FEDERAL COURT OF AUSTRALIA

Fair Work Ombudsman v Maritime Union of Australia (No 2) [2015] FCA 814

Citation:	Fair Work Ombudsman v Maritime Union of Australia (No 2) [2015] FCA 814
Parties:	**FAIR WORK OMBUDSMAN v MARITIME UNION OF AUSTRALIA and WILLIAM TRACEY**
File number(s):	WAD 136 of 2012
Judge(s):	**SIOPIS J**
Date of judgment:	11 August 2015
Catchwords:	**INDUSTRIAL LAW** - the respondents engaged in conduct in contravention of s 346 of the *Fair Work Act 2009* (Cth) – the respondents distributed a poster which named five employees as "scabs" – penalty – where the action taken by the respondents was an act of vengeance against the employees – where action was initiated by senior officials of the first respondent – where the intention of the action was to cause emotional distress to the employees named in the poster – whether each party was entitled to make submissions as to the appropriate range of penalty – whether the Court should award compensation in respect of the emotional distress suffered by the five named employees – where the second respondent claimed penalty privilege – whether the respondents are liable to pay costs pursuant to s 570(2)(b) of the *Fair Work Act*.
Legislation:	*Fair Work Act 2009* (Cth) ss 346, 348, 539(2), 545, 545(2), 545(2)(b), 546(2), 557, 570, 570(2), 570(2)(b) *Crimes Act 1914* (Cth) s 4AA *Building and Construction Industry Improvement Act 2005* (Cth) s 38 *Federal Court of Australia Act 1976* (Cth) s 37M
Cases cited:	*Fair Work Ombudsman v Maritime Union of Australia* [2014] FCA 440 *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCAFC 59 *Barbaro v The Queen* (2014) 305 ALR 232 *Director, Fair Work Building Industry Inspectorate v Foxville Projects Group Pty Ltd* [2015] FCA 492 *Director of the Fair Work Building Industry Inspectorate v Upton* [2015] FCA 672

Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith (2008) 165 FCR 560
Darlaston v Parker (No 2) [2010] FCA 1382
Fair Work Ombudsman v Maritime Union of Australia [2012] FCA 1232
John Holland Pty Ltd v MUA (No 2) [2010] FCA 110
Stuart-Mahoney v Construction, Forestry, Mining and Energy Union (2008) 177 IR 61
Cahill v Construction, Forestry, Mining and Energy Union (No 4) (2009) 189 IR 304
Williams v Construction, Forestry, Mining and Energy Union (No 2) (2009) 182 IR 327
A & L Silvestri Pty Ltd v Construction, Forestry, Mining and Energy Union [2008] FCA 466
Temple v Powell (2008) 169 FCR 169
Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (2014) 140 ALD 337
Australian Licenced Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd (2011) 193 FCR 526
Richardson v Oracle Corporation Australia Pty Ltd (2014) 223 FCR 334
Kraus v Menzie [2012] FCA 3
Construction, Forestry, Mining and Energy Union v Clarke (2008) 170 FCR 574
Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission (2002) 213 CLR 543
Australian Competition and Consumer Commission v FFE Building Services Ltd (2003) 130 FCR 37
Construction, Forestry, Mining and Energy Union v BHP Coal Proprietary Ltd (No 3) (2012) 228 IR 195

Date of hearing:	16 September 2014
Date of last submissions:	24 July 2015
Place:	Sydney (Heard in Perth)
Division:	FAIR WORK DIVISION
Category:	Catchwords
Number of paragraphs:	102
Counsel for the Applicant:	Mr J Bourke QC and Ms R Sweet
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IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY
FAIR WORK DIVISION **WAD 136 of 2012**

BETWEEN:	**FAIR WORK OMBUDSMAN** **Applicant**
AND:	**MARITIME UNION OF AUSTRALIA** **First Respondent**
	WILLIAM TRACEY **Second Respondent**

JUDGE: **SIOPIS J**
DATE OF ORDER: **11 AUGUST 2015**
WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The first respondent is to pay a total pecuniary penalty of $80,000 in respect of five contraventions of s 346(c) of the *Fair Work Act 2009* (Cth).
2. The second respondent is to pay a total pecuniary penalty of $15,000 in respect of five contraventions of s 346(c) of the *Fair Work Act*.
3. The penalties referred to in Order 1 and Order 2 are to be paid into the Consolidated Revenue Fund of the Commonwealth of Australia within 28 days.
4. The respondents are, jointly and severally, to pay, by way of compensation, $20,000 to each of Mr Jonathan Daly, Mr David Mawbey, Mr David Donaldson-Stiff, Mr Matthew Scott and $40,000 to Mr Douglas Watson.
5. There be no order as to costs.

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

IN THE FEDERAL COURT OF AUSTRALIA
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FAIR WORK DIVISION **WAD 136 of 2012**

BETWEEN:	**FAIR WORK OMBUDSMAN** **Applicant**
AND:	**MARITIME UNION OF AUSTRALIA** **First Respondent**
	WILLIAM TRACEY **Second Respondent**

JUDGE:	**SIOPIS J**
DATE:	**11 AUGUST 2015**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 On 6 May 2014, I delivered reasons for judgment and made orders that the first respondent, the Maritime Union of Australia (MUA), and the second respondent, Mr William Tracey, the Assistant Secretary of the Western Australia branch of the MUA, had contravened s 346 of the *Fair Work Act 2009* (Cth) by engaging in adverse action against each of five named employees of the Fremantle Port Authority (*Fair Work Ombudsman v Maritime Union of Australia* [2014] FCA 440). The adverse action comprised the distribution of posters at various locations within the premises of the Fremantle Port Authority at Fremantle and Kwinana which named and denounced as "scabs", five employees. These employees were Mr Jonathan Daly, Mr David Mawbey, Mr David Donaldson-Stiff, Mr Matthew Scott and Mr Douglas Watson. At the relevant time, each of Mr Mawbey and Mr Scott was a vessel traffic service officer (VTSO) and each of Mr Daly, Mr Donaldson-Stiff and Mr Watson was a small craft master, based at the Fremantle inner harbour. The Kwinana premises of the Fremantle Port Authority are referred to as the outer harbour.

