concerned in that contravention within the meaning of section 550 of that Act; and

   (d) thereby itself contravened section 500 of the FW Act.

9. On 13 February 2014, the second respondent, an employee of the first respondent acting on its behalf and within the scope of his authority within the meaning of section 793(1) of the FW Act, by counselling four employees of Rigweld to engage in industrial action before the enterprise agreements by which they were covered had reached their nominal expiry dates, was within the meaning of section 550 of the FW Act, involved in contraventions of section 417(1) of that Act by the said employees of Rigweld, thereby himself contravening section 417(1) of that Act.

10. On 13 February 2014, by the conduct of the second respondent referred to in the previous declaration and the operation of sections 793(1) and (2) of the FW Act, the

first respondent engaged in the said conduct with the said state of mind, thereby itself contravening section 417(1) of that Act.

11. On 13 February 2014, the second respondent, a permit holder within the meaning of the FW Act and an employee of the first respondent acting on its behalf and within the scope of his authority within the meaning of section 793(1) of that Act, by failing to produce for inspection a copy of his entry permit to either of two representatives of the occupiers of the Site (Peter Fraser and Innes Menke) upon their requests whilst exercising or seeking to exercise a State or Territory OHS right within the meaning of section 494(2) of the FW Act, acted in an improper manner and thereby contravened section 500 of that Act.

12. In respect of the second respondent's contravention of section 500 of the FW Act referred to in the previous declaration, the first respondent:

    (a) engaged in the second respondent's conduct by operation of section 793(1) of that Act and thereby participated in that contravention;

    (b) is taken by operation of section 793(2) of that Act, to have known of all of the essential facts constituting that contravention;

    (c) was accordingly knowingly concerned in that contravention within the meaning of section 550 of that Act; and

    (d) thereby itself contravened section 500 of the FW Act.

13. On 13 February 2014, the second respondent, a permit holder within the meaning of the FW Act and an employee of the first respondent acting on its behalf and within the scope of his authority within the meaning of section 793(1) of that Act, by refusing numerous directions from representatives of the occupiers of the Site (Lisa Ranftl, Innes Menke, Percy Jordan and Peter Fraser) to leave the Site whilst exercising or seeking to exercise a State or Territory OHS right within the meaning of section 494(2) of the FW Act, acted in an improper manner and thereby contravened section 500 of that Act.

14. In respect of the second respondent's contravention of section 500 of the FW Act referred to in the previous declaration, the first respondent:

    (a) engaged in the second respondent's conduct by operation of section 793(1) of that Act and thereby participated in that contravention;

    (b) is taken by operation of section 793(2) of that Act, to have known of all of the essential facts constituting that contravention;

(c) was accordingly knowingly concerned in that contravention within the meaning of section 550 of that Act; and

(d) thereby itself contravened section 500 of the FW Act.

15. On 19 March 2014, the second respondent, an employee of the first respondent acting on its behalf and within the scope of his authority within the meaning of section 793(1) of the FW Act, contravened section 494(1) of that Act when he exercised a State or Territory OHS right within the meaning of section 494(2) of the FW Act, in circumstances where he was not a permit holder within the meaning of that Act.

16. In respect of the second respondent's contravention of section 494(1) of the FW Act referred to in the previous declaration, the first respondent:

(a) engaged in the second respondent's conduct by operation of section 793(1) of that Act and thereby participated in that contravention;

(b) is taken by operation of section 793(2) of that Act, to have known of all of the essential facts constituting that contravention;

(c) was accordingly knowingly concerned in that contravention within the meaning of section 550 of that Act; and

(d) thereby itself contravened section 494(1) of the FW Act.

17. On 1 April 2014, the second respondent, an employee of the first respondent acting on its behalf and within the scope of his authority within the meaning of section 793(1) of the FW Act, contravened section 494(1) of that Act when he exercised a State or Territory OHS right within the meaning of section 494(2) of the FW Act, in circumstances where he was not a permit holder within the meaning of that Act.

18. In respect of the second respondent's contravention of section 494(1) of the FW Act referred to in the previous declaration, the first respondent:

(a) engaged in the second respondent's conduct by operation of section 793(1) of that Act and thereby participated in that contravention;

(b) is taken by operation of section 793(2) of that Act, to have known of all of the essential facts constituting that contravention;

(c) was accordingly knowingly concerned in that contravention within the meaning of section 550 of that Act; and

(d) thereby itself contravened section 494(1) of the FW Act.

(collectively, the **Declarations**)

THE COURT ORDERS THAT:

1. The name of the first respondent in this proceeding be changed to the "Construction, Forestry, Maritime, Mining, and Energy Union."
2. The first respondent pay to the Commonwealth of Australia a penalty of $40,000 in respect of its contravention of section 355 of the *Fair Work Act 2009* (Cth) as declared in paragraph 2 of the Declarations.
3. The first respondent pay to the Commonwealth of Australia a penalty of $40,000 in respect of its contraventions of sections 348, 417(1) and 500 of the *Fair Work Act 2009* (Cth) as declared in paragraphs 4, 6 and 8 of the Declarations.
4. The first respondent pay to the Commonwealth of Australia a penalty of $40,000 in respect of its contravention of section 417(1) of the *Fair Work Act 2009* (Cth) as declared in paragraph 10 of the Declarations.
5. The first respondent pay to the Commonwealth of Australia a penalty of $40,000 in respect of its contravention of section 500 of the *Fair Work Act 2009* (Cth) as declared in paragraph 12 of the Declarations.
6. The first respondent pay to the Commonwealth of Australia a penalty of $40,000 in respect of its contravention of section 500 of the *Fair Work Act 2009* (Cth) as declared in paragraph 14 of the Declarations.
7. The first respondent pay to the Commonwealth of Australia a penalty of $25,000 in respect of its contravention of section 494(1) of the *Fair Work Act 2009* (Cth) as declared in paragraph 16 of the Declarations.
8. The first respondent pay to the Commonwealth of Australia a penalty of $25,000 in respect of its contravention of section 494(1) of the *Fair Work Act 2009* (Cth) as declared in paragraph 18 of the Declarations.
9. The second respondent pay to the Commonwealth of Australia a penalty of $6,000 in respect of his contravention of section 355 of the *Fair Work Act 2009* (Cth) as declared in paragraph 1 of the Declarations.
10. The second respondent pay to the Commonwealth of Australia a penalty of $6,000 in respect of his contraventions of sections 348, 417(1) and 500 of the *Fair Work Act 2009* (Cth) as declared in paragraphs 3, 5 and 7 of the Declarations.

11. The second respondent pay to the Commonwealth of Australia a penalty of $8,000 in respect of his contravention of section 417(1) of the *Fair Work Act 2009* (Cth) as declared in paragraph 9 of the Declarations.

12. The second respondent pay to the Commonwealth of Australia a penalty of $8,000 in respect of his contravention of section 500 of the *Fair Work Act 2009* (Cth) as declared in paragraph 11 of the Declarations.

13. The second respondent pay to the Commonwealth of Australia a penalty of $8,000 in respect of his contravention of section 500 of the *Fair Work Act 2009* (Cth) as declared in paragraph 13 of the Declarations.

14. The second respondent pay to the Commonwealth of Australia a penalty of $4,000 in respect of his contravention of section 494(1) of the *Fair Work Act 2009* (Cth) as declared in paragraph 15 of the Declarations.

15. The second respondent pay to the Commonwealth of Australia a penalty of $4,000 in respect of his contravention of section 494(1) of the *Fair Work Act 2009* (Cth) as declared in paragraph 17 of the Declarations.

16. The penalties in paragraphs 2-8 above are to be paid to the Commonwealth of Australia within 28 days.

17. The penalties in paragraphs 9-15 above are to be paid to the Commonwealth of Australia within 90 days.

18. The second respondent pay the penalties in paragraphs 9-15 above (**Penalties**) personally in that he not, whether before or after the payment of the Penalties:

    (a) seek to have or encourage the first respondent in any way whatsoever, directly or indirectly, to pay to him or for his financial benefit in any way whatsoever, any money or financial benefit referable to the payment of the Penalties, whether in whole or in part; and

    (b) accept or receive from the first respondent in any way whatsoever, any money or financial benefit referable to the payment of the Penalties, whether in whole or in part.

19. There be no order as to costs.

THE COURT DIRECTS THAT:

20. The applicant serve these orders on:

(a) the first respondent in accordance with r 10.04 of the *Federal Court Rules 2011* (Cth); and

(b) the second respondent in accordance with r 10.31(e) of the *Federal Court Rules 2011* (Cth).

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

REASONS FOR JUDGMENT

O'CALLAGHAN J:

Introduction

1 By originating application filed on 4 March 2016, the applicant (the **Commissioner**) seeks declarations of contraventions of various provisions of the *Fair Work Act 2009* (Cth) (the **FW Act**) by each of the respondents and the imposition of pecuniary penalties, arising out of events that occurred at the Springvale rail crossing removal project (the **Project**) in Victoria in 2014.

2 The parties have, more recently, agreed on the terms of two agreed statements of fact. The first is a "Statement of Agreed Facts and Admissions" (the **SOAF**), by which each of the respondents has made admissions of certain contraventions of ss 348, 417(1), 494(1) and 500 of the FW Act.

3 The second is a "Supplementary Statement of Agreed Facts and Admissions" (the **SSOAF**), by which each of the respondents made admissions of a contravention of s 355 of the FW Act.

4 In light of these admissions, the Commissioner no longer pursued various other pleaded alleged contraventions.

5 The two substantive issues to be determined are the appropriate penalties to be imposed, and the question whether a "personal payment order" should be made in relation to the second respondent (**Mr Myles**).

Penalties applicable

6 The maximum penalty for each contravention in this case is 300 penalty units for the first respondent (the **CFMMEU**) and 60 penalty units for Mr Myles.

