IN FAIR WORK COMMISSION

Matter No: D2022/10

Application by Grahame Patrick Kelly – withdrawal from amalgamated organisation – Mining and Energy Division – Construction, Forestry, Maritime, Mining and Energy Union

CFMMEU OUTLINE OF SUBMISSIONS CONCERNING SECTION 94A APPLICATION

INTRODUCTION

1. The applicant has made an application under s 94 of the *Fair Work (Registered Organisation) Act 2009* (Cth) (the **Act**) outside the time prescribed by s 94(1) for the making of such an application. He seeks the acceptance of his application outside the prescribed time pursuant to s. 94A(1) of the Act. This is opposed by the Construction, Forestry, Maritime, Mining and Energy Union (the **CFMMEU**).

2. The applicant does not contend that s. 94A(3) of the Act applies. This means that whether the application is accepted out of time is a matter for the Commission's discretion. The mandatory considerations contained in s. 94A(2) do not exclude the range of other matters which may be taken into account by the Commission when deciding what is *appropriate* in the circumstances and whether to exercise discretion to accept the application out of time.

3. Whilst only one application for a ballot has been made, it is important to bear in mind that the application is advanced in respect of either the Constituent Part, defined as the Mining & Energy Division, or the Alternative Constituent Part, defined as that part of the membership of the CFMMEU that would have been eligible for membership of the United Mine Workers Federation of Australia. There are, in substance, two competing applications before the Commission. For the reasons set out below, having regard to the text of ss. 94 and 94A, it is necessary for the Commission to assess the question of whether to accept the application out of time in respect of both the Constituent Part and, separately, the Alternative Constituent Part. It does not follow

that the acceptance in respect of the Constituent Part means that the acceptance automatically flows in respect of the Alternative Constituent Part.

PROPER CONSTRUCTION OF SECTION 94A

4. The principles of statutory construction are settled. The task begins and ends with the statutory text, read in context.[1] That context includes the general purpose and policy of the provision under consideration,[2] which purpose is to be derived from the statutory text and not from any assumption about the desired or desirable operation of the provision.[3] The statutory purpose must be discerned objectively.[4]

5. Section 94 of the Act permits a constituent part to apply for a ballot to withdraw from amalgamation. Section 94(3) provides a time limit for the making of such an application. Section 94A provides the Commission the capacity to accept an application that is made outside the time prescribed by s 94(3).

6. In order for an application to be accepted out of time, the Commission has to be *satisfied* that it is *appropriate* to accept the application. The mandatory considerations identified in s. 94A(2) and (3) are directed at the relevant constituent part. Taking ss. 94 and 94A together, it is readily apparent that in a case such as this, where the application is made on two separate bases, that the Commission must be satisfised that it is *appropriate* in respect of each asserted constituent parts.

7. It is well settled that the use of the word *satisfied* imports a discretion and indicates a broader valuative judgment to be exercised by the repository of the power.[5] The nature of the enquiry is also informed by the use of the word "appropriate". The use of *appropriate* in the context of a discretion has been held to mean "fair and just"[6] and

---

[1] See, eg, *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [51]; *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39]; *Federal Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 250 CLR 523 at [47]; *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1 [57].

[2] *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500 at [41].

[3] *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at [25]-[26]; *Deal v Father Pius Kodakkathanath* (2016) 90 ALJR 946 at [37].

[4] *Thiess v Collector of Customs* [2014] 250 CLR 664 per French J, Hayne, Kiefel, Gageler and Keane JJ at [23].

[5] See *Coal & Allied v. AIRC* and *Seiffert v. Commissioner of Police.*

[6] See *Nile v. Wood (No 2)* (1988) 167 CLR 133 per Dean and Toohey JJ at [143].

as requiring the striking of a balance between relevant considerations so as to provide the outcome which is fit and proper.[7]

8. As was identified in *The Minister for Aboriginal Affairs v. Peko-Wallsend* (1986) 162 CLR 24 at 39 per Mason J, the question of what matters can be taken into account in exercise of the discretion conferred is a question of the proper construction of the Act. That involves a consideration of the text of s. 94A(1), the context provided for by the surrounding provisions and the context of the Act as a whole.

9. The starting point is the words used in s 94A(1). Those words do not limit who can seek to have an application accepted. Any person who has validly made application under s. 94(1) can seek to have that application accepted outside of the timeframe specified in s. 94(3) of the Act.

10. It is accepted that the matters listed in in s. 94A(2) are mandatory considerations. However, they are considerations and not jurisdictional requirements. That is, it is not necessary that the relevant constituent part be a part of an amalgamated organisation that has a record of non-compliance. If the constituent part is not part of such an organisation, then the consideration in s. 94A(2)(a) is not apposite. However, that does not preclude a state of satisfaction that it is *appropriate* to accept the application outside of the time specified in s. 94(3).

11. The mandatory considerations contained in s. 94A(2) do not exclude the range of other matters which may be taken into account when deciding what is appropriate in the circumstances. Such a conclusion would require words to be read into s. 94A(1).

12. The CFMMEU accepts that the question of what is appropriate within the meaning of s. 94A(1) is informed by sub-section (3). That sub-section provides that if the amalgamated organisation has a record of non-compliance and if the constituent part has not contributed to that record, the Commission must accept the application. That bespeaks a legislative intention which values compliance with the law. If a constituent part is part of an organisation with a record of non-compliance to which the constituent part has not contributed, Parliament has decided that an applicant for a ballot under s 94 should be automatically accepted out of time.

---

[7] See *Mitchell v. The Queen* (1996) 130 ALR 449 at 458.

13. The corollary of s. 94A(3) is that if the amalgamated organisation has a record of non-compliance and if the constituent part has contributed to that record, that is a matter which counts against the discretion being exercised in favour of the application being accepted out of time. Why would Parliament encourage the separate registration of an organisation(s) when it has contributed to the record of non-compliance? If this were not the case, it would have been a simple matter for s. 94A(3) to have been expressed in terms of no or *substantially no contribution*. The CFMMEU accepts that the extent of any contribution is relevant to assessing how much the contribution counts against the discretion. However, s. 94A cannot be construed as creating some type of regime which provides an advantage to a constituent part with only a moderate record of non-compliance.

14. It is well accepted that the purpose of the amalgamation provisions in the Act was to facilitate and encourage amalgamations[8] and the provisions should not be construed in a way which introduce uncertainty into the scheme for amalgamation.[9] Therefore when the Commission is considering whether it is *appropriate* in the circumstances to accept an application under s 94 out of time, the question of whether granting the application would undermine confidence in the amalgamation provisions is relevant. This includes the extent to which decisions were taken by the amalgamated organisation in respect of the conduct of its affairs and its internal administration on the assumption that the time for withdrawal from the amalgamation had passed. In the case of an application to withdraw from an organisation with a record of non-compliance, consideration should also properly be given to the extent to which the constituent part had signified its support for the amalgamated organisation's conduct which created the record of non-compliance and any steps taken to disassociate itself from that conduct.

CONSIDERATION UNDER S. 94A(2)(A)

15. The constituent part has contributed to the CFMMEU's record of non-compliance with workplace and safety laws in the following ways:

    (a) *Sayed v CFMEU* [2015] FCA 27;

---

8 *Australian Mines and Metals Association Inc v Construction, Forestry, Maritime, Mining and Energy Union* [2018] FCAFC 223 at [153].

9 *Kelly v CFMMEU* (2021) 310 IR 270 at [128].

(b) *Queensland District Branch of the Mining and Energy Division of the Construction, Forestry, Mining and Energy Union* [2015] FWCD 7109, and

(c) cases in which orders were made under s 418 of the *Fair Work Act 2009* (Cth) and s 127 of the *Workplace Relations Act 1996* (Cth).

16. It is important to remember that the requirement identified in s. 94A(2)(a) is a record of not complying with workplace or safety laws. It is not only concerned with declarations of contravention or the imposition of pecuniary penalties. The s. 418 orders referred to in paragraph 15(b) above represent non-compliance with the FW Act because in each case where the industrial action occurred, there was an in-term enterprise agreement.[10] The consequence is that, in each case, there was a contravention of s. 417 of the FW Act.

17. The constituent parts' non-compliance is not insignificant. That is a matter which counts strongly against it being appropriate to accept the application. The evident purpose of s 94A(2)(a) is to direct the Commission's attention to whether the constituent part has conducted itself previously in a way which is consistent with the law. The failure of the constituent parts in this case to have done that is an indicator that should they be given separate registration, the ultimate product of this application process, it would give rise to an organisation which in its previous manifestations has not complied with the law. It is a factor which militates against a conclusion that it is appropriate to accept the application out of time.

CAPACITY OF CONSTITUENT PARTS TO EFFECTIVELY REPRESENT

18. The CFMMEU accepts that, insofar as the Constituent Part is said to be the Mining & Energy Division, the evidence filed discloses a capacity to promote and protect the economic and social interests of its members.

19. The position in respect of the Alternative Constituent Part is not the same. The supporting material filed with the application does not materially differentiate in the outlines between the resources of the Constituent Part and the Alternative Constituent Part.[11] However, those two entities are fundamentally different. The outline filed in support of the alternative Constituent Part simply identifies the financial assets and resources of the Mining & Energy Division. However, the Alternative Constituent Part

---

10 Statement of Jessica Dawson-Field dated 11 October 2022 (**Dawson-Field Statement**) at [7].

11 See annexure 3 and 4 of the application at [43] to [45].

is not the Mining & Energy Division. There is no evidence before the Commission which would permit it to be satisfied that the Alternative Constituent Part will receive under a s. 109 order the assets of the Mining & Energy Division.

20. Similarly, no attempt is made in the material to identify which, if any, officers, and staff of the Mining & Energy Division will become part of the newly registered Union which is constituted by the group of members who would have been eligible for the United Mine Workers Federation.

21. Given the conflation in the application and supporting material between the Constituent Part and the Alternative Constituent Part, including as to the proposed eligibility rules and resources, on the basis of the material presently filed, it is impossible for the Commission to form a view about the Alternative Constituent Part's ability to promote and protect the economic and social interests of its members.

IT IS NOT APPROPRIATE IN THE CIRCUMSTANCES OF THE AMALGAMATED ORGANISATION

22. In addition to the mandated matters that the Commission is bound to take into account, there are a range of other matters which the Commission should take into account, having regard to the proper construction of the Act as a whole and the scheme for facilitating amalgamations.

23. The first consideration relates to the conduct of the constituent parts in respect of the CFMMEU's record of non-compliance. Not only have the constituent parts contributed to the record in the way identified above, but there are also other aspects of their conduct.

24. *Firstly*, the constituent parts have engaged in conduct that constituted a contempt of court on more than one occasion:

    (a) *CFMEU v BHP Steel (AIS) Pty Ltd* [2001] FCA 1758; and

    (b) *AGL Energy Limited v Hardy* [2017] FCA 420.

25. *Secondly*, rather than taking any step to dissociate the constituent parts from any non-compliance by the CFMMEU (such as motions or internal demands for compliance),

officials of the constituent parts have made regular calls for the abolition of the Australian Building & Construction Commission.[12]

26. *Finally,* the constituent parts are the subject of extant Federal Court Proceedings in the following matters:

(a) *FWO v CFMMEU* (QUD58/2021); and

(b) *ROC v Smyth* (QUD411/2021).

27. The second matter that should be taken into account is that the CFMMEU has existed substantially in its current form for approximately thirty years. The statements of Mr Washington and Mr McDonald reveal that since the original amalgamation in 1991 and 1992, the CFMEU has taken a variety of steps to re-organise its internal affairs in respect of both the allocation of members and assets. These changes happened in two tranches.

28. *Firstly*, in 1995, substantial changes were made in the Union to integrate the FEDFA Division into the Mining & Energy and Construction divisions.[13] These decisions were made at a time where there was no facility for amalgamations to be reversed.[14] The only rational inference is that those decisions were taken in the context where the parties considered that the amalgamation could not be undone.

29. The second tranche concerns steps taken in the early 2000's to integrate the FEDFA Victoria Branch into the CFMMEU. Mr Washington explains that there were lengthy negotiations about the process by which the FEDFA Victoria Branch would be dissolved, and its members allocated to either the Mining & Energy Division and/or the Construction Division.[15] The dissolution of the Branch also involved the allocation of significant assets to the Mining & Energy Division.[16] Those decisions were taken in the context where the period for any application for withdrawal from the amalgamation had expired. Mr Washington deposes to the fact that if there had been

---

12 Dawson-Field Statement at [14]-[15].

13 Statement of Malcolm McDonald (11 October 2022) at [6]-[10].

14 The substance of Part 3 of Chapter 3 the Act was first introduced by the *Workplace Relations & Other Legislation Amendment Act 1996* (Cth).

15 Statement of Washington dated 11 October 2022 (**Washington Statement**) at [8]-[9], [17].

16 Washington Statement at [11].

any prospect that one of the Divisions might have left the amalgamated Union, that would have necessarily impacted the decisions taken about the allocation.[17]

30. The CFMMEU accepts that legislative regimes are always subject to change. However, in circumstances where the Commission is to decide whether it is appropriate (or in other words, fair and just), to permit the Mining & Energy Division to seek to withdraw from the amalgamation some 30 years after the amalgamation has taken place, the Commission should take into account choices which were made by the parties in the context of the amalgamation being final. If the Commission was to decide that it was fair and just in these circumstances, that would undermine faith in the amalgamation process and act as a disincentive to other organisations to enter into amalgamations. That is a powerful factor against the exercise of the discretion in favour of extending time.

31. In light of the structure of the Act and the scheme for amalgamations provided for, having regard to the way in which the amalgamated organisation has conducted itself on the basis that its amalgamations could not be undone and the other conduct of the Constituent Part and Alternative Constituent Parts, it is not appropriate in the circumstances to accept the application out of time.

CONCLUSIONS

32. For the reasons set out above, the application for a ballot should not be accepted.

CW Dowling

CA Massy

11 October 2022

17 Washington Statement at [17]-[22].

IN THE FAIR WORK COMMISSION

Matter No.: D2022/10

Application by Grahame Patrick Kelly – withdrawal from amalgamated organisation – Mining and Energy Division – Construction, Forestry, Maritime, Mining and Energy Union

STATEMENT OF JESSICA MARGARET DAWSON-FIELD

I, Jessica Margaret Dawson-Field, Solicitor of Level 16, 380 La Trobe Street, Melbourne 3000 state:

1. I am a solicitor employed by Maurice Blackburn Lawyers, legal practitioner for the Construction, Forestry, Maritime, Mining and Energy Union (the **CFMMEU**). Subject to the supervision of my principals, I have the care and conduct of this matter on behalf of the CFMMEU.

2. This statement is made in support of the CFMMEU's objection to Mr Kelly's application under s 94A for the Fair Work Commission to accept his application under s 94 after the end of the period prescribed by s 94(1).

3. I make this declaration based on personal knowledge unless I state to the contrary. Insofar as I have relied on information provided to me, I believe that information to be true.

Sayed v Construction, Forestry, Mining and Energy Union

4. At GK-2 to the statement of Grahame Patrick Kelly dated 15 September 2022 (the **Kelly Statement**), Mr Kelly refers to the decision of *Sayed v Construction, Forestry, Mining and Energy Union* [2015] FCA 27. The circumstances of that decision are as follows:

    (a) Mr Sayed was employed by the Mining & Energy Division as part of a proposed alliance with the Australian Workers Union, to be based in Tom Price, Western Australia. In 2015, Mr Sayed was dismissed from his employment. Mr Sayed commenced proceedings in the Federal

Court alleging that the CFMMEU had taken adverse action against him, in contravention of s 340 of the FW Act, including by redeploying him, suspending him from his employment and by terminating his employment because of his political affiliation with the Socialist Alliance.

(b) The Court upheld these aspects of Mr Sayed's claim and found that the CFMMEU had contravened s 340 of the FW Act. Mr Sayed was awarded $3,000 in compensation for humiliation and distress. Annexed and marked JDF-1 is a copy of that decision.

(c) In *Sayed v Construction, Forestry, Mining and Energy Union* [2015] FCA 338, the court ordered the CFMMEU to pay $45,000 in penalties to the Commonwealth. Annexed and marked JDF-2 is a copy of that decision.

(d) In an appeal to the Full Court, those penalties were ordered to be paid to Mr Sayed. Annexed and marked JDF-3 is a copy of the Full Court's decision in *Sayed v Construction, Forestry, Mining and Energy Union* [2016] FCAFC 4.

Non-compliance by M&E Division with the FW (RO) Act

5. In *Queensland District Branch of the Mining and Energy Division of the Construction, Forestry, Mining and Energy Union* [2015] FWCD 7109, a delegate of the General Manager of the Fair Work Commission revoked an exemption held by the Queensland District Branch of the Mining & Energy Division that, while operative, had allowed the Branch to conduct its own elections. In deciding to revoke the exemption, the delegate found non-compliance with the union rules and the RO Act. Insofar as he found non-compliance with the RO Act, that non-compliance included:

(a) that, contrary to RO Act, an officer of the Constituent Part directed the Returning Officer determined that there were irregularities in an election process, when he was not authorised to do so (at [82]); and

(b) that, contrary to the RO Act, in the 2011 election for the office of Executive Vice President, the governing body of the Constituent Part

declared the election ballot and its result "invalid" in response to alleged irregularities, when it was not authorised to do so (at [94]);

(c) that, contrary to the RO Act, the governing body of the Constituent Part, in effect, declared that a person who had purportedly been elected to the office of Executive Vice President of the Queensland Branch had not been elected, when it was not authorised to do so (at [106]).

Annexed and marked JDF-4 is a copy of that decision.

6. That decision was appealed. The Full Bench dismissed the appeal. Annexed and marked JDF-5 is a copy of that decision.

Non-compliance by M&E Division with ss 417 of the FW Act and 217 of the *Workplace Relations Act 1996* (Cth) – M&E Division

7. In GK-3 to the Kelly Statement, Mr Kelly identifies a number of matters in which orders were made under s 418 of the FW Act. In relation to those cases, I note that:

(a) *BHP Coal Ltd v CFMMEU* [2013] FWC 2571 concerned a s 418 order made against members of the Mining & Energy Division where it appears the nominal expiry date of the relevant agreement had not passed. The relevant conduct was also in contravention of s 417 (see paragraph [4]);

(b) *Delta Coal Mining Pty Ltd v CFMEU* [2016] FWC 9146 concerned a s 418 order made in circumstances where the nominal expiry date of the relevant agreement had not passed. The relevant conduct was also in contravention of s 417 (see paragraph [31]); and

(c) *AGL Loy Yang Pty Ltd v CFMEU* [2017] FWC 432 also appears to concern a s 418 order made in circumstances where the nominal expiry date of the relevant agreement had not passed. The relevant conduct was also in contravention of s 417 (see paragraph [28]).

8. In addition, I note the following cases:

(a) *United Collieries Pty Ltd and Construction, Forestry, Mining and Energy Union* (C2002/5911), in which an order was made under s 127(1) of the *Workplace Relations Act 1996* (Cth). Annexed and marked JDF-6 is a copy of that decision;

(b) *BHP Coal Pty Ltd* (Re 056/000 B Print s 2980), in which an order was made under s 127(1) of the *Workplace Relations Act 1996* (Cth). Annexed and marked JDF-7 is a copy of that decision; and

(c) In *BHP Steel (AIS) Pty Ltd v CFMEU* [2000] FCA 1614, the judgement refers to a s 127 order made against the Mining & Energy Division dated 2 December 1999. I have not been able to locate the order made by Commissioner Harrison, but note that the substance of the order is set out in paragraph 1 of the Justice Beaumont's decision.

Extant Federal Court proceedings

QUD58/2021

9. In *Construction, Forestry, Mining and Energy Union v Oaky Creek Coal Pty Ltd* [2017] FWC 5380:

   (a) the CFMMEU sought a good faith bargaining order against Oaky Creek Coal Pty Ltd. During bargaining, employees of the company had set up a picket which was attended by officials of the Mining & Energy Division (at [6]).

   (b) Commissioner Asbury made good faith bargaining orders and, in doing so, made a number of comments regarding the conduct of the picket (at [258]).

10. On 25 February 2021, the Fair Work Ombudsman commenced a proceeding in the Federal Court of Australia arising from the events at Oaky Creek and alleging that the CFMMEU and five of its officials (including Stephen Smyth, District President of the Queensland District Branch of the Mining and Energy Division, Chris Brodsky, District Vice President of the Queensland District Branch of the Mining and Energy Division and Brodie Brunker, Broadmeadow Mine Lodge Assistant Secretary of the Queensland

District Branch of the Mining and Energy Division) contravened ss 340 (adverse action) and s 343 (coercion) of the FW Act. The proceeding was allocated number QUD58/2021.

11. The Union and each of the officials have filed a defence in the proceeding. As at the date of this statement, that proceeding was still on foot.

QUD 411/2021

12. On 30 November 2021, the Registered Organisations Commissioner commenced a proceeding in the Federal Court of Australia alleging that Stephen Smyth had contravened the *Fair Work (Registered Organisations) Act 2009* (Cth) by misusing a credit card issued to him by the Mining and Energy Division. That proceeding was allocated number QUD411/2021.

13. Mr Smyth has filed a defence. At the date of this statement, the proceeding was still on foot. The proceeding is listed for hearing on 28 November 2022, on an estimate of five days.

Attitude of M&E Division to record of non-compliance

14. The Mining and Energy Union has repeatedly made public statements calling for the abolition of the ABCC. Annexed and marked JDF-8 is a bundle of such publications.

15. On 19 March 2009, at a meeting of the National Executive Committee of the CFMMEU, Tony Maher reiterated M&E's support for C&G on the ABCC issue and noted C&G's reciprocal support for M&E's position on climate change. Annexed and marked JDF-9 is an extract the minutes of the NEX held on 19 March 2009.

16. In addition, I am instructed by Mr Dave Noonan and believe that the Mining and Energy Union has not taken any internal steps within the CFMMEU to influence the conduct of the Construction and General Division of the CFMMEU that contributed to the CFMMEU's record of non-compliance with workplace and safety laws.

Other non-compliance with the law

17. I undertook, or caused to be undertaken, searches for other matters that evidence a record of non-compliance by the Mining and Energy Division of the CFMMEU or that

part of the Mining and Energy Division of the CFMMEU as is constituted by the former United Mine Workers Federation of Australia with laws other than workplace and safety laws.

18. The search I describe in paragraph 17 above identified:

(a) In *BHP Steel (AIS) Pty Ltd v CFMEU* [2000] FCA 1614, Justice Beamount found that the CFMMEU Mining & Energy Division, had breached the provisions of a s 127 order made by the Commission by failing to supply each of the employees with a copy of the order, and to take all steps to ensure that members complied with the order. Later, in *BHP Steel (AIS) Pty Ltd v CFMEU* [2000] FCA 1908, Justice Beamount ordered the Union to pay pecuniary penalties for these contraventions. Annexed and marked JDF-10 is a copy of each of these decisions.

(b) *CFMEU v BHP Steel (AIS) Pty Ltd* [2001] FCA 1758, the Full Court found that the CFMEU Mining & Energy Division had committed contempt of Court by failing to immediately cease strike action, namely, the authorizing of its members to stop performing work at the applicant's coal mines in New South Wales after an order to cease had been made by a single judge of the Court. Annexed and marked JDF-11 is a copy of that decision.

(c) *AGL Energy Limited v Hardy* [2017] FCA 420 in which Mr Hardy, the then Secretary of the Loy Yang Lodge of the Mining and Energy Division of the Construction, Forestry, Mining and Energy Union, was found guilty of contempt of court for refusing the comply with a search order made under the Federal Court Rules. Annexed and marked JDF 12 is a copy of that decision.

11 October 2022

Jessica Dawson Field
Solicitor for the CFMMEU

ANNEXURE “JDF-1”

SAYED v CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION

FEDERAL COURT OF AUSTRALIA

MORTIMER J

29, 30 September, 31 October 2014, 30 January 2015 — Melbourne

[2015] FCA 27

Industrial law — Industrial relations — Adverse action taken against employee for prohibited reason of political opinion — (CTH) Fair Work Act 2009 s 351.

Muhammed Ali Sayed (the applicant) was employed by the Construction, Forestry, Mining and Energy Union (the respondent) on a fixed 6-month contract as a trainee organiser in Queensland. The applicant was previously a member of the Socialist Alliance. He was employed for 3 months before complaints were made against him based on his behaviour and comments made on Facebook. His employment was terminated on the basis that he had lied about his involvement in the Socialist Alliance and using the term "rats" on Facebook which was considered offensive and derogatory in the labour movement context. The applicant received all of his contractual entitlements. He alleged that "adverse action" within the meaning of s 342(1) of the Fair Work Act 2009 (Cth) (the Act) was taken against him because of his political opinion. "Adverse action" includes altering an employee's position to their prejudice. The applicant claimed that these actions included a direction to attend a meeting in Sydney, a decision to redeploy him to Queensland, a letter of suspension and his dismissal. Section 360 of the Act provides that a person takes action for a particular reason if the reasons for the action include that reason. Section 351(1) of the Act prohibits the taking of adverse action by an employer against an employee because of, among other grounds, the person's political opinion. Certain conduct is excluded: s 351(2) of the Act. The applicant claimed inter alia compensation for distress, humiliation, pain and suffering under s 545 of the Act. The respondent contended that the applicant's political opinion formed no part of the reasons for any of its actions. The Federal Court of Australia can impose penalties for contravening civil penalty provisions: s 546 of the Act. The applicant moreover asserted contraventions of ss 18 and 31 of the Australian Consumer Law on the basis of misleading or deceptive conduct and misleading conduct relating to his employment.

Held, per Mortimer J, finding that contravention established and compensation payable:

(i) By redeploying, suspending and dismissing the applicant, the respondent contravened s 351 of the Act. The respondent must pay the applicant $3000 by way of compensation for distress and humiliation: at [3].

(ii) The decision to redeploy the applicant was "adverse action" within the meaning of s 342(1) of the Act because he was compelled to go to Queensland if he wished to retain employment. The direction to attend the Sydney meeting was not "adverse action" because it was a preliminary step designed to give the applicant an opportunity to deal with complaints made against him: at [138], [139], [149].

> *Police Federation of Australia v Nixon* (2008) 168 FCR 340; [2008] FCA 467, considered.

(iii) The reason for adverse action was a question of fact. If, in fact, possession of a protected attribute was coincidental, or simply part of the surrounding circumstances, then as a matter of fact the adverse action had not been taken because of that protected attribute: at [190].

Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (2014) 253 CLR 243; 314 ALR 1; 88 ALJR 980; [2014] HCA 41; *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500; 290 ALR 647; [2012] HCA 32, considered.

(iv) When read as a whole, ss 342(1) Item 1(d) and 351 of the Act would operate to render only conduct proscribed under other anti-discrimination regimes as conduct contravening s 351 of the Act: at [161].

(v) Whatever may be the full extent of the meaning of "political opinion", there was no doubt that the applicant's membership of, and involvement in the activities of, the Socialist Alliance constituted the holding and manifestation of a political opinion within the meaning of s 351 of the Act: at [177].

(vi) Distinctions between protected attributes and real or perceived characteristics associated with those attributes permitted the kind of stereotyping which anti-discrimination laws were designed to prevent. If there was an apprehension about what an individual might do, or how she or he might act, because of views or behaviour attributed to people with the protected attribute of that individual, acting on such an apprehension was just as discriminatory as treatment because of what the individual had done, or how the individual had acted: at [195].

(vii) The adverse action against the applicant was taken predominantly because of the tendencies the respondent attributed to members of the Socialist Alliance, rather than because of any actual conduct of the applicant as a member: at [192].

(viii) By s 360 of the Act, a prohibited reason need not be the sole reason for the impugned conduct, so long as it was "included" in the particular reasons for the adverse action: at [198].

(ix) The respondent took adverse action against the applicant for more than one reason, but which included because of his political opinion. The evidence established that the respondent treated the applicant differently than other employees. Any affiliation with the Socialist Alliance would not be tolerated or accepted: at [147], [148], [234].

(x) The applicant was suspended for several reasons, including prohibited reasons. The decision to redeploy the applicant was taken for reasons which included a prohibited reason: namely, his political opinion. This was constituted by his identification with the opinions and beliefs of the Socialist Alliance, his membership of that political party, and his affiliation with that political party. The reasons for the applicant's dismissal also included a prohibited reason: at [241], [242], [245].

(xi) The respondent should pay the applicant a modest amount of general compensation for the unlawful way in which it terminated his employment. Given the absence of any probative evidence other than the applicant's display of despondency, disappointment and anger, but recognising that he relocated from Melbourne to Queensland and then to Perth, and was dismissed summarily and placed directly on a plane back to Melbourne from Sydney, having been compelled to pack up and leave Perth at short notice, any reasonable person in the applicant's position would find this humiliating and distressing: at [316].

(xii) There was no contract between the parties. Even if there was, the applicant's termination of employment could have lawfully occurred pursuant to it, without notice: at [267].

(xiii) There was no contravention of s 18 or s 31 of the Australian Consumer Law. No relevant representation was in fact made by the respondent. Even if it was, then the representation was to a future matter: namely, the prospect of the applicant securing a position as organiser for the respondent: at [274], [283], [287].

R Niall QC and *B Ryde* instructed by *McDonald Murholme* for the applicant.

C Howell instructed by *Slater & Gordon* for the respondent.

Mortimer J.

Introduction

[1] The applicant, Mr Sayed, was employed by the respondent, the Construction, Forestry, Mining and Energy Union, for a little over three months. Although both parties commenced their employment relationship with high hopes about Mr Sayed's role in a somewhat historic alliance between the respondent and the Australian Workers' Union (**AWU**), it was not to be.

[2] Based on three causes of action, the applicant seeks relief from this Court in relation to his treatment during his employment with the respondent and in relation to the termination of his employment.

[3] For the reasons I set out below, I have found that the respondent has contravened s 351 of the Fair Work Act 2009 (Cth) (the Fair Work Act) in respect of three adverse actions taken against the applicant. The applicant is entitled to compensation for loss of income and for distress and humiliation. Compensation is limited because of a paucity of evidence about his loss, or the effect of the adverse action on him. Whether any penalties should be imposed pursuant to s 546(3) of the Fair Work Act will be the subject of separate determination, after submissions from the parties.

General factual findings

[4] The parties filed an agreed statement of facts, which was tendered pursuant to s 191 of the Evidence Act 1995 (Cth). The matters in this section represent my findings on the chronology of events of the dispute, and are drawn from the agreed statement, and from the oral and documentary evidence. Factual findings which go to the core aspects of the applicant's claims are dealt with in the following section of these reasons.

[5] The applicant is a law graduate from the University of Melbourne. He has worked in a number of positions in property management and hospitality while completing his studies to make enough to pay his tuition fees and living expenses. In early 2013, and after completing his law degree, he answered an advertisement for the position of "Trade Union Organiser" with the respondent. The advertisement stated:

> Fulltime position working within North Western Australia. You will participate in planning, implementing, and review of targeted organising campaigns. Duties will include probing targets, setting up campaigns, making initial contact, developing organising committees, systematic contact of members.
>
> You must be self-motivated and have a genuine desire to help workers within the mining industry. You will need to be enthusiastic, work with energy and creativity. A commitment to trade unionism, excellent listening, verbal communication and interpersonal skills are an essential requirement for this position.
>
> Good written communication and computer skills are required. Interstate travel maybe required. You will hold a current drivers licence.
>
> The CFMEU Mining and Energy Division is a principal union that covers mine workers in Australia. You will be part of a highly motivated and dedicated team of organisers and will be working at the forefront of industrial organising.

[6] Mr Vickers, the principal witness for the respondent, described the proposed alliance between the AWU and the respondent in the Pilbara region as coming after 100 years of "difficult history" and of the unions "hating each other". The

aim of the alliance, according to Mr Vickers' evidence, was to commence re-unionisation of the iron ore industry in Western Australia, beginning with the Rio Tinto operations in the Pilbara.

[7] One aspect of the alliance was an arrangement that two organisers — one from the AWU and one from the respondent — would be sent to live and work at the Pilbara, to start the process of encouraging re-unionisation of the Rio Tinto workforce. The position the applicant applied for was the CFMEU organiser in that arrangement.

[8] The applicant attended an interview on 27 February 2013 with Mr Michael Weise, who is the National Organising and Training Coordinator for the CFMEU Mining and Energy Division.

[9] Subsequently, on approximately 28 March 2013 the applicant had a telephone discussion with Mr Weise during which Mr Weise advised the applicant that he would be offered fixed-term employment, on a six-month contract, in the position of CFMEU trainee organiser in Queensland. The contents of this conversation are important to findings about the nature of the employment relationship between the applicant and the respondent, as well as to the applicant's claim under Sch 2 of the Competition and Consumer Act 2010 (Cth) (the Australian Consumer Law).

[10] That telephone conversation was followed up with a letter of offer to the applicant dated 1 April 2013, which he signed and dated on the same day and returned to the respondent.

[11] The letter relevantly stated:

> I am pleased to confirm our offer of employment to you as a Trainee Organiser with the CFMEU Mining and Energy Union. You are required to commence employment with us on Thursday the 11th of April 2013. The position is based on "Fixed Term" employment from your date of engagement until October 11th 2013. Severance and retrenchment provisions do not apply for fixed term employment.
>
> The "Trainee Organiser" annual salary is $72,047 per annum. Your employment conditions are based on the UNITE Employment Agreement 2012. You will accrue leave on a Pro Rata basis.

[12] The second letter given to the applicant that day, and signed and acknowledged by him, relevantly stated:

> This letter is confirmation of our telephone discussion held on March 28, 2013. You applied for the position of organiser with the CFMEU Mining and Energy Union, to be based in Tom Price, Western Australia. This position is to be part of an alliance with the Australian Workers Union and therefore subject to such alliance being initiated. Due to unforeseen administration issue, the alliance is yet to be finalised and is currently unable to be initiated. As in interim measure you have been offered fixed term employment with the CFMEU Mining and Energy Union. In the event that the alliance can be initiated during your fixed term contract, it is expected that you will transfer to the alliance project and be relocated to Tom Price. Full time employment with the CFMEU Mining and Energy Union on the West Australian alliance will be subject to you accepting the employment contract for this position.
>
> In the event that the alliance is unable to be initiated your employment with the CFMEU Mining and Energy Union will cease on October 11th 2013.

[13] It was common ground between the parties that the reason Mr Weise offered the applicant a fixed-term contract of the kind he did was because the arrangements between the AWU and the respondent for the alliance had not been formalised and finalised, and Mr Weise did not want to "lose" the applicant.

[14] On 11 April 2013 the applicant commenced employment with the respondent in Queensland. He relocated from Victoria to Queensland to take up the position. He worked with Mr Ross Kumeroa, who was the CFMEU lead organiser in Queensland. He described, and I accept, that his work involved "doing membership, organising meetings, doing trainings and at one of the occasions appeared before management, BHP management, to resolve a dispute between workers and the management".

[15] The applicant has in the past been a member of a political party called the Socialist Alliance. The Socialist Alliance is a registered political party at both state and federal levels in Australia. The applicant gave evidence that it is a socialist organisation, "heavy on … class politics", revolving around the idea that there are those who own the capital and those who work. Its members variously supported the ideas of Trotsky, Marx, Mao and what the applicant described as "social democrats". All these people, he said, came together in the Socialist Alliance as a "broad non-sectarian socialist political party". He became involved in around 2009, and became a member. Eventually he had personal doubts about the political strategy he thought the Socialist Alliance used. He disagreed with what he saw as too much focus on elections and not enough on youth work. He withdrew as a member at the end of 2011, although he retained links and involvement for some time after that. The precise details of when his involvement ceased are relevant to the issues in the proceeding and I return to those details below.

[16] In about June 2013 Mr Weise gave the applicant a proposed contract relating to his employment as an alliance organiser in the Pilbara, entitled "CFMEU Mining & Energy Division 2013 West Australian Mining Alliance Employment Agreement" (**the Pilbara contract**). The applicant had a discussion with Mr Weise about the stipulated six-month probationary period in the agreement. The applicant said, and I accept, that after consulting Mr Vickers, Mr Weise informed him that the time he had worked under the six-month fixed-term contract would count towards the probationary period in the Pilbara contract. The applicant said, and I accept, that this conversation with Mr Weise occurred in the respondent's national office in New South Wales at the end of June 2013, at a training meeting for its organisers.

[17] At this time Mr Michael Kerley, an organiser from the AWU, had been working with Mr Kumeroa and the applicant in Queensland. This was pursuant to an arrangement under the proposed alliance, whereby the nominated organiser from each of the CFMEU (the applicant) and the AWU (Mr Kerley) would spend time working in the partner union, to gain a better understanding of how that union operated, especially in the way it organised its members. Mr Kerley stayed with the applicant and travelled around with him.

[18] The applicant tendered some evidence, in the form of an agenda and some documents of a meeting held on 26 June 2013 at the respondent's national offices in Sydney, which set out the proposed arrangements between the two unions. The four people at the meeting were the applicant and Mr Weise, and Mr Kerley and Mr Daniel Walton from the AWU. Mr Kerley was to report to Mr Walton, and the applicant was to report to Mr Weise.

[19] The alliance was formally launched the same day. It was "formalised", to use Mr Vickers' term, by a memorandum of understanding (MOU) between the two unions. The terms of that memorandum are not material to the issues in this

proceeding, however the fact that it was formalised on 26 June 2013 is of some significance to the applicant's arguments.

[20] The formalisation of the alliance meant that the applicant would shortly thereafter move to Western Australia, to begin preparatory work on the alliance project.

[21] After the 26 June 2013 launch in Sydney, the applicant returned to Queensland. On about 1 July 2013 there was an incident at a motel, which the respondent sought to highlight in the applicant's cross-examination. The applicant objected to the line of questioning. The incident involved an accident whereby the applicant had driven a rental car into the side of a motel at which he was staying with Mr Kerley. Allegations were made by the motel staff about rude behaviour, which the respondent sought to attribute to the applicant. These allegations were made first through Mr Weise at the time, in a telephone conversation with the applicant on 3 July 2013, and then again in cross-examination in this proceeding. The applicant denied the allegations, both at the time to Mr Weise and in evidence. In evidence the applicant stated eventually Mr Weise accepted it was Mr Kerley who had interacted with the particular motel staff member who had made the complaint, not him. In his evidence Mr Weise did confirm the applicant denied engaging in the behaviour at the time.

[22] The respondent submits the motel incident was principally relevant to the applicant's credit, as well as being relevant to his damages claim, on the basis that it was the kind of incident which demonstrated that, even if the termination of the applicant's employment was unlawful, his employment would not in any event have lasted very long because of his behaviour.

[23] I reject both submissions. I see nothing in the way the applicant dealt with this topic in his evidence which reflects poorly on his credit. In my opinion it is clear the applicant maintained at the time (as confirmed by Mr Weise) that it was not he who had engaged in this behaviour, and he continued to maintain that in his evidence. I also do not accept that there is anything in this evidence which could support an inference that the applicant would have subsequently engaged in conduct such as that alleged against him on this occasion so as to bring his employment to an early conclusion in any event.

[24] Mr Weise then spoke to the applicant again on 5 July 2013. This meeting was in person, in Brisbane, at Mr Weise's initiative. It lasted about half an hour. The purpose of the meeting, on Mr Weise's evidence (which I accept) was to raise some issues with the applicant about his demeanour and approach before he headed over to Western Australia. Mr Weise's evidence, which I accept, was

> I said to Ali, you know, that I considered him a very bright person, passionate, but, you know, over the top in some respects and we had had discussions previously about — and they were general discussions, and we were talking about social issues and, you know, refugee rights and, you know, Ali was quite happy to talk about things that he had done previously and said, you know, that unions ought to be doing more in that regard, you know, and I said, "Well, you know, we need to just keep things simple. Back off; you're making people uncomfortable with the way that you present yourself."

[25] In cross-examination, the applicant accepted that Mr Weise did give him some advice to this effect at the 5 July meeting, although the applicant denied any specific complaints were put to him. In my opinion, Mr Weise may have placed a gloss on the amount of detail he put to the applicant on that occasion and, in contrast, the applicant underplayed the matters Mr Weise raised with him. For the

purposes of the issues in this proceeding, and especially the respondent's submissions about the way the applicant did not "fit" with the alliance arrangement, I find that Mr Weise was, by 5 July 2013, raising aspects of the applicant's behaviour and attitude because Mr Weise believed the applicant was having trouble adjusting to the milieu in which he found himself, and believed there were some interpersonal difficulties between the applicant and the AWU officials he was working with, especially Mr Kerley.

[26] The applicant also gave evidence that he asked Mr Weise if he could be paid under the Pilbara contract when he moved to Western Australia. His evidence was that Mr Weise responded "Your pay will go up on the date of the contract". Mr Weise did not contradict this version in his evidence and I accept this was the substance of what was said about the Pilbara contract on 5 July 2013.

[27] On 8 July 2013 the applicant commenced work in Western Australia. He commenced work in Bunbury at the AWU office, working with five or six AWU organisers and officials, just as Mr Kerley had worked with CFMEU organisers in Queensland.

[28] There was little or no direct evidence about the performance by the applicant of his work in Western Australia between 8 and 16 July 2013. As the applicant contended in final submissions, the respondent did not defend this proceeding by seeking to prove misbehaviour, misconduct or poor performance on the part of the applicant. Rather, as I set out below, the respondent relied on the existence of complaints from the AWU, and Mr Vickers' and Mr Weise's opinions about those complaints. I return to those issues in more detail below.

[29] On or about 16 July 2013 Mr Weise called the applicant to tell him the respondent had received complaints from the AWU about the applicant. There had been a complaint made by Mr Paul Howes, the Secretary of the AWU, to Mr Tony Maher, the National President of the respondent, that the applicant was "a Trot" and was "bagging" AWU officials and delegates. The evidence appears to be that this conversation occurred on or prior to 16 July 2013.

[30] Mr Weise told the applicant he was directed to attend a meeting in Sydney to address those complaints. It was common ground that this direction was given by Mr Vickers, was triggered by the conversation between Mr Howes and Mr Maher, and was conveyed to the applicant through Mr Weise. It appeared to be common ground there was in fact more than one telephone conversation between Mr Weise and the applicant on 16 July 2013 about the need for him to travel to Sydney. The various accounts of these conversations are contentious and relevant to the issues in the proceeding and I deal with these in more detail below.

[31] The applicant flew to Sydney as directed, having packed up all his personal belongings from where he was staying in Perth.

[32] An email was sent by Mr Walton of the AWU dated 18 July 2013, which set out a series of complaints the AWU had about the applicant and his behaviour, although this was after the direction had been given to the applicant to return to Sydney for the meeting on 18 July 2013. However, the "bagging" allegation appears to have been made by Mr Howes prior to the 16 July 2013 conversations between Mr Weise and the applicant. The details of the complaints, and how they relate to the direction to come to Sydney, are contentious and I deal with them below.

[33] On 18 July 2013 the applicant met with Mr Weise, Mr Vickers, and Mr Maher at the respondent's offices in Sydney. He had asked for Mr Kumeroa to be flown down from Queensland to act as his support person at the meeting, and the respondent had agreed to this. Mr Weise took contemporaneous notes of what was said at the meeting, which were tendered in evidence. His evidence, which I accept, was that he did not get everything down in his notes, but "tried to capture as much as … I possibly could" of what was said. Again, what was said at the meeting is contentious to some extent, and I return to my findings on this issue at [99] below.

[34] As a result of that meeting, the applicant did not return to Western Australia. Instead, on 22 July 2013 he returned to Queensland and continued working as an organiser at the Queensland branch.

[35] That same day, another employee of the respondent drew some matters about the applicant to Mr Vickers' attention. This person was one Mr Andrew Dallas, a legal industrial officer employed in the national office of the Mining and Energy Division of the respondent, but who was working out of the Queensland office. This included informing Mr Vickers about material appearing on the applicant's Facebook page. This material, according to Mr Vickers, indicated two things — first, that the applicant was active with the Socialist Alliance at times after those he had given to Mr Vickers during the 18 July 2013 meeting and, second, that the applicant had posted some comments on Facebook on the day of the 18 July 2013 meeting. There was no dispute about the text of the comments, an extract from the applicant's Facebook page being tendered in evidence in the proceeding. The comments were:

> *Oh how the world changes. When you think you know smone [sic] find out got buncha rats around you! No worries stay true to yourself and keep soldering on.*

[36] The meaning and context of the applicant's comments was the subject of some debate and I deal with this below.

[37] This information caused Mr Vickers to write to the applicant, in a letter dated 23 July 2013. In this letter Mr Vickers advised the respondent had suspended the applicant from his position on full pay with immediate effect. The letter required the applicant to show cause why his employment should not be terminated, and required him to attend a meeting at the respondent's national office in Sydney on 26 July 2013. Mr Vickers also advised the applicant to provide a response to the allegation made against him in the letter as soon as possible but no later than the commencement of the meeting on 26 July 2013. In its terms, the letter disclosed Mr Vickers' concerns were twofold. First that the applicant had lied to Mr Vickers about his involvement in the Socialist Alliance since 2010. Second that the Facebook posting to which I have referred at [35] above was directed at Mr Vickers, and/or other officials of the respondent, and the use of the term "rats" in the context of the labour movement was "offensive and derogatory".

[38] The applicant provided a response the following day, 24 July 2013. In that response, he stated that he now "realize[d] that I made a mistake in dates of my resignation from Socialist Alliance" and stated he actually left "end 2011 start of 2012". He also stated that he made the Facebook posting "well before" he met with Mr Vickers and that it was "clearly directed to someone I have known on a personal level" rather than Mr Vickers or CFMEU officials. He did not name the person in his response. In his oral evidence, the applicant developed these two explanations somewhat and I deal with these developments below.

[39] The meeting occurred on 26 July 2013 as foreshadowed. It was not a long meeting. As I set out below, I find Mr Vickers had already made up his mind about the applicant's fate before the meeting started. He was absolutely firm in his opinions. He did not accept the applicant's explanations. He considered he had been lied to. He told the applicant he considered he was not fit to work as a trainee organiser with the respondent and that, although he could be summarily dismissed for what Mr Vickers believed he had done, the respondent would instead pay out his fixed-term contract subject to the applicant leaving immediately and returning all property belonging to the respondent.

[40] That is what occurred. It was common ground the applicant was paid out all his entitlements under his fixed-term contract up to 11 October 2013.

The applicant's claims and the respondent's responses

The adverse action claims

[41] The applicant identified in his statement of claim five events or pieces of conduct which he alleged constituted adverse action for the purpose of s 342 of the Fair Work Act. They are:

1. The conduct on 16 July 2013 when the applicant was informed of complaints against him and directed to fly to Sydney to attend a meeting about the complaints;
2. The conduct of the meeting on 18 July 2013 in Sydney;
3. The redeployment of the applicant to Queensland after the 18 July 2013 meeting;
4. The giving of the show cause letter of 23 July 2013 to the applicant; and
5. The termination of the applicant's employment on 26 July 2013.

[42] The respondent accepted that the last two events were within the meaning of "adverse action" in s 342, but denied that the first three events could be characterised in that way. The respondent accepted the giving of the show cause letter constituted a threat to take adverse action (by way of dismissal) within the scope of s 342(2) of the Fair Work Act.

[43] Insofar as the first three events or pieces of conduct were concerned, the applicant alleged those actions injured the applicant in his employment (s 342(1), Item 1(b)), or discriminated between the applicant and other employees of the respondent (s 342(1), Item 1(d)) and (as to the redeployment only) altered the position of the applicant to his prejudice.

[44] On the first day of the trial the applicant applied for and was granted leave to rely on an amended statement of claim, which in substance added one matter. In relation to the first, second and fourth events or pieces of conduct the applicant also sought to allege the conduct altered the position of the applicant to his prejudice, for the purposes of Item 1(c) of the table in s 342(1), thus bringing the pleading into line with the allegations in respect of the redeployment.

[45] In relation to each of the five events or pieces of conduct, the applicant alleged that the adverse action was taken for reasons including the applicant's political opinion. In other words, for the purposes of s 351(1), the applicant alleged all the identified adverse actions were taken "because of" his political opinion. The applicant contended, relying on s 360, that the reasons for the adverse action at least included his political opinion.

[46] No particulars were given in the statement of claim of what constituted the applicant's political opinion. Not surprisingly, particulars were sought by the respondent. In a letter dated 25 October 2013 the respondent sought particulars

of various aspects of the applicant's statement of claim. A response was provided by the applicant on 8 November 2013. There are only two relevant aspects of the particulars to the issues which need to be determined. First, the manner in which the applicant particularised his political opinion. Second, the manner in which the applicant particularised the allegation that he was a member of a "political party" called the Socialist Alliance.

[47] On the first aspect, the applicant identified his political opinion in the following way:

> the Applicant's political opinion included political opinions he shared with the Socialist Alliance, his membership of the Socialist Alliance, his alleged belief in "Trotskyism", and the belief that he was a communist.

[48] On the second aspect, the applicant gave the following particulars:

> (a) the Socialist Alliance is a political party insofar as it is a party with a political opinion;
> (b) the Applicant was a member insofar as he paid membership fees;

[49] The respondent contended that the applicant's political opinion formed no part of the reasons for any of the actions, even if they were all properly characterised as adverse actions. It contended that, even if the Court were to find that the applicant's membership (past, present, or imputed) of the Socialist Alliance was a reason for any of the alleged adverse actions, membership of the Socialist Alliance did not constitute a "political opinion" as that phrase should properly be construed in s 351(1) of the Fair Work Act.

The contract claim

[50] This claim is put on the basis that the Pilbara contract became a reality rather than, as the respondent contends, simply being the subject of negotiations which were never concluded. The applicant contended that he commenced employment under the Pilbara contract on 8 July 2013, when he moved from Brisbane to Perth. This contract, he contended, entitled him to higher rates of pay, and was for a fixed term until 31 December 2014.

[51] The applicant contended that his dismissal on 26 July 2013 was thus in breach of the Pilbara contract.

[52] As I have noted, the respondent's answer to this claim was a simple one: namely, that the only contract between the parties was the six-month fixed-term contract which was due to expire on 11 October 2013, and the Pilbara contract was never concluded. In the alternative, the respondent contended that, even if the Court were to find the Pilbara contract was concluded, it contained an express term permitting the respondent to terminate the applicant's employment without notice during the probationary period, or on 1 month's notice outside that period. Therefore, there was no breach. The termination on 26 July 2013 was within the probationary period, alternatively the applicant was paid out in a sum which exceeded one month's pay in lieu of notice.

The consumer law claim

[53] The applicant alleged in his statement of claim that the respondent (through Mr Weise, it appears to be alleged) made two representations for the purposes of ss 18 and 31 of the Australian Consumer Law.

[54] The first is expressed in the statement of claim at [40] to be "that when the Western Australian Mining Alliance was operational it would employ him at Tom Price in a full time capacity".

[55] Senior counsel for the applicant informed the Court in opening at trial that the second pleaded representation was not pressed and I do not consider it further.

[56] The respondent denied the entirety of the allegations made by the applicant in respect of the consumer law claim. In its submissions, the respondent contended the representation was not made in the terms alleged and, even if it was, it was not made in trade or commerce, and was a representation as to future matters and not false or misleading at the time it was made. Alternatively the respondent submitted it had reasonable grounds to make the representation and on no basis was the representation false or misleading.

Loss and damage claims

[57] The only economic loss which was quantified by the applicant was alleged to be the loss of income from the Pilbara contract until the date it was expressed to expire: namely, 31 December 2014. The applicant alleged this loss amounted to the sum of $120,188.77 in lost income, plus eligible superannuation entitlements.

[58] The applicant also alleged that the contraventions of the Australian Consumer Law caused him to elect not to go on and complete a Graduate Diploma in Legal Practice so as to be able to seek employment as a legal practitioner. No claims for loss and damage were quantified in respect of this claim.

[59] In relation to the adverse action claims, aside from the claim for penalties, the applicant claimed damages or compensation for "distress, humiliation, pain and suffering". He also sought reinstatement.

[60] As to the claim for penalties under the Fair Work Act, and the claim that any penalties imposed be paid to the applicant, the parties informed the Court that both sought an opportunity to be heard on appropriate penalties, and issues about payment, if the court concluded the contraventions were established.

Relevant legislative provisions

[61] Relevantly, s 351 of the Fair Work Act is headed "Discrimination" and prohibits the taking of adverse action by an employer against an employee for specified reasons. At the time of the alleged contraventions it provided:

> (1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.
>
> Note: This subsection is a civil remedy provision (see Part 4-1).
>
> (2) However, subsection (1) does not apply to action that is:
>
> (a) not unlawful under any anti-discrimination law in force in the place where the action is taken; or
>
> (b) taken because of the inherent requirements of the particular position concerned; or
>
> (c) if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed — taken:
>
> (i) in good faith; and
>
> (ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.

[62] "Adverse action" is defined in s 342(1) by means of a table setting out the circumstances in which a person takes adverse action against another person. In relation to an employer and employee, Item 1 of the table provides:

Adverse action is taken by …	**if …**
an employer against an employee	the employer: (a) dismisses the employee; or (b) injures the employee in his or her employment; or (c) alters the position of the employee to the employee's prejudice; or (d) discriminates between the employee and other employees of the employer.

[63] Each of the federal, territory and state anti-discrimination statutes are specified in s 351(3) as an "anti-discrimination law" for the purposes of subs (2).

[64] By s 342(2), adverse action includes threatening to take and organising the action specified in the table in s 342(1).

[65] Section 360 of the Fair Work Act is an important provision for the resolution of this proceeding. It provides:

> For the purposes of this Part, a person takes action for a particular reason if the reasons for the action include that reason.

[66] Section 361 affects the manner in which the reason for particular action is to be proved. It provides:

> (1) If:
> (a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and
> (b) taking that action for that reason or with that intent would constitute a contravention of this Part;
>
> it is presumed, in proceedings arising from the application, that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.

[67] Section 545 provides for payment of compensation for contraventions of the Fair Work Act:

> (1) The Federal Court or the Federal Circuit 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 Circuit Court may make include the following:
> (a) an order granting an injunction, or interim injunction, to prevent, stop or remedy the effects of a contravention;
> (b) an order awarding compensation for loss that a person has suffered because of the contravention;
> (c) an order for reinstatement of a person.
>
> …

[68] Section 546 of the Fair Work Act empowers the Court to impose penalties for contraventions of civil penalty provisions of the Fair Work Act and, if satisfied it is appropriate, to order any such penalty to be paid to a specified person, including the employee affected by the contravention. Section 546 provides:

> (1) The Federal Court, the Federal Circuit Court or an eligible State or Territory court may, on application, order a person to pay a pecuniary penalty that the court considers is appropriate if the court is satisfied that the person has contravened a civil remedy provision.
>
> …
>
> *Determining amount of pecuniary penalty*
>
> (2) The pecuniary penalty must not be more than:
>
> (a) if the person is an individual — the maximum number of penalty units referred to in the relevant item in column 4 of the table in subsection 539(2); or
>
> (b) if the person is a body corporate — 5 times the maximum number of penalty units referred to in the relevant item in column 4 of the table in subsection 539(2).
>
> *Payment of penalty*
>
> (3) The court may order that the pecuniary penalty, or a part of the penalty, be paid to:
>
> (a) the Commonwealth; or
>
> (b) a particular organisation; or
>
> (c) a particular person.
>
> *Recovery of penalty*
>
> (4) The pecuniary penalty may be recovered as a debt due to the person to whom the penalty is payable.
>
> *No limitation on orders*
>
> (5) To avoid doubt, a court may make a pecuniary penalty order in addition to one or more orders under section 545.

[69] The applicant also makes a claim of contraventions of s 18, or alternatively s 31, of the Australian Consumer Law. Those sections provide:

> 18 *Misleading or deceptive conduct*
>
> (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
>
> (2) Nothing in Part 3-1 (which is about unfair practices) limits by implication subsection (1).
>
> 31 *Misleading conduct relating to employment*
>
> A person must not, in relation to employment that is to be, or may be, offered by the person or by another person, engage in conduct that is liable to mislead persons seeking the employment as to:
>
> (a) the availability, nature, terms or conditions of the employment; or
>
> (b) any other matter relating to the employment.

[70] The applicant alleges the respondent's contraventions of those provisions entitle him to orders for the payment of loss and damage pursuant to s 236 of the Australian Consumer Law, alternatively orders for the payment of compensation pursuant to s 237 of the Australian Consumer Law. Those sections provide:

> 236 *Actions for damages*
>
> (1) If:
>
> (a) a person (the claimant) suffers loss or damage because of the conduct of another person; and
>
> (b) the conduct contravened a provision of Chapter 2 or 3;

the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention.

(2) An action under subsection (1) may be commenced at any time within 6 years after the day on which the cause of action that relates to the conduct accrued.

237 *Compensation orders etc. on application by an injured person or the regulator*

(1) A court may:

(a) on application of a person (the injured person) who has suffered, or is likely to suffer, loss or damage because of the conduct of another person that:

(i) was engaged in a contravention of a provision of Chapter 2, 3 or 4; or

(ii) constitutes applying or relying on, or purporting to apply or rely on, a term of a consumer contract that has been declared under section 250 to be an unfair term; or

(b) on the application of the regulator made on behalf of one or more such injured persons; make such order or orders as the court thinks appropriate against the person who engaged in the conduct, or a person involved in that conduct.

…

(2) The order must be an order that the court considers will:

(a) compensate the injured person, or any such injured persons, in whole or in part for the loss or damage; or

(b) prevent or reduce the loss or damage suffered, or likely to be suffered, by the injured person or any such injured persons.

(3) An application under subsection (1) may be made at any time within 6 years after the day on which:

(a) if subsection (1)(a)(i) applies — the cause of action that relates to the conduct referred to in that subsection accrued; or

(b) if subsection (1)(a)(ii) applies — the declaration referred to in that subsection is made.

Factual findings in relation to contentious aspects of the applicant's claims

[71] All witnesses gave oral evidence. It is as well to begin with general findings about each of the relevant witnesses.

[72] It was clear to me that the applicant is a person who is firmly passionate in his views. The Facebook page extract displays an icon for the applicant which, rather than a photo of the applicant or anything from his personal or social life, displays the words "[s]eeking asylum is a human right". He appears to be a person who makes his views known, with some conviction. The evidence about the approach he brought to his position(s) with the respondent suggests he had a strong desire to support workers at a grassroots level, and to advance their workplace rights.

[73] However, it is clear he was also inexperienced with union structures and union politics. I accept Mr Weise's evidence that he found the applicant to be passionate, and to be a person who spoke up on social justice issues, and might have been inclined to do so even if the context, in terms of where he was and who he was with, was not conducive to strong expression of those views.

[74] I accept that at all material times the applicant held a political opinion aligned with the political platform of the Socialist Alliance. In describing how he came to be involved in the Socialist Alliance, he said:

> Initially, I was reluctant in getting active, because I frankly didn't understand socialism or Communism, coming from Pakistan where, you know, there was very anticommunist education. We went to war with the Soviet Union in Afghanistan, so communism was not really something looked upon or understood. And it took me a few months to actually just engage with them, talk with them around different political issues before actually getting active or involved with them in 2009.

[75] He did not refer in his own evidence to any identification with particular political theories, although he did refer to communism. He did make it clear that he came to support the kind of platforms advocated by the Socialist Alliance:

> I had, to begin with, views similar but not the same, like, around social justice, around crimes that took place here against indigenous population, stolen land, what was taking place around asylum seeker issues so I mean in principal a lot of what they were saying I agreed with before getting involved but once I got involved I really understood and studied on the whole class nature of politics and society and then basically shared those views with other people to recruit them into Resistance and set up Resistance clubs on campuses…

[76] I accept his evidence that he parted company with the Socialist Alliance not because of any disagreement with their political platform but because he did not agree with some of their political strategies. He encapsulated his explanation in the following evidence, which I accept:

> I had doubts about the political strategy that we were using, namely, focusing so much on elections and not so much around youth work. These differences started emerging around mid to late 2011 and 2012 national conference, after that I decided that it was probably — yes, I just felt that I will be wasting my time. I still agreed with their politics, with their views, I have the same views but as a political organisation, how we were operating, I had concerns that really it's not achieving the political goals we should be aiming for.

[77] That the applicant continued to share the political views of the Socialist Alliance is consistent with the threat he made in his 23 July 2013 response to Mr Vickers that he would rejoin the Socialist Alliance.

[78] As a witness, in terms of his recollection I found the applicant reliable on some issues and not others. In terms of his recollection of conversations, he appeared not to have an especially good recollection of the detail of conversations, although on some occasions, which I set out below, I found his response to be genuine and clear in distinguishing between matters he did recollect that he or others had said, and those he denied were said. To this end, he made concessions about what others said which were sometimes against his interests but which I consider to be an indicator of a general level of honesty.

[79] I find that he tended to agree with propositions put to him in cross-examination more, it seemed, to put an end to the questioning than because he in fact agreed with the version of events being put to him. For that reason I have given little weight to the answers in his evidence which were along the lines of "if that is how you want to put it, then I will agree…". The applicant was not a forthcoming witness and there were aspects of his evidence where his explanations remained incomplete and unsatisfactory — for example, his evidence about why he did not tell Mr Vickers the true extent of his involvement with the Socialist Alliance.

[80] Mr Vickers was a confident witness whose evidence was frankly expressed. Relevantly, I have found at [233] below, that his denials about the role played by the applicant's affiliations with the Socialist Alliance in his decision-making should not be accepted. Otherwise, his evidence about the sequence and nature of contested events was generally reliable.

[81] Mr Weise I found to be a generally reliable witness, although his recollection of details of conversations was, like the applicant's, imperfect.

[82] It was curious that no party called Mr Kumeroa as a witness. I make one finding about his absence at [314] below.

The basis of the applicant's employment

[83] It is clear from the evidence that the applicant applied for a position working as an organiser for the respondent on a new venture with the AWU in the Pilbara. He did not apply to be a general organiser with the respondent. He was employed on the recommendation of Mr Weise because Mr Weise considered the applicant was a good candidate for the advertised Pilbara position, not because Mr Weise considered the applicant should be employed by the respondent for any other reason. The parties both submitted that the six-month fixed-term contract under which the applicant was employed was an interim arrangement, made so that the respondent did not "lose" the applicant and he would be available to take up the organiser position when the alliance with the AWU was finalised, as all parties expected it would be. I accept those submissions.

[84] The applicant altered his living arrangements to accommodate both the interim position and the alliance position. He moved from Melbourne to Queensland, and then from Queensland to Western Australia.

[85] The applicant was given a copy of a proposed employment contract for his position as an organiser with the alliance by Mr Weise.

[86] The proposed Pilbara contract was expressed to commence on 22 July 2013. It was expressed, in proposed cl 2, to remain in force until 31 December 2014. It is clear the parties were indeed working towards a start date on or about 22 July 2013 when the applicant left Queensland and moved to Western Australia from 8 July 2013, after the signing of the MOU with the AWU. Clause 14 of the Pilbara contract provided:

> 14. **PROBATIONARY PERIOD**
> Employees shall be subject to a probationary period of 6 months from the commencement of their employment. During this probationary period, the employer, or the employee, may terminate the employment agreement without providing notice to the other party.
> The severance and retrenchment provisions of this agreement do not apply during the probationary period.

[87] Aside from the probationary period clause, cl 3 entitled either party to terminate the contract of employment on one month's notice.

[88] As I set out in more detail below at [262], I find that there was never a concluded agreement between the applicant and the respondent in relation to the Pilbara contract.

[89] Therefore, I proceed on the basis of a finding that at all material times the applicant's employment was governed by the six-month fixed-term contract of employment with the respondent.

The direction to the applicant on 16 July 2013 to attend a meeting in Sydney

[90] After he had arrived in Western Australia on 8 July 2013, the applicant went to work at the Bunbury office of the AWU, with five or six AWU officials including Mr Kerley. He arrived in the middle of a campaign by the AWU to secure majority support for a petition signed by workers or members at one of the BHP plants, in order to start enterprise negotiations between BHP and the AWU.

[91] Just over a week after the applicant had arrived, a complaint was made which led to Mr Weise having a conversation with the applicant, during which he directed the applicant to attend a meeting in Sydney. The applicant's evidence was that there were three conversations with Mr Weise on 16 July 2013. The

applicant had been due to fly to Tom Price on approximately 22 July 2013, to begin work with the AWU on the Pilbara alliance.

[92] In the first conversation, the applicant described being told by Mr Weise to "pack up my stuff and he will make arrangements for me to fly to Sydney where Andrew Vickers and Tony Maher need to speak to me or want to speak to me". I accept the applicant's evidence that Mr Weise told him he did not know the reasons for the meeting.

[93] The applicant then called Mr Weise back. He asked for more information and for a support person, nominating Mr Kumeroa.

[94] The third conversation involved Mr Weise calling the applicant back, telling him Mr Vickers agreed to Mr Kumeroa being flown down to act as a support person. In this third conversation the applicant's evidence was Mr Weise told him the meeting "was basically around my membership of a political party, Socialist Alliance". His evidence was Mr Weise used the phrase "not happy with my politics", in describing the complaints. In cross-examination he maintained this phrase had been used, saying he was told Tony Maher had received complaints from Paul Howes. He repeated, in cross-examination, that what he was told was that Paul Howes had a "complaint about your politics and Social — and your involvement with Socialist Alliance".

[95] In cross-examination he agreed Mr Weise had also conveyed to him there was a complaint about the applicant "bagging" AWU officials to AWU members.

[96] Mr Weise did not give any evidence in chief on the topic of the 16 July 2013 meeting. In cross-examination he admitted that all the detail he had at the time of the 16 July 2013 conversations (of which he said there were two) was that some links had been discovered about the applicant's involvement with the Socialist Alliance and that Mr Maher had received complaints from Mr Howes that the applicant was "bagging" AWU officials to their members.

[97] The evidence of both the applicant and Mr Weise is to the same effect about the topics of the conversation being the applicant's links with Socialist Alliance and complaints that he had been "bagging" AWU officials to their members. It is immaterial whether the content was spread over two conversations or three and neither witness's recollection was clear enough to make a finding one way or the other. Both witnesses were clear that Mr Weise did not offer any reason for the direction to attend the meeting in Sydney, or indicate what the meeting was about in the first conversation he had with the applicant. I am not prepared to accept Mr Sayed's evidence that his "politics" was at least part of the way Mr Weise described the problem. The witnesses' recollections are not clear enough for me to be persuaded one way or the other about whether any such term was in fact used by Mr Weise.

[98] So far as the issues in dispute are concerned, the important factual point is that one of the two reasons given to the applicant by Mr Weise for the applicant being directed to "pack up" and go to Sydney was his links to, or involvement with, the Socialist Alliance. It is also important that, at this stage, the concern on this issue was expressed as originating from Mr Howes. In my opinion, the fact Mr Howes was the person making the complaint explains to a large extent why it was acted on so precipitously, and why the applicant was summoned in such an arbitrary fashion to "pack up" and fly back across the country to deal with the complaint.

The 18 July 2013 meeting

[99] The meeting was convened on Mr Vickers' directions, as the person responsible in a line management sense for the applicant. Nevertheless, it was only a preliminary or first inquiry about the complaints made by Mr Howes. The applicant was being given a chance to explain his side of the story, and I find that Mr Vickers and Mr Weise brought reasonably open minds to that meeting. They were, I find, concerned especially at anything which might threaten the embryonic alliance in the Pilbara. Work on the alliance was very close to commencing and the alliance had already been formalised by an MOU signed on 26 June 2013. It was this heightened concern which led to the convening of the meeting.

[100] There were some aspects of the conversations during this meeting which were not in dispute in substance. I make the following findings. Present at this meeting were Mr Maher, Mr Vickers, Mr Weise, the applicant and Mr Kumeroa. It was held at the respondent's national office in Sydney. The atmosphere was tense, there was none of the small talk about sport or the like which often accompanied such meetings. The applicant had met Mr Vickers and Mr Maher only once before, at different times. Mr Maher told the applicant there were two areas of complaint against him — his association with the Socialist Alliance and his "bagging" of AWU officials.

[101] It was Mr Maher who led the conversation with the applicant at the meeting about the remarks made by Mr Howes. The applicant's evidence, which I accept on these issues, was that Mr Maher told the applicant he received a phone call from Mr Howes, who raised a "couple of concerns" with him — his association with the Socialist Alliance and his "bagging" of AWU officials. Mr Maher told the applicant what Mr Howes had said during his telephone call to Mr Maher — "once a Trot, always a Trot". Although it is not in Mr Weise's notes, Mr Vickers accepted this is what Mr Maher conveyed to the applicant at the meeting.

[102] Mr Vickers also gave some evidence about how the complaint from Mr Howes had been conveyed. His evidence was that Mr Maher had made a statement to Mr Vickers in early July 2013 (Mr Vickers could not be more precise about the date) to the following effect "Howes has got a problem with our bloke in the West. He reckons he's a Trot and he's bagging his officials and delegates". It was this conversation with Mr Maher that prompted Mr Vickers to call Mr Weise and have him arrange a face to face meeting with the applicant. There is also an email from Mr Howes to Mr Maher, on 16 July 2013, but it is clear this email is for the purposes of Mr Howes providing further information about the applicant to Mr Maher to support his complaint. The email consists of hyperlinks to two Socialist Alliance websites, one Facebook page and a "Greenleft" website.

[103] Mr Maher also told the applicant the AWU was not happy with his body language and demeanour; that he got "in other people's personal space".

[104] The applicant's evidence was that Mr Vickers was the person who spoke most about the second aspect of the complaint. Mr Vickers told the applicant Mr Howes had complained about the applicant bagging the AWU to its members, and bagging AWU officials to AWU members. Mr Vickers told the applicant one of the complaints was that he had said the AWU was a bosses' union and had sold out on its members.

[105] There were three key statements made by Mr Vickers. The applicant gave evidence, and I accept, that Mr Vickers talked “a fair bit” about why the applicant’s involvement with the Socialist Alliance was not acceptable. There was no debate between the parties that Mr Vickers made these statements. The real issue is what they reveal about Mr Vickers’ reasons for taking the decisions he did at this meeting, and subsequently.

[106] The first statement made by Mr Vickers was in relation to the applicant’s involvement with the Socialist Alliance. Mr Vickers told the applicant “It may be a problem for Mr Howes but it is not a problem for me”.

[107] In cross-examination, the applicant agreed that Mr Vickers had then continued, with words to the effect of “Having said that, the Trots have a history of infiltrating progressive organisations and seeking to undermine them”. In his own evidence, the applicant described Mr Vickers’ statements in the following way:

> That he — that this was a huge concern. He has seen what Socialist Alliance does, how it infiltrates the union movement and hijacks trade unions. He talked about his bad experience that his wife had, who — with her union Socialist Alliance had played a negative role. And that he won’t sit back and watch a union that he has worked for and built for so many years be taken over by Socialist Alliance…. Their policies are destructive. He talked about, you know, that they’re — if they want to take over the union, it will be complete destruction…. He will not sit back and allow Socialist Alliance to take over the union. I remember that. Those were his words. I remember the negative role Socialist Alliance had played in his wife’s union. I remember him talking about how destructive Socialist Alliance and their influence in the union movement is. Now, if you’re talking — if you ask me to put this in quotation marks, this is the best I can come up with.