2 The parties made submissions in relation to questions of penalty, compensation and costs. Each of the applicant and the respondents made oral and written submissions to this Court on the range of penalties which could be imposed on the MUA and Mr Tracey. I might

observe, in passing, that there was a considerable difference between the range of penalties proposed by each party.

3 After this decision was reserved, the decision by the Full Court in *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCAFC 59 (*CFMEU*) was delivered. Before the *CFMEU* decision, there were a number of first instance decisions in this Court which held that the principle in the High Court decision in *Barbaro v The Queen* (2014) 305 ALR 232 (*Barbaro*), which precluded the prosecution in a criminal case from making submissions on the range of sentences which may be imposed upon an offender, did not apply to a civil penalty case.

4 However, in *CFMEU*, the Full Court took a different view to that expressed by the various single judge decisions, and determined that the decision in *Barbaro* did apply to civil penalty cases.

5 The parties in this case then made further written submissions as to the effect of the *CFMEU* decision on the approach that the Court should adopt in relation to the submissions which each party had made in relation to the appropriate penalty to be applied.

6 The applicant accepted that the consequence of the Full Court decision in *CFMEU* was that the Court should not have regard to those parts of the applicant's submissions which suggested the appropriate penalties to be applied. However, the parties disagreed as to whether a similar approach should be taken to the respondents' submissions as to the appropriate penalties to be applied.

7 The respondents relied upon the observations of Flick J in *Director, Fair Work Building Industry Inspectorate v Foxville Projects Group Pty Ltd* [2015] FCA 492 (*Foxville*) to the effect that whilst the Court was precluded from having regard to the submissions by the regulator in relation to the quantum of penalty, it:

> …remains open to the contravening employer…to continue to advance submissions as to what is considered to be an appropriate range of penalty…

8 The applicant, however, relied upon *Director of the Fair Work Building Industry Inspectorate v Upton* [2015] FCA 672 (*Upton*) in which Gilmour J, not having been referred to *Foxville*, observed at [17] that:

> There is no reason in principle as to why an applicant should be precluded from making submissions on the range or amount of penalties but not the respondent.

9 It is unnecessary for me to comment upon the divergent views expressed in each of *Foxville* and *Upton* because, in my view, in the particular circumstances of this case, nothing turns upon the resolution of this issue one way or the other. This is because the range of penalties suggested by the respondents was premised upon the Court accepting its submissions in relation to the weight to be placed on each of the various considerations identified in [13] below. As will become apparent, I have not accepted the respondents' submissions in relation to important aspects of these considerations. Accordingly, the substratum for the range of penalties suggested by the respondents falls away.

10 The High Court has granted special leave to appeal from the decision of the Full Court in *CFMEU*. The respondents have contended that the Court should await the outcome of the High Court appeal before fixing penalties and awarding compensation. In my view, for the reasons expressed in the preceding paragraph, it is not necessary to await the outcome of the High Court appeal in the *CFMEU* case.

11 I have reached the decision I have in relation to the penalties to be imposed, as an independent exercise of discretion for the reasons which I have set out below.

PENALTY

12 There was no disagreement between the parties as to the approach that the Court should adopt in relation to the exercise of the Court's discretion to impose a penalty. The parties referred to a number of factors to which the Court may have regard in considering the exercise of the discretion. These factors are well known and have been referred to in a number of authorities. See, for example, *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 (*Australian Ophthalmic*), *Darlaston v Parker (No 2)* [2010] FCA 1382 at [7].

13 These factors include the following:

(a) the nature and extent of the impugned conduct;
(b) the circumstances in which the impugned conduct took place;
(c) the period of the impugned conduct;
(d) the nature and extent of any loss or damage sustained as a result of the impugned conduct;
(e) whether there has been similar previous conduct by the respondents;

(f) whether the contraventions arose over one course of conduct;

(g) whether senior management was involved in the impugned conduct;

(h) whether there had been any contrition exhibited;

(i) whether the respondents had cooperated with the applicant;

(j) the need for deterrence.

14 It is, also, well recognised that those factors are not exhaustive and do not substitute for the exercise of the discretion by reference to the facts and circumstances of each case and to the statutory regime in question. As Buchanan J observed at [91] in *Australian Ophthalmic*:

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

15 Further, the Court should in the exercise of its discretion, have regard to the maximum penalty prescribed on the basis that the maximum penalty would be reserved for the worst type of cases falling within the relevant provision.

16 As a preliminary matter, I observe that each of the parties accepted that the imposition of the penalty should be approached on the basis that there were five separate contraventions of s 346 of the *Fair Work Act* by each of the MUA and Mr Tracey, on the basis that adverse action which was taken against each of the employees, constituted a separate contravention. It was accepted that s 557 of the *Fair Work Act* had no application to a contravention of s 346 of the *Fair Work Act*. Each of the parties also accepted that there were common elements in the contravening conduct in that Mr Tracey was the main protagonist and all of the named employees were named in the same poster; and that, therefore, these circumstances of the case could be addressed by the application of the totality principle.