7 A "penalty unit" is defined in s 4AA of the *Crimes Act 1914* (Cth). At the relevant time the value of a penalty unit was $170. Accordingly, the maximum penalty that might be imposed for each contravention on the CFMMEU is $51,000, and on Mr Myles, $10,200.

The facts

8 The SOAF and the SSOAF are attached as **Annexure A** and **Annexure B** to these reasons and they form part of the reasons.

9 As the respondents' written submissions accurately record, by the SOAF Mr Myles admitted to on:

(1) 6 February 2014: contravening ss 417(1), 348 and 500 of the FW Act;

(2) 13 February 2014: contravening ss 417(1), 500 (failure to show permit); 500 (refusals to leave premises when requested to do so) of the FW Act;

(3) 19 March 2014: contravening s 494(1) of the FW Act; and

(4) 1 April 2014: contravening s 494(1) of the FW Act.

10 By the SOAF, the CFMMEU:

(1) admitted that it had also committed the contraventions of s 417(1) and s 348; and

(2) admitted that it was knowingly concerned in each of Mr Myles' contraventions of s 500 and s 494(1).

11 By the SSOAF, Mr Myles and the CFMMEU admitted to contravening s 355 of the FW Act on 19 June 2013.

12 I adopt the following summaries largely from the respondents' written submissions detailing the relevant events admitted to in the SOAF and the SSOAF.

19 June 2013

13 On 19 June 2013, Mr Myles threatened to organise and/or take action against McConnell Dowell Constructors (Aust) Pty Ltd (**McDow**), with the intention of coercing McDow and/or Balfour Beatty Australia Pty Ltd to not engage Clifton Formwork on the Project by saying words to the effect that he did not want Clifton Formwork engaged on the Project; he was "on a mission to get Clifton Formwork"; there would be a "blue"; warning that there would be "trouble", if Clifton Formwork were engaged on the Project; and in relation to Clifton Formwork, "there will be pickets outside the gates if they're on this job" and "don't blame me that you weren't warned".

6 February 2014

14 On 6 February 2014, Mr Myles entered the Project construction site (being the intersections of Springvale Road, Queens Avenue, Lightwood Road and Sandown Road (the **Site**)) in response to a request for assistance from Peter Castles, a Health and Safety Representative employed at the Site for the purpose of assisting Mr Castles and for the purpose of holding discussions with

the employees of Oak Park (Tullamarine) Pty Ltd (**OPT**) and the employees of Oz Fixing Pty Ltd (**Oz Fixing**), in accordance with s 484 of the FW Act.

15 Having entered the Site, Mr Myles procured the conduct pleaded in paragraphs [18]-[19] of the SOAF, namely:

> On Thursday, 6 February 2014, after a short pre-start meeting to be conducted immediately before 7:00am, somewhere between around 37 and 43 of the OPT Employees and the Oz Fixing Employees were required to commence work on the Project at the Site at 7:00am.
>
> Between around 6:30am and 10:00am on 6 February 2014, instead of attending the pre-start meeting and instead of performing any work on the Project, somewhere between around 37 and 43 of the OPT Employees and the Oz Fixing Employees sat in the Site sheds at the Sandown Road end of the Site and failed or refused to perform any work.

16 It is common ground that Mr Myles (and therefore the CFMMEU) is liable for only one penalty in relation to ss 417 and 348 of the FW Act with respect to the contraventions on 6 February 2014.

13 February 2014

17 On 13 February 2014 at around 6:45pm, Mr Myles entered the Site and convened and conducted what he described to Project representatives as a "union meeting" with four employees of Rigweld Holdings Pty Ltd (**Rigweld**) and Rob Smit (the night shift Health and Safety Representative on the Project), in the crib sheds off Newcomen Road behind the Site office on the Site. Having entered the Site, Mr Myles counselled or procured the four Rigweld employees to engage in industrial action within the meaning of s 19 of the FW Act, either by imposing a ban, limitation or restriction on the performance of their work or by failing or refusing to perform any work at all on their night shift that evening.

18 Mr Myles' entry to the Site was in response to a request for assistance from Mr Smit for the purpose of assisting Mr Smit. My Myles left the Site shortly after 7:00pm ended when the meeting ended. The four Rigweld employees also left the Site and did not commence or perform any work on their night shift that evening. The conduct of the four Rigweld employees was counselled or procured by Mr Myles.

19 At some time around or just after 8.00pm that night, Mr Myles re-entered the Site and proceeded around various areas of the Site in the company of Mr Smit. Again, Mr Myles entered the Site in response to a request for assistance from Mr Smit for the purpose of assisting Mr Smit.

20 Between around 8:30pm and 8:50pm, Mr Myles refused numerous directions from representatives of the Project to leave the Site, despite threats to call police. Mr Myles stated that he refused to leave until he had finished and that he had a job to do.

21 Mr Myles raised issues and questions about the safety of the emergency access to and egress from the stormwater sump/retention chamber and, in response to a statement from Peter Fraser that he (Mr Myles) was on the Site illegally, said that he (Mr Myles) was accompanying Mr Smit.

22 Around this time, Mr Fraser asked Mr Myles to produce for inspection a copy of his entry permit. Mr Myles refused or failed to produce his entry permit and said words to the effect of "I haven't got any ID, I'm not leaving the site, why don't you call the police – I'd love that".

23 Mr Menke also requested to see Mr Myles' entry permit and Mr Myles did not produce one. Mr Menke said to Mr Myles that if he could not show any documentation or reason for being there, then he would need to leave. Mr Myles said "I'm not going anywhere until I'm finished."

24 At around 9:00pm, the police were called and several Protective Services Officers attended the Site. After they spoke with Mr Myles, he left the Site.

19 March and 1 April 2014

25 On 19 March 2014, Mr Myles entered the Site in response to a request for assistance from Mr Castles, a Health and Safety Representative employed at the Site for the purpose of assisting Mr Castle. When challenged, he informed a McDow representative that he had a safety concern and was allowed to go on to the Site. In support of his position, Mr Myles produced a notice of suspected contravention. The representative then allowed Mr Myles entry.

26 On 1 April 2014, Mr Myles sought and obtained access to the Site. Mr Myles indicated his intention to enter the Site and Mr Hill and Mr White both informed Myles that he was not allowed to enter the Site and that if he sought to do so, they would call the police. Mr Castles said that he had invited Mr Myles and Mr Matuszac to the Site to inspect the crane setup for some asphalt placement. Mr Myles then said that Mr Castles had asked him and Mr Matuszac to assist with the safety of the crane setup (because he had particular expertise with cranes) and that he was therefore entitled to enter the Site under s 70 of the *Occupational Health and Safety Act 2004* (Vic) (the **OHS Act**).

27 After being asked to see his permits, Mr Myles went to his car and then showed Mr Hill and Mr White some sections of the OHS Act and his entry permit issued under that Act. Mr Myles and Mr Matuszac then entered the Site with Mr Castles, with Mr Hill in company.

Competing submissions

28 The parties are apart on the question of the appropriate penalties to be imposed for the admitted contraventions.

29 The respondents submit that most of the appropriate penalties should be in the "mid-range", and in respect of the contraventions on 19 March and 1 April 2014 (when Mr Myles relied on his entry permit issued under the OHS Act) at the "lower end".

30 The applicant submits, to the contrary, that penalties should be the maximum in respect of the CFMMEU and "high" for Mr Myles.

31 The parties are also at odds about whether Mr Myles' two site entries on 13 February 2014 constitute one contravention or two contraventions.

The applicant's submissions

32 The applicant submitted that the CFMMEU is a highly experienced and skilled participant in the industrial arena, and that Mr Myles also has extensive experience in the industry and extensive experience in representational roles within it, including as an employed organiser of the CFMMEU.

33 It was submitted that:

(1) each of the respondents "knew full well the vice of the contravening behaviour and chose to engage in it anyway";

(2) each of the contraventions is objectively serious, and the fact that the apparent consequences of some of the contraventions were more serious than others is of marginal relevance;

(3) the statutory penalty for each and every contravention is the same, indicating that Parliament treats all of the relevant contraventions as equally serious;

(4) all contraventions of the FW Act committed by recidivist contraveners such as the CFMMEU and Mr Myles are objectively serious because of that fact; and

(5) it can be inferred that the repeated, unlawful behaviour of the CFMMEU's representatives is condoned at the very highest levels of management of the CFMMEU.

34 It was further submitted as follows:

> In any event, the contraventions of sections 348, 355 and 417(1) of the FW Act, involving threats of (or actual) coercive conduct and counselling industrial action by workers on the Project to secure industrial objectives pursued by Myles and the CFMMEU, is the antithesis of the scheme of the FW Act and the will of the Parliament. Coercion contraventions are "a particularly serious form of industrial (mis)conduct". As is now clear, the unlawful conduct that is the subject of this proceeding is but another example of the same modus operandi deployed by the CFMMEU and its officers (including Myles) on an exceedingly large number of previous and subsequent occasions. A small collection of judicial comments about the CFMMEU's penal history was recorded recently, including "dismal", "appalling" and "reveal[ing] a lamentable, if not disgraceful, record of deliberately flouting industrial laws" (to which can be added "disgraceful and shameful"). It must be met with pecuniary penalties with a sufficient deterrent effect.
>
> (Citations omitted.)

35 The applicant also adduced unchallenged evidence about the financial condition of the Construction and General Division Victoria/Tasmania Divisional Branch of the CFMMEU. It recorded revenue of $30,958,899 for the year ending 31 December 2016 and $6,620,150 for the 3 months from 1 January to 31 March 2017; and as at 31 March 2017, had net assets of $58,694,140 (including $9,384,326 of cash and cash equivalents).