[108] There were other versions of this conversation put to the applicant in cross-examination, but the applicant did not accept them. In my opinion the passages I have extracted above reflect his best attempt to recall what Mr Vickers said. It is obvious from his own evidence that it is in part recall, and in part reconstruction.

[109] Mr Vickers himself did not really deny the substance of the applicant’s evidence about these statements. I note that there is some inconsistency between Mr Vickers’ assertion I have set out in [106] and the remainder of his remarks. This is an inconsistency of the same character as that apparent in his oral evidence. I express my findings on the importance of those inconsistencies at [228]–[233] below.

[110] Mr Vickers’ recollection of the allegation made by Mr Howes was clear. He described it as being: “That … he [that is, the applicant] was a Trot”. Mr Vickers described his own concern with the applicant being “a Trot” in the following terms:

> The concern that — that I had was the way that I knew Trots operated inside the trade union movement or sought to.

[111] Mr Vickers’ evidence was that he assumed Mr Howes had the same concern. He said that the words he may have used (to describe what he believed members of the Socialist Alliance did in unions) “were that [they] infiltrated and undermined the leadership of trade unions”. He repeated the phrase “infiltrating and undermining” on several occasions during his evidence.

[112] Mr Weise took notes at this meeting. They were taken contemporaneously. In answer to a leading question, his evidence was that where he could, he tried to take down what people said "verbatim". He then volunteered "I mean, people talk quicker than I can write, but I tried to capture as much as what I possibly could". I accept that latter evidence, but not his statement about taking down what people said "verbatim". Mr Weise was later asked to type up his notes, which he did. The applicant did not dispute the typed version was an accurate transposition of the handwritten version. Each of the witnesses' evidence involved aspects of reconstruction. In my opinion Mr Weise's notes, given their contemporaneity and his evidence about what he diligently tried to capture, reflect the most reliable account of what was said at the 18 July 2013 meeting.

[113] The notes are as follows:

18-7-2013 TM AV RK AS MW
4.10pm
ALI SAYED

Tony Maher opened discussions informing of complaints received by us from Paul Howes.

- Bagging AWU
- Socialist Alliance involvement

AV	spoke about alliance with AWU hard to do politically 100 years of troubled history. Pilbara tough environment Big investment by us ie $1 million
AV	says he understand why people are critical of AWU, as he is critical of them Socialist alliance affiliations is very concerning, is worrying possible infiltrations
AV	don't micro manage unite but won't stand by and let it be at risk
AS	Socialist alliance left 3 years ago through political differences was not aware he had to disclose involvement in all things Resigned 2010 after National Conf because of political differences
AS	said he has talked extensive to MW about his social involvement

Had discussion about (Ali stated) his beliefs stated he's proud about his beliefs

AS	said he is not a hack from a political party here to infiltrate our union
AS	said he is not here to defend all practices of Social Alliance
AV	spoke on his view on Social Alliance in particular that part of there (sic) mantra is that they oppose trade unions
AV	said he accepts that Ali is being honest about his explanation on his involvement or non involvement
AV	made point of clarifying his role in union
AWU	commentary
AS	says at no time in the since he has been with AWU did he bag anyone form their union
AS	went through some of his work and said at no time did he bag
AS	said he has thought long and hard about all comments and only can recall discussions he had with Michael Kerley after work they had discussed differences between two unions

AS	went through discussions delegate and organisers some of things they say are too bad or hard to accept
AS	gone through his work outline success etc
AS	told that he joined union (our) as soon as he stared with us
RK	told meeting Michael Kerley rang RK and in told him some things RK said he worked with us and has had discussions about his attitude approach
RK	says he has no doubt AS did not bag directly anyone. RK said he and AS and RK had discussions about AWU and history.
RK	said he had spoke (sic) his mind to the lads — Michael Kerley said he has told AWU about AS comments.
RK	questioned who/what type of work and methods will be applied in Tom Price — cause AWU don't get it
AS	asked if there were any allegations about his work

OUTLINE OF SOME ISSUES

TM	not listening opinionated and arrogant body language and intimidation
TM	spoke about aluminium been a tough industry — all looking to get out
AS	made point he has his views and if he witnesses something he considers is wrong he can't sit back no matter what
AV	you have not said anything that is inconsistent with comments from AWU other than the socialist alliance. AV also said that the way AS has responded today also fits in with AWU suggestion or complaints.
AV	outlined difficulties and sensitivity on getting alliance to happen
AV	summed up AS as he respects AS views and morals but thinks that AS is a square peg in a round hole
AS	has arrived at the same conclusion. He is not right man for job.
RK	asked if there was any chance AS could be put to work in QLD

[114] In relation to the last part of these notes, about the applicant's suitability for the Pilbara position, the applicant strongly denied saying anything to the effect that he had "arrived at the same conclusion. He is not the right man for the job". This was one aspect of his evidence he was firm about. Despite his firmness, I find on the balance of probabilities that Mr Weise's notes record the substance of what the applicant did say at the meeting. Whether the applicant meant it when he said it or was just agreeing to accommodate the concerns raised, or immediately regretted saying it, or regretted saying it later, is a separate matter. In my opinion the fact the applicant agreed with Mr Vickers' "square peg in a round hole" statement is of little relevance to the liability of the respondent under the Fair Work Act. There are a multitude of explanations for why an employee in the applicant's position would make a statement like that, other than the proposition that he was conceding he was not right for the job. It is neither possible nor necessary to reach a concluded view as to why the applicant may have made a statement to such an effect.

[115] The applicant's evidence about the "square peg in the round hole' statement was as follows:

> Now, after that did Mr Vickers say anything about what was to then happen?—Yes. So this is where I guess I heard how — so what he said was that everything that I had said

> fitted with the complaint of CFMEU that this is exactly how Socialist Alliance members talk and I'm not — I'm a square peg in a round hole and I was not the right person for the job in Pilbara.

[116] The discussion then turned to what should happen next. The applicant's evidence was:

> Did you make any response to that as to what would happen?—I asked him what be my future and he said they will pay me a month pay in lieu and send me where I want to go and this is where I raised that I actually signed a fixed term contract which he wasn't aware of.
>
> …
>
> — — — was anything said about what would happen to you then?—So at — the conclusion was that they were going to talk about me staying in Queensland. Ross Kumeroa had asked them if there was any way that I could stay in Queensland and the union doesn't lose someone like me, now that AWU doesn't want me.

[117] I accept that evidence. The applicant then described how he and Mr Kumeroa left the meeting and went downstairs. Mr Weise and Mr Vickers then came downstairs, and told the applicant that he could fly to Queensland and work with Mr Kumeroa as an organiser in Queensland to the end of his contract. The evidence is clear in my opinion that this arrangement was made by reference to the fixed-term contract due to end on 11 October 2013.

The 23 July 2013 show cause letter and the applicant's response

[118] As I have set out above, it is not contentious that on 22 July 2013, the same day the applicant flew to Queensland to start work there as arranged, some information was given to Mr Vickers, which Mr Vickers interpreted as indicating, first, that the applicant had lied about the extent of his involvement with the Socialist Alliance and, second, that the applicant had put up a Facebook posting which Mr Vickers interpreted as directed at him, and at other CFMEU officials.

[119] This led Mr Vickers, on 23 July 2013, to send the "show cause" letter to the applicant, alleged by the applicant to constitute the third form of adverse action against him. In this letter, Mr Vickers also suspended the applicant from duty. It is clear, and the applicant does not dispute, that the two matters referred to in the show cause letter were matters drawn to Mr Vickers' attention after the meeting with the applicant on 18 July 2013. The applicant received this letter when he was in Mackay, in Queensland. In the letter, Mr Vickers required the applicant to attend a further meeting in Sydney on 26 July 2013, and suggested the applicant prepare a response to the allegations. Having recited the importance of the alliance and of the applicant's role in it, and emphasising that the alliance needed to be based on "a newly established level of trust and cooperation between the two organisations", Mr Vickers then set out in the letter how he considered the applicant's behaviour had not been consistent with this:

> Therefore, I was deeply disappointed to learn that you had expressed derogatory and/or defamatory comments about the AWU and its officials whilst employed in the role of organiser with the CFMEU. These were matters expressly raised with you during our meeting in Sydney on 18 July 2013 at which it was generally accepted that you were an inappropriate person to be the CFMEU organiser in that joint venture project. Notwithstanding, and based upon your assurances to me and the other officials of the CFMEU present at the meeting, the CFMEU was prepared to continue your fixed term employment but based other than in the Pilbara.
>
> I have subsequently been made aware of the apparent inaccuracy of your assurances and another matter, which deeply concern me and lead me to conclude, *prima facie*, that

your employment should be terminated. In this letter we outline allegations going to serious misconduct, which, if substantiated, would justify the termination of your employment.

Your truthfulness during my interview with you on 18 July 2013

On 18 July 2013, as well the AWU complaints referred to earlier we raised general concerning general concerns about your outside political involvement. The purpose of us raising this with you, as was made clear, was not to prevent from being politically involved, but to make clear our expectations that you would not allow your political views or activities to interfere with, or prejudice your role as an organiser with the CFMEU.

As I made clear to you in answer to an assertion by you to the effect of "*all union leaders are members of the ALP*" I am not a member of a political party and I am agnostic about the party membership choices of employees or officials of the union. However, what greatly concerns me is the nature of the responses you gave in answer to the allegation put to you that you were a member of the National Council of the Socialist Alliance. During this conversation you denied being a member of the Socialist Alliance and stated that you severed all relations with this organisation in **2010**. However, subsequent Internet searches have revealed that this response is clearly untrue. For example:

- The draft minutes of the Socialist Alliance National Council meeting of January 15-6 2011 (available at: http:alliancevoices.blogspot.com.au/2011/03/raft-minutes-of-socialist-alliance.html) lists you as a participant in this meeting, including as a mover of a resolution calling on more experienced members of the Socialist Alliance to conduct education sessions for members of Resistance.
- You were advertised in Green Left Weekly as a speaker at a forum on the Revolution in Egypt, which occurred at Melbourne University on 1 March 2011. You are mentioned as a member of Resistance. At our meeting on 18 July 2013, you confirmed that you were a one-time convenor of Resistance and that Resistance is the "youth wing" of the Socialist Alliance.
- I have viewed video posted on your Facebook page on 23 October 2011 by an individual identified as "Aron Micallef" addressing a crowd at an "Occupy Melbourne" rally in which you declare, *inter alia*, "… I am a Socialist from Socialist Alliance…."
- You are identified as a co-author (with Mikaelia Baillie) of a document entitled "*Amendments to Socialist Alliance's Charter of Women's Rights*" which was posted on the "Alliance Voices: Socialist Alliance Discussion Bulletin and National Newsletter" website on or about 11 January 2012 (available at http://alliancevoices.blogspot.com.au/2012/01/amendments-to-socialist-alliances.html)
- I have been provided with a Facebook entry made by an individual identified as "Grant Brookes" dated 4 November 2012 in relation to local council elections in Victoria. You are listed as one of the "activists" that assisted with the campaign. Immediately below that posting is a posting by you exclaiming your delight that Sue Bolton had been elected to Moreland Council. Publicly available material on the Internet indicates that Sue Bolton is a prominent member of the Socialist Alliance. Sue Bolton is also listed on the employee form that you signed shortly after being offered employment with the CFMEU as your nominated contact person in the event of an emergency.

These postings clearly indicate that you have lied to me about your involvement in the Socialist Alliance or Resistance since 2010. Please specifically address this allegation.

Facebook posting — "…*buncha rats around you*!"

I have been made aware of a Facebook posting by you apparently lodged via mobile whilst you were in the vicinity of Pyrmont in Sydney on Thursday 18 July 2013. The posting states:

> "*Oh how the world changes. When you think you know smone find out got buncha rats around you! No worries stay true to yourself and keep soldering on*"

I am concerned that the use of the term "rats" is a reference to myself and/or other officials of the CFMEU. Its posting seems to be directly related (by virtue of time and location) to my interview with you on 18 July 2013. It hardly bears repeating that the term "rat" is an offensive and derogatory term in the labour movement. It conjures the image of disreputable turncoat, or alternatively, someone to be equated with filth vermin. I take extreme exception to being described in this way, if I am the intended object of this comment. I also object to any official of the CFMEU being portrayed in this way.

Please also specifically address this allegation in your response to me.

[120] The applicant did provide a written response. He characterised the different information he had provided about his involvement in the Socialist Alliance as a "mistake". He emphasised there was not "a single piece of evidence" to show he had been involved with Socialist Alliance since commencing with the respondent. He stated that he posted the Facebook comments "well before" his meeting with Mr Vickers, Mr Maher and Mr Weise, while he was waiting at the reception desk. He described the allegations of him bagging AWU officials as "hearsay" and "false allegation". He ended his response in the following terms:

I have been involved in numerous campaigns around workers rights and take a stand in support of the vulnerable that continue to suffer at the hands of our politicians and corporate Australia. I am proud of my involvement in each and every single campaign that I was involved in. I believe there is a lot I can offer in organizing members of CFMEU. But I reiterate my view here that for me injustice is egregious regardless of whether it is in a workplace or outside it. I am proud to call myself a communist. It is for this reason that I put my hand up for this job and will continue to fight the neo liberal onslaught against the working people within and outside Australia.

I also want to let you know that regardless of the outcome of our meeting tomorrow; I will go and sign up with Socialist Alliance. Not because I want to cause trouble within CFMEU but due to what I have witnessed over the past few weeks. I am still coming to terms with the fact that I have been put through all this primarily for my 'suspected involvement' in in a socialist party. I have been advised by well wishers within this Union that by doing so I will put myself as an open target for the Union leadership to come at me with everything and do it relentlessly until they get rid of me. To this I say fine! If I am to work in this Union all I can assure you is that the members will always come first. And my actively engaging in a party with a socialist agenda is a clear manifestation of where me allegiances lay: with the working people! Their interest will be my only guide as it is the very reason I joined this Union or any other in future. I respect that there are others in this Union who whist may not share my views are working very hard to further the interest of our members, and I greatly respect that.

I don't ever intend to undermine the democratic process of this Union regardless of what I might think personally. I hope that you accept this letter with a similar sense of openness and forthrightness that I have written it. The members pay my wages and I consider myself their servant. I would never do anything that keeps me from giving my 100% to the members.

[121] It was clear from Mr Vickers' evidence that he believed he had been lied to by the applicant about the nature and extent of his involvement in the Socialist Alliance. It is also clear that Mr Vickers genuinely believed the

Facebook posting referred to him, and to other CFMEU officials. It was not until the applicant gave evidence in this proceeding that the applicant identified the target of those comments as Michael Kerley, the AWU organiser he had been working with. The applicant did not identify Mr Kerley as the object of those remarks in his written response to Mr Vickers, nor at any time before or after his dismissal. His evidence was that he thought saying in his written response that it was directed at someone "on a personal level" was enough, without "naming names". It might be said the applicant missed an opportunity to correct the impression Mr Vickers had formed, but in my opinion as I set out below I have formed the view that Mr Vickers' view that the applicant had to go was so firmly entrenched I doubt such correcting information would have made any difference.

[122] The applicant's oral evidence on this issue was marked by a reluctance to admit that he made a conscious choice not to tell Mr Vickers about the nature and extent of his ongoing involvement with the Socialist Alliance. Ultimately, the applicant accepted it was a conscious choice. He explained it, both in cross-examination and in re-examination, by saying once he was told that links to Socialist Alliance were a problem for the respondent, he gave an untruthful account of when he left the party in order to try and distance himself from it. He admitted that having been untruthful, he had then "dug a hole for myself".

The termination of the applicant's employment on 26 July 2013

[123] The applicant's written response did nothing to assuage Mr Vickers. He discussed the matter with Mr Maher, and then in an email to Mr Maher and Mr Weise in the evening of 25 July 2013 he said "Nothing changes from my perspective". The next day the applicant was informed by a letter from Mr Vickers that his employment was terminated "effective today". Mr Vickers told the applicant the respondent would pay him for the balance of the fixed term for which he had been engaged (that is, until 11 October 2013) including any accrued leave entitlements. That is what occurred. As to the reason for the termination, Mr Vickers expressed it thus:

> I further confirm that you are not being terminated for any reason other than the fact that I have come to the conclusion that you are not an appropriate "fit" for the role that we engaged you for.

[124] I return to the issue of Mr Vickers' reasons below. It is sufficient to note at this point that the formal notice of termination given by Mr Vickers did not nominate as the reason the lies Mr Vickers considered the applicant to have told, nor the offensive remarks Mr Vickers believed he had directed towards Mr Vickers and the respondent. Nor did it refer at all to the applicant's links to the Socialist Alliance.

Evidence about loss, reinstatement and other remedies sought

[125] There was little evidence of loss adduced on behalf of the applicant. There was no medical or other evidence about the effects of the termination of his employment. The applicant himself gave no evidence about the consequences at a personal level for him of his termination of employment. He said he was "put" on a flight back to Melbourne the day his employment was terminated. He said he looked for a lot of jobs since his employment was terminated but had not secured employment.

[126] Belatedly, in re-examination the applicant was asked a question about his ability to work with the union should he be reinstated. Unsurprisingly, the respondent objected since there had been no evidence in chief about reinstatement, and no cross-examination about it either. The objection was upheld.

[127] The applicant's claim for loss of future income was put in two ways. Either the adverse action was the cause of the applicant not commencing work in the Pilbara and of the Pilbara contract never being concluded or, if the Pilbara contract was concluded, there was a breach of it by the respondent. The respondent contested both ways in which the claim was put, but there was no apparent dispute between the parties that if that claim succeeded the total loss of income suffered by the applicant to December 2014 would have been $120,188.77 plus superannuation.

Determination of each of the applicant's claims

[128] The parties each filed outlines of submissions prior to trial and comprehensive written submissions after the conclusion of the evidence. The Court reconvened for oral submissions on 31 October 2014. I do not recite all the submissions made by the parties, but I have given careful consideration to them.

[129] By the time of final submissions, the applicant's case under the Fair Work Act had narrowed somewhat. First, he identified four rather than five incidents of adverse action, namely:

- The direction given on 16 July 2013 to attend the meeting in Sydney on 18 July 2013 (s 342(1), Items 1(c) and (d));
- The decision made at the meeting on 18 July 2013 to redeploy the applicant from Western Australia where he was working on the alliance, to Queensland (s 342(1), Items 1(c) and (d));
- The letter from Mr Vickers to the applicant on 23 July 2013 suspending him (s 342(1), Items 1(c) and (d)); and
- The dismissal of the applicant on 26 July 2013 (s 342(1), Items 1(c) and (d)).

[130] Second, there was no reliance in final submissions on Item 1(b) of s 342(1) — injury in employment.

[131] The respondent admitted that the conduct in the last two dot points in [129] above constituted adverse action, but denied the action was taken for a prohibited reason. It denied the conduct in the first two dot points in [129] constituted adverse action at all, but, if it did, the respondent maintained the submission that the conduct was not undertaken for a prohibited reason.

[132] Therefore, it is necessary to determine whether the conduct identified by the applicant in the first two dot points constitutes "adverse action" for the purposes of s 342(1) of the Fair Work Act.

Were the 16 July 2013 direction and the decision at the 18 July 2013 meeting adverse action for the purposes of s 342 of the Fair Work Act?

[133] Item 1(c) in the table in s 342(1) uses the phrase "alters the position of the employee to the employee's prejudice" in a way which involves a concept broader than effects on the legal rights of an employee. In its terms its focus is on the "position" occupied by the employee at the time of the alleged adverse action. The word "position" directs attention to the place occupied by an employee within the workplace and the organisational structure established by

the employer, as well as to her or his employment generally. It includes a loss of security of employment, and a deterioration in the "advantages enjoyed by an employee": see *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1; 153 ALR 643; 27 ACSR 535; [1998] HCA 30 at [4] per Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ; *Community and Public Sector Union v Telstra Corp Ltd* (2001) 107 FCR 93; [2001] FCA 267 at [17]–[20] (*CPSU*). The applicant submitted there was authority to support the proposition that the commencement of an investigation by an employer into the conduct of an employee is within Item 1(c), relying on *Jones v Queensland Tertiary Admissions Centre Ltd (No 2)* (2010) 186 FCR 22; [2010] FCA 399 at [80]–[82] per Collier J. Her Honour there did not accept that amenability to a disciplinary investigation is a "normal" incident of employment, even if the investigation is commenced in good faith and on a proper evidentiary basis.

[134] In contrast, in *Police Federation of Australia v Nixon* (2008) 168 FCR 340; [2008] FCA 467 at [48] (*Nixon*), Ryan J reached an apparently opposite conclusion. His Honour said:

> I consider, with respect, that amenability to a disciplinary charge brought in good faith and on a proper prima facie evidentiary basis is a normal incident of employment and does not of itself, **before the laying of the charge**, constitute "an adverse affection of, or deterioration in, the advantages enjoyed by the employee" in the sense used by the High Court in the passage from *Patrick Stevedores* 195 CLR 1
>
> …

(Emphasis added.)

[135] In *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd (No 3)* (2013) 216 FCR 70; [2013] FCA 525 at [103], Murphy J agreed with Collier J. His Honour emphasised that, bearing in mind the adverse action had to be undertaken for a prohibited reason before it would be unlawful:

> I respectfully agree with the views of Collier J. With great respect to the approach taken by Ryan J, in my opinion an investigation brought in good faith and carried out properly may nevertheless constitute adverse action. It must be accepted that an investigation which threatens the possibility of dismissal (as in the present case) will operate to reduce the security of future employment of the employee concerned. If it does so, *CPSU v Telstra* at [17]–[18] is authority for the proposition that it constitutes adverse action.

[136] Other decisions, such as *United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board* (2003) 198 ALR 466; 123 IR 86; [2003] FCA 480 at [89] (*United Firefighters*) per Goldberg J, also support the proposition that at least some kinds of disciplinary action (in that case, the laying of charges against an employee) can constitute "prejudice", in the sense that an employee is affected in her or his employment from the time a charge is laid, not only from when it is proven.

[137] In *CPSU*, the Full Court recognised the application of Item 1(c) involved a question of degree. The Court interpreted the adjective "prejudicial" in the phrase as requiring an alteration that was "real and substantial" rather than "merely possible or hypothetical": at [18]. On the facts before it, the Full Court found that the sending of an email by Telstra to its senior management, instructing that in a redundancy process preference be given to making redundant employees employed under awards or certified agreements, imposed an additional "detrimental criterion" (at [19]) on those employees in terms of their

exposure to the risk of redundancy. That, the Full Court held, was sufficient to constitute a "prejudicial alteration" for the purposes of the then s 298K(1) of the Workplace Relations Act 1996 (Cth). In all the authorities it has been accepted there is no material difference between the approach that should be taken to s 342(1) Item 1(c) and that which has been taken to the same terms in s 298K(1) of the Workplace Relations Act.

[138] Given the breadth with which the authorities contemplate the terms of Item 1(c) will be approached, there is no doubt that the redeployment decision made at the 18 July 2013 meeting was adverse action against the applicant. He was not permitted to return to Western Australia to prepare for the position both parties had intended he would perform — namely, that of organiser in the Pilbara alliance. He had moved to Western Australia but now was not permitted to return there. Instead, he was compelled to go back to Queensland if he wished to retain his employment at all. He was placed in a different organiser position which was not the position he had applied for, and had expected to commence in a matter of days from the time he was directed to attend the meeting in Sydney. He would clearly be subjected to greater scrutiny by Mr Weise and Mr Vickers. He was not trusted by them, especially by Mr Vickers. It seems likely the applicant only secured this reprieve at all because of Mr Kumeroa's intervention, and because Mr Kumeroa would be supervising the applicant. That is indeed how Mr Vickers put it in his evidence — "We came to the decision that Ross will keep an eye on him". Despite there being no change to his pay or his general conditions of employment, the fact that the applicant was directed away from the job he had applied for, had wished to do and had begun preparations for, and the obvious detriment that he now had to be supervised by Mr Kumeroa and work to his direction, was an alteration to the applicant's position and in my opinion a prejudicial one to him. Inevitably, there would be a stigma attached to the fact that, despite being appointed to a six-month position for the sole reason of being available to take up the Pilbara contract, he would now not be permitted to do so. His security of employment was reduced to a definite end date of 11 October 2013, which was not the position he was in immediately before the 18 July meeting.

[139] As to the direction that the applicant go to Sydney for the meeting on 18 July 2013, I am not prepared to find that constituted an alteration of the applicant's position to his prejudice, the allegation of it being an injury in his employment having been abandoned. Of course, examining these issues in hindsight, taking into account subsequent events, tends to support such a characterisation. That would be an incorrect approach. The question is whether, in and of itself, the direction to attend the meeting in Sydney, given at the time and in the circumstances it was given, had the effect set out in Item 1(c). I consider the direction is closer in nature to the situation discussed by Ryan J in *Nixon*: it is a preliminary step designed to give the applicant an opportunity to deal with the complaints that had been made. It was not like the facts of *United Firefighters* where charges had been laid. Contrary to being prejudicial to his position, the opportunity to have complaints put and to be able to explain the position may well be beneficial to an employee. The employee may be able to assuage the concerns of the employer: no "charges" have been laid, no disciplinary process initiated. There is, at that stage, no threat of dismissal, nor any threat to the security of employment. Once a formal investigation has commenced, or charges are laid, or formal allegations are made, then the

characterisation may change as a matter of fact, but in my respectful opinion characterising a direction to attend an initial meeting as a prejudicial alteration to an employee's position is not warranted.

[140] If I am wrong about the characterisation of the direction to attend the 18 July 2013 meeting, then on the assumption it was adverse action within the meaning of s 342(1) of the Fair Work Act, for the reasons I express below, the direction was given for reasons which involved a prohibited reason. In that sense, as I explain in more detail below, all of the conduct and decision-making towards the applicant on and from 16 July 2014 was for reasons which included a prohibited reason. I make this finding despite Mr Vickers' express evidence that the appellant would still have been directed to attend the 18 July 2013 meeting even if Mr Vickers did not know anything about the applicant's membership of the Socialist Alliance. That evidence was given in answer to a leading question, with the benefit of hindsight, in the context of a proceeding alleging that Mr Vickers acted unlawfully. It is a reconstruction, and a self-serving one for the respondent. That is not to suggest Mr Vickers gave dishonest evidence — rather, it is to find that it is not possible for Mr Vickers reliably to recreate circumstances in which he gave that direction, devoid of one of the central aspects — namely, the complaints by Mr Howes about the applicant's membership of the Socialist Alliance and Mr Vickers' very strong views about that political party and its methods of operation.

[141] On the question whether the decision at the 18 July 2013 meeting constituted adverse action within s 342(1), the respondent made a further submission. It submitted that "redeployment" (which is what is pleaded by the applicant in relation to the decision at the 18 July 2013 meeting) was not an appropriate term. The respondent submitted an employee could not be "redeployed" before a contract had started. The Pilbara contract had not commenced, and therefore there could be no redeployment. The respondent submitted the only reason the applicant ended up in Queensland was because Mr Kumeroa asked for that to occur. It was not action taken by the employer — the employer merely acquiesced to a suggestion from the applicant's representative. The respondent submitted this was important not only for liability but because that is where any loss would be incurred if the respondent's submission about the prohibited reason were not accepted. In other words, it is this decision which deprives the applicant of the future benefit of the Pilbara contract. The last submission was correctly made, and is important.

[142] I do not otherwise accept the respondent's submissions about redeployment. The applicant was on a fixed-term six-month contract, the express purpose of which was to give time for the alliance with the AWU to be formalised and put in place. By 18 July 2013 the MOU had been signed, the alliance had been launched and the applicant had been "deployed" to Western Australia to prepare to start in the position by getting to know the way the AWU worked in Western Australia. After the 18 July 2013 meeting, in my opinion it is correct to describe what occurred as a "redeployment", for the remainder of the applicant's fixed-term contract. The choice for the respondent was what action it would take, Mr Vickers having decided to act on and accept the complaint from Mr Howes, and the allegations from the AWU officials in Western Australia. It was Mr Vickers' decision, having consulted Mr Weise, that it was acceptable to the respondent for the applicant to move to Queensland for the remainder of his six-month contract. The evidence did not suggest, one way or the other, that

Mr Vickers had made any decision on whether the applicant would, after 11 October 2013, continue as an employee of the respondent. What was clear as a result of Mr Vickers' decision at the 18 July 2013 meeting, was that the applicant would not be working as an organiser in the alliance, but would be working as a general CFMEU organiser in Queensland. That was against the applicant's wishes and all parties' expectations since the time he had been employed. It is appropriate in my opinion to describe what occurred as a "redeployment".

[143] The redeployment constituted an alteration of the applicant's position to his prejudice within the terms of Item 1(c) of s 342(1).

[144] Mr Vickers' decision also constitutes discrimination between the applicant and other employees of the respondent within the terms of Item 1(d) of s 342(1), in the sense I have explained that provision at [150] to [163] below.

[145] The applicant was given two reasons for his attendance at the 18 July 2013 meeting — Mr Howes' complaint that the applicant was a "Trot" and involved in the Socialist Alliance, and allegations that he had "bagged" AWU officials in Western Australia. One directly involves questioning his holding and manifestation of a political opinion, and in my opinion the other indirectly involves doing so, for the reasons I have explained at [199]–[240] below.

[146] The inquiries made of the applicant at this meeting forced him to reveal, discuss, explain and justify the political opinions he had, in connection with the Socialist Alliance. As a party, the Socialist Alliance was subject to severe criticism by Mr Vickers at that meeting, in terms of its method of operation, and its aims in relation to unions. A new employee in the applicant's position could not help but feel under siege by Mr Vickers because of the political opinions he had been discovered to hold, and to manifest by joining the Socialist Alliance, and maintaining an association with it. It is little wonder the applicant was defensive and not entirely forthcoming about how recently he had been involved with the party. His attempts to downgrade his involvement with the Socialist Alliance and distance himself from party activities, while not excusable in terms of being less than the truth, are somewhat understandable in context.

[147] Mr Vickers' evidence was clear that he would never generally question employees about their political affiliations. He sought to buttress this aspect of his evidence by proclaiming that he was himself a communist. Far from persuading me that his questioning the applicant in the way he did, deciding to remove him for the alliance and redeploying him to Queensland had nothing to do with the applicant's political opinions, this evidence confirms for me that Mr Vickers did act for this reason. Mr Vickers was prepared to accept that the applicant had tendencies in opinion and behaviour which Mr Vickers identified with those affiliated with the Socialist Alliance, and what that party stood for. He may not have cared if the applicant proclaimed himself a communist, but that is not the point. The inquiry is not about what political opinions Mr Vickers would tolerate or accept, or himself identify with. It is about what political opinions, if any, he would not tolerate. The evidence clearly reveals Mr Vickers would not tolerate or accept any affiliation with the Socialist Alliance.

[148] Based on Mr Vickers' own evidence about the general irrelevance of the political opinions and allegiances of the respondent's employees, and his adamant evidence that he would never usually question employees about their political affiliations, it is clear Mr Vickers treated the applicant differently than he treated other employees of the respondent. There is no evidence to suggest other

employees would be redeployed because an affiliation with a particular political party had been identified, and Mr Vickers' own evidence tended to confirm this would not occur. That it might be said Mr Vickers would have acted in the same way towards any employee allegedly involved with the Socialist Alliance does not take his decision outside the terms of Item 1(d) of s 342(1). Rather, it suggests the discrimination between employees would have extended, impermissibly, to the class of employees who had affiliations with the Socialist Alliance.

[149] Accordingly I find Mr Vickers' decision to redeploy the applicant to Queensland constituted adverse action within the terms of both Items 1(c) and 1(d) of s 342(1) of the Fair Work Act. I find that the direction to attend the 18 July 2013 meeting did not constitute adverse action within the terms of Item 1(c) of s 342(1) of the Fair Work Act.

The meaning of "discriminates" in s 342(1), Item 1(d)

[150] Given the findings I have reached above in relation to the direction to move to Queensland, the principal relevance of Item 1(d) is in relation to the direction to attend the 18 July 2013 meeting. Unless Item 1(d) applies to the direction to attend the 18 July 2013 meeting, that direction will not constitute adverse action for the purposes of the Fair Work Act.

[151] The question Item 1(d) asks in the context of the facts in this proceeding is whether, in giving that direction at the behest of Mr Vickers, Mr Weise (for the respondent) discriminated between the applicant and other employees of the respondent.

[152] The "discriminates" term is not defined in the Fair Work Act. In s 351, the "discrimination" is the taking of adverse action as defined on one of the prohibited grounds. Since Item 1(d) is one of the four ways in which adverse action can be taken, there is some circularity in the statute.

[153] Section 351 was contained in the Fair Work Act as introduced in 2009. The Explanatory Memorandum to the Bill states that it is "intended broadly to cover" s 659(2)(f) of the predecessor to the Fair Work Act, the Workplace Relations Act, which made it unlawful to dismiss an employee for certain discriminatory reasons. Section 659(1) of the Workplace Relations Act provided that the section was intended to assist in giving effect to Australia's international obligations with respect to termination of employment including the *Convention concerning Discrimination in respect of Employment and Occupation, the Family Responsibilities Convention*, and *the Termination of Employment Recommendation, 1982*. The Explanatory Memorandum to the Fair Work Act makes clear that, by s 351, the protections set out in s 659(2)(f) of the Workplace Relations Act have been extended beyond termination of employment to prohibit any adverse action, as defined in s 342.

[154] The respondent contended "discriminates" should be given the meaning which is attributed to it in anti-discrimination statutes — namely, less favourable treatment. It supports this submission contextually by pointing out, correctly, that Items 1(a)–(c) in s 342(1) all involve some form of less favourable treatment towards an employee. The respondent's construction might also be assisted by the use of the adjective "adverse" in the key statutory phrase "adverse action".

[155] The respondent's submissions did not grapple with indirect discrimination and how this would be encapsulated, given the rather tortured statutory definitions of that term: see, for example, s 6 of the Disability Discrimination Act 1992 (Cth) and s 5(2) of the Sex Discrimination Act 1984

(Cth). These statutory definitions go well beyond the approach of asking whether conduct is "facially neutral" but has a discriminatory effect, which was the original explanation of the concept of indirect discrimination: see *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 358; 103 ALR 513 at 519 per Mason CJ and Gaudron J. In indirect discrimination as statutorily defined, there is also the added layer of reasonableness, which is difficult to incorporate into ss 351 and 342 simply by implication. It is conceivable the Parliament sought not to incorporate concepts of indirect discrimination into ss 351 and 342, but that would be to impute to Parliament an intention to deal with only the most obvious and direct kinds of discrimination. For example, although termination of employment is clearly covered by Item 1(a), a situation such as that which arose in *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165; 89 ALR 1 may not be picked up by the respondent's approach. That was a case where a "last on, first off" policy was applied to redundancies made by an employer. The evidence showed women were disproportionately represented and affected by that policy, because of their tendency for later entry or re-entry into the workforce after having children. The Court found there was indirect discrimination. It would be a significant omission from the protections otherwise intended to be offered by s 351, read with s 342, if indirect discrimination were not covered.

[156] The respondent contends that the approach taken by Katzmann J in *Construction, Forestry, Mining & Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 3)* [2012] FCA 697 at [40] (*Pilbara Iron*) supports its submission. It submits that a comparator (real or hypothetical) must be used to ascertain whether there was less favourable treatment. Here, the respondent submits for the purposes of Item 1(d) the comparator would be another employee against whom similar allegations of "bagging" another union's officials had been made, but without any allegations about connections with the Socialist Alliance. The respondent submits such an employee would have been treated in precisely the same way and there is therefore no "discrimination" for the purposes of Item 1(d).

[157] In *Pilbara Iron*, Katzmann J observed (at [40]) that Item 1(d) speaks of discrimination occurring "between employees" and not "against" an employee, but concludes that, especially given the presence in Item 2 of the word "against", there is no material difference. In the matter before her Honour, both parties accepted that "discriminate" should be construed as "treat less favourably", so that her Honour did not have to decide this question. In contrast, the parties in this proceeding contended for different constructions. The construction issue is significant in this proceeding because, as I have found, the direction to attend the July 2013 meeting did not alter the applicant's position in his employment to his prejudice and if the direction is not within Item 1(d) it cannot constitute adverse action.

[158] The applicant submits "discriminates" in Item 1(d) should simply be construed as treating people differently. In this way, the attributes set out in s 351 then prohibit such different treatment by reference to a consideration irrelevant to the performance of an employee's work. The applicant relies on the analysis given by Gaudron J in *Street v Queensland Bar Association* (1989) 168 CLR 461 at 570–1; 88 ALR 321 at 395–6 (*Street*). Her Honour there said:

> Although in its primary sense "discrimination" refers to the process of differentiating between persons or things possessing different properties, in legal usage it signifies the process by which different treatment is accorded to persons or things by reference to

> considerations which are irrelevant to the object to be attained. The primary sense of the word is "discrimination between"; the legal sense is "discrimination against".
>
> Where protection is given by anti-discrimination legislation, the legislation usually proceeds by reference to an unexpressed declaration that certain characteristics are irrelevant within the areas in which discrimination is proscribed. Even so, the legislation frequently allows for an exception in cases where the characteristic has a relevant bearing on the matter in issue. Thus, for example, the Anti-Discrimination Act 1977 (N.S.W.), whilst proscribing discrimination in employment on the grounds of race and sex, allows in ss 14 and 31 that discrimination is not unlawful if sex or race is a genuine occupational qualification.
>
> The framework of anti-discrimination legislation has, to a considerable extent, shaped our understanding of what is involved in discrimination. Because most anti-discrimination legislation tends to proceed by reference to an unexpressed declaration that a particular characteristic is irrelevant it is largely unnecessary to note that discrimination is confined to different treatment that is not appropriate to a relevant difference. It is often equally unnecessary to note that, if there is a relevant difference, a failure to accord different treatment appropriate to that difference also constitutes discrimination.

[159] Thus, the applicant submits he was treated differently to other employees by being required to fly to Sydney to attend a meeting called to inquire into his involvement with the Socialist Alliance, and complaints about him "bagging" AWU officials. Other employees of the respondent, he submitted, were not directed to attend meetings so that inquiries into their allegiances with political parties could be investigated.

[160] I accept the applicant's submission as a matter of construction in relation to Item 1(d), but it does not assist him for the reasons I outline below. In my opinion, the language in Item 1(d), and its use of the word "between", suggests the conduct which is to be examined is the way in which the employer targets the particular employee. Is that employee treated differently from other employees? By s 351, the "irrelevant" reasons for the different treatment (to adopt the concept used by Gaudron J in *Street*) are then specified. The inquiry is thus a straightforward one, to that point, and does look only for differential treatment, as the applicant submits.

[161] However, the terms of s 351(2), read with subs (3), then must be applied. Those provisions expressly pick up the detailed regimes of each of the territory, state and federal anti-discrimination statutes. In other words, the requirements that there be "less favourable treatment", the complicated requirements for indirect discrimination, and the exceptions for which each statute provides are, through these provisions, incorporated so as to limit the protections given by Div 5 of Pt 3-1 of the Fair Work Act in a way which is intended to mirror the limits under those other legislative schemes. When read as a whole, ss 351 and 342(1) Item 1(d) will operate to render only conduct proscribed under other anti-discrimination regimes as conduct contravening s 351. That, in substance, is the outcome for which the respondent contended, although not because of the meaning of "discriminates" in Item 1(d) of s 342(1), but rather at the subsequent step of the application of the prohibition in s 351.

[162] In being directed to attend the 18 July meeting in Sydney, I find the applicant was not treated differently to other employees of the respondent. In my opinion the sensitivity of the new alliance with the AWU, together with the evidence of Mr Vickers in particular about his determination to have nothing threaten the alliance, leads me to infer that any other employee against whom

"bagging" allegations were made, especially by a person such as Mr Howes, would have been called to a meeting by Mr Vickers in the same peremptory fashion as the applicant was. The overlay of the allegations about the applicant's political activities no doubt compounded the urgency and arbitrariness of the way the meeting was arranged, but in my opinion there is insufficient evidence for me to be satisfied that another employee of the respondent would not have been summoned to such a meeting.

[163] Having identified the adverse action taken by the respondent for the purposes of s 351 as the 18 July 2013 decision to redeploy the applicant, the 23 July 2013 suspension decision and show cause letter, and the 26 July 2013 termination of employment, I turn now to consider the prohibited reason in s 351 on which the applicant relies: political opinion.

The meaning of "political opinion" in s 351

[164] This term is not defined in s 351. The context in which it appears, especially the presence of s 351(2) and (3) as central aspects of the determination of a contravention under s 351(1), means that the term should be given, insofar as it is possible, a meaning which is consistent with the interpretation it has been given in anti-discrimination law.

[165] The manner in which s 342 relates with s 351 is, as the applicant submitted, that the particular adverse action is picked up and applied as part of s 351. Relevantly to this proceeding, and based on the findings I have made, there are therefore three questions of contravention to be addressed:

- Whether the decision made at the meeting on 18 July 2013 to redeploy the applicant, from Western Australia where he was preparing to work on the alliance to Queensland, was because of the applicant's political opinion;
- Whether the show cause letter from Mr Vickers to the applicant on 23 July 2013, in which the applicant was suspended, was because of the applicant's political opinion; and
- Whether the dismissal of the applicant on 26 July 2013 was because of the applicant's political opinion.

[166] Treatment of a person because of the holding, and or alternatively the manifestation, of a political belief or opinion is a circumstance which is addressed in extradition and refugee law as well as anti-discrimination law. The commission of offences characterised as political did not generally expose a fugitive to extradition, and were considered an exception to a state's mutual obligations to extradite fugitives from justice. The development of political opinion as a protected attribute in anti-discrimination law needs to be seen in this wider context. The construction question centres on the meaning and interpretation of the adjective "political", whether the noun to which it is attached is "offence", or "opinion" or "belief".

[167] In the extradition context, Viscount Radcliffe described some of the characteristics of a "political" offence in *R v Governor of Brixton Prison*; *Schtraks v Government of Israel* [1964] AC 556 at 591–2; [1962] 3 All ER 529 at 540. His Lordship said:

> In my opinion the idea that lies behind the phrase "offence of a political character" is that the fugitive is at odds with the State that applies for his extradition on some issue connected with the political control or government of the country. The analogy of "political" in this context is with "political" in such phrases as "political refugee,"

> "political asylum" or "political prisoner." It does indicate, I think, that the requesting State is after him for reasons other than the enforcement of the criminal law in its ordinary, what I may call its common or international, aspect. It is this idea that the judges were seeking to express in the two early cases of *Re Castioni* and *Re Meunier* when they connected the political offence with an uprising, a disturbance, an insurrection, a civil war or struggle for power: and in my opinion it is still necessary to maintain the idea of that connection. It is not departed from by taking a liberal view as to what is meant by disturbance or these other words, provided that the idea of political opposition as between fugitive and requesting State is not lost sight of: but it would be lost sight of, I think, if one were to say that all offences were political offences, so long as they could be shown to have been committed for a political object or with a political motive or for the furtherance of some political cause or campaign. There may, for instance, be all sorts of contending political organisations or forces in a country and members of them may commit all sorts of infractions of the criminal law in the belief that by so doing they will further their political ends: but if the central government stands apart and is concerned only to enforce the criminal law that has been violated by these contestants, I see no reason why fugitives should be protected by this country from its jurisdiction on the ground that they are political offenders.

[168] Australian law recognises that the term "political offence" (and its usual definition of an offence of a "political character") in extradition law included conduct which is "directed against the political order" either in a direct sense (with offences such as treason) or an indirect or relative sense (for common law offences such as murder, where carried out for political purposes): see *Dutton v O'Shane* (2003) 132 FCR 352; 200 ALR 710; [2003] FCAFC 195 at [185]–[186] per Finn and Dowsett JJ.

[169] In *Tzu-Tsai Cheng v Governor of Pentonville Prison* [1973] AC 931 at 943–5; [1973] 2 All ER 204 at 207–9, Lord Diplock traced the history of the political offence exception, and at AC 945; All ER 208–9 emphasised the need for a connection between the impugned conduct and changes to government or government policy:

> My Lords, the noun that is qualified by the adjectival phrase "of a political character," is "offence." One must, therefore, consider what are the juristic elements in an offence, particularly one which is an extradition crime, to which the epithet "political" can apply. I would accept that it applies to the mental element: the state of mind of the accused when he did the act which constitutes the physical element in the offence with which he is charged. I would accept, too, that the relevant state of mind is not restricted to the intent necessary to constitute the offence with which he is charged, for in the case of none of the extradition crimes can this properly be described as being political. The relevant mental element must involve some less immediate object which the accused sought to achieve by doing the physical act. It is unnecessary for the purposes of the present appeal, and would, in my view, be unwise, to attempt to define how remote that object might be. If the accused had robbed a bank in order to obtain funds to support a political party, the object would, in my view, clearly be too remote to constitute a political offence. But if the accused had killed a dictator in the hope of changing the government of the country, his object would be sufficiently immediate to justify the epithet "political." For politics are about government. "Political" as descriptive of an object to be achieved must, in my view, be confined to the object of overthrowing or changing the government of a state or inducing it to change its policy or escaping from its territory the better so to do. No doubt any act done with any of these objects would be a "political act," whether or not it was done within the territory of the government against whom it was aimed. But the question is not simply whether it is political qua "act" but whether it is political qua "offence."

[170] It is well established in refugee law that the Convention ground of "political opinion" may encompass "any opinion on any matter in which the machinery of state, government and policy may be engaged": see *Canada (Attorney-General) v Ward* [1993] 2 SCR 689 at 746 per La Forest J (for the Court).

[171] In *Voitenko v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 355; 55 ALD 629; [1999] FCA 428, Hill J said (at [33]):

> It is not necessary in this case to attempt a comprehensive definition of what constitutes "political opinion" within the meaning of the Convention. It clearly is not limited to party politics in the sense that expression is understood in a parliamentary democracy. It is probably narrower than the usage of the word in connection with the science of politics, where it may extend to almost every aspect of society. It suffices here to say that the holding of an opinion inconsistent with that held by the government of a country explicitly by reference to views contained in a political platform or implicitly by reference to acts (which where corruption is involved, either demonstrate that the government itself is corrupt or condones corruption) reflective of an unstated political agenda, will be the holding of a political opinion. With respect, I agree with the view expressed by Davies J in *Minister for Immigration & Ethnic Affairs v Y* (unreported, Federal Court, Davies J, 15 May 1998) that views antithetical to instrumentalities of government such as the Armed Forces, security institutions and the police can constitute political opinions for the purposes of the Convention. Whether they do so will depend upon the facts of the particular case.

[172] Recognising that it may be difficult to draw outer limits around the concept of "political opinion" (as many of the refugee cases dealing with opposition to corrupt government activities highlight: see *Lian Hua Zheng v Minister for Immigration and Multicultural Affairs* [2000] FCA 670 at [32]–[34] per Merkel J; see also *VNAY v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 96 at [18]), there is no doubt at all that membership of a political party, and engaging in activities associated with a political party, is one of the clearest examples of the holding and manifestation of a political opinion, such membership and involvement being one of the quintessential ways in which people seek to bring about change to governments, and to government policies and priorities: cf *Minister for Immigration and Multicultural Affairs v Singh* (2002) 209 CLR 533; 186 ALR 393; 67 ALD 257; [2002] HCA 7 at [22] per Gleeson CJ. At its simplest that is because the nature and existence of political parties is closely connected to advocacy for changes in government, and the formulation of government policies.

[173] Indeed, in refugee law, much of the debate about whether a person falls within or outside the Convention reason of "political opinion" occurs where a person is not a member of, or associated with, a particular political party: see the series of cases discussed in J C Hathaway and M Foster, *The Law of Refugee Status*, 2nd ed, Cambridge University Press, 2014, pp 405–6. In such cases, generally the Convention attribute of political opinion has still been found to be applicable, based on a person's conduct and beliefs as expressed. However, membership, and involvement in the activities, of a political party has always been the clearest of examples of the holding and expression of the political opinion.

[174] Although cases concerning discrimination on the basis of political opinion are rare, a similar approach has been taken: see *Nestle Australia Ltd v President and Members of the Equal Opportunity Board*

[1990] VR 805 at 815 per Vincent J; *Lindisfarne R & S L A Sub-Branch and Citizen's Club Inc v Buchanan* (2004) 80 ALD 122; [2004] TASSC 73 at [10].

[175] The respondent did not dispute the nature and extent of the applicant's involvement in the Socialist Alliance as described in the evidence (as opposed to what the applicant initially told Mr Vickers), nor was there any challenge to the way he expressed his political beliefs and explained why he had joined the Socialist Alliance.

[176] To the extent the respondent submitted that membership of a political party is "not the same thing" as the holding and manifestation of a political opinion, if that submission was intended to apply to circumstances where the evidence demonstrated a person was a member of a party without any evidence the person shared the beliefs, policies and aims of that party, then further consideration may need to be given to whether a person in such a situation could be said to have a political opinion for the purposes of s 351 of the Fair Work Act. The example is hypothetical and is not the situation on the evidence in this proceeding. It need not be further considered. I note in any event that the situation posited by the respondent does not purport to deal with the imputations which might be made (relevantly, by an employer) out of an employee's "mere" membership of a political party. In that sense, bare or "mere" membership may still be sufficient to attract the protection of s 351, but these matters are inherently fact dependent.

[177] Whatever may be the full extent of the meaning of "political opinion", there is no doubt that the applicant's membership of, and involvement in the activities of, the Socialist Alliance constituted the holding and manifestation of a political opinion within the meaning of that phrase in s 351 of the Fair Work Act.

Reasons for conduct: The relevance of **Board of Bendigo Regional Institute of Technical and Further Education v Barclay**

[178] Before I turn to my findings on contravention it is necessary to address the respondent's reliance on *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500; 290 ALR 647; [2012] HCA 32 (*Barclay*), and the subsequent decision of the High Court in *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2014) 253 CLR 243; 314 ALR 1; 88 ALJR 980; [2014] HCA 41 (*BHP Coal*). In particular, the respondent relied on the passage in *BHP Coal* from the judgment of French CJ and Kiefel J where their Honours said (at [20]):

> In *Bendigo* French CJ and Crennan J pointed out that it is erroneous to treat the onus imposed on the employer by s 361 as being heavier, or different, if adverse action is taken while an employee happens to be engaged in industrial activity. Their Honours said that it is incorrect to conclude that, because the employee's union position and activities were inextricably entwined with the adverse action, the employee was therefore immune, and protected, from the adverse action. Such an approach would destroy the balance between employers and employees which the Act seeks to attain and which is central to s 361.

[179] The High Court's decision in *Barclay* clarified a number of matters, in particular about the operation of the statutory presumption in s 361 of the Fair Work Act. In their reasons, members of the Court emphasised that such a presumption, combined with the nature of the inquiry being one as to the "particular reason" of the decision-maker and involving an assessment of the

state of mind of the decision-maker (rather than a wholly objective inquiry), meant that the presumption would rarely be effectively rebutted without direct testimony from the decision-maker: at [42]–[45] per French CJ and Crennan J, at [101] and [127] per Gummow and Hayne JJ, at [146] per Heydon J. As French CJ and Crennan J observe at [50] (see also Gummow and Hayne J at [86] and Heydon J at [149]), citing *General Motors-Holden Pty Ltd v Bowling* (1976) 12 ALR 605 at 617 (*Bowling*) per Mason J, the rationale for the presumption (and the correlative reverse onus) is that the burden should fall on the person whose own knowledge might best explain the reason for her or his conduct or decision.

[180] Evidence from the decision-maker, if given, may not be conclusive. As Hayne J (in dissent) observed in *BHP Coal* at [38]:

> *Bendigo* did not decide that accepting the decision-maker's evidence of why adverse action was taken necessarily concluded the issue in a case where the employee was engaged in industrial activity. As counsel for the Minister, intervening, rightly submitted in *Bendigo*, "[i]t is an error to reduce the question to a binary choice between believing or rejecting the evidence" of the relevant decision-maker.

[181] French CJ and Kiefel J made a similar point in *BHP Coal* at [8]. These observations have particular relevance in the light of my findings about Mr Vickers' reasons.

[182] This focus on the state of mind of the decision-maker, and the importance of her or his evidence to the working out of the statutory presumption, led the court in *Barclay* also to emphasise the operation of the link which arises through the use of the word "because" in the text of a provision such as s 351. Referring to the Court's earlier decision in *Bowling*, French CJ and Crennan J (at [62]) said that the fact that an individual happens to be a union representative, or engaged in industrial activities at the time adverse action is taken against her or him, leads to no presumption that status was the reason for the adverse action, rather than just a surrounding circumstance. Gummow and Hayne JJ (at [85] and [104]) also refer to and apply Mason J's approach in *Bowling* at 616 and 619, where his Honour said:

> The protection of trade unions and their representatives from discrimination and victimisation by employers does not require an interpretation as extreme as that favoured by Isaacs J. It would unduly and unfairly inhibit the dismissal of a union representative in circumstances where other employees would be dismissed and thereby confer on the union representative an advantage not enjoyed by other workers, to penalize a dismissal merely because the prohibited factor entered into the employer's reasons for dismissal though it was not a substantial and operative factor in those reasons.
>
> … [Section] 5(1) does not proscribe the circumstances which it lists as the sole or predominant reasons for dismissal. It is sufficient if the circumstance is a substantial and operative factor. And it does not cease to be such a factor because it is coupled with other circumstances or because regard is had to it in association with other circumstances not mentioned in the section.

[183] It appears there is thus a majority in *Barclay* which endorses the approach of asking whether the employer had proven that the prohibited reason was not a substantial or operative factor. It is helpful to recall the terms in which Mason J in *Bowling* applied this approach to the facts in that case (at 617–18):

> Once it is said that the appellant dismissed [the respondent] because he was deliberately disrupting production and was setting a bad example it is not easy to say without more

> that this had nothing to do with his being a shop steward. Although the activities in question did not fall within his responsibilities as a shop steward his office gave him a status in the work force and a capacity to lead or influence other employees, a circumstance of which the appellant could not have been unaware. It would be mere surmise or speculation, unsupported by evidence, to suppose that the appellant's management, if concerned as to the bad example he was setting, divorced that consideration from the circumstance that he was a shop steward.

[184] Although the language in *Bowling* of "substantial and operative factor" is not the language of s 360 of the Fair Work Act, as Gummow and Hayne JJ pointed out in *Barclay* at [103], the extrinsic material in relation to s 360 did refer to the intention to incorporate earlier jurisprudence from the former provision (s 792 of the Workplace Relations Act) and summarised the effect of that jurisprudence as being that the reason must be "an operative and immediate reason for the action", but not the "sole or dominant" reason.

[185] The relationship between the role played by the protected attribute in an employer's decision-making and the reverse onus was examined again in *BHP Coal*. At [14], French CJ and Kiefel J referred with approval to the reasons for judgment of Kenny J in the Full Court below (*BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* (2013) 219 FCR 245; [2013] FCAFC 132 at [57]):

> Her Honour pointed out that this court in *Bendigo* rejected the proposition that an employer must establish that the reasons for the adverse action were entirely dissociated from the employee's union activities, in order to discharge the onus of proof. Her Honour added that an employee's activity is not insulated from adverse action by an employer because it happens to be done in the course of an otherwise lawful industrial activity.

[186] In *BHP Coal*, French CJ and Kiefel J go on to state (at [19]):

> Section 346 does not direct a court to enquire whether the adverse action can be characterised as connected with the industrial activities which are protected by the Act. It requires a determination of fact as to the reasons which motivated the person who took the adverse action.

[187] It was on this basis that French CJ and Kiefel J concluded (at [22]) that the trial judge had erred in finding that because the respondent held up a sign during the conduct of an industrial protest, there was a connection between that industrial activity and the disciplinary conduct taken against him sufficient to support a finding that the adverse action was taken because of the respondent's industrial activity. Their Honours emphasised that a "connection" was not enough.

[188] This difference between a "connection" and a "reason" may, with respect, be elusive. Possession of a protected attribute is clearly insufficient, and it may also be accepted that if the occasion for adverse action happens to coincide with manifestation of a protected attribute (such as political opinion or industrial activity), that is insufficient. If, however, more than this is meant by the use of the term "connection" then it seems to me as a matter of fact in a given case there may well be an overlap with a "reason" for the adverse action. So too the distinction between an employer not having to prove adverse action was "entirely disassociated" from a prohibited reason, but having to prove the prohibited reason was not a "substantive and operative" reason. Repeating that these will be questions of fact to be determined on the evidence in a particular case does not remove the difficulty of the somewhat fine distinctions being drawn in the

authorities. With respect, they also illustrate the difficulties in paraphrasing, or moving away from, the statutory language which here relevantly requires that an employer prove action was not taken for reasons which "included" a prohibited reason.

[189] *BHP Coal* is a difficult case, not the least because of the divergent approaches taken by the justices. All reasons emphasise the factual nature of the task of ascertaining why adverse action was taken against a person. All reasons recognise this generally involves an inquiry about the state of mind of the decision-maker, although it is not limited to that inquiry.

[190] Seeking to rely on *Barclay* and *BHP Coal*, the respondent submitted that the allegations about the applicant "bagging" AWU officials were independent of the allegations about the Socialist Alliance, and that an employee gains no special protection or immunity simply because he or she happens to have a protected attribute if the reason for the adverse action is independent of that attribute. So much may be accepted; that submission is simply another way of expressing the underlying proposition that the reason for adverse action is a question of fact. If, in fact, possession of a protected attribute is coincidental, or simply part of the surrounding circumstances, then as a matter of fact the adverse action has not been taken because of that protected attribute.

[191] The core question for the Court is whether, as a matter of fact, the respondent's characterisation of the role played by the applicant's political opinion in Mr Vickers' decision-making as "coincidental" or "part of the context or surrounding circumstances" or some such description, is correct.

[192] The task being as fact dependent as it is, there will always be limited assistance to be gained from comparisons with other decisions. Neither *Barclay* nor *BHP* Coal provide in my opinion the kind of watershed moment suggested by the respondent, so that one might erect a "pre-*Barclay*" and "post-*Barclay*" dichotomy as counsel for the respondent sought to do. The applicant has not submitted there is a "connection" between the applicant's membership and involvement in the Socialist Alliance and the adverse action. He has submitted those matters, indicia of the protected attribute of political opinion, were a reason for the adverse action. Whether or not that is so is a question of fact, but there is nothing in the applicant's claims which results in the outcome of this case turning on the kinds of matters discussed in *Barclay*, nor in *BHP Coal*. The difference is highlighted, as the applicant submitted, by the fact that in the present case, the adverse action was taken predominantly because of the tendencies Mr Vickers attributed to members of the Socialist Alliance, rather than because of any actual conduct of the applicant as a member of the Socialist Alliance.

[193] The respondent's submissions also sought to separate out Mr Vickers' apprehensions that the Socialist Alliance might undermine or infiltrate the respondent from the holding of a political opinion as a member of the Socialist Alliance. It was, the respondent submitted, akin to the offensive sign held up during an industrial protest in the *BHP Coal* case — the reason for the adverse action was the offensiveness of the sign, not the industrial activity. Here, at least, if the remainder of the respondent's submissions were rejected, the respondent submitted that the reason for the adverse action was the apprehension of undermining and infiltration, not the political beliefs of the Socialist Alliance.

[194] As I set out below, on the facts I reject this submission. I doubt, in any event, at a level of premise or principle, that such a distinction can be drawn. The respondent seeks to separate a protected attribute from characteristics either

associated with it, or perceived by the decision-maker to be associated with it. In the days before pregnancy became a distinctly protected attribute in anti-discrimination law, becoming pregnant was seen as a characteristic associated with women, or perceived to be associated with women. An employer might say: I refused to give the female applicant the job because she might become pregnant, not because she was a woman. As it has been found, that is still sex discrimination: see, eg, *Wardley v Ansett Transport Industries (Operations) Pty Ltd* (1984) EOC 92-002. This approach was not the subject of appeal. Ansett's appeal of that decision to the Supreme Court of Victoria had a constitutional focus: namely an asserted inconsistency between a Commonwealth instrument and the relevant state anti-discrimination law, pursuant to s 109 of the Commonwealth Constitution. This argument was rejected by the High Court: see *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237; 28 ALR 449.

[195] At base, distinctions between protected attributes and real or perceived characteristics associated with those attributes permits the kind of stereotyping which anti-discrimination laws are designed to prevent. If there is an apprehension about what an individual might do, or how she or he might act, because of views or behaviour attributed to people with the protected attribute of that individual, acting on such an apprehension is just as discriminatory as treatment because of what the individual has done, or how the individual has acted.

The existence of more than one reason for Mr Vickers' conduct

[196] There was no dispute between the parties that the person whose conduct needed to be assessed for the purposes of determining a contravention of s 351 was Mr Vickers. It was he who, on learning of the complaint from Mr Howes, directed the applicant attend the 18 July 2013 meeting in Sydney. It was he who was the principal decision-maker at that meeting. It was he who wrote the show cause and suspension letter to the applicant on 23 July 2013, and it was he who terminated the applicant's employment on 26 July 2013. The respondent correctly accepted liability for the conduct of Mr Vickers.

[197] As the respondent conceded, the determination of whether there was a contravention of s 351 turns fundamentally on the facts, and on the Court's finding as to what "moved" Mr Vickers, bearing in mind the reverse onus in s 361.

[198] By s 360, a prohibited reason need not be the sole reason for the impugned conduct, so long as it is "included" in the particular reasons for the adverse action. The findings in this proceeding turn on an application of this provision, because there is no doubt Mr Vickers acted for more than one reason in relation to each of the three events which I have found constituted adverse action. In my opinion, there is, in any event, a connection between the prohibited reason and the reason asserted to be permissible (the "bagging" allegations), so that the latter is also a prohibited reason. I return to that at [239] below.

The correct characterisation of Mr Vickers' reasons for the adverse action

[199] The respondent submits that the "substantial and operative factor" in Mr Vickers' decision-making was his view that the applicant was not suited to working with the AWU, in part because of his views about that union. Any employee who voiced that level of disapproval about a union with which the respondent was trying to build an alliance, after years of acrimonious relations,

would have been treated in the same way. This submission reflects the wording of the termination of employment letter sent by Mr Vickers.

[200] The evidence does reveal Mr Vickers' concern at the applicant's apparent critical approach to the practices and operation of the AWU. However, the applicant had been hired specifically for the alliance position; indeed he had been offered a six-month contract in order to keep him available for this position. He was a very new employee, and new to the union movement. Yet, in a matter of a couple of weeks, he went from embarking on one of the respondent's most important alliance projects to having his employment terminated. The swiftness and inflexibility of Mr Vickers' decision-making was, in my opinion, not because of the applicant's criticisms of the AWU but because of his association with the Socialist Alliance. Mr Vickers did not trust him, and did not want him anywhere near the embryonic alliance.

[201] This attitude was, I find, substantially informed and driven by Mr Vickers' own views about the Socialist Alliance, the party's agenda and its mode of operation.

[202] Although Mr Vickers played down in his evidence the fact that it was Mr Howes who was the originator of the complaints against the applicant, and it was Mr Howes who was concerned about the applicant's associations with the Socialist Alliance, I find that the fact it was Mr Howes making the complaint did have some influence over the course of events. The speed with which Mr Maher and Mr Vickers reacted once Mr Howes complained is indicative of his influence. No doubt it was of serious concern to Mr Maher and Mr Vickers that the Secretary of the AWU had made such complaints, and was disturbed by the applicant's apparent political allegiances.

[203] These circumstances were capable of threatening the progress of the alliance — but that was at least in part because of how seriously Mr Howes had taken what the applicant was alleged to have done, and how adversely he viewed the applicant's political connections. The complaints by Mr Howes triggered a direction to the applicant to attend a meeting with the two most senior members of the Mining and Energy Division — namely Mr Maher and Mr Vickers. Mr Vickers accepted it was "generally" the position of the AWU (and therefore of Mr Howes) that it had no tolerance for people who were members, or had associations with, the Socialist Alliance.

[204] Mr Vickers' real concerns emerged early in his evidence in chief, when he was describing how he heard about the complaints from Mr Howes. He was asked about this reaction to them, and said:

> When Mr Maher told you about the complaints, what was you reaction to that? How did — what did you think?—Well, I won't repeat the exact words that I said but I thought, you know, what else can go wrong? You know, is — is someone trying to ensure that this alliance never works and we never get another crack at re-unionising the Pilbara. So I — I was a bit frustrated.

[205] When Mr Vickers referred to "someone", it became apparent that the combination of allegations — that the applicant was involved with the Socialist Alliance and was also bagging AWU officials — had particular resonance with Mr Vickers and, as far as he was concerned, meant only one thing — infiltration. He confirmed this subsequently in his evidence in chief, when explaining the substance of the complaint from Mr Howes:

> Mr Maher in fact continued with, "And Paul Howes should know, given his background." And I do know that Mr Howes, like many other trade union officials, have

a view that people with the political persuasion who we would refer to as "Trots" have a history of seeking to infiltrate and undermine trade union activity.

[206] It became apparent Mr Vickers had done his own research about the applicant prior to the 18 July 2013 meeting:

What did you put to him?—I put to him that, based on Paul Howes' comments and concerns, I did some searching of the Socialist Alliance website, and I told Mr Sayed that I couldn't find any reference of him being active in the Socialist Alliance past about March 2010, I think was the date. To which he almost immediately responded that, "That's because I resigned about then, because I had serious internal differences with the organisation."

…

why did you do some searches?—I did some searches because Mr Howes, a key partner in the alliance, had raised a concern, and if I needed to tell him that the CFMEU didn't care whether our organiser was a communist, a socialist, a Trot, or a callithumpian — I would tell him that to his face — I wanted to be sure of my facts.

[207] The latter part of this answer by Mr Vickers is one which I do not accept in its entirety. I find he conducted the internet searches so that he had some independent sources with which to confront the applicant, and to assist him in discovering the real extent of the applicant's association with the Socialist Alliance. I do not consider it was for the purpose of "defending" the applicant against the allegation by Mr Howes, or going back to Mr Howes and saying it didn't matter. This, in my opinion, is a reconstruction by Mr Vickers.

[208] The applicant's evidence that he realised he was "in trouble" because of his Socialist Alliance connections was in my opinion an accurate description of his situation. Mr Vickers' evidence was that it "can't be correct and it's not correct" the applicant was redeployed to Queensland because he was a <u>member</u> of the Socialist Alliance, given that Mr Vickers had put to him and the applicant had agreed that he resigned in about March 2010, and the falsity of this was not known to Mr Vickers until a few days later. Mr Vickers' proposition can be accepted, to that limited extent. In my opinion, the reason for Mr Vickers' conduct was not confined to concerns about the currency of the applicant's membership of the Socialist Alliance, it was the applicant's involvement and association with that party at all which caused Mr Vickers considerable disquiet. After all, even when the applicant's employment was terminated and the true version about the length of his involvement emerged, the applicant was not at that time a member of the Socialist Alliance. Current membership was neither the trigger nor the central issue. Especially since the applicant had made it clear he did not leave the Socialist Alliance because of differences in political opinion or belief, but rather a difference in emphasis in terms of campaigns and strategies. What was critical to Mr Vickers was the applicant had an association at all with the Socialist Alliance, together with his concern about future infiltration and undermining within the respondent by the Socialist Alliance if the applicant remained employed as an organiser.

[209] On discovering the applicant had posted the message extracted at [35] above on Facebook, and had been untruthful about when he ceased his involvement with the Socialist Alliance, Mr Vickers drafted a letter to be sent to the applicant. In his evidence, he described passing the letter on to the union's legal officer in Sydney to have a look at it and suggest any modifications.

I infer from this that the version of the letter in evidence before the Court is a version which has been examined by the respondent's legal officer.

[210] Mr Vickers explained the immediate suspension on the basis that he did not want the applicant working for the union in any capacity after discovering he was a "blatant liar". Some attention was paid in the oral evidence to that part of the letter where Mr Vickers speaks of the "assurance" given to him, Mr Maher and Mr Weise by the applicant, and Mr Vickers' subsequent description of those assurances as being inaccurate. Mr Vickers maintained this part of his letter concerned the "bagging" allegations. I do not accept that explanation. I find this part of the letter is a reference to the applicant's assurance at the 18 July 2013 meeting about when he had ceased involvement with the Socialist Alliance. Mr Vickers also refers to "another matter" in the same sentence. This, I find, is a reference to the Facebook post. Mr Vickers deals with the Facebook post after having dealt with the applicant's lack of truthfulness about the length of his association with the Socialist Alliance. Mr Vickers turns first to the Socialist Alliance issue, and that supports the interpretation I place on what is meant by "assurances".

[211] The potential consequences of the applicant's affiliation with the Socialist Alliance were clearly actuating Mr Vickers at the time he wrote the suspension letter. When asked about his use of the word "agnostic" in the show cause letter extracted at [119] above, Mr Vickers said:

> I'm sorry, but my concern is not their [ie Socialist Alliance members'] affiliation. My concern is what they do.

[212] In re-examination Mr Vickers expanded on what he meant by "what they do" and his use of the terms "infiltrating and undermining":

> MS HOWELL: What do you mean when you use the word "infiltrating", Mr Vickers?—Well, infiltrate, from my — my use of the term and — is where people, for reasons which are inconsistent with that — and at odds with the intended employment arrangement, for example, actively seek to — to get in there — to get into an employment arrangement, either inside a union, or through leadership of a union, where they can then utilise or pursue the political ideologies, as opposed to doing the job that they're — they've been employed to do. That's my concept of infiltration and the purpose that I use the term "infiltration", and indeed "undermining" as conjunctive words, or whatever the grammatical term is, your Honour. I'm a coal miner. I apologise.

[213] Although this may have been a distinction in Mr Vickers' mind it is not material for the purposes of the operation of s 351 of the Fair Work Act. This evidence reveals Mr Vickers' heightened apprehension about what he perceived those affiliated with the Socialist Alliance would "do" within the CFMEU. This led him to ascribe that apprehension to the applicant, which involved treating the applicant differently because of his association with the Socialist Alliance, which is an aspect of the applicant's political opinion.

[214] I accept the 23 July 2013 suspension letter also strongly reflects Mr Vickers' anger at being lied to, and what might have been left of the applicant's reputation in Mr Vickers' eyes was destroyed by those lies.

[215] It may be, as the respondent submitted in substance, that Mr Vickers would have taken the same approach had "assurances" been given at an earlier time about a person's involvement in the Australian Labor Party, which then turned out to be false. The difference is, I find, questions about involvement in the ALP would never have been asked. In that sense, the applicant's political opinion

remains a reason which was "involved" in Mr Vickers' decision to suspend the applicant immediately. The impermissible and unlawful questioning began the series of events which led to the applicant's lies.