17 Under s 539(2) and s 546(2) of the *Fair Work Act* and s 4AA of the *Crimes Act 1914* (Cth) (as then applied) the maximum penalties available for a contravention of s 346 of the *Fair Work Act* were $33,000 (being 300 penalty points) in respect of the MUA - it being a body corporate; and $6,600 (being 60 penalty points) in respect of Mr Tracey.

The nature and extent of the impugned conduct

18 I consider first the nature and extent of the conduct which led to the contraventions and the circumstances in which the conduct occurred.

19 The circumstances in which the contravening conduct occurred are set out in detail in the principal judgment. As is described in the principal judgment, this conduct, referred to as the "scab poster action", occurred after four of the five employees named in the scab poster had worked during a period of strike action which had been organised by Mr Tracey. As a consequence of the four employees working during the strike, the objective of the strike, namely, to bring the operations of the port of Fremantle to a halt, failed. The fifth person named on the poster, Mr Watson, did not work during the strike, but had fraternised very briefly with those employees coming on shift who worked during the strike.

20 I found that Mr Tracey was angry after the strike had failed to bring the operations of the Fremantle port to a halt, and that Mr Tracey had undertaken the scab poster action as an act of vengeance against the four employees who had exercised their right not to go on strike. I found that this was also Mr Tracey's motivation in naming Mr Watson as a "scab" on the scab poster, even though Mr Watson had not worked during the period of the strike, namely, 1 to 3 December 2011.

21 I also found that Mr Christopher Cain, the secretary of the Western Australia branch of the MUA, and the highest ranking MUA official in Western Australia, shared Mr Tracey's anger and that each of them had the motivation to "exact vengeance" against the named employees. I also found that Mr Cain had authorised Mr Tracey to engage in the scab poster action. Accordingly, I found that the MUA was directly liable for the scab poster action; and I found that the MUA had in respect of each of the named employees, engaged in adverse action in contravention of s 346 of the *Fair Work Act*.

22 The applicant contended that the fact that senior officials within an experienced trade union had deliberately engaged in the contravening conduct in order to exact vengeance against employees who had exercised their lawful workplace rights not to engage in industrial action, ought to be regarded as a highly aggravating factor when determining penalty. It was a further aggravating factor, said the applicant that, as an experienced industrial participant each respondent would have known that each of the named employees had a right not to participate in industrial action, but, nevertheless, each respondent took deliberate and calculated action which undermined the statutory protections afforded to the employees.

23 The applicant also contended that a further aggravating factor was the fact that Mr Tracey had distributed the scab posters both in the inner harbour at Fremantle and the outer harbour at Kwinana. This, said the applicant, was an attempt to influence the wider workforce beyond the VTSOs and the small craft masters group in the inner harbour, to marginalise the employees named in the scab poster.

24 A further aggravating factor, said the applicant, was that Mr Watson, who had not participated in the strike action, was named, and despite his request for an apology from Mr Tracey, none was forthcoming.

25 The respondents contended that it was relevant to take into account that the MUA and Mr Tracey did not engage in the contravening conduct for their own gain, but rather in response to actions which they saw as antithetical to the interests and efforts of their members. The respondents said that it was their view that the persons named in the scab poster were allowing the other workers to carry the burden of the fight for better conditions, and yet were seeking to share the benefits of the outcome. Senior counsel for the respondents submitted that this circumstance did not excuse their conduct, but served to explain it. In support of this contention, senior counsel for the respondents referred to the following observations of Barker J in the case of *Fair Work Ombudsman v Maritime Union of Australia* [2012] FCA 1232 (*Broome Port Authority*) at [25]:

> Although, as was agreed by the respondents, the industrial action was unlawful, I accept that it arose out of concerns for the treatment of the BPA employees. As such, the conduct of the respondents is to be contrasted with conduct carried out for arbitrary or base motives.

26 I do not accept that the impugned conduct of the MUA and Mr Tracey in this case is of a similar nature to the conduct which was the subject of consideration by Barker J.

27 In *Broome Port Authority*, Mr Tracey held a meeting of employees of the Broome Port Authority during the term of a certified agreement. At the meeting, Mr Tracey proposed a motion that the employees withdraw their labour for 24 hours and spoke in support of the motion. The employees then voted in favour of the motion and withdrew their labour from the Broome Port Authority for the next 24 hours.

28 In this case, however, the decision to engage in the scab poster action was made only by Mr Tracey and Mr Cain. In contrast to *Broome Port Authority*, the decision to engage in the scab poster action was not a collective decision by employees to take strike action by

withholding labour from an employer for a 24 hour period. Rather, this was vindictive action taken by two senior union officials to cause emotional harm, distress and fear to a small number of individuals who had acted lawfully, but in a manner which Mr Tracey and Mr Cain found objectionable. In my view, the conduct of the MUA and Mr Tracey is more appropriately to be characterised as falling into the category of conduct described by Barker J as "conduct carried out for arbitrary or base motives".

29 Senior counsel for the respondents also contended that no special weight should be given to the "deliberate" element of the scab poster action, because, said senior counsel, s 346 of the *Fair Work Act* contemplated that contravening conduct would be deliberate conduct.