36 It was further submitted that the CFMMEU therefore "has sufficient means to pay any penalties imposed by this Court. In fact, they are, unfortunately, simply a cost of the way in which the CFMMEU does business".

37 As to Mr Myles, it was submitted that "[i]n the absence of any evidence to the contrary, it can be inferred that the CFMMEU will itself also seek to pay the penalties imposed on [Mr] Myles, unless a personal payment order is made".

38 The applicant submitted that "[g]eneral and specific deterrence must play the primary (or sole) role in assessing the appropriate penalty in cases of contraventions of regulatory legislation, including the FW Act and that penalties must be fixed with a view to ensuring that the penalty is not such as to be regarded by the offender or others as an acceptable cost of doing business. The written submission continued (at [22]-[30]):

> The CFMMEU's penal record is well-established. Prior contravening conduct of the CFMMEU is set out in a table at Attachment B to this outline. [not reproduced in the documents annexed to these reasons]

Contraventions of different industrial laws or by different branches or divisions of the CFMMEU in different States, are as a matter of principle, not irrelevant or of little relevance to the fixation of an appropriate penalty, merely because of that fact.

Regrettably, unlawful conduct is "normalised" within the CFMMEU. The CFMMEU simply does not care about the law or the penalties imposed on it for its contraventions of it.

The Court's repeated criticism of the CFMMEU's deplorable history of offending and its general approach to unlawful behaviour has not altered the CFMMEU's approach. This led recently to a Full Court penalising the CFMMEU with six maximum penalties, including some of which were "right of entry" contraventions with no discernible loss or impact to anyone. It is difficult to see why maximum penalties for the CFMMEU are not appropriate in this case either, involving equally (or more) serious conduct.

More directly relevant to the fixation of appropriate penalties in this case are the CFMMEU's contraventions of industrial laws involving coercion and the right of entry provisions. In the table at Attachment B, over 50 of the proceedings involve contraventions of industrial laws involving coercion and about 20 involve contraventions of provisions within the "right of entry" regime.

As the Full Court was right to do in *The Broadway on Ann Case*, when proper regard is had to the seriousness of the present contraventions in light of the CFMMEU's approach to the law and penalties and having regard to the centrality of deterrence (both specific and general), each and every new contravention must be properly seen as sufficiently grave so as to warrant the maximum penalty available.

Turning to Myles, no different considerations apply. Myles has a terribly long record, although not as inordinately long as that of the CFMMEU. Prior to the imposition of his most recent penalties (of $19,500), Myles was described as having a "deplorable personal history of offending". Prior contravening conduct of Myles is set out in a table at Attachment C to this outline, totalling in excess of $136,000 in penalties levied on Myles personally. Much of that misconduct involves similar contraventions and similar behaviour to that in issue in this case (coercive threats/conduct, counselling or procuring work stoppages and improper behaviour whilst exercising rights of entry).

General deterrence has a significant role to play in the penalties imposed by the Court upon Myles, being an employee and officeholder of the CFMMEU. Any penalties imposed on Myles need to be effective to act as a general deterrent to any other CFMMEU officer or delegate and to show that significant penalties will be imposed, irrespective of whether the conduct is ordered, supported or condoned by the CFMMEU (as their employer).

As for specific deterrence, Myles is still an employed organiser of the CFMMEU. He has further, ongoing opportunity to contravene the FW Act and the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth), by acting as one of the CFMMEU's institutionalised human agents and he has an extensive record of prior offending. The need for specific deterrence is also high and any penalties imposed on him should be at (or close to) the maximum also.

(Citations omitted.)

The respondent's submissions

39 Unlike the applicant's submissions, the submissions of the respondents dealt separately with the relevant events, as follows.

19 June 2013

40 At [12]-[14] the following submission was made:

> While accepting that contraventions of the FW Act involving coercive conduct are viewed as being particularly serious, the conduct must nonetheless be viewed in context. The conduct took place in a meeting in a café, at which various people were in attendance. The Court has before it no evidence about the way in which the words were spoken, nor Mr Myles' demeanour or tone when speaking them. There is no evidence that Mr Myles was behaving aggressively, or otherwise inappropriately. There is no evidence before the Court as to the conduct of the meeting, the events leading up to the words spoken or the general tenor or tone of the other participants in the meeting. The Court has only the fact of the meeting, the words spoken and the admission by Mr Myles as to his state of mind in speaking them.
>
> The Court can only act on the basis of the evidence before it. In the present case, the conduct is not of a particularly serious kind. The act of uttering words in a meeting at a café is, without more, at the lower end of the spectrum when it comes to assessing the seriousness of the conduct. There is no suggestion that any person involved in the conversation was concerned about the words spoken by Mr Myles. There is no evidence that any contemporaneous complaint was made about Mr Myles' conduct. There is no evidence that there was any immediate response to the words. There is no evidence of loss, damage or any harm at all that flowed from the conduct.
>
> The conduct was isolated. It was not repeated. It did not continue beyond the meeting in question, nor did it escalate. The appropriate penalty for this contravention is a mid-range penalty.

6 February 2014

41 At [16]-[19] the following submission was made:

> … The actuating motivation for Mr Myles entering the Site was to aid a health and safety representative employed at the Site. Mr Myles' entry was responsive to a request for assistance from a person holding an important statutory office. While it is admitted that Mr Myles acted unlawfully while on the Site, some account must be taken of Mr Myles' motivation for entering the Site.
>
> That Mr Myles' motivation for acting as he did was connected to genuine concerns about health and safety can be inferred from the matters in paragraph [25] of the SOAF. Mr Myles prepared a "notice of suspected contravention" and provided it to the relevant employers. Having done so, he asked the relevant employers to take steps to secure the attendance of the workforce at a CFMMEU manual handling training course. It can be inferred that manual handling was the subject of the safety concern underpinning Mr Myles' entry to the Site.
>
> There is no suggestion that the conduct was part of a broader industrial campaign, nor had any motivation not connected to the safety concerns.
>
> Mr Myles' contravening conduct, when balanced against the request that he enter the Site (which was made by a statutory office holder) and the safety motivation underpinning his conduct, was not of the most serious kind. The appropriate penalty is a mid-range penalty.

13 February 2014

42 At [24]-[28] the following submission was made:

> While it is admitted that Mr Myles acted unlawfully on 13 February 2014, the seriousness of his unlawful conduct must be assessed against the relevant context of his entry to the Site being for the purpose of rendering aid in response to a request from an health and safety representative.
>
> Mr Myles has admitted to three contraventions of the FW Act for his conduct on this day, being:
>
> (a) one contravention of s 417(1);
>
> (b) one contravention of s 500, by reason of his failure to show his permit; and
>
> (c) one contravention of s 500, by reason of his multiple refusal[s] to leave the Site.
>
> When assessing the penalties for the s 500 contraventions, the Court should treat the contraventions as forming part of a course of conduct. Section 557 – which is not relevant to this contravention – does not "cover the field" in relation to the fixing of penalty. While the course of conduct principle does not permit the fixing of a single penalty, where the contraventions arose out of a course of conduct, the penalties imposed in relation to the contraventions should generally reflect that fact, otherwise there is a risk that the respondent will be doubly punished in respect of the relevant acts or omissions that make up the multiple contraventions.
>
> Where there is an interrelationship between the legal and factual elements of a number of contraventions, a person who has engaged in such contravening conduct should not be penalised more than once for a single course of conduct.
>
> It is open to the Court to adopt this approach in this case. That is, the Court may issue two penalties and moderate the penalty on the basis that the relevant conduct formed part of a "course of conduct". The contravening conduct happened during a single entry to site and formed part of a continuous sequence of events. The contraventions are intimately connected with the manner in which Mr Myles entered the Site and the question of whether he was permitted to enter the Site pursuant to the request from Mr Smit and to thereafter remain on the Site. They cannot be separated from each other. The appropriate penalty is a mid-range penalty [cumulatively].

19 March 2014 and 1 April 2014

43 At [32]-[34] the following submission was made:

> It can be inferred from the SOAF that Mr Myles believed he was entitled to enter the premises in response to a request for assistance from Mr Castles. If that is so, it must be accepted that Mr Myles did not deliberately contravene the Act. Contrary to the submissions of the Commissioner, there is no basis to say that Mr Myles "well knew" the vice of his conduct and proceeded to act in the face of that knowledge. The material in the SOAF identifies that Mr Myles in fact believed that he was entitled to enter the Site.
>
> The penalty should, for each of these days, be at the lower end of the range. It can be inferred from the SOAF that Mr Myles believed he was entitled to enter the premises in response to the requests for assistance from Mr Castles. It can equally be inferred that Mr Myles did not deliberately contravene the Act. He believed, wrongly, that he

was entitled to enter the premises when requested to do so by an occupational health and safety representative. Contrary to the submissions of the Commissioner, there is no basis to say that Mr Myles "well knew" the vice of his conduct and proceeded to act in the face of that knowledge.

Further, it is also relevant that Mr Myles was entering for a safety purpose. He was responding to a request for assistance from an elected occupational health and safety official. Contrary to the submissions of the Commissioner, it is highly relevant that there is no evidence of any loss or damage being suffered on either day as a result of Mr Myles' conduct. Nor is there any evidence of any disruption to work. These contraventions should be seen as technical contraventions, committed unknowingly and in the context of the good faith exercise of powers in relation to safety concerns on the Site. These factors are sufficient to warrant the imposition of a penalty at the lower end of the range for these two dates.