[216] The applicant's response, which I have extracted at [120] above, was predominantly concerned with his association with the Socialist Alliance, both in the past and in terms of reasserting that the beliefs of that party still represented his political views, and that he saw no inconsistency between those views and continuing as an organiser for the respondent.

[217] As I have also observed, the response made no difference to Mr Vickers. At the meeting on 26 July 2013, when the applicant tried to engage Mr Vickers about the issues, Mr Vickers' evidence was that he responded that there "is no role for you in this organisation past today". The termination letter was written by Mr Vickers after this conversation. It stated:

> Dear Ali Sayed
>
> I write to confirm that the Union no longer has a requirement for your services, effective today.
>
> I further confirm that you are not being terminated for any reason other than the fact that I have come to the conclusion that you are not an appropriate "fit" for the role that we had engaged you for.
>
> The Union will pay you for the balance of the fixed term that you were engaged for, that being till 11th October 2013, including leave entitlements that you would have otherwised accrued.
>
> I thank you for your efforts in your time with us, and reiterate my hope that you find a rewarding and appropriate role into the future.

[218] The applicant had asked for a "non-derogatory" termination letter and this was what Mr Vickers provided. It is not in my opinion reliable evidence of the reasons for the termination of employment as it was expressly drafted to leave out the issues which had really caused the termination. The disavowal in this letter by Mr Vickers of any reason for termination other than the applicant's "fit" at the CFMEU may be accepted as far as it goes. Whether this passage was inserted on legal advice or not was understandably not the subject of any evidence. Expressed in such general terms, it is one way of describing Mr Vickers' views at the time. To describe the applicant as not an appropriate "fit" for the role says nothing about *why* the applicant is not an appropriate fit. Given the agreement about the drafting of the letter, and its general terms, I do not accept that the reason proffered in writing is a complete explanation of the true reasons for the applicant's termination. It is not inconsistent with the true reasons, but neither is it complete.

[219] In cross-examination, Mr Vickers described his concern as being with "the way that I knew Trots operated inside the trade union movement or sought to". He accepted that Mr Howes would have called the applicant a "Trot" because he was a supporter of the political opinions or theories of Trotsky.

[220] Mr Vickers explained he needed to address Mr Howes' concerns by calling the applicant back from Perth for the "purpose of understanding precisely what Mr Howes' concern was". There was, however, no evidence that Mr Vickers explored this issue any further with Mr Howes, as opposed to the applicant. Having received the complaint — that the applicant was a "Trot" — I find Mr Vickers knew exactly what this meant, and exactly what Mr Howes' concerns were, as Mr Vickers' evidence later revealed. He had no need to "explore" Mr Howes' concerns — what he needed to, and did, explore was whether the

applicant was a "Trot", and was a member of the Socialist Alliance. Mr Vickers accepted that "generally speaking" there was a relationship between describing someone as a "Trot" and as a member of the Socialist Alliance. In other words, the "Trots" which both Mr Howes and Mr Vickers saw as troublesome operated through the Socialist Alliance. Mr Vickers well knew, as he admitted in cross-examination, that the AWU had "no tolerance" for people who had any association with the Socialist Alliance.

[221] In cross-examination, Mr Vickers said it was not membership of the Socialist Alliance which worried him, but rather that the activities of some Socialist Alliance members are "very concerning". That is not what Mr Weise's notes of the 18 July 2013 meeting record Mr Vickers saying. Those notes record Mr Vickers as saying to the applicant "Social Alliance affiliations is very concerning, is worrying, possible infiltrations". Whether or not these are exactly the words used by Mr Vickers, there is a subtle but important difference in emphasis between what he is recorded as having said at the meeting and his recollection in evidence. This is in my opinion an example of Mr Vickers trying to downplay in his evidence the views he expressed about Socialist Alliance at the time to the applicant.

[222] Mr Vickers did not shy away from the same characterisation of Socialist Alliance's activities in his evidence. He admitted that the words he may have used were that the Socialist Alliance "infiltrated and undermined the leadership of trade unions".

[223] Mr Vickers' focus on how the Socialist Alliance, in his view, undermines and infiltrates unions explains the relationship between the "bagging" allegations and the applicant's involvement with Socialist Alliance. The "bagging" allegations fitted, in my opinion, with Mr Vickers' entrenched understanding of how Socialist Alliance operated. It was the kind of behaviour he would expect from someone with Socialist Alliance affiliations — that he or she would set about undermining union officials, by running them down to their own members. Mr Vickers repeated on at least four occasions his description of "infiltrating and undermining" as his preferred description of what those with Socialist Alliance affiliations did inside trade unions. He was clear he would not see "the union put at risk by infiltration and undermining by Trots, yes". He repeated a short time later in his evidence that he would not allow anyone to "undermine the integrity of the union" and that, in his opinion, a person with Socialist Alliance affiliations could "potentially" do this.

[224] In his evidence Mr Vickers distinguished the remarks he made to the applicant about respecting the applicant's beliefs. He confirmed this related to the applicant's professed beliefs in socialism and communism, and his beliefs in "fairness and justice and all those things". That evidence is consistent with Mr Vickers' attitude to the Socialist Alliance: it is affiliation with that party which caused Mr Vickers great concern.

[225] This brings me to Mr Vickers' remark that the applicant was a "square peg in a round hole". The use of this phrase assumed some importance in the parties' respective arguments. The respondent submitted, and Mr Vickers gave evidence, that he meant by the use of this phrase the applicant's views about the AWU, which he continued to expose at the 18 July 2013 meeting, and that he indicated he would not change. Therefore, so far as Mr Vickers was concerned, the applicant was not suited to the alliance job.

[226] The applicant's evidence was that Mr Vickers linked this phrase with the applicant's association with the Socialist Alliance. The applicant's evidence was:

> Now, after that did Mr Vickers say anything about what was to then happen?—Yes. So this is where I guess I heard how — so what he said was that everything that I had said fitted with the complaint of CFMEU that this is exactly how Socialist Alliance members talk and I'm not — I'm a square peg in a round hole and I was not the right person for the job in Pilbara.

[227] I do not find the applicant's account sufficiently reliable. While this is not conclusive, Mr Weise's notes do not record Mr Vickers expressly drawing any such link in the discussion. I accept Mr Vickers' evidence that the "square peg in a round hole" remark was directed towards the way the applicant was interacting with the AWU, and his views about the AWU. That finding does not affect my confidence that operating at all material times on Mr Vickers' decision-making was the applicant's affiliations and associations with the Socialist Alliance. As I made clear at the outset, in my opinion there was more than one reason operating in Mr Vickers' decision-making.

[228] Mr Vickers denied a number of propositions put to him in cross-examination concerning whether he acted as he did against the applicant because of the applicant's association with Socialist Alliance. For example, he said in his evidence in chief that "the association with the Socialist Alliance is irrelevant to me", and he denied in cross-examination that a current and active association with the Socialist Alliance would have made the applicant unacceptable for the Pilbara job.

[229] The respondent submitted the Court should accept those denials and, if it did so, it was clear Mr Vickers did not act for a prohibited reason.

[230] The fact that Mr Vickers gave evidence of not knowing anything about the applicant's political beliefs is not material. Questions were asked of Mr Vickers about whether he knew the applicant was a communist, or a socialist, and he said he did not until the applicant volunteered some information at the 18 July 2013 meeting. It was not the applicant's beliefs in communism, or socialism, which were in issue. It was his affiliation and association with the Socialist Alliance. Mr Vickers knew about that association from the time Mr Howes' complaint was conveyed to him.

[231] The applicant submitted Mr Vickers' denials were inconsistent with other parts of Mr Vickers' evidence and with what he did and said at the time of the adverse action. I accept those submissions.

[232] The inconsistencies in Mr Vickers' evidence are irreconcilable. For Mr Vickers to answer in cross-examination that it has never been his practice to ask a candidate if they are a member of a political party and that it is the policy of the union not to ask such a question, is inconsistent with how Mr Vickers behaved towards the applicant. His subsequent evidence that he was not aware of any person within the respondent ever being called to a meeting to explain their membership of the Australian Labor Party, or any other political party, was similarly inconsistent with how he treated the applicant.

[233] I find Mr Vickers' denials in oral evidence, given in the context of this proceeding, were an attempt to reconstruct his reasoning process with the benefit of hindsight, affected by the fact that he, and the respondent, were under scrutiny for acting for a prohibited reason.

Summary of findings on Mr Vickers' reasons

[234] For these reasons, I find that Mr Vickers took each of the three identified adverse actions against the applicant because of the political opinion of the applicant. I accept that Mr Vickers took these three identified adverse actions for more than one reason. Mr Vickers' reasons for the suspension and dismissal included his anger at being lied to, and this is not a prohibited reason in and of itself. I accept, however, as the applicant submitted, that the subject matter of the lie was critical to Mr Vickers. For a variety of reasons in a variety of circumstances, employees may be untruthful with their employers. Not all such untruths are capable of characterisation as serious misconduct. Like any other human behaviour, context is important: context may be exculpatory or it may be inculpatory. So, too, the subject matter of the untruth. Here, the subject of the applicant's relationship with the Socialist Alliance was already a matter of grave concern to Mr Vickers. In my opinion, that the applicant had been untruthful about the nature and longevity of his relationship with the party only fuelled Mr Vickers' suspicions that the applicant could not be trusted to work within the AWU and the CFMEU. If the untruth had been about a different subject matter (for example, the applicant's experience before taking the organiser position) it cannot be said with confidence that Mr Vickers' reaction would have been so virulent and immediate.

[235] As Mr Vickers' answers in cross-examination about how he would have dealt with an employee who lied about her or his sexuality reveal, the context and subject matter of a lie told by an employee may be critical to an employer's decision-making. That was, I find, the case in relation to the applicant, adversely to his interests. In both the inquiry into the applicant's affiliation with the Socialist Alliance, and the hypothetical example of an employee being questioned about her sexuality, the questioning itself was capable of contravening s 351, depending on what was identified as the adverse action. That, in answering questions which may in themselves be unlawful, an employee lies, will not provide any absolute justification for dismissal, nor relieve an employer of the potential application of s 351. Nor will proof of a lie by an employee necessarily discharge the onus imposed by s 361. I do not accept the respondent's submission that anything said, whether by way of ratio or dicta, by the High Court in *Barclay*, or *BHP Coal*, precludes this approach. In the present case, the subject matter of the applicant's lies means Mr Vickers' reliance on the lies as part of the justification for dismissal does not assist the respondent to discharge its onus under s 361.

[236] Mr Vickers' reasons also included the post by the applicant on his Facebook page, which Mr Vickers, perhaps mistakenly but I accept genuinely, believed at the time to be a derogatory reference to him and other officials of the respondent. This is not a prohibited reason.

[237] I find that Mr Vickers took each of the identified adverse actions because of the complaints from the AWU about the applicant "bagging" AWU officials to their members, and AWU complaints about the applicant's interpersonal style and the way he related to AWU officials. I consider this in part also to be a prohibited reason, and in part not.

[238] I accept that, on hearing the allegations about how the applicant had behaved to AWU officials, and on hearing the applicant's explanation about his intention to adhere to his principles in identifying behaviour he did not agree with, Mr Vickers believed the applicant would not fit in as an organiser in the

alliance. In my opinion Mr Vickers more readily believed and accepted the truth of those allegations because of what he learned about the applicant's association with the Socialist Alliance. It was this prohibited reason which in my opinion explains why Mr Vickers was so ready to act against the applicant despite him denying any misconduct, and without any investigation into the truth of the AWU allegations. It would be artificial to try and dissect Mr Vickers' reaction any further. People may act for a multiplicity of reasons: the way in which those reasons interact in the mind of a respondent cannot reliably be ascertained. It is not possible in hindsight for a Court to do more than identify, if the evidence supports such an identification, and taking into account where the burden of proof lies, that on the balance of probabilities one of the real reasons was a prohibited reason. That is the point of s 360.

[239] A combination of matters caused Mr Vickers to act as he did in taking the three identified adverse actions against the applicant. This is well illustrated by the "bagging" allegations. I find that a significant part of Mr Vickers' concern about the "bagging" allegations was inextricably linked to the applicant's political opinion. His concern stemmed from his strong personal belief that people associated or affiliated with the Socialist Alliance tended to infiltrate and undermine unions in a way he considered destructive. The "bagging" allegations were consistent with Mr Vickers' views about the kind of conduct in which those associated with the Socialist Alliance engaged, because they were, he considered, designed to undermine the workers' confidence in their union organisers. That is, he saw in the way the applicant was alleged to have behaved signs of such infiltration and undermining which he considered typical of Socialist Alliance members, and he was determined to put a stop to it.

[240] The question whether the respondent has proven that the applicant's political opinion was not a substantive and operative factor in the taking of each of the three adverse actions against the applicant must be answered in the negative. In my opinion, the respondent has not discharged its burden and, more than that, I can be positively satisfied on the evidence that the applicant's political opinion was a substantive and operative factor in each of the three adverse actions taken against the applicant.

Whether the decision made at the meeting on 18 July 2013 to redeploy the applicant from Western Australia, where he was working on the alliance, to Queensland contravened s 351(1) of the Fair Work Act

[241] For the reasons I have set out above, the decision to redeploy the applicant was taken for reasons which included a prohibited reason: namely, the applicant's political opinion. His political opinion was constituted by his identification with the opinions and beliefs of the Socialist Alliance, his membership of that political party, and his affiliation with that political party.

Whether the letter from Mr Vickers to the applicant on 23 July 2013 suspending him contravened s 351(1) of the Fair Work Act

[242] As I have explained, it is clear the applicant was suspended by Mr Vickers for several reasons, including prohibited reasons.

[243] Mr Vickers' 23 July 2013 suspension letter to the applicant identified that it would be unacceptable to the respondent if the applicant allowed his "political views or activities" to interfere with or prejudice his role as a CFMEU organiser. As the applicant correctly submits, the assumption inherent in this statement is that the applicant had "outside political involvement" into which the respondent

would see fit to inquire, and that the respondent would decide whether that "outside political involvement" was acceptable to it, or not.

[244] The respondent, through Mr Vickers, made those inquiries without any real consideration of what the applicant in fact had done with the Socialist Alliance. It did so without inquiring whether the applicant would engage in the kind of behaviour Mr Vickers attributed to members of the Socialist Alliance. Rather, Mr Vickers assumed two things. First, that an affiliation with the Socialist Alliance meant the applicant was likely to engage in such behaviour (in other words, a stereotyping approach) and second, that the "bagging" allegations (and they were only allegations because no inquiry was ever conducted into their truth) were consistent with Mr Vickers' own perceptions about the behaviour of members of the Socialist Alliance, in terms of the way they infiltrated and undermined union leadership.

Whether the dismissal of the applicant on 26 July 2013 contravened s 351(1) of the Fair Work Act

[245] The respondent conceded, and I accept, that the issues about Mr Vickers' reasons for dismissing the applicant are the same as those applicable to the 26 July 2013 letter and the suspension. For the reasons I have set out I find that Mr Vickers' reasons for the applicant's dismissal also included a prohibited reason: namely, his political opinion.

[246] Some attention was paid in final submissions to Mr Vickers' denials in cross-examination that he was concerned the applicant was, in July 2013, still involved in the Socialist Alliance and that was why he dismissed him. The respondent submitted these denials were clear evidence of no causal link between the applicant's dismissal and his affiliation with the Socialist Alliance. The applicant submitted it was a "fair inference" that Mr Vickers believed the applicant's involvement with the party remained current and this played a part in the dismissal.

[247] I have addressed what I see as the unreliability of Mr Vickers' denials at [233] above. The material discovered by Mr Vickers through Mr Dallas showed the applicant was campaigning for the Socialist Alliance party in November 2012. This was five months before he commenced working for the respondent and approximately eight months prior to the time he was alleged to have been "bagging" AWU officials.

[248] In my opinion, the evidence clearly establishes that Mr Vickers did not trust the applicant, in terms of not only any ongoing affiliation with the Socialist Alliance, but also any sympathy for or alignment with the beliefs and practices of members of that party within the union movement, as Mr Vickers perceived them to be. He was determined to remove the applicant from the alliance and the CFMEU and thus remove any possibility of the "infiltration and undermining" of which he spoke so strongly in his evidence. The redeployment to Queensland for a few months until 11 October 2013 was, I find, a concession to the persuasive powers of Mr Kumeroa. In reality, Mr Vickers wanted the applicant out of the CFMEU. Whether Mr Vickers did or did not believe that the applicant was a current member of the Socialist Alliance as at 26 July 2013 was, in my opinion, not an issue that affected Mr Vickers' reasons for dismissing the applicant, nor for taking the two earlier forms of adverse action.

The breach of contract claim

[249] Little time was spent in evidence or argument concerning this claim. No authorities were referred to, and the argument about how the applicant said the Pilbara contract was concluded was not developed in final oral submissions. The applicant simply relied on his written submissions. Those written submissions were brief, and also not particularly developed. In them, the applicant submitted:

- "around late June 2013" there was a binding employment agreement between the applicant and the respondent;
- the terms were those set out in the Pilbara contract in the form tendered in evidence;
- the termination of the Pilbara contract on the basis of complaints about the applicant, and involving his political opinion, was a breach of the Pilbara contract;
- Even if the Pilbara contract contained (as it did on its face) clauses entitling the respondent to terminate the contract either without notice during the probation period or with notice outside it, those clauses did not entitle the respondent to terminate the contract on the grounds of the applicant's political opinion. Relying on *Walker v ANZ Banking Group Ltd (No 2)* (2001) 39 ACSR 557; [2001] NSWSC 806 at [95]–[98] (*Walker*) per Austin J, the applicant submitted there was an "equitable limitation" on any right of the respondent to terminate the contract and it would be unconscionable for such a right to be exercised in the circumstances revealed by the evidence.
- The damage suffered by reason of the breach of contract is the loss of the income the applicant would have derived from employment under the contract, to at least 31 December 2014: namely, $120,188.77 plus superannuation.

[250] This claim is attended by a number of difficulties, beginning with the assertion that there was a concluded contract between the parties "around late June 2013".

[251] The evidence discloses, and I find, that Mr Weise gave the applicant a copy of a document entitled "CFMEU Mining and Energy Division 2013 Western Australian Mining Alliance Employment Agreement". It was an agreed fact that this occurred in "June 2013" but both parties' evidence placed the date more precisely at around 19 June 2013. The applicant's evidence about what occurred when Mr Weise gave him the document was:

> … And did Mr Weise tell you anything about that document?—Well, he wanted me to go through it and sign it and give it to him there. I asked him if I could take it with me and have a read and see if — and actually show it to Ross Kumeroa because Ross Kumeroa, who was the lead organiser for Queensland district who I had working with, had asked me to make sure that given that CFMEU has an enterprise agreement for all the organisers that, you know, things match and I didn't want to undermine any conditions for the separate contract that other CFMEU organisers had basically gained through negotiations at their enterprise bargaining.

[252] It can be seen that, at this stage, the applicant wanted an opportunity to check all the terms of the contract with Mr Kumeroa, especially for their consistency with the relevant enterprise agreement. It is clear the applicant did not agree to be bound by the contract on this day.

[253] The applicant's evidence was that the next time he saw Mr Weise he "raised the question around probationary time period in the agreement". The applicant suggested that the time he had served on the six-month fixed-term contract should be counted as part of the six-month probationary period in the Pilbara contract.

[254] The applicant said Mr Weise told him he needed to discuss that issue with Mr Vickers. The applicant's evidence was that subsequently — around the "end of June" — Mr Weise told the applicant

> He agreed to it. He informed me that Mr Andrew Vickers has agreed to my probationary time to be counted into this agreement.

[255] That evidence, although not especially clearly expressed, appears to be to the effect that the respondent, through Mr Vickers, agreed to an alteration to cl 14 so that the period of six months ran not from the commencement of the applicant's employment under the Pilbara contract (which was expressed in the proposed version to commence on 22 July 2013) but from the date of the applicant's commencement of employment with the respondent: namely, 11 April 2013.

[256] The applicant also relies on the content of a meeting held on 26 June 2013, in which several operational aspects of the alliance were discussed and agreed, such as travel and accommodation arrangements, and who would report to whom. This was also the day on which the alliance was officially launched in Sydney by Mr Howes and Mr Maher, and the MOU in relation to the alliance was signed. No authorities were relied on, nor any submission developed, about how this conduct, which concerned the arrangements between the respondent and AWU at union level, could provide objective evidence one way or the other to prove that the applicant and the respondent had agreed to be bound by the terms of the Pilbara contract, with cl 14 allegedly verbally altered. I do not accept that the conduct of the respondent and the AWU on 26 June 2013, including the discussion about what role Mr Sayed would play, is sufficient evidence that the parties had agreed by that date to be bound by the terms of the Pilbara contract.

[257] No contract was ever signed by either the applicant or the respondent. The contract in evidence is not expressed on its face to relate to the applicant. It is a generic contract, with the other contracting party identified as "Person or persons employed by the CFMEU Mining and Energy Division". It does bear the applicant's name at the end of the document.

[258] No argument was put by the applicant that there was any preliminary agreement, in the sense set out in *Masters v Cameron* (1954) 91 CLR 353; see also *Graham Evans Pty Ltd v Stencraft Pty Ltd* [1999] FCA 1670 at [43]–[45] per Dowsett J (with whom French and Whitlam JJ agreed).

[259] No attention was given to how the Court was to determine what the parties intended in terms of formation of the contract, in accordance with the approach set out by the High Court in *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95; 187 ALR 92; [2002] HCA 8 at [25]:

> Because the search for the "intention to create contractual relations" requires an objective assessment of the state of affairs between the parties (as distinct from the identification of any uncommunicated subjective reservation or intention that either may harbour) the circumstances which might properly be taken into account in deciding whether there was the relevant intention are so varied as to preclude the formation of

> any prescriptive rules. Although the word "intention" is used in this context, it is used in the same sense as it is used in other contractual contexts. It describes what it is that would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened. It is not a search for the uncommunicated subjective motives or intentions of the parties.

5

[260] In final submissions, senior counsel for the applicant appeared to narrow the timeframe during which the applicant submitted the contract was concluded. He submitted this occurred from the date the alliance was officially launched in Sydney, and there was a meeting about the respective roles to be played by the applicant and Mr Kerley: namely, 26 June 2013. As I have observed above, all of this evidence relates to the way in which the alliance — as an arrangement between the CFMEU and the AWU — would function in its entirety. It is difficult in my opinion to see how evidence of what was said at this meeting could be used to prove that each of the applicant and the respondent had agreed to the specific terms in the proposed Pilbara contract, with an oral alteration about the commencement of the probation period.

10

15

[261] Other than reference to this meeting, the applicant did not point to the evidence which he submitted proved that some time after 19 June 2013, but before the direction on 16 July 2013 to attend the Sydney meeting, the respondent and the applicant had agreed to immediately be bound by the terms of the Pilbara contract, despite the parties not having signed any formal agreement, although one was clearly contemplated. Nor did he identify the evidence which should lead the Court to decide what the "words and conduct" of the respondent would have led a reasonable person in the position of the applicant to believe, in respect of when the rights and liabilities contained in the Pilbara contract were to become binding on the parties.

20

25

[262] I do not consider the applicant has discharged his burden of proof in relation to the allegation that the Pilbara contract bound the parties from "the end of June", or from 26 June 2013. First, the date from which the parties are said to have treated the contract as binding is too vague. Identifying the date by reference to the launch of the alliance is unpersuasive. The way the applicant reconciled this contention with the commencement date in the proposed contract of 22 July 2013 was never explained. These inconsistencies about when the Pilbara contract was concluded, and when it was alleged to take effect, incline against a conclusion that the parties had bound themselves to any particular employment agreement before 16 July 2013. It was not contended by the applicant any agreement was made after that date.

30

35

40

[263] Second, there is no evidence the parties (not even the applicant) sought to employ the dispute resolution clause in cl 17 of the Pilbara contract when allegations against the applicant were made in mid-July 2013. There is no evidence the applicant received the motor vehicle referred to in cl 6 of the Pilbara contract, or that steps were taken to procure one. There is no evidence the applicant received the housing referred to in cl 7, or that any arrangements were made to that effect: rather, what scant evidence there is suggests the applicant was living in hotels while in Western Australia.

45

[264] On 16 July 2013, when the applicant was put on notice of complaints against him, he was in Perth familiarising himself with AWU operations, but had not commenced work as an organiser in the Pilbara.

50

[265] The initial offer of employment to the applicant on 1 April 2013 expressly stated that "Full time employment with the CFMEU Mining and Energy Union on the West Australian alliance will be subject to you accepting the employment contract for this position". This suggests the respondent never contemplated a binding agreement with the applicant unless and until a written employment contract was finalised and signed. No evidence was adduced by the applicant to prove that this position adopted by the respondent upon the applicant's employment changed at some point in time.

[266] In my opinion, what the evidence reveals is an advanced stage of negotiations between the parties about the terms of the applicant's second employment contract, largely brought on by the applicant himself wishing to check the terms and then modify at least one of them. There was clearly an expectation in late June 2013 by both parties that a second employment contract would be finalised, but in my opinion that event did not occur. Nothing in Mr Weise's answers in cross-examination suggests the respondent considered the contract binding on it before the events from 16–26 July 2013 which are the subject of this proceeding. Mr Vickers' decision to pay the applicant out until 11 October 2013 is conduct objectively consistent with the six-month fixed-term contract being the contract which continued to bind the respondent.

[267] If I am wrong in this finding, and there was a contract agreed between the parties as alleged by the applicant, in my opinion the respondent is correct to submit that the applicant's termination of employment could have lawfully occurred pursuant to cl 14 of the Pilbara contract, without notice. Even if the applicant's evidence is accepted and cl 14 was verbally altered so as to commence from 11 April 2013, on any view the events of 16–26 July 2013 remain within this six-month probationary period. The respondent did not breach the Pilbara contract by terminating the applicant's employment. It was not alleged the other two forms of adverse action (aside from dismissal) constituted a breach of the Pilbara contract.

[268] Finally, I accept the respondent's submission that the applicant should not be permitted, in final submissions, to raise a new basis on which he asserts the termination of his employment was unlawful. The equitable argument briefly referred to in final submissions, but not developed in any way, is not pleaded by the applicant. Despite the respondent's clear reliance in submissions filed before trial on cl 14 of the proposed Pilbara contract and its contention (in the alternative to its contention there was no contract) that it had a right to terminate without notice, the applicant did not identify any bar in equity to the respondent's reliance on cl 14.

[269] The respondent is also correct to point out that *Walker* is an interlocutory decision dealing with a commercial dispute rather than an employment situation, and that this kind of argument is likely to be affected by the decision of the High Court in *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169; 312 ALR 356; 88 ALJR 814; [2014] HCA 32 concerning the absence of any generally implied term of trust and confidence into an employment contract. It is some distance removed from the applicant's contention that unreasonableness or unconscionability exists if there is a termination in accordance with the terms of the contract, but for a reason which includes the political opinion of the employee.

[270] This argument constitutes a clear addition to the applicant's pleaded case. There is generally no entitlement to relief outside a party's pleaded case, given the denial of procedural fairness to the other party: *Banque Commerciale SA, En Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286; 92 ALR 53 at 58 per Mason CJ and Gaudron J. The applicant did not apply to amend his statement of claim to include such a claim. If this argument had been developed appropriately in submissions before trial, it may be that as a matter of practical effect there would be no procedural unfairness in allowing the argument to be made and considered, but that was not the case. The contention was raised, and then only by reference to an authority I consider has no obvious application. It was not developed at all.

[271] It is not appropriate in those circumstances for the Court itself to develop in reasons for judgment possible contentions drawn from authorities not referred to, and embark on its own application of them, when neither the authorities nor their application was developed in submissions by the party who seeks to rely on them. The absence of such development illustrates why it is not in the interests of the administration of justice for a new argument, raised late and without notice, to be considered.

The consumer law claim

[272] The representation which is pleaded to have been made by the respondent to the applicant, and to contravene ss 18 and 31 of the Australian Consumer Law, was that "*when the Western Australian Mining Alliance was operational it would employ him at Tom Price in a full time capacity*". The second pleaded representation under the consumer law claim was abandoned by the applicant.

[273] The representation is pleaded as having been made by Mr Weise in a telephone conversation on 28 March 2013, and in a letter from the respondent dated 1 April 2013 offering the applicant employment with the respondent.

[274] The short answer to this claim is, as the respondent submits, that no such representation was in fact made.

[275] The applicant's evidence was not consistent with the pleaded allegation. He did not give evidence the alleged representation was made by Mr Weise at his interview on 28 March 2013. The applicant's evidence was that there were "a number of discussions" with Mr Weise, and the second discussion occurred "a couple of weeks" after his 28 March 2013 interview, with a third conversation occurring "a couple of days" after the second one. This timing is inconsistent with the sending of the letter by the respondent on 1 April 2013, and the content of that letter. The applicant's oral evidence was that in the third conversation Mr Weise told him that "some admin side of things … haven't gone exactly to plan" and the respondent would offer the applicant a "stop gap". His oral evidence was that Mr Weise said — in this third conversation — " We will offer you this contract and as soon as everything is resolved on AWU's side, then you will move to Pilbara". This would place the representation some weeks after the 28 March 2013 interview and the 1 April 2013 letter.

[276] Mr Weise's evidence was that "as best he can remember" he told the applicant that:

> the alliance was not finalised and that we did not want to lose him to, you know, if he picked up work elsewhere. So, in the meantime, if he would be happy enough I could guarantee him at least six months work with us on the east coast until such time as the alliance was finalised.

[277] In cross-examination, Mr Weise adhered to his evidence that all he "guaranteed" the applicant was the six-month fixed-term contract, and that he couched his discussion about the Pilbara position in terms of an "expectation" that it would go ahead. Mr Weise agreed that he knew the applicant was relocating from Victoria to Queensland, and doing so in the context that the Pilbara position would be offered to him once formalities had been completed.

[278] The letter from the respondent to the applicant on 1 April 2013 made a much more qualified statement. Having acknowledged the alliance was yet to be finalised as at the date of the letter "due to unforseen [sic] administration issue" and was "currently unable to be initiated", Mr Weise on behalf of the respondent offered the applicant a fixed-term contract for six months with the respondent. Mr Weise then stated in the letter:

> In the event that the alliance can be initiated during your fixed term contract, it is expected that you will transfer to the alliance project and be relocated to Tom Price.

[279] The statement which I have extracted at [265] above was then made, indicating the requirement for a formal contract to be agreed before any such employment would commence.

[280] As I have observed in relation to other issues, I do not find the applicant's recollection to be particularly reliable, in terms of detail. His account of the time period over which the discussions occurred with Mr Weise was clearly wrong. Either he was too casual in his evidence, or he was reconstructing. This is not to doubt the general substance of the chronology as the applicant gave it, nor to find that he was being deliberately dishonest. However I do not find his recollection of the detail of what was said, or when it was said, to be reliable or persuasive.

[281] Mr Weise, on the other hand, was the author of the 1 April 2013 letter. It was carefully expressed. As he said in oral evidence, no "guarantee" was given to the applicant. Nor, taking to account the whole of the evidence, could any sensibly or reasonably have been given at that stage — the alliance was somewhat precarious, and was between two unions with a long history of acrimony. The uncertainty was the reason for the six-month fixed-term contract.

[282] I find that in his telephone conversations with the applicant, on the balance of probabilities Mr Weise made no representation of the kind alleged. Rather, he was cautious to couch his statements in terms of "expectation". While it is true that the point of offering the applicant a six-month contract was, as Mr Weise agreed in cross-examination, because the respondent wanted to have him available for the Pilbara organiser position, the mechanism chosen to achieve that was a six-month fixed-term contract, in the expectation (but no more) that, during those six months, the problems with the alliance could be sorted out and the project could proceed. Indeed, the 1 April 2013 letter went as far as to point out, in the last sentence, that if the alliance could not be initiated, the applicant's employment with the respondent "will cease on October 11th 2013".

[283] If, contrary to my finding, such a representation was made by Mr Weise on behalf of the respondent, then it was obviously a representation as to a future matter: namely, the prospect of the applicant securing a position as organiser for the respondent in the alliance. The effect of s 4 of the Australian Consumer Law is that if a representation is made as to a future matter, and the person making the representation has reasonable grounds to make it at the time it was made, it will not be misleading or deceptive within the meaning of s 18. The absence of

reasonable grounds will mean that it is deemed to be misleading or deceptive: see *SPAR Licensing Pty Ltd v MIS Qld Pty Ltd* (2014) 314 ALR 35; [2014] FCAFC 50 at [16] (*SPAR Licensing*).

[284] Without more, a promise or representation that is made but not fulfilled will not be misleading and deceptive: see *SPAR Licensing* at [17]–[21] per Buchanan J, and the authorities there referred to.

[285] Further, and contrary to the applicant's submissions, s 4(3)(b) makes plain that the respondent bears no onus of establishing that it had reasonable grounds for making the alleged representation. In the absence of adducing any evidence of reasonable grounds, the deeming effect of s 4(2) will operate. Here, there was sufficient evidence adduced by both parties about the circumstances in which the applicant was offered the six-month fixed-term contract, and the parties' expectations that the alliance would come to fruition, so that s 4(2) could have no application. Although the respondent has an evidential burden, the legal burden to prove the respondent did not have reasonable grounds remains with the applicant: see *SPAR Licensing* at [74] per Foster J.

[286] If, contrary to my finding of fact, such a representation was made, the respondent has discharged its evidential burden and the applicant has not discharged his legal burden of proving there were no reasonable grounds for the representation he alleges was made. The respondent had, through Mr Weise interviewing candidates for the advertised position of the alliance organiser role, decided that the applicant was the best candidate for that role. Negotiations on the alliance were advanced, and the evidence reveals most of the stumbling blocks in and around April 2013 were centred on AWU issues. Nothing in the evidence suggests that Mr Weise or Mr Vickers believed at the time of employing the applicant that the alliance was unlikely to proceed. Their expectation was that it would proceed — and they were sufficiently confident about that to commit funds to pay the applicant for a six-month position which was not entirely necessary, in order to ensure he was available for the alliance role.

[287] There was no contravention of s 18 or s 31 of the Australian Consumer Law by the making of the alleged representation if, contrary to my finding, it was in fact made.

Relief

[288] Having found the respondent contravened s 351 of the Fair Work Act in the redeployment, suspension and dismissal of the applicant, the question of appropriate relief must be addressed.

[289] The parties jointly submitted that they be given an opportunity to make submissions on the application of the penalty provisions in s 546 of the Fair Work Act, should a contravention of s 351 be found. Accordingly, I have made directions giving the parties that opportunity, including the opportunity for a further oral hearing if they submit it is required. The question of penalty is independent from any orders in relation to compensation to the applicant, which should be made on the evidence before the Court, the applicant having had his opportunity at trial to tender whatever admissible material he wished to in respect of his loss and damage.

[290] As I have noted, there was little if any such evidence, whether in documentary or oral form. The applicant pleaded he had suffered "distress, humiliation, pain and suffering" but this allegation was not supported by his oral evidence. He gave no express evidence to that effect. He appeared despondent at

times about what had occurred. At other times he displayed some anger and disappointment. All those reactions are understandable in the circumstances but neither through his demeanour, nor through any express evidence he gave, did it appear that the contraventions had any significant and lasting effect on him at the level of "distress" or "humiliation" or "pain and suffering".

[291] Nor was any expert evidence called on his behalf to support the allegation in the pleading.

[292] It is true he gave evidence that he was currently unemployed, and had not been employed since the respondent terminated his employment. His elaboration of this consisted of one statement: that he had "looked for a lot of jobs". He gave no evidence about the nature and extent of the attempts he had made, despite having earlier given evidence that throughout his university course he had a range of jobs in property management and in the hospitality sector. He gave no evidence about whether had completed the necessary training to be admitted to practice as a barrister and solicitor, despite having given evidence that this was one of his plans before he applied for the position with the respondent.

[293] I find the applicant has adduced insufficient evidence to persuade me on the balance of probabilities that the fact he has been without employment since 26 July 2013 to the date of trial was caused, directly or indirectly, by the termination of his employment. It appears he secured the position with the respondent relatively easily, in a short period after finishing his law degree. Without more evidence, there is no basis upon which any damages could be awarded for the period he has been without income after the termination of his employment. In any event, the applicant did not in his pleadings or in his submissions seek to quantify any such loss other than by a fixed sum calculated by reference to the Pilbara contract.

[294] I have found no contract between the parties about the Pilbara alliance organiser position was ever concluded, and that, even if there was, there was no breach of that contract. Accordingly the applicant's claim for loss of income pursuant to that contract must fail.

[295] The applicant also submitted that he was entitled to the loss of the benefit of the Pilbara contract because that benefit was lost to him on 18 July 2013 when he was redeployed to Queensland as a result of the decision of Mr Vickers. He submits the loss of the benefit of the Pilbara contract flowed from the adverse action taken by the respondent in contravention of s 351, and did so independently of whether the Pilbara contract had been concluded by 18 July 2013.

[296] The applicant submits there is no basis on which the Court could find that, absent the adverse action by the respondent, the applicant would have been dismissed from his employment before 31 December 2014, the date on which the Pilbara contract was to expire, and a renewal of that contract would be required. He submits that various incidents at a Queensland motel raised by the respondent in evidence and said to indicate misbehaviour by the applicant were not taken into account by Mr Vickers in his decision-making and their truth was never proved at trial, nor was evidence of them admitted for that purpose. I accept both those submissions.

[297] He submitted the complaints which did form the basis of Mr Vickers' decision-making all referred to the applicant's working relationship with the AWU, not the respondent, and therefore were not probative of any likelihood he

would have experienced problems in continuing to work for the respondent. I do not accept this submission, because it is based on an incorrect premise.

[298] The premise is that, absent the adverse action, the applicant would have continued working for the respondent other than in contact with the AWU. That premise ignores the situation in which the adverse action occurred. In assessing what would have occurred in the absence of the adverse action it must be borne in mind that the position the applicant was expected to fill by the end of the July was as a CFMEU organiser working on the alliance at Tom Price. That is, working with Mr Kerley and the AWU officials in the alliance.

[299] No submission was made that there was available to the respondent an ongoing position after 11 October 2013 to which the applicant could have been assigned, which did not involve working with the AWU. Nor was any evidence adduced on which such a submission could be based. The whole point of the redeployment was to strike a balance between giving effect to Mr Vickers' views that the applicant shouldn't continue working for the respondent at all, and the unfairness to the applicant of terminating his employment during his fixed-term six-month contract.

[300] The respondent submitted that it was "inconceivable" the applicant would have been placed in the Pilbara position, given the complaints made about him, the attitudes he had expressed about the conduct of the AWU officials, his description of Mr Kerley as a "rat" and his determination to speak his mind about the shortcoming he perceived existed in the AWU mode of operation. This submission of course takes all three adverse actions together, although as the respondent's counsel conceded in argument, it was in reality the redeployment which was the initial cause of the applicant losing the benefit of employment as an organiser for the respondent on the alliance.

[301] In *Dafallah v Fair Work Commission* (2014) 225 FCR 559; [2014] FCA 328 at [148]–[161] I set out what I consider to be the applicable principles and approach to an award of compensation pursuant to s 545 of the Fair Work Act. I need not repeat them, but it is important to recall the statutory criterion is what the Court considers "appropriate", provided there is a causal connection between the contravention and the compensation awarded.

[302] In my opinion, had Mr Vickers not taken into account the applicant's association and affiliation with the Socialist Alliance in his decision-making, the course of events would have been quite different. I make that finding first on the basis that my impression of Mr Vickers was that he generally strove to take a fair approach to his decision-making, although he did seem to have a tendency to rush to judgment about matters, and people. From his answers in cross-examination he seemed aware of his responsibilities when acting on behalf of the respondent as an employer. Had he approached the complaints from the AWU without adopting the unlawful reasoning he did, in my opinion he would, like any reasonable manager in his position, have had the AWU complaints investigated to ascertain whether there was any foundation in fact for them. Having done that, and given the applicant a reasonable opportunity to be heard, he would have been required to form a view about whether the AWU complaints were made out and what should be done. He was required by the law to put the complaint from Mr Howes about the applicant being a "Trot" to one side, and not allow it to affect his decision-making.

[303] Given the respondent did not seek in this trial to prove the truth of the AWU complaints, it is not possible for the Court to draw any inferences about which way Mr Vickers was likely to have decided. He may have found the AWU complaints were trivial, or falsified. Even if made out, he may have seen them as no more than “teething problems” in the alliance. He may have found them to be serious enough to warrant some disciplinary action against the applicant. It cannot be ruled out that Mr Vickers may have formed a view that the applicant’s behaviour and attitudes to the AWU posed a threat to the success of the alliance, even without the Socialist Alliance issues, but I find this would have been unlikely to lead to the summary dismissal of the applicant.

[304] If Mr Vickers put to one side the complaint by Mr Howes (about the applicant being a “Trot”) and the applicant’s involvement with the Socialist Alliance, as the law required him to do, in my opinion there was a range of possible outcomes, none of which was likely to involve the immediate termination of the applicant’s employment. Without the impermissible questioning by Mr Vickers, the applicant would not have lied about the nature and extent of his association with the Socialist Alliance. Without the overlay of the Socialist Alliance issues (and the fact of a complaint from Mr Howes about those issues), I doubt Mr Vickers and Mr Weise would have acted with such speed and so adversely to the applicant in terms of their decision-making at the 18 July 2013 meeting about the need to remove or redeploy him. The applicant would not have felt so under siege and it is likely he would not have posted what he did on Facebook about Mr Kerley.

[305] Accordingly, I find it is highly improbable that, absent the prohibited reasons, Mr Vickers’ decision-making would have followed the same course that it did. I find it improbable the applicant would have been so immediately precluded from taking up the organiser position in the Pilbara. Even if, upon proper investigation, Mr Vickers found the complaints made out in fact, I find it more likely the applicant would have been warned and counselled about how he should treat his AWU colleagues, and that Mr Weise would have more closely supervised him for some time after mid-July 2013. I find it is likely the Pilbara contract would have been concluded between the applicant and the respondent and the applicant would have moved to Tom Price and started work in the position Mr Weise had originally selected him for. It is likely he would have continued to be closely supervised by Mr Weise.

[306] Even if the concluded contract had a term to the effect sought by the applicant, the probationary period on the Pilbara contract would not have expired until 11 October 2013 — some 11 weeks after the applicant would have commenced at Tom Price. During that period his employment could have been terminated without notice by the respondent. After that period, and drawing the inference that a clause in substance the same as cl 3 would have been inserted in the concluded contract, the applicant’s employment could have been terminated on one month’s notice by him, or by the respondent.

[307] Consideration of the applicant’s own evidence persuades me it is likely the Pilbara position would not have been wholly successful for him. He was inexperienced in the union movement. He had no experience with miners, nor with their living and working conditions. He had no experience in remote areas of Australia, or of Western Australia at all. He was being placed into a volatile situation, needing to forge a productive working relationship between two unions with a long history of significant antagonism. He was required to do so in a

mining environment which was hostile to union organisation generally, as the 26 June 2013 meeting agenda in evidence frankly admitted. He would be living in an unfamiliar and somewhat harsh environment, having come straight from law school in Melbourne. Although his evidence disclosed a determined adherence to principles and values he viewed as important, the applicant displayed considerable equivocation and diffidence in the witness box. He did not strike me as the kind of person who would cope well with being, or feeling as if he was, "on the outer" in a remote and strange living and working environment.

[308] It is difficult to infer from the evidence how long the applicant may have lasted in the Pilbara before either he chose to resign, or further steps were taken to terminate his employment. For example, there was no evidence at all given about the fate of the alliance, what in fact did occur in the six to 12 months after July 2013, whether Mr Kerley stayed on, whether the respondent employed a new organiser and whether that person occupied the position successfully.

[309] I find there is an insufficient evidentiary basis for me to infer, in the applicant's favour, that he would have remained on the Pilbara contract for a substantial period of time. Balanced against this is the evidence given by Mr Weise about the nature of the complaints made to him, and the views he expressed to the applicant. Mr Weise gave evidence that Mr Kerley had complained the applicant was raising issues "like boat people and refugees in meetings with him", that Mr Weise told the applicant such things were not really his concern and he should tone things down a bit. He agreed in cross-examination that he told the applicant he was "too passionate" in his views. Mr Weise agreed in cross-examination that he had told the applicant "you're not there to solve all the problems". Mr Weise gave evidence that, in his view, the working relationship between the applicant and Mr Kerley seemed to be deteriorating.

[310] These answers by Mr Weise reflect, I find, his views about the applicant and the way he approached his work with the AWU in the short time he had been in Perth. They are consistent with the applicant's own evidence that he did not agree with the AWU's organisation practices, that he thought they did not engage sufficiently with the workers, they were too "rigid", that the way the union officials had been operating at Tom Price for three years, on six-figure salaries, had not been working.

[311] Taking into account my finding at [305] above that the applicant would have commenced working in the Pilbara alliance as the CFMEU organiser under a concluded version of the Pilbara contract, the only inference I am prepared to draw based on the evidence is that the relationship with Mr Kerley would have continued to deteriorate, the applicant would have continued to voice his criticism of the way the AWU was operating which would in turn have generated more complaints, the applicant would have continued to voice his opinions on social justice issues such as asylum seekers in ways that were not viewed by either the respondent or the AWU as part of his role and the working environment would have fairly rapidly become untenable, especially given the applicant's lack of experience or preparation for the environment in which he would find himself, as I have outlined at [307] above. Whether this would have taken three or six months is difficult to say but I find it is probable it would not have taken longer than six months before the applicant would have moved out of the Pilbara position, either at his own instigation or that of the respondent. There is, as I have found, no evidentiary basis to find or infer that another position with the respondent would have been available to him on an ongoing basis.

[312] As I have set out at [249] above, the applicant submitted the commencement date for the proposed Pilbara contract was 22 July 2013, and the evidence shows the applicant was scheduled to fly to Tom Price on that date. There is sufficient evidence for the Court to infer that, had the contravention not occurred, it is probable the applicant would not have remained employed under the Pilbara contract for longer than six months after 22 July 2013, that is, no longer than approximately 22 January 2014. It is appropriate that the applicant be compensated for loss of income during that period, because the adverse action of redeploying him denied him the benefit of working in that role, which is the role for which he applied and the role for which the respondent considered him to be the best candidate. The parties are in the best position to calculate that loss precisely, and will be directed to do so.

[313] The applicant also sought reinstatement. There is authority for the proposition that reinstatement, "in the ordinary case", is an appropriate order where an employment has been terminated for a prohibited reason: see *Independent Education Union v Geelong Grammar School* [2000] FCA 557 at [34] per Finkelstein J; *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (No 3)* (2012) 228 IR 195; [2012] FCA 1218 at [125] per Jessup J.

[314] It was included as one form of relief in his application but not developed as a substantive claim until quite late in the trial, when the applicant was asked questions in re-examination. The respondent objected to it being developed in this way, but I consider it was open to the applicant to do so, given that relief was sought in the application and some of the cross-examination of the applicant. Nevertheless one consequence of its late development is that, again, there was an insufficient evidentiary foundation laid for the claim to be successful. There was no evidence at all about whether any position was available with the respondent for the applicant, let alone the position to which he sought reinstatement — that of organiser for the alliance in the Pilbara. There was no evidence about the current state of the alliance as at the date of trial. The one witness who might have been able to give some persuasive evidence about how the applicant's reinstatement could be successful — his apparent supporter Mr Kumeroa — was not called as a witness by either party. I infer that neither party considered his evidence would be helpful to their respective cases.

[315] In contrast, Mr Vickers remained clearly mistrustful of the applicant. Mr Weise, despite having been the person responsible for the decision to employ the applicant, showed no confidence in the applicant's ability as an organiser having now experienced the applicant's performance of that role. The applicant has engaged in litigation against the respondent and there will inevitably be resentment and tension between them. No evidence at all was given by anyone, including the applicant, to suggest this would not be the case. There was no evidence about the position the applicant should be reinstated to — no witness gave any evidence about whether the CFMEU Pilbara position still existed. Even if it did, an order for reinstatement would be inconsistent with my finding that it is probable the applicant would not have remained in the Pilbara alliance organiser position for longer than six months. Having made that finding, an order for reinstatement would not be an appropriate order, even if there was a proper evidentiary base for it, which there is not. I decline to order reinstatement.

[316] I consider the respondent should be ordered to pay the applicant a modest amount of general compensation for the unlawful way in which it terminated his employment. Taking into account the absence of any probative evidence other than the applicant's display of despondency, disappointment and anger, but recognising that he relocated from Melbourne to Queensland and then to Perth, and was dismissed summarily and placed directly on a plane back to Melbourne from Sydney, having been compelled to pack up and leave Perth at short notice, any reasonable person in the applicant's position would find this humiliating and distressing. I propose to award the applicant $3000 in compensation for humiliation and distress.

Orders

The court declares that:

1. In redeploying, suspending and dismissing the applicant, the respondent contravened s 351 of the Fair Work Act 2009 (Cth).

The court orders that:

2. The respondent pay the applicant $3000 by way of compensation for the distress and humiliation caused by its contravention.

The court directs that:

3. On or before 6 February 2015, the parties draw up and file minutes of proposed final orders reflecting the Court's reasons for judgment concerning the amount to be awarded to the applicant pursuant to s 545 of the Fair Work Act 2009 (Cth) for compensation for loss of income arising from the respondent's contravention.
4. On or before 13 February 2015, the applicant is to file and serve any submissions he wishes to make as to the claim for penalties pursuant to s 546 of the Fair Work Act 2009 (Cth).
5. On or before 27 February 2015, the respondent is to file and serve any submissions it wishes to make as to the claim for penalties pursuant to s 546 of the Fair Work Act 2009 (Cth).
6. The submissions referred to in paragraphs 4 and 5 are not to exceed 10 pages.
7. On or before 6 March 2015, the applicant file and serve any reply he wishes to make to the respondent's submissions, not to exceed 3 pages.

STEPHEN TULLY
BARRISTER

ANNEXURE "JDF-2"

FEDERAL COURT OF AUSTRALIA

Sayed v Construction, Forestry, Mining and Energy Union [2015] FCA 338

Citation:	Sayed v Construction, Forestry, Mining and Energy Union [2015] FCA 338
Parties:	**MUHAMMED ALI SAYED v CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION**
File number:	VID 1072 of 2013
Judge:	**MORTIMER J**
Date of judgment:	13 April 2015
Catchwords:	**INDUSTRIAL LAW** – penalties – adverse action because of employee's political opinion – three contraventions of s 351 of the *Fair Work Act 2009* (Cth) – whether contraventions formed one course of conduct – relevant factors in assessment of penalties – seriousness of contraventions – discrimination on basis of political opinion to be subject to strong disapproval – "common informer" rationale for payment of penalties to particular persons or organisations under *Fair Work Act 2009* (Cth) s 546(3) – whether penalties and compensation should be ordered to be paid to the same person
Legislation:	*Fair Work Act 2009* (Cth) ss 351, 539, 545, 546, 546(3), 557(1), 570
Cases cited:	*AB v The Queen* (1999) 198 CLR 111; [1999] HCA 46 *Attorney-General (SA) v Tichy* (1982) 30 SASR 84 *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560; [2008] FCAFC 8 *Construction, Forestry, Mining and Energy Union v Cahill* (2010) 194 IR 461; [2010] FCAFC 39 *Construction, Forestry, Mining and Energy Union v Williams* (2009) 262 ALR 417; [2009] FCAFC 171 *CPSU, The Community and Public Sector Union v Telstra Corporation Limited* (2001) 108 IR 228; [2001] FCA 1364 *Dafallah v Fair Work Commission* (2014) 225 FCR 559; [2014] FCA 328 *Fair Work Ombudsman v Australian Shooting Academy Pty Ltd* [2011] FCA 1064 *Fair Work Ombudsman v Maclean Bay Pty Ltd (No 2)* [2012] FCA 557 *Fair Work Ombudsman v Skilled Offshore (Australia) Pty Ltd* [2015] FCA 275

Fair Work Ombudsman v W.K.O. Pty Ltd [2012] FCA 1129
Gibbs v The Mayor, Councillors and Citizens of City of Altona (1992) 37 FCR 216
Johnson v The Queen (2004) 205 ALR 346; [2004] HCA 15
Kelly v Fitzpatrick (2007) 166 IR 14; [2007] FCA 1080
Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
McIlwain v Ramsey Food Packaging Pty Ltd (No 4) (2006) 158 IR 181; [2006] FCA 1302
Mill v The Queen (1988) 166 CLR 59
Mornington Inn Pty Ltd v Jordan (2008) 168 FCR 383; [2008] FCAFC 70
Murrihy v Betezy.com.au Pty Ltd (No 2) (2013) 221 FCR 118; [2013] FCA 1146
National Tertiary Education Union v Royal Melbourne Institute of Technology (2013) 234 IR 139; [2013] FCA 451
Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union (2008) 171 FCR 357; [2008] FCAFC 170
QR Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (2010) 204 IR 142; [2010] FCAFC 150
R v Faulkner (1972) 56 Cr App R 594
R v Knight (1981) 26 SASR 573
Royer v Western Australia (2009) 197 A Crim R 319; [2009] WASCA 139
Sayed v Construction, Forestry, Mining and Energy Union [2015] FCA 27
Schanka v Employment National (Administration) Pty Ltd (No 2) (2001) 114 FCR 379; [2001] FCA 1623
Seymour v Stawell Timber Industries Pty Ltd (1985) 9 FCR 241; (1985) 13 IR 289
Veen v The Queen (No 2) (1988) 164 CLR 465
Wong v The Queen (2001) 207 CLR 584; [2001] HCA 64

Thomas DA, *Principles of Sentencing* (2nd ed, Heinemann, 1979)

Date of hearing: Heard on the papers

Date of last submissions: 10 March 2015

Place: Melbourne

Division: FAIR WORK DIVISION

Category: Catchwords

Number of paragraphs: 94

Solicitor for the Applicant: McDonald Murholme

Counsel for the Respondent: Ms C Howell

Solicitor for the Respondent: Slater & Gordon

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 1072 of 2013**

BETWEEN:	**MUHAMMED ALI SAYED** **Applicant**
AND:	**CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION** **Respondent**

JUDGE:	**MORTIMER J**
DATE OF ORDER:	**13 APRIL 2015**
WHERE MADE:	**MELBOURNE**

THE COURT ORDERS THAT:

1. In respect of the contravention of s 351 of the *Fair Work Act 2009* (Cth) by redeploying the applicant, the respondent pay a penalty of $20,000.

2. In respect of the contravention of s 351 of the *Fair Work Act 2009* (Cth) by suspending the applicant, the respondent pay a penalty of $10,000.

3. In respect of the contravention of s 351 of the *Fair Work Act 2009* (Cth) by dismissing the applicant, the respondent pay a penalty of $15,000.

4. The penalties payable by reason of paragraphs 1 to 3 inclusive of these orders be payable to the Commonwealth, on or before 18 May 2015.

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

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 1072 of 2013**

BETWEEN:	**MUHAMMED ALI SAYED** **Applicant**
AND:	**CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION** **Respondent**

JUDGE:	**MORTIMER J**
DATE:	**13 APRIL 2015**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

INTRODUCTION AND SUMMARY

1 I delivered judgment in this proceeding on the applicant's claims against the respondent on 30 January 2015: *Sayed v Construction, Forestry, Mining and Energy Union* [2015] FCA 27. I found the respondent had contravened s 351 of the *Fair Work Act 2009* (Cth) by three separate, but sequential acts against the applicant: redeploying him on 18 January 2013 with effect from 22 July 2013; suspending him from his duties on 23 July 2013 and dismissing him on 26 July 2013. I found that the respondent's reasons for those three acts against the applicant included a prohibited reason, being his political opinion. That political opinion was his membership of and association with the Socialist Alliance. I awarded the applicant $3,000 by way of general compensation pursuant to s 545(2)(b) of the Fair Work Act, and made orders that the parties calculate, by reference to my reasons, the loss of income suffered by the applicant. The parties complied with those orders and I subsequently made orders that the respondent pay the applicant $36,984.16 less applicable taxation. These reasons should be read in conjunction with my reasons given on 30 January 2015.

2 As I noted at [60] of that judgment, Mr Sayed also sought by way of relief orders that the respondent pay pecuniary penalties pursuant to s 546 of the Fair Work Act. The parties agreed this aspect of the proceeding should await the Court's decision on contravention, Mr Sayed's claim for reinstatement and his claim for compensation. The parties were given an opportunity to make submissions on appropriate penalties in light of my

reasons for judgment. Neither party sought an oral hearing on the issue of penalties and accordingly the matter has been determined on the basis of the parties' respective written submissions.

3 For the reasons set out below three separate penalties, of varying amounts, will be imposed on the respondent for the contraventions.

LEGISLATIVE FRAMEWORK

4 As I noted, the respondent's contraventions were under s 351 of the Fair Work Act. That section provides:

> **351 Discrimination**
>
> (1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.
>
> Note: This subsection is a civil remedy provision (see Part 4-1).
>
> (2) However, subsection (1) does not apply to action that is:
> (a) not unlawful under any anti-discrimination law in force in the place where the action is taken; or
> (b) taken because of the inherent requirements of the particular position concerned; or
> (c) if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed—taken:
> (i) in good faith; and
> (ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.
>
> (3) Each of the following is an ***anti-discrimination law***:
>
> (aa) the *Age Discrimination Act 2004*;
> (ab) the *Disability Discrimination Act 1992*;
> (ac) the *Racial Discrimination Act 1975*;
> (ad) the *Sex Discrimination Act 1984*;
> (a) the *Anti-Discrimination Act 1977* of New South Wales;
> (b) the *Equal Opportunity Act 1995* of Victoria;
> (c) the *Anti-Discrimination Act 1991* of Queensland;
> (d) the *Equal Opportunity Act 1984* of Western Australia;
> (e) the *Equal Opportunity Act 1984* of South Australia;
> (f) the *Anti-Discrimination Act 1998* of Tasmania;
> (g) the *Discrimination Act 1991* of the Australian Capital Territory;
> (h) the *Anti-Discrimination Act* of the Northern Territory.

5 In relation to the imposition of penalties for contraventions of a civil remedy provision of the Fair Work Act, s 546 of the Act provides:

546 Pecuniary penalty orders

(1) The Federal Court, the Federal Magistrates Court or an eligible State or Territory court may, on application, order a person to pay a pecuniary penalty that the court considers is appropriate if the court is satisfied that the person has contravened a civil remedy provision.

Note: Pecuniary penalty orders cannot be made in relation to conduct that contravenes a term of a modern award, a national minimum wage order or an enterprise agreement only because of the retrospective effect of a determination (see subsections 167(3) and 298(2)).

Determining amount of pecuniary penalty

(2) The pecuniary penalty must not be more than:

(a) if the person is an individual—the maximum number of penalty units referred to in the relevant item in column 4 of the table in subsection 539(2); or

(b) if the person is a body corporate—5 times the maximum number of penalty units referred to in the relevant item in column 4 of the table in subsection 539(2).

Payment of penalty

(3) The court may order that the pecuniary penalty, or a part of the penalty, be paid to:

(a) the Commonwealth; or

(b) a particular organisation; or

(c) a particular person.

Recovery of penalty

(4) The pecuniary penalty may be recovered as a debt due to the person to whom the penalty is payable.

No limitation on orders

(5) To avoid doubt, a court may make a pecuniary penalty order in addition to one or more orders under section 545.

6 The penalties that may be imposed by this Court following a finding that there had been a contravention of s 351 are set out in s 539 of the Fair Work Act. Relevantly, s 539 provides:

539 Applications for orders in relation to contraventions of civil remedy provisions

(1) A provision referred to in column 1 of an item in the table in subsection (2) is a ***civil remedy provision***.

(2) For each civil remedy provision, the persons referred to in column 2 of the item may, subject to sections 540 and 544 and Subdivision B, apply to the courts referred to in column 3 of the item for orders in relation to a contravention or proposed contravention of the provision, including the maximum penalty referred to in column 4 of the item.

Note 1: Civil remedy provisions within a single Part may be grouped together in a single item of the table.

Note 2: Applications cannot be made by an inspector in relation to a contravention of a civil remedy provision by a person in certain cases where an undertaking or compliance notice has been given (see subsections 715(4) and 716(4A)).

Note 3: The regulations may also prescribe persons for the purposes of an item in column 2 of the table (see subsection 540(8)).

7 Section 351(1) is included as a civil remedy provision at item 11 of the table set out in s 539(2). The maximum penalty to be imposed for a contravention of s 351(1) is 60 penalty units. Item 11 of that table provides as follows:

Standing, jurisdiction and maximum penalties				
Item	**Column 1 Civil remedy provision**	**Column 2 Persons**	**Column 3 Courts**	**Column 4 Maximum penalty**
Part 3-1--General protections				
11	340(1) 340(2) 343(1) 344 345(1) 346 348 349(1) 350(1) 350(2) 351(1) 352 353(1) 354(1) 355 357(1) 358 359	(a) a person affected by the contravention; (b) an industrial association; (c) an inspector	(a) the Federal Court; (b) the Federal Magistrates Court	60 penalty units

8 The penalty to be imposed on a body corporate, including a trade union, pursuant to s 546(2)(b) of the Fair Work Act is five times the maximum number of penalty units referred to in the relevant item in column 4 of the table in s 539(2).

9 Section 4AA of the *Crimes Act 1914* (Cth) determines the rate of a penalty unit, and it is currently fixed at $170.

10 There was no disagreement in the parties' submissions about the effect of these provisions in the current proceeding. The maximum penalty that may be imposed by the Court for each of the three identified contraventions is 60 penalty units x 5 x $170 which is $51,000.

PARTIES' SUBMISSIONS ON PENALTY

11 The applicant submits the respondent should be ordered to pay three separate pecuniary penalties, in the "mid-range", taking into account the maximum penalty would be $51,000, and therefore in excess of $150,000 for the three contraventions. He also submitted the penalties should be "significant". The applicant does not make any submissions about what this "mid-range" is. He submits any penalties ordered should be payable to him, pursuant to s 546(3)(c) of the Fair Work Act.

12 The applicant relied on the (non-exhaustive) factors identified by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 and accepted by Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14; [2007] FCA 1080 as relevant to determining the penalty to be imposed in a given case. In summary, he submitted the respondent's conduct, as found by the Court, was "severe" in nature and extent, the applicant was a relatively inexperienced employee and the contraventions were committed by and involved senior members of the CFMEU. The applicant submitted he had still not found further employment, that his prospects of gaining such employment within the union movement were diminished because of the respondent's conduct, and he had incurred "considerable expense" in relocating first to Queensland and then having to return to Melbourne after his employment was terminated. He relied on statements on the CFMEU website concerning how large the union was. He submitted no contrition had been shown by reason of the respondent's denial and active contesting of his allegations. He relied on Mr Vickers' evidence at trial which, he submitted, tried to absolve the CFMEU of wrongdoing. Principles of both general and special deterrence were relied upon.

13 The respondent submitted the Court should not impose any penalty. It advanced four reasons for this submission:

a. although a prohibited reason formed part of its reasons for the adverse action, the respondent had other legitimate and non prohibited reasons for the adverse action;

b. the applicant by his conduct contributed to the adverse action [principally, in relation to his behaviour towards AWU officials, his Facebook post, his complaints about the AWU and therefore his general inability to "fit in"];

c. the respondent, at the time of the adverse action, had formed a genuinely held and reasonable view that the applicant was unsuited to the position for which he was employed; and

d. the respondent endeavoured to act fairly towards the applicant, including by making payment of three months remuneration in lieu of notice on termination of his employment.

14 The respondent accepted that the approach taken in *Mason* and *Kelly* identified factors to be taken into account, while noting such a summary imposed no restriction or prescription on the factors which the Court could consider.

15 The respondent also emphasised, and in contrast to the applicant, that although s 557(2) does not in terms apply to s 351, in an appropriate case the Court should take into account that a single course of conduct has resulted in multiple contraventions: see *QR Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2010) 204 IR 142; [2010] FCAFC 150 at [49] per Keane CJ and Marshall J. The respondent also referred to the observations by Middleton and Gordon JJ in *Construction, Forestry, Mining and Energy Union v Cahill* (2010) 194 IR 461; [2010] FCAFC 39 at [39], to the effect that where there is an "interrelationship between the *legal and factual elements of two or more offences*" (emphasis in original) care must be taken that an offender is not punished twice for what is essentially the same criminality. In the present circumstances, the respondent submitted that while there were three "distinct" decisions, the events commenced with the meeting on 18 July 2013 and occurred over a short space of time, involving the same person and similar factual issues, with some factual and legal elements of the dismissal and suspension contraventions overlapping. Therefore the respondent submitted that the contraventions should be treated as one course of conduct and (I infer), if a penalty were to be imposed, a single penalty imposed.

16 In submitting there should be no penalty imposed, the respondent points to the payments to the applicant already of $3,000 for general damages and $36,984.16 (less applicable taxation) as compensation for economic loss, as well as the significant legal costs incurred by the respondent and not recoverable under the Fair Work Act for defending the unsuccessful claims in consumer law and in contract.

17 The respondent submits that some of the applicant's submissions should not be accepted for a number of reasons, including reliance on evidence which has not been adduced, failure to distinguish between the circumstances of the three contraventions, and reliance on authorities with very different facts such as the decision of Jessup J in *Murrihy v*

Betezy.com.au Pty Ltd (No 2) (2013) 221 FCR 118; [2013] FCA 1146. The respondent submitted the applicant incorrectly identified three members of CFMEU management as involved in the contraventions when in fact only Mr Vickers had any role in the suspension and dismissal contraventions, and was the only decision-maker in respect of the redeployment contravention (albeit other senior managers were involved). The respondent submitted the factual circumstances were unusual, unlikely to arise again in other employment contexts and did not call for general deterrence. The respondent's submissions repeatedly emphasised that the three decisions found to contravene the Fair Work Act were also made for "non prohibited reasons". Finally, it should be noted that the respondent submitted, in the alternative, that if a penalty were to be imposed, it should be at the "low end of the range".

18 In reply, the applicant submitted that the only non-prohibited reason identified in the Court's judgment – the fact the applicant lied to Mr Vickers – was linked to the prohibited reason because of the subject matter of the lie. He submitted the respondent's position that no penalty should be imposed was also evidence of its lack of contrition, as was its submission that the applicant's conduct contributed to the adverse actions. He maintained there were three separate contraventions and the "course of conduct" approach should not be adopted. The applicant submitted the Court's findings that the applicant would not have lasted longer than a further six months were not relevant to penalty, and submitted that finding did not absolve the respondent from the consequences of its unlawful conduct. The applicant generally took issue with most of the respondent's submissions.

CONSIDERATION

19 There are four principal matters for determination: whether a penalty should be imposed on the respondent at all; if so, is there only one "course of conduct" to be assessed for penalty purposes; what should be the amount of that penalty; and, finally, whether the penalty (if ordered) should made payable to the applicant.

20 In my opinion penalties should be imposed on the respondent. They should be significant, and imposed separately in respect of each contravention. The penalties should not be payable to the applicant, as this would represent a windfall to him, in light of the conclusions I reached in my reasons on 30 January 2015 about his failure to adduce evidence of loss and damage.

21 No evidence was adduced in respect of penalty by either party. That has some consequences for them both, to which I refer below.

22 In reaching my conclusion, I have not taken into account anything submitted by the applicant at [37] of his submissions. As the respondent correctly pointed out, this paragraph seeks, at the least, to have the Court draw inferences from the conciliation process before the Fair Work Commission. The paragraph will be disregarded. Further, there were aspects of the applicant's submissions which depended on factual assertions for which no evidence is currently before the Court. For example, at [19] of his written submissions the applicant submitted he is "yet to find alternate employment" (that is, as at the date of the written submissions, namely 13 February 2015) and at [20] he submitted he "incurred considerable expense in relocating to Queensland". There is no evidence to support these assertions and I have disregarded them.

Penalties should be imposed

23 The respondent's submission that no penalties should be imposed fails to recognise sufficiently the findings the Court has made. There were clear findings that the applicant was treated as he was because of his political opinion. Making decisions which result in a person losing his employment because of his allegiance and membership of a political party should be the kind of conduct which simply does not occur in the Australian community any more. It should be subject to strong disapproval by the courts. That it should occur within a union which, from the tenor of Mr Vickers' evidence, places great store in the rights to freedom of speech and freedom of conscience, emphasises why this Court must mark its disapproval of the respondent's conduct by the imposition of penalties.

24 It is true the Court's findings reflect the fact that there were a number of reasons Mr Vickers took each of the decisions that he did. As to two of the three contraventions, there was a finding that Mr Vickers acted as he did because the applicant had lied to him, but as the applicant submits, the subject matter of the lie is important. I also found (at [236]) that Mr Vickers' reasons included the Facebook post by the applicant. In relation to all three contraventions I found (at [237]) that Mr Vickers made the decisions he did because of complaints from the Australian Workers' Union about the applicant "bagging" its officials and about the applicant's interpersonal skills. I found these were in part a prohibited reason, and in part not. The presence of other reasons does not excuse, or ameliorate the severity of, the reliance on a prohibited reason. Human conduct is frequently

prompted by a variety of reasons. To comply with the Fair Work Act, and with anti-discrimination law generally, employers must ensure that no matter whether lawful reasons also exist, they do not act for an unlawful reason.

25 I found (at [302]-[305]) that absent the prohibited reason, other (less serious) action would likely have been taken against the applicant, involving warnings, and assistance with his workplace manner and performance. At the very least, the AWU complaints would have had to be investigated to see if they had any basis. None of this occurred because Mr Vickers peremptorily acted on the face value of Mr Howes' complaint, and on the basis of his own deep-rooted suspicions about people associated with the Socialist Alliance who were working in unions. In that sense, it is plain that the applicant would not have lost his job when he did if only the non-prohibited reasons had driven the decision-making. That is why it is also inaccurate for the respondent to characterise its views as "genuinely held and reasonable". Mr Vickers' evidence certainly demonstrated a genuine opinion about members of the Socialist Alliance, and a genuine opinion about the applicant's lies and his Facebook post. The genuineness was no doubt in part the explanation for the peremptory action. There could be however, nothing reasonable – in a legal sense – about the views the applicant was unsuited to the CFMEU position when those views were substantially based on the applicant's political opinion.

26 Finally, I reject the respondent's submission that the payment of the applicant's salary until October 2013 was made out of fairness. Mr Vickers gave no evidence that, on termination of the applicant's employment, he authorised the payment "in fairness". It is correct that I found (at [299] of the 30 January 2015 reasons for judgment) the redeployment struck a balance between the view that the applicant should not continue to work for the CFMEU at all and the unfairness of terminating his employment during his fixed-term six-month contract. In other words, there was a recognition by the CFMEU that the applicant had an enforceable fixed-term contract in circumstances where, as at 18 July 2013, there would be no legal justification for the CFMEU summarily dismissing him. However, once the termination was made, there is simply no evidence about why the CFMEU decided to pay the applicant up to October 2013. In this aspect, like the applicant, the respondent seeks through submissions to impose something of a gloss on or an addition to the evidence as it was at trial.