30 Whilst it may well be the case that certain conduct which contravenes s 346 will be deliberate in one sense (for example, by the decision to dismiss an employee for a prohibited purpose), that circumstance would not preclude a court from taking that aspect of the impugned conduct into account and giving it such weight for the purposes of imposing a penalty as the circumstances justified.

31 In this case, each of Mr Tracey and Mr Cain knew that the distribution of the scab posters would cause emotional distress and harm to the named employees, and intended that that should happen. In my view, the fact that two powerful men who held senior positions in the MUA, as an act of vengeance, chose to marginalise and cause distress and fear to a very small minority of persons who acted lawfully, is a highly aggravating factor.

32 Accordingly, I regard the nature, extent and circumstances of the impugned conduct of the MUA and Mr Tracey as giving rise to a serious contravention of s 346 of the *Fair Work Act*.

Duration of the conduct

33 As to the duration of the conduct, I found that Mr Tracey distributed the scab posters over a period of two days on 7 December and 8 December 2011 at various locations in both the inner harbour and the outer harbour. However, a scab poster was also found displayed on 15 December 2011 – 8 days after the initial distribution of the posters. Further, such distribution of the posters which did occur came to the attention of the *West Australian* newspaper which on 12 December 2011, published a front page article about the distribution of the posters. The five named employees were not, however, named in the newspaper article.

34 I regard this consideration as being a neutral consideration in relation to the imposition of a penalty. This is because such distribution as did occur, and the period during which the posters were on display, were sufficient to cause the posters to come to the attention of fellow employees at both the inner and outer harbour, and was also sufficient to cause the emotional distress and fear to each of the named persons, to which each deposed.

Damage caused by the conduct

35 As to the damage which was caused by the conduct, the action of the MUA and Mr Tracey caused no economic loss to the Fremantle Port Authority, nor was it intended that it should. Each of Mr Cain and Mr Tracey intended to inflict emotional distress and fear on each of the named employees, and in that respect they succeeded.

Course of the conduct

36 The next consideration is whether the conduct arose out of one course of conduct. As mentioned, it was common cause that the course of conduct provisions in s 557 of the *Fair Work Act* do not operate in relation to the contraventions of s 346 of the *Fair Work Act*. However, as mentioned, it was also accepted that there were common elements in the conduct which gave rise to each of the five contraventions and this circumstance should be taken into account when considering the application of the totality principle to the question of penalty.

Previous conduct of the respondents

37 As to the question of the previous conduct of the respondents, the applicant only relied upon previous conduct by the MUA. This was a contravention by the MUA of s 38 of the *Building and Construction Industry Improvement Act 2005* (Cth). In February 2010, the Court imposed a penalty of $15,400 on the MUA (*John Holland Pty Ltd v MUA (No 2)* [2010] FCA 110 (*John Holland*)).

38 The conduct which gave rise to the contravention of s 38 of the *Building and Construction Industry Improvement Act* in the *John Holland* case, occurred in New South Wales in 2008. The MUA organised a picket of the construction site at which a desalination plant was being built because the employer had an employee collective agreement, rather than, as the MUA wanted, a union collective agreement. As a consequence of the picket, work was halted on the project for three days. The union official who authorised the picket was the Sydney branch secretary of the MUA.

39 The respondents contended that little weight should be placed upon the conduct of the MUA which was the subject of the contravention in *John Holland* because the conduct had occurred in March 2008 – some considerable time before the conduct in this case, the contravention was by a group of workers in New South Wales with no apparent connection to the Western Australia branch of the MUA and the nature of the contravening conduct bore no resemblance to the nature of the conduct in this case.

40 In dealing with the question of previous contraventions of the law, it is necessary to bear in mind the following considerations.

41 First, prior contraventions may be a relevant consideration, and may lead to the imposition of a heavier penalty than would otherwise have been the case. However, that circumstance should not lead to the imposition of a penalty which is disproportionate to the gravity of the contravening conduct.

42 Secondly, in imposing a penalty on a party, the relevance of the party's prior conduct is that that conduct may indicate that the imposition of a previous penalty has not acted as a sufficient deterrent to the contravening party. Accordingly, in assessing the potential impact of that prior conduct on the penalty to be imposed, it is necessary to have regard to the nature of the prior contraventions and the relationship of that prior conduct to the conduct the subject of the contravention before the Court. Thus, the less similar the prior conduct is to the impugned conduct, the less likely that prior conduct will be accorded weight impacting upon the amount of the penalty (*Stuart-Mahoney v Construction, Forestry, Mining and Energy Union* (2008) 177 IR 61). This is, however, subject to a further consideration. That is that the number of previous contraventions may lead the Court to conclude that the particular person or body in question has demonstrated an indifference to compliance with the law. This may also be relevant to the issue of specific deterrence.

43 There was a difference between the parties in relation to whether the fact that the prior contravening conduct in *John Holland*, which had occurred in New South Wales, was a relevant consideration.

44 The respondents relied upon the observations made by Kenny J in *Cahill v Construction, Forestry, Mining and Energy Union (No 4)* (2009) 189 IR 304 after her Honour had referred to a schedule of prior contraventions by various divisions and branches of the

Construction, Forestry, Mining and Energy Union around Australia. At [69], Kenny J observed:

> In summary, the history referred to above shows that the Union, through its representatives at various levels around the country, has a history of engaging in coercive conduct relevantly similar to the kind in question in this case. I would not, however, accord equal weight to all parts of this history, especially having regard to the fact that not all elements of this history are to be treated as prior contraventions and *many elements relate to events outside Victoria and also at a level that might be thought more indicative of local than national concern*. (Emphasis added by respondents.)