44 The respondents' submissions with respect to the CFMMEU were as follows (at [35]-[38]):

As to the CFMMEU, its previous history of contraventions, while relevant, cannot be allowed to obscure the contravention for which it is being penalised. While its history is relevant, the penalty must nonetheless be appropriate having regard to all of the circumstances of the particular contravention. This was acknowledged in *Auimatagi v Australian Building and Construction Commissioner* [2018] FCAFC 191. There, the Court was dealing with an appeal from a single judge at first instance on the questions of both liability and relief. The Full Court upheld the appeal on liability and accordingly it was not necessary to deal with the appeal against the penalty imposed. However, the Full Court found that, was it necessary to do so, it would have found that the imposition of the maximum penalty of $51,000 was manifestly excessive. The Court observed that it "is difficult to escape the conclusion that the "recidivism" to which the primary judge referred was not merely a factor in giving a penalty at the high end of an appropriate response to the contravention, but in substance there was punishment for past conduct".

The approach that was disapproved by the Full Court is the approach that the Commissioner urges upon the Court in this case. The Commissioner's submissions make do not engage with the facts. They do not assist the Court to determine the objective seriousness of the contraventions nor do they assist the Court to determine the "appropriate response" to the contraventions. Rather, the Commissioner's submissions are primarily focused on the CFMMEU's history of contraventions. Those submissions do not assist the Court.

For the reasons given above, the contraventions in this case, with the exception of the events of June 2013, all occurred in the context of Mr Myles being invited on Site by a statutory office holder in response to safety concerns. There is no evidence that they formed part of any larger industrial campaign or strategy, nor that the CFMMEU's senior management directed or counselled the conduct.

Further, as set out above, in relation to at least two of the offences, Mr Myles believed that he was lawfully entitled to enter the Site. In relation to those days (19 March 2014 and 1 April 2014) there is no evidence of any loss, damage, harm or inconvenience caused by the technical breaches of s 494(1) of the FW Act. The CFMMEU's history of contraventions cannot be allowed to obscure that these contraventions are technical contraventions that should be penalised appropriately. The appropriate balance between the nature of the penalties and the CFMMEU's history of contraventions is for a mid-range penalty to be imposed.

(Citations omitted.)

45 Counsel for the applicant submitted that "Of course [Mr Myles] can't turn up and say, 'I'm here because I want to stop your job.' But to use safety as a cover and justification for entry, which is perfectly lawful, and then once there behave unlawfully, manifests a vice of a higher order, in our submission, because it provided him with a lawful opportunity to behave unlawfully".

Consideration

Correct approach to assessment of penalties

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

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

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

48 It is, of course, necessary to have regard to the maximum penalty, but it is but one (although one very important) yardstick.

49 As the Full Court said in *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25 at 63 [154]- [156] (quoted in *The Non-Indemnification Personal Payment Case* at [26]):

> In considering the sufficiency of a proposed civil penalty, regard must ordinarily be had to the maximum penalty. In *Markarian*, a criminal sentencing context, it was observed 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.

> The reasoning in *Markarian* about the need to have regard to the maximum penalty when considering the quantum of a penalty has been accepted to apply to civil penalties in numerous decisions of this Court both at first instance and on appeal (*Director of Consumer Affairs, Victoria v Alpha Flight Services Pty Ltd* [2015] FCAFC 118 at [43]; *Australian Competition and Consumer Commission v BAJV Pty Ltd* [2014] FCAFC 52; (2014) ATPR 42-470 at [50]- [52]; *Setka v Gregor (No 2)* [2011] FCAFC 90; (2011) 195 FCR 203 at [46]; *McDonald v Australian Building and Construction Commissioner* [2011] FCAFC 29; (2011) 202 IR 467 at [28]- [29]). As *Markarian* makes clear, the maximum penalty, while important, is but one yardstick that ordinarily must be applied.

> Care must be taken to ensure that the maximum penalty is not applied mechanically, instead of it being treated as one of a number of relevant factors, albeit an important one. Put another way, a contravention that is objectively in the mid-range of objective seriousness may not, for that reason alone, transpose into a penalty range somewhere in the middle between zero and the maximum penalty. Similarly, just because a contravention is towards either end of the spectrum of contraventions of its kind does not mean that the penalty must be towards the bottom or top of the range respectively. However, ordinarily there must be some reasonable relationship between the theoretical maximum and the final penalty imposed.

50 With those principles in mind, I now turn to consider the appropriate penalties in respect of the (admitted) contraventions.

19 June 2013

51 The respondents' counsel accepts, quite rightly, that contraventions of the FW Act involving coercive conduct "are viewed as being particularly serious". I struggle to see what difference it makes that the threats were made at a café, or that no one "complained" about his conduct. But it is to be accepted that Mr Myles did not behave aggressively and that there is no evidence or admission concerning any damage flowing from the conduct.

52 I also take into account the utilitarian value of the admissions and the agreement on facts.

53 Turning first to Mr Myles, there was no evidence led about his personal assets. As the Full Court said of Mr Myles in *The Non-Indemnification Personal Payment Case* at [30]): "His record of contraventions is not as inordinately long as that of the CFMMEU. Nevertheless, his contraventions have included serious matters of a blockade and obstruction of a site. We would take into account that the conduct for which he has last been penalised was in March 2015 ..."

54 I do likewise. In those circumstances, I will impose a penalty of $6,000 on Mr Myles for the 19 June contravention.

55 The CFMMEU is a large organisation with significant financial resources (see [36] above). Given its prior history, its apparent willingness to contravene the FW Act in a serious way to impose its will, and the need for deterrence of an organisation of its size, I will impose a penalty of $40,000 on the CFMMEU for the contravention on 19 June 2014.

6 February 2014

56 As for the 6 February 2014 contraventions, I do not accept that I should take into account Mr Myles' "motivation" for entering the site, as the respondents contend. It is more to the point that he acted unlawfully whilst on site. In those circumstances, and again taking into account the matters mentioned with respect to the 19 June 2013 contravention above, I will impose a penalty of $6,000 on Mr Myles for the 6 February 2014 conduct.

57 I will impose a penalty of $40,000 on the CFMMEU for the 6 February 2014 contraventions.

13 February 2014

58 The respondents submit that entering and leaving the site once, and then doing the same again, on 13 February 2014 should be taken to constitute a single contravention within the meaning of s 557 of the FW Act. Counsel submitted as follows in oral argument:

> Mr Myles entered the site at 6.45 and conducted the union meeting. He left the site at 7 and motioned for the employees to join him, which they did. And at around or just after 8 o'clock he re-entered the site and proceeded around various areas of it in the company of Mr [Smit] – Mr [Smit], of course, being the health and safety representative who had sought his assistance … It all happened, your Honour, as part of a continuous chain of events. The request for assistance, the meeting with the workers, the workers leaving the site, Mr Myles leaving with them, and then Mr Myles re-entering the site and inspecting it in the company of the Occupational Health & Safety representative, and thereafter engaging with the relevant officials.
>
> It is not the case that these are unrelated pieces of conduct. It all happened as part of one continuous sequence of events, and in that context, knowing that Mr Myles has gone on site for the purpose for which he went on site, we say that it is open to your Honour and that your Honour should accept that it does form part of a course of conduct.

59 As noted above, Mr Myles has admitted to three contraventions of the FW Act for his conduct on this day, being one contravention of s 417(1); one contravention of s 500, by reason of his failure to show his permit; and one contravention of s 500, by reason of his multiple refusals to leave the Site.

60 The proper function of the phrase "course of conduct" in s 557 in circumstances such as this is to ensure that, having regard to the circumstances (factual and legal), a party is not penalised

twice for the same conduct: see *The Non-Indemnification Personal Payment Case* at [31] and the cases there cited. But here the two entries to the site are self-evidently not relevantly the same conduct. They are two contraventions of the same type that occurred on the same day. I do not therefore accept that the respondents will be "doubly punished". In my view, the three contraventions relating to the two separate entries and the further breach of s 471(1) should be dealt with separately. A penalty must therefore be imposed for each of the three contraventions.

61 I will impose a penalty of $40,000 on the CFMMEU for each of the three contraventions on 13 February 2014 (a total of $120,000).

62 I will impose a penalty of $8,000 on Mr Myles for each of the three contraventions on 13 February 2014 (a total of $24,000).

19 March and 1 April 2014

63 The events of 19 March and 1 April 2014 fall into a slightly different category.

64 It is not necessary here to recite the history of the decision of the Full Court in *Australian Building and Construction Commissioner v Powell* (2017) 251 FCR 470 (Allsop CJ, White J and myself). It is sufficient to say that until the point was decided, some degree of uncertainty attended the question of whether the terms and operation of ss 58 and 70 of the OHS Act did or did not, for the purposes of s 494 of the FW Act, confer a right to enter premises. In that case, the Full Court held that the plain words of s 494(1) and (2) of the FW Act and the construction of ss 58(1)(f) and 70 of the OHS Act meant that Mr Powell, as an official of an organisation, required a permit under the FW Act to enter the premises because he was exercising his right to enter the premises, or the health and safety representative's right to have him enter the premises, to assist the representative in his task.

65 It is in light of those circumstances that the respondents contend that it should be inferred that Mr Myles had an honest, but mistaken, belief that the Victorian legislation gave him a statutory right to enter the Site. For the purpose of arriving at an appropriate penalty, and for that purpose only, I accept that submission, including because Mr Myles relied upon that legislation as the legal basis of his "right" to entry.

66 Accordingly, I agree that a penalty at the lower end of the range is appropriate. I will impose a penalty of $25,000 on the CFMMEU for each of the two days (a total of $50,000) and a penalty of $4,000 on Mr Myles for each of the two days (a total of $8,000).

Totality

67 In arriving at these penalties, I have had regard to the totality of the penalties, the overall seriousness of the contraventions, and the need for the proportionality of the penalties to the seriousness of the contraventions and to the conduct as a whole, consistently with the totality principle: see, by way of example only, *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560, 583 at [102] (per Buchanan J).