27 Contrary to the respondent's submissions, there can be no sense in which the Court should refuse to impose a penalty because of some notion of "contribution" by the applicant. Such an approach again seeks to undermine the Court's findings of contravention. The applicant is not responsible at all for the respondent's reliance on a prohibited reason. Mr Vickers, and the respondent, bear legal responsibility for that. The applicant's alleged attitude towards the AWU, the alleged way he conducted himself and the apparent dissatisfaction of some of his AWU colleagues were taken into account in my assessment of the likely longevity of the working relationship between the applicant and the respondent, and my findings that, without the unlawful discrimination and had he been able to continue on in his employment, it is probable that within six months the applicant would have left, or he would have been lawfully dismissed.

"One course of conduct"?

28 Having determined that it is appropriate to impose penalties, the next question is whether there should be three penalties – one for each contravention – or only one, on the basis that the three acts constituted one course of conduct.

29 It is common ground that s 557(1) of the Fair Work Act does not apply in terms to s 351, because it is not referred to in s 557(2). Section 557(1) should nevertheless be set out:

> **557 Course of conduct**
>
> (1) For the purposes of this Part, 2 or more contraventions of a civil remedy provision referred to in subsection (2) are, subject to subsection (3), taken to constitute a single contravention if:
> (a) the contraventions are committed by the same person; and
> (b) the contraventions arose out of a course of conduct by the person.

30 In my opinion the principles underlying the constraint on judicial discretion imposed by a provision such as s 557(1) should be considered, at least as a matter of discretion, in circumstances where s 557 does not apply on its terms. As Middleton and Gordon JJ said in *CFMEU v Cahill*, the risk of double punishment should still be recognised. However, the principles which inform the question whether what a person or entity is to be punished for is, in truth, one course of conduct extend beyond the criminal law's aversion to double punishment. A broader notion of what is a just outcome, based on a characterisation of a person's conduct, is involved.

31 Consideration in this Court of the concept of a single course of conduct (see, for example, *Mornington Inn Pty Ltd v Jordan* (2008) 168 FCR 383; [2008] FCAFC 70 at [41]-[42] per Stone and Buchanan JJ; *Construction, Forestry, Mining and Energy Union v Williams* (2009) 262 ALR 417; [2009] FCAFC 171 at [14]-[19] per Moore, Middleton and Gordon JJ), and in other Courts (see, for example, *Johnson v The Queen* (2004) 205 ALR 346; [2004] HCA 15 at [4]-[5] per Gleeson CJ; *Royer v Western Australia* (2009) 197 A Crim R 319; [2009] WASCA 139 at [24] per Owen JA) regularly refers to a passage from the judgment of Wells J in *Attorney-General (SA) v Tichy* (1982) 30 SASR 84 at 92-93, where his Honour said:

> It is both impracticable and undesirable to attempt to lay down comprehensive principles according to which a sentencing judge may determine, in every case, whether sentences should be ordered to be served concurrently or consecutively. According to an inflexible Draconian logic, all sentences should be consecutive, because every offence, as a separate case of criminal liability, would justify the exaction of a separate penalty. But such a logic could never hold. When an accused is on trial it is part of the procedural privilege to which he is entitled that he should be made aware of precisely what charges he is to meet. But the practice and principles of sentencing owe little to such procedure; what is fitting is that a convicted prisoner should be sentenced, not simply and indiscriminately for every act that can be singled out and brought within the compass of a technically identifiable conviction, but for what, viewing the circumstances broadly and reasonably, can be characterised as his criminal conduct. Sometimes, a single act of criminal conduct will comprise two or more technically identified crimes. Sometimes, two or more technically identified crimes will comprise two or more courses of criminal conduct that, reasonably characterized, are really separate invasions of the community's right to peace and order, notwithstanding that they are historically interdependent; the courses of criminal conduct may coincide with the technical offences or they may not. Sometimes, the process of characterization rests upon an analysis of fact and degree leading to two possible answers, each of which, in the hands of the trial judge, could be made to work justice. The practice of imposing either concurrent or consecutive sentences cannot avoid creating anomalies, or apparent anomalies, from time to time. What must be done is to use the various tools of analysis to mould a just sentence for the conduct of which the prisoner has been guilty. Where there are truly two or more incursions into criminal conduct, consecutive sentences will generally be appropriate. Where, whatever the number of technically identifiable offences committed, the prisoner was truly engaged upon one multi-faceted course of criminal conduct, the judge is likely to find concurrent sentences just and convenient.

32 In *Johnson* at [5], Gleeson CJ added that:

> Ultimately, justice requires due consideration of whether, and to what extent, the appellant "was truly engaged upon one multi-faceted course of criminal conduct", and whether the sentences imposed properly reflected the outcome of that consideration.

33 In sentencing for breaches of the criminal law, there is recognised tension and conflict between the considerations which sentencing judges must apply. McHugh J

described this in *AB v The Queen* (1999) 198 CLR 111; [1999] HCA 46 at [14] in the following terms:

> Many, probably the large bulk of, sentences reflect compromises between conflicting objectives of sentencing. One objective is to impose a sentence that reflects adequate punishment for the culpability of the convicted person, having regard to the community's view concerning the need for retribution, denunciation, deterrence, community protection and sometimes vindication. Another objective is to impose a sentence, with or without conditions, that will further the public interest by encouraging and not discouraging the convicted person to renounce criminal activity and to re-establish himself or herself as a law-abiding citizen. Still another objective is that the sentence should reflect an allowance for those circumstances, personal to the convicted person, which call for mitigation. These objectives and others have to be achieved within a conceptual framework that requires that there should be parity between sentences, that the sentence should be proportional to the circumstances of the crime and that, where more than one sentence is involved, the total sentence should not exceed what is appropriate for the overall criminality of the convicted person.

34 These compromises and tensions exist less acutely in determinations about the imposition of penalties, but appear nevertheless. In fixing a penalty, just as imposing a sentence, the aim is, as Wells J observed, to "mould a just sentence for the conduct" found to have occurred, and where there are "truly two or more incursions into criminal conduct" to punish these incursions separately.

35 Here, the respondent concedes that each contravention relates to a "distinct decision", although it submits the factual and legal substratum is the same. That submission takes matters at too broad a level. The starting point is to recognise the importance of the respondent's concession: there were indeed three entirely separate decisions, taken at different points in time, on the basis of a different set of circumstances and for a different purpose, each decision affecting the applicant adversely in different ways.

36 With the redeployment decision the applicant lost the opportunity he thought he had accepted the interim organiser job in order to pursue – namely, working on the Pilbara alliance. And he had to move back to Queensland. With the suspension decision he lost the right to attend work at all, and suffered the reputational damage and exposure to termination which attended the decision. With the dismissal, he lost his employment altogether. As I have set out above, each decision was taken for more than one reason, but those reasons differed as between the redeployment, and the suspension and dismissal, and each was made in a distinctly different context. I have assumed, for the purpose of this analysis and in the respondent's favour, that Mr Vickers did seriously consider what the applicant said in his letter in response to the suspension decision, and therefore was making a fresh decision about

the applicant's dismissal. The factors common to all three decisions were the applicant's political opinion, and the complaints from Mr Howes and the AWU about the applicant. The latter, I have previously found, were also connected to the political opinions the applicant held, and the perceptions of what these political opinions meant for the CFMEU.

37 While it is true that the events occurred over a short space of time, this does not necessarily indicate one course of conduct. Otherwise, the more quickly and hastily employers made decisions, or a series of decisions, the easier it would be for them to seek to characterise their decisions as one course of conduct.

38 In *Murrihy (No 2)*, Jessup J (at [76]) considered that a series of steps taken by the employer in that case (including termination of computer access and cessation of remuneration) were all "manifestations" of the employer's suspension of the employee. I consider that circumstance to be quite different from the present. In the present case, each of the contraventions is truly separate, and is not a manifestation of one of the other contraventions. Mr Vickers, with the assistance of Mr Weise and Mr Maher, consciously and deliberately took three decisions about what to do with the applicant.

39 At the time of each decision, Mr Vickers had a variety of choices about what he could do. After the 18 July meeting, he could have had the AWU complaints investigated. Or he could have had the applicant counselled and more closely supervised by Mr Weise. Or he could have suggested to the AWU that Mr Kerley be redeployed, thus supporting the interests of the CFMEU's own organiser. Instead, he chose to remove the applicant from Western Australia, and prevent him starting in the Pilbara position. That choice was substantially actuated by Mr Vickers' views about the applicant's political opinion, which also inclined him to accept Mr Howes' views and the AWU complaints at face value. On 22 July 2013, when Mr Vickers was given further information about the applicant's involvement with the Socialist Alliance, and about a Facebook post he had made, again Mr Vickers had choices available to him. He could have written a less confrontational letter to the applicant than he did. He could have discounted the Facebook post as a misguided outburst by a new and junior employee in the heat of the moment. He might have sought to understand the sense of betrayal the applicant felt towards Mr Kerley (had the applicant felt uninhibited enough to disclose to Mr Vickers that the comment was directed at Mr Kerley, which he clearly did not). Mr Vickers could have set about trying to understand why the applicant might have lied about the extent of his involvement with the Socialist Alliance and asked himself whether his

own emphasis on that issue in his decision-making was appropriate (let alone lawful). On 25 July 2013 (when he sent the "nothing changes from my perspective" email to Mr Weise and Mr Maher) and on 26 July 2013 when he decided to terminate the applicant's employment, Mr Vickers again had choices, other than the one he made. Yet, at each stage of his decision-making about the applicant's employment and future with the CFMEU, I have found he acted as he did because the applicant had been a member of the Socialist Alliance and was affiliated with it. In my opinion, it was this reason – the prohibited reason – which influenced Mr Vickers to make the choices which were the most detrimental to the applicant.

40 I consider each of Mr Vickers' three decisions to be a separate "incursion" into unlawful conduct under s 351 of the Fair Work Act. The question of penalties should in my opinion be approached on the basis there are three contraventions and three penalties should be imposed.

The level of penalty to be imposed

41 I have reviewed other decisions of this Court in relation to the imposition of penalties under s 351, or other similar provisions of the Fair Work Act, or its predecessors. I do so taking into account caution of the kind expressed by Logan J in *Fair Work Ombudsman v Australian Shooting Academy Pty Ltd* [2011] FCA 1064 at [35]:

> The position which obtains is that the discretion as the imposition of penalty must be exercised in the circumstances of individual cases. Particular care must be taken in the absence of guiding authority at an intermediate appellate level as to appropriate penalties in respect of frequently-encountered contraventions so as not to skew the imposition of penalty by reference to other outcomes in the original jurisdiction in respect of quite different facts.

42 Without engaging in any direct comparisons, in my opinion it is helpful to consider in particular some of the language used by other judges at first instance in their consideration of appropriate penalties, measured against the maximum penalties available in the circumstances.

43 The maximum penalties prescribed by Parliament are the legislative choice made about the outer limit of appropriate punishment for a particular contravention. However in a case where there are multiple contraventions to which the "one course of conduct" and totality principles must be applied, the maximum penalty specified for each single contravention may not be especially informative as to what represents a just outcome. At most the maximums set encourage the Court to ask itself whether the contravention as

found is of "the worst" kind. In *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 478, Mason CJ, Brennan, Dawson and Toohey JJ said:

> The second subsidiary principle material to this case is that the maximum penalty prescribed for an offence is intended for cases falling within the worst category of cases for which that penalty is prescribed. That does not mean that a lesser penalty must be imposed if it be possible to envisage a worse case; ingenuity can always conjure up a case of greater heinousness. A sentence which imposes the maximum penalty offends this principle only if the case is recognizably outside the worst category.
> (Citations omitted.)

44 The process of arriving at an appropriate penalty will remain one affected by what has been described as "instinctive synthesis": *Fair Work Ombudsman v Skilled Offshore (Australia) Pty Ltd* [2015] FCA 275 at [19] per Gilmour J, referring to *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560; [2008] FCAFC 8 at [27] per Gray J and [55] per Graham J, who in turn refer respectively to *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25 at [37] per Gleeson CJ, Gummow, Hayne and Callinan JJ (approving *Wong v The Queen* (2001) 207 CLR 584; [2001] HCA 64 at [74]-[76] per Gaudron, Gummow and Hayne JJ) and at [84] per McHugh J. However it is described, the aim is, as the authorities to which I have referred at [31] to [34] above suggest, to mould a just and proportionate sentence or, in this case, a just and proportionate penalty.

45 In *Skilled Offshore (Australia)*, Gilmour J fixed penalties for direct contraventions at 65% of the maximum, in relation to breaches by the Maritime Union Australia in enforcing a closed shop at the Western Australian waterfront over almost a year. His Honour described the contraventions (at [65]) in the following terms:

> the MUA's conduct involving, as it did, gross interference with the freedom of association rights of the Loves, depriving them, at a critical time of their lives, of the opportunity to gain well paid employment. These serious consequences for the Loves involved the MUA not only in refusing the Loves membership of the MUA but in the intimidation, by threats of industrial action, of OMS to which that company succumbed, such that OMS, although it wanted to employ the Loves, did not do so. The MUA's conduct involved its blatant use of illegitimate industrial action power to bully OMS into not employing the Loves.

46 His Honour imposed some penalties concurrently and some cumulatively, having regard to the totality principle.

47 In *National Tertiary Education Union v Royal Melbourne Institute of Technology* (2013) 234 IR 139; [2013] FCA 451, Gray J fixed penalties for two contraventions at $27,000 for the dismissal (being 82% of the then maximum penalty) and at

$17,000 for breaching the enterprise agreement (being 67% of the then maximum penalty), but then reduced the total penalty to $37,000 by applying the totality principle. His Honour found the respondent had made a university professor redundant for reasons including a complaint she made against her supervisor, and had breached the enterprise agreement by failing to offer the option of voluntary redeployment. At [141], His Honour described the contraventions in the following way:

> The contravention of s 340(1)(a) of the *Fair Work Act* must be regarded as very serious. In effect, RMIT made use of its redundancy processes to rid itself of an employee, who was considered to be troublesome, at least partly because she was prepared to exercise her workplace rights by making complaints about the behaviour of her immediate supervisor. The process was conducted unfairly, with an attempt to narrow the focus of consideration to a financial situation which was alleged to exist, but not established by a rigorous process and not in accordance with reality. Attempts to introduce into the redundancy process objective criteria, by reference to which Professor Bessant might have been able to justify retaining her position, were resisted. The contravening reasons for Professor Bessant's dismissal were kept secret. Even in Court, they were not addressed by Professor Gardner, and others who could have shed light on them were not called to give evidence. Their existence was certainly known to Ms Gough, as is demonstrated by the disclaimer in her letter of 28 October 2011. This contravention was serious also in its effect on Professor Bessant. There was evidence from Linda Gale and Mr Cupido, both from the NTEU, and from Professor Bessant herself, that the dismissal of a professor, even when labelled as a redundancy, would have a very significant effect on the ability of the dismissed professor to obtain another job in a university. Such a dismissal would mean inevitably that a prospective employer would take the view that the dismissed professor must have some undesirable qualities, or must have been guilty of some bad conduct, in order to have been chosen for redundancy. This evidence was not addressed squarely by RMIT in its evidence. The proposition that a dismissal for any reason makes it difficult to obtain another job, especially in a field in which the number of potential employers is quite small and the pool of possible candidates is quite large, is not inherently improbable. Professor Gardner conceded the scarcity of level E jobs in social sciences. I accept that there was serious damage to Professor Bessant's prospects of re-employment as a result of the redundancy process. That process itself was drawn out and complex, and caused significant distress to Professor Bessant. For all of these reasons, I take the view that the contravention was a very serious one.

48 In *Fair Work Ombudsman v W.K.O. Pty Ltd* [2012] FCA 1129, a child care centre had breached various provisions including by denying unpaid parental leave and adverse action for reasons including the employee's pregnancy. Barker J held (at [104]) that there should be a penalty "towards the lower end of the range", consistently with the penalty agreed between the parties. His Honour described the contraventions (at [104]) as "serious ones", and stated:

> The fact is that the respondents unilaterally and unlawfully decided to reduce the hours of employment of a pregnant employee. This led to the employee being constructively dismissed from her employment when she felt she had no option but to

terminate her employment in light of her significantly reduced hours.

49 In *W.K.O.*, it was obviously an important factor in his Honour's consideration that "in the end the respondents did not contest their liability at a trial and relatively early in the process admitted their contraventions", a matter which his Honour found to the respondents' credit: at [105].

50 I have reached the conclusion that the respondent's conduct in this case calls for significant penalties for the three contraventions, while recognising each contravention had different effects, and a different level of seriousness.

51 The absence of any evidence of previous contraventions by the respondent means, as Jessup J pointed out in *Murrihy (No 2)*, that the respondent's conduct must be measured in and of itself, without reference to previous conduct. I do not consider this as some kind of positive factor in the respondent's favour, which seemed to be the implication from the respondent's submissions. Especially in relation to unlawful discrimination, where the true reasons for conduct are often difficult to uncover, one cannot simply infer, as the respondent seemed to suggest the Court might, that this kind of conduct has not occurred before within the CFMEU. Nor can one infer it has. Rather, the conduct stands to be assessed for what it has been found by the Court to be. In my opinion absence of evidence about prior contraventions that have been litigated and determined simply means there is no evidence of that nature which might otherwise have contributed to an increase in the penalty to be imposed.

52 There are three aspects of the nature and extent of the conduct which I consider most significant in determining the level of penalty to be imposed. I have already addressed them above, but summarise them here.

53 First, each of Mr Vickers' decisions – redeployment, suspension and dismissal – had considerable consequences for the applicant. He had to move from one state to another. Then he had to face losing his job. Then he lost his job. Although as I noted in the 30 January 2015 reasons for judgment there was little evidence of loss adduced on behalf of the applicant, that fact does not affect my view about the serious nature of each of the contraventions. In particular, to dismiss a person because of his political opinion is especially serious, even accepting by that stage other factors were also at work in Mr Vickers' decision-making. As I have said more than once in these reasons and in my 30 January 2015 reasons, the applicant's political opinion was entangled in some of those other reasons as well.

54 Second, there were other choices available to the respondent, through Mr Vickers, when faced with the complaints by the AWU and Mr Howes. The respondent elected to take, in quite a confrontational and hurried way, the choices with the most serious consequences for the applicant. The redeployment was not, in my opinion, chosen out of any sense of kindness or fairness to the applicant, contrary to the way the respondent sought to characterise it. It was chosen because the respondent recognised the applicant had a fixed-term contract and could not be summarily dismissed on the basis of the AWU allegations.

55 Third, for an employer to act adversely to an employee's legitimate interests on the basis of the employee's political opinion is conduct to be censured in the strongest terms. In cross-examination, Mr Vickers recognised it would be unlawful, and inappropriate, to ask an employee questions about membership of the ALP, and was quick to insist he would not do so. He accepted, with similar alacrity, that he would not ask a CFMEU employee questions about her or his sexual orientation. When it came, however, to a political organisation that Mr Vickers saw (rightly or wrongly, with or without any basis in fact) as a threat to the way the CFMEU operated and was organised, he had no compunction in doing whatever needed to be done to an employee he perceived supported, or had been aligned with, that organisation. That is, when it really mattered, when something was perceived to be at stake, he would quickly and actively discriminate. That attitude led him to act as he did on the complaints of Mr Howes, which complaints as recorded in the witnesses' evidence appear similarly discriminatory. Mr Vickers acted irrespective of and without seeking to ascertain whether the applicant had any intentions of engaging in the kind of undermining and infiltration with which Mr Vickers tarred all those associated with the Socialist Alliance. That is, he engaged in stereotyping. He did not care, before he sacked Mr Sayed, whether Mr Sayed would in fact undermine or infiltrate the CFMEU in a way which was harmful. He acted on prejudice.

56 Those three aspects in my opinion make the three contraventions deserving of significant levels of penalties. It cannot be said the contraventions are of the most heinous or serious kind that could be imagined in the context of discriminatory adverse action against an employee. Nor are they trifling, trivial or insignificant.

57 I consider requirements of general deterrence not only support the imposition of penalties in this case, but also affect the amount of that penalty. The remarks of Marshall J in *Fair Work Ombudsman v Maclean Bay Pty Ltd (No 2)* [2012] FCA 557 at [29] – that rights

are a shell unless respected – have some resonance in the present case. The inclusion of anti-discrimination prohibitions in the Fair Work Act was designed to bring a broader range of conduct in the workplace into line with the general requirements of anti-discrimination law. By deeming s 351 to be a civil remedy provision for which penalties may be imposed, Parliament has clearly intended to make principles of general deterrence applicable to discriminatory conduct which contravenes s 351. General deterrence in the area of anti-discrimination has an important role to play, in part because discrimination is often difficult to prove, even when the adverse action or the effect of discrimination is obvious. Therefore, deterrence is important. Anti-discrimination law, and provisions such as s 351, operate on decision-making which has first an internal and then an external aspect. If, by the imposition of penalties, employers see that courts will look carefully and closely at their reasons for decision-making in the workplace, and will punish them if their reasons are prohibited reasons, in my opinion this is capable of contributing to employers, and those who act on their behalf, giving greater pause for thought about whether their reasons are lawful ones in advance of taking decisions.

58 I do not consider that special or specific deterrence in relation to the CFMEU has a large role to play in the fixing of penalties in this proceeding. The penalties must be such that they sound an effect within the union, make clear that what has occurred is unlawful and that the Court disapproves in serious terms. However there was nothing in the evidence of either Mr Vickers or Mr Weise which would make me apprehend the union would fail to learn from this experience. The discrimination was obvious, but did arise in somewhat particular circumstances that may be unlikely to be repeated. More critically, I am satisfied the CFMEU will now better understand its legal responsibilities in relation to the operation of s 351 on its decision-making about its employees.

59 The respondent was not required to compromise at all during the trial of the applicant's allegations, and was entitled fully to defend itself against them. Having chosen to do that, there is nothing in its conduct prior to or at trial which could be said to be deserving of any particular leniency or "credit", in contrast to circumstances where a respondent may admit a contravention and save the applicant and the Court the time and resources of a trial on liability. In its penalty submissions there is no apology, nor any acceptance of the unlawfulness the Court has found. The respondent is not required in any sense to demonstrate these features, but their absence removes those possible mitigating factors from the discretionary balancing exercise.

60 I do not consider the evidence of Mr Vickers at trial, and to which I referred at length in my 30 January 2015 reasons, shows anything in the nature of contumacy or malevolence, such as to increase the culpability of the respondent. Mr Vickers was at pains to deny the applicant's political opinion was a reason for the redeployment, the suspension and the dismissal, but in the context of the respondent's complete contesting of the allegations, this is unsurprising. I did not make any finding that Mr Vickers was wilfully dishonest. He sought to explain and rationalise his decision-making which is understandable given the spotlight placed on it by this trial. For some reason, he seemed to consider political allegiances and associations with the Socialist Alliance were in a different category from those with the main political parties in Australia. For the purposes of s 351 (and, I might add, any other anti-discrimination statute where political opinion is nominated as a protected attribute), the law makes no such distinction.

61 There was no other evidence of contrition, or attempts to ameliorate the effects of the unlawful conduct. The fact that the compensation ordered has been paid is nothing more than compliance with the Court's orders. Evidence could have been adduced, but was not, to demonstrate changes of practice within the CFMEU, or some new consciousness about the decision-making process where allegations about political affiliations of employees or officers are made. No such evidence was adduced, and so there is nothing of this kind to weigh in the balance in the respondent's favour.

The totality principle

62 The totality principle was described by Stone and Buchanan JJ in *Mornington Inn* (2008) 168 FCR 383; [2008] FCAFC 70 at [42] as:

> a final check to be applied to ensure that a final, total or aggregate, penalty is not unjust or out of proportion to the circumstances of the case.

63 Their Honours refer at [43] to the more expansive explanation of the principle given by the High Court in *Mill v The Queen* (1988) 166 CLR 59 at 62-63, where the Court endorses descriptions of the principle given by a number of commentators, for example, Thomas DA, *Principles of Sentencing* (2nd ed, Heinemann, 1979), pp 56-57 where the learned author describes the court's function in applying the principle as "to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'". In *Mill*, the High Court also refers at 63 to the decision of the Full Court of the South Australian Supreme Court in *R v Knight* (1981) 26 SASR 573 where Walters, Zelling and Williams JJ in a joint

judgment at 576 described the task as being to look at the totality of the sentences and to decide whether it could be said that in all the circumstances of the case, "the imposition of a cumulative sentence was incommensurate with the gravity of the whole of his proven criminal conduct" or with the offender's "due deserts". In *Knight*, the Full Court at 576 also referred to the pithy summation of the task by Lord Widgery LCJ in *R v Faulkner* (1972) 56 Cr App R 594, at 596:

> at the end of the day, as one always must, one looks at the totality and asks whether it was too much.

64 Accepting the need for powers to be exercised fairly, reasonably and judicially, this task nevertheless remains highly intuitive. Part of the judicial task, and the reason it is reposed in judges, is to bring to bear a detached sense of what is fair and just, to the community, the victim and the perpetrator, doing the best one can to balance what are inevitably conflicting interests.

Conclusion on the amount which should be fixed as a penalty for each contravention

65 Given there are three contraventions for which I have found penalties should be imposed separately, the theoretical maximum penalty that could be imposed is $51,000 for each contravention, making a total of $153,000. In addition to the features of the respondent's conduct, through Mr Vickers, that I have set out above, I make the following additional findings.

66 In my opinion, different penalties for each contravention are justified because of the nature and effect of each contravention.

67 For the contravention of s 351 by the redeployment of the applicant I consider a penalty of $20,000 should be imposed. Although it was the contravention with the least permanent effect, the redeployment was the decision which set the scene for the remainder of the conduct against the applicant. It set Mr Vickers on a path from which he scarcely considered deviating. It was at this point that the prohibited reason operated with greatest effect. Mr Vickers was barely persuaded to keep the applicant on at all after the 18 July 2013 meeting. His views of the applicant, informed and actuated by his views about the applicant's political opinion, were fairly well cast after the redeployment decision. Had Mr Vickers put out of his mind the prohibited reasons and approached the complaints of Mr Howes and the AWU in a different manner, the outcome for the applicant – at least in the medium term – would most likely have been quite different. In my opinion, the redeployment decision was

the one with less non-prohibited justifications, on any objective view. It was the one most closely connected with the complaint of Mr Howes that the applicant was “a Trot”.

68 For the contravention of s 351 by the suspension of the applicant, I have imposed a penalty of $10,000. The suspension decision was an immediate reaction to the discovery of the applicant’s lies about his involvement with the Socialist Alliance, and Mr Vickers’ mistaken impression of what was meant in the Facebook post. Its hasty and judgmental nature reflected the playing out of the views Mr Vickers had already formed about the applicant’s allegiances. The suspension lasted for a brief period of time. It did not result in any relocation for the applicant. He was suspended on pay. It certainly made it clear his employment was at risk, and he was subjected to what was no doubt a difficult and confrontational meeting on 26 July 2013 in Sydney. Although serious, its effects were short-term. In the whole context, it is the least serious of the three contraventions.

69 For the contravention of s 351 by the dismissal of the applicant I have imposed a penalty of $15,000. This decision ended the applicant’s employment. It is the ultimate sanction an employer can impose on an employee and cannot be regarded as anything but a serious contravention. The failure of the applicant to adduce what one might have expected to be fairly straightforward evidence of loss means there is little or no evidentiary basis for the Court to assess the impact – immediate or continuing – on him of the contravention. The Court can, I consider, take into account the obvious effect termination of employment has on any person where it is not voluntary. It can take into account the applicant’s bare statement that he remained unemployed at the time of trial and that he had “looked for a lot of jobs” since leaving the CFMEU, although the reasons for his unemployment and the efforts he had made (or not made) to find other employment were not otherwise the subject of any evidence. It is difficult in those circumstances to afford much weight to his statement of unemployment. Notwithstanding the paucity of evidence from the applicant, this penalty must impose tangible punishment for unlawfully depriving the applicant of his entitlement to work at the CFMEU.

70 The total for the three contraventions is therefore $45,000. I consider that total is just, and proportionate to the circumstances of the case. In a society where civil and political rights are greatly respected, in particular by the legislative choices of the Parliament, to require the respondent to pay penalties totalling $45,000 is commensurate in my opinion with the gravity of the respondent’s conduct as I have found it to be. The Court should mark

its disapproval of an employer taking adverse action against an employee because of his political opinion. That is especially so where the employer sees the particular political opinion held as a "threat" to the employer, without any inquiry into what the employee has in fact done and based on the stereotyping of persons the employer believes hold similar political opinions.

71 I should add that, even if I had concluded that the three contraventions should be characterised as one course of conduct, then I would consider a penalty of $45,000 in respect of that course of conduct as a whole to be just and appropriate.

Penalties should not be payable to the applicant

72 The applicant has sought orders that the penalties be payable to him, but does not develop that submission in any detail. Somewhat surprisingly, the respondent's submissions did not address this issue at all.

73 In *NTEU v RMIT* at [146] Gray J described the effect of s 546(3) as follows:

> The scheme under which the enforcing party is the recipient of the penalty is designed to encourage the enforcement of provisions of the *Fair Work Act* and of agreements and other instruments made under it.

74 Those observations had particular force in a case of the kind with which his Honour was then dealing, where a union had brought proceedings on behalf of one of its members, thus shouldering for itself the burden of the conduct of what was obviously a substantial piece of litigation, in circumstances where that litigation had as one of its aims the securing of individual financial benefits for the union member by way of compensation, but also of marking out, from the perspective of the protection of the rights of all relevant workers, the boundaries of alleged unlawful conduct by RMIT.

75 There is more than a little irony in the fact that the contravener here is a union, in relation to a provision where the circumstances which obtained in *NTEU v RMIT* are far more commonplace. This case demonstrates that a union is no less accountable for such contraventions than any other employer.

76 I dealt with the authorities about payment of penalties, and the underlying rationales concerning common informers, in *Dafallah v Fair Work Commission* (2014) 225 FCR 559; [2014] FCA 328 at [139]-[143], and I need not repeat those passages. In those paragraphs, amongst other observations, I respectfully agreed with the remarks of Greenwood

J in *McIlwain v Ramsey Food Packaging Pty Ltd (No 4)* (2006) 158 IR 181; [2006] FCA 1302 at [108] (endorsed by Branson and Lander JJ in *Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union* (2008) 171 FCR 357; [2008] FCAFC 170 at [70]):

> the imposition of a penalty under the Act is designed fundamentally to serve the public interest in acting as a deterrent to the particular Respondents and others generally from engaging in conduct of the kind the subject of the findings. In circumstances where an order has been made for compensation for both economic loss and a non-economic component concerning the disturbance, dislocation and loss of secure employment suffered by the individuals, there seems to be no good policy reason why the individuals should additionally have the benefit of an order for the payment to them of the penalty.

77 I consider those remarks applicable and pertinent to this proceeding.

78 Although I acknowledge the rationale behind the "common informer" provisions, described in some detail by Moore J in *Schanka v Employment National (Administration) Pty Ltd (No 2)* (2001) 114 FCR 379; [2001] FCA 1623 at [77]-[87], the interrelationship between this rationale and the existence of compensation provisions such as s 545 has not been much explored. It may be that these rationales developed in contexts where the person who was the "common informer" was not the person directly affected by the contravention, or if she or he was, had no statutory right to compensation, nor to other remedies such as reinstatement, so that the only recompense or "reward" the person who brought the proceeding and exposed the unlawful behaviour could receive was what the Court ordered to be paid by way of penalty.

79 The existence of these tensions seems to have escaped the drafters of the Explanatory Memorandum to the Fair Work Bill 2008 (Cth) which states:

> 2157. Subclause 546(3) provides that the court may order pecuniary penalties (or part of a pecuniary penalty) to be paid to the Commonwealth, a particular organisation or a person. Ordinarily, any pecuniary penalty awarded by the court is paid to the applicant or, in the case of proceedings brought by a Commonwealth official such as an inspector, to the Commonwealth (on the basis that the applicant represents the Commonwealth).
>
> 2158. Also, it gives the court the flexibility to award the penalty to someone other than the plaintiff or applicant where the plaintiff or applicant requests. For example, where an inspector brings penalty proceedings against the director of a company that has gone into liquidation, the inspector might request the court to pay any penalty to an employee rather than the Commonwealth in circumstances where the employee is out of pocket as a result of the company being liquidated.
>
> …
>
> 2160. Subclause 546(5) provides that a court can make a pecuniary penalty order in

> addition to one or more orders made under clause 545. The effect of this is that a court is not restricted to the making of only one order in respect of any contravention of a particular civil remedy provision.
>
> 2161. For example, in a case involving a contravention of a civil remedy provision related to underpayment of minimum wages under a modern award, the court may order that the employee is entitled to compensation for that underpayment and a pecuniary penalty may also be imposed on the employer for the contravention.

80 The proposition that both compensation and penalties might be ordered by the Court is straightforward. The proposition that they might both be ordered to be paid to the same person is more complex. In addition to *McIlwain* and *Plancor*, there are two cases which do discuss the complexity, at least by reference to the concept of avoiding "windfalls".

81 In *Seymour v Stawell Timber Industries Pty Ltd* (1985) 9 FCR 241; (1985) 13 IR 289 (in the related context of the *Conciliation and Arbitration Act 1904* (Cth)), Gray J did advert to the need in imposing penalties to adhere to the legislative scheme as it appears, and his Honour's approach appears to proceed on the basis that penalties should not be imposed in a way which delivers a windfall contrary to the particular legislative scheme. The proceeding in *Seymour* was brought by the applicant in his capacity as an inspector under the Conciliation and Arbitration Act, and the contraventions related to failure to pay two apprentices in accordance with the applicable award. Only one of the two apprentices was a member of any relevant union. As such, the Court had no power under s 119 of the Conciliation and Arbitration Act to make any order relating to unpaid wages with respect to the apprentice who was not a union member. The applicant submitted that the Court should order the penalty be paid to the non-union member apprentice in part satisfaction of the unpaid wages. The Court declined to make such an order and instead ordered the whole of the penalty be paid into the Consolidated Revenue Fund.

82 Gray J made the following observation in *Seymour* at 268:

> The legal obligation remains on the respondent to pay wages to Mr Hughes. It is true that the court cannot, under either s 119(3) or s 123 of the Act, order the respondent to make those payments. Nevertheless, I would expect the company to fulfill its legal obligation, once it is made aware of the existence of that obligation by reason of the decision of the court. If the company were to go into liquidation, it may be that the liquidator would have an obligation to pay Mr Hughes's outstanding wages. If the amount of the penalty were paid to Mr Hughes, and the company discharged its legal obligation by paying him wages, Mr Hughes would have received a windfall benefit. He would have received this benefit by reason of his not having been a member of an organisation. In my view, to confer such a benefit would be a denial of the central role of organisations in the system of conciliation and arbitration set up under the Act, and would run contrary to the objects of the Act. …
> (Citations omitted.)

83 Observations to similar effect concerning the need to order penalties in a way which was consistent with the legislative scheme as it stood were made by Northrop J at 246.

84 In *CPSU, The Community and Public Sector Union v Telstra Corporation Limited* (2001) 108 IR 228; [2001] FCA 1364 at [25]-[28], and after having examined the history of the "common informer" prosecution, Finkelstein J stated

> It cannot be doubted that employer and employee organisations play a legitimate and important role in seeing that there is compliance with the provisions of the Workplace Relations Act. For example, an individual employee will rarely have the ability to fund a proceeding for a contravention. If unions do not bring such proceedings, contraventions will go unpunished.
>
> Perhaps the "usual" order is to be explained on the basis that often an industrial organisation brings proceedings for a contravention of the Workplace Relations Act to protect the legitimate interests of its individual members. In such a case it is appropriate for the organisation to receive the penalty, to defray its actual costs and to provide some compensation for the time lost by its staff. In this regard it should be noted that, apart from exceptional cases, a party to a proceeding in a matter arising under the Workplace Relations Act is not entitled to recover costs: see s 347.
>
> However, there is no reason to make "the usual order", if that will result in a windfall to an organisation. Proceedings for pecuniary penalties are not to be used for profit: cf *Municipal Officers Association of Australia v City of Bayswater* (1987) 22 IR 45, 51; *Seymour v Stawell Timber Industries Pty Ltd* (1985) 13 IR 289, 311.
>
> An appropriate order (if there be enough funds) would allow the unions a sufficient sum to meet their costs and expenses, including the expense of staff time. The balance (if any) should be paid into the Consolidated Revenue Fund. …

85 At least part of the explanation for what Gray J describes in *Gibbs v The Mayor, Councillors and Citizens of City of Altona* (1992) 37 FCR 216 at 223-224 as the "usual" order that penalties be payable to the person who brought the proceeding appears to be the public interest in providing recompense for costs and expenses incurred in bringing the proceeding, so as to encourage (or, at least, not discourage) the exposure of allegations of unlawful conduct. His Honour said:

> The usual order, when the proceeding is not brought by an inspector appointed under the Act, is for payment to the person or organisation applying for the penalty. … In the present case, the applicant has brought the proceeding on behalf of the Union, to enforce the Award for the benefit of the Union and its members. Had the applicant brought the proceeding in his personal capacity, and at his own expense, it would have been appropriate to order that the penalties be paid to him. It is unlikely that the applicant has become responsible personally for the costs of the proceeding and more likely that those costs will be met by the Union. In the circumstances, it is appropriate that the Union should be the recipient of the penalties.

86 It is to be noted here that, just as Finkelstein J did in *CPSU v Telstra*, his Honour appears to refer to expenses and costs in a broader sense than simply legal costs.

87 The current legislative policy manifested in the Fair Work Act by s 570(1) is that parties to proceedings such as the present are, subject to s 570(2), or ss 569 or 569A, to bear their own legal costs. This adds a further tension in the appropriate approach when considering whether to order that penalties be payable to a person in the applicant's situation.

88 Where the applicant is a union, or other representative organisation, there will be a wide range of resources occupied in bringing a proceeding alleging contraventions of the Fair Work Act, many of which are separate to any fees paid to solicitors and counsel for legal representation and advice in the proceeding. To that extent the rationale remains for ordering a penalty be paid to a union, or other representative organisation, even in the face of the clear legislative policy evinced in s 570 of the Fair Work Act.

89 That rationale has no application in the present case. In the present case, whatever fees for solicitors and counsel the applicant has incurred, Parliament has determined that, unless the circumstances set out in s 570(2), or ss 569 or 569A, exist, he should bear his own costs of this proceeding. Once again, it would in my opinion introduce an inconsistency into the application of the present legislative scheme in the Fair Work Act to order that the respondent pay penalties to the applicant so that he could, in that way, recover his legal costs.

90 The circumstances of the present case provide a good example of the tension between an exercise of the power under s 546(3)(c) and the fact that the Court has already made a final determination, on the basis of the evidence adduced (or not adduced) by the same person, as to the compensation which it is appropriate the respondent pay to the person in relation to the contraventions.

91 In the 30 January 2015 judgment, I observed that there was little or no evidence of damage or harm adduced on behalf of Mr Sayed. To say that is not to say there was no significant general harm caused to Mr Sayed by the respondent's conduct: rather, that if there was, Mr Sayed did not seek to prove it. It was for that reason that, despite my findings of three serious contraventions of s 351 of the Fair Work Act, resulting in Mr Sayed losing his job, there was a relatively modest award of general compensation. Simply put, there was no evidentiary foundation laid for any more. Nor was there any evidence about ongoing financial loss. The loss of income component of Mr Sayed's compensation award under s 545

was limited to a large extent by my finding (at [311]) that it was probable it would have taken no longer than six months before the applicant would have, in any event and in the absence of any unlawful discrimination, moved out of the Pilbara position – whether at his own instigation or that of the respondent.

92 In combination, these factors explain why, despite the language I have used in these reasons for judgment about the seriousness of the respondent's contraventions, what the respondent has to this point been ordered to pay to Mr Sayed has been relatively modest. That is either because there was a forensic decision taken not to adduce any further evidence on behalf of Mr Sayed, or because the damage was of a limited nature, or both.

93 In my opinion, to order that the sums of money imposed by way of penalty on the respondent be paid to the applicant would to be to deliver to him a windfall which would not be appropriate in the circumstances, and would not serve the interests of the administration of justice. He would receive more in real terms through the penalty payment than I determined he was entitled to by way of compensation, yet would receive that $45,000 in addition to receiving payment from the respondent by way of compensation. The inherent requirement in the compensation provisions of the Fair Work Act that a person seeking compensation prove the loss he or she alleges he or she has suffered, and otherwise prove to the satisfaction of the Court the entitlement to the remedy sought (e.g., reinstatement) would be undermined, as would the legislative policy behind s 570(1).

94 There will be orders that the penalties be payable to the Commonwealth, pursuant to s 546(3)(a) of the Fair Work Act. The penalties are payable within 25 working days from the date of the pronouncement of these orders.

I certify that the preceding ninety-four (94) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mortimer.

Associate:

Dated: 13 April 2015

ANNEXURE “JDF-3”

FEDERAL COURT OF AUSTRALIA

Sayed v Construction, Forestry, Mining and Energy Union

[2016] FCAFC 4

Tracey, Barker and Katzmann JJ

17 November 2015, 22 January 2016

Industrial Law — Civil penalties — Imposition of penalty — Discretion to award penalties to successful applicant — Whether party that brings successful contravention proceeding usually entitled to payment of any pecuniary penalty imposed — Fair Work Act 2009 (Cth), s 546(3).

Section 539(2) of the *Fair Work Act 2009* (Cth) (FWA) relevantly provided that the persons who were entitled to apply for the imposition of a pecuniary penalty for a contravention of s 351 included a person affected by the contravention, an industrial association or an inspector. Section 546(3) of the FWA further relevantly provided that the Court could order that a pecuniary penalty, or part of a pecuniary penalty be paid to the Commonwealth, a particular organisation, or a particular person.

The question for the Court was whether the primary judge had erred in ordering that a pecuniary penalty imposed on the respondent, as a result of a proceeding successfully brought by the appellant, be paid to the Commonwealth. The primary judge had relevantly held that it was not appropriate to order that the penalty be paid to the applicant because it would deliver him a “windfall” in circumstances where he had also been awarded compensation for loss occasioned by the contravention of the FWA.

Held: By the Court: The power conferred by s 546(3) of the FWA is ordinarily to be exercised by awarding any penalty to the successful applicant, save that when a public official vindicates the law by suing for and obtaining a penalty, it is appropriate that the penalty be paid to the Consolidated Revenue Fund. Further the penalty may also be ordered to be paid to the organisation on whose behalf the initiating party has acted. [96], [101]

Vehicle Builders’ Employees’ Federation of Australia v General Motors Holdens Pty Ltd (1977) 32 FLR 100, followed.

Gibbs v Mayor, Councillors and Citizens of City of Altona (1992) 37 FCR 216; *Seymour v Stawell Timber Industries Pty Ltd* (1985) 9 FCR 241; *Woodside Burrup Pty Ltd v Construction, Forestry, Mining and Energy Union* (2011) 220 FCR 551; *Murrihy v Betezy.com.au Pty Ltd (No 2)* (2013) 221 FCR 118, approved.

Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union (2008) 171 FCR 357, considered.

Per curiam: There is no connection to be drawn between the exercise of power to award a penalty to an applicant and the power to order compensation under the FWA to an applicant who has suffered loss. [103]-[104]

Community and Public Sector Union v Telstra Corporation Ltd (2001) 108 IR 228; *Municipal Officers Association of Australia v City of Bayswater* (1987) 22 IR 45, disapproved.

Finance Sector Union of Australia v Australia and New Zealand Banking Group Ltd [2002] FCA 1035, approved.

Appeal against decision of Mortimer J, [2015] FCA 338, allowed.

Cases Cited

Community and Public Sector Union v Telstra Corporation Ltd (2001) 108 IR 228.

Dafallah v Fair Work Commission (2014) 225 FCR 559.

Finance Sector Union of Australia v Australia and New Zealand Banking Group Ltd [2002] FCA 1035.

Gibbs v Mayor, Councillors and Citizens of City of Altona (1992) 37 FCR 216.

Hannpost Pty Ltd v Mita Copiers Australia Pty Ltd (1996) 67 FCR 416.

McIlwain v Ramsey Food Packaging Pty Ltd (No 4) (2006) 158 IR 181.

Municipal Officers Association of Australia v City of Bayswater (1987) 22 IR 45.

Murrihy v Betezy.com.au Pty Ltd (No 2) (2013) 221 FCR 118.

Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union (2008) 171 FCR 357.

Sayed v Construction, Forestry, Mining and Energy Union [2015] FCA 338.

Sayed v Construction, Forestry, Mining and Energy Union (2015) 327 ALR 460.

Schanka v Employment National (Administration) Pty Ltd (No 2) (2001) 114 FCR 379.

Seymour v Stawell Timber Industries Pty Ltd (1985) 9 FCR 241.

Vehicle Builders' Employees' Federation of Australia v General Motors Holdens Pty Ltd (1977) 32 FLR 100.

Woodside Burrup Pty Ltd v Construction, Forestry, Mining and Energy Union (2011) 220 FCR 551.

Appeal

The appellant appeared in person.

S Crawshaw SC, for the respondent.

22 January 2016

The Court

1 *Mr* Muhammad Ali *Sayed* was employed by the Construction, Forestry, Mining and Energy Union (CFMEU or union) as an organiser for a little over three months in 2013. During the course of his employment allegations were made about his conduct which led, ultimately, to him being dismissed. He commenced a proceeding in this Court alleging that various disciplinary responses by the CFMEU, culminating in the termination of his employment, constituted adverse action within the meaning of Pt 3-1 of the *Fair Work Act 2009* (Cth) (FW Act). He further alleged that such action had been taken against

him because of his political opinion in contravention of s 351(1) of the FW Act. Mr Sayed sought relief which included compensation, reinstatement and the imposition of pecuniary penalties on the CFMEU.

2 Liability issues were tried first. On 30 January 2015 the primary judge made a declaration that three of the four actions taken by the CFMEU against Mr Sayed had been taken because of his political opinion and that, as a result, contraventions of s 351 of the FW Act had occurred: see *Sayed v Construction, Forestry, Mining and Energy Union* [2015] FCA 27. The four disciplinary measures about which Mr Sayed complained were a direction to him to travel from Western Australia to Sydney to attend a meeting at which his conduct was to be discussed, and his subsequent redeployment, suspension and dismissal. Her Honour ordered that the CFMEU pay Mr Sayed $3,000 by way of compensation for the distress and humiliation caused to him by these contraventions. On 6 February 2015 her Honour made a further order that the CFMEU pay Mr Sayed $36,984.16, less tax, as compensation for loss of income caused by the termination of his employment.

3 Her Honour then considered written submissions from the parties relating to what, if any, pecuniary penalties should be imposed on the CFMEU in respect of these contraventions. In his written submissions Mr Sayed sought an order that any penalties imposed on the CFMEU should be paid to him. This claim was not dealt with by the CFMEU in its written submissions. On 13 April 2015 her Honour made orders imposing pecuniary penalties in respect to each of the three adverse actions which she had held had occurred. Penalties of $20,000, $10,000 and $15,000 were imposed respectively for the redeployment, the suspension and the dismissal of Mr Sayed. Her Honour further ordered that each of these penalties should be payable to the Commonwealth: see *Sayed v Construction, Forestry, Mining and Energy Union* [2015] FCA 338.

4 On 30 April 2015 Mr Sayed filed an appeal against her Honour's order that the penalties be paid to the Commonwealth. He sought orders setting aside that order and the making of an order that the penalties be paid to him.

5 On 19 May 2015 the CFMEU filed a notice of cross-appeal. The cross-appeal was said to be against the compensation orders made on 30 January 2015 and 6 February 2015 and each of the orders imposing penalties made on 13 April 2015.

6 The appeal was case managed. Procedural orders were made by Jessup J on 14 May 2015 and 19 June 2015 and by Tracey J on 4 November 2015. One of these procedural orders required Mr Sayed to file an outline of submissions in support of his appeal and in response to the CFMEU's cross-appeal by 9 November 2015. Mr Sayed filed submissions on 10 November 2015. In those submissions Mr Sayed advanced arguments in support of his claim that the pecuniary penalties, imposed by the primary judge on the CFMEU, should be payable to him. In addition, however, he sought to challenge her Honour's finding that the direction, given to him, to return to Sydney to attend the meeting did not constitute adverse action. He also challenged her Honour's findings relating to the quantum of compensation and asserted an entitlement to payment of $120,188.77. Mr Sayed neither applied for nor foreshadowed an application to amend his notice of appeal to raise these additional grounds.

7 At the commencement of the appeal hearing Mr Sayed made oral applications for leave to amend his notice of appeal and to tender further documentary

evidence in support of his appeal. The Court refused both applications and intimated that it would provide reasons for so ruling at a later date. Those reasons follow.

8 Senior Counsel for the CFMEU, in written submissions filed shortly before the appeal hearing, properly drew attention to the possibility that its proposed proceeding might not be a cross-appeal within the meaning of the *Federal Court Rules 2011* (Cth) (Rules). He submitted that, if the Court did not consider that the purported cross-appeal met the requirements of the Rules, the CFMEU should be granted an extension of time within which to file an appeal in the same terms.

The issues

9 The following issues were raised by the pleadings and submissions:

(1) Whether the CFMEU has cross-appealed and, if not, whether it should be granted an extension of time within which to file an appeal.

(2) Whether Mr Sayed should be permitted to amend his notice of appeal to raise additional grounds.

(3) Whether Mr Sayed should be given leave to file further documentary evidence in support of his appeal.

(4) Whether her Honour erred in ordering that the penalties be paid to the Commonwealth, and not to Mr Sayed.

10 The first three procedural questions were disposed of at the hearing. The Court determined that the purported cross-appeal did not satisfy the requirements of r 36.21(1) of the Rules and made a declaration to that effect. It refused the CFMEU leave to file an appeal out of time. The Court also determined that Mr Sayed should not be permitted to amend his notice of appeal and refused leave to file further documentary evidence in support of his appeal. The Court indicated that it would publish its reasons for these decisions at a later date and then proceeded to hear Mr Sayed's appeal.

The procedural questions

Preliminary observations on case management

11 Before dealing with the first three issues something should be said generally about the context in which the related applications came to be made. Section 37M of the *Federal Court of Australia Act 1976* (Cth) (FCA Act) provides that the overarching purpose of the civil practice and procedure provisions which govern the operation of the Court is the facilitation of the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible. These provisions include the Rules. Section 37M(3) provides that such provisions "must be interpreted and applied, and any power conferred or duty imposed by them (including the power to make Rules of Court) must be exercised or carried out, in the way that best promotes the overarching purpose". Section 37N of the FCA Act requires that parties and their legal advisers must conduct proceedings in a manner consistent with the overarching purpose.

12 The primary judge's findings relating to liability and her related orders were published on 30 January 2015 and 6 February 2015. Neither party appealed against her Honour's compensation orders or the declaration on which they were founded within the 21 days prescribed by r 36.03 of the Rules.

13 The primary judge's orders imposing penalties on the CFMEU for contravening s 351(1) of the FW Act and the reasons for making those orders were published on 13 April 2015. Mr Sayed's appeal was filed on 30 April 2015. No appeal was filed by the CFMEU. Its notice of cross-appeal was not filed until 19 May 2015. There is a strong basis for inferring that, had Mr Sayed not appealed, the CFMEU would not have sought to challenge any of the orders. Similarly, it may readily be inferred, that, had the CFMEU not lodged its notice of cross-appeal, Mr Sayed would not have sought to add to his grounds of appeal.

14 Case management of the appeal commenced on 14 May 2015 at which time the CFMEU's proposed cross-appeal had been foreshadowed but not filed. Mr Sayed had six months notice that the CFMEU was proposing to cross-appeal and of the orders which it was seeking to challenge. Despite this, the possibility of his expanding his grounds was first raised, somewhat obliquely, in his written submissions filed on 10 November 2015.

15 The CFMEU, for its part, did not alert Mr Sayed or the Court to the possibility that the efficacy of its cross-appeal might arise as an issue on the appeal until its written submissions were filed on 20 October 2015.

16 The result was that both parties were placed at a disadvantage when oral applications were made at the commencement of the appeal hearing.

17 The parties should have, but did not, raise these issues during the case management process. The failure to do so was inconsistent with the obligations imposed on them by s 37N of the FCA Act. Their conduct was antithetical to the overarching purpose.

Has the CFMEU cross-appealed and, if not, should it be granted an extension of time within which to file an appeal?

18 The CFMEU's notice of cross-appeal identified the orders which it sought to challenge as:

- The compensation order made on 30 January 2015;
- The compensation order made on 6 February 2015; and
- The three orders, made on 13 April 2015, imposing pecuniary penalties on it for contravention of s 351(1) of the FW Act.

19 Cross-appeals are dealt with in r 36.21 of the Rules. Relevantly that rule provides:

> (1) A respondent who wants to appeal from part of a judgment or an order must file a notice of cross-appeal, in accordance with Form 123.
>
> (2) The notice of cross-appeal must state:
>
> (a) the part of the judgment, or the order, to which the cross-appeal relates; and

20 The predecessor of r 36.21 was O 52, r 22, which facilitated an appeal by a respondent who desired "to appeal from a part of the judgment or to seek a variation of a part of the judgment" against which an appeal had been lodged. A "judgment" was defined to mean an order which was under appeal. The rule in this form was considered by a Full Court in *Hannpost Pty Ltd v Mita Copiers Australia Pty Ltd* (1996) 67 FCR 416. Branson J (with whom Sheppard and Spender JJ agreed) held that, while a cross-appeal could be brought against "part of a judgment" it could not be brought against "the whole judgment": see at 427.

21 The Explanatory Statement for the 2011 Rules said that the new Pt 36 did "not substantially alter existing practice but streamlines, simplifies and consolidates some aspects of the former Rules". It also stipulated that the Part dealt with notices of cross-appeal "in similar terms existing under the former Rules".

22 These statements are accurate. Although orders are specifically referred to in r 36.21(1) and (2) the reference to "the judgment" in the former O 52, r 22 picked up orders.

23 The CFMEU's notice of cross-appeal, in our view, seeks to challenge all of the orders made by the primary judge. The compensation order made on 30 January 2015 was the only coercive order made on that day. It was accompanied by a declaration that the CFMEU had contravened s 351 of the FW Act when it deployed, suspended and dismissed Mr Sayed and a number of procedural directions. The purpose of the declaration was to identify the legal basis for the making of the compensation order under s 545 of the FW Act. The only order made on 6 February 2015 was another order for compensation. The CFMEU also sought to challenge three of the four orders made on 13 April 2015. Each of these three orders imposed a pecuniary penalty for the contraventions. The fourth order was merely consequential: it directed that the penalties should be paid to the Commonwealth. In these circumstances we did not consider that the notice of appeal was confined to a part of a judgment or an order made by the primary judge.

24 We announced that a declaration to this effect would be made.

25 The CFMEU submitted that, if the Court considered that the purported cross-appeal was not limited to parts only of the primary judge's orders, it should be granted leave to file a notice of appeal in the same terms. The application was consented to, but only on a quid pro quo basis, that is to say, only if Mr Sayed were given leave to substantially amend his notice of appeal.

26 The CFMEU could have but did not appeal against any of the primary judge's orders until after Mr Sayed had appealed against the consequential order made on 13 April 2015. No doubt this was the result of forensic decisions. No evidence was tendered to explain the reason for the failure to appeal within the time limit prescribed by the Rules.

27 Again, any such application could have and should have been made in the course of the appeal management process. The CFMEU is a sophisticated and experienced litigant in this Court. No good reason was shown to justify extending to it the indulgence that it sought.

28 In these circumstances we determined that an extension of time to appeal should not be granted.

Should Mr Sayed be permitted to amend his notice of appeal?

29 Mr Sayed had been aware, for over nine months, of the quantum of compensation which had been awarded to him by the primary judge and the basis of the relevant calculations. He did not seek to challenge the adequacy of the awards or the legal reasoning which underpinned them. When he made his oral application Mr Sayed had not prepared a draft amended notice of appeal.

30 Mr Sayed failed to provide any adequate explanation for his late application. The additional grounds on which he proposed to rely had not been formulated. As a result the CFMEU would have been forced to speculate about the case it might belatedly be called on to meet.

31 The application was, therefore, refused.

Should Mr Sayed be given leave to file further documentary evidence in support of his appeal?

32 Mr Sayed applied for leave to tender and rely on eight documents which (with one exception) he said had been in the Court book at trial but had not been tendered. The exception was the bill of costs received from his solicitor on which he, initially, said that he proposed to rely to advance submissions relating to the quantum of compensation and his claim to be paid the pecuniary damages awarded against the CFMEU.

33 Mr Sayed produced a list which identified each of the eight documents. On examination it emerged that five of the documents had, in fact, been tendered at trial. A sixth document was said to be an email and an attachment. The covering email had not been tendered but the attachment had. That left two documents. The first was a bundle of job applications which had been in the Court book but had not been tendered. The final document was the solicitor's bill of costs.

34 Under questioning Mr Sayed abandoned any reliance on the bill of costs because he ultimately accepted that any costs burden which fell on him had no bearing on the amount of compensation to which he was entitled. Nor did it support his claim that the pecuniary damages should be paid to him.

35 Rule 36.57 requires that any application to the Court to receive further evidence on appeal must be filed at least 21 days before the hearing and be accompanied by an affidavit containing certain prescribed information. No such application was made to the Court.

36 Mr Sayed was represented by Senior and Junior Counsel at trial. He was unable to explain why they chose not to tender particular documents, if, in fact, any such failure had occurred.

37 Any application by Mr Sayed to tender further documents should have been made in accordance with the Rules and in the course of the appeal management process. In the absence of any explanation for the late application and any attempt to relate particular documents to issues arising on the appeal, the application was refused.

The appeal

Did the primary judge err in ordering that the pecuniary penalties be paid to the Commonwealth, and not to Mr Sayed?

38 As explained above, on 13 April 2015, following consideration of the written submissions of the parties on penalties, and (by consent of the parties) without the need for an oral hearing, her Honour made the following orders as to penalties:

> 1. In respect of the contravention of s 351 of the *Fair Work Act 2009* (Cth) by redeploying the applicant, the respondent pay a penalty of $20,000.
> 2. In respect of the contravention of s 351 of the *Fair Work Act 2009* (Cth) by suspending the applicant, the respondent pay a penalty of $10,000.
> 3. In respect of the contravention of s 351 of the *Fair Work Act 2009* (Cth) by dismissing the applicant, the respondent pay a penalty of $15,000.
> 4. The penalties payable by reason of paragraphs 1 to 3 inclusive of these orders be payable to the Commonwealth, on or before 18 May 2015.

39 Mr Sayed now appeals against order 4, insofar as it required the CFMEU to pay the penalties to the Commonwealth. He contends that the primary judge, in

the exercise of the power created by s 546(3) of the FW Act, should have ordered that the penalties be paid directly to him and erred in failing to do so.

40 Section 546(3) allows the Court to order that a penalty or part of a penalty, be paid to the Commonwealth, a particular organisation or a particular person.

The primary judge's reasons

41 The primary judge, in deciding that the penalties should be payable to the Commonwealth, and not Mr Sayed, reasoned as follows.

42 First, her Honour referred to her decision in *Dafallah v Fair Work Commission* (2014) 225 FCR 559 at [139]-[143], where she dealt with a number of the authorities concerning payment of penalties under the FW Act. Her Honour noted that she had there agreed with the remarks of Greenwood J in *McIlwain v Ramsey Food Packaging Pty Ltd (No 4)* (2006) 158 IR 181 at [108] (which her Honour said were endorsed by Branson and Lander JJ in *Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union* (2008) 171 FCR 357 at [70], although their Honours there noted the remarks went to the issue of the appropriateness of ordering that any penalty be paid to the individual affected *when that individual is not the applicant*) as follows:

> the imposition of a penalty under the Act is designed fundamentally to serve the public interest in acting as a deterrent to the particular Respondents and others generally from engaging in conduct of the kind the subject of the findings. In circumstances where an order has been made for compensation for both economic loss and a non-economic component concerning the disturbance, dislocation and loss of secure employment suffered by the individuals, there seems to be no good policy reason why the individuals should additionally have the benefit of an order for the payment to them of the penalty.

43 Her Honour said, at [77], that these remarks were "applicable and pertinent to this proceeding".

44 Her Honour considered, at [78], that the interrelationship between the rationale behind "common informer provisions", described in some detail by Moore J in *Schanka v Employment National (Administration) Pty Ltd (No 2)* (2001) 114 FCR 379 at [77]-[87], and the existence of compensation provisions such as s 545, had not been much explored. Her Honour considered that it "may be" that these rationales developed in contexts where the person who was the common informer was not the person directly affected by the contravention, or if she or he was, had no statutory right to compensation, nor to other remedies such as reinstatement, so that the only recompense or "reward" the person who brought the proceeding and exposed the unlawful behaviour could receive was what the Court ordered to be paid by way of penalty.

45 Her Honour then made a number of references to what she described as the "tensions" between the statutory right of a common informer to have an order that a pecuniary penalty be paid to them and their right to seek compensation for themselves or somebody else. In that regard, her Honour referred to the following paragraphs of the *Explanatory Memorandum* to the *Fair Work Bill 2008* (Cth):

> 2157. Subclause 546(3) provides that the court may order pecuniary penalties (or part of a pecuniary penalty) to be paid to the Commonwealth, a particular organisation or a person. Ordinarily, any pecuniary penalty awarded by the

> court is paid to the applicant or, in the case of proceedings brought by a Commonwealth official such as an inspector, to the Commonwealth (on the basis that the applicant represents the Commonwealth).
>
> 2158. Also, it gives the court the flexibility to award the penalty to someone other than the plaintiff or applicant where the plaintiff or applicant requests. For example, where an inspector brings penalty proceedings against the director of a company that has gone into liquidation, the inspector might request the court to pay any penalty to an employee rather than the Commonwealth in circumstances where the employee is out of pocket as a result of the company being liquidated.
>
> …
>
> 2160. Subclause 546(5) provides that a court can make a pecuniary penalty order in addition to one or more orders made under clause 545. The effect of this is that a court is not restricted to the making of only one order in respect of any contravention of a particular civil remedy provision.
>
> 2161. For example, in a case involving a contravention of a civil remedy provision related to underpayment of minimum wages under a modern award, the court may order that the employee is entitled to compensation for that underpayment and a pecuniary penalty may also be imposed on the employer for the contravention.

46 At [80], her Honour stated that the proposition that both compensation and penalties might be ordered by the Court was "straightforward", but the proposition that they might both be ordered to be paid to the same person was "more complex".

47 To her mention of the decisions in *McIlwain* and *Plancor*, her Honour added reference to *Seymour v Stawell Timber Industries Pty Ltd* (1985) 9 FCR 241 and *Community and Public Sector Union v Telstra Corporation Ltd* (2001) 108 IR 228 (*CPSU v Telstra*), which her Honour said bore on the complexity issue, at least by reference to the concept of avoiding "windfalls". Her Honour also referred to *Gibbs v Mayor, Councillors and Citizens of City of Altona* (1992) 37 FCR 216 (Gray J).

48 In relation to *Gibbs* and *CPSU v Telstra*, the primary judge noted that the authorities appeared to refer to expenses and costs in a broader sense than simply legal costs, in order to justify what had been referred to in a number of those decisions as the "usual order", namely, that the entity or person who successfully brings a contravention proceeding is entitled to receive payment of any pecuniary penalty imposed.

49 But her Honour considered, at [87], that the current legislative policy concerning the payment of costs in proceedings under the FW Act, manifested in the FW Act by s 570(1), is that parties to proceedings such as the present are, subject to s 570(2), or s 569 or s 569A, to bear their own legal costs. Her Honour said that "[t]his adds a further tension in the appropriate approach when considering whether to order that penalties be payable to a person in the applicant's situation".

50 Her Honour added, at [88], that where the applicant is a union there will be a wide range of resources occupied in bringing a proceeding alleging contraventions of the FW Act, many of which are separate to any fees paid to solicitors and counsel for legal representation and advice in a proceeding and, to that extent, "the rationale remains for ordering a penalty to be paid to a union", even in the face of the "clear legislative policy" evinced in s 570 of the FW Act.

51 Her Honour said, at [89], however, that "that rationale" had no application in the present case as:

> whatever fees for solicitors and counsel the applicant has incurred, Parliament has determined that, unless the circumstances set out in s 570(2), or ss 569 or 569A, exist, he should bear his own costs of this proceeding. Once again, it would in my opinion introduce an inconsistency into the application of the present legislative scheme in the Fair Work Act to order that the respondent pay penalties to the applicant so that he could, in that way, recover his legal costs.

52 Her Honour went on to say, at [90], that the circumstances of the present case provided a good example of the tension she had identified between the exercise of the power under s 546(3)(c) and the fact that the Court had already made a final determination, on the basis of evidence adduced, as to the compensation appropriate to be paid for the contraventions.

53 Her Honour noted, at [91], that in her earlier judgment, she had observed (in the context of the claim for compensation) that little or no evidence of damage or harm to Mr Sayed had been adduced. The judge said that it was for this reason that, despite her findings of three serious contraventions resulting in Mr Sayed losing his job, there was a "relatively modest award of general compensation". Nor, her Honour added, was there any evidence about ongoing financial loss.

54 At [92], the primary judge said that, in combination, these factors explained why, despite the language she had used in her reasons for judgment about the seriousness of the contraventions, what the union had to that point been ordered to pay to Mr Sayed had been relatively modest.

55 Her Honour then concluded, at [93], that:

> In my opinion, to order that the sums of money imposed by way of penalty on the respondent be paid to the applicant would be to deliver to him a windfall which would not be appropriate in the circumstances, and would not serve the interests of the administration of justice. He would receive more in real terms through the penalty payment than I determined he was entitled to by way of compensation, yet would receive that $45,000 in addition to receiving payment from the respondent by way of compensation. The inherent requirement in the compensation provisions of the Fair Work Act that a person seeking compensation prove the loss he or she alleges he or she has suffered, and otherwise prove to the satisfaction of the Court the entitlement to the remedy sought (e.g., reinstatement) would be undermined, as would the legislative policy behind s 570(1).

56 Thus, her Honour, by order 4 of the orders made on 13 April 2015, ordered that the penalties be payable to the Commonwealth.

The grounds of appeal

57 Mr Sayed relied on the following grounds:

> 1. In circumstances where the respondent did not submit that the penalty should be paid to consolidated revenue and no party raised or considered in submission the relevance of the principles applicable to a common informer the applicant was denied an opportunity to advance submissions and to lead evidence on the question of whether the penalty should be paid to the applicant or to the Commonwealth.
> 2. The learned Primary Judge erred in holding that the payment of a penalty to the applicant would constitute a windfall in circumstances where:
>   a. He had been the victim of a serious breach of the protection of the Act;

b. The proceeding was not simply one for the recovery of lost wages;
c. There was no other person or organisaiton [sic] that would bring the proceeding in order to vindicate the breach of the Act.

3. The learned primary Judge erred in treating the question of the identity of the person to whom a penalty is to be made as being informed solely or primarily by the issue of compensation.
4. The learned primary Judge erred in not finding that the public interest required that penalties be paid to the applicant, so as not to discourage those without financial means or support from bringing instances of contravention under s351 to the court.

The resolution of the appeal

58 The appeal should be upheld. In our view, the primary judge's focus on the question whether or not an order that the penalties be paid to Mr Sayed would deliver him a "windfall", which would not be appropriate in the circumstances, led to error in this case.

59 The nature of the power to direct payment of a penalty under s 546(3) is to be discerned from a consideration, not just of the text of the provision, but also of its context in Pt 4 of the FW Act which deals with civil remedies; its legislative history and the construction of like predecessor provisions; as well as by reference to the Explanatory Memorandum. While her Honour considered some matters of context, she overlooked others and, in particular, some important features of the legislative history and of Pt 4 of the FW Act.

60 The so-called "common informer" legislation that is now found in s 546(3) of the FW Act, in one form or another, has been a part of the industrial relations framework of the Commonwealth since the passage of the pioneering *Conciliation and Arbitration Act 1904* (Cth) (1904 Act).

61 Sections 44 and 45 of the 1904 Act as enacted (renumbered ss 59 and 60 in a 1947 amendment to the 1904 Act and then subsequently renumbered ss 119 and 120 in a 1956 amendment to the 1904 Act) provided as follows:

> 44.(1) Where any organization or person bound by an order or award has committed any breach or non-observance of any term of the order or award any penalties which the Court has power to impose may be imposed by any Court of summary jurisdiction constituted by a Police Stipendiary or Special Magistrate.
>
> (2) Any such penalty may be sued for and recovered by —
>
> (a) the Registrar; or
>
> (b) any organization which is affected, or whose members or any of them are affected, by the breach or non-observance; or
>
> (c) any member of any organization who is affected by the breach or non-observance.
>
> 45. Where the Court, or any Court of summary jurisdiction, imposes any penalty for any breach or non-observance of any term of an order or award, it may order that the penalty, or any part thereof, be paid into the Consolidated Revenue Fund, or to such organization or person as is specified in the order.

62 Following the repeal of the 1904 Act with the introduction of the *Industrial Relations Act 1988* (Cth) (1988 Act), ss 178 and 356 of the 1988 Act provided:

> Imposition and recovery of penalties
>
> 178.(1) Subject to section 182, where an organisation or person bound by an

award or an order of the Commission breaches a term of the award or order, a penalty may be imposed by the Court or, except in the case of a breach of a bans clause, by a court of competent jurisdiction.

…

(5) A penalty for a breach of a term of an award or order may be sued for and recovered by:

(a) an inspector;

(b) a party to the award or order;

(c) a member of an organisation who is affected by the breach;

(d) an organisation that is affected, or any of whose members are affected, by the breach; or

(e) an officer of an organisation that is affected, or any of whose members are affected, by the breach where the officer is authorised, under the rules of the organisation, to sue on behalf of the organisation.

…

Application of penalties

356. A court that imposes a penalty under section 178 or 311 may order that the penalty, or a part of the penalty, be paid:

(a) into the Consolidated Revenue Fund; or

(b) to a particular organisation or person.

63 Relevantly, s 178(5)(c) was amended in a 1990 amendment to the 1988 Act to read as follows:

(c) an employer who is a member of an organisation and who is affected by the breach;

(ca) a person:

(i) whose employment is, or at the time of the breach was, subject to the award; and

(ii) who is affected by the breach;

64 And s 178(5)(e) was amended in a 1993 amendment to the 1988 Act to read:

(e) an officer or employee of an organisation that is affected, or any of whose members are affected, by the breach where the officer or employee is authorised, under the rules of the organisation, to sue on behalf of the organisation.