45 The applicant on the other hand relied upon the observations made by Jessup J in the case of *Williams v Construction, Forestry, Mining and Energy Union (No 2)* (2009) 182 IR 327 at [20]-[21]:

> 20 …In the context of a corporate respondent with a presence in different States, I consider it to be almost self-evident that prior contraventions in State A have at least the potential to answer in the negative the question whether a particular contravention in State B is an uncharacteristic aberration. It may be aberrant of the officials in State B, but it need not be aberrant of the corporation itself. Both the BCII Act and the WR Act are relevantly concerned with the conduct of organisations, and I consider that the deterrent effect of a penalty would be significantly compromised if the court were obliged to turn a blind eye to a prior contravention merely because it occurred in a different division or branch of an organisation.
>
> 21 …How the Union – or any incorporated body – organises itself internally is a matter for its own members. Some bodies employ a highly centralised system of control. Others vest the real decision-making power in divisions, branches or, indeed, groups of members at the workplace. In the latter case, however, no less than in the former, it is the body itself which acts when the internal group or individual having generic responsibility for the relevant area of activity does something with legal consequences. In the case of trade unions, if ever there was any doubt about that proposition, it was laid to rest by *Heatons Transport (St Helens) Ltd v Transport and General Workers' Union* [1973] AC 15. And just as a union may not, by a judicious decentralisation of authority, avoid responsibility for things done by its servants or agents acting within the scope of their authority, neither, in my view, can a union (or, for that matter, any like body) by the same process render irrelevant to the matter of fixing penalties its own prior contraventions merely by reason that they were committed in some other section, division or branch of the larger body.

46 This question has also been addressed in other single judge decisions in this Court. (See, for example, *A & L Silvestri Pty Ltd v Construction, Forestry, Mining and Energy Union* [2008] FCA 466 at [13] (Gyles J), *Temple v Powell* (2008) 169 FCR 169 at [63] (*Temple*) (Dowsett J), *Director of the Fair Work Building Industry Inspectorate v*

Construction, Forestry, Mining and Energy Union (2014) 140 ALD 337 at [54] (White J), *Upton* at [59] (Gilmour J).)

47 The weight of the authorities supports the view that the mere fact that the conduct the subject of prior contraventions by a union occurred in another State, will not of itself render the prior contraventions irrelevant, or to be accorded no or lesser weight. As Dowsett J said in *Temple*, whether prior contraventions are relevant to penalty is a question of logic.

48 However, in the context of this case, I will accord the prior contravention in the *John Holland* case little weight in assessing the impact of that conduct on the penalty to be imposed because of the substantially different nature of the conduct in that case to this case. In particular, the conduct in that case involved a complaint which the MUA had with an employer and was not, as in this case, action taken by two senior officials of the MUA against individual employees. This action which, as I have said before, was founded upon the anger of Mr Tracey and Mr Cain and their desire to exact vengeance on the five named employees, does not fall into the same category as a case where the MUA has in the course of taking industrial action, contravened other sections of the *Fair Work Act* or other industrial legislation. The kind of unlawful conduct in this case falls into a different, but serious category.

Senior management

49 As to the involvement of senior management of the MUA in the contravening conduct, I found that the contravening conduct was the product of a discussion between Mr Cain and Mr Tracey at a breakfast meeting on 6 December 2011. As previously mentioned, Mr Cain and Mr Tracey were two of the most senior officials in the MUA branch in Western Australia. Accordingly, in my view, senior management was not only involved, but was in fact the source of the scab poster action which was taken by the respondents. I regard this as a matter to which very considerable weight is to be given in assessing the seriousness of the contravening conduct, and the penalty which should be imposed.

Contrition

50 Senior counsel for the respondents did not submit that either respondent had exhibited any contrition in relation to the taking of the scab poster action.

51 Rather, senior counsel submitted, and I accept the submission, that the lack of contrition is not an aggravating circumstance which might increase the penalty.

Cooperation

52 Senior counsel for the respondents did not contend that either had cooperated with the applicant. Accordingly, this is not a factor upon which either of them can rely in mitigation of the penalty which might otherwise have been imposed.

Deterrence

53 I now deal with the question of specific deterrence.

54 It is apparent from Mr Tracey's evidence, set out at [260] of the principal judgment, that Mr Tracey has a deeply embedded distain and contempt for employees who go to work when their co-employees are on strike, notwithstanding that in going to work the employees have acted lawfully. Some of the epithets which he agreed described such people were "disloyal", "low life", "scum" and "despicable".

55 As mentioned in the principal judgment, Mr Cain did not give evidence, but I found that Mr Cain shared Mr Tracey's adverse views of the persons referred to by Mr Tracey as "scabs", and that Mr Cain authorised the taking of the scab poster action against the five named employees because Mr Cain was also angry with those employees and wanted to obtain vengeance, and assert the power of the MUA.

56 I have no reason to believe that either of Mr Tracey or Mr Cain have changed their views. There is, in my view, therefore, a need for the penalty which is imposed to contain a very substantial element of specific deterrent.

57 Whilst the facts of this case relate to essentially the actions of two senior officials of the Western Australia branch of the MUA management, there is also a need to have regard to the general deterrent of precluding persons and corporate bodies whose conduct is regulated by the *Fair Work Act*, from misusing their power to harm those individuals who choose to exercise their workplace rights in a manner with which those persons or corporate bodies disagree. Respect for the self-worth and dignity of each person who participates in the Australian workforce is a value which underlies much of the adverse action protection of the *Fair Work Act*. The penalty should be at a level which will deter those who may be minded to act in a manner which infringes this core value.