Personal Payment Order

68 The applicant seeks a personal payment order against Mr Myles. The respondents opposes it, for reasons that counsel put in the course of her oral submissions in these terms:

> … that's my point about when we are assessing behaviour, we need to put it in its proper temporal context; and we have now the burden of the personal payment order that was made and the opprobrium that goes with it, your Honour, and the short point is that when you put those two things together, an absence of any determined contraventions relating to conduct later than 1 March 2015 in the context of this conduct having happened earlier than that, and the fact that he has now felt the burden of a personal payment order – it's appropriate for an opportunity to be given to allow Mr Myles through continued conduct to demonstrate that his behaviour has changed.
>
> And we say it wouldn't simply follow, because a personal payment order was made against Mr Myles in the past, that one should be made in the present case. They are a form of order that has a particular burden for an individual, and in circumstances where nothing can be pointed to to demonstrate that Mr Myles has continued to engage in contravening conduct after 1 March 2014, it is not necessarily the case that an order of this kind should be made in this proceeding, and in fact Mr Myles should be given the opportunity to demonstrate that he has felt the effect and the burden of that personal payment order, and has changed his behaviour.

69 But in the absence of any evidence about the asserted burden and opprobrium, to say nothing of evidence about contrition, I do not accept that those matters should weigh in the balance.

70 In *The Non-Indemnification Personal Payment Case* at [39]-[41], the Full Court reasoned as follows in imposing a personal payment order on Mr Myles:

> It was submitted on behalf of the Union and Mr Myles that the exercise of the power can only be animated in circumstances where there is a proven (by compelling evidence) necessity for the order, by a proven failure of deterrence from the imposition of penalties unaccompanied by a personal payment order. This is so, it was submitted, because the implication of the implied power comes from the express power carrying with it everything necessary for its exercise; that is, everything necessary for deterrence. Thus, here, it was submitted, there was no proven failure of (specific) deterrence of Mr Myles by penalties alone. We reject this submission. The source of the implication of the power does not limit or constrain the circumstances of its exercise by some "wait and see" principle. The imposition of the order must be appropriate, not to increase the "sting" of the proper penalty (as senior counsel for the Commissioner accepted) but to ensure, as far as possible, that the burden of the proper penalty be recognised. Here the reasons why, in our view, a personal payment order

can be justified are straightforward. The primary judge said the following at [199]-[200] in support of the non-indemnification order:

> 199 As I have noted at [143] above, a registered organisation such as the CFMMEU can only behave in the way it does because individuals within the union decide that action should be taken. The CFMMEU is legally represented and has access to legal advice. Both the organisation and its officials who lead the contravening conduct seem, on the evidence before me, to be uninterested in whether the conduct is lawful or not, provided they consider the industrial outcome to be sufficiently important. The CFMMEU, and its individual officers such as Mr Myles, operate very much on an 'end justifies the means' basis.
>
> 200 The need for an individual to take responsibility for conduct found to be unlawful, and for that responsibility not to be transferred, lies behind provisions such as s 77A of the Competition and Consumer Act. Where corporate entities are principal actors, it is one of the few mechanisms by which individual behaviour may be changed or affected and the compliance objectives of regulatory schemes advanced.

> The Union acts through its officials, of whom Mr Myles was, and is, one. The penalty against the individual must be a burden or have a sting to be a deterrent. The history of contravening by the Union, all undertaken through its officials, reflects a willingness to contravene the Act and to pay the penalties as a cost of its approach to industrial relations. Mr Myles has a history of significant contravention. A personal payment order of the kind to which we will come will bring home to him, and others in his position, that he, and they, cannot act in contravention of the Act knowing that Union funds will always bale him, or them, out.
>
> There is ample foundation to consider the order presently warranted. This is especially so in the complete absence of any evidence of contrition or change of approach from either the Union or Mr Myles.

71 That reasoning applies with equal force in this case.

72 For those reasons, I will make an order in the same form as the order made in *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Non-Indemnification Personal Payment Case) (No 2)* [2018] FCAFC 117, namely that Mr Myles pay the penalties to be imposed personally in that he not, whether before or after the payment of the penalties:

> (a) seek to have or encourage the first respondent in any way whatsoever, directly or indirectly, to pay to him or for his financial benefit in any way whatsoever, any money or financial benefit referable to the payment of the penalties, whether in whole or in part; and
>
> (b) accept or receive from the first respondent in any way whatsoever, any money or financial benefit referable to the payment of the penalties, whether in whole or in part.

73 Counsel sought an order giving Mr Myles 180 days to pay. In the absence of any evidence about why, I cannot accept that. I will allow 90 days.

74 I will make the declarations sought; and direct that the applicant within 7 days file and serve a draft minute of order setting out the terms of the orders he propounds conformably with these reasons.

I certify that the preceding seventy-four (74) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice O'Callaghan.

Associate:

Dated: 7 December 2018

ANNEXURE A

Statement of Agreed Facts and Admissions between the Applicant and Respondents

No. VID 195 of 2016

Federal Court of Australia
District Registry: Victoria
Division: Fair Work

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER
Applicant

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION and another
Respondents

This Statement of Agreed Facts is made for the purposes of section 191 of the *Evidence Act 1995* (Cth) and the admissions are made only for the purposes of this proceeding.

The purpose of this document

1. This Statement of Agreed Facts and Admissions sets out the facts that the Applicant and the Respondents have agreed for the purpose of disposing of parts of this proceeding.

2. This statement further sets out admissions of the Respondents that may be relied upon in this proceeding.

The parties and other relevant persons

3. The Applicant is the Australian Building and Construction Commissioner and is entitled to bring this proceeding seeking orders under sections 545 and 546 of the *Fair Work Act 2009* (Cth) (**the FW Act**).

4. At all material times, the First Respondent (**the CFMEU**) was:

Filed on behalf of	The Applicant and the Respondents
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(a) an organisation registered under the *Fair Work (Registered Organisations) Act 2009* (Cth);

(b) an industrial association within the meaning of section 12 of the FW Act, whose eligibility rules allowed membership by persons whose employment consisted of, or included, building work within the meaning of section 5 of the *Fair Work (Building Industry) Act 2012* (Cth) (**FWBI Act**) and section 6 of the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) (**BCIIP Act**); and

(c) a building association and a building industry participant for the purposes of section 4 of the FWBI Act and section 5 of the BCIIP Act.

5. The Second Respondent (**Myles**):

(a) is and was at all material times, employed by the CFMEU as an organiser;

(b) is and was at all material times, an officer of the CFMEU within the meaning of section 12 of the FW Act;

(c) was at all times between 15 March 2011 and the end of 14 March 2014 (and not thereafter), a person who held an entry permit issued pursuant to section 512 of the FW Act;

(d) is and was at all material times, a person who held an entry permit issued pursuant to section 83 of the *Occupational Health and Safety Act 2004* (Vic.) (**OHS Act**);

(e) is and was at all material times, a building industry participant for the purposes of section 4 of the FWBI Act and section 5 of the BCIIP Act;

(f) was acting in his capacity as an officer of the CFMEU in relation to the matters admitted herein; and

(g) was acting within the scope of his actual or apparent authority for and on behalf of the CFMEU in relation to the matters admitted herein.

6. McConnell Dowell Constructors (Aust) Pty Ltd (**McDow**) was at all material times relevant to the matters admitted herein:

(a) a corporation duly incorporated under the *Corporations Act 2001* (Cth) (**Corporations Act**);

(b) part of an unincorporated Joint Venture with Balfour Beatty Australia Pty Ltd (**BBA**) known as the MDBBJV, formed to construct and deliver the Springvale Rail Crossing Removal Project (**Project**) to the Chief Executive of the Victorian Roads Corporation;

(c) a person who had entered a contract for services with Rigweld Holdings Pty Ltd (**Rigweld**), under which McDow arranged for structural steel and precast panel installation works to be carried out;

(d) a person who had entered a contract for services with Oak Park (Tullamarine) Pty Ltd (**OPT**), under which McDow arranged for concrete construction works to be carried out;

(e) a person that employed a number of managerial and related employees to perform work on the Project at the Site, including a Project Manager, a Construction Manager, Superintendents, Senior Project Engineers, a Project Director and a Health, Safety and Environment Manager; and

(f) a person that occupied or otherwise controlled the Site.

7. BBA was at all material times relevant to the matters admitted herein:

(a) a corporation duly incorporated under the Corporations Act;

(b) part of the MDBBJV, formed to construct and deliver the Project to the Chief Executive of the Victorian Roads Corporation;

(c) a person who had entered a contract for services with Rigweld, under which BBA arranged for structural steel and precast panel installation works to be carried out;

(d) a person who had entered a contract for services with OPT, under which BBA arranged for concrete construction works to be carried out;

(e) a person that employed a number of managerial and related employees to perform work on the Project at the Site, including various Supervisors; and

(f) a person that occupied or otherwise controlled the Site.

8. Rigweld was at all material times relevant to the matters admitted herein:

(a) a corporation duly incorporated under the Corporations Act;

(b) a person who employed other persons whose employment consisted of, or included, building work within the meaning of section 5 of the FWBI Act;

(c) in the business of providing structural steel and panelling construction work to various principal contractors, pursuant to contracts for services; and

(d) contracted by McDow and BBA to provide and complete some structural steel and precast panel installation works on the Project, located at the Site.

9. OPT was at all material times relevant to the matters admitted herein:

(a) a corporation duly incorporated under the Corporations Act;

(b) the corporate trustee for the OPT Holdings Trust;

(c) a person who employed other persons whose employment consisted of, or included, building work within the meaning of section 5 of the FWBI Act;

(d) in the business of providing concrete construction work to various principal contractors, pursuant to contracts for services;

(e) contracted by McDow and BBA to provide and complete some concrete construction works on the Project, located at the Site; and

(f) a person who had entered a contract for services with Oz Fixing Pty Ltd (**Oz Fixing**), under which OPT arranged for various steel fixing works associated with the concrete construction works to be carried out.