65 Then, under the *Workplace Relations Act 1996* (Cth) (WR Act) as introduced by the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth), ss 178 and 356 were amended as follows:

Imposition and recovery of penalties

178.(1) Subject to section 182, where an organisation or person bound by an award, an order of the Commission or a certified agreement breaches a term of the award, order or agreement, a penalty may be imposed by the Court or, except in the case of a breach of a bans clause, by a court of competent jurisdiction.

…

(5) A penalty for a breach of a term of an award or order may be sued for and recovered by:

(a) an inspector;

(b) a party to the award or order;

(c) an employer who is a member of an organisation and who is affected by the breach;

(ca) a person:

(i) whose employment is, or at the time of the breach was, subject to the award; and

(ii) who is affected by the breach;

(d) an organisation that is affected, or any of whose members are affected, by the breach; or

(e) an officer or employee of an organisation that is affected, or any of whose members are affected, by the breach where the officer or employee is authorised, under the rules of the organisation, to sue on behalf of the organisation.

(5A) A penalty for a breach of a term of a certified agreement may be sued for and recovered by:

(a) an inspector; or

(b) an employee whose employment is subject to the agreement; or

(c) a person or organisation that is bound by the agreement; or

(d) an organisation:

(i) that has at least one member whose employment is subject to the agreement; and

(ii) that is entitled to represent the industrial interests of the member in relation to work carried on by the member that is subject to the agreement; or

(e) an officer or employee of an organisation mentioned in paragraph (c) or (d), where the officer or employee is authorised, under the rules of the organisation, to sue on behalf of the organisation.

…

Application of penalty

356. A court that imposes a monetary penalty under this Act (other than a penalty for an offence) may order that the penalty, or a part of the penalty, be paid:

(a) into the Consolidated Revenue Fund; or

(b) to a particular organisation or person.

66 Following amendments in 2005 to the WR Act, s 178 was renumbered as s 719, and s 718 set out, in a table to subs 718(1), those persons who could apply for a penalty or other remedy under Div 2 of Pt 14, in relation to a breach of an applicable provision. Section 356 was renumbered s 841. Section 841 provided as follows:

841 Application of penalty

A court that imposes a pecuniary penalty under this Act (other than a penalty for an offence) may order that the penalty, or a part of the penalty, be paid:

(a) to the Commonwealth; or

(b) to a particular organisation or person.

67 In the current FW Act s 546(3) provides:

Payment of penalty

(3) The court may order that the pecuniary penalty, or a part of the penalty, be paid to:

(a) the Commonwealth; or

(b) a particular organisation; or

(c) a particular person.

68 Section 539(2), which appears in Pt 4.1, Div 2, Subdiv A dealing with applications for orders, authorises the persons referred to in the table to that subsection to apply to the courts referred to in the table for orders in relation to a contravention or proposed contravention of a relevant provision, including the maximum penalty referred to in the table. By subs (1) a provision referred to in column 1 of the table is a "civil remedy provision".

69 Section 351(1), upon which Mr Sayed relied and succeeded in this proceeding, is one of the general protection provisions referred to in Item 11 of the table.

70 The table further identifies the persons or entities who may apply for the imposition of a penalty for contravention of s 351(1), namely:

> (a) a person affected by the contravention;
> (b) an industrial association;
> (c) an inspector[.]

71 Mr Sayed brought the proceeding against the union as "a person affected by the contravention". While it may be said that s 351(1) has something in common with the "common informer" provisions to which the primary judge alluded, it is different from such provisions in that the Parliament has directly authorised "a person affected by the contravention" — not just any person — to bring an enforcement proceeding.

72 One may begin to understand, therefore, why it is that s 546(3), in Pt 4.1, Div 2, Subdiv B, empowers the Court to order that a pecuniary penalty, or a part of the penalty, be paid to the Commonwealth, a particular organisation, or a particular person. If a proceeding for contravention of s 351(1) is brought by the inspector, the inspector being a public official of the Commonwealth, it may be expected that ordinarily the pecuniary penalty would be paid to the Commonwealth. If a union were to bring the proceeding successfully, for the benefit of its members, it may be expected that the penalty would be paid to the union. If the union brought the proceeding for the benefit of a particular member, there might be payment of the penalty to that member, on the basis he or she is a particular person to whom it should be paid; or part payment to that member and the balance to the union. If a person individually affected by a contravention brought the proceeding, then the penalty may be paid to him or her as a particular person. There is a certain symmetry between the person or entity authorised to prosecute an enforcement proceeding and the person or entity to whom the penalty, if imposed, might be paid. This symmetry is recognised by the Explanatory Memorandum and authority.

73 For example, the Explanatory Memorandum, by paragraph 2157 (set out above) expressly notes that:

> Ordinarily, any pecuniary penalty awarded by the court is paid to the applicant or, in the case of proceedings brought by a Commonwealth official such as an inspector, to the Commonwealth (on the basis that the applicant represents the Commonwealth).

74 Paragraph 2158 then goes on to point out that s 546(3) gives the Court the flexibility to award the penalty to someone other than the applicant, "where the plaintiff or applicant requests". The example given is where an inspector brings penalty proceedings against the director of a company that has gone into liquidation and asks the Court to pay any penalty to an employee, rather than

the Commonwealth, in circumstances where the employee is out of pocket. That example, it might be noted, in passing, comprehends that a particular person may, in a sense, be compensated for being "out of pocket".

75 Paragraph 2160 further observes that, by s 546(5), the Court can make a pecuniary penalty order in addition to one or more orders made under s 545 (being an order that the Court considers appropriate, including but not limited to injunctions, compensation and reinstatement under s 545(2)). Paragraph 2160 states that the effect of this is that a court is not restricted to the making of only one order in respect of any contravention of a particular civil remedy provision. This lends support to the view that a compensation order is not intended to be a surrogate for a penalty order.

76 In that regard, s 546(5) provides:

> To avoid doubt, a court may make a pecuniary penalty order in addition to one or more orders under section 545.

77 This subsection, of course, does not say anything about to whom a penalty should be paid.

78 The concept of the "usual order" — to which paragraph 2157 of the Explanatory Memorandum alludes — is a long standing principle governing the exercise of the discretion to make an order directing the payment of a penalty under s 546(3).

79 In *Plancor*, referred to above, an industrial magistrate, following the non-appearance of the appellant, Plancor Pty Ltd, gave summary judgment for the union which had brought the proceeding on behalf of its member, Ms Baker, and awarded three penalties for three separate breaches of the relevant award, totalling some $19,000. The magistrate then ordered, pursuant to s 841 of the then operative WR Act, set out at [66] above, that the total amount of the penalty be paid, in part ($2,000) to Ms Baker, in part ($4,000) to the union, and the balance ($13,000) to the Consolidated Revenue Fund.

80 At that time, s 718(1) of the WR Act, by Item 4(c) of the table to that subsection, authorised an organisation of employees to bring an enforcement proceeding. Item 4(c) of the table to s 718(1) also allowed an employer or employee bound by the relevant collective agreement and an inspector to bring a proceeding.

81 In their joint judgment, Branson and Lander JJ, at [63], observed that the decision to order that the penalties imposed be paid to Ms Baker, the union and the Consolidated Revenue Fund was "not uncontroversial" and that the magistrate ought to have provided reasons for making the order.

82 At [64], their Honours then discussed the exercise of the power conveyed by s 841 of the WR Act. Their Honours first noted the observations of Gray J (the third member of the Full Court in *Plancor*) in *Gibbs* at 223-224, where his Honour had said that the "usual order" in such a proceeding, when not brought by an inspector, is for payment to the person or organisation applying for the penalty (citing authority, as discussed further below). Their Honours noted that Gray J then stated:

> In the present case, the applicant has brought the proceeding on behalf of the Union, to enforce the Award for the benefit of the Union and its members. *Had the applicant brought the proceeding in his personal capacity, and at his own expense, it would have been appropriate to order that the penalties be paid to him.* It is unlikely that the applicant has become responsible personally for the costs of the proceeding and more likely that those costs will be met by the Union. In the

> circumstances, it is appropriate that the Union should be the recipient of the penalties.

(Emphasis added.)

83 We interpolate that the costs provisions in the WR Act were not materially different from the costs provisions in the FW Act.

84 Branson and Lander JJ noted, at [65], that that approach had been adopted in a number of other cases, although they also observed, at [66], that in *CPSU v Telstra*, Finkelstein J, at [22]-[28], queried the appropriateness of the "usual order" in every case.

85 In those paragraphs, set out by their Honours, Finkelstein J referred to "common informer" legislation which, by the time of Henry VIII, gave informers the right of action to recover a penalty in their own name. His Honour did not doubt that employer and employee organisations play a legitimate and important role in seeing that there is compliance with the provisions of industrial legislation, and noted that an individual employee will rarely have the ability to fund a proceeding for a contravention. His Honour said that if unions do not bring the proceedings, contraventions will go unpunished.

86 Finkelstein J added:

> Perhaps the "usual" order is to be explained on the basis that often an industrial organisation brings proceedings for a contravention of the … Act to protect the legitimate interests of its individual members. In such a case, it is appropriate for the organisation to receive the penalty, to defray its actual costs and to provide some compensation for the time lost by its staff.
>
> …
>
> However, there is no reason to make "the usual order" if that will result in a windfall to an organisation. Proceedings for pecuniary penalties are not to be used for profit
>
> …
>
> An appropriate order (if there be enough funds) would allow the unions a sufficient sum to meet their costs and expenses, including the expense of staff time. The balance (if any) should be paid into the Consolidated Revenue Fund.

87 Branson and Lander JJ then referred, at [67], to some remarks of Wilcox J in *Finance Sector Union of Australia v Australia and New Zealand Banking Group Ltd* [2002] FCA 1035. There, at [16], Wilcox J said that he was not sure that he agreed with what Finkelstein J had said in *CPSU v Telstra*. Wilcox J considered the rationale of the "usual order" practice is that it tends to encourage a "common informer" to police the relevant legislation. His Honour added that he considered the rationale was likely to be defeated if the common informer is not allowed to make a profit.

88 Branson and Lander JJ, at [68], referred to conflicting authorities expressing agreement with the observation of Wilcox J, or approval of the observation of Finkelstein J. It may be said, in passing, as indeed the judgment of the primary judge reveals that this division of opinion has endured.

89 Their Honours then made observations, at [69] of the joint judgment, as to what a "windfall" might mean, in the context in which it had been used by Finkelstein J:

> In our view, neither the total penalty actually imposed in this case, nor the amount of the penalty likely to be imposed on reconsideration of that penalty, is sufficient to give rise to concerns about a "windfall". We understand a "windfall" in this context to involve an unexpected and relatively large financial benefit. Within an

> organisation such as the respondent, the true cost of bringing a legal proceeding is likely to prove substantial if the time of all staff involved is appropriately accounted for and other costs, possibly including overheads, identified. Before a penalty could constitute a "windfall" in the relevant sense it would need to exceed the total amount of that cost by a significant margin.

90 But their Honours refrained from expressing a concluded view on whether, in a case in which it would otherwise be appropriate for the "usual order" to be made, such an order should not be made if it would be likely to result in a windfall to an applicant (in the sense they had described it). In other words, their Honours refrained from deciding the issue that apparently now arises for consideration in this appeal.

91 In *Plancor*, Gray J observed, at [38], that in *Vehicle Builders' Employees' Federation of Australia v General Motors Holdens Pty Ltd* (1977) 32 FLR 100 at 113, the Full Court had recognised that:

> each of the persons entitled to institute proceedings under s. 119 of the [1904] Act (see s. 119 (2)) can be said to be an appropriate person selected by the legislature to police the legislation. In other words, each has a special interest to institute proceedings, and in our opinion s. 119 (2) has a limiting effect: cf. Commonwealth *Crimes Act 1914*, s. 13.

We interpolate that s 13 of the *Crimes Act 1914* (Cth) then authorised any person to institute a proceeding for a criminal offence against the law of the Commonwealth.

92 Returning to *Plancor*, Gray J further observed, at [39], that in *Seymour* Northrop J had described a proceeding brought under s 119 as "based on the concept of an action brought by a common informer", and added that normally in proceedings for a penalty brought by a common informer "any penalty imposed is ordered to be paid to the person who brought the proceedings".

93 Gray J then referred, at [41], to what he had said in *Gibbs*, to the effect that the *Vehicle Builders' Employees' Federation* case and *Seymour* were the foundation for his view that, when a proceeding is not brought by an inspector, the "usual order" is for payment to the person or organisation applying for the penalty. His Honour added, at [41], that where the applicant has not brought the proceeding in his personal capacity, but on behalf of an organisation, it was more appropriate to exercise the power to order payment of the penalty to that organisation. His Honour noted (as did Branson and Lander JJ in their joint judgment in the same case) that, in expressing this exception, he had said:

> In the present case, the applicant has brought the proceeding on behalf of the Union, to enforce the Award for the benefit of the Union and its members. Had the applicant brought the proceeding in his personal capacity, and at his own expense, it would have been appropriate to order that the penalties be paid to him.

94 Gray J went on to observe, at [42], that unfortunately the references to the applicant's "own expense" and to "the cost of the proceeding" seemed to have been subsequently relied on as a foundation for the notion that an order that the penalty be paid to the initiating party is made in order to compensate that party for the cost of bringing the proceeding. His Honour said that was "not the view that [he] intended to express", nor was it the correct view, and stated:

> Nothing in the reasoning in the *Vehicle Builders' Employees' Federation* … case or *Seymour* … suggests that the legislative intention behind the power to order payment of a penalty to an organisation or person was compensatory.

95 His Honour then noted, at [43], that the maximum penalty that could be imposed for many years would have been highly unlikely to compensate a party bringing a proceeding for the costs incurred in doing so. His Honour observed that, for many years, the industrial legislation had provided that there be no order for costs in a proceeding arising under that legislation, save in circumstances specifically defined. His Honour added, at [43]:

> To utilise the power to award payment of a penalty to the party initiating the proceeding as a way of compensating for that party's costs would be to undermine this policy. It cannot be the case that, in choosing to increase the maximum penalty that can be imposed, Parliament intended to substitute a new rationale for the power to order payment of a penalty to a particular organisation or person.

96 His Honour concluded, at [44], that:

> The correct view is that the initiating party is normally the proper recipient of the penalty as part of a system of recognising particular interests in certain classes of persons … in upholding the integrity of awards and agreements the subject of penal proceedings. Where a public official vindicates the law by suing for and obtaining a penalty, it is appropriate that the penalty be paid to the Consolidated Revenue Fund. Otherwise, the general rule remains appropriate, that the penalty is to be paid to the party initiating the proceeding, with the *Gibbs* … exception that the penalty may be ordered to be paid to the organisation on whose behalf the initiating party has acted.

97 Gray J added, at [45], that the notion that the penalty was designed to compensate for the costs of the proceeding has in turn led to the notion that the Court should avoid ordering a payment which would produce a "windfall" to the initiating party, referring to what was said by Finkelstein J in the *CPSU v Telstra* case. He also referred to what French J (as his Honour then was) said in *Municipal Officers Association of Australia v City of Bayswater* (1987) 22 IR 45 at 51, in referring to s 120 of the 1904 Act (as amended in 1956):

> I have not been persuaded that there is any reason that this penalty ought to be paid to the applicants. The applicants' interests in respect of these particular redundancies have not been seriously affected. There is no suggestion that the employees concerned have been in any way under compensated for the redundancies to which they have been subjected.

98 Gray J considered that French J was in error in seeing the purpose of the order as compensatory. Gray J added that the passage he had previously cited from *Seymour* contained a refutation of that proposition and provided no support for the proposition that proceedings for pecuniary penalties are not to be used for profit. His Honour added that, "[t]he question of profit simply did not arise".

99 Gray J concluded:

> The notion that the order to pay a penalty to the initiating party could produce a windfall is a false notion. If the true purpose of such an order is taken into account, and the order is not regarded as compensatory in any way, any notion of a windfall disappears.

100 We respectfully agree.

101 Given the legislative history of ss 539(2) and 546(3) of the FW Act, since the enactment of ss 44 and 45 in the pioneering 1904 Act, and the manner in which the "usual order" was articulated in such early cases as the *Vehicle Builders' Employees' Federation* case and *Seymour*, which is reflected in the Explanatory

Memorandum, we consider that the power conveyed by s 546(3) is ordinarily to be exercised by awarding any penalty to the successful applicant. We accept that there may be cases (of which this is not one) where the penalty, or a part of the penalty, should be paid to another person in the circumstances described by Gray J in *Plancor* at [44] (as set out at [96] above).

102 The examples given in the Explanatory Memorandum and by Gray J in *Gibbs* as to when a payment (or a part payment) might be made to a particular person support the view that, depending on the factual circumstances of a particular case, a particular person for whose benefit, in effect, the contravention proceeding was brought may be the beneficiary of a s 546(3) order in the types of cases there referred to.

103 However, the circumstance that a beneficiary of such an order is no longer "out of pocket" (to use the language of the Explanatory Memorandum) does not, in our view, support the articulation of a principle that a successful applicant is only entitled to such an order if they can demonstrate they have incurred costs, not being legal costs within s 570 of the FW Act; or where they can show that if the penalty is paid to them they would not receive a "windfall" — however that term should properly be understood.

104 In our view, the legislative history of s 546(3), older authority and the terms of the Explanatory Memorandum show that no immediate or obvious connection was intended to be drawn between the exercise of the s 546(3) power and the exercise of the power under s 545 of the FW Act to order compensation.

105 Moreover, s 546(5) makes it plain the Court may make a pecuniary penalty order in addition to a s 545 order. The fact that a compensation order has also been made should not control the exercise of the s 546(3) power with respect to the payment of the penalty.

106 There is no necessary tension, as the primary judge put it, between the application of the "usual order", where a person affected by the contravention succeeds in a court proceeding and a penalty is imposed, and the separate entitlement of that person to be compensated under s 545. Nor is there any necessary relationship between the s 570 limitation on the recovery of legal costs in proceedings under the FW Act, except in prescribed circumstances, and the application of the "usual order".

107 Rather, s 546(3) has a long and well-understood operation. The FW Act enables, amongst others, a person affected by a contravention to initiate an enforcement proceeding and to receive the penalty, where one is imposed.

108 We note that this understanding as to how the power to award the payment of a penalty should be exercised was preferred by Gilmour J in *Woodside Burrup Pty Ltd v Construction, Forestry, Mining and Energy Union* (2011) 220 FCR 551.

109 That case dealt with s 49(5) of the *Building and Construction Industry Improvement Act 2005* (Cth) (BCII Act), which provided:

> A pecuniary penalty is payable to the Commonwealth or some other person if the Court so directs.

110 Gilmour J noted, at [125], that applications under the BCII Act differed from those under the WR Act (in effect at that time) in that a successful applicant was entitled to an order for costs. Nonetheless, his Honour considered the authorities referred to above.

111 At [133]-[134], his Honour accepted what Gray J had said in *Plancor* at [45] that the power to award payment of a penalty to an applicant is not regarded as compensatory and that:

> It is a distinct power of a kind historically construed as intended to encourage common informers.

112 His Honour said that save, perhaps, for the question of a windfall, there was no reason why such an order should not be made even where an applicant is awarded both costs and compensation. However, Gilmour J further added, as to the "windfall" question, that his view accorded with what Gray J had said in *Plancor* at [45], to the effect that properly understood, because such an order is not regarded as compensatory in any way, "any notion of a windfall disappears". In the event, however, Gilmour J found it unnecessary to resolve the "windfall" issue, finding, at [136], that no question of a windfall arose in that case.

113 The decision of Jessup J in *Murrihy v Betezy.com.au Pty Ltd (No 2)* (2013) 221 FCR 118 also generally supports the approach we have identified above. Referring to *Plancor*, Jessup J made the following points in relation to the case before him, at [116]:

- First, the case did not call for a consideration of the situation in which a registered organisation is the applicant.
- Secondly, in the words of Branson and Lander JJ in *Plancor*, the applicant was "the individual affected by the conduct so penalised", so the circumstance that she may, in some instances, have been compensated for some of the loss which she had sustained would not necessarily stand in the way of her receiving all or some of the penalties to be imposed.
- Thirdly, their Honours' treatment of the "windfall" point was consistent with it being appropriate to take into account the costs and expenses to which the applicant, as applicant, had obviously been exposed in the assertion of her contractual and statutory rights in the proceeding. That was not to suggest that the s 546(3) discretion should be exercised in a way that provides a substitute for costs which are unavailable under s 570 of the FW Act, but, where there have clearly been such costs and expenses, it may serve to counter any suggestion that the applicant would walk away from the case with a "windfall" or "profit".
- And fourthly, provisions of the kind now found in s 546(3)(b) and (c) of the FW Act — in the case of (c), to the extent that it refers to an applicant — have a considerable history in federal industrial legislation, and have for many years been recognised as setting up a presumptive entitlement in the nature of that of a common informer.

114 At [118]-[119], Jessup J further noted that:

- First, there were some areas of the case before his Honour in which the applicant would receive compensation (or damages). There were, however, areas in which she would not.
- Secondly, the case before him was not a case in which non-economic loss had been either alleged or proven. But that was not to say that the applicant should not be regarded as a victim of the respondents' contraventions whose position was affected for the worse by their conduct.

- Thirdly, his Honour had upheld the applicant's claims for costs in some areas. While a payment under s 546(3)(c) should not be regarded as a back-door method of securing costs, nonetheless the recovery of costs to some extent has the potential to bear upon any consideration of whether such a payment would deliver a "windfall" to the applicant.
- Fourthly, the "common informer" policy considerations which are ingrained into s 546(3)(c) and its statutory predecessors were said to "speak loudly" in the circumstances of the case before his Honour. For the applicant — an individual employee in a responsible position in a non-industrialised workplace — to have advanced, and persisted with, claims which the Court had held to be legitimate, and to have done so in the face of the deferrals and procrastinations of the respondents, could only have constituted a substantial, continuing, burden for her. In a forensic and evidentiary environment which would have tested the most seasoned of litigators, the applicant maintained her focus and, ultimately, achieved the success which was always her due. His Honour considered it to be "four-square" within the policy of s 546(3)(c) that an employee in the position of the applicant should be encouraged to proceed as she had done, thereby making it the more likely that the applicable provisions of the FW Act will be more than mere words on the statute book.

115 We agree generally with the observations made by Jessup J.

116 In this appeal, as Jessup J said of the case before him, the policy considerations of s 546(3) "speak loudly" in the circumstances to justify the payment of the penalty imposed to the individual affected by the contravention who, under the authority of the FW Act, commenced and maintained this enforcement proceeding. If Mr Sayed had not pursued the action, it is unlikely that it would have been pursued. He took on the proceeding at obvious cost to himself.

117 It is as clear today, as it was in 1904, that unions will not always, or invariably, be the prosecutor in an enforcement proceeding under industrial legislation. Yet the principle adopted by the primary judge would have the effect of stultifying civil penalty proceedings by persons affected by a contravention who are not backed by industrial power of one sort or another.

118 There is, in any event, something problematic about not applying the "usual order" because of an apprehended "windfall" to the successful applicant. In the joint judgment of Branson and Lander JJ in *Plancor*, at [69], their Honours considered that neither the total penalty actually imposed in that case, nor the amount of the penalty likely to be imposed on reconsideration, was sufficient to give rise to concerns about a "windfall". Having just referred to what Finkelstein J said in *CPSU v Telstra*, suggesting a "windfall" factor may be relevant to the exercise of the power in that case, their Honours made the observations about the concept of "windfall" set out above at [89].

119 In our view, it is not at all clear on the evidence in this case that, if the primary judge had chosen to direct payment of the penalties to him Mr Sayed would have received a windfall in the sense described by Branson and Lander JJ. We say this because, although Mr Sayed did not lead evidence himself about the extent of costs he had incurred in maintaining his prosecution of the CFMEU, it was obvious, on the face of the proceeding, that he had significant personal involvement in the maintenance of the proceeding where he

was represented over a three-day hearing by Senior and Junior Counsel, instructed by solicitors he had retained, who also prepared the submissions as to penalty. Accepting that legal expenses should not be taken into account in considering "the true cost" of bringing such a prosecution because of the stipulation in s 570 that a party's legal costs are not recoverable except in circumstances not applicable here, there can be no doubt that Mr Sayed, in bringing and maintaining the prosecution of the union, and in dealing with the solicitors he instructed and the counsel they briefed, must have incurred considerable time, trouble and lost opportunity, not to mention the real risk to his career that Mr Sayed assumed in running the proceeding.

120 To the extent that the primary judge appears to have drawn a distinction, at [88]-[89], between a case prosecuted by a union or other representative organisation and one prosecuted by the person directly affected by the contravention(s), we fail to see how that distinction, of itself, should lead to any immediate assumption or conclusion that the individual, by contrast to an organisation, has not, or has not necessarily, incurred significant time, trouble and lost opportunity costs in maintaining the prosecution, so that in the absence of some disentitling feature, the usual order for payment of the penalty to the prosecutor is appropriate.

121 Furthermore, it is not apparent to us why the receipt of a penalty should not operate as an incentive to an affected person to bring a prosecution like this under the FW Act. After all, as Wilcox J noted in *Finance Sector Union*, it ensures the enforcement of the legislative scheme. Moreover, as Jessup J put it in *Murrihy*, this incentive to bring and maintain such a proceeding makes it more likely that the applicable provisions of the FW Act "will be more than mere words on the statute book". As Gray J said in *Plancor*, the question of "profit" does not arise on a proper construction of the power.

122 For these reasons we would allow the appeal and vary order 4 made on 13 April 2015 so that:

> The penalties payable by reason of paragraphs 1 to 3 inclusive of these orders be payable to the applicant forthwith.

Conclusion and order

123 The following orders and declaration should be made:

(1) The appellant's application for leave to amend his notice of appeal be refused.
(2) The appellant's application for leave to tender further documentary evidence on the appeal be refused.
(3) The respondent's application for an extension of time to appeal be refused.
(4) The appeal be allowed.
(5) In place of order 4 made 13 April 2015, there be an order that "the penalties payable by reason of paragraphs 1 to 3 inclusive of these orders be payable to the applicant forthwith".

The Court declares that:

(6) The respondent's purported cross-appeal does not satisfy the requirements of r 36.21(1) of the *Federal Court Rules 2011* (Cth) in that it is not an appeal from "part of a judgment or an order" of the primary judge.

Orders accordingly

Solicitors for the respondent: *Slater and Gordon*.

NICHOLAS DERRINGTON

ANNEXURE “JDF-4”

[2015] FWCD 7109 [Note: An appeal pursuant to s.604 (C2015/7271) was lodged against this decision - refer to Full Bench decision dated 12 January 2016 [[2016] FWCFB 197] for result of appeal.]

FAIR WORK COMMISSION

DECISION

Fair Work (Registered Organisations) Act 2009

s.186(2)(b) – Revocation of AEC Exemption

Queensland District Branch of the Mining and Energy Division of the Construction, Forestry, Mining and Energy Union

(R2014/186)

MR ENRIGHT MELBOURNE, 30 OCTOBER 2015

Revocation of AEC Exemption

[1] This decision concerns the proposed revocation of an exemption that enables a branch of a registered organisation to conduct its own elections internally without the participation of the Australian Electoral Commission (**AEC**). The relevant revocation provisions are set out in s 186(2)(b) of the *Fair Work (Registered Organisations) Act 2009* (**RO Act**) and regulation 137(2) of the Fair Work (Registered Organisations) Regulations 2009 (**RO Regulations).**

[2] The exemption was granted to the Queensland District Branch (the **Branch**) of the Mining and Energy Division (the **Division**) of the Construction, Forestry, Mining and Energy Union (**CFMEU**) on 2 May 1996 (the **AEC exemption**).

[3] While this decision concerns the proposed revocation of an AEC exemption issued to the Branch, because of the operation of the Division's rules with respect to elections in the Branch, as well as the making of detailed submissions by the Division, it will also be necessary to refer in significant detail to various relevant matters relating to the Division.

[4] Notwithstanding the detailed references to a range of matters relating to the Division, the revocation proceedings were commenced for reasons related to the conduct of elections in the Branch (including actions by the Branch's Board of Management (the **Board**)) which gave rise to concerns about whether future elections for the Branch will be conducted under the rules and the RO Act.

[5] The issue for determination is whether the AEC exemption issued to the Branch on 2 May 1996 should be revoked in accordance with s 186(2)(b) of the RO Act.

Background

[6] Organisations registered under the RO Act must have rules that provide for, among other things, the election of the holder of each office (refer s 143). The requirement that every office in an organisation and branch of an organisation is elected is an important element in ensuring democratic control.

[7] All elections for offices are to be conducted by the AEC unless an exemption has been issued to an organisation or branch (refer ss 182(1), (2) and s 186). The RO Act also requires all elections for offices

by a direct voting system to be conducted by a secret postal ballot unless an exemption has been issued to the relevant organisation or branch (refer s 144).

[8] On 2 May 1996 the Division was issued with an exemption from the requirement that elections be conducted by secret postal ballot under s 198 of the *Industrial Relations Act 1988* (**IR Act**) in R20016/1996 (**secret postal ballot exemption**). As a result, elections for the Division and most of its branches are conducted by attendance ballot under Divisional Rule 17.

[9] On the same day the Branch was issued with an exemption under s 213 of the IR Act from the requirement that the AEC conduct its elections in matter **R20021/1996** while the Division and most of its other branches were also granted AEC exemptions. As a result, the Division and the relevant branches (including the Queensland District Branch) were entitled to conduct their own elections.

[10] Subsequently, quadrennial elections were conducted pursuant to the exemptions in 1996, 2000, 2004, 2008, and 2012 as most offices in the Division and branches have four year terms. By-elections have also been conducted by the Branch in other years such as 2011 and 2013.

[11] The relevant provisions regarding AEC exemptions and postal ballot exemptions are now set out in ss 183 to 186 and 144 of the RO Act respectively.

[12] Elections conducted by organisations or branches with AEC exemptions are not subject to review by any external body. Essentially, the only review mechanism for AEC exemptions is the power to revoke in s 186(2) of the RO Act to which I now turn.

[13] In accordance with s 186(2)(b), the General Manager (the **General Manager**) of the Fair Work Commission (the **Commission**) is empowered to revoke an election exemption as follows:

> (2) The General Manager may revoke an exemption granted to an organisation or branch under subsection (1):…
>
> > (b) if the General Manager:
> >
> > > (i) is no longer satisfied as mentioned in subsection (1); and
> > >
> > > (ii) has given the committee of management of the organisation or branch an opportunity, as prescribed, to show cause why the exemption should not be revoked.

[14] Given that the revocation provisions refer to s 186(1) I include that section below:

> (1) Where an application in relation to an organisation or branch has been lodged under subsection 183(1) and, after any objections duly made have been heard, the General Manager is satisfied:
>
> > (a) that the rules of the organisation or branch comply with the requirements of this Act relating to the conduct of elections for office; and
> >
> > (b) that, if the organisation or branch is exempted from subsection 182(1), the elections for the organisation or branch, or the election for the particular office, as the case may be, will be conducted:
> >
> > > (i) under the rules of the organisation or branch, as the case may be, and this Act; and
> > >
> > > (ii) in a manner that will afford members entitled to vote at such elections or election an adequate opportunity of voting without intimidation;
>
> the General Manager may exempt the organisation or branch from subsection 182(1) in relation to elections for the organisation or branch, or the election for the particular office, as the case may be.

[15] In accordance with s 343A, the General Manager had delegated powers under s 186 to me as the Director of the Regulatory Compliance Branch, including the power to revoke exemptions under s

186(2).

[16] References in this decision to the duties and powers of the General Manager with respect to s 186(2) and other provisions relating to AEC exemptions, will be references to the duties and powers of the General Manager as delegated to the Director of the Regulatory Compliance Branch under s 343A of the RO Act.

[17] On 20 August 2015, pursuant to section 186(2)(b) and regulation 137(2) in performing my role as the delegate of the General Manager in accordance with s 343A, I issued a Notice to Show Cause (**Show Cause Notice**) to the Committee of Management of the Branch with a

Statement of Reasons which are discussed in more detail below.

[18] The Statement of Reasons included six reasons. In summary the six reasons were as follows:

i. Postal voting has occurred in Branch elections for many years contrary to Rule 17.

ii. The Branch has not always appointed Returning Officers in accordance with Rule 17(a).

iii. The relevant Returning Officer for the Branch has not appointed a Local Returning Officer at each lodge or locality to conduct attendance ballots for every election under Rule 17(a).

iv. The Branch President issued a direction to the Returning Officer in a by-election for the Branch Executive Vice President in 2011 (the **2011 election**) regarding when the ballot should close at a particular lodge and subsequently determined that irregularities had occurred in the election (where both such actions by the Branch President appeared to have been done without relevant authority under the rules or the RO Act).

v. The Branch's Board passed a resolution to deem the 2011 election invalid without relevant authority under the rules or the RO Act.

vi. The effect of the Board's resolution in the 2011 election was to declare, in effect, that a person who had been purportedly elected in that election had not been elected.

[19] The Show Cause Notice invited the Committee of Management of the Branch to show cause as to why the exemption issued to it in matter **R20021/1996** should not be revoked and listed a hearing of the matter on 17 September 2015.

[20] Written submissions and other materials were lodged prior to the hearing and the hearing proceeded on 17 September 2015. Further details of the hearing are provided below.

Legislative history

[21] The legislative history of AEC exemptions is relevant to the present matter.

[22] The Parliament first empowered Commonwealth officials to conduct elections for registered organisations in 1949. At the time this was an option that organisations could utilise but it was not mandatory. The Commonwealth then moved from an optional arrangement to, in most cases, a mandatory arrangement. There were a number of reasons for this which included: to reduce irregularities in elections of organisations; to facilitate a consistent approach in the conduct of such elections; and to enhance the confidence of the public and members of organisations in the conduct of such elections.

[23] The history of these changes is summarised in the 1997 report of the Joint Standing Committee on Electoral Matters regarding the role of the AEC in conducting industrial elections (the **JSCEM Report**). For example, the JSCEM Report noted that in 1949 the Parliament not only introduced the option for officially conducted elections[1] but also introduced provisions regarding election inquiries for the following reasons (emphasis added):

> 1.23 The preamble to the 1949 Act [Commonwealth Conciliation and Arbitration Act 1949] stated that it was:
>
>> An Act to make provision for the prevention of irregularities in connexion with elections for offices in organisations registered under the Conciliation and Arbitration Act 1904-1948 and to vest in the Commonwealth Court of Conciliation and Arbitration additional powers for the prevention of such irregularities, and for these purposes to amend that Act.
>
> 1.24 In the Second Reading Speech to the 1949 bill, Senator McKenna said:
>
>> For some considerable time the Government has been investigating the need for statutory provision of this kind. Evidence of malpractices and irregularities in the elections of officials of some registered organisations has accumulated and has been confirmed by responsible industrial bodies and other bodies closely associated with industrial activities.[2]

[24] In 1989 it became mandatory for registered organisation elections to be conducted by Commonwealth officials unless an exemption had been granted. This was a result of the recommendations in the Report of the Committee of Review into Australian Industrial Relations Law and Systems (the **Hancock Report**) of 1985 as follows (emphasis added):

> 1.39 In 1985 the Hancock Report noted the increasing use made of the facility for officially conducted elections between 1949 and 1983.[3] …[the] Hancock Report considered that:
>
>> The conduct of elections by Commonwealth officials facilitates a consistency of approach, leading to fewer invalidities and disputed elections. It should enhance the confidence of the community and the members of organisations in the conduct of ballots.[4]
>
> 1.40 The Hancock Report recommended that the CA Act be amended to, amongst other things, require that all elections for office holders within registered organisations be officially conducted unless an exemption had been granted.[5] This recommendation was adopted in the *Industrial Relations Act 1988*[6] ('the IR Act') which replaced the CA Act and which commenced operation on 1 March 1989.[7]

[25] In 1989 it also became mandatory for all elections by a direct voting system to be conducted by secret postal ballot unless an exemption had been granted.

[26] More than 150 exemptions have been granted under the IR Act and subsequent legislation including the RO Act although most were granted soon after 1988. Many of the exemptions no longer operate in circumstances that some organisations have since been deregistered and/or the relevant branch of an organisation has been abolished.

Divisional History

[27] In 1990, the 'United Mineworkers Federation of Australia' (**UMW**) was established as a result of the amalgamation of three mining unions including the 'Australasian Coal and Shale Employees' Federation' (**ACSEF**) which had been federally registered in some form since 1913 and had predecessors dating back to the 19th century.

[28] On 10 February 1992 a further amalgamation occurred between the UMW and the 'The ATAIU & BWIU Amalgamated Union' to form the federally registered organisation known as the CFMEU.[8]

[29] Of relevance to this matter, the practical effect of the amalgamation on 10 February 1992 to form the CFMEU was that the UMW became the Mining and Energy Division of the CFMEU.

[30] Subsequent to the amalgamation forming the CFMEU, elections for office holders of the Division were conducted by the AEC later in 1992 by secret postal ballot.

Governance of the Division

[31] The Division consists of three main levels. The first level is the lodge (**Lodge**). A lodge is a workplace sub-branch of the Division that seeks to bring together all members within a particular workplace, locality or company and the rules of the Division and the branches mandate the establishment of Lodges wherever practical. [9]

[32] The next level is the District Branch. District Branches are approximately co-extensive with State borders (although there are currently two separate branches in NSW). Each branch typically has a Branch Board of Management and Branch Executive.

[33] The next level is the National level, consisting of the Central Council, the Central Executive and the full time executive officers. Central Council is the supreme governing body of the Division and is comprised of the General President, the General Vice President/s, three Vice Presidents, the General Secretary and representatives of the District Branches (refer Divisional Rule 8).

[34] As part of this governance structure the Division and each branch have rules. An important element of the governance of the Division is that decisions made by a Branch Board of Management or the Division's Central Council must be endorsed by a majority of members at the Lodges in order to become binding (for example, refer Branch Rule 8(iv) and Divisional Rule 8(iv)).

Applications for exemptions in 1996

[35] On 19 February 1996 the Division lodged an application under s 198 of the IR Act for a secret postal ballot exemption. At the same time, the Division and seven of its branches (including the Queensland District Branch) lodged applications for AEC exemptions under s 211 of the IR Act.

[36] On 2 May 1996 a hearing was conducted by the Industrial Registrar of the Australian Industrial Registry to consider the applications as well as an application to amend the rules of the Division. The Division was represented by Mr P Tyson of Counsel accompanied by Divisional officials including the General President Mr J Maitland and General Secretary, Mr B Watson.

[37] It was asserted in the applications and related materials that the Division and seven of its branches were endeavouring to return to what was described as the 'traditional method of election within the Division and its predecessors, the Australasian Coal & Shale Employees Federation and the United Mine Workers Federation of Australia'[10] which was stated to be the internal conduct of elections by attendance ballot rather than the AEC conducting secret postal ballots.

[38] As part of the Division's application for a secret postal ballot exemption the Division's Rules were amended to remove the provision for postal ballots and to provide only for attendance ballots at each 'lodge' or 'locality'. In particular, Divisional Rule 17(a) was amended to state (emphasis added):

> The Central Council and each District Branch Board of Management shall appoint a Returning Officer to conduct elections within the Division and each District Branch respectively…(called in this Rule the Returning Officer).
>
> <u>Such Returning Officer shall for the purpose of each election</u> <u>appoint Local Returning Officers who shall be responsible for the conduct of elections at each lodge or locality</u> in such a way as to ensure, as far as practicable that no irregularities can occur in relation to an election.
>
> Such Returning Officer or Local Returning Officer shall not be the holder of any office in or be an employee of the Union, a Division or a District Branch or lodge of the Division.

[39] I also note that the rules of the Branch require branch elections to be conducted in accordance with Divisional Rule 17 (refer Rules 7(i)(d), 8(i)(d), 9(i)(b), 9(i)(e) and 10(b)).

[40] On 2 May 1996 the Industrial Registrar granted the exemptions and approved the rule alterations.

Complaint

[41] On 22 May 2013 correspondence was provided to the General Manager of the Commission which contained an anonymous complaint about the conduct of elections by the Division and the Branch in 2011 and 2012.

The elections referred to in the complaint were as follows:

● the by-election for the Branch Executive Vice President that was conducted from October to December 2011 by the Branch Returning Officer, Mr Dennis Hansell (**the 2011 election**); and

● the quadrennial election for most offices in the Division and its branches that was conducted from about March to May 2012 by the Division's National Returning Officer, Mr Kenneth Hawkins (the **2012 election**).

[42] The Regulatory Compliance Branch of the Commission conducted a range of inquiries to assist the General Manager in relation to the complaint.

[43] On 31 May 2013 the General Manager wrote to the Branch Secretary, Mr Timothy Whyte advising that a complaint had been received regarding the conduct of the 2011 election and the 2012 election and sought responses to a range of questions which would assist the General Manager in dealing with the complaint.

[44] On 6 June 2013, the current General Secretary of the Division, Mr Andrew Vickers, provided a written response regarding the 2012 election for the Division, together with copies of relevant documents. On 8 July 2013 Mr Whyte provided a detailed written response regarding the 2011 election in the Branch, together with copies of relevant documents.

Inquiries by the Commission

[45] Subsequent to receipt of the initial complaint on 22 May 2013, the Regulatory Compliance Branch conducted a comprehensive range of inquiries to assist the General Manager in addressing the complaint.

[46] The comprehensive inquiries included:

i. Obtaining and reviewing the Division's Returning Officers Manual (the **Election Manual**).

ii. Reviewing the transcript of proceedings of 2 May 1996 regarding the granting of the exemptions.

iii. Conducting a number of interviews with members of the Division regarding the election practices in the Division.

iv. Reviewing the electoral history of the Division under the RO Act and prior legislation.

v. Reviewing relevant authorities in relation to irregularities in industrial elections generally.

vi. Reviewing the use of postal voting within the Division by gathering data regarding the prevalence of postal voting in the Division and assessing whether the provisions in the Election Manual regarding postal voting were consistent with the Division's rules.

vii. Reviewing the 'participation' rate of members in the Division's elections by: gathering data regarding the voting rates for elections within the Division and its branches that are conducted by attendance ballot and comparing it to: the voting rates in the Victorian District Branch of the Division which does not have an AEC exemption (and its elections are conducted by secret postal ballot by the AEC). [11]

[47] During the conduct of these and associated inquiries, three other matters of interest emerged.

First Matter of Interest – complaint by former officer

[48] The first matter of interest was that *The Australian* newspaper published two articles on 28 and 29 January 2014 regarding the conduct of elections in the Division. In particular, the articles quoted a Mr Stuart Vaccaneo, the former Executive Vice President of the Branch, as claiming 'there have been elections [in the Division] … that have been run corruptly' and that the Division should not be able to run its own elections because it could not be trusted.

[49] Officers of the Regulatory Compliance Branch subsequently engaged with and interviewed Mr Vaccaneo. It was established during that process that it had been the resignation by Mr Vaccaneo from his former office as Branch Executive Vice President which triggered the 2011 election. Mr Vaccaneo subsequently provided a range of relevant documents and a formal statement for the purposes of assisting the Regulatory Compliance Branch with its inquiries.

[50] Among other things, Mr Vaccaneo's statement included his extensive experience as an elected officer in the Division and his observations of election practices in general and a range of issues emerging from the 2011 election in particular.

[51] Mr Vaccaneo also later made written submissions to the Trade Union Royal Commission (the **TURC**) in relation to Issues Paper No 3 (Funding of Trade Union Elections) regarding the conduct of elections in the Division pursuant to the relevant AEC exemptions which were published on its web site.

Second Matter of Interest - Submission to the Trade Union Royal Commission (TURC)

[52] The second matter of interest was that the CFMEU lodged a public submission with the TURC in August 2014 entitled 'Submission by the Construction, Forestry, Mining and Energy Union in response to Issues Paper No 3 'Funding of Trade Union Elections'' (the **TURC Submission**).

[53] The contents of the TURC submission were identified as relevant to the inquiries being conducted by the Regulatory Compliance Branch for a number of reasons including that the submission provided direct confirmation that postal voting was regularly occurring within the Division, contrary to its rules, and that the rate of postal voting was increasing.

[54] The central focus of the TURC Submission was the conduct of elections by the Division under exemptions issued to it in 1996 under the IR Act. The aim of the submission was:

> …to show that far from promoting a deficit of democratic control and transparency, the operation of the statutory exemption in respect of the Union is an exemplar of democratic control by the membership[12]

[55] The submission included that the Division's 'National Returning Officer is also responsible for ensuring a postal vote component for the union elections for those members who are not organised into lodges. The postal vote component of the General elections conducted by the Union … represent a small minority of the votes cast.' [13]

[56] The submission also refers to the Election Manual [14] and sets out the following quote from that manual:

> Our union demands the highest standards of our officer (sic) bearers, from the grass roots Lodge and Branch level, to District Officers and up to the National leadership. We pride ourselves on the quality and character of our officials and we have always set a high benchmark for the processes we engage in, especially the election of our office-bearers. [15]

[57] The submission concludes with the following:

> There is no valid reason from the perspective of the Union and the members it represents, to alter a system that is working effectively[16]

[58] For the removal of doubt, the references to the 'Union' in the TURC Submission refer to the *Mining and Energy Division* as page 1 of the submission refers to ' … the CFMEU Mining & Energy Division ('the Union')'.

Third matter of interest – prescribed envelopes for postal ballots

[59] In 2003 a range of amendments were introduced into the federal industrial legislation regarding the use of prescribed envelopes for postal votes.

[60] The amendments came into operation on 12 May 2003 with the commencement of Schedule 1B (Registration and Accountability of Organisations Schedule (**RAO Schedule**)) of the *Workplace Relations Act 1996* (**WR Act).** The legislative changes made in 2003 have generally continued under the RO Act which came into general operation on 1 July 2009.

[61] Section 188 of the legislative regime that commenced in 2003 introduced a requirement that postal ballots 'cannot be counted' unless the vote is returned in prescribed envelopes as follows:

> If the rules of an organisation provide for elections for office by postal ballot, a vote in the election cannot be counted unless the ballot paper on which it is recorded is returned as follows:
>
> (a) the ballot paper must be in the declaration envelope provided to the voter with the ballot paper;
>
> (b) the declaration envelope must be in another envelope that is in the form prescribed by the regulations.

[62] The relevant envelopes (being a declaration envelope and another envelope) are currently provided for in regulations 5 and 6 of the RO Regulations.

[63] It is relevant to note that the Branch and Division appear to have been using postal votes from 1996 (without this being allowed under the rules) and, in addition, using postal votes since 2003 without the use of the envelopes referred to in s 188 and regulations 5 and 6. The potential implications of this will be discussed later in this decision.

Outcome of the Commission's inquiries

[64] At the conclusion of the comprehensive inquiries conducted by staff of the Regulatory Compliance Branch, all of the available materials were presented to me as the Delegate of the General Manager to consider appropriate action.

[65] The materials raised two issues for consideration. First, whether a notice should be issued and a hearing conducted for the Division to show cause why the Division's secret postal ballot exemption (that allows the Division to conduct attendance ballots) should not be revoked under s 144. Second, whether to issue a notice and conduct a hearing for the Branch to show cause why the AEC exemption issued to it should not be revoked under s 186(2)(b).

[66] As to the first issue, I concluded that it was appropriate in all the circumstances to formally write to the Division and identify a broad range of concerns regarding the conduct of elections in the Division as a whole. On 20 August 2015 I formally wrote to Mr Vickers in his capacity as the General Secretary of the Division and I identified a range of specific concerns regarding the conduct of elections in the Division. I advised Mr Vickers that some instances had been identified in which the conduct of elections in the Division appeared to be inconsistent with the rules of the Division, including the use of postal ballots in elections.

[67] As to the second issue, it appeared to me that I could no longer be satisfied that elections for the Branch would be conducted under the rules of the organisation or Branch, and the RO Act as required by s 186(1)(b)(i) and I concluded that it was appropriate in all the circumstances to issue a Show Cause Notice to the Branch to which I now turn.

Show Cause Notice to Branch (R2014/186)

[68] On 20 August 2015 I formally advised the Branch Secretary Mr Whyte that on the basis of the available materials, it appeared to me that I could no longer be satisfied of the matters in s 186(1)(b)(i) of the RO Act and that I proposed to revoke the exemption issued in matter R20021/1996.

[69] I enclosed a Show Cause Notice to the Committee of Management of the Branch issued in accordance with s 186(2)(b) and regulation 137(2) of the RO Regulations. I invited the Committee of Management to show cause as to why the exemption issued to the Branch should not be revoked and listed the matter for hearing on 17 September 2015.

Statement of reasons

[70] Attached to the Show Cause Notice was a Statement of Reasons which outlined six reasons and their associated particulars upon which I relied to reach a preliminary view that it appeared to me that I could no longer be satisfied of the matters in s 186(1)(b)(i). The notice and statement contained detailed references to a range of documents, copies of which were sent to the Branch with the notice, including Mr Vaccaneo's statement and its annexures, and the original exemption certificate and decision in transcript of 2 May 1996.[17] The six reasons and their associated particulars were as follows:

Reason Number One

[71] Contrary to Rule 17 of the CFMEU, Mining and Energy Division rules (Divisional Rules) which provides that attendance ballots are to be conducted at each lodge or locality in the Division, postal voting has purportedly been permitted by the Queensland Branch.

Particulars of Reason Number One

[72] An email sent on 11 December 2011, from the President of the Queensland Branch, Mr Stephen Smyth to a Vice President of the Queensland Branch, Mr Glenn Power and others, makes reference to postal voting in the 2011 election, as well as earlier elections.

[73] The Notice to Members of the 2011 election for the office of Executive Vice President of the Queensland Branch makes provision for postal voting.

[74] The Division's Returning Officers Manual: a Guide to District and National Election Processes of the CFMEU, Mining and Energy Division provides that a postal ballot is to be conducted for: eligible members who do not belong to a lodge; members who received approval to cast a postal vote from the national Returning Officer; or where a Local Returning officer is not available to conduct a site vote.

Reason Number Two

[75] Contrary to Divisional Rule 17(a), which provides that each District Branch Board of Management shall appoint a Returning Officer to conduct elections within each District Branch, Returning Officers have not been appointed by the Queensland Branch Board of Management.

Particulars of Reason Number Two

[76] In respect of three elections for the Queensland Branch held in 2010, no minute of a Board determination to appoint Mr Dennis Hansell as the Returning Officer for those elections can be located.

[77] In respect of the 2011 Queensland Branch election for the office of Executive Vice President, no minute of a Board determination to appoint Mr Hansell as the Returning Officer can be located.

[78] It appears that the former Queensland Branch Secretary, Mr Jim Valery, "arranged" for Mr Hansell to be the Returning Officer for the 2011 Queensland Branch election for the office of Executive Vice President, without reference to the Board.

Reason Number Three

[79] Contrary to Divisional Rule 17(a), Returning Officers for Queensland Branch elections have not appointed Local Returning Officers who are responsible for the conduct of elections at each lodge or locality in such a way as to ensure as far as practicable that no irregularities can occur in relation to an election.

Particulars of Reason Number Three

[80] In the Queensland Branch, it appears that the practice is for Local Returning Officers to be elected by lodge members, rather than appointed by the Returning Officer, and that not every lodge and locality has a Local Returning Officer.

[81] Irregularities purportedly occurred in the 2011 election for the office of Executive Vice President of the Queensland Branch. These include:

> i. Ballots issued to two Local Returning Officers are alleged to have gone missing;
>
> ii. Ballot papers were allegedly returned to the Returning officer other than in a manner provided by the Rules;
>
> iii. The ballot may not have been conducted in all places as a secret ballot.

Reason Number Four

[82] Contrary to Divisional Rule 17 and the RO Act, an officer of the Queensland Branch directed the Returning Officer as to the conduct of the 2011 election for the office of Executive Vice President and subsequently determined that there were irregularities in the election process.

Particulars of Reason Number Four

[83] On 3 October 2011, the Returning Officer for the 2011 election for the office of Executive Vice President, Mr Denis Hansell issued an election notice which stated that the ballot would close on 9 December 2011, 'unless granted extension by the Returning Officer.'

[84] In or about mid-November 2011, ballot papers sent by Mr Hansell to the Local Returning Officer of the Peak Downs lodge 'disappeared'.

[85] On 1 December 2011, Mr Hansell sent new ballot papers to the Local Returning Officer of the Peak Downs lodge and granted the lodge an extension to 16 December 2011. It appears that Mr Hansell subsequently advised the Local Returning Officer at the Peak Downs Lodge that he would accept any ballots that were returned and postmarked on or before 16 December 2011.

[86] On 15 December 2011, the President of the Queensland Branch, Mr Stephen Smyth expressed concern about Mr Hansell's decision to extend the ballot period and directed Mr Hansell that, in order for the ballots from the Peak Downs lodge to be counted, they had to be received by the Returning Officer in Brisbane by 16 December 2011 and not merely posted by that date. Mr Smyth further advised Mr Hansell that the failure to clarify the date for return of ballots may 'lead to the members at Peak Downs Lodge being inadvertently disenfranchised. Such disenfranchisement may constitute an irregularity and cause the election result to be declared a nullity.'

[87] Mr Smyth's direction to Mr Hansell was contrary to Divisional Rule 17(a) and ss 143(1)(b) of the RO Act, which provide for the conduct of an election by a returning officer, who is not the holder of any office in, or an employee of the organisation or branch. This is designed to ensure the independence of the election process.

[88] The effect of Mr Smyth's direction, if complied with, would have reduced voting at the Peak Downs lodge by at least two days, which is the time it would be expected ballots posted from Peak Downs to be received in Brisbane.

[89] It appears that Mr Smyth had an interest in the outcome of the election contested by two Vice Presidents of the Queensland Branch (Mr Shane Brunker and Mr Glenn Power). On 11 December 2011, Mr Smyth wrote to Mr Power and others regarding Mr Brunker's chances of success in the election. It appears that Mr Power, and not Mr Brunker, was Mr Smyth's preferred candidate in the election. Mr Smyth stated [in an email to Mr Power and others] that in order for Mr Brunker to be successful he would:

> … need to get **all the votes** from Peak Downs, Tarong, Burton, New Acland and West Moreton to even draw level!!! I don't believe this would occur and have to have everyone vote!!

[90] Mr Hansell did not accord with Mr Smyth's direction and accepted Peak Downs votes received after 16 December 2011 and included these in the final ballot count on 20 December 2011. Mr Smyth subsequently determined that: Mr Hansell's decision to extend the ballot period and the Peak Downs lodge's alleged failure 'to comply with the District Returning Officer's written directions to return their ballots by the closing date of 16th December' were 'irregularities' in the election process.

[91] The Divisional Rules or the RO Act do not empower an officer of an organisation to determine the question of whether an irregularity has happened in relation to an election. This is a power that is reserved for the Federal Court under s 206 of the RO Act, which provides that the Federal Court may inquire into and determine the question of whether an irregularity has happened in relation to an election.

[92] Further, in the Division's general election held in 2012, a decision of the Division's National Returning Officer, Mr Ken Hawkins, to vary the ballot period was not treated as an irregularity. The Division's Special Central Council endorsed the election report of the Returning officer, which noted that there had been a variation to the ballot time at Norwich Park Mine. The minutes of this meeting indicate that Mr Smyth, who is a member of the Special Central Council, seconded this motion.

[93] The actions of Mr Smyth in issuing directions to the Returning Officer as to the conduct of the election, and subsequently determining that there were irregularities in the election process, were contrary to the RO Act and the Rules of the Division.

Reason Number Five

[94] Contrary to the RO Act and the Rules of the Division and the Queensland Branch, in the 2011 election for the office of Executive Vice President, the Board declared the election ballot and its result "invalid" in response to alleged irregularities.

Particulars of Reason Number Five

[95] On 21 December 2011, a Special Board of Management meeting was held and it appears that the Board resolved that the ballot for the Executive Vice President would be declared "invalid" as a result of identified irregularities and the position held over until the 2012 general election.

[96] The vote for the resolution was initially tied at five votes for and five votes against. Mr Stephen Smyth used his casting vote as Queensland Branch President to pass this resolution.

[97] On 23 December 2011 Mr Smyth wrote to all members stating that the Board had proposed and accepted that:

> The ballot and its result would be deemed as invalid due to a number of irregularities within the election process and it was more appropriate to leave the position unfilled until the general election to be held in 2012[18]

[98] It appears that the Queensland Branch considers that the Board was empowered to take such action by Queensland Rule 8(v)(h), which provides that the Board has power to 'reverse any decision of any Lodge, subject to sub-rule 8(iv), and generally to do all acts, business or things which the District Branch Board of Management decides are proper for the achievement of the objects established in Rule 3 of these Rules.'

[99] However, Queensland Rule 8(v)(h) does not empower the board to:

i. determine the question of whether an irregularity has happened in relation to an election; or

ii. declare an election, or any step in relation to an election, to be 'invalid'.

[100] The Board does not have this power under the Divisional or Queensland Branch Rules or under the RO Act.[19]

[101] This is a power that is reserved for the Federal Court. Pursuant to s 206 of the RO Act, the Federal Court may:

i. inquire into and determine the question of whether an irregularity has happened in relation to an election; and

ii. where an irregularity has occurred, make certain orders including an order declaring the election, or any step in relation to the election, to be void.

[102] Further, even if the Board was empowered to take such action by Queensland Rule 8(v)(h), it appears that the Board subsequently failed to act in accordance with sub-rule 8(iv), which provides that:

i. all business transacted by the Board, shell be confirmed before the meeting concludes and copies of the confirmed minutes shall be posted to the lodges;

ii. each lodge 'shall submit the confirmed resolutions of the Board to a [vote at a] meeting of the Lodge membership' and send the results back to the Branch Secretary within six weeks; and

iii. board resolutions 'shall become the binding policy' of the Queensland Branch if an aggregate majority of members vote in favour of the resolution.

[103] Contrary to sub-rule 8(iv), it does not appear that the minutes of the Special Board of Management meeting were properly minuted and the resulting resolution confirmed nor was the Board's resolution sent to the lodges and endorsed by the lodge membership.

[104] The actions of the Board in determining that irregularities had occurred and consequently deeming the ballot and its result invalid were beyond the power of the RO Act and the Rules of the Division and the Queensland Branch.

[105] Further, one of the most senior members of the Queensland Branch, the Queensland Branch President, Mr Stephen Smyth, played a central role in authorising these actions and remains in a position of authority. It also appears that five other members of the Board, who voted to declare the ballot and its result invalid remain in office.

Reason Number Six

[106] Contrary to the RO Act and the Rules, the Board, in effect, declared that a person who had purportedly been elected to the office of Executive Vice President of the Queensland Branch had not been elected.

Particulars of Reason Number Six

[107] On 20 December 2011:

i. a written declaration of the result of the election for the office of Executive Vice President of the Queensland Branch was purportedly issued by the Returning Officer;

ii. at 11.39 hrs', Mr Brunker received a phone call from the Returning Officer, Mr Denis Hansell, notifying him that he was the winner of the ballot by 50 votes.

[108] On the same day Mr Hansell wrote to the Board of Management tendering his resignation.

[109] The Queensland Branch President, Mr Smyth, in conjunction with the Queensland Branch Secretary, then convened a Special Board of Management meeting to determine 'whether to uphold or reject the Ex-Queensland Returning Officers… declaration of the recently run and currently vacant Executive (Senior) Vice President of the Queensland District.'

[110] On 21 December 2011, the Board appears to have passed a resolution declaring the ballot and its result invalid due to a number of irregularities, with the effect that a person who had been purportedly elected (Mr Brunker) did not take up the position of Executive Vice President.

[111] On 24 December 2011, Mr Brunker emailed Mr Smyth and Mr Valery referring to 'the BOM's decision to overturn the Returning Officer's declaration of myself for the Senior Vice President'.s (sic) position.'

[112] The RO Act does not grant power to a committee or officer of an organisation to declare a person purporting to have been elected not to have been elected.

[113] This is a power reserved for the Federal Court under ss 206(4) and (5). Pursuant to ss.206(4) of the RO Act, the Federal Court may, where it has determined that an irregularity has occurred, make certain orders including an order declaring a person purporting to have been elected not to have been elected. The Federal Court must not declare that a person was not elected, unless the Federal Court is of the opinion that, having regard to the irregularity found, and any circumstances giving rise to a likelihood that similar irregularities may have happened or may happen, the result of the election may have been affected, or may be affected, by irregularities (ss 206(5).

[114] It appears that Mr Smyth formed the view that Mr Hansell did not declare the election result before he resigned, and consequently, that Mr Hansell had no power to complete the election.

[115] However, it is unclear on the materials what time the resignation occurred and when it took effect and it does not appear there was any agreement by the Board about this. The draft minutes of the Special Board of Management meeting state that "there was never any agreement as to whether the declaration was official or should be seen as outside the rules of the union."

[116] Further, if Mr Hansell had resigned before declaring the result, the Board failed to appoint a new Returning officer to complete the election [20]instead deeming the ballot and its result "invalid."

[117] The actions of the Board in determining that irregularities had occurred and consequently deeming the ballot and its result invalid, with the result that the person who was purportedly elected was apparently not elected and did not take up office, was beyond the power of the RO Act and the Rules of the Division and the Queensland Branch.

Submissions and materials lodged prior to hearing

[118] On 11 September 2015 the following submissions and materials were filed with the Commission:

i. Written submission of Mr S. Crawshaw SC on behalf of both the Branch and Division dated 11 September 2015 which also relied on:

a. an Affidavit of Mr Vickers dated 10 September 2015 (the **affidavit**) with two annexures which contained:

i. statistics regarding the number of persons engaged in the coal mining industry in Australia

ii. the CFMEU's TURC Submission (as referred to above which includes within it a copy of the Division's Election Manual).

ii. Letter from Mr Vickers of 11 September 2015 which responded to the concerns raised in my letter to him of 20 August 2015 regarding the conduct of elections in the Division. Mr Vickers' letter also confirmed that the Division and Branch had prepared a joint submission in response to

the Show Cause Notice. It also indicated that he had prepared his affidavit in support of the joint submission with the intention of being present at the hearing in order to answer any questions that might arise from his affidavit or in relation to the operation of the Division and/or District Branches. The letter also contained two schedules that were stated to be a 'concrete solution' to the issues raised in the present matter as follows:

a. Draft amendments to the election provisions in Rule 17 (the **Draft Rules**);

b. Draft amendments to Rule 8 (regarding the Division's National Convention).

[119] In addition, on 15 September 2015 the Division provided a copy of redacted Central Council Minutes of March 2012 that considered issues arising out of the 2011 election which:

- stated that the Branch's Board declared the 2011 ballot 'null and void';
- passed three resolutions that purported to address problems arising from that election:
  - the Central Council adopted changes to the Election Manual (although details of the changes were not included in the redacted minutes) and directed that the revised manual be distributed within the Division and training provided pursuant to it;
  - that in future all national elections for the Division be conducted by a National Returning Officer;
  - that, if possible, all future elections for the branches covered by the exemptions be conducted by the National Returning Officer.

The Hearing

[120] In accordance with regulation 137(2) of the RO Regulations, I conducted a hearing on 17 September 2015 to provide the Committee of Management of the Branch with an opportunity to show cause as to why the exemption should not be revoked.

[121] Mr S Crawshaw SC appeared on behalf of the Branch and Division accompanied by the Branch Secretary, Mr Timothy Whyte, the General Secretary of the Division, Mr Vickers and the National Legal Director of the Division Mr Alex Bukarica.

[122] The hearing was recorded and a transcription was subsequently prepared.

[123] During the hearing, I again referred individually to the six reasons in the written Statement of Reasons and I summarised my concerns with respect to each of those reasons. I provided the participants an opportunity to respond to the six respective reasons.

[124] During the hearing, Mr Crawshaw SC submitted that the way the Branch and Division had dealt with the Statement of Reasons was essentially to act on the basis that there have been breaches of the rules and the RO Act set out in the Statement of Reasons. Mr Crawshaw SC indicated that the basis of the submissions made in response to the Statement of Reasons was not to provide a separate response in relation to each separate reason, but to accept there had been breaches of the rules and the RO Act and to say:

> …we take that on board. Indeed we take on board what's happened with that 2011 mine election as a wake-up call to try and improve the situation in the future.[21]

[125] Mr Crawshaw SC further referred to matters which were said to support how both the Branch and Division had responded to remedy the matters of concern.

[126] Mr Vickers also responded to a number of issues during the hearing as did Mr Bukarica and Mr Whyte.

[127] During the hearing I undertook to consider and take into account the materials lodged by the Branch on 11 September 2015 including the letter from Mr Vickers, the submission by Mr Crawshaw SC, the Affidavit of Mr Vickers and the supporting documents and materials.

[128] Prior to the hearing I had conducted a preliminary examination of the Draft Rules lodged by Mr Vickers (which he described in his affidavit as being a 'concrete solution' to the issues raised in the present matter). The Draft Rules indicated that the Division seeks to supplement its existing attendance voting regime with the use of postal ballots where necessary. However, on my examination of the Draft Rules, it was clear that they were deficient because they did not provide for the mandatory envelopes for postal ballots prescribed by s 188 of the RO Act and regulations 5 and 6 of the RO Regulations (as previously referred to above).

[129] During the hearing I made specific reference to this deficiency in the Draft Rules. Mr Crawshaw SC responded to that reference by indicating that the Division would not have any problem in making sure that the proposed new Rule 17 would comply with s 188 and regulations 5 and 6.

[130] Finally I note that during the hearing Mr Crawshaw SC inquired whether the determination of the present matter could be deferred until the Draft Rules referred to by Mr Vickers (that seek to address the issues arising in the conduct of the Branch's elections) have been passed and certified.

[131] In considering all of the relevant circumstances of this matter, I have had particular regard to the Draft Rules and I have also considered the submission concerning deferring the making of this decision while the Draft Rules are formalised. While I took into account the Draft Rules, I determined not to defer this decision and on 16 October 2015 I wrote to Mr Vickers advising of that determination.

Concessions by Branch and Division

[132] In his formal submission of 11 September 2015, Mr Crawshaw SC made general concessions that irregularities, as well as contraventions of the rules and the RO Act, had occurred in the 2011 election. He also submitted that these irregularities and other issues, in large part, were a result of defects in relation to the appointment and actions of Returning Officers.

[133] Mr Crawshaw SC's submission generally accepted the 'irregularities … [had] occurred in the 2011 by-election … [as] set out in the Statement of Reasons'. [22] In other words, the submission by Counsel for the Branch and Division appeared to be accepting each of the irregularities and contraventions which had been set out in the Statement of Reasons. Alternatively and at the least, the submissions did not appear to challenge any of the reasons in any material way.

[134] During the hearing conducted in Brisbane on 17 September 2015, Mr Crawshaw SC made the following significant concession:

> …you will see from our written submissions that the way we dealt with the statement of reasons is essentially to act on the basis that there have been breaches of the rules or Act as set out therein for the purposes of this hearing.[23]

[135] Accordingly, I consider that notwithstanding having the opportunity to challenge the six reasons and their associated particulars as set out in the Statement of Reasons, the Branch has conceded those reasons as having been made out and unchallenged.

[136] I also note that the Branch and the Division have not challenged the veracity of the information in Mr Vaccaneo's statement or the documents he provided.

Approach to submissions and other materials

[137] Notwithstanding the concessions by the Branch and the Division, extensive submissions were made in relation to this matter (primarily in the written submissions made by Mr Crawshaw SC but also in the other lodged materials). In order to ensure that I have taken into account all of the relevant materials, I intend to deal with these submissions as follows.

[138] First I will consider the jurisdictional submission that asserted that the revocation of an AEC exemption requires the General Manager to be no longer satisfied of every element in s 186(1) (the *every element in s 186(1)* submission).

[139] Then I will consider the submissions that have asserted that the General Manager can be satisfied that contraventions will not occur in future Branch elections. These submissions may be described as falling under three main headings as follows:

- The *remedial action* submissions which set out that the Branch and Division are taking remedial action to ensure the issues identified do not continue as follows:
  - The Division has proposed Draft Rules to avoid such issues in future;
  - The Division will appoint a National Returning Officer to conduct all elections;
  - The training of returning officers will be improved.
- The *inexperience in 2011* submission which set out that the issues in the 2011 election were due to the inexperience of the Returning Officer and other officers.
- The *complete history* submissions which set out that the complete history of Branch elections indicates the Branch will comply with the rules and the RO Act as follows:
  - Elections generally have been conducted correctly for a long period of time;
  - The Branch and Division have knowledge and experience regarding elections;
  - There have been no legal challenges or complaints regarding elections.

[140] Then I will consider a number of additional submissions made by Mr Crawshaw SC that were described as relating to the exercise of discretion under s 186(2) although some of these submissions appear to extend beyond discretionary issues to other issues such as jurisdiction.

Every element in s 186(1) submission

[141] The written submissions of Mr Crawshaw SC included excerpts from s 186(1) and (2) and asserted that the effect of s 186 is that the General Manager is only entitled to exercise the discretion to revoke an exemption if no longer satisfied (underlining added):

> (a) that the rules of the organisation or branch comply with the requirements of [the RO] …Act relating to the conduct of elections for office; <u>and</u>
>
> (b) that, if the organisation or branch is exempted from subsection 182(1), the elections for the organisation or branch, or the election for the particular office, as the case may be, will be conducted:
>
> > (i) under the rules of the organisation or branch, as the case may be, and this Act; <u>and</u>
> >
> > (ii) in a manner that will afford members entitled to vote at such elections or election an adequate opportunity of voting without intimidation;

[142] Accordingly, this submission appears to assert that an exemption can only be revoked if the decision maker is no longer satisfied of every element in s 186(1).

[143] In my view the submission is misconceived for the following reasons:

- an exemption may be granted if the decision maker is satisfied of *every* element in s 186(1);
- an exemption may be revoked if the decision maker is 'no longer satisfied as mentioned in subsection [186](1)' and has given the prescribed notice;

- being no longer satisfied under s 186(1) would mean no longer being satisfied in relation to every element in s 186(1); therefore

- if the General Manager was no longer satisfied of only *one* element under s 186(1) then he/she would ‘no longer [be] satisfied as mentioned in subsection s 186(1)’ and thus would have jurisdiction to revoke the exemption.

[144] In light of the above I reject this submission. Indeed, the notice and statement of reasons that were issued in the present matter only concern satisfaction regarding the conduct of elections under the rules and the RO Act (under s 186(1)(b)(i)) and do not purport to deal with intimidation (under s 186(1)(b)(ii)) or the contents of election rules (under s 186(1)(a)) - although comments may be included in this decision regarding the Draft Rules that seek to remedy problems identified in the conduct of the Branch’s elections.

Remedial action submission – Draft Rules

[145] It was submitted that the Branch and Division have taken and are willing to take action to prevent any repetition of the irregularities that occurred in the 2011 election.

[146] Mr Vickers referred to what he described as a ‘concrete solution to the issue…raised’ as being his intention to submit the Draft Rules to a special meeting of Central Council in the near future and to file an application for approval of the rule changes with sufficient time to enable the Draft Rules to be operational prior to the scheduled general elections in 2016.