58 In my view, the contraventions which occurred in this case fall into the category of an abuse of power by the powerful against the vulnerable, are serious contraventions.

59 I take into account the matters to which I have referred in these reasons and applying an instinctive synthesis approach, in respect of all the matters to which I have referred, I find that in respect of each of the respondents, the contravention attracts a penalty in respect of each contravention of 75% of the maximum penalty.

60 Accordingly, in relation to each of the contraventions, I would impose a penalty on the MUA of $24,750. The total penalty in relation to the five contraventions, before the application of the totality principle, is, therefore, $123,750. However, on the application of the totality principle, I impose a penalty of $80,000.

61 In relation to Mr Tracey, the penalty for each contravention is $4,950. The total penalty, therefore, for the five contraventions is $24,750, before the application of the totality principle. In my view, the appropriate penalty once the totality principle is applied is $15,000.

COMPENSATION

62 The applicant also claimed compensation pursuant to s 545(2)(b) of the *Fair Work Act* in respect of the loss suffered by each of the five individuals named in the scab poster. Section 545 relevantly provides as follows:

> (1) The Federal Court or the Federal Magistrates Court may make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision.
>
> (2) Without limiting subsection (1), orders the Federal Court or Federal Magistrates Court may make include the following:
>
> (a) …
>
> (b) an order awarding compensation for loss that a person has suffered because of the contravention;
>
> (c) …

63 I should mention as a preliminary observation that all parties agreed that limitations in the *Civil Liability Act 2002* (WA) did not affect the Court's power to award compensation to each of the named employees pursuant to s 545 of the *Fair Work Act*.

64 The applicant contended that the loss which was suffered by each of the named employees was not economic loss. The applicant identified the loss as the loss of quiet enjoyment of their working entitlement due to marginalisation and apprehension and fear of

violence, the loss of quiet enjoyment of their after work environment due to fear of violence, and the infringement of their right to dignity.

65 It is established that the "loss" referred to in s 545(2)(b) of the *Fair Work Act* included loss other than economic loss, and this would include emotional harm and distress. In *Australian Licenced Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd* (2011) 193 FCR 526 (*ALAEA*), Barker J found that the power to award compensation under s 545(2) of the *Fair Work Act* included the power to award compensation in respect of non-economic loss, including for distress, hurt or humiliation. None of the parties contended otherwise.

66 There was a considerable discrepancy in the submissions of the parties in relation to the amount of the compensation which ought to be ordered by the Court in respect of the loss which was suffered by each of the five named employees.

67 The respondents contended that the Court should award compensation in the sum of up to $2,500 to each of Mr Daly, Mr Mawbey, Mr Donaldson-Stiff and Mr Scott and $5,000 to Mr Watson. By contrast, the applicant contended that it was appropriate that each of the five named employees be awarded compensation in the vicinity of $50,000 to $100,000.

68 As is well recognised, the assessment of compensation for emotional distress is inherently imprecise. However, some assistance may be obtained by referring to some cases where awards of statutory damages or compensation for emotional distress have been made.

69 I approach the question of compensation on the basis that the applicant failed to prove that the scab poster action caused any of the named employees to suffer psychological harm by way of the adjustment disorders to which Dr Terace referred in his evidence. Accordingly, the compensation is to be assessed by reference only to the emotional distress and fear which I accepted, in the principal judgment, that each of the five named employees suffered.

70 The case of *Richardson v Oracle Corporation Australia Pty Ltd* (2014) 223 FCR 334 (*Richardson*) was a case where the applicant had suffered a chronic adjustment disorder and mixed feelings of anxiety and depression. There was also evidence that the contravening conduct had adversely affected the applicant's sexual relationship with her then partner. The primary judge in that case described the psychological damage to the applicant as not insignificant. The Full Court awarded compensation of $100,000 in respect of general

damages. I am mindful that this quantum was considerably more than the amount of compensation awarded at first instance and that this was done to reflect changing community standards. However, as already mentioned, the nature of the emotional distress suffered in that case gave rise to "not insignificant" psychological damage and so it is different to the distress suffered by each of the named employees.

71 The Full Court in *Richardson* referred to, and distinguished, the case of *Kraus v Menzie* [2012] FCA 3 (*Kraus*). In that case, Mansfield J awarded general damages in the amount of $12,000, in a case where there had been a number of instances of sexual harassment over a short period which Mansfield J found "barely had any adverse personal affect" upon the applicant. As I did in this case, in *Kraus*, Mansfield J rejected the applicant's contention that the adjustment disorder which the applicant had suffered had been caused by the contravening conduct.

72 In *ALAEA*, Barker J awarded Mr Puspitono, the employee in that case, who had been dismissed and had been the subject of adverse action by his employer, the sum of $7,500. At [450] Barker J observed:

> In my view, Mr Puspitono is entitled to some measure of compensation for the distress and humiliation I have found he suffered as a direct consequence of the contraventions proved by the evidence. The Union claims a non-economic loss order under this head of $25,000. I consider such an assessment is too high. I am prepared, however, having regard to the status of Mr Puspitono as a licensed aircraft maintenance engineer, the annual income he received of approximately $55,000 at material times, the level of distress and humiliation he felt as disclosed by his evidence, not only at the fact of dismissal, but due to the negative assessment which adversely affected his reputation in the aircraft maintenance industry in Indonesia, that a non-economic loss order in the sum of $7,500 is appropriate.