10. Oz Fixing was at all material times relevant to the matters admitted herein:

(a) a corporation duly incorporated under the Corporations Act;

(b) a person who employed other persons whose employment consisted of, or included, building work within the meaning of section 5 of the FWBI Act;

(c) in the business of providing steel fixing work to various contractors, pursuant

to contracts for services; and

(d) contracted by OPT to provide and complete some steel fixing works associated with the concrete construction works on the Project, located at the Site.

11. By reason of the matters in paragraphs 6-10 herein, each of McDow, BBA, Rigweld, OPT and Oz Fixing were at all material times relevant to the matters admitted herein, building industry participants for the purposes of section 4 of the FWBI Act.

The employment regulation

12. At all material times relevant to the matters admitted herein:

(a) Rigweld employed various employees who were required to and did perform work on the Project, in various classifications including crane crews, Riggers, Steel Erectors, Dogmen and Mobile Crane Drivers (**Rigweld Employees**);

(b) OPT employed various employees who were required to and did perform work on the Project, in various classifications including Tradespersons, Riggers/Dogmen, Scaffolders, Steelfixers, Concrete Finishers and Trades Assistants (**OPT Employees**); and

(c) Oz Fixing employed various employees who were required to and did perform work on the Project, in various classifications including Tradespersons, Riggers/Dogmen, Scaffolders, Steelfixers, Concrete Finishers and Trades Assistants (**Oz Fixing Employees**).

13. At all material times relevant to the matters admitted herein:

(a) the Rigweld Employees were required pursuant to the terms of their individual contracts of employment and their roster, to perform work for Rigweld on the Project as required and/or directed;

(b) the OPT Employees were required pursuant to the terms of their individual contracts of employment and their roster, to perform work for OPT on the Project as required and/or directed; and

(c) the Oz Fixing Employees were required pursuant to the terms of their

individual contracts of employment and their roster, to perform work for Oz Fixing on the Project as required and/or directed.

14. The *Rigweld Holdings Pty Ltd and the CFMEU Rigger Steel Erector Enterprise Agreement 2011 – 2015*:

    (a) was an enterprise agreement within the meaning of the FW Act;

    (b) was approved by Fair Work Australia on 19 December 2011;

    (c) commenced operation on 26 December 2011;

    (d) had a nominal expiry date of 31 March 2015; and

    (e) at all material times relevant to the matters admitted herein, covered each of the Rigweld Employees employed as Riggers and Steel Erectors and the CFMEU.

15. The *Rigweld Holdings Pty Ltd and the CFMEU Mobile Crane Hiring Industry Enterprise Agreement 2011 – 2015*:

    (a) was an enterprise agreement within the meaning of the FW Act;

    (b) was approved by Fair Work Australia on 14 December 2011;

    (c) commenced operation on 21 December 2011;

    (d) had a nominal expiry date of 30 June 2015; and

    (e) at all material times relevant to the matters admitted herein, covered each of the Rigweld Employees employed as crane crew, Dogmen or Mobile Crane Drivers and the CFMEU.

16. The *OPT Holdings Trust T/As Oak Park Tullamarine and the CFMEU Building and Construction Industry Enterprise Agreement 2011 – 2015*:

    (a) was an enterprise agreement within the meaning of the FW Act;

    (b) was approved by Fair Work Australia on 3 July 2012;

    (c) commenced operation on 10 July 2012;

(d) had a nominal expiry date of 31 March 2015; and

(e) at all material times relevant to the matters admitted herein, covered each of the OPT Employees and the CFMEU.

17. The *Oz Fixing Pty Ltd and the CFMEU Civil Construction Industry Enterprise Agreement 2011 – 2015*:

(a) was an enterprise agreement within the meaning of the FW Act;

(b) was approved by Fair Work Australia on 14 November 2012;

(c) commenced operation on 21 November 2012;

(d) had a nominal expiry date of 31 March 2015; and

(e) at all material times relevant to the matters admitted herein, covered each of the Oz Fixing Employees and the CFMEU.

Events of Thursday, 6 February 2014

18. On Thursday, 6 February 2014, after a short pre-start meeting to be conducted immediately before 7.00am, somewhere between around 37 and 43 of the OPT Employees and the Oz Fixing Employees were required to commence work on the Project at the Site at 7.00am.

19. Between around 6.30am and 10.00am on 6 February 2014, instead of attending the pre-start meeting and instead of performing any work on the Project, somewhere between around 37 and 43 of the OPT Employees and the Oz Fixing Employees sat in the Site sheds at the Sandown Road end of the Site and failed or refused to perform any work.

20. By acting as admitted in paragraph 19 herein, each of the OPT Employees and the Oz Fixing Employees referred to therein engaged in industrial action within the meaning of section 19 of the FW Act, either by imposing a ban, limitation or restriction on the performance of their work or by failing or refusing to perform any work at all during the period admitted.

21. The conduct of the OPT Employees and the Oz Fixing Employees admitted in paragraphs 19 and 20 herein was counselled or procured by Myles.

22. Myles entered the Site that morning:

    (a) in response to a request for assistance from Peter Castles, a Health and Safety Representative employed at the Site and for the purpose of assisting Mr Castles; and

    (b) for the purpose of holding discussions with the OPT Employees and the Oz Fixing Employees, in accordance with section 484 of the FW Act.

23. Before entering the Site on 6 February 2014 as admitted herein, Myles had not given McDow, BBA or any other relevant occupier of the Site, an entry notice for the entry in accordance with section 487 of the FW Act.

24. Between around 8.00am and 9.30am on 6 February 2014, Myles attended several meetings with various representatives from McDow and OPT in the Site offices, including David Gee (McDow Deputy Construction Manager), Peter Fraser (McDow Project Director), Dennis Cordner (McDow Health, Safety and Environment Manager), Daryl Hill (McDow Superintendent), Arnold McGill (McDow Construction Manager), Gerry McCarry (McDow Superintendent) and Ian Bell (Director of OPT).

25. During the meetings referred to in paragraph 24 herein, Myles:

    (a) handed to Mr Hill a "Notice of Suspected Contravention" relating to risk assessments and training regarding manual handing, pursuant to and as required by section 88(1) of the OHS Act;

    (b) for and on behalf of the CFMEU, requested or required McDow and/or OPT to organise for the OPT Employees and the Oz Fixing Employees to attend a CFMEU manual handling training course (**Training Course Request**);

    (c) said that he could tell "*the boys*" (being the OPT Employees and the Oz Fixing Employees) to leave the Site sheds if the Training Course Request was agreed to and that they would be "*shedded up*" until he got a commitment to the training course and it was written; and

    (d) after securing the agreement of McDow and OPT to the Training Course Request, said words to the effect "*I can tell the boys to leave the sheds now*".

26. By itself, the Training Course Request was lawful.

Myles's admitted contraventions of the FW Act on 6 February 2014

Section 417(1) of the FW Act

27. By reason of the matters admitted in paragraphs 12, 13, 16 and 17 herein, in acting as admitted in paragraph 20 herein, each of the OPT Employees and the Oz Fixing Employees referred to therein contravened section 417(1) of the FW Act.

28. By reason of the matters admitted in paragraph 21 herein, Myles was involved in the contraventions of section 417(1) of the FW Act by each of the OPT Employees and the Oz Fixing Employees admitted in paragraph 27 herein, within the meaning of section 550 of the FW Act.

29. By reason of the matters admitted in paragraph 28 herein, Myles admits that he contravened section 417(1) of the FW Act.

Section 348 of the FW Act

30. In acting as admitted in paragraph 21 herein, Myles organised and/or took action against McDow and/or OPT and/or Oz Fixing with the intention of coercing McDow and/or OPT to engage in industrial activity within the meaning of section 347(b)(iv) of the FW Act, namely, to comply with the Training Course Request.

31. By reason of the matters admitted in paragraph 30 herein, Myles admits that he contravened section 348 of the FW Act.

Section 500 of the FW Act

32. At all material times when acting as admitted in paragraphs 21-25 herein, Myles was exercising, or seeking to exercise the right under section 484 of the FW Act to enter the Site for the purpose of holding discussions with the OPT Employees and the Oz Fixing Employees, in accordance with Part 3-4 of the FW Act.

33. By reason of the matters admitted in paragraphs 22(b), 23 and 32 herein, in acting as admitted in paragraphs 21-25 herein, Myles admits that he acted in an improper manner.

34. By reason of the matters admitted in paragraphs 5(c), 6(f), 7(f), 32 and 33 herein, Myles admits that he contravened section 500 of the FW Act.

Events of Thursday, 13 February 2014

35. On Thursday, 13 February 2014, four of the Rigweld Employees were required to perform a night shift on the Project commencing at 7.00pm.

36. At around 6.45pm on 13 February 2014, Myles entered the Site and convened and conducted what he described to Project representatives as a "union meeting" with the four Rigweld Employees referred to in paragraph 35 herein and Rob Smit (night shift Health and Safety Representative on the Project), in the crib sheds off Newcomen Road behind the Site office on the Site.

37. Myles entered the Site as referred to in paragraph 36 herein in response to a request for assistance from Mr Smit, a Health and Safety Representative employed at the Site and for the purpose of assisting Mr Smit.

38. Shortly after 7.00pm, the meeting referred to in paragraph 36 herein ended, Myles left the Site and motioned for the four Rigweld Employees to join him, which they did. The four Rigweld Employees thereafter left the Site for the evening.

39. The four Rigweld Employees referred to in paragraph 35 herein did not commence or perform any work on their required night shift that evening.

40. By acting as admitted in paragraphs 38 and 39 herein, each of the four Rigweld Employees engaged in industrial action within the meaning of section 19 of the FW Act, either by imposing a ban, limitation or restriction on the performance of their work or by failing or refusing to perform any work at all on their night shift that evening.