[147] The Draft Rules propose a number of amendments to Divisional Rule 17 regarding the following matters:

- that the attendance voting regime should be amended to allow for postal voting where necessary;

- that the Returning Officer shall:

    - have access to independent legal advice;

    - be free from any influence or direction of any officer or employee;

    - provide a report to the General Secretary at the end of each election regarding the election result (and the report may also make recommendations regarding how to improve member participation in elections and other matters);

    - have regard to the experience and training of persons when appointing Local Returning Officers to conduct attendance ballots at lodges or localities.

[148] However, as indicated above, a preliminary examination of the Draft Rules purporting to be a ‘concrete solution’ to the issues being raised revealed that they did not provide for the mandatory envelopes for postal ballots referred to in s 188 and regulations 5 and 6.

[149] I also note that the Draft Rules appear to be at a preliminary stage and do not appear to be sufficiently crafted to remedy the electoral issues identified in the present matter. While I note that Mr Vickers subsequently forwarded a revised version of the Draft Rules to the Commission on 14 October 2015 (which refer to the postal voting envelopes prescribed by s 188 and regulations 5 and 6) in my view those revised alterations also appear to be at a relatively preliminary stage (hereafter the two drafts will be referred to as the Draft Rules).

[150] Section 143(1)(f) provides that the election rules of an organisation ‘must be such as to ensure, as far as practicable, that no irregularities can occur in relation to an election’. I note that this provision is stated in mandatory terms. The same provision applies to election rules for branches (refer s 143(4).

[151] Based on the information that has come to light in the present matter it appears that the current rules and the Draft Rules may not ensure as far as practicable that no irregularities can occur in elections.

For example, in relation to the 2011 election a number of controversies arose regarding the operation of Rule 17 – such as:

- whether the rules allow the Returning Officer to vary a ballot period; and
- whether the rules deal with the situation where the office of returning officer may become vacant.

[152] The current rules and the Draft Rules do not appear to address the above points.

[153] The Draft Rules also require the National Returning Officer to provide a report at the end of each election to the General Secretary. These reports would include the results of each election and may make recommendations as to how to improve the participation of members in the election process and other relevant matters.

[154] During the hearing I asked Mr Vickers whether the reports would be provided to the Commission. Mr Vickers responded as follows:

> ..I have no fundamental reason – there is no fundamental reason why a copy of that report couldn't be or wouldn't be provided to the Fair Work if Fair Work wished it. [24]

[155] However the Draft Rules do not *require* the reports to be lodged with the Commission.

[156] I note that there is detailed information on the AEC website regarding the conduct of industrial elections including a 'Model Rules Guide'. It is not clear from the material I have seen that the Division has sought to inform itself about the best way of drafting election rules by referring to specialised material of that kind.

[157] In all the circumstances, it appears to me that the Division would benefit from a comprehensive review of Divisional Rule 17.

[158] Accordingly I am not persuaded that the passing or certification of the Draft Rules would be sufficient to ensure that irregularities do not occur in future elections and that those elections are conducted in accordance with the rules or the RO Act.

[159] I note however the positive approach being taken by the Division in submitting Draft Rules and requesting advice from the Regulatory Compliance Branch about the drafts to assist the Division in addressing the election concerns which have emerged in this matter. The Regulatory Compliance Branch will continue to assist the Division in this regard.

Remedial action submission – National Returning Officer

[160] Mr Vickers included in his correspondence that the 'central measure' proposed by the Division to remedy the issues arising in the 2011 election is the centralisation of the Returning Officer function with a single National Returning Officer appointed by Central Council as set out in the Draft Rules. Mr Vickers indicated that this would have the effect of removing the option of District Branches appointing their own Returning Officer. He also noted that the Draft Rules would have the effect of strengthening the independent status of the National Returning Officer under the rules.

[161] Mr Vickers also indicated the Division's intention to appoint an experienced, impartial and qualified person of integrity as the National Returning Officer. [25]

[162] Mr Vickers added that the National Returning Officer would have access to independent legal advice as to his or her obligations under the rules and the RO Act as an important measure to insulate against election irregularities.

[163] In so far as centralising the Returning Officer function with a single National Returning Officer is concerned, I note that this has apparently been the practice for all elections in the Division and the

branches covered by the exemptions since 2012 (in light of the Central Council's resolution of March 2012 to that effect) and that the Division currently has access to internal and external legal advice.

[164] The Division conceded that postal ballots have been in use for many years contrary to the rules and Local Returning Officers have historically not been appointed in accordance with the rules. While mandating an experienced single National Returning Officer appears to be on its face a positive step, the use of a National Returning Officer for quadrennial elections for the Division and most branches since 1996 did not seem to have any significant bearing on avoiding those types of contraventions. Neither did the use of a National Returning Officer appear to have any significant bearing on the failure by the Branch to identify or comply with s 188 of the WR Act and the associated regulations when introduced in 2003.

[165] In all the circumstances, on balance I am not persuaded that the appointment of an experienced single National Returning Officer, of itself or in combination with other actions taken or to be taken, will ensure that elections for the Branch will be conducted under the rules of the Division or Branch and the RO Act.

[166] While I acknowledge that they are capable of mitigation, there are also additional and demonstrable risks associated with reliance on a compliance strategy grounded upon a single person such as a National Returning Officer in terms of the ongoing capacity of that person, including that the person may, at any time, choose to resign or retire because of illness or other reason.

[167] Some of these types of risks are mitigated when the AEC conducts elections on behalf of registered organisations. For example, s 193 provides a range of powers to AEC 'electoral officials' regarding the conduct of elections, including how to deal with the inability of a Returning Officer to complete an election. I also note that these provisions only appear to apply to AEC officers as 'electoral official' is defined in s 6 to include AEC officials.

[168] Accordingly I am not persuaded that the conduct of elections by one National Returning Officer will necessarily ensure that issues do not arise in future elections for the Branch or that future elections for the Branch will be conducted in accordance with the rules and the RO Act.

Remedial action submission – Training

[169] The relevance of submissions relating to training is that while delivered at the Divisional level, it is submitted that remedial training will ensure that future Branch elections will be conducted in accordance with the rules and the Act. Mr Vickers stated in his correspondence that the move towards a single National Returning Officer 'will be accompanied by better training of all returning officers'.[26] It appears that the training is based on the Election Manual. The TURC Submission states that:

> The Union has produced a "Returning Officers Manual" that explains in detail the responsibilities and obligations of National and Local Returning Officers in the conduct of the elections of the Union … [and which] goes into specific detail as to how an election should be conducted under the ballot rule of the Union[27]

[170] Mr Vaccaneo has also stated that it was his understanding that 'the election manual was first produced by the Division's National Office a considerable time ago (possibly in the 1990's) and that since then it has been periodically revised'. [28]

[171] It also appears that the current version of the Election Manual was approved by the Central Council in March 2012 as the minutes of the relevant meeting state:

> Council resolves to adopt the changes to the Returning Officers Manual as revised & presented to Council & direct the National Executive to distribute the manual to lodges & Districts & conduct appropriate training prior to the National Elections being conducted.[29]

[172] Given that the National Office of the Division (generally) and the Central Council (specifically since at least 2012) have had a practice of issuing an Election Manual it is necessary to consider whether

this would assist in the conduct of Branch elections under the rules.

[173] The Election Manual appears to encourage rule breaches regarding postal voting - as the Statement of Reasons stated at reason one (emphasis added):

> Contrary to Rule 17 … postal voting has purportedly been permitted by the … Branch
>
> Particulars … The Division's Returning Officers Manual … provides that a postal ballot is to be conducted for: eligible members who do not belong to a lodge; members who receive approval to cast a postal vote from the National Returning Officer; or where a Local Returning Officer is not available to conduct a site vote.

[174] The fact that the supreme governing body of the Division has been responsible for issuing an election manual that contains directions, instructions and/or guidance that would lead to contraventions of the election rules raises concerns about the capacity of the Branch and Division to comply with the election rules. I also note that the issues in the Election Manual are not limited to postal voting.

[175] For example, the Election Manual states that a Local Returning Officer 'must be a financial member of the Union' (refer page 9) although there is no such mandatory requirement in the election rules.

[176] In addition, the Election Manual states that the election roll 'can only be viewed in the presence of the National Returning Officer or his representative' (refer page 11) and there is no such mandatory requirement in the rules.

[177] Further, while acknowledging it is an issue for the Division and not specifically the Branch, I have concerns about a committee of 'officers' issuing an election manual that purports to guide returning officers. While this may appear to be a benevolent act it raises a number of potential issues.

[178] In the legislation there is a separation of powers between the making of election rules and the conduct of elections. Officers of an organisation or branch make rules for elections (this is normally done by committees of officers in accordance with the rule altering procedures of the organisation or branch - refer s 143, 159). Thereafter 'every such election' must be conducted by an independent returning officer who is neither an officer nor employee of the organisation (refer s 143(1)(b) and Rule 17(a)).

[179] Given that the 'conduct' of an election would seem to require the relevant person to exercise an independent judgment regarding how the rules are to be applied it would seem that the issuing of an election manual by a committee of officers would tend to have the effect of influencing how a returning officer would apply the election rules.

[180] My concerns regarding the Election Manual are compounded by the fact that a large number of persons appear to have received training based on the Election Manual and that it is intended that the National Returning Officer also receive this training. For example, Mr Vickers' letter of 11 September 2015 stated (emphasis added):

> The Divisional Council has instituted a training program for Local Returning Officers …The training provided to Local Returning Officers includes a thorough analysis of the Returning Officers' Manual produced by the Divisional Office …… It is intended that the National Returning officer … and all local returning officers will be required to complete this returning officer training …[30]

[181] Mr Vickers also stated in his letter that since the 2011 election:

> one hundred and twenty eight returning officers [have been] trained … [including] fifty five from the Queensland District …[31]

[182] My concerns relate to the fact that the current manual encourages those who have been trained in positions (such as the National Returning Officer and Local Returning Officers) to conduct elections which are contrary to the rules, including elections for the Branch.

[183] While the Draft Rules state that the returning officer 'shall be free from the direction or influence of any officer or employee of the Division' it appears to me that an election manual (that is prepared or approved by any officer or employee) and any associated training (that is conducted by any officer or employee) may lead to an unintended result.

[184] Accordingly I am not persuaded that training referred to by Mr Vickers will necessarily ensure that issues do not arise in relation to future elections for the Branch or that future elections for the Branch will be conducted in accordance with the rules and the RO Act.

Inexperience in 2011 submission

[185] Mr Vickers accepted that the conduct of the 2011 election was clearly unsatisfactory. He included that the processes associated with the 2011 election fell well short of the standards the Division expect and to which, in his submission, the Division has generally adhered to before and after the exemptions were granted.

[186] In what I acknowledge were difficult concessions for the General Secretary of the Division (and a Vice President of the CFMEU) to make, Mr Vickers described the 2011 Queensland by-election as a 'debacle' and made the following comment during the hearing:

> In truth elections were conducted for nearly a century within the branches in a way which was done effectively by custom and practice and with a huge amount of commitment to the processes of democracy within the union and membership control of the union, and it would be dishonest of me not to concede and admit at least in these proceedings that some of that including by the Board within the Queensland election, and particularly that by-election [the 2011 election] to the eternal shame and embarrassment of the organisation as a whole, particularly someone like me who has been in the organisation and was present at the Queensland district for the period that I was.[32]

[187] It was apparent to me that Mr Vickers' 'eternal shame and embarrassment' was directly linked to the conduct of the Queensland District Board in the 2011 election.

[188] In his letter of 11 September 2015 Mr Vickers also stated:

> The principal reason that the process in Queensland had gone off the rails was the inexperience of the returning officer and his inability to handle the pressure of a keenly contested election. [33]

[189] During the hearing Mr Vickers also referred to the inexperience of elected officers in relation to the 2011 election as follows:

> …actions by the Board of Management [occurred] in excess of the rules and in breach of the Registered Organisations Act. That comes about as a consequence of having relatively inexperienced district officials as well, the officers of the union.[34]

[190] I have given careful consideration to the information provided and concessions made by Mr Vickers on these points and make the following observations.

[191] First, regarding the purported inexperience of the Returning Officer in the 2011 election (Mr Hansell), I note that Mr Hansell, had conducted three previous elections in the Branch in 2010 (according to Mr Whyte's letter to the General Manager of 8 July 2013. [35] Apart from the rule contraventions regarding postal ballots and the election of Local Returning Officers (which appear to have occurred generally in elections for the Division and most branches since 1996), I have not been made aware of any other particular difficulty encountered by Mr Hansell in the conduct of those elections.

[192] I also note that the more considerable experience of the national returning officers who have conducted general elections for the Branch and Division from 1996 to 2012 has not prevented contraventions of the rules in relation to postal ballots and the election of Local Returning Officers.

[193] Second, it is to Mr Vickers' credit that he has been willing to make concessions regarding contraventions of the RO Act and the rules by the Branch's officers in the 2011 election.

[194] However, having regard to Mr Whyte's letter of 8 July 2013, it appears that Mr Vickers was in attendance at the Branch's office in Brisbane on the day of the final count for the 2011 election. On that day there was apparently a controversy between Mr Smyth and the Returning Officer as to whether the Returning Officer should include the votes from the Peak Downs Lodge in the final count. Mr Whyte's letter then states that there was a discussion between the Returning Officer and Mr Vickers on this point as follows:

> Mr Vickers recalls that he told Mr Hansell that it was not his responsibility (as the Divisional Secretary) to give advice to a Returning Officer but that if he had been the Returning Officer he would not have counted or accepted the Peak Downs votes.[36]

[195] While there is nothing to indicate that Mr Vickers gave any direction to the Returning Officer in relation to the 2011 election to that effect, the apparent fact that Mr Vickers expressed a view, which if it had been put into effect may have led to a reduction in the number of the members validly voting at the Peak Downs attendance ballot, is a matter of some concern.

[196] I am not persuaded that the issues that arose in the 2011 election were due to the inexperience of the Returning Officer or the relevant elected officers. In my view, the 2011 election issues I have referred to in the Statement of Reasons are more likely related to intentional conduct by the Branch Board of Management and it is that conduct which gives rise to serious concerns about whether future elections in the Branch will be conducted in accordance with the rules and the RO Act.

Complete history submission – conduct of past elections

[197] This submission asserted that in order to assess satisfaction in relation to future elections, that regard can be had to the experience with past elections in general. For example, Mr Crawshaw SC stated that '[t]aken as a whole, despite the irregularities that occurred in the 2011 by-election set out in the statement of reasons, the … generally satisfactory past experience'[37] regarding the conduct of Branch elections suggests that future elections would be conducted in accordance with the rules and the RO Act.

[198] I have no difficulty in acknowledging the potential merits of such a submission and I took great care in considering the historical facts associated with this matter and all of the material associated with the historical and contemporary conduct of elections within the Branch and Division.

[199] However, notwithstanding that the election rules are those of the Division, the history of elections in the Branch appears to display, over a considerable period of time, the conduct of postal votes contrary to the rules and other contraventions regarding the appointment of Local Returning Officers at each lodge or locality in the Branch.

[200] In his letter of 11 September 2015 Mr Vickers sought to explain the 'apparent disjuncture between the actual practice of Returning Officers conducting elections under the prevailing exemption and the effect of Rule 17'[38] in relation to postal voting and the appointment of Returning Officers and Local Returning Officers.

[201] Mr Vickers expressed regret that the 'disjuncture' had occurred while submitting that 'the reasons for the emergence of this practice are essentially benign in that the clear intent of the previous National Returning Officer was to facilitate and maximise the participation of members of the Division in elections who are not members of a Lodge.' Mr Vickers also indicated that the types of members who were provided with postal ballots included employees of contractors, itinerant members and members of Lodges that do not have a Local Returning Officer.

[202] He also referred to a 'massive expansion' in contractor arrangements in the coal mining industry since the 1990's. Mr Vickers further included that the membership of the Division in the industry has been substantially transformed from a position in the early 1990's where there was almost no contractor

based employment in the industry to the position in 2015 where perhaps a third or more of the workforce is employed by contractors.

[203] According to Mr Vickers, the growth in contracting arrangements and the growing percentage of members who are not attached to a Lodge 'throws up some particular challenges to the Union.'

[204] I note that it is likely postal ballots have been used in elections since the exemption was issued in 1996 in contravention of Divisional Rule 17. It is clear that s 6 of the RO Act defines an irregularity to include a 'breach of the rules of an organisation or branch' as follows:

> **Irregularity**, in relation to an election or ballot, includes:
>
> > (a) a breach of the rules of an organisation or branch of an organisation; and
> >
> > (b) an act or omission by means of which:
> >
> > > (i) the full and free recording of votes by all persons entitled to record votes and by no other persons; or
> > >
> > > (ii) a correct ascertainment or declaration of the results of the voting ;
> > >
> > > is, or is attempted to be, prevented or hindered; and
> >
> > (c) a contravention of section 190.

[205] In addition, it appears that since 2003 there may have been a failure in every Branch election in which postal ballots have been used to use the postal envelopes referred to in regulations 5 and 6. I have already noted further above that in 2003 s 188 commenced and it provided that a postal ballot 'cannot be counted' unless it has been returned in the prescribed envelopes.

[206] It is also important to note how the mandatory envelope regime for postal ballots was inserted into s 188.

[207] The use of such envelopes was recommended by the Joint Standing Committee on Electoral Matters in their 1997 inquiry into the role of the AEC in conducting industrial elections.[39] In submissions to that inquiry, the AEC submitted that:

> The integrity of elections is enhanced by the use of declaration envelopes. Security is enhanced by the Returning Officer being able, where possible to compare the signature and other written information on the envelope with available records and to confirm a voter's eligibility. Declaration envelopes also provide a record of those persons who apparently have voted, thereby assisting in the detection of possible multiple voting. [40]

[208] In relation to the first proposed bill in relation to this issue the Department of Employment Workplace Relations and Small Business made submissions that:

> This change is designed to minimise the opportunity for tampering or interfering with ballots and ensure that the election process produces fair, representative and accurate results.[41]

[209] Accordingly it appears that such envelopes are designed to protect the security of postal voting. However, given that the Divisional and Branch Rules did not provide for postal voting from 2003 to the present it is unclear whether, in a technical sense, s 188 has been contravened because s 188 is stated to only apply 'if the rules of an organisation provide for elections for office by postal ballot'.

[210] In light of the above, it is not entirely clear what the full implications may be of the Branch's use of postal ballots since 1996 – although there are a number of sections of the RO Act that may be relevant to the issue.

[211] Section 200 provides that an application may be made to the Federal Court regarding alleged election irregularities (as defined in s 6 of the RO Act). Such applications may be made by a member or former member of an organisation as well as the Electoral Commissioner (refer ss 200(1) and (3)). It is also noted that the Electoral Commissioner 'must' apply to the Federal Court for an election inquiry if he/she is of the opinion that there has been an irregularity that may have affected the result of the election (refer s 200(2)). While such applications should normally be lodged within three months of the result of the election the Court may extend that time (refer reg 143).

[212] Subsections 206(4) and (5) provide that where the Court is satisfied that an irregularity has occurred that has affected the result the Court may, among other things, declare the election void or declare that a person (who has purportedly been elected) has not been elected.

[213] I also note that ss 318 to 322 deal with invalidities and the validation of acts. Many of the provisions relating to the validation of acts indicate that a purported act that may have been invalid may be deemed as being validated after four years. Applications may also be made to the Court regarding alleged invalidities.

[214] The fact that potential irregularities may have been occurring since 1996 is a matter of significant concern in circumstances where the onus of conducting elections in accordance with the rules and the regulatory framework fall squarely on the organisation or Branch to whom the exemption has been issued.

[215] Accordingly, based on the past conduct of elections in the Branch I am not satisfied that future elections in the Branch will be conducted in accordance with the rules or the RO Act.

Complete history submission - knowledge and experience regarding elections

[216] The submissions in this matter (and also the material lodged in relation to the original application for the exemption in R20021/1996 and the related exemption applications) referred to the purported extensive knowledge of members of the Division, including the General Secretary and Returning Officers in relation to elections, democratic control and the rules. These submissions are relevant to the Branch.

[217] For example, Mr Vickers in his affidavit referred to the considerable experience he has gained between the time he first commenced work in a Queensland mine as a Cadet Mine Surveyor in 1971 to his election in 2009 as the General Secretary of the Division.

[218] I also note that in the original application for the exemptions in 1996 Counsel for the Division and its Branches (Mr Tyson) referred to a statutory declaration made by the then General Secretary of the Division Mr Watson for the purposes of the application as follows:

> Mr Tyson: … Mr Watson states …there is a high level of awareness by the overwhelming majority of members of the importance of proper conduct of elections within the organisation and the requirements of the rules and that there is a high level of awareness of the traditional election procedures and then [at] sub paragraph (d) he states that:
>
> > *The returning officer appointed under the rules … are [sic] prominent members of the division with many years of experience.* [42]

[219] Notwithstanding what was put to the Industrial Registrar for the purposes of the application for exemption in R20021/1996 (and the related applications) about the extensive knowledge and experience of Returning Officers and Local Returning Officers, and what has been referred to in the current submissions, it is in my view likely that contraventions of the Rules, at least in so far as the use of postal voting and potentially the selection of Local Returning Officers are concerned, were occurring in elections which immediately followed the issuing of the exemptions to the Branch in 1996 and those contraventions may have continued unabated, and apparently undetected, up until recent elections.

[220] It is likely, at least in part, that these potential irregularities continued to occur because of the absence of any external oversight of the elections and despite the knowledge and experience of members of the Division, including members of the Branch.

[221] Accordingly, I am not satisfied that the purported knowledge and experience of elected officers, returning officers or members of the Branch is sufficient to ensure that future elections for the Branch will be conducted in accordance with the rules or the RO Act.

Complete history submission – absence of legal challenges

[222] At page 32 of the TURC Submission the following statement is made:

> … there has been an absence in living memory of legal challenges to the validity of election results [in the Division]

[223] I am not persuaded by the above statement given that strong concerns were raised with very senior officials of the Branch and the Division in relation the 2011 election challenging the voiding of the election outcome although no formal action was taken in relation to the raising of those concerns.

[224] I have also noted previously that the use of postal ballots and other contraventions over an extensive period would appear to provide potential grounds for election challenge albeit that I am not aware of any relevant challenges having been made.

[225] Accordingly, I am not satisfied, based on this submission, that future elections for the Branch will be conducted in accordance with the rules or the RO Act.

Additional submissions by Counsel - discretionary and other matters

[226] In addition to the general submissions set out above, Mr Crawshaw SC also submitted, in the alternative, that even if the General Manager is no longer 'completely'[43] satisfied that elections for the Branch will be conducted under the rules and the RO Act, the word 'may' in s 186(2) of the Act clearly provides that a 'discretion' arises as to whether the General Manager should revoke the exemption.

[227] It was submitted that *Fernwood Fitness Centres Pty Ltd* [1995] VADT 7 (*Fernwood*) should be taken into account in relation to the exercise of a discretion to revoke an exemption. That decision concerned the revocation of an exemption (that enabled a fitness centre to only allow women to attend) under s 40(3) of the *Equal Opportunity Act 1984* (Vic) (**EO Act**) and included the following comments:

> Like the power to grant an exemption, the power to revoke an exemption is discretionary. Similar considerations apply to revocation as those which we have already set out in relation to the granting of an exemption. The matter will be considered in the light of all the facts before us, and of the objectives and the scheme of the Act. The onus to show the need for revocation is on the applicants for revocation of the exemption.
>
> If the applicant does no more than reiterate circumstances already taken into account by the Board when granting the exemption, and does not point to any defect of process or any additional or unforseen circumstances, then it is unlikely that revocation of the exemption will be justified.
>
> It was submitted on behalf of Fernwood that, in considering this matter, we should take three factors into account:-
>
> - Whether there were any irregularities in the process leading to the original exemption;
> - Whether the original exemption remains appropriate;
> - The consequences to Fernwood if the exemption were revoked.
>
> We accept that these are important factors to be taken into account in determining the ultimate question of whether it is appropriate to revoke the exemption.[44]

[228] Accordingly this suggests that exemption provisions in an Act must be, among other things, interpreted and applied in light of the objects and scheme of the Act and decisions regarding exemptions must be arrived at reasonably based on the information available to the decision maker.

[229] However it is important to point out a key difference between the circumstances in *Fernwood* and the present matter. In *Fernwood* the EO Act provided no express criteria regarding the basis upon which an exemption should be granted or revoked. As a result, the *Fernwood* decision focused great attention on the objectives and scheme of the EO Act to provide guidance regarding the granting or revocation of exemptions. By contrast, s 186 of the RO Act provides express criteria regarding the granting and revocation of AEC exemptions. Therefore, while the objectives and scheme of the RO Act are relevant , the express criteria in s 186 are the primary determinative criteria the General Manager must have regard to when considering whether to grant or revoke an AEC exemption.

[230] Eight grounds were submitted and relied upon to support a submission that even if the General Manager is no longer 'completely' satisfied that elections for the Branch will be conducted under the rules and the RO Act, the General Manager should not as a matter of discretion, revoke the exemption. While these issues were described as 'discretionary' I note that a number of the eight grounds may be more accurately characterised as jurisdictional or substantive, as will be seen from the discussion of the issues below.

[231] I have carefully considered these submissions, with respect to the discretion referred to, and each of the grounds submitted in support. It is convenient to summarise those grounds here and evaluate the merit of those submissions.

First additional submission - Democratic control

[232] First, it was submitted that the objective of Part 7 of the RO Act is the democratic control of organisations and that the membership will suffer in terms of its democratic control if the exemption is revoked. It was put that the current participation percentage of union members in elections conducted within the Division is high (at least 65%) compared to elections conducted by the AEC (and the information in the TURC Submission was relied on for this purpose). It was submitted that this ground should be given 'considerable weight' in the exercise of the discretion.

[233] This submission raised a number of complex issues. After careful consideration of those issues, I am not satisfied that the Branch or Division have provided a persuasive argument on this point for a number of reasons.

[234] As a matter of jurisdiction the revocation of a *secret postal ballot exemption* under s 144 requires consideration of whether the exemption is 'likely to result in a fuller participation by members … in the ballot' under s 144. There is no such requirement regarding an AEC exemption. This seems to suggest that the Parliament chose not to give 'considerable weight' to this issue in relation to AEC exemptions.

[235] As a matter of discretion I note that the standards in the RO Act refer, among other things, to 'democratic functioning and control' (refer s 5(3)(d)) and it seems appropriate to have regard to those standards in this matter. However the submission itself regarding democratic control seems to be based on an incorrect premise. The submission assumes that the revocation of the AEC exemption will prohibit the Branch from conducting attendance ballots. That is incorrect. If the AEC exemption is revoked then the AEC will be required to conduct ballots under the election rules that apply to the Branch. If those rules require attendance ballots to be conducted then the AEC would be required to do so.

[236] Accordingly, a more cogent argument on this point could have demonstrated how the conduct of elections under the current or proposed rules *by the Branch* would lead to more democratic control and/or higher voting rates than elections conducted under the current or proposed rules *by the AEC*. In my view the submission did not do this.

[237] In addition, it is not entirely clear to me how the statistics provided by the CFMEU in its TURC submission support the contentions being made. For example, the table of voting percentages for the Division in 1996, 2000, 2004, 2008, 2009 and 2012 did not include voting rates regarding properly conducted attendance ballots under the rules. In particular I note that the table states: 'Return rate[s] <u>including postal votes</u>' (underlining added).[45]

[238] I note that without supporting data, the table of voting percentages for the Division included 'average' or 'median' percentages. The absence of supporting data prevents any validation of the

percentages submitted.

[239] While I acknowledge that context and circumstances will differ from State to State, including such issues as the relative remoteness of actual mine sites, data that is available to the Commission suggests that the actual voting rates in the Queensland District Branch in 2012 (where it has been possible to ascertain voting rates for offices of that Branch) were *lower* (median: 49.6%) than the voting rates in reported recent elections in the Victorian District Branch conducted by the AEC by secret postal ballot (median: 64%) as follows:

Office & year of election	**Ballot papers issued**	**Ballot papers returned**	**Percentage returned**	**Source of data**
Victorian District Branch - Lodge President of Hazelwood Mining – 2013	114	74	64%	AEC Results for E2013/139
Victorian District Branch - Lodge President of Hazelwood Energy – 2012	160	105	65%	AEC Results for E2012/250
Victorian District Branch – President – 2008	1,048	563	53%	AEC Results for E2008/117
Queensland District Branch - Executive Vice President – 2012	9,545	4,717	49.41%	Post-election report of Division's National Returning Officer (Mr Hawkins)
Queensland District Branch – Secretary – 2012	9,545	4,735	49.60%	As above.
Queensland District Branch - Central Councillor – 2012	9,545	4,741	49.66%	As above.

Second additional submission - incongruity

[240] The second ground submitted that it would be incongruous and confusing for different methods of elections to be used within the Division if the exemption for the Branch were to be revoked. This submission is unpersuasive given that the legislation expressly allows exemptions to be granted to individual branches of an organisation. I also note that while the Mining & Energy Division generally conduct elections pursuant to such exemptions the other Divisions in the CFMEU and the Victorian District Branch of the Division do not. I am not aware of material which indicates that these differing approaches have led to incongruous results.

Third additional submission – granting of exemption

[241] The third ground asserted that, there had been no suggestion that there were any irregularities in the process leading to the original granting of the AEC exemption to the Branch

[242] While I acknowledge that it does suggest an irregularity in the process leading to the original granting of the AEC exemption, during the course of the hearing I raised with the General Secretary Mr Vickers the issue of the word 'locality' being included in Divisional Rule 17 and whether it could or should have been apparent to the Branch or Division in 1996 that there would be contractors, or other members who would not be attached to a Lodge who would inevitably require access to postal ballots. This was based on the uncontested view that a locality would be a site where members are engaged that does not have a lodge structure.

[243] Based on the material gathered in this matter it appears in retrospect that the Branch may not have been able to ensure that an attendance ballot would be conducted by a Local Returning Officer at 'each … locality' in the Branch as required by Divisional Rule 17(a) from 1996 onwards. If the full information that is now available was known at the time of the application in 1996, it is likely to have assisted the Industrial Registrar with the requisite statutory decision making responsibility.

Fourth additional submission – content of election rules

[244] The fourth ground was that no question had arisen about whether the rules of the Branch or Division comply with the requirements of the RO Act relating to the conduct of elections.

[245] This ground has two elements: first as a jurisdictional issue it is a repeat of the 'every element of s 186(1) submission.' I have indicated above that it is not mandatory for the revocation proceedings to consider the contents of the elections rules under s 186(1)(a). Secondly, and as a discretionary issue, the submission did not provide any details regarding how this issue should influence the exercise of my discretion in this matter. Further, as I have already indicated above, to the extent that I have considered the current election rules or Draft Rules that consideration would appear to favour revoking the exemption.

Fifth additional submission – intimidation

[246] The fifth ground was that no question had arisen about whether members have an adequate opportunity of voting without intimidation. This ground also has two elements: first as a jurisdictional issue it is a repeat of the 'every element of s 186(1) submission' and as I have previously indicated, it is not mandatory for the revocation proceedings to consider intimidation under s 186(1)(b)(ii). Secondly, as a discretionary issue, the submission did not provide any details regarding how this issue should influence the exercise of my discretion in this matter.

Sixth additional submission – general conduct of elections

[247] The sixth ground was that, apart from the 2011 election the past experience of elections carried out under the exemption has been generally satisfactory. In my view this is a repeat of the 'complete history' submissions I have previously considered above.

Seventh additional submission – action to remedy issues

[248] The seventh ground is that the Division and the Branch have taken action to prevent the repetition of irregularities. In my view this is a repeat of the remedial action submissions that have been previously considered above.

Eighth additional submission – conduct of elections by AEC

[249] The eighth ground is that the conduct of an election by the AEC does not necessarily prevent irregularities and the submission referred me to an irregularity by the AEC Returning Officer in an election conducted by the AEC in another division of the CFMEU in *Re Election for Office in the Construction, Forestry, Mining and Energy Union; Ex parte Sutton* [2002] FCA 971. I accept the submission that the conduct of an election by the AEC does not necessarily prevent irregularities occurring in an election and therefore this submission requires further analysis.

[250] I accept that unforeseen problems can occur in elections conducted by the AEC and other organisations and there are public examples capable of demonstrating this point. However, in my view

the key issue that arises in the present matter is that there are issues emerging from the conduct of elections in the Branch that go beyond one or two unforeseen problems in individual elections.

[251] For example, material available in this matter has identified the use of postal votes contrary to the rules over many years and identified serious issues with the actions of the Branch in relation to the 2011 election. These issues tend to suggest there has been a failure of the responsible officers to ensure the integrity and credibility of the election system operating under the Branch's AEC exemption.

[252] These issues raise questions about the ability of the Branch to conduct its elections in accordance with its rules. Further and in my view, it is less likely that such on-going issues could have continued to occur if the AEC was conducting the elections, given the experience of AEC officers and the specific provisions in the RO Act that assist AEC officials in their conduct of elections.

[253] I include among those specific provisions, the following.

[254] Section 193 provides a range of powers to AEC 'electoral officials' regarding the conduct of elections, including how to address problems in an organisation's rules while an election is on foot and how to deal with the inability of a Returning Officer to complete an election (these provisions appear to only pertain to AEC officers as 'electoral official' is only defined in s 6 to include AEC officials).

[255] Section 197 requires the AEC to prepare a post-election report that, among other things, requires the AEC to discuss whether any of the election rules of an organisation are difficult to interpret or apply.

[256] As far as I am aware, these provisions do not apply, in a mandatory sense, to elections conducted by organisations or branches that have AEC exemptions.

[257] In addition, while a member or former member of an organisation can apply to the Federal Court for an inquiry regarding alleged election irregularities under s 200(1) the Electoral Commissioner of the AEC has additional powers in relation to such matters as follows.

[258] Subsection 200(2) provides that the Electoral Commissioner 'must' apply to the Federal Court for an election inquiry if he/she believes that the result of an election has been affected by an irregularity.

[259] Subsection 200(3) provides that the Electoral Commissioner 'may' apply to the Federal Court for an election inquiry if he/she believes that there has been an irregularity in an election.[46]

[260] Accordingly, in my view, the AEC is less likely to make errors in the conduct of elections than the Branch; and if a problem arose in the conduct of an election by the AEC, it is more likely that the AEC would be better armed and equipped to deal with it.

[261] This is also consistent with the view taken by the Hancock Report that the 'conduct of elections by Commonwealth officials facilitates a consistency of approach, leading to fewer invalidities and disputed elections' and 'should enhance the confidence of the community and the members of organisations in the conduct of ballots'.[47]

[262] As a result, I am not persuaded by the submission that I should exercise my discretion to uphold the Branch's exemption on the grounds that problems sometimes occur in elections conducted by the AEC.

Consideration

[263] I have carefully considered and taken into account all of the circumstances and the available materials of this matter in determining whether I am no longer satisfied of the matters in subsection 186(1)(b)(i) of the RO Act and if I am not, whether I should exercise the discretion to revoke the exemption held by the Branch.

[264] I have carefully considered and taken into account each of the written and verbal submissions made by and on behalf of the Division and the Branch, including: the letter from the General Secretary of the Division Mr Vickers dated 11 September 2015; the Schedules attached to that letter; the written

submission of Mr Crawshaw SC on behalf of the Division and the Queensland District Branch dated 11 September 2015; the affidavit of Mr Vickers dated 10 September 2015; and the annexures to that letter including statistics regarding persons engaged in coal mining and the CFMEU's TURC Submission dated 1 August 2014.

[265] Having regard to the knowledge and extensive mining industry experience of Mr Vickers, I have carefully considered his correspondence and submissions about the history and context of the coal mining industry and in particular, the conduct of elections in that industry.

[266] To his credit, Mr Vickers made relevant and important concessions about the contraventions of the RO Act and a range of rules which I had asserted in my Statement of Reasons dated 20 August 2015.

[267] It was also apparent that Mr Vickers was prepared to make further difficult concessions as the General Secretary of the Division (and as a Vice President of the CFMEU) during the hearing by describing the 2011 Queensland election as a 'debacle' and referring to his 'eternal shame and embarrassment' about the conduct of the Queensland Board in that election.

[268] It is apparent that the Division and the Branch have taken, are taking and are proposing to take, action to prevent any repetition of irregularities. That action includes: submitting rule changes to the Division which would facilitate postal ballots; submitting rule changes which centralise the Returning Officer function with a single National Returning Officer appointed by Central Council while removing the option of District Branches appointing their own Returning Officer; ensuring better training of all returning officers and providing access to independent legal advice to the National Returning Officer; and ensuring more explicit onus on the National Returning Officer to be satisfied that Local Returning Officers are sufficiently trained or experienced to undertake their functions.

[269] On the other hand, I have also taken into account that notwithstanding the purportedly extensive experience, knowledge and training delivered in the Division focused on election processes, it is likely that on-going contraventions of the rules including with respect to postal voting and the appointment of Local Returning Officers have been occurring since exemptions were granted to the Division and the Branch in 1996. I have also taken into account the potential failure of the Division and the Branch to comply with the RO Act requirements concerning declaration envelopes since the 2003 amendments referred to in this decision.

[270] While these are relevant matters it was the egregious conduct of the Queensland Board of Management in the 2011 election which has caused me the greatest concern. I agree with the manner in which Mr Vickers characterised the election as a 'debacle' although in my view, the conduct of the Board is more likely to have been intentional rather than due to inexperience.

[271] In particular, I am concerned about the beyond power actions of the Queensland District President Mr Smyth and the Queensland Board of Management in resolving to determine election irregularities, voiding an election outcome, declaring (in effect) that an elected candidate had not been elected and then failing to comply with a rule with respect to providing that resolution to rank and file members of the Branch for endorsement. That Mr Smyth had a preferred candidate and a concomitant interest in the outcome of the election exacerbated my concerns.

[272] The available materials in general and the relevant rules in particular demonstrate that District Branches have autonomy over matters that affect members of the District Branch only.[48] In all the circumstances, I continue to have serious concerns both about whether senior officers in the Queensland Branch might seek, without appropriate power or authority, to impinge upon future Branch elections and the capacity of the Division to prevent, or adequately deal with such interference if or when it was to occur.

[273] On balance, I am not persuaded that the measures taken, being taken or to be taken either singularly or in aggregate, satisfy me that if the Queensland Branch is exempted from having its elections conducted by the AEC under s 186(1), that elections for the Branch will be conducted under the rules of the Division or Branch and the RO Act.

[274] In the submission of Mr Crawshaw SC dated 11 September 2015, it was put that even if the General Manager is, to use his words 'no longer completely satisfied that elections for the Queensland Branch will be conducted under the rules and the … RO Act, the word "may" in s 186(2) of the … RO Act clearly provides that a discretion arises as to whether the General Manager should revoke the exemption'.[49]

[275] I accept that the power to revoke the exemption is discretionary and I have taken each of the relevant matters into account in considering whether to exercise the discretion.

[276] I have again considered each of the relevant circumstances in this case including the nature and extent of the irregularities and contraventions referred to in this decision such as the contraventions of the Rules and of the RO Act which have been conceded.

[277] I have also carefully considered the submissions concerning consequences to the Branch if the exemption were to be revoked and I have evaluated those submissions.

[278] In considering whether to exercise the discretion, I have again considered each of the actions taken, being taken and to be taken by the Division and the Branch, including submitting rule changes which would facilitate postal ballots, submitting rule changes which centralise the Returning Officer function with a single National Returning Officer, ensuring better training of all Returning Officers and providing access to independent legal advice to the National Returning Officer.

[279] Further, I considered the oral submissions made during the hearing of 17 September 2015, including that the Division and the Branch have taken on board what has occurred in this case and used those circumstances as a wake-up call while trying to improve the situation in the future.

[280] I have also considered the willingness expressed by Mr Crawshaw SC on behalf of the Division to include the requirements of s 188 of the RO Act and the relevant regulations, including regulations 5 and 6 after I had brought those requirements to his attention.

[281] After carefully considering these additional and relevant matters, I continue to have serious concerns both about whether senior officers in the Queensland Branch might seek, without appropriate power or authority, to impinge upon future Branch elections and the capacity of the Division to prevent, or adequately deal with such interference if or when it was to occur.

[282] As I have indicated above, I agree with the manner in which Mr Vickers characterised the 2011 election as a 'debacle.' In my view, the conduct of the Board in that election is more likely to have been intentional rather than due to inexperience and on balance, I am not satisfied that if the Queensland Branch is exempted from having its elections conducted by the AEC under s 186(1) of the RO Act, that elections for the Branch will be conducted under the rules of the Division or Queensland Branch and the RO Act. Accordingly, I am satisfied that I should exercise my discretion and revoke the AEC exemption issued in R20021/1996.

Conclusion

[283] I am not satisfied that if the Queensland District Branch is exempted from having its elections conducted by the AEC under s 186(1) of the RO Act, that elections for the Branch will be conducted under the rules of the Division or Branch and the RO Act. Accordingly, I revoke the AEC exemption issued in R20021/1996 as of the date of this decision.

DELEGATE OF THE GENERAL MANAGER

Appearances:

Mr S Crawshaw SC for the Branch and Division

Hearing details:

17 September 2015

Brisbane

[1] JSCEM Report at page 7. The relevant statutory amendments 'provided that the Industrial Registrar was to conduct elections at the request of an organisation, or a branch of an organisation, if he considered it practical to do so'.

[2] Australia, Senate, 1949, *Debates,* vol. 203, p. 1399.

[3] *Report of the Committee of Review into Australian Industrial Relations Law and Systems*, April 1985, Vol. 2, para. 9.144.

[4] Ibid. para. 9.146.

[5] Ibid, para 9.145 and Vol. 1, *Recommendations for Change*, page 28 (Recommendation 80).

[6] Act No. 86 of 1988, section 210.

[7] JSCEM Report, page 10.

[8] The amalgamated organisation was initially known as the 'Construction, Forestry, Mining and Energy Union'.

[9] Mr Vickers' affidavit at [24].

[10] Statutory Declaration of Mr B Watson, General Secretary, of 18 April 1996.

[11] *Elections for the Victorian District Branch are conducted by secret postal ballot by the AEC pursuant to Victorian District Branch Rule 14. This branch was established in the Division in 2001 (refer rules of 13 August 2001 in matter R2001/36) and thus it did not participate in the exemption applications in 1996. In a letter dated 24 July 2001 in relation to R2001/36 Mr B Watson, the Division's General Secretary stated that the proposed Victorian District Branch Rules had been adopted by Central Council and 'the majority of members have endorsed the decision of Central Council to adopt the Victorian District Branch Rules' pursuant to Divisional Rule 8(iv). Mr P Tyson of Turner Freeman also stated in a letter of 5 July 2001 'you will see … Rule 14 ['Ballots'] has been included. You will understand that it is proposed, once the [Victorian] District Branch is registered, to apply for exemptions under Sections 198*

and 210 of the [IR] Act (in line with the exemptions already granted to the Division and the other Branches). As part of that exemption application it will be proposed that Rule 14 of the Victorian District Branch Rules be deleted'. It subsequently appears that no applications for exemptions were lodged by that branch and no rule alterations made to remove Victorian District Branch Rule 14. While Divisional Rule 12(iii) provides for the election of Committee of Management members of each branch pursuant to Divisional Rule 17 the above materials indicate that Victorian District Branch Rule 14 was intended to apply in that branch as the alterations to establish that branch with that ballot rule were adopted by Central Council and a majority of members pursuant to Divisional Rule 8(iv).

[12] *TURC Submission, page 2.*

[13] TURC Submission, page 31.

[14] TURC Submission, pages 31, 32.

[15] *TURC Submission, page 32.*

[16] *TURC Submission, pages 39.*

[17] While Industrial Registrar Kelly indicated on page 27 of the transcript that he would 'publish reasons at a later date' it appears that no decision was subsequently issued or published.

[18] *Letter from Branch President Smyth to members of 23 December 2011.*

[19] See also: *Hodgson v Wilkinson* 12 FLR 191 at 208-9 in which a majority of the Commonwealth Industrial Court held that a committee of management had no power to declare that a ballot that was being conducted by a returning officer be declared null and void.

[20] See, for example: *Re Inquiry into elections for office in Amalgamated Society of Carpenters and Joiners of Australia* 4 FLR 247 at 251.

[21] Transcript of hearing at page 3.

[22] Submissions by Mr Crawshaw SC at [12].

[23] *Transcript of hearing at page 3.*

[24] *Transcript of hearing at page 17.*

[25] Mr Vickers' affidavit at [52] and [53].

[26] Letter of Mr Vickers of 11 September 2015 at page 5.

[27] TURC Submission at pages 31, 32.

[28] Statement of Mr Vaccaneo at page 9.

[29] Central Council Minutes of 12 to 15 March 2012 at page 11.

[30] Mr Vickers' letter of 11 September 2015 at pages 7 to 8.

[31] Mr Vickers' letter of 11 September 2015 at pages 7 to 8.

[32] *Transcript of hearing at page 9.*

[33] *Mr Vickers's affidavit at [42].*

[34] Transcript of hearing at page 9.

[35] Letter from Mr Whyte to the General Manager of 8 July 2013 at pages 4, 5.

[36] Letter from Mr Whyte to the General Manager of 8 July 2013 at page 15.

[37] Submissions by Mr Crawshaw SC at [12].

[38] Mr Vickers' letter of 11 September 2015 at page 2.

[39] While the recommendation in the JSCEM Report referred to the use of declaration envelopes in relation to elections conducted by the AEC the legislation that was passed and commenced in 2003 required such envelopes to be used for all postal ballot elections relating to registered organisations (refer JSCEM Report at page xiii).

[40] *AEC submission to the Joint Standing Committee on Electoral Matters, 21 January 1997 at page 13.*

[41] *Submissions to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee inquiry into the Workplace Relations (Registered Organisations) Bill 2001.*

[42] *Transcript of hearing of 2 May 1996 at page 12.*

[43] The word 'completely' has been introduced in the submission by Mr Crawshaw SC and is not included in the RO Act.

[44] *Fernwood Fitness Centres Pty Ltd* [1995] VADT 7 at pages 9, 10.

[45] TURC Submission at page 36.

[46] While it is not beyond doubt, the power of the Electoral Commissioner to apply to the Federal Court regarding irregularities in an 'election' appear to extend to an election conducted within an organisation or branch that has an AEC exemption.

[47] Hancock Report, Volume 2, Report p 493.

[48] See Rule 12(ii).

[49] Submissions by Mr Crawshaw SC at [16].

Printed by authority of the Commonwealth Government Printer

<Price code A, PR572957>

ANNEXURE “JDF-5”

[2016] FWCFB 197
FAIR WORK COMMISSION

DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Construction, Forestry, Mining and Energy Union-Mining and Energy Division; Construction, Forestry, Mining and Energy Union-Mining and Energy Division Queensland District Branch
(C2015/7271)

VICE PRESIDENT WATSON
SENIOR DEPUTY PRESIDENT WATSON
COMMISSIONER GREGORY

BRISBANE, 12 JANUARY 2016

Appeal against decision [2015] FWCD 7109 *of the delegate of the General Manager at Melbourne on 30 October 2015 in matter number R2014/186 – Whether exemption granted to conduct elections internally should be revoked – Whether delegate was satisfied that compliant elections will be conducted in the future – Proper application of statutory tests – Procedural fairness – Fair Work (Registered Organisations) Act 2009 – s.186*

Introduction

[1] This decision concerns an application by the Construction, Forestry, Mining and Energy Union-Mining and Energy Division; Construction, Forestry, Mining and Energy Union-Mining and Energy Division Queensland District Branch for permission to appeal and an appeal against a decision of Chris Enright, delegate of the General Manager, handed down on 30 October 2015.

[2] The decision of Mr Enright concerns a revocation under s.186(2)(b) of the *Fair Work (Registered Organisations) Act 2009* (Registered Organisations Act) of the exemption granted to the Queensland District Branch of the Mining and Energy Division of the CFMEU which enabled the Branch to conduct its own elections for office internally without the participation of the Australian Electoral Commission (AEC).

[3] In the hearing of the appeal in this matter, Mr S. Crawshaw SC appeared with Mr A. Bukarica on behalf of the CFMEU.

Background

[4] On 2 May 1996, the Branch was granted an exemption under ss. 198 and 213 of the *Industrial Relations Act 1988* that elections are to be conducted by secret postal ballot and that the AEC conduct its elections. The exemption has continued under subsequent replacement legislation.

[5] The decision of the General Manger's delegate reveals the history leading to his decision. In May 2013, an anonymous complaint was received by the General Manager of the Fair Work Commission about the conduct of elections by the Division and the Branch in 2011 and 2012. At the request of the General Manager, the Regulatory Compliance Branch of the Commission conducted a range of inquiries in relation to the complaint. During the conduct of these inquiries, additional matters of interest emerged in relation to the elections. Mr Enright subsequently commenced revocation proceedings. His stated reasons related to the past conduct of elections in the Branch which gave rise to concerns about whether future elections would be conducted in accordance with the Registered Organisations Act.

[6] In relation to the issues arising in relation to the AEC exemption, Mr Enright formed the view that he could no longer be satisfied that elections for the Branch would be conducted under the rules of the Branch. On 20 August 2015, Mr Enright therefore issued a Notice to Show Cause to the Committee of Management of the Branch with a Statement of Reasons. The reasons were summarised in his decision as follows:

> "i. Postal voting has occurred in Branch elections for many years contrary to Rule 17.
>
> ii. The Branch has not always appointed Returning Officers in accordance with Rule17(a).
>
> iii. The relevant Returning Officer for the Branch has not appointed a Local Returning Officer at each lodge or locality to conduct attendance ballots for every election under Rule 17(a).
>
> iv. The Branch President issued a direction to the Returning Officer in a by-election for the Branch Executive Vice President in 2011 (the 2011 election) regarding when the ballot should close at a particular lodge and subsequently determined that irregularities had occurred in the election (where both such actions by the Branch President appeared to have been done without relevant authority under the rules or the RO Act).
>
> v. The Branch's Board passed a resolution to deem the 2011 election invalid without relevant authority under the rules or the RO Act.
>
> vi. The effect of the Board's resolution in the 2011 election was to declare, in effect, that a person who had been purportedly elected in that election had not been elected."

[7] The Show Cause Notice invited the Branch's Committee of Management to show cause as to why the exemption granted to it to conduct its own elections should not be revoked. Written submissions and other material were filed with the Commission and the matter was listed for hearing before Mr Enright on 17 September 2015.

The Decision under Appeal

[8] Mr Enright's conclusions are expressed as follows:

> "**[268]** It is apparent that the Division and the Branch have taken, are taking and are proposing to take, action to prevent any repetition of irregularities. That action includes: submitting rule changes to the Division which would facilitate postal ballots; submitting rule changes which centralise the Returning Officer function with a single National Returning Officer appointed by Central Council while removing the option of District Branches appointing their own Returning Officer; ensuring better training of all returning officers and providing access to independent legal advice to the National Returning Officer; and ensuring more explicit onus on the National Returning Officer to be satisfied that Local Returning Officers are sufficiently trained or experienced to undertake their functions.
>
> **[269]** On the other hand, I have also taken into account that notwithstanding the purportedly extensive experience, knowledge and training delivered in the Division focused on election processes, it is likely that on-going contraventions of the rules including with respect to postal voting and the appointment of Local Returning Officers have been occurring since exemptions were granted to the Division and the Branch in 1996. I have also taken into account the potential failure of the Division and the Branch to comply with the RO Act requirements concerning declaration envelopes since the 2003 amendments referred to in this decision.
>
> **[270]** While these are relevant matters it was the egregious conduct of the Queensland Board of Management in the 2011 election which has caused me the greatest concern. I agree with the manner in which Mr Vickers characterised the election as a 'debacle' although in my view, the conduct of the Board is more likely to have been intentional rather than due to inexperience.
>
> **[271]** In particular, I am concerned about the beyond power actions of the Queensland District President Mr Smyth and the Queensland Board of Management in resolving to determine election

irregularities, voiding an election outcome, declaring (in effect) that an elected candidate had not been elected and then failing to comply with a rule with respect to providing that resolution to rank and file members of the Branch for endorsement. That Mr Smyth had a preferred candidate and a concomitant interest in the outcome of the election exacerbated my concerns.

[272] The available materials in general and the relevant rules in particular demonstrate that District Branches have autonomy over matters that affect members of the District Branch only. In all the circumstances, I continue to have serious concerns both about whether senior officers in the Queensland Branch might seek, without appropriate power or authority, to impinge upon future Branch elections and the capacity of the Division to prevent, or adequately deal with such interference if or when it was to occur.

[273] On balance, I am not persuaded that the measures taken, being taken or to be taken either singularly or in aggregate, satisfy me that if the Queensland Branch is exempted from having its elections conducted by the AEC under s 186(1), that elections for the Branch will be conducted under the rules of the Division or Branch and the RO Act.

[274] In the submission of Mr Crawshaw SC dated 11 September 2015, it was put that even if the General Manager is, to use his words 'no longer completely satisfied that elections for the Queensland Branch will be conducted under the rules and the … RO Act, the word "may" in s 186(2) of the … RO Act clearly provides that a discretion arises as to whether the General Manager should revoke the exemption'.

[275] I accept that the power to revoke the exemption is discretionary and I have taken each of the relevant matters into account in considering whether to exercise the discretion.

[276] I have again considered each of the relevant circumstances in this case including the nature and extent of the irregularities and contraventions referred to in this decision such as the contraventions of the Rules and of the RO Act which have been conceded.

[277] I have also carefully considered the submissions concerning consequences to the Branch if the exemption were to be revoked and I have evaluated those submissions.

[278] In considering whether to exercise the discretion, I have again considered each of the actions taken, being taken and to be taken by the Division and the Branch, including submitting rule changes which would facilitate postal ballots, submitting rule changes which centralise the Returning Officer function with a single National Returning Officer, ensuring better training of all Returning Officers and providing access to independent legal advice to the National Returning Officer.

[279] Further, I considered the oral submissions made during the hearing of 17 September 2015, including that the Division and the Branch have taken on board what has occurred in this case and used those circumstances as a wake-up call while trying to improve the situation in the future.

[280] I have also considered the willingness expressed by Mr Crawshaw SC on behalf of the Division to include the requirements of s 188 of the RO Act and the relevant regulations, including regulations 5 and 6 after I had brought those requirements to his attention.

[281] After carefully considering these additional and relevant matters, I continue to have serious concerns both about whether senior officers in the Queensland Branch might seek, without appropriate power or authority, to impinge upon future Branch elections and the capacity of the Division to prevent, or adequately deal with such interference if or when it was to occur.

[282] As I have indicated above, I agree with the manner in which Mr Vickers characterised the 2011 election as a 'debacle.' In my view, the conduct of the Board in that election is more likely to have been intentional rather than due to inexperience and on balance, I am not satisfied that if the Queensland Branch is exempted from having its elections conducted by the AEC under s 186(1) of the RO Act, that elections for the Branch will be conducted under the rules of the Division or

Queensland Branch and the RO Act. Accordingly, I am satisfied that I should exercise my discretion and revoke the AEC exemption issued in R20021/1996.

Conclusion

[283] I am not satisfied that if the Queensland District Branch is exempted from having its elections conducted by the AEC under s 186(1) of the RO Act, that elections for the Branch will be conducted under the rules of the Division or Branch and the RO Act. Accordingly, I revoke the AEC exemption issued in R20021/1996 as of the date of this decision."

(references omitted)

Grounds of Appeal

[9] The CFMEU submits that Mr Enright acted upon wrong principles in his application of the statutory test relating to prerequisites for revocation of the exemption. In particular, it contends that the decision is in error and does not correctly apply the statutory requirements for revocation by:

- Finding that there was no review of elections by an external body and that the only review mechanism was the power to revoke the exemption;

- Not explaining how the Statement of Reasons, which dealt with past conduct of elections, led to the conclusion that Mr Enright could no longer be satisfied that future elections for the Branch will be conducted in accordance with the Registered Organisations Act and the CFMEU's rules; and

- Requiring the CFMEU to demonstrate that it could ensure that elections are conducted in accordance with the Registered Organisations Act and the CFMEU's rules, that irregularities do not occur in future elections, and that issues do not arise in relation to future elections.

[10] The CFMEU also submits that Mr Enright erred in making findings not open to him based on the material before him, that he failed to accord the CFMEU and its officers procedural fairness, and that he failed to take into sufficient account a number of discretionary matters in relation to the revocation of its AEC exemption.

[11] The CFMEU accepts that the decision under appeal is properly described as a discretionary and therefore it is required to demonstrate appealable error of the type set out in *House v The King*. 1 In that case the High Court described the approach as follows:

> "The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

Permission to Appeal

[12] The CFMEU submits that permission to appeal should be granted for the following reasons:

- The appeal raises novel questions regarding how a delegate of the General Manager should approach the issue of whether to revoke an exemption from a ballot conducted by the AEC;

- The appeal raises the issue as to the tests to be applied in relation to a Notice to Show Cause as to why an AEC ballot exemption should not be revoked;

- The decision is attended with sufficient doubt to warrant its reconsideration;

- There is significant public interest in ensuring that a decision to revoke an AEC ballot exemption is free from error; and

- Substantial injustice would result if permission to appeal was refused.

[13] We are satisfied that the subject matter of the appeal and the novelty of the issues justifies permission to appeal being granted. We turn to consider the particular grounds of appeal.

External Review

[14] This ground of appeal relates to a statement at paragraph [12] of the decision in which it is stated:

> **"[12]** Elections conducted by organisations or branches with AEC exemptions are not subject to review by any external body. Essentially, the only review mechanism for AEC exemptions is the power to revoke in s 186(2) of the RO Act to which I now turn."

[15] The CFMEU contends that this statement suggests that the delegate was acting under the mistaken belief that the only review mechanism available for an election when an AEC exemption has been granted is revocation of the exemption. It contends that election enquiries can be instituted in the Federal Court.

[16] The statement of the delegate is in the introductory outline of the background to the matter. It is a general statement that might refer to the usual situation rather than the availability of legal remedies. It is not appropriate to review the language of a decision with an overly critical perspective. There is no basis to suggest that this statement caused the delegate to ask an incorrect question. We dismiss this ground of appeal.

Past and Future Elections

[17] The CFMEU contends that the delegate erred in the way he considered the absence of satisfaction that future elections would be conducted under the rules and the Registered Organisations Act and did not explain how the consideration of events in the past, principally the 2011 by-election, could lead to his opinion about the future.

[18] The delegate's decision arose, as we have noted, from a Show Cause Notice issued to the CFMEU. After dealing with the matters that gave rise to his concerns, his decision deals with the various submissions raised by the CFMEU in response to that Show Cause Notice. The decision contains sections dealing with each of those submissions. He termed them the Remedial action submission – Draft Rules, the Remedial action submission – National Returning Officer, the Remedial action submission – Training, the Inexperience in 2011 submission, the Complete history submission – conduct of past elections, the Complete history submission – knowledge and experience regarding elections, the Complete history submission – absence of legal challenges, and Additional submissions by Counsel – discretionary and other matters.

[19] The CFMEU contends that the findings were in error because they were expressed as findings that each submission was insufficient to overcome the absence of satisfaction in relation to future elections and contained various other errors. It submits in particular that the language used by the delegate erects a bar higher than provided for in the Act by use of words such as:

> **"[168]** Accordingly I am not persuaded that the conduct of elections by one National Returning Officer will necessarily ensure that issues do not arise in future elections for the Branch or that future elections for the Branch will be conducted in accordance with the rules and the RO Act."

[20] The CFMEU contends that the test is whether the delegate "is no longer satisfied" that elections "will be conducted …under the rules of the organisation…and this Act". It contends that the requirement that changes "will necessarily ensure that issues do not arise in the future" is a more stringent requirement.

[21] We have reviewed the decision and the detailed Statement of Reasons. The delegate identified his reasons for coming to the preliminary view that he could no longer be satisfied as to the matters in s.186(1)(b)(i). He applied the wording of the sections in coming to that view. He then considered all of the arguments advanced by the CFMEU. His conclusions that we have set out above are properly focussed on the test in the Registered Organisations Act. In the course of considering the impact of certain changes he used different language such as whether the change would ensure future compliance. In our view this is entirely appropriate. If the particular changes would ensure future compliance then it would follow that the delegate would be satisfied that compliant elections will be conducted. On the other hand, if the changes do not ensure compliance, then in the context of all of the circumstances, it is unlikely that he could be satisfied that compliant elections will be conducted. As we have observed that was the conclusion he reached in the terms of the Act when he said in his overall conclusions:

> **"[273]** On balance, I am not persuaded that the measures taken, being taken or to be taken either singularly or in aggregate, satisfy me that if the Queensland Branch is exempted from having its elections conducted by the AEC under s 186(1), that elections for the Branch will be conducted under the rules of the Division or Branch and the RO Act."

[22] In our view, this ground of appeal essentially invites us to adopt an overly critical review of the Statement of Reasons. We are not persuaded that in the context of a discretionary decision and the proper meaning of the test in the Registered Organisations Act, this ground of appeal establishes any appealable error. We dismiss this ground of appeal.

Findings Regarding Conduct of Branch Officers

[23] The CFMEU submits that the CFMEU and its branch officials were denied procedural fairness by not being put on notice that breaches of the rules in 2011 were intentional and egregious. The CFMEU submits that the matter was raised at the hearing as a product of inexperience rather than something more serious as ultimately found. It contends that in making the finding a range of matters were not taken into account and the delegate erred in taking it into account as there is no logical connection between it and the conduct of future elections.

[24] We are not persuaded that this ground of appeal has substance. In our view, the matters of concern were raised with the CFMEU and it had ample opportunity to address them. The detailed evidence was assessed and findings were made. The CFMEU has not established that this ground discloses appealable error.

Postal Ballots and Local Returning Officers

[25] The CFMEU contends that it was erroneous for the delegate to concentrate on postal ballots and appointment of local returning officers being inconsistent with the Division's rules because it was a Division wide problem rather than one peculiar to the Branch and rule changes are being made to address this issue.

[26] We are not persuaded that the delegate's treatment of this issue involves appealable error. The evidence was considered, findings of fact were made and these were considered as part of the ultimate

conclusion.

Discretionary Matters

[27] The CFMEU submits that a narrow approach to discretion was adopted and various factors were not taken into account in deciding to cancel the exemption. In our view, these grounds do not reflect a fair and proper reading of the decision. We consider that they are overly critical of the language used in the Statement of Reasons. It is clear to us that the delegate applied the correct test and made a decision based on the evidence. It has not been shown that any extraneous factors affected the result or that relevant matters were not taken into account.

Procedural Fairness

[28] The CFMEU submits that certain issues concerning the rules of the CFMEU were not raised prior to the decision and that, to the extent they were problematical, they were Division wide problems. Further it contends that the decision was influenced by persons in impermissible ways – including interviews with CFMEU members in which the CFMEU was not involved, consideration of newspaper reports and the participation of other members of the General Manager's staff in the hearing process.

[29] The functions under the relevant Democratic Control provisions of the Registered Organisations Act and the regulations are administrative functions vested in the General Manager. The General Manager has broad powers of investigation into various matters under the Registered Organisations Act. The processes of investigation are to be determined by the General Manager or delegate in the particular circumstances of the case, subject to compliance with the obligation to afford procedural fairness. In this case the detailed statement of reasons in the Show Cause process, which followed an investigation, flagged the key issues that required consideration. The CFMEU had an opportunity to submit material in writing and at a hearing. Having regard to the nature of the process involved, the procedure adopted by the delegate and the opportunities provided to the CFMEU for input we are not persuaded that the procedure involves appealable error. We dismiss this ground of appeal.

Conclusions

[30] Because of the novelty and subject matter of the appeal we grant permission to appeal. As we have concluded that each ground of appeal lacks merit we dismiss the appeal.

<u>VICE PRESIDENT</u>

Appearances:

Mr S. Crawshaw SC, with Mr A. Bukarica, on behalf of the CFMEU.

Hearing details:

2015.

Melbourne.

7 December.

Final written submissions:

CFMEU on 2 December 2015.

1 (1936) 55 CLR 499.

Printed by authority of the Commonwealth Government Printer

<Price code C, PR576012>

ANNEXURE “JDF-6”

PR925399

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996
s.127(2) application to stop or prevent industrial action

United Collieries Pty Ltd
and
Construction, Forestry, Mining and Energy Union
(C2002/5911)

Various employees Coal Industry

VICE PRESIDENT LAWLER SYDNEY, 6 DECEMBER 2002

s.127(2) - Application to stop or prevent industrial action -Coal industry - industrial action that is threatened

DECISION

[1] By application dated 3 December 2002 the Applicant, United Collieries Pty Ltd, ("**United**") sought an order under s.127(1) of the Workplace Relations Act ("**WRA**") against the Construction, Forestry, Mining and Energy Union ("**CFMEU**") and the members of the CFMEU employed by United at its colliery at 134 Jerry's Plain Road, Warkworth, NSW ("**the mine**").

[2] In his opening, Mr Houlihan for the United, alleged:

- That the CFMEU's members at the mine had not worked since the beginning of the evening shift on 2 December 2002 and were still not working;

- That there was a certified agreement in place (the United Collieries Agreement 1999) but the dispute settling procedures provided for in the relevant certified agreement had not been utilised by the workers;

- That no advice had been given by the CFMEU (or the striking workers) to United as to the reasons for the stoppage; and

- United had been given no notice of the stoppage.

[3] The hearing of the application did not commence until shortly after 6.00pm on 3 December 2002 because the CFMEU's advocate, Mr Slevin, was occupied in four other s.127 applications brought by other NSW coal employers before Commissioner Roberts. Following Mr Houilhan's opening, and in an effort to confine the ambit and thus the duration of the hearing, Mr Slevin was invited to obtain instructions on the central factual matters asserted by Mr Houlihan. Having obtained those instructions, Mr Slevan indicated that the CFMEU did not challenge or admit the matters set out in the preceding paragraph and noted that the "expectation" was that there would be a return to work at 10.30pm this evening, 3 December 2002 (being the start of the night shift).

[4] In the present case the CFMEU submitted that no order should be made given that the workers were to return to work later that evening. Of course, the

instructions conveyed by by Mr Slevin were only of an "expectation" that there would be a return to work.

[5] The main contest in the present application was the proper ambit of any order under s.127. The Applicant had sought an order prohibiting all industrial action until 31 December 2002 (being the expiry date of the United Collieries Agreement 1999). The CFMEU contended that the order should be confined to prohibiting the current stoppage on the basis that the evidence before the Commission did not provide a proper basis for any wider order. Reliance was placed on *Coal and AlliedOperations v AFMEPKIU (1997) 73 IR 311* at p 318.2 - 318.4 and *Australian Paper Limited Ltd v CEPU (1998) 81 IR 15* at 29.4ff.

[6] The only witness to give evidence was Mr James Middleton, the operations manager at the mine. Relevantly, he gave evidence that:

- During the currency of the existing certified agreement, the mine had been subjected to stoppages at short notice on a number of occasions. He could recall at least two stoppages in 2002 and at least two stoppages in 2001 and maybe more. He thought there had been stoppages in 2000 but he had no precise recollection. The stoppage the precipitating the present application was distinguished from the previous stoppages in that no reason had been given to United for this stoppage whereas on previous occasions a reason had been given. In this respect Mr Middleton described the present stoppage as "unusual".

- Each of the four stoppages that he could remember involved a breach of the current certified agreement by the CFMEU's members.

- A total of 112 employees were involved in the present stoppage.

- A stoppage at the mine necessitates a substantial process of withdrawal of equipment and other tasks (referred to as “securing the mine”).

- United was planning an important and difficult operation known as ‘longwall face shortening’ in the coming weeks and was particularly concerned that this operation should not be disrupted.

- The mine produces approximately 18,000 tonnes of coal per day (worth about $60 per tonne) and United is able to sell all the coal it mines.

- The majority shareholder in United is company known as Xstrata.

[7] Also in evidence was a CFMEU “Media Release” dated 27 November 2002 entitled *“Miners Union warns Xstrata faces campaign of action unless it abandons aggressive anti-union strategy”* (Exhibit 1). That media release warned that Xstrata *“faces a concerted campaign of action”*. It recorded that *“Delegates from all Xstrata’s operations throughout NSW and Queensland met in Cessnock today and unanimously endorsed a comprehensive campaign, including industrial action”* and that *“Miners Union General President Tony Maher warned that Xstrata faced the full force of the union movement...”*. It quoted Mr Maher as ‘warning’ that *“...unless the company reverts to its previous course of respecting workers rights and agreements it will face a concerted industrial, corporate, legal and international campaign”*.

[8] Mr Slevin conceded that Xstrata was a significant shareholder in each of the four coal industry applicants who were seeking s.127 orders before Commissioner Roberts in respect of current stoppages at their respective mines.

[9] The application had been served on the CFMEU at about 9.00am on 3 December 2002. The CFMEU did not call any evidence and nor did Mr Slevin apply for an adjournment to enable the CFMEU to call evidence.

[10] The remedy provided by s.127 is a remedy that will often prove futile if an order under s.127(1) cannot be obtained speedily. The Parliament has commanded the Commission to hear and determine applications under s.127(1) as quickly as practicable: s.127(3). The Commission should be astute to ensure that such applications are listed, heard and determined with maximum expedition lest the very delay in that process permits a party to inflict the damage that the whole procedure is designed to avoid. In relation to urgent applications of this sort there is no reason why a respondent should not arrange for witnesses to be available to give evidence by telephone if it is impractical to bring them to the Commission.

[11] The evidence in the present case, together with the concessions made by Mr Slevin on behalf of the CFMEU (made, I might say, in conformity with the highest standards that could be expected from an officer of a superior court), support an inference that the current stoppage at the mine is part of the *"campaign"* of *"industrial action"* endorsed by *"delegates from all Xstrata's operations throughout NSW"* as referred to in the CFMEU media release. I draw that inference.

[12] Relevantly the Macquarie Dictionary defines "threaten" to mean:

> *"**1**. to utter a threat against; menace. **2**. to be a menace or source of danger to. **3**. to offer (a punishment, injury, etc.) by way of threat. **4**. to give an ominous indication of: the clouds threaten rain. -v.i. **5**. to utter or use threats. **6**. to indicate impending evil or mischief." (emphasis added)*

[13] Industrial action can be "threatened" within the meaning of s.127(1) notwithstanding that there is no threat of specific industrial action expressly uttered or written. If the circumstances are such as to give rise to an ominous indication that industrial action will occur this will be sufficient.

[14] In this matter, the strident tone of the CFMEU media release announcing a *"campaign"* of *"industrial action"* endorsed by a meeting of *"delegates from all Xstrata's operations throughout NSW"* (which, on the evidence, would include the delegate from United's mine), the history of stoppages at the mine during the currency of the present certified agreement and the 'wild-cat' nature of the current stoppage occurring at the same time as stoppages at other mines in which Xstrata has an interest all combine to present an ominous indication that further industrial action will occur and is thus "threatened" within the meaning of s.127(1). In this regard, I also note in particular that a *"campaign"* is, by its very nature, something that is ongoing. For the same reasons it is appropriate that any order under s.127 should extend for a period beyond the expected conclusion of the current stoppage. If, as I have found, industrial action is threatened then any order under s.127 in respect of such threatened action will be in conformity with the reasoning of that portion of the Full Commission's decision in *Coal and Allied* upon which the CFMEU relies.