73 In that case, Mr Puspitono had complained about having to work overtime. Subsequently, his employer provided a negative assessment to Garuda, whose authorisation was a necessary condition for his continuing employment. Garuda withdrew its authorisation and Mr Puspitono was dismissed from his employment. Mr Puspitono gave evidence that he was very distressed about the way his employer had treated him and he had suffered headaches, stress and vomiting and that his reputation had been sullied with Garuda.

74 There are two comments to make in relation to *ALAEA*.

75 First, *ALAEA* was not a case where there had been, as there was in this case, widespread distribution of the disparaging comments made in the scab poster which caused

and exacerbated the emotional distress experienced by the five named employees. In other words, this was a case of "naming and shaming" the five employees to the Fremantle Port Authority workforce at large, whereas by contrast, in Mr Puspitono's case there was no public element to his distress and humiliation.

76 Secondly, there was no element in *ALAEA* of Mr Puspitono experiencing a continuing fear of physical harm to himself or his family or of property damage.

77 I have set out in the principal judgment the emotional distress and the fear which each of the named employees suffered. In my view, in awarding compensation, a distinction is to be drawn between Mr Daly, Mr Donaldson-Stiff, Mr Mawbey and Mr Scott, on the one hand and Mr Watson, on the other hand.

78 An important distinguishing aspect of this case, from the cases to which I have referred above, is that each of the five named employees experienced a continuing fear of physical harm to themselves and their family, and the fear of damage to property. This aspect of the emotional distress experienced by each of the named employees should find expression in the amount of compensation awarded.

79 In relation to each of Mr Daly, Mr Donaldson-Stiff, Mr Mawbey and Mr Scott, I award compensation in the sum of $20,000. In making an award in this sum, I have taken into account that Mr Daly and Mr Donaldson-Stiff after the scab poster action again elected to work during a strike, and that I found in the principal judgment, that Mr Daly exaggerated the extent of his emotional distress.

80 Mr Watson did not work during the strike. Mr Watson was, nevertheless, named as a "scab" because he fraternised for a very brief time with the incoming crew who attended for work as the first shift to work during the strike period.

81 Mr Watson was unable to sleep for a number of nights after he found out about the scab poster. He felt a particular outrage because he had not worked during the strike and he had been falsely denigrated by Mr Tracey as having done so. When he sought an explanation from Mr Tracey as to why he was named in the scab poster and sought an apology from Mr Tracey, Mr Tracey insulted Mr Watson and refused to give an apology. Mr Watson's emotional distress was further exacerbated by the fact that Mr Tracey had told him that he would not be able to work again in the maritime industry in Western Australia and, on the basis of the threat, Mr Watson changed his plans which had been to work overseas for some

time before returning to Australia. Further, Mr Watson feared that he and his family would suffer harm at the hands of disgruntled workers.

82 In my view, the sum of $40,000 is an appropriate and reasonable award of compensation for Mr Watson.

COSTS

83 The applicant contended that this was a case where s 570(2)(b) of the *Fair Work Act* applied, with the consequence that the MUA and/or Mr Tracey should pay the applicant's costs. Section 570(2) provides as follows:

> (2) *The party may be ordered to pay the costs only if:*
>
> (a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or
>
> (b) the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs; or
>
> …

84 The applicant submitted that the MUA and/or Mr Tracey should bear the applicant's costs incurred after two alternative dates, because their unreasonable conduct caused the applicant to incur costs after those dates.

85 The dates in question are:

(1) from 9 August 2012, being the date of the filing of the MUA's and Mr Tracey's defences,

(2) alternatively, from 31 October 2012, being the date at which the applicant had completed the filing of its affidavit evidence-in-chief.

86 The applicant contended that the unreasonable conduct was that the MUA and Mr Tracey maintained baseless defences in respect of the s 346 claims.

87 The applicant referred to a number of specific paragraphs of the defence which was filed by the MUA on 9 August 2012 which the applicant alleged showed that the MUA maintained a baseless defence. Among the paragraphs impugned were paragraphs that put in issue whether the distribution of the scab poster would constitute prejudice in employment, whether the MUA had contravened s 346 of the *Fair Work Act*, and whether the conduct of

Mr Tracey was at law the conduct of the MUA. The applicant also referred to a number of specific paragraphs in Mr Tracey's defence which the applicant alleged were unsustainable.

88 Alternatively, the applicant contended that after the applicant filed its affidavit evidence-in-chief, the MUA and/or Mr Tracey "must have become aware that there was no proper basis on which to ground a defence to the s 346 allegations".

89 As the Full Court in *Construction, Forestry, Mining and Energy Union v Clarke* (2008) 170 FCR 574 at [28]-[29] observed, it is incumbent upon a party relying upon s 570(2) of the *Fair Work Act* to satisfy two criteria. The first criterion is that the other party must have engaged in an "unreasonable act or omission", and the second criterion is that the unreasonable act or omission caused the complainant to incur costs in connection with the proceeding. Once those two criteria are satisfied then the Court has a discretion to order that the party that engaged in the unreasonable act or omission pay some or all of the costs of the other party.

90 The Full Court also observed that whether a party has acted unreasonably depends upon the circumstances of each case.

91 I deal first with the allegation that Mr Tracey conducted a baseless defence.

92 The applicant acknowledged that Mr Tracey was entitled, as he had done, to claim penalty privilege. However, said the applicant, this entitlement was only one factor to be taken into account, and that the Court still had a discretion to award costs against Mr Tracey, if the overall manner in which he had conducted his defence had been unreasonable. I do not accept this contention by the applicant.