41. The conduct of the four Rigweld Employees admitted in paragraphs 38-40 herein was counselled or procured by Myles, including by him acting as admitted in paragraph 38 herein.

42. At some time around or just after 8.00pm on 13 February 2014, Myles re-entered the Site and proceeded around various areas of the Site in the company of Mr Smit.

43. Myles entered the Site as referred to in paragraph 42 herein in response to a request for assistance from Mr Smit, a Health and Safety Representative employed at the Site and for the purpose of assisting Mr Smit.

44. Between around 8.30pm and 8.50pm on 13 February 2014, Myles refused numerous directions from representatives of the Project to leave the Site, despite threats to call the police. Myles refused directions from Lisa Ranftl (McDow Senior Project Engineer), Innes Menke (BBA Supervisor), Percy Jordan (McDow Superintendent) and Peter Fraser (McDow Project Director). Myles said that he refused to leave until he had finished and that he had a job to do.

45. In various conversations at or around this time:

    (a) Myles raised issues and questions about the safety of the emergency access to and egress from the stormwater sump/retention chamber; and

    (b) in response to a statement from Peter Fraser that he was on the Site illegally, said that he was accompanying Mr Smits.

46. At or around this time, Mr Fraser requested Myles to produce for inspection a copy of his entry permit and Myles refused or failed to produce for inspection his entry permit, saying words to the effect that "*I haven't got any ID, I'm not leaving site, why don't you call the police – I'd love that*".

47. At or around this time, Mr Menke requested Myles to produce for inspection a copy of his entry permit and Myles refused or failed to produce for inspection his entry permit.

48. Mr Menke then said to Myles words to the effect "*If you can't show me any documentation or reason for being here, you need to leave*", to which Myles responded with words to the effect "*I'm not going anywhere until I'm finished*".

49. At or around 9.00pm after the police had been called, several Protective Services Officers attended the Site and spoke to Myles, after which Myles left the Site.

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Myles's admitted contraventions of the FW Act on 13 February 2014

Section 417(1) of the FW Act

50. By reason of the matters admitted in paragraphs 12-15 herein, in acting as admitted in paragraph 40 herein, each of the four Rigweld Employees referred to therein contravened section 417(1) of the FW Act.

51. By reason of the matters admitted in paragraph 41 herein, Myles was involved in the contraventions of section 417(1) of the FW Act by each of the Rigweld Employees admitted in paragraph 50 herein, within the meaning of section 550 of the FW Act.

52. By reason of the matters admitted in paragraph 51 herein, Myles admits that he contravened section 417(1) of the FW Act.

Section 500 of the FW Act – failure to show entry permit

53. At all material times when acting as admitted in paragraphs 42-49 herein, Myles was exercising, or seeking to exercise a State or Territory OHS right pursuant to sections 58(1)(f) and 70(1) of the OHS Act, within the meaning of section 494(2) of the FW Act.

54. By reason of the matters admitted in paragraphs 42-43 and 53 herein, in acting as admitted in paragraphs 46 and 47 herein, Myles admits that he acted in an improper manner.

55. By reason of the matters admitted in paragraphs 5(c), 6(f), 7(f), 53 and 54 herein, Myles admits that he contravened section 500 of the FW Act.

Section 500 of the FW Act – multiple refusals to leave the Site

56. By reason of the matters admitted in paragraphs 42-43 and 53 herein, in acting as admitted in paragraphs 44, 48 and 49 herein, Myles admits that he acted in an improper manner.

57. By reason of the matters admitted in paragraphs 5(c), 6(e), 6(f), 7(e), 7(f), 53 and 56 herein, Myles admits that he contravened section 500 of the FW Act.

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Events of Wednesday, 19 March 2014 – Myles's admitted contravention of section 494(1) of the FW Act

58. At or around 9.00am on Wednesday, 19 March 2014, Myles (in company with Mr Castles) approached Daryl Hill (McDow Superintendent) at the entrance to the Site shed compound and said to Mr Hill that he wanted to go out on Site. Mr Hill responded with words to the effect "*I can't let you, I've heard that your permit's expired.*" Myles responded with words to the effect "*That's right. I'm allowed to go on site, I've got a safety concern*", at which point he provided to Mr Hill a "Notice of Suspected Contravention" relating to access to and egress from a work area on the concourse and an incomplete scaffold, pursuant to and as required by section 88(1) of the OHS Act. Mr Hill then allowed Myles to enter the Site.

59. Myles entered the Site as referred to in paragraph 58 herein in response to a request for assistance from Mr Castles, a Health and Safety Representative employed at the Site and for the purpose of assisting Mr Castles.

60. By reason of the matters admitted in paragraph 5(c) herein, on 19 March 2014, Myles was not a permit holder within the meaning of the FW Act.

61. In acting as admitted in paragraph 58 herein, Myles exercised a State or Territory OHS right pursuant to sections 58(1)(f) and 70(1) of the OHS Act, within the meaning of section 494(2) of the FW Act.

62. By reason of the matters admitted in paragraphs 5, 6(f), 7(f) and 58-61 herein, Myles admits that he contravened section 494(1) of the FW Act.

Events of Tuesday, 1 April 2014 – Myles's admitted contravention of section 494(1) of the FW Act

63. At about 8.30am on Tuesday, 1 April 2014, Myles attended a meeting with Mr Hill, David White (McDow Operations Manager – Southern Region), Mr Castles and Tony Matuszac (from the Australian Rail, Tram and Bus Union). The meeting was at the "Free Burma Café" located near the Site on Springvale Road, Springvale.

64. In and immediately after the meeting admitted in paragraph 63 herein, Myles sought and obtained access to the Site. Myles indicated his intention to enter the Site and Mr Hill and Mr White both informed Myles that he was not allowed to enter the Site and that if he sought to do so, they would call the police. Mr Castles said that he had invited Myles and Mr Matuszac to Site to inspect the crane setup for some asphalt placement. Myles then said that Mr Castles had asked him and Mr Matuszac to assist with the safety of the crane setup (because he had particular expertise with cranes) and that he was therefore entitled to enter the Site under section 70 of the OHS Act.

65. After being asked to see his permits, Myles went to his car and then showed Mr Hill and Mr White some sections of the OHS Act and his entry permit issued under the OHS Act. Myles and Mr Matuszac then entered the Site with Mr Castles, with Mr Hill in company.

66. By reason of the matters admitted in paragraph 5(c) herein, on 1 April 2014, Myles was not a permit holder within the meaning of the FW Act.

67. In acting as admitted in paragraph 64 herein, Myles exercised a State or Territory OHS right pursuant to sections 58(1)(f) and 70(1) of the OHS Act, within the meaning of section 494(2) of the FW Act.

68. By reason of the matters admitted in paragraphs 5, 6(f), 7(f) and 64-67 herein, Myles admits that he contravened section 494(1) of the FW Act.

The CFMEU's admitted contraventions of the FW Act

69. The CFMEU admits that all actions and conduct taken by Myles as admitted herein were also actions and conduct taken by it, by reason of the matters referred to in paragraphs 5(b), 5(f) and 5(g) herein and sections 363(1)(b) and 793(1) of the FW Act.

70. The CFMEU admits that it had the same state(s) of mind that Myles had when he was taking the actions and conduct as admitted herein, by reason of the matters referred to in paragraphs 5(b), 5(f) and 5(g) herein and sections 363(3) and 793(2) of the FW Act.

71. By reason of the matters admitted in paragraphs 69 and 70 herein, the CFMEU admits that it contravened:

    (a) section 417(1) of the FW Act, as referred to in paragraph 29 herein;

    (b) section 348 of the FW Act, as referred to in paragraph 31 herein; and

    (c) section 417(1) of the FW Act, as referred to in paragraph 52 herein.

72. At all material times when acting as admitted in paragraphs 21-25 herein, Myles was aware and had knowledge of:

    (a) his own actions (and those of others) as admitted in those paragraphs; and

    (b) the matters admitted in paragraphs 5(c), 6(f), 7(f) and 32 herein.

73. At all material times when acting as admitted in paragraphs 42-49 herein, Myles was aware and had knowledge of:

    (a) his own actions (and those of others) as admitted in those paragraphs; and

    (b) the matters admitted in paragraphs 5(c), 6(e), 6(f), 7(e), 7(f) and 53 herein.

74. At all material times when acting as admitted in paragraph 58 herein, Myles was aware and had knowledge of:

    (a) his own actions (and those of others) as admitted in that paragraph; and

    (b) the matters admitted in paragraphs 5, 6(f), 7(f) and 59-61 herein.

75. At all material times when acting as admitted in paragraph 64 and 65 herein, Myles was aware and had knowledge of:

    (a) his own actions (and those of others) as admitted in those paragraphs; and

    (b) the matters admitted in paragraphs 5, 6(f), 7(f), 66 and 67 herein.

76. By reason of the matters admitted in:

    (a) paragraphs 69, 70 and 72 herein, the CFMEU admits that it was directly or indirectly knowingly concerned in Myles's contravention of section 500 of the FW Act, as admitted in paragraph 34 herein;

(b) paragraphs 69, 70 and 73 herein, the CFMEU admits that it was directly or indirectly knowingly concerned in Myles's contravention of section 500 of the FW Act, as admitted in paragraph 55 herein;

(c) paragraphs 69, 70 and 73 herein, the CFMEU admits that it was directly or indirectly knowingly concerned in Myles's contravention of section 500 of the FW Act, as admitted in paragraph 57 herein

(d) paragraphs 69, 70 and 74 herein, the CFMEU admits that it was directly or indirectly knowingly concerned in Myles's contravention of section 494(1) of the FW Act, as admitted in paragraph 62 herein; and

(e) paragraphs 69, 70 and 75 herein, the CFMEU admits that it was directly or indirectly knowingly concerned in Myles's contravention of section 494(1) of the FW Act, as admitted in paragraph 68 herein.