[15] In the present case, the CFMEU media release identified a reason for the *"campaign"* against Xstrata, claiming that Xstrata *"continues to renege on existing agreements at its operations and pursues the victimisation of union activists."* There was no evidence of any breach of agreement or victimisation of union activists by United (or Xstrata for that matter) in connection with the operation of United's mine. However, even assuming this were so, it would not justify the stoppage that had occurred in this case. The Workplace Relations Act contains a variety of substantial remedies for the breach of certified agreements and the victimisation of employees on the ground of their active participation in union affairs. The Commission can be expected to deal with applications against employers who breach certified agreements or the provisions of the Act protecting employees from victimisation with appropriate expedition. In short, even if the CFMEU's claims against Xstrata were correct, this would be most unlikely to legitimise a 'wild-cat' strike of the sort that has occurred. The proper course for the CFMEU to adopt in such circumstances is to invoke the dispute settling procedures in the relevant award or certified agreement and, at an appropriate point (which may, depending upon the gravity of the employer's conduct, be at the outset) approach the Commission or the Court for appropriate relief.

[16] In commenting on whether or not the truth of the allegation against Xstrara would "legitimise" the strike action that has occurred I had in mind the statements by the Full Commission in *Coal and Allied* (at p 327.9) that

> *"...for the Commission to exercise the discretion [to make an order under s.127(1)], it will usually need to be satisfied that the industrial action to be made subject to the order is <u>illegitimate in a sense warranting that it should attract appropriately a direction by the Commission that it cease or</u>*

not occur. The exercise of the discretion is a serious step in the sense that it involves both a finding that the relevant industrial action is, or will be illegitimate and a determination that a continuation or a commencement of it should unlawful as a contravention of the Act." (emphasis added)

and (at 329.6) that:

"The requirement for the Commission to exercise a discretion to direct the cessation of particular unprotected industrial action is the condition precedent to continuation or commencement of it being a contravention of the Act. That condition connotes a requirement that the character of the industrial action is evaluated for the purposes of establishing whether in the Commission's view the industrial action is illegitimate, to a degree that the commencement or continuation of it should be subject to a direction causing it to be unlawful." (emphasis added)

[17] For my own part I must express some discomfort with the introduction of a requirement that conduct must be 'evaluated' for the purpose of determining whether it is "illegitimate, to a degree that the commencement or continuation of it should be subject to a direction causing it to be unlawful" as a precondition to determining whether a s.127 order should issue. Undoubtedly, s.127(1) confers a discretion on the Commission and, thus, in appropriate circumstances it the Commission may decline to make an order under s.127(1) notwithstanding that the express statutory preconditions are satisfied. It is common for Courts and tribunals to be invested with discretions. However, those discretions should be exercised judicially and not capriciously or according to the subjective whim of the particular decision maker in the particular case. It is common for body of

jurisprudence to be developed to provide an objective guide to the exercise of particular discretions.

[18] On one view, the effect of these passages in *Coal an Allied* is to inject a further condition precedent that must be established before an order can be made which is necessarily an inappropriate fetter on the discretion Parliament has seen fit to invest in the Commission. Alternatively, it is a requirement that provides little assistance in determining how the discretion ought be exercised because it does not provide any objective basis for determining when industrial action is "illegitimate" as opposed to "legitimate" nor any guidance as to the **criteria** by which the Commission is to "**evaluate**" whether "industrial action is illegitimate, to a degree that the commencement or continuation of it should be subject to a direction causing it to be unlawful".

[19] I cannot think that the Full Commission intended that the evaluation of the illegitimacy or otherwise of industrial action, and the degree of illegitimacy, ought turn on whether the member hearing an application **subjectively** viewed the particular industrial action as a morally justified response to some perceived wrong by the other party. This would seem to be at odds which the whole legislative scheme introduced in the amendments to the Act since 1996 where industrial action is authorised and, indeed, protected in connection with the making of agreements which, once made, the parties are supposed to observe (including, critically, the dispute settling procedures which certified agreements must incorporate).

[20] I am fortified in this view by the decision of the Full Commission in *CEPU and AG Coombs Fire Protection Pty Ltd [Q1727]* (Giudice J, Polites SDP, Hingley C, 17 June 1998) (at p 2):

The appellant relied in particular upon passages from the decision of the Full Bench in Coal and Allied. *Those passages are:*

> "There is nothing in either the Second Reading Speech or in the provisions of the Act from which it should be inferred that unprotected action is per se to be treated as illegitimate to a degree that warrants it automatically being subject to direction. . . . The requirement for the Commission to exercise a discretion to direct the cessation of particular unprotected industrial action is the condition precedent to continuation or commencement of it being a contravention of the Act. That condition connotes a requirement that the character of the industrial action is evaluated for the purposes of establishing whether in the Commission's view the industrial action is illegitimate, to a degree that the commencement or continuation of it should be subject to a direction causing it to be unlawful." [(1997) 73 IR 311 at p.329]

It was submitted, relying on the passages just quoted, that in hearing s.127 applications the Commission is required to decide whether particular industrial action is legitimate or illegitimate and, only if the action is found to be illegitimate, to make an order. We think this approach is simplistic and involves too literal a reading of the Full Bench's comments. The Full Bench pointed out that s.127 involves the exercise of a discretion. But the passages do not suggest that the exercise of the discretion should be artificially limited so as to turn simply on the question of whether the industrial action was legitimate. The discretion is to be exercised on normal principles taking into account all of the relevant circumstances including, but not limited to, the nature and extent of the industrial action. We add that in the exercise of that discretion it is a very relevant

> *consideration that the Act provides a procedure for taking protected industrial action. The procedure involves initiation of a bargaining period (s.170MI), supplying particulars of the matters sought to be negotiated (s.170MJ), the giving of notice of industrial action, normally 3 days (s.170MO) and a requirement that negotiations have been tried before industrial action is taken (s.170MP). Where an organisation or person declines to follow the procedure it takes industrial action not provided for in the Act. In this case Commissioner Tolley was bound to take into account, and no doubt did, the fact that the Appellant had not purported to follow the procedure and that none of the industrial action was protected. (underline emphasis added)*

See also *CBI Constructors Pty Ltd and AMWU [r1748]* (Giudice J, Polites SDP, Gregor C, 10 February 1999).

[21] Where the statutory pre-conditions in s.127 are otherwise satisfied, extreme or extraordinary circumstances would be required to justify an exercise of discretion **not** to make an under s.127 where, as here, there was no suggestion that the action was by workers directly affected by a reasonable and genuine concern as to their immediate safety, was not protected action and where a certified agreement applied and there had been no attempt to follow the dispute settling procedures in that certified agreement.

[22] In summary, I find:

(a) That the work performed at the mine is regulated by a certified agreement, namely the United Collieries Agreement 1999;

(b) That the current stoppage is industrial action that is happening in relation to work that is regulated by that certified agreement; and

(c) That further industrial action is threatened in relation to work that is regulated by that certified agreement.

[23] The conditions precedent in s.127 were satisfied and it was my opinion that an order under s.127 should be made. There was no issue that the then current stoppage or any prospective industrial action occurring prior to 31 December 2002 was or could be "protected action". I therefore determined, in the exercise of my discretion, to extend the operation of the order until 31 December 2002. I agreed with Mr Slevin that the terms of the draft order submitted by the Applicant were too broad and I have prepared an order that introduces an appropriate degree of precision in conformity with the guidance provided by North J in *Australian Paper*.

BY THE COMMISSION:

VICE PRESIDENT

Printed by authority of the Commonwealth Government Printer

<Price code D>

ANNEXURE “JDF-7”

Australasian Legal Information Institute

BHP Coal Pty Ltd, Re; 056/00 B Print S2980 [2000] AIRC 841; (7 February 2000)

BHP Coal Pty Ltd, Re; 056/00 B Print S2980

Printed with the authority of the Australian Industrial Relations Commission Mis 056/00 B Print S2980

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
Workplace Relations Act 1996

s.127(2) application to stop or prevent industrial action

BHP Coal Pty Ltd

Hay Point Services Pty Ltd

BHP (AIS) Pty Ltd

(C No. 40077 of 2000)

Various employees — Coal mining industry

COMMISSIONER HODDER — BRISBANE, 7 FEBRUARY 2000

Industrial action

ORDERS

A. Pursuant to s.127 of the *Workplace Relations Act 1996* the Commission orders as follows:

1. Title

This Order shall be known as the BHP Coal (Coal Export Price) Industrial Action Order 2000.

2. Persons Bound and Application of Order

(a) This Order is binding upon:

(i) the Construction, Forestry, Mining and Energy Union (the CFMEU), its officers, members and employees;

(ii) the Colliery Officials Association of New South Wales (the COA), its officers, members and employees;

(iii) the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (the AMWU), its officers, members and employees;

(iv) the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (the CEPU), its officers, members and employees; and

(v) BHP Coal Pty Ltd, Hay Point Services Pty Ltd and BHP Steel (AIS) Pty Ltd (the Companies)

Each of whom is a party to the proceeding.

(b) This Order applies in relation to work performed at each of the sites listed in Schedule A. The work performed at each of the sites is regulated by the awards and certified agreements listed in Schedule B.

(c) The parties bound by this Order themselves and through their respective officers, members, employees, agents and delegates are to comply with this Order; and

(d) Despite anything else stated in this Order, it shall not apply to action to which the following order applies:

BHP Coal Industrial Action Order 2000 [Print S2619]

3. Industrial Action to Stop

The CFMEU, COA, AMWU and CEPU shall not in relation to the work to which this Order applies for the purposes, wholly or partly, of any dispute or disagreement about or concerning negotiations or the outcome of negotiations over export coal prices:

(a) take or continue strike action;

(b) commence or instigate any ban on employees attending for and performing work in accordance with the applicable awards or certified agreements listed in Schedule B;

(c) direct, procure, advise or authorise union members or other employees to stop performing work in accordance with the applicable awards or certified agreements listed in Schedule B.

4. Service of Order

(a) Without limitation as to other means of service it will be sufficient service of this Order upon the CFMEU, COA, AMWU and CEPU if a copy is served by facsimile on the following:

(i) National Secretary - CFMEU

(ii) National Secretary - COA N.SW.

(iii) National Secretary - CEPU; and

(iv) National Secretary - AMWU.

(b) it will be sufficient service of this Order if it is read in the presence of a representative of the CFMEU, COA, CEPU and AMWU; and

(c) it will be sufficient service of this Order if a copy is sent by fax to the Lodge officials or site delegates of the CFMEU, COA, CEPU and AMWU.

B. This Order shall come into force from 4.30pm (Eastern Standard Time) on Monday, 7 February 2000 and shall remain in force until 5.00pm (Eastern Standard Time) on Friday, 11 February 2000.

BY THE COMMISSION

COMMISSIONER

Printed by authority of the Commonwealth Government Printer
<Price code C>

SCHEDULE A

Coal Mining Sites

A. Queensland

1. Norwich Park Mine

2. Blackwater Mine

3. Peak Downs Mine

4. Saraji Mine

5. Goonyella Riverside Mine

6. Crinum/Gregory Mine

7. Hay Point Coal Terminal

B. New South Wales

1. Tower Colliery

2. Elouera Colliery

3. West Cliff Colliery

4. Appin Colliery

5. Cordeaux Colliery

SCHEDULE B

Awards and Certified Agreements

A. Queensland

1. Norwich Park Mine

Awards

Coal Mining Industry (Production and Engineering) Consolidated Award 1997

Agreements

Norwich Park Enterprise Agreement 1998

2. Blackwater Mine

Awards

Coal Mining Industry (Production and Engineering) Consolidated Award 1997

Agreements

Blackwater Mine Enterprise Agreement 1999

3. Peak Downs Mine

Awards

Coal Mining Industry (Production and Engineering) Consolidated Award 1997

Agreements

Peak Downs Mine Enterprise Agreement 1999

4. Saraji Mine

Awards

Coal Mining Industry (Production and Engineering) Consolidated Award 1997

Agreements

Saraji Mine Enterprise Agreement 1998

5. Goonyella Riverside Mine

Awards

Coal Mining Industry (Production and Engineering) Consolidated Award 1997

Agreements

Goonyella Riverside Enterprise Agreement 1999

6. Crinum Gregory Mine

Awards

Coal Mining Industry (Production and Engineering) Consolidated Award 1997

Agreements

Crinum Mine CFMEU Agreement 1997

BHP Coal Pty Ltd Gregory Mine CFMEU Enterprise Agreement 1998

BHP Coal Pty Ltd Gregory Mine CEPU Enterprise Agreement 1998

7. Hay Point Terminal

Awards

Bulk Loading Hay Point Services Pty Ltd Award 1994

Agreements

Hay Points Services Pty Ltd Certified Agreement 1998

B. New South Wales

1. Tower Colliery

Awards

Coal Mining Industry (Production and Engineering) Consolidated Award 1997

Agreements

Tower Colliery Minesite Agreement 1996

Tower Colliery and CFMEU Survival Agreement Certified Agreement 1998

2. Elouera Colliery

Awards

Coal Mining Industry (Production and Engineering) Consolidated Award 1997

Agreements

Elouera Colliery Certified Agreement 1999

3. West Cliff Colliery

Awards

Coal Mining Industry (Production and Engineering) Consolidated Award 1997

Agreements

West Cliff Colliery Certified Agreement 1999

4. Appin Colliery

Awards

Coal Mining Industry (Production and Engineering) Consolidated Award 1997

Agreements

Appin Colliery Certified Agreement 1998

Appin Colliery Survival Agreement Certified Agreement 1998

5. Cordeaux Colliery

Awards

Coal Mining Industry (Production and Engineering) Consolidated Award 1997

Agreements

Cordeaux Colliery Enterprise Agreement 1994

Cordeaux Colliery Survival Agreement 1998

** end of text **

ANNEXURE "JDF-8"

Mining & Energy Union
10 December 2013 ·

Don't let the current Government bring shame on us again by robbing construction and maritime workers of their rights at work. Share this picture from Australian Unions : all workers should be treated equally; stop the re-introduction of the ABCC.

CFMEU - Construction & General
10 December 2013 ·

This International Human Rights Day - remember how Tony Abbott's plans to bring back the ABCC will rob Australian workers of their rights, including the right t... **See more**

Mining & Energy Union
29 May 2014 ·

CFMEU - Construction & General
29 May 2014 ·

Today in the Australian the Coalition have said that they fully support Fair Work's attacks on individual union members who took unprotected strike action. Members were fined in amounts ranging from $1000 to $10,000 and some have now been issued with asset seizure orders for their houses and other assets. The laws under which these and other building workers have been charged represent a shift towards intimidating individuals rather than the union for standing up for themselves at work, and are almost unbelievable.

Stephen Smyth - District President, CFMEU M&E QLD

17 July 2015 ·

Great advertising for the CFMEU proud to be a CFMEU member.

THEGUARDIAN.COM

Joe Hockey: the CMFEU is a militant union – video

Speaking at the COSBOA National Small Business Summit in Sydney, treasurer Joe Hockey acc...

14

9 comments 7 shares

Like Comment Share

Mining & Energy Union

24 March 2016 ·

Sign the petition against the ABCC. Every signature counts
http://www.standupspeakoutcomehome.org.au/abcc-will-try...

CFMEU - Construction & General

24 March 2016 ·

For those who have never heard of Ark Tribe, you need to watch this. For those of us who have, enjoy...
We don't need the ABCC, we need a fair tax system.
Sign the petition against the ABCC here http://www.standupspeakoutcomehome.org.au/abcc-will-try-silence-workers

Mining & Energy Union
6 February 2018 ·

The ABCC continues it's war against unions. It has nothing to do with "reform" or "productivity". It's everything to do with acting on behalf of their LNP masters.

CG.CFMEU.ORG.AU

Nothing has changed at the ABCC: Eureka Flag banned on construction sites

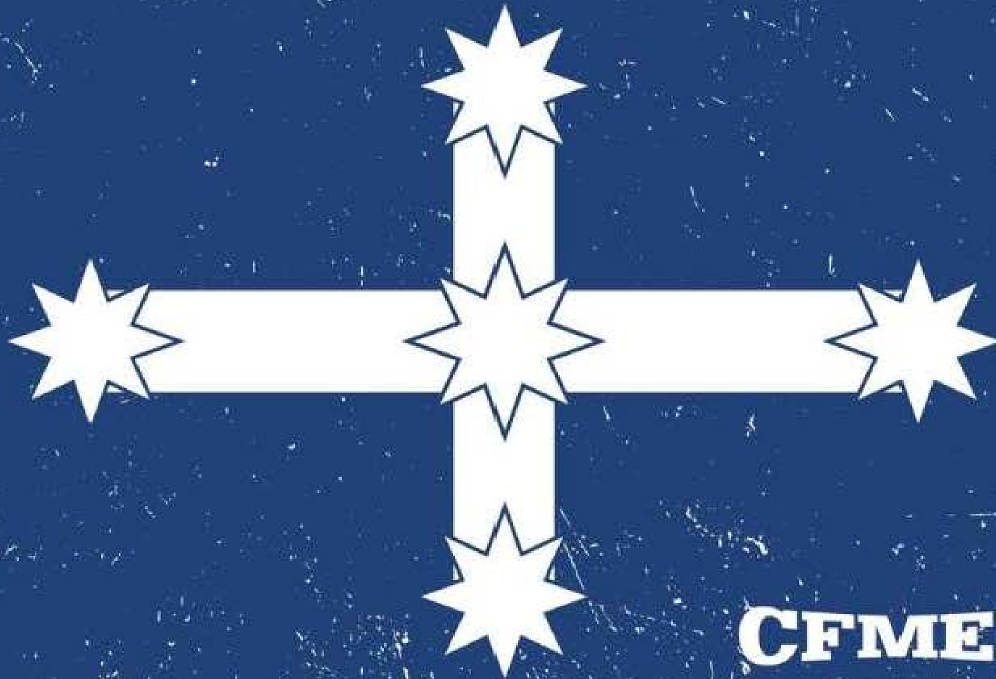
13

5 shares

Like Comment Share

Mining & Energy Union

6 February 2018 ·



Construction Forestry Maritime Mining and Energy Union

5 February 2018 ·

A new directive issued by Malcolm Turnbull's union-busting ABCC has warned of more stringent controls on union material on federal Government jobs - including employees wearing anything that features the Eureka Flag.

This flag represents our struggle, and we stand united beneath it.

https://www.theaustralian.com.au/.../5cab8cbc47d7dcab007b...

Mining & Energy Union

5 June 2018 ·

Victory for the CFMEU - Fair Work says its OK to fly the Eureka and CFMEU flags on building sites.

THEAUSTRALIAN.COM.AU

Union win a rebuff for ABCC

The Fair Work Commission has ruled that Eureka and construction union flags can be flown fro...

Heath Timmins
5 September 2018 ·

CFMEU Vic-Tas
4 September 2018 ·

Construction workers have been jailed for refusing to answer questions from the Liberal Party's anti-worker ABCC. Michaelia Cash writes her own rules.

2

1 share

Mining & Energy Union

6 September 2018 ·

A perfect day for fighting for the ABCC 🌞✊

CFMEU Construction & General NSW is with **Fatani Kavaefiafi**.

6 September 2018 ·

Sydney❤️👌 #changetherules

37

1 comment 3 shares

MEU Mount Thorley Warkworth Lodge

11 May 2019 ·

Construction Forestry Maritime Mining and Energy Union

10 May 2019 ·

Take the pledge to change the government and scrap the anti-union and anti-worker ABCC.

CHANGETHEGOVT.CFMEU.ORG.AU

Take action to abolish the ABCC

To change the rules we have to change the government.

3

Like Comment Share

Write a comment...

Press Enter to post.

MEU Mount Thorley Warkworth Lodge
15 November 2019 ·

What a disgrace!

SPOT THE DIFFERENCE:

CFMMEU fined $50,000 after refusing to work without female toilet

Union prosecuted in the Federal Court for fighting for basic amenities for female construction workers.

MEANWHILE...

South Australia Government drops charges against Royal Adelaide Hospital builder over 2014 death of worker

Hansen Yuncken and Leighton Contractors (now CPB) kill a worker and walk away with no penalty.

CFMEU Vic-Tas
15 November 2019 ·

MEU Mount Thorley Warkworth Lodge

24 November 2019 ·

A novel idea

Westpac broke money laundering laws 23 million times and will pay a tiny $43 fine per breach.

We demanded a women's toilet and copped a $50,000 fine.

Maybe we should do a rebrand...

Construction Forestry Maritime Mining and Energy Union

24 November 2019 ·

One rule for the big banks, another for the rest of us.

Thousands rally in solidarity as 107 face Court – ACTU launches Fighting Fund

Thousands of workers throughout Australia, including members of our Union, demonstrated their support for the 107 Western Australia trade unionists facing massive fines or jail sentences following charges that they went on strike in support of a victimized safety delegate.

The solidarity rallies were held on 29 August as the workers faced their first day in court. The charges have been brought by the Howard Government's construction industry's industrial police force, the ABCC. At the date of the first hearing, the ABCC process servers had only been able to serve writs on 74 of the 107.

Some members of our Union at the Sydney rally.

While the Howard Government's legal team wanted the court to proceed as quickly as possible, the defence team argued for reasonable time to prepare cases. The Judge agreed and adjourned the case until 1 November.

In the meantime, unions will continue to campaign on behalf of the 107 and their families whose predicaments are winning broad community support.

Dave Noonan, recently elected National Secretary of the CFMEU Construction Division, told a huge rally in Perth: "This dispute is about intimidation. John Howard wants a workforce that is scared. He wants every one of you to know that if you stand up to the boss his industrial police force will come after you. But we won't be intimidated, we'll fight for our rights", he said.

ACTU leaders Greg Combet and Sharan Burrow pledged the full support of the union movement pointing out that the ACTU has set up a fighting fund for this campaign.

"The Australian people will not stand for the Government suing individual workers and putting people's homes and their assets in jeopardy. This will be a focus of our campaign in months to come", pledged Greg Combet.

Sharan Burrow pointed out "that on average, every week someone dies on a building site in Australia while many more are injured. Our battle is to save lives, but does the Howard Government care? No ... This Government will only be satisfied when workers are too powerless and intimidated to speak up. Well, we've got a message for the Howard Government - that day will never come".

Solidarity rally in Perth on 29 August.

SUPPORT THE 107

The 107 workers and their families are facing a long, protracted and expensive legal battle and they need our support.

At the solidarity rally in Sydney, our Union helped kick off the national fighting fund with a $10,000 donation.

Other unions and workplaces have set pledge targets, organised contributions through weekly pay packet deductions or are running raffles and other fundraisers.

Members of our Union and Lodges wishing to make a donation should contact their District Secretary to make arrangements.

Messages of support can be sent through the ACTU's campaign website: www.rightsatwork.com.au/campaigns/supportthe107.

Our Union welcomes WA Govt boost for Collie coal

Gary Wood (right) with WA State Treasurer Eric Ripper.

Our Union has welcomed a Western Australia Government pledge to spend $3 million developing the coal industry in Collie. The money is part of a $10 million industry rescue package announced last year. It aims to increase the domestic use of coal and identify new export markets.

Under the strategy there will be a big expansion of coal mining, from six million tonnes this year to 10 million tonnes by 2010. Our Union's WA Secretary Gary Wood told *Common Cause* that the initiative will help to secure the future of the mining town. "Hopefully, we can see an opportunity for more jobs in the coal industry", he said.

"Initially it will maintain the existing levels but I think as we see developments in coal technology, and hopefully the opening up of export markets, we can see an opportunity for more jobs in the coal industry", Gary told *Common Cause*.

Collie miners rally to support WA 107

Collie members before boarding the bus for the Perth solidarity rally.

BY GARY WOOD, OUR UNION'S WA SECRETARY

On Tuesday 29 August, 46 miners made the trip from Collie to Perth to support the 107 construction workers who were facing the Federal Court for allegations of breaches of Howard's WorkChoices laws.

The rally was emotionally charged with many of the 107 supported by wives and children, many of who were visibly upset at the prospect of losing the family home should the Court impose the threatened $28,600 fines on each of them.

However, with the support of the Union, the attack on these workers will be vigorously resisted.

The Collie miners returned to the workplace emotionally charged and determined to do whatever it takes to bring about the defeat of the Howard Government at the next federal election.

Premier Coal Lodge Secretary Steven Flynn summed up the feelings of the contingent: "To witness the Perth solidarity rally first hand reinforced the need to convey the message far and wide, both within the Union movement and outside, of the need to remove this draconian conservative Howard Government".

SO MUCH FOR 'WORK CHOICES'

Howard forces Sydney Uni to offer AWAs to 6,000 staff, or lose millions in funding

Sydney University has been forced to offer its 6,000 academic and general staff AWAs or face the loss of tens of millions of dollars in Federal Government funding.

In a move that makes a mockery of freedom of choice, the University was blackmailed into offering the AWAs by 30 August or it would immediately have lost $13 million in funding under the Howard Government's Higher Education Workplace Relations Requirements.

This law applies to all higher education institutions funded by the Federal Government. The penalty for refusing to offer AWAs is the loss of hundreds of millions of dollars in funding.

It says it all about the bankruptcy of WorkChoices, doesn't it? - Rather than winning the education sector's support for AWAs by persuasive arguments, the Howard Government has to resort to blackmail to achieve its agenda

Howard Govt sues WA workers

Families face $28,600 fines or workers go to jail

The Howard Government has started to sue ordinary construction workers over alleged industrial action.

On July 5, the Howard Government's union-busters, the ABCC, started legal action in the Federal Court against 107 construction workers on the Perth to Mandurah rail project in WA.

The following evening, about 60 workers and their families were served with writs in their homes. They are charged with taking 'unlawful industrial action' in February and March this year, after the site delegate was sacked from the job.

They face fines of up to $22,000 under building legislation and some face a further $6,600 for allegedly ignoring an Industrial Relations Commission order banning strikes on the project.

The ABCC has asked the Court to make orders against the workers declaring their action unlawful and to impose the fines as well as ordering that the workers pay the Federal Government's costs of the Court action.

This is the first time individual workers have faced fines for strike action in Australia under these laws.

It is not a matter of pay being docked for time lost or an employer seeking to recover economic loss.

Rather, it is the Howard Government launching Court prosecutions against workers that could see ordinary Australian families lose their homes as punishment for standing up for their rights at work.

And it is only the beginning.

The remaining 296 workers on the Perth railway project may also be charged. And the ABCC is lining up similar prosecutions against individual workers in Victoria, Tasmania, South Australia, NSW and Queensland.

The WA workers served with writs and their families have vowed to fight this battle out together and oppose the fines.

Families of CFMEU Construction workers in WA demonstrate their determination to stand by the embattled workers.

"The workers are feeling very positive", said CFMEU WA Branch Secretary Kevin Reynolds. "They understand what has happened here. They think the law is wrong. This is a John Howard law that is targeted against working class people. The workers are very determined to fight this out", he said.

Their cases begin in the Federal Court on August 29. Our Union is supporting these workers as they prepare to front up to the Court.

The 107 WA workers are the first union members to face political persecution in nearly 40 years. Australians should be concerned they will not be the last.

Support the workers and their families

- Donate to the National Fighting Fund for the WA Workers: Contact the CFMEU national construction office for details on (02) 8524 5800.
- Send a message of support to the workers and their families through the CFMEU WA Branch: Level 1, 82 Royal Street, East Perth, WA 6004. Phone (08) 9221 1055 or email: jmellor@cfmeuwa.com

Workers and families defiant – They will never break our spirit!

There's no way my kids are going to be living on Vegemite sandwiches while I pay a fine to the Government for sticking up for a principle. At the end of the day, your beliefs are what you have. Some things that you do have consequences and we just have to fight on.

– John, father of four, whose name is among the 107 listed for charges.

Who's got $28,000 sitting aside to pay for something like this? We are ordinary, working class people. We live from week to week. If we can't pay, he will have to go to jail. I can't sleep at night.

– Bernie, mother of three, whose husband is among the 107 workers targeted.

I am hoping Aussies will step up and tell this government, enough is enough. These attacks on our democratic rights have got to stop.

I'm typical, I don't know what to do. There's no way I could pay a $28,000 fine. They are talking about seizing assets. What assets?

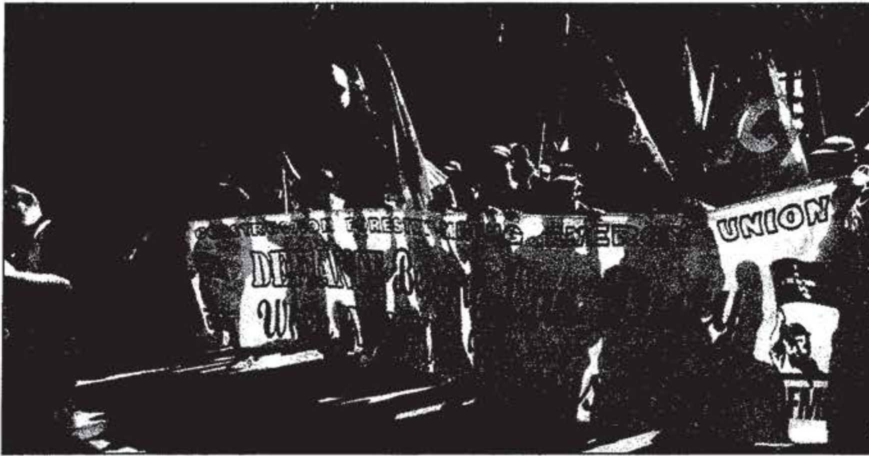
My wife and I are trying to buy our first home, it's been a hard road but we're nearly there. Now it looks like, if we get it, we will have to sell it to pay John Howard.

– Another worker who is also listed for charges.

We have been inundated with phone calls of support from all over Australia with people offering to kick in to a fighting fund to support these people.

I am super confident that the Australian working class will not see these people out of pocket.

– Kevin Reynolds, CFMEU WA Construction Branch Secretary



Howard's IR watchdog rules Cowra sackings and pay cuts *are* legal

The election of a Beazley Labor Government, with its commitment to rip up Howard's repressive IR laws, has taken on even greater urgency following the ruling by the Government's own workplace watchdog that the proposed sackings and pay cuts at the Cowra abattoir were indeed legal.

The Office of Workplace Services has released a report that confirms it was legal for the Cowra abattoir to, as it did in early April, propose sacking 29 meatworkers and re-employ them on wages that involved pay cuts of around 30% - up to $180 a week lower.

Because the operation employed more than 100 workers, the employer could not hide behind the unfair dismissal option to get away with this. However, WorkChoices provides a sneaky get out clause that allows all employers to engage in such sackings and pay cuts for 'operational' reasons.

This ruling opens the gate for all Australian workers to be legally sacked and re-employed on lower wages and conditions under the Howard Government's new IR laws.

Why repressive building union laws are a concern for all Australians

BY JOHN SUTTON,
NATIONAL SECRETARY
CFMEU CONSTRUCTION

It may have gone under many people's radar, but one of the first pieces of legislation passed by the new Senate will have a profound impact on the Australian way of life.

The so-called Building Industry Improvement Act is the Howard Government's response to the Cole Royal Commission, a $60 million witchhunt designed to paint a picture of corruption in the building industry which failed to come up with the goods, leading to just a single case and a $1,000 penalty.

The legislation passed by the Senate drastically cuts the industrial and political rights of building workers leaving them open to fines and imprisonment if they refuse to divulge details of industrial meetings to a government agency set up to 'police the industry'.

Why should the general public care about the plight of a bunch of building workers?

Well first, the Howard Government has made it clear these laws could be applied more widely over time. If you think the proposed changes to industrial relations are scary, this regime for the construction industry takes it to an entirely new level, effectively criminalizing union activity in all but the most narrow of parameters.

More broadly, the changes will produce a domino effect, crashing into hard-won 'rights' the wider community holds dear, such as the uniquely Australian green bans.

Thirty years ago, construction workers joined forces with community groups to become Australia's first urban environmentalists. They imposed green bans for developments that weren't up to standard and this phenomenon soon spread around the world.

Under the Building Industry Improvement Act, such activities will be illegal - developers would have the power to sue unions and individual workers for damages where they take such a principled stand.

If the developer did not take the action, the Howard Government's new Australian Building and Construction Commissioner could seek fines against the Union of $110,000 per breach and individual workers of $22,000 per breach.

So let's be clear about the impact of these laws. There will be no more green bans to save Australian icons such as Sydney's Centennial Park, or Kelly's Bush or the Rocks; no action to protect Redfern Oval or the literally hundreds of other parks and heritage buildings that have been saved over the decades.

Under the new regime green bans are just one of the areas where unions and their members will be constrained from acting.

The CFMEU has a proud history of supporting community causes, the anti-war movement, the South Sydney rugby league club in its successful battle for survival; our alliance with the community is a deep and abiding one.

By passing this legislation, building workers become a special class of citizens in Australia - with fewer rights than other Australians to take part in industrial and political action.

It will be harder to bargain for wages and conditions, to stand up for safety and to eke out an existence in an industry that has always been subject to the peaks and troughs of the market.

But the Australian community loses too, if one of the organisations that has invested its energy into building up our social capital becomes hamstrung and litigated into submission.

Howard gets his $60M union-bashing report

Cole Royal Commission "the biggest, most expensive political witch-hunt in Australian political history"

As *Common Cause* goes to press, the Howard Government has been handed its $60 million union-bashing war-plan by Royal Commissioner Terrence Cole. In the words of CFMEU Construction Division National Secretary John Sutton – "It is the biggest, most expensive political witch-hunt in Australian political history".

Although the report was handed to Workplace Relations Minister Abbott on 24 February, its public release has been strategically delayed until the Howard Government determines when it can wring the maximum political capital from it.

One thing is sure though, the Howard Government has not forked out over $60million for nothing. The Royal Commission was always designed as an attack on unions.

Indeed, it is worth recalling comments made by one of Australia's top shock jocks and close friend of Prime Minister Howard, Alan Jones, when he accused the Commission of bias in September last year:"There has been a fairly major exercise in union-bashing going on for some months, calling itself a Royal Commission into the building industry", he said. Backing his claim of bias Jones went on to quote what he described as "some unbelievable figures" unearthed by union research into the Royal Commission hearings that showed:

- 97% of hearing time had been devoted to anti-union topics;
- 604 employers were called to give evidence and only 33 workers;
- 71% of witnesses were from employers or their representatives while only 3% of the witnesses were from the workers ranks;
- Only 2% of hearing time was spent on topics which didn't adversely affect the Union.

"Now surely in all of these things fairness has to be real as well as apparent", said Jones.

The full extent of the Commission's bias against the workers and their Union is told in a book published on the very day that the Howard Government received Cole's report. Written by Jim Marr the book is entitled *First, The Verdict - The Real Story of the Building Industry Royal Commission.* What Marr uncovered should concern anyone who cares about a fair go in contemporary Australian society:

- Witnesses unwilling to criticise the CFMEU were not called to give evidence;
- Counsel Assisting the Commission made allegations of serious criminality that, after widespread media coverage, were shown to be unfounded;
- Serious criminal behavior by employers, including Commission witnesses, was largely ignored in public hearings.

In short, Marr's book reveals that the Cole Royal Commission was a $60 million political witch-hunt that selected evidence on its capacity to embarrass the CFMEU.

And for their trouble, the 13 senior counsel assisting the Cole Royal Commission have shared in a $10.3 million bonanza for a little over 18-months work.

John Sutton contrasted the Howard Government's spending on the Cole Commission to the Royal Commission into HIH. "Howard could only find $30 million to investigate the billion dollar collapse of HIH in which tens of thousands of Australians were burned yet it can find twice that amount of taxpayers money to target hardworking Australians who have been exercising their legal right to belong to a union", he said.

Meanwhile, the CFMEU continues to lobby Federal MPs and Senators to turn their attention to the real problems of safety in the building industry.

The Union has pointed out that the fatality rate now exceeds that of the mining industry and has called for a national review of Occupational Health and Safety laws, the introduction of industrial manslaughter legislation in every jurisdiction and the establishment of a national database to track accidents and incidents in the construction industry.

With three deaths and three serious accidents in the construction industry in the first four weeks of this year, John Sutton said that any weakening of the regulation of workplace health and safety by the Federal Government would lead to more deaths and injuries.

He said that the Cole Royal Commission had attempted to politicize the issue of safety, and warned that any attempt by the Government to weaken health and safety rights would be vigorously opposed by the Union.

"Sorry, I can't afford to give you a raise. I just gave myself a two million dollar cost of living increase."

Backdoor deal to pass ABCC sells out one million workers

Workers protesting against ABCC.

CFMEU Construction National Secretary Dave Noonan.

The passing of the Bill to bring back the Australian Building and Construction Commission (ABCC) by the Senate just before it finished for the year, has sold out the civil and industrial rights of one million Australian workers.

The revival of the Howard-era repressive industrial laws that strip construction workers of basic civil rights was delivered through a backdoor deal with One Nation, Senators Nick Xenophon and Derryn Hinch. While they claim some 'wins' on their pet issues in stitching up the deal with the Turnbull Government, it is at the expense of the basic democratic rights of construction workers today and who knows who else tomorrow.

On the day of the shameful deal, 30 November, CFMEU National Construction Secretary Dave Noonan said that the rights of one million construction workers have been sold down the river by cross bench Senators to horse trade with the Turnbull Government on other issues.

"These are laws that will take away rights, will endanger safety and conditions for ordinary workers in the industry. We know this because we've been here before and that's what happened."

"These laws destroy important protections that all Australians are entitled to, no matter in which industry they work," he said.

The ABCC bill:

- Removes the right of silence for construction workers.
- Bans workers, Unions and employers agreeing to limit casualisation.
- Prohibits workers, Unions and employers from promoting the employment of apprentices.
- Bans Unions and employers agreeing to safe hours of work or any limitation at all on excessive overtime.
- Prohibits workers seeking the assistance of their Union on safety issues on building sites.
- Bans measures that give workers job security.

Dave Noonan said that despite the return of the WorkChoices style ABCC laws, the Union will continue to stand up for its members, fight for safety on sites and bargain for better conditions for workers in the industry.

"We will also continue to fight for an end to bad and discriminatory laws that favour the interests of big property developers and multinational construction companies over the interests of ordinary working Australians.

"These are bad laws and that's why it has taken the Abbott/Turnbull governments three years to pass them."

Dave Noonan thanked Senator Jacqui Lambie for her support in opposing the ABCC along with former Senators John Madigan, Ricky Muir and Glenn Lazarus for withstanding pressure from the Government to pass the Bill during their time in office.

"They deserve to be congratulated for staying true to their principles and for voting down laws that are essentially an ideological attack on construction workers", he said.

Applications open for 2017 Mineworkers Trust Scholarships

Application forms for the Mineworkers Trust Scholarships for 2017 are now available for download from our Union's website www.cfmeu.com.au.

To be eligible for one of the 20 scholarships worth $6,250 each, a candidate must be:

- A CFMEU Mining or Energy worker, their family member, or dependent.
- Undertaking or applying to undertake courses at the Diploma level or higher at TAFE or at a public university in 2017.

Criteria for assessing applications include:

- Likelihood of the applicant completing the course.
- The financial situation of the applicant.
- The benefits derived by mining and energy workers and/or their communities by the completion of the course.
- The academic record of the applicant.

Applications must be received by email to execsupport@cfmeu.com.au or by post to Mineworkers Trust Scholarship, PO Box Q1641, NSW1230.

Protecting Top End of Town behind Turnbull refusal to act on national corruption watchdog

CFMEU National Secretary Michael O'Connor speaking at a rally in support of workers rights.

Why is the Turnbull Government so stubbornly refusing to establish a national corruption watchdog despite widespread public support for it? Recent independent polling shows 65% of voters support a national corruption body.

So, what's behind Turnbull's refusal?

In short, the answer is that the Liberal's don't want to shine a light on their own Big End of Town supporters. They are running protection for them even as big business corruption has been exposed on a massive scale with Australian links to global networks.

Indeed, an independent national anti-corruption watchdog might want to investigate the recent $4.4 million political donations scandal involving the Liberal Party in Turnbull's home State of NSW.

CFMEU National Secretary Michael O'Connor has renewed calls for a broad-ranging national corruption body that looks into all industries, including all areas of business and Government.

"While the Government has been focused on chasing unions and smashing workers rights we have seen allegations arise in Australian business and political circles that indicate very clearly that dishonest behaviour occurs in all industries", he said.

"We have seen scandal after scandal come out of the Liberal Party, Australia's big banks, the ASX, and many other dodgy practices. Australian companies that have been caught up in corruption allegations include Leighton Holdings, Australian Water Holdings, the Australian Wheat Board, BHP Billiton and Lend Lease. And yet the Turnbull Government sits on its hands to protect its big business mates.

"We have seen corrupt practices where businesses exploit and underpay their workers at 7-Eleven and in the hospitality sector.

"But what does Malcolm Turnbull do? Continues to hound unions and Australian workers to distract the public from what's really going on."

Michael O'Connor said it was time the Government came clean on corruption in its own backyard rather than use unions as a scapegoat and distraction for its own unethical behaviour.

Construction workers with fewer rights than drug dealers

It is a sign of worrying times in Australia when a Federal Government with a comfortable majority in Parliament calls a rare Double Dissolution election because it wants to more fiercely attack workers rights in the construction industry.

It is even more troubling when the existing laws are so repressive that a construction worker has fewer rights than a drug dealer. Still the Turnbull Government wants to restore the Australian Building and Construction Commission (ABCC) with even greater powers to attack workers.

Turnbull says that the ABCC is necessary to improve the construction industry. It's a lie. The construction industry is booming. Four of the top 10 richest billionaires in Australia are developers. The ABCC is simply about taking away workers rights in order to benefit the hip pocket of developers and large multinational construction companies.

Make no mistake about it. The repressive ABCC is a ruthless force that would not be confined to the construction industry. It is a template for repressing workers in other industries. The Turnbull Government is using the construction industry as a battleground for an ideological war on workers rights. If it's building workers today, then who tomorrow?

WA construction workers in solidarity.

Union rallies in support of WA 76 – Charged for the "serious offence" of protesting for jobs and families

By Rob Mitchell

On 28 February last year, a community-based political rally took place on the grounds of the WA Premier's office at Parliament Place, West Perth. Twelve months later, 76 workers woke up to find they had been charged with a "serious offence".

The rally was to protest against the lack of local content on large-scale resource-based manufacturing projects, the lack of training opportunities for young people and local jobs being given up in preference to 457 visa workers.

These are valid and important issues which concern the entire Australian community, and which had been a major topic on the political landscape for months leading up to the rally.

Questions are now being asked why the 76 were charged almost a year later, and did the Abbott Government give the order to "go and get them"?

The workers were served a summons from the revamped Fair Work Building and Construction, the replacement organisation for the Australian Building and Construction Commission.

The 76 workers are all from the same contractor Crown Construction. They were working at the new children's hospital site and are now being prosecuted and facing fines of $10,200 each.

Workers from Crown Construction in previous years had attended various other political rallies without being prosecuted. It is believed this is the first time in Australia that workers have been charged for attending a political rally to express their democratic views and concerns.

Among the many questions arising from the charges is why have these 76 workers (and their families) from approximately 5,000 been singled out for punishment?

Do these charges set a new precedent?; will it be deemed unlawful in the future for unionists or community members to attend a political protest? This issue goes to the very heart of our democracy and the right to free speech.

CFMEU National Secretary Michael O'Connor and Construction Division National Secretary Dave Noonan met with some of the workers on a trip to Perth recently. "These 76 workers will have the powerful backing of our 130,000 members Australia-wide", said Michael O'Connor.

Taking their story to Canberra

The Liberals are now introducing new legislation into Parliament called the Building and Construction Industry (Improving Productivity) Bill 2013. The Bill fulfils the Coalition's election promises to re-establish the repressive ABCC to mount a further campaign to attack the basic civil rights of construction and building workers.

Representatives of the WA 76 travelled to Canberra to meet with MPs to discuss their own plight and the more general threat to civil liberties posed by the Abbott Government's renewed attack on workers.

It was a productive trip and the Union has vowed to continue to lobby and urge Parliamentarians to vote in favour of democracy and against the unfair and unjust powers of the ABCC.

One thing is certain out of all this: Union members and their families are more determined than ever to fight for their basic rights. Meanwhile, as we continue to fight for a Fair Go, the next federal election in 2016 can't come soon enough.

We'll fight Abbott plan to force industrial police on building workers

The Abbott Government has wasted no time in turning its guns on workers in the construction and building industry. One of their first moves has been to revamp John Howard's repressive industrial police force – the Australian Building and Construction Commission (ABCC) – and unleash it to attack workers rights.

Abbott moved quickly to undermine the reforms of the Gillard Government by appointing right-wing ideologue John Lloyd and former ABCC Deputy Commissioner Nigel Hadgkiss to lead the charge.

ACTU President Ged Kearney said the Abbott Government had made clear its intention to re-establish the ABCC if it could get legislation passed by Parliament and the new body would be like the old ABCC which used its coercive powers to unfairly target construction workers.

"The old ABCC was a failed institution that achieved nothing except to intimidate and harass construction workers", Ged Kearney said.

"The new Government has not learnt the lessons of WorkChoices by appointing two of its key figures to oversee its attack on workplace rights in the construction industry.

"Under the Howard Government the ABCC showed no desire to investigate the actions of rogue employers. It was simply an attack on unions and workers.

"Construction workers were subject to extreme powers – including secret interrogations and the abolition of the right to silence – which did not apply to workers in any other industry.

"The ABCC spent $135 million of taxpayers money yet failed to find evidence of serious wrongdoing by union officials", she said.

CFMEU will stand United to defend workers rights

CFMEU Construction National Secretary Dave Noonan issued a defiant warning to the Abbott Government that our Union would stand united in the face of any attacks on workers.

Addressing the CFMEU Construction National Conference in Queensland on 21 October, Dave Noonan said: "Tony Abbott has no mandate to take away our members human rights; no mandate, to cut their wages and no mandate to make their jobs less safe".

He went on to say:

"Unlike Tony Abbott our Union keeps its promises, and we promise this: We will not shirk our responsibility to stand up for our members rights on site. We will not compromise on defending our member's safety. We will fight to keep our wages and conditions. And we know we are not alone.

"Despite Tony Abbott's attempts to demonise construction workers and their Union, despite his friends attempts in the Murdoch media to denigrate us for our pay and conditions, we know that we have friends everywhere.

"Working people, even those not in unions, look to the CFMEU for inspiration. They like the fact that we stand up for ourselves, fight for better wages and conditions and look out for each other in a tough working environment.

"They like it because they know that each time we raise our head and take a stand, we are not just doing it for ourselves.

"They like it because they know that strong Unions have the ability to not only help their own members, but to also be there for others in our community who need a hand.

"And under an Abbott Government when they come after us, we will all need to reach out and help each other. We will need to stick together, and we will need to back those in our communities who are also doing it hard.

"It's what we've always done and that's how we'll get through the bad times and come out on the other side of this, together, united and strong", said Dave Noonan.

Blue collar workers are not terrorists!

Abolish the ABCC

General President Tony Maher Reports

After a good year of campaigning, our Union will need to hit the ground running in 2013

This year has marked the 20th anniversary of the formation of the CFMEU and like all organisations that unite across a diverse range of industries it has taken some time for the Union to find its feet and realise its true potential.

I am happy to say that in 2012, the CFMEU has come of age as a strong national force delivering for its membership in mining and energy as well as in our construction and forestry Divisions.

Our successful campaigns on the job and in the political arena are the direct result of our national leadership working more effectively together to bring the strength of the three Divisions into a more cohesive fighting force to support our members rights and interests wherever they have been challenged.

This has delivered some very impressive outcomes for all our members including:

- Improved coal long service leave;
- Retention of the Regional Infrastructure Fund with revenue from the mining tax;
- New anti-dumping legislation to support Austraian manufacturing; and
- The scrapping of the Australian Building and Construction Commission (ABCC).

These are achievements that none of our Divisions would have won alone. It took the unity of purpose and the determination of all our members to deliver these gains.

The entire CFMEU supported our Union's determination to extend the benefits of the coal industry's long service leave and with that support behind us we got the industry and the Federal Labor Government on board and they delivered. The Coal Mining Industry Long Service Leave Scheme was finalised at the end of last year when the second tranche of Commonwealth legislation was enacted. We now have the scheme protected (as best it can be) by Federal Legislation supported by both sides of politics as well as preserving the benefit of 13 weeks leave for 8-years of service that now includes a portable provision giving many more workers access to the scheme that they never had before.

The BHP Billiton campaign was by far the biggest industrial dispute of the year. The sheer determination of members and their families to demand a fair go and a bit of respect had the nation sit up and take notice. The arrogance of BHP Billiton CEO Marius Kloppers in refusing to meet a community delegation has left an imprint on the minds of thousands of BHP Billiton employees and the public at large.

The support provided by all of our members through the National Assistance Fund meant that even the world's biggest mining company that was prepared to lose around $2 billion to fight this dispute couldn't get 3,500 determined Union employees to accept their terms. Again, the BHP coal mineworkers received the full support of our fellow members throughout the construction and forestry arms of the CFMEU nationally.

Looking forward to 2013, we will continue to push the Federal Government and the Opposition alike through our campaign for workers to share more in the benefits of the mining boom. In the new year we will intensify the CFMEU's *Let's spread it around* campaign to improve the lot of our mining communities; increase Australia's manufacturing sector and improve opportunities for Australians to find decent and secure employment in our resources industries.

While companies are quick to point to lower prices, the most recent report from the Bureau of Resources and Energy Economics show increases in production of resources to three times the pre-boom levels over the next decade. There is still plenty to be spread around.

Next year will see a Federal election with the stakes high not only for our members but for millions of other workers as well. There will be much union bashing in the media in the year ahead as Tony Abbott tries to lay the groundwork for a Royal Commission into unions. I'm all for prosecuting the handful of bad apples but let's not forget Abbott's real objective is to prevent unions from running campaigns like the 2007 *Your Rights at Work* campaign. The only reason he'd want that is to allow him to reintroduce a rebranded but essentially the same WorkChoices.

So while we enjoy a break over Christmas and the New Year our Union will hit the ground running in 2013 with the same determination and conviction to represent the interests of all our members, your families and our communities.

The National Executive and Staff wish all our Members Season's Greetings and a Happy 2013

Common Cause is published by Tony Maher for the Mining and Energy Division of the Construction, Forestry, Mining and Energy Union (CFMEU).

Editor: **Paddy Gorman**
Phone: **(02) 9267 1035**
Web: **www.cfmeu.com.au**

Designed & Printed by Breakout
www.breakout.net.au
Phone (02) 9283 0123

New fresh national strategy delivers for all CFMEU workers

Workers from all industries represented by the CFMEU have benefitted from a renewed and fresher national approach to key issues affecting all members in the wake of the Union's recent commitment to a more effective strategy better suited to the needs of today.

This follows a recent re-evaluation by the Union's three sectors – construction, forestry and mining and energy – to determine how to work more effectively together on key priorities for workers represented by the Union, and members are seeing the results.

The new approach sees a more energised and effective national team, with officials across industries backing each other in publicly advocating a more coherent national CFMEU positon with employers and in meetings with Governments and other stakeholders.

"It is now commonplace to see all three Divisions working together, putting the same position to Government and the media and working hard to get better results for members," said Michael O'Connor, CFMEU National Secretary.

"And we are already seeing wins."

New Anti-Dumping Regime

Campaigning and lobbying by the CFMEU has successfully convinced the Federal Government to rewrite their anti-dumping laws to better protect Australian jobs.

"Australian manufacturing jobs, including CFMEU members, were being threatened by illegally dumped foreign products," said National Secretary Michael O'Connor.

"Members from both the Forest and Furniture and the Construction and General Divisions have campaigned on the issue, and officials from all Divisions prosecuted the issue with Government," said Michael.

This collective approach saw results, with better laws being written and more resources for customs to police them on the way.

Gassy Mines Compensated in Carbon Deal

While most coal mines will be largely unaffected by the carbon price, and jobs will continue to grow, a small number of mines with high methane emissions were at risk.

"There are 23 mines that would bear a high cost per tonne of coal because of high methane levels," said Tony Maher, President of the CFMEU Mining and Energy Division.

"We worked hard to make sure the Government understood the issue and provided a package to help those mines reduce their emissions.

"It was great to know that every time Dave Noonan (CFMEU Construction and General Division Secretary) and Michael O'Connor (CFMEU National Secretary) were talking to the Prime Minister or Ministers, they were putting the case to support coal miners from these mines.

"And it paid off. $1.3 billion was allocated in the package to help these mines reduce their methane emissions, so they can stay open, be cleaner and safer," said Tony.

More Challenges Ahead

"We will keep working together for members across the Union," said Michael. "A key challenge will be sorting out the Australian Building and Construction Commission."

Construction Division Secretary Dave Noonan believes the support of the other Divisions will be critical to getting a good result.

"When politicians see it is not just construction workers who want the ABCC abolished, but that miners, timber, furniture and paper workers are also backing them up, it is hard for any government to ignore.

"I know that when I walk into a room to fight to restore construction workers' basic rights I have the whole CFMEU behind me, and that is a great strength," said Dave.

Michael also pointed to the Tasmanian forest deal.

"Both Dave and Tony have been key supporters of getting a good deal for Tasmanian timber workers. I know that while their Divisions continue to support Forestry and Furniture on this key issue we have the best chance for a good outcome here and in all areas where members of the CFMEU face challenges," he said.

Allan doing what he loved – fishing

Sad loss of Allan Perry

One of our Union's rank and file stalwarts in the Northern District Allan Perry has passed away aged 59. Allan worked for nine years at Swamp Creek; 14 years at Warkworth and six years at Warkworth Mount Thorley. He was on C crew for 20 years and was well liked and highly respected by all who knew him.

Allan's nickname was ALP. He was a passionate believer in workers rights and was prepared to stand up for them. While he was a fierce defender of workers values and principles he had a lighter side that he shared with us all. Allan loved fishing and he was a practical joker –a real Aussie bloke.

Allan passed away on Sunday 7 August after a three year battle with cancer . He was put to rest five days later with his Warkworth union cap.

The respect and affection in which Allan was held was evident by the large number of the old Warkworth Lodge members who attended his funeral. He was a great bloke and a top Unionist. He will be missed by all.

On behalf of its readers, *Common Cause* extends its sincerest condolences to the family and friends of Allan Perry on their sad loss.

Russell Trappel, Mount Thorley Warkworth Lodge President.

NSW Energy activists complete 'Advanced Leader Course'

Pictured are activists from our NSW Energy District who were presented with their certificates having successfully completed our Union's 'Advanced Leader Course'.

The course was run by our Union's National Training Coordinator Ray Barker and Unite Coordinator Mick Weise.

The certificates were presented by NSW Energy District President Allen Drew. All the recipients are members of the NSW Energy District's Board of Management.

From left to right are – Bob Chapman, Delta Electricity; Jason Porter, QENOS; Darren Maxwell, Energy Australia; District President Allen Drew; Mark Connor, QENOS; Mark McGrath, Shell Refinery; and Paul Samaras, Shell Gore Bay. ■

Senate report confirms need to abolish repressive powers in construction industry

Unions have welcomed the recognition by a Senate committee that there is no place for coercive powers in any workplace and that all workers should be subject to the same laws.

A report of the Senate Education, Employment and Workplace Relations Legislation Committee inquiry into the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009 has backed union concerns that coercive powers in the industry are an infringement of civil rights.

Workers rally outside the Elizabeth Magistrates Court on August 11 in support of construction worker Ark Tribe who is being prosecuted by the ABCC. His next Court appearance is listed for 30 October.

"The overriding principle is that there should be one set of laws for all workers, regardless of the industry they work in", said ACTU Secretary Jeff Lawrence.

"We remain absolutely opposed to the continuation of coercive powers that clearly impinge upon the civil liberties and rights of people, or upon the right to be members of a union.

"There are established laws to deal with criminal behaviour, but additional coercive powers in the construction industry are oppressive and an infringement of basic rights."

The committee's majority report said:

"The coercive powers should not have a continuing role in the enforcement of workplace laws. The ultimate goal must be the regulation of the building and construction industry under the same laws as the rest of the workforce".

Jeff Lawrence said big construction companies and property developers wanted to retain unfair laws in the industry because they stood to gain financially from laws that reduced workers rights.

"The Australian Building and Construction Commission was set up by the Howard Government to undermine the rights of 900,000 hardworking Australians who every day risk their lives on building sites around the nation and play a major role in driving the economy.

"We need to make the construction industry one in which people want to work and feel valued for their contribution – not one in which they face the possibility of compulsory interviews and potentially even jail simply for attending a union meeting.

"We welcome the fact that the Bill proposes to abolish the ABCC as a separate institution, and will continue to campaign for equal rights for all workers and the removal of coercive powers in the construction industry", said the ACTU Secretary. ■

Trial date set for CFMEU Union leader facing 6-months jail

The Victorian Court has set aside December 2-3 for the trial of CFMEU official Noel Washington, who has been charged with refusing to attend a compulsory interview with the Howard Government's industrial police force in the construction industry.

For refusing to reveal what occurred at a union meeting and have his civil liberties thrashed, Noel Washington faces a possible 6-months in jail. He is the first Australian to be brought to trial under these particular provisions introduced by the Howard Government that are regarded as the most oppressive industrial laws in the Western world.

Noel Washington's first Court appearance on 12 September was marked with a rally by construction workers and supporters outside the courtroom in Geelong while workers in other States also demonstrated in solidarity with the Victorian Union leader.

CFMEU Construction National Secretary Dave Noonan said it was "amazing" that Federal Labor, "elected to restore Australians rights at work, should care so little about the rights of the 900,000 construction workers who built this country.

"When people like Noel are facing six months in prison for upholding their civil liberties and democratic rights, two years from now to reform these laws simply isn't soon enough", he said.

The Rudd Government is refusing to immediately abolish these repressive laws and is committed to keeping them in place until January 2010, as well as maintaining the Howard Government's industrial police force until then.

However, our Union, with the support of the entire Australian trade union movement, is fighting to end these unjust laws now.

Why our Union is backing construction workers

Our Union is giving its full support to a campaign to pressure the Rudd Government to restore democratic and civil rights to workers in the construction industry.

We believe that the draconian repressive powers of the Howard Government's Australian Building Construction Commission (ABCC) have no place in a democratic society.

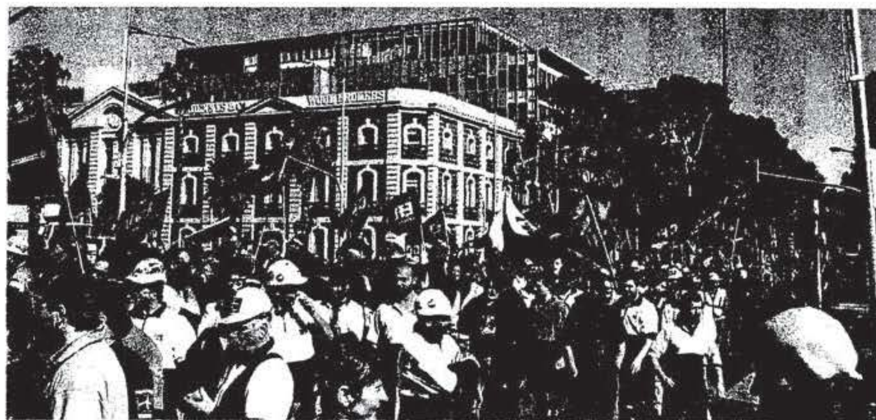
The ABCC has forced ordinary workers to attend interrogations under threat of six months jail. The workers have no right to silence, and cannot refuse to attend. Afterwards, they are not allowed speak to anyone about what was discussed in the interrogation – not even to their families.

The ABCC powers are sweeping – workers and their representatives can be fined and jailed; union meetings can be secretly recorded; their choice of legal representation can be denied.

National Secretary of the CFMEU Construction Division Dave Noonan describes the ABCC as "the most repressive legacy of Howard's unfair IR laws. No other workers, apart from workers in the construction industry, are faced with this sort of heavy-handed and undemocratic assault on their human rights", said Dave Noonan.

"The ABCC was set up to benefit Howard's mates in the construction industry. Now the big end of town is pushing to keep the ABCC in a desperate attempt to keep their massive profits and intimidate workers from speaking up about safety and their rights on site", says Dave Noonan. ■

Noel Washington addresses the rally outside the Geelong Court.



Union members and supporters rally in Geelong to support Noel Washington's stand against the repressive powers of the ABCC.

To support Australian construction workers fighting the most repressive industrial laws in the Western world visit the campaign website: www.rightsonsite.org.au

CFMEU's Noel Washington faces jail for standing up for workers rights

For as long as he can remember, he has always hated bullies. And because of that he has always spoken out or stood up against those with power who intimidate or harass people. This time he risks losing his freedom, but the way Noel Washington sees it, he has no choice.

Noel faces jail as he has been charged by the Department of Public Prosecutions and is set to appear in the Magistrates Court in the near future. The charge is for refusing to attend an interview with the Australian Building and Construction Commission (ABCC) – an organization that was set up by the Howard Government to harass, intimidate and bully workers and their unions in the construction industry.

As a union official for 27 years, Noel is no stranger to being in the witness box and being cross examined by the best of them. He's not afraid of being questioned by the ABCC and that's not why he hasn't turned up, despite three letters requesting him to do so.

"The ABCC are the biggest bullies I've ever dealt with", Noel says. "The laws they have at their disposal have no place in a democratic society like Australia and they use those laws freely to go after ordinary workers.

"They frighten people, they threaten people by forcing them to attend these interrogations, workers are not entitled to choose their own legal representative and they are forbidden to talk to anyone about what took place in these interrogations. These laws belong in a totalitarian state, not modern Australia", he said.

The ABCC want Noel to answer questions relating to union meetings held at Bovis Lend Lease in 2007. The way Noel sees it, it's none of their business.

"I'm not going to talk about what happened at a union meeting. I'm not going to give up workers, our members or any official of the Union."

Bovis Lend Lease is complaining, among other things, that uncomplimentary things were said about company managers at the Union meeting.

CFMEU official Noel Washington facing jail for standing up for workers rights.

Noel thinks this in itself is laughable, since union meetings are probably the one place where workers are free to have a whinge about the boss.

Bovis Lend Lease is a company that enthusiastically embraced the Howard Government's agenda to weaken unions in the construction industry.

Noel makes it clear that he is not taking a stand against the ABCC to draw attention to himself. He has been involved in a number of cases where the ABCC have gone after people he knows. "This is about the defenceless people that the ABCC have picked on and will continue to pick on if these laws are kept in place", he said.

For Noel, this is about those who have already suffered at the hands of the ABCC, workers like Brodene Wardley, an OHS rep who was doing her job in protecting the safety of workers, this is about Ivan Franjic, a 19-year old apprentice who was interrogated after an accident where a worker was seriously injured. This is about the delegate who stopped a job to raise money for the family of a worker who died from a workplace accident.

"All of these people and many, many more have been hauled into secret interrogations by the ABCC when they've done nothing wrong. Workers are phoned in their homes at night and intimidated into answering questions about union meetings.

"Why should anyone have to live in this state of fear?

"I have a brother, son and son-in-law in this industry, not to mention the countless friends. I don't want any of them working and living under these laws", said Noel.

Australia's reputation as a country with decent rights for working people has taken a battering with these laws. The International Labour Organisation (ILO) has condemned the ABCC and made personal representations to Workplace Relations Minister Julia Gillard about the issue.

"The last thing I want to do is go to jail", says Noel. "But there are bigger things at stake here. Workers rights for one. And in the construction industry, we don't have them". ■

Aussie workers with less rights than criminals or terrorists

By Tony Maher

While the Rudd Labor Government continues to deliver on its promised WorkChoices IR reforms, there is a weeping industrial sore that is a disgrace to Australia – the continued existence of the Howard Government's industrial police force in the building and construction industry, the ABCC (Australian Building and Construction Commission). It was set up by the Howard Government after the Cole Royal Commission into the construction industry, which cost the taxpayer $66 million and didn't produce a single successful prosecution of any worker.

The ABCC was staffed by some of the most aggressive anti-union warriors in Australia, armed with the most repressive industrial powers in the Western world and set loose on construction and building sites throughout Australia.

Under its provisions, the ABCC can summons anyone it likes, deny them the right to legal representation of their choice, deny them the right to silence at interrogations and if they speak about what they were asked by the ABCC, even with wives and family, they are liable to six months in prison.

These powers and these laws have no place in today's Australia, or indeed in any democracy. The only reason they are still here is because in the lead up to the last federal election, the Labor Party was spooked by big business and the media into committing to retain the ABCC until 31 January 2010.

However, the ABCC's harassment and persecution of building workers continues apace. It has 150 enforcers in its employment that cost the taxpayer $33 million a year. There are Aussie workers facing jail terms from charges brought on by the ABCC because of refusal to attend interrogations during which all their civil rights are suspended.

There is growing public alarm as more and more people become aware of what is happening to building workers in Australia.

Victorian Federal Labor MP Darren Cheeseman said the public would be shocked to learn how the current laws worked.

"One of the issues that comes across to me is that building industry workers under this legislation have even less rights than criminals or terrorists", he said recently in Parliament.

The Rudd Government has got to act on this scandal and disband the ABCC immediately. It needs to repeal all legislation pertaining to it. All charges laid by the ABCC and those pending should be immediately dropped.

Our Union regards the existence and the activities of the ABCC as offensive to democracy and an attack on not only the industrial rights of construction and building workers but as a violation of the civil rights of all Australians.

That is why we are backing our fellow workers in the construction industry to the hilt in this campaign. Read what CFMEU Construction National Secretary Dave Noonan has to say about the ABCC on pages 14 and 15 of this issue and you will see why all Australians should get behind the campaign to end this disgrace. ■

CFMEU official faces jail term

As this issue of *Common Cause* goes to press, it has just been announced that Victorian CFMEU Construction Senior Vice-President Noel Washington is to appear in Court to face charges brought against him by the ABCC under the repressive powers granted to it by the Howard Government.

Noel has been summonsed to appear in the Magistrates Court in August.

He is charged because he has refused to be interrogated by the ABCC.

Noel Washington has done nothing wrong. The ABCC admits this and have brought charges against him purely because he was a witness to an incident that the ABCC is pursuing in its vicious campaign against construction workers.

Noel is facing a possible jail term because he refuses to be subjected to a Star Chamber interrogation that strips him of his civil rights and under laws that are an offence to any democratic society. ■

COVER

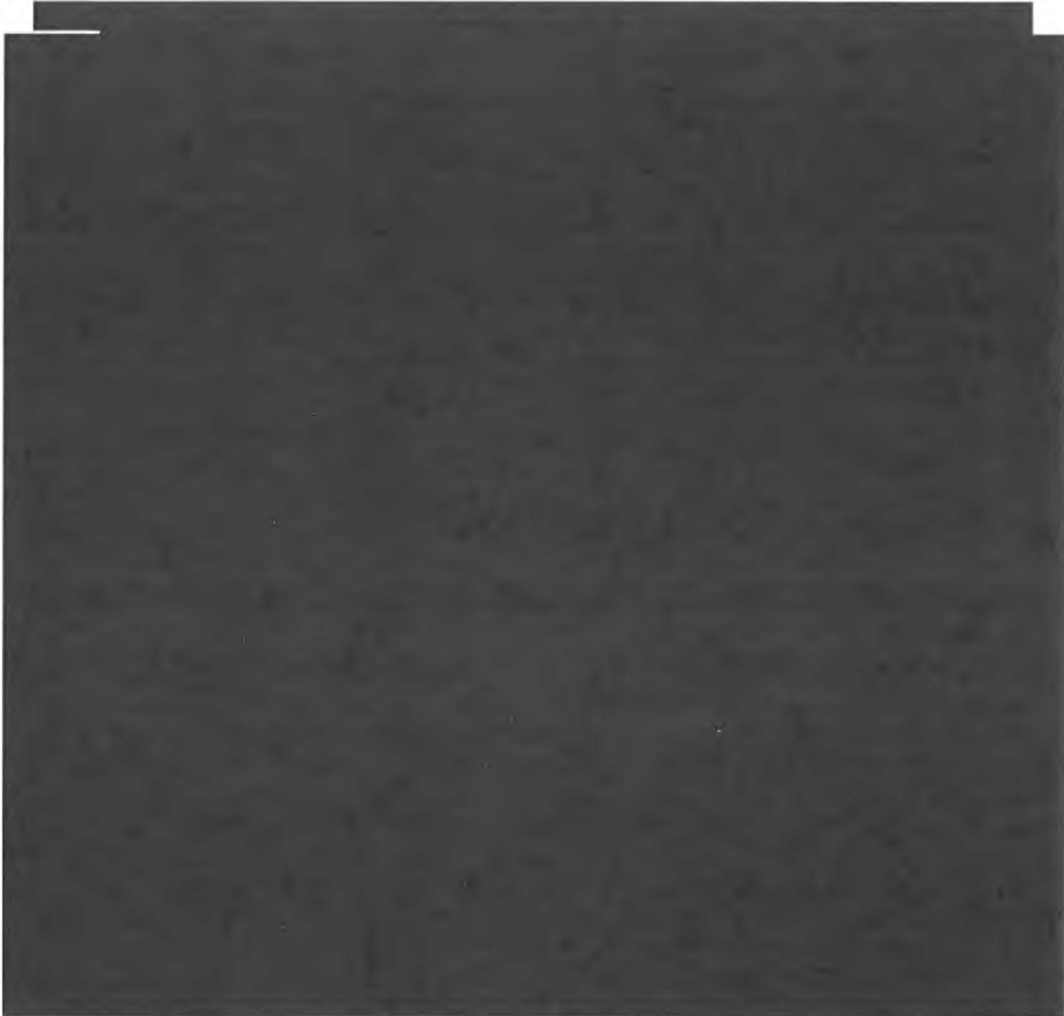
Pictured at the Angus Place colliery in the South/West District are, from front: Lodge President Garry Brown, Federal Minister for Home Affairs Bob Debus, and Angus Place miner Big Kevvy Morgan. The picture was taken 9km underground at the continuous miner in 900 panel.

Common Cause is published by Tony Maher for the Mining and Energy Division of the Construction, Forestry, Mining and Energy Union (CFMEU).

Editor: *Paddy Gorman.*
Level 1, 365 Sussex Street, Sydney 2000.
Phone: (02) 9267 1035, Fax: (02) 9267 3198.
Designed & Printed by **Breakout**
Phone (02) 9283 0123

ANNEXURE "JDF-9"

5. **General Political and Industrial Report**



Tony Maher reiterated M&E's support for C&G on the ABCC issue and noted C&G's reciprocal support for M&E's position on climate change. He said it was important for the union as a whole to pick critical issues and lock in together on them.