93 In the case of *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at [31], the High Court observed that:

> Today the privilege against exposure to penalties serves the purpose of ensuring that those who allege criminality or other illegal conduct should prove it. (Footnote omitted.)

94 Further, in the case of *Australian Competition and Consumer Commission v FFE Building Services Ltd* (2003) 130 FCR 37 at [12]-[13], the Full Court (Emmett, Hely and Jacobson JJ) observed:

> The privilege against self-incrimination protects an individual from making a disclosure that may lead to incrimination or to the discovery of real evidence of an

> incriminating nature: *R v Sorby* (1983) 152 CLR 281 at 310. Further, a respondent in a proceeding that is solely for the recovery of a pecuniary penalty should not be ordered to disclose information or produce documents that may assist in establishing his or her liability to the penalty: *Refrigerated Express Lines (A/asia) Pty Ltd v Australian Meat & Livestock Corporation (No 2)* (1979) 42 FLR 204; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 336.
>
> The privilege of refusing to answer questions or provide information on the ground that the answers or the information might tend to expose the party to the imposition of a pecuniary penalty:
>
> - is not confined to discovery and interrogatories;
> - is available at common law;
> - is distinct from the privilege against exposure to conviction for a crime (*Pyneboard* (at 337)).
>
> The rationale for the privilege is that an applicant must prove its own case and should not get any assistance from the respondent in proving its case: *Trade Practices Commission v Abbco Iceworks Pty Ltd* (1994) 52 FCR 96 at 129; *Daniels Corp International Pty Ltd v Australian Competition and Consumer Commission* (2002) 77 ALJR 40 at 47 [31]. The privilege can only be abrogated by statute: *Reid v Howard* (1995) 184 CLR 1. As the privilege is not subject to judge-made exceptions or qualifications, it cannot be abridged or undermined in consequence of a court accepting undertakings proffered by the applicant designed to avoid or diminish the danger that provision of the information would expose the respondent to a penalty.

95 It is apparent that Mr Tracey was entitled to claim the privilege against penalty and was under no duty to give any assistance to the applicant in proving its case against him. The applicant's contention, if accepted, would have the effect of substantially undermining the utility of penalty privilege because by claiming penalty privilege a party would put himself or herself at risk of incurring a costs order, on the basis that the exercise of penalty privilege was unreasonable. Such a major infringement upon the utility of penalty privilege could only be achieved by legislation in the clearest of terms. In my view, s 570 of the *Fair Work Act* does not constitute legislation of that nature, nor does s 37M of the *Federal Court Act 1976* (Cth). It follows, therefore, that Mr Tracey's entitlement to claim penalty privilege precludes the applicant from criticising Mr Tracey's conduct of his defence on the basis that he failed to give any assistance to the applicant in the proving of the applicant's case.

96 In any event, although not obliged to do so, Mr Tracey did file a defence prior to the close of the applicant's case, and at the commencement of the trial he made a number of admissions which he was not obliged to make. It cannot be said that Mr Tracey acted unreasonably in the conduct of his defence within the meaning of s 570 of the *Fair Work Act*.

97 I now deal with the allegation that the MUA acted unreasonably by conducting a baseless defence.

98 In dealing with this submission, it is necessary to observe that the applicant alleged that the respondents had contravened both s 346 and s 348 of the *Fair Work Act*, and that the respondents had by their contravening conduct caused four of the five named employees to suffer psychiatric harm. In my view, the applicant has for the following reasons, failed to make good its contention that the MUA acted unreasonably by conducting a baseless defence.

99 First, it was not unreasonable for the respondents to contest the allegation that the distribution of the scab poster constituted "prejudice in employment" and so amounted to a contravention of s 346 of the *Fair Work Act*. I accept the respondents' contention that there was an element of novelty in the allegation that the distribution of the scab poster constituted prejudice in employment. However, I do not accept the respondents' contention that on the only prior occasion that the Court had considered the question, the Court answered in the negative. The case of *Construction, Forestry, Mining and Energy Union v BHP Coal Proprietary Ltd (No 3)* (2012) 228 IR 195 at [110]-[111] on which the respondents relied for this contention, was, in my view, distinguishable for the reasons set out in my principal judgment.

100 Secondly, the respondents were successful in defending the applicant's claim that compensation was payable by the respondents to four of the five named employees because the scab poster action had caused four of the named employees to suffer a recognisable psychiatric condition. At the trial, the respondents were successful in demonstrating the absence of a causal link between the scab poster action and the alleged ostracism and attendant psychiatric condition. This aspect of the case occupied a not inconsiderable amount of time.

101 Thirdly, the respondents were successful in defeating the s 348 claims. There was a very substantial overlap between the factual allegations including the involvement of the first respondent in the conduct relied upon as constituting the alleged contravening conduct. Accordingly, even if the applicant had been able to show that the respondents defended the s 346 claims unreasonably, the applicant would not have been able to show that the applicant incurred wasted costs, because the applicant would have been required to prove virtually all of the facts in support of the s 348 claims that the applicant was required to prove in support of the s 346 claims.

102 It follows that, in my view, the applicant has failed to establish that the respondents acted unreasonably in the conduct of the litigation and, accordingly, no order for costs will be made under s 570(2)(b) of the *Fair Work Act*.

I certify that the preceding one hundred and two (102) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Siopis.

Associate

Dated: 11 August 2015