77. By reason of the matters admitted in:

(a) paragraph 76(a) herein, the CFMEU admits that it was involved in Myles's contravention of section 500 of the FW Act admitted therein and thereby admits that it also contravened section 500 of the FW Act;

(b) paragraph 76(b) herein, the CFMEU admits that it was involved in Myles's contravention of section 500 of the FW Act admitted therein and thereby admits that it also contravened section 500 of the FW Act;

(c) paragraph 76(c) herein, the CFMEU admits that it was involved in Myles's contravention of section 500 of the FW Act admitted therein and thereby admits that it also contravened section 500 of the FW Act;

(d) paragraph 76(d) herein, the CFMEU admits that it was involved in Myles's contravention of section 494(1) of the FW Act admitted therein and thereby admits that it also contravened section 494(1) of the FW Act; and

(e) paragraph 76(e) herein, the CFMEU admits that it was involved in Myles's contravention of section 494(1) of the FW Act admitted therein and thereby admits that it also contravened section 494(1) of the FW Act.

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Declarations and penalties

78. The parties agree that the court ought declare that:

(a) by reason of paragraphs 27-29 herein, Myles contravened section 417(1) of the FW Act;

(b) by reason of paragraphs 30-31 herein, Myles contravened section 348 of the FW Act;

(c) by reason of paragraphs 32-34 herein, Myles contravened section 500 of the FW Act;

(d) by reason of paragraphs 50-52 herein, Myles contravened section 417(1) of the FW Act;

(e) by reason of paragraphs 53-55 herein, Myles contravened section 500 of the FW Act;

(f) by reason of paragraphs 56-57 herein, Myles contravened section 500 of the FW Act;

(g) by reason of paragraphs 58-62 herein, Myles contravened section 494(1) of the FW Act;

(h) by reason of paragraphs 64-68 herein, Myles contravened section 494(1) of the FW Act;

(i) by reason of paragraph 71(a) herein, the CFMEU contravened section 417(1) of the FW Act;

(j) by reason of paragraph 71(b) herein, the CFMEU contravened section 348 of the FW Act;

(k) by reason of paragraphs 76(a) and 77(a) herein, the CFMEU contravened section 500 of the FW Act;

(l) by reason of paragraph 71(c) herein, the CFMEU contravened section 417(1) of the FW Act;

(m) by reason of paragraphs 76(b) and 77(b) herein, the CFMEU contravened

section 500 of the FW Act;

(n) by reason of paragraphs 76(c) and 77(c) herein, the CFMEU contravened section 500 of the FW Act;

(o) by reason of paragraphs 76(d) and 77(d) herein, the CFMEU contravened section 494(1) of the FW Act;

(p) by reason of paragraphs 76(e) and 77(e) herein, the CFMEU contravened section 494(1) of the FW Act.

79. The parties agree that the following matters remain outstanding and that they require determination by the Court:

(a) the allegations in paragraphs 16-19 and 70(b) (or 71(b)) of the Applicant's Further Amended Statement of Claim dated 20 December 2017 (**FASOC**);

(b) the number and size of any pecuniary penalties that Myles should be ordered to pay (to the Commonwealth of Australia, within 28 days of the Court's order) in relation to his admitted contraventions of the FW Act referred to in paragraphs 78(a)-78(h) herein and if established, any contravention of section 355 of the FW Act as alleged in paragraph 19 of the FASOC;

(c) the number and size of any pecuniary penalties that the CFMEU should be ordered to pay (to the Commonwealth of Australia, within 28 days of the Court's order) in relation to its admitted contraventions of the FW Act referred to in paragraphs 78(i)-78(p) herein and if established, any contravention of section 355 of the FW Act as alleged in paragraph 70(b) (or 71(b)) of the FASOC; and

(d) paragraph F of the Prayer for Relief in the FASOC.

80. The parties agree that in addition to making appropriate declarations and orders pursuant to paragraphs 78-79 herein, that the Court should order that the Applicant's Originating Application dated 3 March 2016 should be otherwise dismissed and that there should be no order as to costs.

81. The parties agree that the respondents admitted liability as set out herein and agreed to this Statement of Agreed Facts and Admissions.

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Date: 5 March 2018

MinterEllison
Solicitors for the Applicant

Kristen Reid, CFMEU
Solicitor for the Respondents

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Schedule of parties

No. VID 195 of 2016

Federal Court of Australia
District Registry: Victoria
Division: Fair Work

Respondents

Second Respondent	Joseph Myles

ANNEXURE B

Supplementary Statement of Agreed Facts and Admissions between the Applicant and Respondents

No. VID 195 of 2016

Federal Court of Australia
District Registry: Victoria
Division: Fair Work

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER
Applicant

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION and another
Respondents

This Statement of Agreed Facts is made for the purposes of section 191 of the *Evidence Act 1995* (Cth) and the admissions are made only for the purposes of this proceeding.

The purpose of this document

1. This supplementary Statement of Agreed Facts and Admissions supplements and adds to the existing Statement of Agreed Facts and Admissions dated 5 March 2018 (**SOAF**) and sets out the further facts that the Applicant and the Respondents have agreed for the purpose of disposing of additional parts of this proceeding.

2. This statement further sets out further admissions of the Respondents that may be relied upon in this proceeding.

3. This supplementary Statement of Agreed Facts and Admissions adopts and uses the same defined terms (with the same meaning) as contained in the SOAF.

Filed on behalf of	The Applicant and the Respondents
Prepared by	Jennifer Bourke
Law firm (if applicable)	MinterEllison
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Events of Wednesday, 19 June 2013

4. At all material times in 2013, Clifton Formwork (Vic) Pty Ltd (**Clifton Formwork**) was in the business of providing formwork, steel reinforcing and concreting civil construction works to a range of contractors in the building and construction industry in Victoria.

5. By reason of the matters admitted in paragraph 4 herein, at all material times in 2013, Clifton Formwork was an "independent contractor" within the meaning of section 355 of the FW Act.

6. On Wednesday, 19 June 2013, Myles attended a meeting at the "Free Burma Café" located near the Site on Springvale Road, Springvale with Arnold McGill (McDow Construction Manager on the Project), David Gee (McDow Deputy Construction Manager on the Project), Alexander "Sandy" Williamson (McDow Superintendent on the Project) and Ben Cordier (Organiser employed by the Australian Rail, Tram and Bus Union).

7. In the meeting, Myles said words to the effect that:

   (a) he did not want Clifton Formwork engaged on the Project;

   (b) he was "*on a mission to get Clifton Formwork*";

   (c) there would be a "*blue*", and warning that there would be "*trouble*", if Clifton Formwork were engaged on the Project; and

   (d) in relation to Clifton Formwork, "*there will be pickets outside the gates if they're on this job*" and "*don't blame me that you weren't warned*".

8. In acting as admitted in paragraphs 6-7 herein, Myles threatened to organise and/or take action against McDow, with the intention of coercing McDow and/or BBA to not engage Clifton Formwork on the Project.

9. By reason of the matters admitted in paragraphs 5 and 8 herein, Myles admits that he contravened section 355 of the FW Act.

10. The CFMEU admits that the actions and conduct taken by Myles as admitted herein were also actions and conduct taken by it, by reason of the matters referred to in paragraphs 5(b), 5(f) and 5(g) of the SOAF and sections 363(1)(b) and 793(1) of the FW Act.

11. The CFMEU admits that it had the same state(s) of mind that Myles had when he was taking the actions and conduct as admitted herein, by reason of the matters referred to in paragraphs 5(b), 5(f) and 5(g) of the SOAF and sections 363(3) and 793(2) of the FW Act.

12. By reason of the matters admitted in paragraphs 10 and 11 herein, the CFMEU admits that it contravened section 355 of the FW Act, as referred to in paragraph 9 herein.

Additional declarations and penalties

13. In addition to the agreed declarations contained in paragraph 78 of the SOAF, the parties agree that the court ought declare that:

    (a) by reason of paragraphs 8-9 herein, Myles contravened section 355 of the FW Act; and

    (b) by reason of paragraph 12 herein, the CFMEU contravened section 355 of the FW Act.

14. The parties agree that paragraph 79 of the SOAF should be varied such that the following matters remain outstanding and that they require determination by the Court:

    (a) the number and size of any pecuniary penalties that Myles should be ordered to pay (to the Commonwealth of Australia, within 28 days of the Court's order) in relation to his admitted contraventions of the FW Act referred to in paragraphs 78(a)-78(h) of the SOAF and paragraph 13(a) herein;

    (b) the number and size of any pecuniary penalties that the CFMEU should be ordered to pay (to the Commonwealth of Australia, within 28 days of the Court's order) in relation to its admitted contraventions of the FW Act referred to in paragraphs 78(i)-78(p) of the SOAF and paragraph 13(b) herein; and

(c) paragraph F of the Prayer for Relief in the FASOC.

15. The parties agree that in addition to making appropriate declarations and orders pursuant to paragraph 78 of the SOAF and paragraphs 13-14 herein, that the Court should order that the Applicant's Originating Application dated 3 March 2016 should be otherwise dismissed and that there should be no order as to costs.

16. The parties agree that the respondents admitted liability as set out herein and agreed to this supplementary Statement of Agreed Facts and Admissions.

Date: 13 April 2018

MinterEllison
Solicitors for the Applicant

Date: 12 April 2018

Kristen Reid, CFMEU
Solicitor for the Respondents

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Schedule of parties

No. VID 195 of 2016

Federal Court of Australia
District Registry: Victoria
Division: Fair Work

Respondents

Second Respondent	Joseph Myles