ANNEXURE “JDF-10”

FEDERAL COURT OF AUSTRALIA

BHP Steel (AIS) Pty Ltd v Construction, Forestry, Mining & Energy Union [2000] FCA 1614

WORKPLACE RELATIONS – order by Australian Industrial Relations Commission that industrial action stop or not occur – whether order, which applied for a period of two months, was only in respect of current dispute or could also apply to a later national dispute.

WORKPLACE RELATIONS – collateral challenge as to the validity of the order open to the respondent – order not invalid by failure to identify time and date by which conduct ordered was to be done – use of the adverb "immediately" sufficiently certain – positive expression to perform work is tantamount to negative stipulation to cease industrial action – order that respondent supply a copy of order to employees within power to give incidental directions.

WORKPLACE RELATIONS – respondent failed to supply a copy of the order to employees – respondent failed to take steps to ensure the employees complied with the order.

Workplace Relations Act 1996 (Cth) s 127, s 178, s 143(1)

O'Toole v Charles David Pty Ltd (1991) 171 CLR 232
Ousley v The Queen (1997) 192 CLR 69
The Attorney-General (Cth) v Breckler (1999) 197 CLR 83
Dorsman v Nichol (1978) 20 ALR 231
Measures v McFadyen (1910) 11 CLR 723
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v A G Coombs Fire Protection (1998) 87 IR 110
Phillip Morris Incorporated v Adam P Brown Male Fashions Pty Ltd (1981) 148 CLR 457
Re Refugee Review Tribunal; Ex parte Aala [2000] HCA 57
Australasian Meat Industry Employees' Union v Meneling Station Pty Ltd (1986) 16 IR 245
Microsoft Corporation v Marks (1996) 139 ALR 99
Australian Industry Group v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union [2000] FCA 629
Hillingdon London Borough Council v Cutler [1968] 1 QB 124
The Queen v Kelly; Ex part Berman (1953) 89 CLR 608
Attorney-General v Walthamstow Urban District Council (1895) 11 TLR 533

The Macquarie Dictionary, 2nd ed., 1991
Halsbury's Laws of England, 4th ed. (Reissue)

BHP STEEL (AIS) PTY LIMITED V CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION

N 150 OF 2000

JUDGE: **BEAUMONT J**
DATE: **21 NOVEMBER 2000**
PLACE: **SYDNEY**

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **N 150 OF 2000**

BETWEEN:	**BHP STEEL (AIS) PTY LIMITED** **APPLICANT**
AND:	**CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION** **RESPONDENT**
JUDGE:	**BEAUMONT J**
DATE OF ORDER:	**21 NOVEMBER 2000**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The breaches alleged in pars 1 and 2 of the amended application have been established.

2. The claim made in par 3 of the amended application be dismissed.

3. The proceedings be stood over to Wednesday, 22 November 2000 at 9.45 a.m. for directions on the hearing of the question of penalty in respect of the breaches found.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **N 150 OF 2000**

BETWEEN: **BHP STEEL (AIS) PTY LIMITED**
APPLICANT

AND: **CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION**
RESPONDENT

JUDGE: **BEAUMONT J**
DATE: **21 NOVEMBER 2000**
PLACE: **SYDNEY**

REASONS FOR JUDGMENT

BEAUMONT J:

INTRODUCTION

1 By its statement of claim, BHP Steel (AIS) Pty Limited ("BHP") has made the following claims against the Construction, Forestry, Mining and Energy Union ("the Union"), a registered organisation under the *Workplace Relations Act 1996* (Cth) ("the Act"), in these proceedings under s 178 of the Act for the imposition of penalties for alleged breaches of an order made by the Australian Industrial Relations Commission ("the Commission") under s 127 of the Act:

- BHP is the operator of, and the employer of the workforce at, several coal mines including the Tower Colliery ("the Mine"). (This is common ground.)

- BHP employs members of the Union at the Mine ("the Employees") pursuant to the terms of awards and certified agreements of the Commission as production and maintenance workers. (This is common ground.)

- On 2 December 1999, the Commission (Commissioner Harrison) made an order ("the Order") pursuant to s 127 of the Act.

(By s 127 the Commission may, by order, give direction that industrial action stop or not occur. It is common ground that the Commission purported to make the Order. However, the Union claims that the Order was not valid.)

- The Employees were bound by the Order.

- The Employees the subject of the Order were members of the Tower Lodge of the Union at the Mine; as such members of the South Western District Branch and the Mining & Energy Division of the Union; and bound by the registered rules of the Union, including the National Rules, the Mining & Energy Division Rules and the South Western District Branch Rules (collectively "the Rules"). (This is common ground.)

- The Rules provide, *inter alia*, that:

  (a) Each Lodge in the South Western District shall be managed by a Committee consisting of a President, Secretary, Treasurer and three other members – Rule 11(iii)(a) of the rules of the South Western District Branch of the respondent ("the Branch Rules");

  (b) Before a stoppage of work takes place at any mine, the Committee of the Lodge must fully investigate the cause of the dispute and endeavour to effect a settlement – Rule 11(ix)(a) of the Branch Rules;

  (c) Failing settlement of a dispute by the Committee of the Lodge, the matter is to be referred to the District Executive of the South Western District Branch of the respondent ("the Branch") who are to inquire into the matter and endeavour to settle the dispute – Rule 11(ix)(a) of the Branch Rules;

  (d) No Lodge or members of a Lodge shall cease work without the sanction of the District Branch Executive of the Branch – Rule 11(ix)(b);

(e) The President of a Lodge in conjunction with the Secretary and Treasurer shall ensure that the Rules of the Mining and Energy Division of the respondent ("the Division") and the District Branch rules and the Lodge rules are carried out – Rule 11(iv) of the Branch Rules;

(f) The Secretary of a Lodge shall, in conjunction with the President and the Treasurer, ensure that the Rules of the Division, the District Branch and the Lodge are carried out – Rule 11(v) of the Branch Rules;

(g) The Board of Management of the Branch can make, impose, order and enforce any levies, fines, fees or subscriptions on all members of the Branch not in conflict with the Rules of the District Branch or the Rules of the Division for any one or more of the objects set out in Rule 3 of the Branch Rules – Rule 7(v)(c) of the Branch Rules;

(h) The Board of Management of the Branch can inflict any fine on any Lodge or member, such fine not to exceed $1,000 on any Lodge or $100 on any member – Rule 7(v)(h) of the Branch Rules;

(i) The District Branch Executive of the Branch is empowered to suspend any member of the Executive or the Board of Management of the Branch or representatives of the District Branch on any Board or Body for any breach or infringement of the Rules of the Division or the District Branch including for disobedience of any request or order contained in any resolution of the Central Council of the Division or the Board of Management of the Branch and to inflict any fine not exceeding $100 and to demand and collect fines payable by all members – Rule 8(iv)(a) and (d) of the Branch Rules;

(j) The District Branch Secretary and President shall, as far as possible, observe that the Rules are carried out by the Branch Lodges – Rule 8(ii)(a) and (e) of the Branch Rules;

(k) The District Branch Secretary has power to call special meetings of the Board of Management in cases of emergency – Rule 8(ii)(e) of the Branch Rules;

(l) The Central Council is the Committee of Management of the Division. The Central Council has power to do any or all other acts or things which it decides are proper for the achievement of the objects established in Rule 4 of the Division Rules – Rule 8(ii)(a) and (vi)(n) of the Division Rules;

(m) The Committee of Management of the Division can impose any fine on any District Branch, Lodge or member of the Division for a breach of the Division Rules – Rule 8(vi)(i) of the Division Rules;

(n) Executive Officers of the Division also have power to carry out the objects of the Division and ensure as far as possible that the Rules are carried out – Rule 10(ii) of the Division Rules;

(o) The objects of the Division include:

(i) to uphold the Rules of the Division; and
(ii) to prevent by conference or otherwise needless cessation of work – Rule 4(c) and (d) of the Division Rules;

(p) The General President (and other Executive Officers) of the Division shall as far as possible ensure that the Rules care carried out – Rule 10(ii) of the Division Rules;

(q) The National Conference has power to impose penalties, suspend or expel members for knowingly refusing to comply with the rules of the Union – Rule 13(x)(c) of the National Rules;

(r) The National Committee and National Executive control the business and affairs of the Union while the National Executive or National Conference is not in session. The National Executive Committee and National Executive have care, control, superintendence, management and administration in all respects of the affairs and business of the Union – Rules 14(ii) and 15(iv) of the National Rules;

(s) The National Executive has power to impose penalties, suspend or expel members for knowingly refusing to comply with the Rules – Rule 15(iii)(h) of the National Rules;

(t) The President or Secretary of the Mining and Energy Division of the respondent has power to do all things in connection with any dispute however made and by whomsoever made and may delegate such functions either generally or specifically – Rule 31(e) and (f) of the National Rules.

- The Order was served on the Union on Thursday 2 December 1999 as follows:

  (a) At about 11.50 a.m. on 2 December 1999, Commissioner Harrison's associate provided copies of the Order to Howard Fisher, District Officer of the Union (who had appeared for the Union in the proceedings);

  (b) At about 1.00 p.m. on 2 December 1999, BHP's solicitors (Blake Dawson Waldron) served a copy of the Order at the National Office of the Union.

  (c) At about 12.51 p.m. on 2 December 1999, Blake Dawson Waldron transmitted a facsimile copy of the Order to (i) the Southern District Office of the Union; and (ii) the Federal Secretary of the Union.

- In breach of the provisions of the Order, the Union did not supply each of the Employees with a copy of the Order.

- Pursuant to the provisions of the Order, BHP required that the Employees the subject of the Order be at work and make themselves available for work and perform work at the Mine on 2 December 1999.

- (In breach of the Order) the Employees did not immediately cease and refrain from engaging in industrial action and did not make themselves available for work and perform work as BHP reasonably required, that is to say, the Employees who had

been rostered for day shift and afternoon shift on 2 December 1999 did not attend or return to work and complete or perform their shifts as required.

- In breach of the Order) the Union failed to take any or all steps necessary and available to it under the Rules to ensure that the Employees complied with the Order in that:

  (a) The Union issued instructions to the Employees that they should not return to work until 11.00 p.m. on 2 December 1999; or (alternatively)

  (b) The Union failed to take all or any of the steps and/or exercise all or any of the powers available to it under the Rules.

2 In addition to BHP's claims in respect of events said to have occurred in December 1999, BHP made several other claims in respect of events said to have occurred in January 2000 in further alleged breach of the Order as follows:

- On 20 January 2000, the Employees the subject of the Order were required to be at work, and to make themselves available for and perform work, on day, afternoon and night shifts at the Mine.

- The Employees the subject of the Order engaged in industrial action in the form of a strike, and did not make themselves available for work as required by BHP for each of those shifts. (This is common ground.)

- The Union instigated and/or directed and/or procured the Employees the subject of the Order to go out on strike in that –

  (a) On 20 January 2000, a twenty-four hour national stoppage took place affecting BHP mines, including the Mine; and

  (b) The stoppage was instigated, directed or procured at the direction of the Union at a national level.

- Further, the Union failed to take any or all steps necessary and available to it under the Rules to ensure that the Employees the subject of the Order complied with the Order in that:

  (a) The Union took no steps to ensure that the Employees the subject of the Order complied with the Order; or (alternatively)

  (b) The Union failed to take all or any of the steps and/or exercise all or any of the powers available to it under the Rules.

3 By its amended application, BHP claims the following relief:

(1) An order under s 178 of the Act for the imposition of a penalty on the Union for its alleged failure to supply a copy of the Order to the Employees as required by par 5 of the Order. (The terms of par 5, providing for "Service of Order", appear below.)

(Section 178 provides for the imposition and recovery of penalties and confers that jurisdiction upon this Court.)

(2) An order under s 178 for the imposition of a penalty on the Union for breach of par 3 of the Order on 2 December 1999. (The terms of par 3, providing for "Industrial Action to Stop", appear below.)

(3) An order under s 178 for the imposition of a penalty on the Union for breach of par 3 on 20 January 2000.

THE PROVISIONS OF S 127 OF THE ACT

4 Relevantly, s 127 provides as follows:

- If it appears to the Commission that "industrial action" (see below) is happening, or is threatened, impending or probable, in relation to, *inter alia*, work that is regulated by an award or a certified agreement, the Commission may, by order, give directions that the "industrial action" stop or not occur (s 127(1)).

("Industrial action" is the subject of a lengthy definition in s 4(1) of the Act. It includes (*inter alia*) (a) the performance of work in a manner different from that in which it is customarily performed, the result of which is a restriction or limitation on, or a delay in, the performance of the work where (*inter alia*) the terms and conditions of the work are prescribed by an award of the Commission, or by a certified agreement; or (b) a ban, limitation or restriction on the performance of work in accordance with the terms and conditions prescribed by an award or certified agreement; or (c) a ban, limitation or restriction on the performance of work that is adopted in connection with an industrial dispute; or (d) a failure or refusal by persons to attend for work if (*inter alia*) the failure or refusal is in connection with an industrial dispute.)

- The Commission may make such an order of its own motion, or on the application of (*inter alia*) (a) a party to the industrial dispute (if any); or (b) a person who is directly affected, or who is likely to be directly affected, by the industrial action (s 127(2)).

- The Commission must hear and determine an application under s 127 as quickly as practicable (s 127(3)).

- A person or organisation to whom an order under s 127(1) is expressed to apply, must comply with the order (s 127(5)).

THE PROCEEDINGS IN THE COMMISSION

5 By its application to the Commission under s 127 dated 1 December 1999, BHP sought (*inter alia*) the following orders: that the Employees "must cease all industrial action as defined by the Act immediately and resume normal work without any strike, ban or limitation of any kind"; that the Union "must not impose any restriction or impediment on the Employee attending for and performing work normally …"; and that the Union "must take all steps necessary and available under the rules of the [Union] to ensure that the Employees comply with [the] Order".

6 The grounds of BHP's application were (relevantly):

> *"1. A dispute exists between* [BHP] *and the* [Union] *in relation to the introduction by* [BHP] *of a bonus scheme commensurate with the ability of the business to pay,* [which scheme] *was rejected by the workforce.*
>
> *2. The employees took strike action from 11.00 p.m. on 30 November 1999 for a period of 48 hours in support of their claim …."*

7 The application came before Commissioner Harrison on Thursday, 2 December 1999 at 10.10 a.m. Mr T Davies appeared for BHP and Mr Fisher appeared for the Union. Mr Davies repeated the claims made by BHP in its application, that is to say, that members of the Union commenced strike action at about 11.00 p.m; that earlier, the members of the Union had rejected a proposal for a new bonus arrangement and a grievance was lodged with BHP; and that BHP had responded, but that before the dispute settlement procedure was followed, at the first shift meeting thereafter held at 11.00 p.m. on 30 November 1999, the members decided to go out on strike for 48 hours, without notice to BHP. Mr Fisher opposed the application.

8 The Commission adjourned at 10.54 a.m., resuming at 11.58 a.m. to give its decision. At 12.03 p.m., after giving its decision, the Commission adjourned indefinitely.

THE COMMISSION'S DECISION

9 Relevantly, the Commission's decision was as follows:

> *"[2] The Commission has been informed that a 48 hour strike by the above members commenced at 11.00pm on 30 November 1999 following what can best be described as a breakdown in negotiations around a revised 'survival agreement' for the Colliery.*
>
> *[3] Mr Davies, on behalf of the Company submitted that the action of the members is in breach of the Disputes Settling Procedures contained in the relevant award and agreement. He described the action as a 'wildcat strike' occurring at a time when the colliery is 'haemorrhaging' financially. With the prospect of further ongoing industrial action, the orders sought were necessary to protect and ensure the viability of the business.*
>
> *[4] Mr Fisher who appeared for the union did not generally dispute the tenuous economic position of the colliery but complained of a heavy*

handed approach by management in introducing changes to the bonus scheme applicable on site.

[5] He submitted that a proposed revised bonus scheme, which was recommended for acceptance by the unions district official, was rejected by a meeting of the rank and file members.

[6] Exhibit BHP1 is a copy of a grievance form lodged by the union's lodge at Tower Colliery and a copy of the response of management. It reads:

> 'We *(the Lodge)* do not believe the Company has the right to change our bonus arrangements without reaching an agreed position with the workforce. The AIRC ordered BHP and the Union to trial on 2-2-99 the BHP Group Bonus Scheme on a 6 months trial. This has continued. The Company has made a change without agreement.'

[7] The Company's response in part reads:

> 'During November 1999 Management and Unions have been required, due to poor business results in the financial year to date, to review all areas of the operations to develop a survival plan which helps deliver improved business forecasts for the remainder of the financial year and allows the mine to remain operational. Part of the review and negotiations was a request by Management for the development of a new bonus agreement based on the ability of the business to pay and which would therefore assist with the survival of the Colliery.
>
> 'The Colliery has been forced by market conditions to act immediately to effect survival changes. To maintain a bonus scheme the business cannot afford, will jeopardise the viability of the mine.'

[8] Section 127 directs the Commissions attention to whether it appears that industrial action is happening, threatened, impending or probable.

[9] Having considered the submissions of the parties in todays proceedings, I am clearly satisfied that industrial action is occurring and is probable into the future.

[10] It is against the background of the submissions that I am satisfied that I should exercise the discretion contained in section 127 and make an order in this matter.

[11] I do so because I consider the action complained of to be unauthorised and extremely counter productive to the viability of the Colliery."

THE COMMISSION'S ORDER

10 The relevant operative provisions of the Order (which were entitled the BHP Coal (Tower Colliery) Industrial Action Order) provided for the following matters:

"2. ***Parties Bound***

This Order is binding upon:

(a) the Construction, Forestry, Mining and Energy Union (the CFMEU) and its officers, and

(b) employees of BHP Steel (AIS) Pty Ltd who are:

(i) members of the CFMEU;

(ii) employed as production and maintenance workers at Tower Colliery; and

(iii) currently employed in work which is regulated by the Coal Mining Industry (Production and Engineering) Consolidated Award 1997, the Tower Colliery U.M.W. Clause 20 Minesite Agreement 1996 and the BHP Coal – CFMEU - Tower Colliery – Survival Agreement 1998; and

(c) BHP Steel (AIS) Pty Ltd (the Company).

3. ***Industrial Action to Stop***

3.1 The employees referred to in paragraph 2(b) herein must immediately cease and refrain from engaging in industrial action in the form of any strike, or any restriction, ban or other limitation on the performance of work.

3.2 The employees referred to in paragraph 2(b) herein must make themselves available for work and perform work as the Company may reasonably require.

3.3 The CFMEU must take any and all steps necessary and available under the rules of the CFMEU to ensure that the employees referred to in paragraph 2(b) above comply with the Order.

...

5. ***Service of Order***

5.1 *A copy of this Order must be served by the Company on the CFMEU and must be supplied by the CFMEU to each of the employees referred to in paragraph 2(b) above. Service by the Company of this Order on the CFMEU shall be sufficient service of the Order on the CFMEU and its officials and members.*

6. ***Terms and date of effect***

6.1 *This order will take effect from 2 December 1999 and remain in force for a period of two months."*

THE UNION'S DEFENCES

11 In its Defence, the Union has denied, or otherwise put in issue, BHP's claim that it breached the Order in the respects mentioned.

12 In addition, as noted, the Union sought to raise a special defence that the Order was invalid. By its solicitors' letter dated 11 August 2000, the Union provided the following further particulars of this defence:

"The orders were not validly made in that they were too wide, ambiguous, vague and uncertain and otherwise beyond power, and further in particular:-

- *They failed to properly identify those persons bound by the orders, including a failure to identify by name those natural persons subject to the orders;*
- *They failed to properly identify the particular industrial action to which they were directed ('the identified industrial action');*
- *They failed to specify the particular conduct they sought to prohibit;*
- *They failed to exclude industrial action other than the identified industrial action;*
- *They went beyond power by attempting to prohibit industrial action other than the industrial action happening;*
- *They are in relation to matters beyond those matters specified in Section 127(1)(a)-(c) and are accordingly altogether invalid or at least to the extent they go beyond those matters;*
- *They failed to identify a time and date by which the matters ordered to be done were to be done, or if they did they identified times which could not be complied with;*
- *To the extent that the orders went beyond giving a direction that the industrial action stop they were beyond power (for example orders 3.3 and 5.1);*

- *They were beyond power in providing for substituted service on officials and members of the respondent; and*
- *They were not orders for the purpose of S 143(1) of the Act."*

13 (Section 143(1) provides:

"143(1) ***[Commission's duties]*** *Where the Commission makes a decision or determination that, in the Commission's opinion, is an award or an order affecting an award, the Commission shall promptly:*

(a) reduce the decision or determination to writing that:

(i) expresses it to be an award;
(ii) is signed by at least one member of the Commission; and
(iii) shows the day on which it is signed; and

(b) give to a Registrar:

(i) a copy of the decision or determination; and
(ii) a list specifying each party who appeared at the hearing of the proceeding concerned.")

THE ISSUES FOR DETERMINATION

14 Whilst BHP tendered a substantial body of affidavit evidence, with one exception (to be mentioned below), this evidence was not itself controversial, most of it being documentary material, although the parties were at issue as to the proper inferences to be drawn from some of this material. The exception noted consisted of an affidavit of Mr Newman, deposing to a conversation with Mr Harris, an official of the Union. BHP sought to tender this as an admission binding on the Union. At the hearing, I ruled that this was inadmissible, and that I would publish reasons for the ruling later. These reasons have been published simultaneously with these reasons.

15 Before describing the evidence, both affidavit and oral, bearing upon the factual issues that arise, it will be necessary to turn first to consider a preliminary issue, that is, the meaning and operation of the Order, and then, in the light of those matters, to consider the Union's challenge to its validity.

THE FIRST ISSUE: THE MEANING AND OPERATION OF THE ORDER

16 The meaning and operation of the Order should first be considered. The material provisions of the Order were, it will be recalled, as follows:

- With respect to its scope, the Order is expressed to be "binding upon":

  (a) The Union and its officers;

  (b) The Employees.

  (c) BHP.

- In ordering "[i]ndustrial action to stop", the Order directs (par 3.1) that the Employees "must immediately cease and refrain from engaging in industrial action in the form of any strike, or any restriction, ban or other limitation on the performance of work".

- In this connection, the Order then directs (par 3.2) that the Employees "must make themselves available for work and perform work as [BHP] may reasonably require".

- Further in this connection, the Order directs (par 3.3) that the Union "must take any and all steps necessary and available under the rules of the [Union] to ensure that the [Employees] comply with the Order".

- In directing service of the Order, the Order directs (par 5.1) that a copy (1) "must be served by [BHP] on the [Union]" and (2) "must be supplied by the [Union] to each of the [Employees]". It is further directed that "[s]ervice by [BHP] of this Order on the [Union] shall be sufficient service of the Order on the [Union] and its official and members".

- The Order was to take effect from 2 December 1999 and to remain in force for two months (par 6.1).

17 In construing the Order, it is necessary to have regard to its statutory context, which, as noted, is s 127 of the Act. It will be recalled that the following are, relevantly, its principal features:

- The grant to the Commission of the power, by order, to direct that "industrial action" (as defined) stop if it appears to the Commission that such is happening in relation to an "industrial dispute" (as defined) (s 127(1)).

- An organisation to whom such an order is expressed to apply must comply with the Order (s 127(5)).

18 When the Order is read in this statutory context, the Order should, in my view, receive the following interpretation of its meaning and operation:

- Since the Order is expressed (par 2(a)) to bind, *inter alios*, the Union, the Union is bound by virtue of s 127(5)) to comply with it. The Employees, likewise, are bound to comply.

- The Employees must, during the period of two months from 2 December 1999, **immediately cease and refrain** from engaging in "industrial action" in any of the forms specified and must make themselves available for work and perform work as BHP may reasonably require (pars 3.1, 3.2, 6.1).

19 Although, as has been said, "industrial action" has the particular meaning provided by its statutory definition (s 4(1)), the other language of par 3.1 and par 3.2 was, in my view, intended to have its ordinary meaning. However, on behalf of BHP a claim is made, as noted, which would give these provisions an ambulatory operation, so as to pick up (albeit within the two month period) industrial action happening in relation to a different dispute. As has been seen, the amended statement of claim addressed not only the Tower Colliery dispute which was unresolved as at 2 December 1999, but also the national stoppage which later happened on 20 January 2000. This (latter) particular claim is reflected in par 3 of the amended application, whereby BHP seeks the imposition of a penalty for an alleged breach of Order 3 on 20 January 2000.

20 But, in my opinion, on its true construction, the Order was not intended to operate in the ambulatory fashion contended for by BHP.

21 It is true that, as a matter of statutory function, the Commission is empowered, by the terms of s 127(1), to direct, by order, that “industrial action” stop or not occur if a number of different circumstances appear to the Commission to exist; that is to say, if “industrial action” is happening, or is threatened, impending or is probable, in relation to, *inter alia*, an “industrial dispute” or work that is regulated by an award or a certified agreement. As a matter of the potential scope of the power to direct, by order, that “industrial action” stop or not occur, it is clear from the language and structure of s 127(1) that the Commission’s powers **may** be exercised not only where “industrial action” has occurred, but also where, although it has not yet occurred, it is threatened, impending or probable. In the former case, the appropriate form of order would be a direction that the action “stop”; and in the latter case, that it “not occur”. The present question is not concerned with the scope of the statutory power, but with the meaning and operation of a particular order.

22 It may be accepted that the Commission could, in appropriate circumstances, have given a direction that operated in respect of not only the current dispute at the Tower Colliery, but also in respect of a future national dispute. In my view, however, the language of the Order makes it clear that only the former, and not the latter, was intended to be addressed. There are, in the terms of the Order, several indications to this effect. For one thing, the entitlement nominated is “the BHP Coal (Tower Colliery) Industrial Action Order”. For another, the description of the Employees bound picks up (par 2(b)(iii)) those members of the Union employed as production and maintenance workers at the Colliery currently employed in work regulated by the award and Tower Colliery agreements specified. None of this language is broad enough to pick up a national stoppage. Nor is the language of the Order appropriate to include a future industrial matter. The Order is to “cease and refrain” the action immediately. This could only be intended to refer to action then happening, as distinct from threatened future conduct, in which latter case, the Order would, presumably, direct that the action “not occur”.

23 In other words, in my view, the Order applied only to the existing industrial dispute at the Tower Colliery on 2 December 1999, and did not apply to the later national dispute which happened on 20 January 2000. Accordingly, I reject the ambulatory construction of the Order contended for by BHP.

24 I therefore dismiss the claim, made in par 3 of the amended application, that a penalty be imposed for the alleged breach on 20 January 2000 of Order 3.

THE SECOND ISSUE: THE VALIDITY OF THE ORDER

25 As has been seen, the Union now seeks to challenge the validity of the Order on several grounds.

26 For its part, BHP seeks to meet this challenge in a number of ways, including a preliminary submission, going to the Court's jurisdiction, that a collateral challenge of this kind is not available, given especially the circumstance that the Union must be taken to have elected not to apply to the Full Bench of the Commission at the time for leave to appeal.

27 In my opinion, a collateral challenge is open to the Union, at least upon the technical, formal or procedural grounds (as distinct from the merits) sought to be agitated here. (Clearly, an attack upon constitutional grounds would be available, notwithstanding the existence of a privative clause – see *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 – but no constitutional question arises here).

28 It is established, in my view, that if action may be properly classified as administrative, rather than judicial, its validity may be challenged in judicial review proceedings (see *Ousley v The Queen* (1997) 192 CLR 69 at 79 – 80; 100). *Ousley* was cited in the present context in *The Attorney-General (Cth) v Breckler* (1999) 197 CLR 83. Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ said (at 108):

> *"If the determination of a complaint by the Tribunal be characterised as activity of an administrative nature, then in the absence of legislative prescription to the contrary, the determination would be open to collateral review by a court in the course of dealing with an issue properly arising as an element in a justiciable controversy of which the Court was seised. This proposition recently was applied in the Court in* Ousley v The Queen*."*

29 Their Honours then also cited *Boddington v British Transport Police* [1999] 2 AC 143 at 161 – 162 and 172 – 173.

30 In *Boddington*, Lord Irvine LC said (at 161 – 162):

"By contrast, where subordinate legislation (e.g. statutory instruments or byelaws) is promulgated which is of a general character in the sense that it is directed to the world at large, the first time an individual may be affected by that legislation is when he is charged with an offence under it: so also where a general provision is brought into effect by an administrative act, as in this case. A smoker might have made his first journey on the line on the same train as Mr. Boddington; have found that there was no carriage free of no smoking signs and have chosen to exercise what he believed to be his right to smoke on the train. Such an individual would have had no sensible opportunity to challenge the validity of the posting of the no smoking signs throughout the train until he was charged, as Mr. Boddington was, under byelaw 20. In my judgment in such a case the strong presumption must be that Parliament did not intend to deprive the smoker of an opportunity to defend himself in the criminal proceedings by asserting the alleged unlawfulness of the decision to post no smoking notices throughout the train. I can see nothing in section 67 of the Transport Act 1962 or the byelaws which could displace that presumption. It is clear from Wandsworth London Borough Council v. Winder *[1985] A.C. 461 and* Reg. v. Wicks *[1998] A.C. 92, 116,* per *Lord Hoffmann that the development of a statutorily based procedure for judicial review proceedings does not of itself displace the presumption."*

31 Lord Steyn said (at 172):

"The general *rule of procedural exclusivity judicially created in* O'Reilly v. Mackman *[1983] A.C. 237 was at its birth recognised to be subject to exceptions, notably (but not restricted to the case) where the invalidity of the decision arises as a collateral matter in a claim for infringement of private rights. The purpose of the rule was stated to be prevention of an abuse of the process of the court, and that purpose is of prime importance in determining the reach of the general rule: compare* Mercury Communications Ltd. v. Director General of Telecommunications *[1996] 1 W.L.R. 48, 57E,* per *Lord Slynn of Hadley. Since* O'Reilly v. Mackman *decisions of the House of Lords have made clear that the primary focus of the rule of procedural exclusivity is situations in which an individual's sole aim was to challenge a public law act or decision. It does not apply in a civil case when an individual seeks to establish private law rights which cannot be determined without an examination of the validity of a public law decision."*

32 Lord Steyn went on to say (at 173):

"There is, above all, another matter which strikes at the root of the decision in Bugg's *case. That decision contemplates that, despite the invalidity of a byelaw and the fact that consistently with* Reg. v. Wicks *such invalidity may in a given case afford a defence to a charge, a magistrate court may not rule*

> *on the defence. Instead the magistrates may convict a defendant under the byelaw and punish him. That is an unacceptable consequence in a democracy based on the rule of law. It is true that* Bugg's *case allows the defendant to challenge the byelaw in judicial review proceedings. The defendant may, however, be out of time before he becomes aware of the existence of the byelaw. He may lack the resources to defend his interests in two courts. He may not be able to obtain legal aid for an application for leave to apply for judicial review. Leave to apply for judicial review may be refused. At a substantive hearing his scope for demanding examination of witnesses in the Divisional Court may be restricted. He may be denied a remedy on a discretionary basis. The possibility of judicial review will, therefore, in no way compensate him for the loss of* the right *to defend himself by a defensive challenge to the byelaw in cases where the invalidity of the byelaw might afford him with a defence to the charge. My Lords, with the utmost deference to eminent judges sitting in the Divisional Court I have to say the consequences of* Bugg's *case are too austere and indeed too authoritarian to be compatible with the traditions of the common law."*

33 In my view, there are no indications in the Act's legislative scheme that a collateral challenge of the present kind was prohibited. Nor, in my opinion, should the Union be held estopped from challenging the validity of the Order on the technical grounds raised. The position would be different if an attempt were made now to re-agitate the merits; different considerations would apply, for instance, such an attempt could be seen as an abuse of process under the modern doctrine (cf. *Boddington*, above, at 172).

34 It follows that the present collateral challenge is justiciable in this proceeding.

35 It will be convenient to consider the several grounds of challenge to the validity of the Order in turn as follows.

(a) Was the Order invalid because it failed to properly identify the persons bound, and (specifically), because it failed to identify those persons by name?

36 In my opinion, there was no need to identify the persons bound by their names. As noted, s 127(5) provides that a person "to whom an order is expressed to apply" must comply with it. It follows that the person must be expressly identified. But it does not follow that a person cannot be identified by membership of a class of persons, provided that class itself is expressly identified. In other words, there is no requirement that each person bound must be individually named in the Order.

37 Here, par 2(b) identifies the class of persons bound by the following steps: first, to identify the employees of BHP who are members of the Union; next, within that group, to identify those who are employed as production and maintenance workers at Tower Colliery; finally, within this group, to identify those who are currently employed in work regulated by the Award and Agreements specified.

38 In my opinion, this is a legitimate process of identification of those persons bound by the Order. It is explicit and may be rendered certain by its application in a context which is appropriate for the application of such a process of identification.

39 This collateral challenge is rejected.

(b) Was the Order invalid because it failed properly to identify the particular industrial action to which the Order was directed?

40 I have already considered the meaning and operation of the Order. In my opinion, once the Order is read down in the way I would, confining the Order as on its face directed to the current dispute at the Tower Colliery, and rejecting BHP's ambulatory construction, it must follow that, in my view, there is no uncertainty in this area.

41 I reject this collateral change.

(c) Was the Order invalid because it failed to specify the particular conduct prohibited or because the Order failed to exclude industrial action other than the "identified" industrial action, or because the Order attempted to prohibit other industrial action or otherwise went beyond s 127(1)(a) – (c)?

42 Again, I have considered these aspects in dealing with the Order's meaning and operation. Again, once BHP's ambulatory interpretation is rejected, the meaning of the Order in these respects is, in my opinion, sufficiently certain.

(d) Was the Order invalid because it failed to identify a time and a date by which the conduct ordered was to be done?

43 It will be recalled that par 3.1 of the Order directed that the Employees must "immediately" cease and refrain from engaging in the industrial action specified. In my opinion, the use of the adverb "immediately" is sufficiently certain for present purposes. Its primary dictionary meaning is "1. Without lapse of time, or without delay; instantly; at once." (*The Macquarie Dictionary*, 2nd ed.). Clearly, I think, the use of the adverb in the Order was intended to have its ordinary meaning. Authority confirms this.

44 In *Dorsman v Nichol* (1978) 20 ALR 231, Forster CJ said (at 237):

> *"There is a good deal of authority concerning the meaning of the word 'immediately' in contexts other than the one presently under consideration. 'It has already been decided and necessarily so that the words 'immediately afterwards' in the statute cannot be construed literally; and if you abandon the literal construction of the words, what can you substitute but 'within a reasonable time' especially as an endorsement of the certificate* eo instanti *can be of no necessity whatever' (*Page v Pearce *(1841) 8 M & W 677, per Abinger CB at 678). 'There are, however, many cases in which it has been held that the word 'immediate' occurring in a statute is not to be construed in its strict sense 'on the instant' but that it means with reasonable promptness having regard to all the circumstances of a particular case' (*R v Aston *(1850) 19 LJMC 236, per Wightman J at 239). 'It is impossible to lay down any hard and fast rule as to what is the meaning of the word 'immediately' in all cases. The words 'forthwith' and 'immediately' have the same meaning. They are stronger than the expression 'within a reasonable time' and* ***imply prompt, vigorous action without any delay*** *and when there has been such action as a question of fact having regard to the circumstances of a particular case' (*R v Justices of Berkshire *(1879) 4 QBD 469 per Cockburn CJ at 471). The last citation appears to differ from* Page v Pearce, supra, *and in so far as it does so* Page v Pearce *must be taken to have been overruled by that later case which is a decision of a Full Court of the Court of Queen's Bench. The two cases may be reconciled by paraphrasing Lord Cockburn to say that in most, if not all, circumstances a reasonable time implies prompt and vigorous action. In some situations ten days afterwards may be immediately and others one hour later might not be. One other fact is to be looked at, when construing this or indeed any other word, is the intention of the legislature either specifically stated or implied."* (Emphasis added)

45 This approach is supported by High Court authority.

46 In *Measures v McFadyen* (1910) 11 CLR 723, Isaacs J said (at 736):

> *"'Forthwith' has been defined in several cases, and they are not altogether uniform, but the greater number and the most authoritative afford a clear idea of the meaning. In* Ex parte Lamb; In re Southam, Jessel *M.R. and* Lush *L.J. pointed out that its meaning depends to a great degree upon the circumstances in which it is used. It is evident that a contract to forthwith deliver a ton of flour demands much more prompt performance than to forthwith construct an ironclad, and so the word cannot be said to have an invariable meaning, irrespective of the subject matter in connection with which it is used.*
>
> *''Forthwith' of course means,' says* Bowen *L.J. ''at once' having regard to the circumstances of the case':* Lowe *v.* Fox. Sir James Hannen *thought it meant 'with as little delay as possible':* Furber *v.* Cobb*, and similarly in* Roberts *v.* Brett *Lord* Chelmsford *considered it meant 'without delay or loss of time.' In the* Queen *v.* Berkshire Justices Cockburn *C.J. said: - 'The words 'forthwith' and 'immediately' have the same meaning. They are stronger than the expression 'within a reasonable time', and* ***imply prompt, vigorous action, without any delay, and whether there has been such action is a question of fact, having regard to the circumstances of the particular case****.'* (Emphasis added)

47 In my opinion, these observations are equally pertinent here.

(e) Was the Order invalid because it was impossible of performance within the time prescribed?

48 On this (alternative) branch of its argument, the Union points to the use of the adverb "immediately" in par 3.1 and contends that, on its face, the Order was impossible of performance "immediately" on the date the Order was made, 2 December 1999.

49 I cannot accept the submission. Once the adverb "immediately" is read, as I think it should be, as "as soon as reasonably possible in the circumstances" – the claim of impossibility of performance evaporates.

(f) Did the Order, by par 3.3 and by par 5.1, purport to do more than s 127(1) authorised (that is, to direct that industrial action stop or not occur) and if so, did this invalidate the Order?

50 It will be convenient to consider par 3.3 first.

51 It will be remembered that, by par 3.1, it was directed that the Employees must immediately cease and refrain from engaging in industrial action in any of the forms then specified; that, by par 3.2, it was directed that the Employees must make themselves available for work and perform work as BHP may reasonably require; and that, by par 3.3, it was directed that the Union must take any and all steps necessary and available under the Union's rules to ensure that the Employees comply with the Orders.

52 On behalf of the Union, it is submitted that par 3 goes beyond s 127(1) because, rather than direct the cessation or non-recurrence of any industrial action, the Order "purports to place a mandatory obligation on [the Employees] … [and] … on [the Union] to take various steps under the [Rules]".

53 I cannot accept the submission.

54 Although the terms "industrial dispute" and "industrial action", used in s 127(1), are specifically defined by the Act, it is clear that the language of the provision is otherwise intended to have its ordinary meaning. In particular, in the provision (in s 127(1)) empowering the Commission, by order, to give directions that the industrial action "stop", the verb "stop" is, in my view, plainly intended to have its ordinary meaning. The *Macquarie*, 2nd ed., offers this definition:

> *"**1.** to cease from, leave off, or discontinue:* to stop running. ***2.** To cause to cease; put an end to:* to stop noise in the street ***3.** To interrupt, arrest, or check (a course, proceeding, process, etc.).* ***4.** To cut off, intercept, or withhold:* to stop supplies. ***5.** To restrain, hinder, or prevent (fol. by* from*):* to stop a person from doing something.*"*

55 In using the verbs "cease" and "refrain", par 3.1 uses language consistent with the ordinary meaning of "stop" and is thus within power.

56 It is true that, as a matter of form, par 3.2 is expressed in positive, rather than negative, terms. But as a matter of substance, par 3.1 and par 3.2 are, in truth, to the same effect. As has been seen, a common element of the various forms of "industrial action" as defined in s 4(1) is a failure or refusal to perform work in the customary manner. A negative stipulation that such a practice cease (par 3.1), is tantamount to a direction to perform work in

the customary manner (par 3.2). I perceive no excess of power in the direction given in par 3.2.

57 It is also true that par 3.3 stands in a position different from par 3.1 and par 3.2. Paragraph 3.3 is directed to the Union. But, as a matter of the scope of the power to give directions under s 127(1), a registered organisation of employees cannot, as a matter of law, be beyond the reach of s 127(1). In *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v A G Coombs Fire Protection* (1998) 87 IR 110, the Commission (Guidice J, Polites SDP and Hingley C) said (at 113):

> *"Mr Bourke also referred us to s 4(8) which provides as follows:*
>
> > *'(8) In this Act, a reference to engaging in conduct includes a reference to being, whether directly or indirectly, a party to or concerned in the conduct.'*
>
> *Whilst there are difficulties with this provision it appears to us to be sufficiently wide to extend participation in industrial action to the conduct of inciting or encouraging such industrial action."*

58 The Commission went on (at 114) to cite the following passage from the judgment of Ryan J in *Kilpatrick Green Pty Ltd v CEPU*,(unreported, Federal Court of Australia, 28 May 1998):

> *"An organisation of employees which through officers or employees counsels, procures or 'organises' the taking of industrial action by employees whose employment is subject to a certified agreement is at least indirectly a party to or concerned in that industrial action."*

59 I respectfully agree.

60 In my opinion, par 3.3 is within power. The actual exercise of that power is, of course, another question.

61 I turn next to the attack on par 5.1.

62 It will be recalled that par 5.1 directs service of the Order upon the Union, and further direct that a copy of the Order "be supplied by the [Union] to each of the [Employees]".

63 On behalf of the Union, it is contended that, since the Order contemplated service upon the Union, the further direction that the Union supply a copy of the Order to Employees is unnecessary and superfluous and thus beyond power.

64 I cannot accept the contention.

65 The Act does not prescribe any particular form of "service", or notification, of an order made under s 127(1). However, a power to give incidental directions in this area may be implied to the extent that it is necessary to render the exercise of the statutory power effective (see, e.g. *Phillip Morris Incorporated v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 per Gibbs J at 496; cf. *Re Refugee Review Tribunal; Ex parte AALA* [2000] HCA 57 per Gaudron and Gummow JJ at par 13). In my opinion, par 5.1 was within power. Nor, in my view, is there any ambiguity in the notion of "supply". It has its ordinary dictionary meaning of "furnish" or "provide". It does not require personal service.

THE THIRD ISSUE: WERE THERE ANY BREACHES OF THE ORDER?

66 I turn next to find the primary facts.

(a) Findings of primary fact in respect of events occurring on or about 2 December 1999.

67 As noted, there was no real contest about these primary facts. The only evidence adduced by the Union was in the form of an affidavit by its solicitor annexing the record of the proceedings before the Commission. None of the witnesses was cross-examined. Accordingly, I accept the evidence tendered which was to the following effect:

- As stated in the Commission's reasons (above), a 48 hour strike by the Employees commenced at 11.00 p.m. on 30 November 1999, following a "breakdown" in negotiations around a revised "survival agreement" for the Colliery.

- At the hearing before the Commission (on the morning of 2 December 1999), Mr Fisher, appearing for the Union, accepted (transcript p 7) that the Union "are taking industrial action …".

- Immediately following the Commission hearing, the Associate to Commissioner Harrison provided copies of the Order to Mr Fisher (according to the affidavit of Mr Newman sworn on 20 June 2000 (par 14)).

- At the conclusion of the hearing before the Commission (i.e. shortly after noon on 2 December 1999), Dean Dalla Valle, BHP's General Mine Manager, said to Mr Fisher:

  "How are we going to get these blokes back to work …?"

  Mr Fisher replied:
  "We will see you at 11 pm."

  (See the affidavit of Mr Newman, sworn 20 June 2000, par 16; and the affidavit of Mr Dalla Valle, sworn 19 June 2000, par 6.)

- The Order was served on the Union at the office of its Federal Secretary in Sydney at 1.07 p.m. on 2 December 1999 (according to the affidavit of Rebecca Jean Graham sworn 2 December 1999, pars 3 – 5).

- One of the Employees, Mr William John Quintal (whose oral evidence is referred to below), attended the Mine on the afternoon of 2 December 1999. According to the affidavit evidence of Mr Newman (par 18), in Mr Newman's presence, Mr Quintal said words to the effect –

  "I haven't heard from the Union."

- Mr Newman observed that none of the Employees had commenced work on the shift due to commence at 3.00 p.m. on 2 December 1999 (par 19).

- Mr Newman then telephoned Mr Harris (see separate ruling where most of this conversation is ruled inadmissible).

- In accordance with BHP's "Dispute Procedure" dated 26 July 1999, one of the Employees, Myk Smalko (whose oral evidence is explained below), wrote a letter to Mr Newman (his affidavit, par 20) on or about 6 December 1999 as follows:

"Mr P Newman
Manager Tower Colliery
Douglas Park Rd
Douglas Park
NSW 2569

Dear Sir,
I am writing in response to a letter I received from Mr Dalla Valle, dated 061299.

I object to being deemed as being held personally responsible for my non-compliance of following the Tower Disputes Procedure and my non-adherence of the Commission order to return to work.

Firstly, the question was asked by several members of the legality of the stoppage in relation to following the disputes procedure. We were all re-assured that we were in compliance. Also what our position was in respect with our District in backing this action. Again, we were told that the district was in support of our action. I then can only trust what was told us by our Executive and District officials, as I am expected to trust BHP when we are given talks by its representatives, as being the truth.

Secondly, in the failure of afternoon shift complying to the Commissioner's orders to return to work. Being on afternoon shift, the first I heard of such an order was upon my return to work on Monday. I had no communication from either the union executives or the company in relation to this matter. I believe that NOT all reasonable effort was made to communicate with the workforce to inform us of the order by the Commission.

If there is some misinterpretation of the Disputes Procedure, then I suggest that the legal people from both sides sit down and make it so it is not open to any misinterpretation, in conjunction with the Commission.

*Also, I object to letters, such as your above mentioned letter, being sent to me before **ALL** the facts have been determined.*

Though I am writing this on only my behalf, I'm sure there are others at Tower who are in a similar position as myself. Who as individuals and families are grieved to having received such a pointed, accusatory letter such as we have received. We are not the criminals as some would deem us to be, but the victims of greedy people putting profits ahead of all else.

I trust that in future, consideration will be given to the form and content of letters being sent to your employees, should such circumstances arise again.

yours faithfully
(Signed Myk Smalko)
Myk Smalko"

- None of the Employees worked on the shift commencing at 3.00 p.m. on 2 December 1999 (Mr Newman, par 21).

- None of the Employees returned to work until 11.00 p.m. on 2 December 1999 (Mr Newman, par 22).

- From about 12.15 p.m. on 2 December 1999, David Mark Pearce, BHP's Payroll Officer (affidavit sworn 19 June 2000, pars 5 – 12), attempted to contact each of the Employees who were to commence work that afternoon (with perhaps one exception). In some cases he was able to make contact, and in some cases he was able to leave a message. In other instances, no contact was made. When contact was made, Mr Pearce said:

"... Commissioner Harrison has issued section 127 orders which orders employees to cease and refrain from industrial action and must return to work immediately."

- At about 2.00 p.m. on 2 December 1999, a copy of the Order was posted on a notice board at the Mine (affidavit of Trevor Charles Jones, BHP's Human Resources Manager, sworn 19 June 2000, par 5).

- At about 5.00 p.m. on 2 December 1999, Mr Jones said to Mr Harris:

"Ken, the guys are in breach of the orders made by Commissioner Harrison."

Mr Harris said:

"I know."

Mr Jones said:

"They need to get back to work." (Mr Jones, par 6.)

- Mr Quintal, who was subpoenaed by BHP to give evidence, gave the following evidence (transcript pp 14 and following). Mr Quintal is a machine operator, and a member of the Union. On 1 and 2 December 1999, he was rostered on the permanent afternoon shift. At the time, there was a 48 hour strike, in which he participated. On the first day of the strike (1 December 1999), he was on strike. But at about 2.30 p.m. on the second day (2 December 1999), he attended for work, because he had heard from someone at BHP that he "was supposed to come back to work". However, having arrived at work, and having spoken to some of BHP's staff, he sought, but failed, to find the Union's representative at the Mine. He also sought to telephone Mr Lester, the Union President, but was unable to make contact. He did not proceed to work the shift, but if Mr Lester had told him to go back to work, he would have done so. After attempting to reach Mr Lester, he spoke by telephone with another Union official at the Union's office in Wollongong, and was told to go home until notified to come to work. He was never provided with a copy of the Order.

- Mr Smalko was also called by BHP on subpoena to give evidence (transcript pp 20 and following) as follows. Mr Smalko was an underground coal miner (face worker), employed at the Mine until August 2000. He participated in the 48 hour stoppage in early December 1999. He was due to work the afternoon shift during the stoppage. During the first day of the stoppage, he was requested by Mr Lester, Lodge President, to secure a dangerous place. He did this, but did not work either of the two shifts. He was not contacted about going to work on the second day of the stoppage. The Union did not provide him with a copy of the Order, although a copy was attached to a letter he received from BHP.

(b) Did the Union breach par 5.1 of the Order by failing to supply a copy of the Order to the Employees?

68 This is the claim made in par 1 of the amended application.

69 It is common ground that these are penal, yet civil, proceedings and that BHP needs to satisfy the Court on the balance of probabilities and to that degree of satisfaction explained in

Briginshaw v Briginshaw (1938) 60 CLR 336, on each and every essential matter necessary to show that a breach of the Order has been committed (see, e.g. *Australasian Meat Industry Employees' Union v Meneling Station Pty Ltd* (1986) 16 IR 245 per Evatt J at 254).

70 As has been seen, the Union raised, and I have rejected, a preliminary contention as to the validity of the Order, including a challenge to the provisions of par 5.1 itself. It is further, and alternatively, submitted on behalf of the Union that the present case falls within the analogous principle applied in proceedings for contempt for failure to comply with a court order, namely that the terms of the order must be clearly expressed and the evidence of the breach must clearly appear (see *Microsoft Corporation v Marks* (1996) 139 ALR 99 at 118 – 119; *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union* [2000] FCA 629 at pars 33 – 34).

71 In considering the challenge to the validity of par 5.1, it was first necessary to construe that provision. As has been seen, there was, in my view, no apparent ambiguity in the provision, and the phrase "must be supplied" in particular is not equivocal or uncertain. On the contrary, the requirement imposed on the Union, that it had to supply (i.e. furnish or provide) a copy of the Order to each of the Employees within a reasonable time, is explicit and free of any ambiguity.

72 As to the evidence of breach, again the position is clear. Although the Union called no evidence on the point, the foregoing uncontroversial primary facts plainly indicate that the Union made no attempt at any time to provide the Employees with a copy of the Order.

73 Accordingly, in my view, a breach of par 5.1 has been clearly established. I so find.

(c) Did the Union breach par 3.3 of the Order on or about 2 December 1999 by failing to take any and all steps necessary available under its rules to ensure that the Employees complied with the Order?

74 This is the claim made in par 2 of the amended application.

75 Incorporated by reference into this question are the two anterior related questions: (1) did the Employees breach par 3.1 by failing to immediately cease and refrain from engaging

in industrial action?; and (2) did the Employees breach par 3.2 by failing to make themselves available for work and perform work as BHP may reasonably require?

76 Again, the Union not only challenged the validity of the Order in these respects, it further submitted that these provisions of the Order were not clearly expressed, so that no breach of any of the sub-pars of par 3 could be established.

77 I cannot accept the submissions in any respect.

78 So far as concerns the meaning of sub-pars (1) and (2), upon my construction (above) of these provisions, the requirements made of the Employees are, as I have found, clearly expressed in every respect. I reject the notion that they possess inherent ambiguity.

79 Has a breach by the Employees of these requirements been clearly demonstrated? Again, the Union called no evidence on the point. The primary facts advanced in BHP's evidence (above) plainly indicate that the Employees did not cease and refrain from their industrial action commenced on 30 November 1999 and did not, in the currency of the 48 hour stoppage, make themselves available for work. I find that these ingredients of a breach of the requirements of par 3.3 have been clearly established.

80 In other respects, par 3.3 of course raises separate questions in respect of the position of the Union itself as follows.

81 First, is, as the Union contends, the language of the composite phrase "must take any and all steps necessary and available under the rules of the [Union] to ensure …" uncertain or ambiguous? In my opinion, it is not. On the contrary, as a whole, it should receive its ordinary meaning, as was plainly intended. The adjective "necessary" has, I think, its ordinary meaning of "that cannot be dispensed with" (*Macquarie*, 2nd ed.). The adjective "available" (under the Rules) likewise is intended to its ordinary meaning of "suitable or ready for use" (*Macquarie*, 2nd ed.)

82 Secondly, do the facts demonstrate, to the requisite degree of satisfaction, that the Union failed to act accordingly?

83 As has been seen, in its amended statement of claim, BHP points to a wide range of powers available to the Union in the present kind of context; and significantly, the Union called no factual evidence on the question at all.

84 However, further several points arise in this connection, notwithstanding the absence of evidence from the Union. As a matter of ordinary interpretation of an order of the present kind, the directions given must be complied with within a reasonable time, even if language such as "immediately" or "forthwith" is used (see above and see *Hillingdon London Borough Council v Cutler* [1968] 1 QB 124). It is true that cases could arise where, for special reasons, it may be impossible or impractical for a person bound by an order to act inside a particular period of time. No doubt this would bear upon the question of what was a reasonable period of time for this purpose. But there was no evidence from the Union suggesting any impossibility or impracticality here.

85 As a matter of legal principle, compliance must be, in some way, within the power or capacity of the person directed before it could be held to have failed to comply (see *The Queen v Kelly; Ex part Berman* (1953) 89 CLR 608 per Dixon J at 623). At the same time –

> *"Where an injunction is mandatory in its terms, it is the duty of the party bound by the injunction to discover the proper means of obeying the order."* (Halsbury's Laws of England, 4th ed. (Reissue), par 472.)

86 In *Attorney-General v Walthamstow Urban District Council* (1895) 11 TLR 533, Chitty J said (at 533 – 534):

> *"The defendants argued that the application was based on contempt of Court and that unless the Court was satisfied that the defendants were wilfully disobeying the order the Court would not make an order for sequestration. The meaning of these applications was, however, to enforce the rights of the parties obtaining orders. If the Court saw that an order was disobeyed the Court could not refuse to execute the order, because to do that would be to deny the right of the parties obtaining the order. That there was a nuisance and that for some months past there had been a nuisance was satisfactorily proved.* ***It was the duty of the defendants to find out the proper means of obeying the order****. If a defendant was not merely doing his best, but also taking proper measures to comply with the order, the Court would suspend the sequestration where a corporation was concerned in order to give to the corporation some opportunity of finding means of dealing with the subject of complaint.* ***It was, however, no part of a plaintiff's duty to point out to a defendant the proper means to remedy the nuisance. It was the defendant's***

> ***duty to find out the proper mode of complying with the order****."* (Emphasis added)

87 Applying that approach here, it appears clearly from the evidence that, although at all times well aware of the requirements of the Order, the Union took no steps to ensure that the Employees complied. The Union having called no evidence on the question, it may be inferred that any evidence, if called, would not have assisted the Union's case. In particular, the Union did not seek to lead evidence that compliance with the Order was not, in fact, possible under the rules. No legal reason of any substance for the Union's failure to comply with the Order was forthcoming.

88 In all of these circumstances, I am comfortably satisfied that a breach of par 3.3 has been demonstrated. I so find.

ORDERS

89 At this stage I make the following orders:

4. Declare that the breaches alleged in pars 1 and 2 of the amended application have been established.

5. Dismiss the claim made in par 3 of the amended application.

6. Stand the proceedings over to Wednesday, 22 November 2000 at 9.45 a.m. for directions on the hearing of the question of penalty in respect of the breaches found.

I certify that the preceding eighty-nine (89) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Beaumont.

Associate:

Dated: 21 November 2000

Counsel for the Applicant:	H I Dixon
Solicitor for the Applicant:	Blake Dawson Waldron
Counsel for the Respondent:	S Crawshaw SC, I Taylor
Solicitor for the Respondent:	R L Whyburn & Associates
Date of Hearing:	19 October 2000
Date of Judgment:	21 November 2000

FEDERAL COURT OF AUSTRALIA

BHP Steel (AIS) Pty Ltd v CFMEU [2000] FCA 1908

WORKPLACE RELATIONS imposition of penalty for breach by Union of order of Australian Industrial Relations Commission.

Lynch v Buckley Sawmills Pty Ltd (1984) 3 FCR 503
Masters v Highway One Pty Ltd (1990) 33 IR 1
Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority (1993) 32 NSWLR 683
Transport Workers Union of Australia v Glynburn Contractors (Salisbury) Pty Ltd (1991) 37 IR 313

BHP STEEL (AIS) PTY LIMITED V CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION

NO. N 150 OF 2000

JUDGE: BEAUMONT J
DATE: 21 DECEMBER 2000
PLACE: SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **N 150 OF 2000**

BETWEEN:	**BHP STEEL (AIS) PTY LIMITED** **APPLICANT**
AND:	**CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION** **RESPONDENT**
JUDGE:	**BEAUMONT J**
DATE OF ORDER:	**21 DECEMBER 2000**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. Order the imposition of the following penalties:

   (a) Breach of par 3.3 - $2,000.

   (b) Breach of par 5.1 - $200

2. Order that these penalties be paid to the applicant.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **N 150 OF 2000**

BETWEEN: **BHP STEEL (AIS) PTY LIMITED**
APPLICANT

AND: **CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION**
RESPONDENT

JUDGE: **BEAUMONT J**
DATE: **21 DECEMBER 2000**
PLACE: **SYDNEY**

REASONS FOR JUDGMENT (NO 2)
(ON PENALTY)

BEAUMONT J:

1 On 21 November 2000, for the reasons I then gave, I made orders, amongst others, declaring that the Union had committed certain breaches of the order made by the Commission, specifically:

(1) that the Union take any and all steps necessary and available under its Rules to ensure that the relevant employees comply with the order (par 3.3); and

(2) that the Union supply a copy of the order to each of those employees (par 5.1).

2 It will be recalled that, by par 3.1 of the order, the employees "must immediately cease and refrain from engaging in industrial action …".

3 The maximum penalty that may be imposed under s 178(1) of the Act for a breach of a term of an order is $10,000 (s 178(4)(a)(ii)).

4 BHP seeks a penalty in respect of each of the breaches found. BHP submits that the two breaches should be treated separately for the purpose of penalty, contending that s 178(2) operates only in respect of two or more breaches of the **same** term of an award or order.

5 By s 178(2) it is relevantly provided that, for the purposes of s 178, where:

(a) two or more breaches of a term of an order are committed by the same organisation; and

(b) the breaches arose out of a course of conduct by the organisation the breaches shall be taken to constitute a single breach of the term.

6 I accept BHP's submission, which accords with the course of authority (see *Lynch v Buckley Sawmills Pty Ltd* (1984) 3 FCR 503 per Keely J; *Masters v Highway One Pty Ltd* (1990) 33 IR 1 at 3-4). In the present case, as a matter of form at least, par 3.3 and par 5.1 are separate and distinct terms. I propose to approach the question of penalty accordingly.

7 BHP further submits, and I accept, that there was no time in the present matter for it to seek injunctive relief. On the other hand, the Union submits, and I accept, that the short duration of the stoppage ought now to be taken into account.

8 The Union further submits, and I accept, that, in any event, and accepting that the principle of "totality" may not have the same force as in the case of a fine, as opposed to imprisonment (see *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 per Kirby P at 704), the breaches of pars 3.3 and 5.1, although distinct in form, in truth and in substance arise out of the same single course of action. In such a case, it is appropriate in the exercise of fixing penalty, to have regard to the interlocking relationship between such breaches (see *Transport Workers Union of Australia v Glynburn Contractors (Salisbury) Pty Ltd* (1991) 37 IR 313 per Lee J at 314). At the same time, I regard the breaches as serious. No attempt was made by the Union to explain, let alone justify, why no step was taken by it to comply with the Order. Taking into account the circumstances that, in essence, a single action is involved here, and upon applying the totality principle to an appropriate extent, I am of the view that penalties of $2,000 (par 3.3) and $200

(par 5.1) ought to be imposed. I will further order that the penalty be paid to BHP (see s 356).

ORDERS

9 I make the following orders:

1. Order the imposition of the following penalties:

   (c) Breach of par 3.3 - $2,000.

   (d) Breach of par 5.1 - $200

2. Order that these penalties be paid to the applicant.

I certify that the preceding nine (9) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Beaumont.

Associate:

Dated: 21 December 2000

Counsel for the Applicant: H J Dixon SC

Solicitor for the Applicant: Blake Dawson Waldron

Counsel for the Respondent: S Crawshaw SC

Solicitor for the Respondent: R L Whyburn & Associates

Date of Hearing: 19 December 2000

Date of Reasons for Ruling: 21 December 2000

ANNEXURE "JDF-11"

GENERAL DISTRIBUTION

FEDERAL COURT OF AUSTRALIA

Construction, Forestry, Mining & Energy Union v BHP Steel (AIS) Pty Ltd

[2001] FCA 1758

CONTEMPT – order restraining "strike action" by a union – whether the union complied with the order – meaning of "immediately" – standard of proof required for a contempt – role of particulars in a statement of charge – whether the particulars supported the alleged contempt.

Workplace Relations Act 1996 (Cth) s 127

Dorsman v Nichol (1978) 20 ALR 231 at 237 referred to
Measures v McFadyen (1910) 11 CLR 723 at 736 referred to
Kent Free Press v NGA [1987] IRLR 267 referred to
BHP Steel (AIS) Pty Ltd v Construction, Forestry, Mining and Energy Union (2000) 102 IR 275 cited
Iberian Trust Ltd v Founders Trust and Investment Co Ltd [1932] 2 KB 87 at 95 cited
United Steelworkers of America Local 663 v Anaconda Company (Canada) Ltd (1969) 67 WWR 744 cited
Austin Rover Group Ltd v AUEW (TASS) [1985] IRLR 162 cited
Re Distillery, Brewery Union 604 v British Columbia Distillery (1975) 57 DLR (3rd) 752 cited
Adam Phones Ltd v Goldschmidt [1999] 4 All ER 486 per Jacob J at 495 cited
Witham v Holloway (1995) 183 CLR 525 cited
Microsoft Corporation v Marks (1996) 69 FCR 117 cited
Hinch v Attorney-General for the State of Victoria (1987) 164 CLR 15 at 49 cited
Doyle v The Commonwealth (1985) 156 CLR 510 at 516 cited
Coward v Stapleton (1953) 90 CLR 573 at 579-580 cited
Concrete Constructions Pty Ltd v Plumbers and Gasfitters Employees' Union (No 2) (1987) 15 FCR 64 at 73 cited
Cotroni v Quebec Police Commission (1977) 80 DLR (3rd) 490 at 497 cited
Harmsworth v Harmsworth [1987] 1 WLR 1676 at 1683 cited
Australian Building Construction Employees' and Builders Labourers' Federation v Minister of State for Industrial Relations (1982) 43 ALR 189 at 206-207 cited
In re Bramblevale Ltd [1970] 1 Ch 128 at 137 cited
AMIEU v Mudginberri Station Pty Ltd (1986) 161 CLR 98 cited
R v Booth [1983] 1 VR 39 cited
Australian Consolidated Press Limited v Morgan (1965) 112 CLR 483 cited
Australian Industry Group v Automotive, Food, Metals, Engineering, Printed and Kindred

Industries Union [2000] FCA 629 considered
The Plumbers and Gasfitters Employees' Union of Australia v John Holland Constructions Pty Limited (1988) 10 ATPR 40-849 cited
Seaward v Paterson (1897) 1 Ch 545 cited
Esso Australia Resources Ltd v Commissioner of Taxation (1998) 84 FCR 541 cited
Jones v Dunkel (1959) 101 CLR 298 considered
RPS v The Queen (2000) 199 CLR 620 cited
Livesey v New South Wales Bar Association (1983) 151 CLR 288 followed
Re JRL, ex parte CJL (1986) 161 CLR 342 cited
Johnson v Johnson (2000) 201 CRL 488 considered
Hanneberry v Legal Ombudsman [1998] VSC 142 cited
R v Gray [1977] VR 225 cited
Cho Hung Yam (1991) 55 A Crim R 116 cited
North Australian Aboriginal Legal Aid Services Inc v Bradley [2001] FCA 908 considered
Re Wilcox; Ex parte Venture Industries Pty Ltd (No 2) (1997) 72 FCR 151 cited

Borrie & Lowe's Law of Contempt (2nd ed. 1983 at p.379)
Lightman QC *A Trade Union in Chains: Scargill Unbound – The Legal Constraints of Receivership and Sequestration* (1987) CLP 25, 27-28
Lord Wedderburn *Contempt of Court: Vicarious Liability of Complaints and Unions* (1992) 21 Ind. L.J. 51, 53-56
O'Regan *Contempt of Court and the Enforcement of Labour Injunctions* (1991) 54 MLR 385, 393-394

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION v BHP STEEL (AIS) PTY LTD (ACN 000 019 625)
Q1 OF 2001; Q68 OF 2001

LEE, FINN AND MERKEL JJ
12 DECEMBER 2001
PERTH (HEARD IN BRISBANE)

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY **Q 1 OF 2001**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT

BETWEEN:	**CONSTRUCTION, FORESTRY, MINING & ENERGY UNION** **APPELLANT**
AND:	**BHP STEEL (AIS) PTY LIMITED (ACN 000 019 625)** **RESPONDENT**
JUDGE:	**LEE, FINN AND MERKEL JJ**
DATE OF ORDER:	**12 DECEMBER 2001**
WHERE MADE:	**PERTH (HEARD IN BRISBANE)**

THE COURT ORDERS THAT:

1. The appeal be allowed in part.

2. The declaration made by Kiefel J on 15 December 2000 be varied by deleting therefrom all words after the word "by" and inserting in their stead the following:

> *" 'failing to immediately cease strike action, namely, the authorizing of its members to stop performing work at the applicant's coal mines in New South Wales.' "*

3. Otherwise, the appeal be dismissed.

4 There be no order as to the costs of the appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY **Q 68 OF 2001**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT

BETWEEN: **CONSTRUCTION, FORESTRY, MINING & ENERGY UNION**
APPELLANT

AND: **BHP STEEL (AIS) PTY LIMITED (ACN 000 019 625)**
RESPONDENT

JUDGE: **LEE, FINN AND MERKEL JJ**
DATE OF ORDER: **12 DECEMBER 2001**
WHERE MADE: **PERTH (HEARD IN BRISBANE)**

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders made by Kiefel J on 30 March 2001 be set aside.

3. The matter be remitted to her Honour for re-determination of the questions of penalty and costs.

4. The respondent pay the appellant’s costs of and incidental to the appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

QUEENSLAND DISTRICT REGISTRY **Q 1 OF 2001**
Q 68 OF 2001

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT

BETWEEN:	**CONSTRUCTION, FORESTRY, MINING & ENERGY UNION** **APPELLANT**
AND:	**BHP STEEL (AIS) PTY LIMITED (ACN 000 019 625)** **RESPONDENT**
JUDGE:	**LEE, FINN AND MERKEL JJ**
DATE:	**12 DECEMBER 2001**
PLACE:	**PERTH (HEARD IN BRISBANE)**

REASONS FOR JUDGMENT

LEE, FINN JJ:

1 The respondent ("BHP Steel") applied to the Court for a declaration that the appellant ("the CFMEU") had committed a contempt of the Court and for the imposition of a penalty in respect of the alleged contempt. BHP Steel alleged that the CFMEU disobeyed an order of the Court made on 7 February 2000 ("the Order"). The application was heard by the Judge (Kiefel J) who had made the Order. On 15 December 2000 her Honour declared that the CFMEU was guilty of contempt of the Court "by its conduct in breaching the Order made against it ... by continuing strike action and authorising its members to stop performing work and procuring and authorising its members to take further strike action". On 30 March 2001 her Honour imposed a fine of $200,000 for that contempt and ordered the CFMEU to pay BHP Steel's costs "of the whole of the proceedings" on an indemnity basis. In these two appeals the CFMEU seeks to have the declaration, and the orders for the payment of a fine and costs, set aside.

2 Members of the CFMEU were employed by BHP Steel at coal mines in Queensland ("the Queensland mines") and New South Wales ("the New South Wales mines"). Prior to

February 2000 an industrial issue had arisen between the CFMEU and BHP Steel's parent company, ("BHP"), as to the price BHP should obtain for coal produced by BHP Steel and exported by BHP. In 1995 members of the CFMEU authorised the Central Executive ("the Executive") of the Mining and Energy Division ("the Division") of the CFMEU, to call for a stoppage of work for a period of up to seven days in relation to that issue, at the discretion of the Executive.

3 On 7 February 2000 the CFMEU became aware that BHP had agreed to reduce the price of the coal it exported and at about 5.00 pm on that day (all times stated herein refer to Australian Eastern Daylight Saving Time) the Executive issued a media release that the CFMEU would direct its members to "strike" for 24 hours from the commencement of the "night-shift" on that day, *i.e.* from 7.00 pm at the Queensland mines and from 11.00 pm at the New Sought Wales mines. At about the same time the CFMEU gave notice of the direction to members' representatives at the mines ("the Lodge Officers"). The Lodge Officers were unpaid officials elected by members at each mine site to represent them in issues arising at the respective mines.

4 At about 5:30 pm BHP Steel obtained an order from the Australian Industrial Relations Commission ("the Commission") under s 127 of the *Workplace Relations Act 1996* (Cth) ("the Act") which directed that:

> *"The* [CFMEU] *shall not in relation to the work* [performed at the Queensland and New South Wales mines] *for the purposes, wholly or partly, of any dispute or disagreement about or concerning negotiations or the outcome of negotiations over export coal prices:*
>
> *(a) take or continue strike action;*
>
> *(b) commence or instigate any ban on employees attending for and performing work in accordance with…applicable awards or certified agreements…;*
>
> *(c) direct, procure, advise or authorise union members or other employees to stop performing work in accordance with…applicable awards or certified agreements…"*

5 Later that day BHP Steel applied to the Court for an injunction pursuant to s 127(6) of the Act on the ground of a contravention, or a proposed contravention, by the CFMEU of

the Commission's order.

6 The Order granting the injunction was made at about 9.50 pm on 7 February 2000. The application was heard, and the Order made, *ex parte.* In the contempt proceeding before her Honour the CFMEU admitted that a copy of the Order had been sent by facsimile transmission to the national office of the Division at about 11.22 pm, but the time or times at which officers of the Executive actually received notice of the terms of the Order remained in issue.

7 The relevant paragraphs of the Order provided that:

> *"1. The* [CFMEU]...*whether by* [its] *servants or agents or otherwise howsoever immediately cease any of the following with respect to…* [BHP Steel's] *coal mines* [in Queensland and New South Wales]:
>
> *(a) strike action;*
>
> *(b) any ban on employees attending for and performing work in accordance with the applicable awards or certified agreements ...; or*
>
> *(c) directing, procuring or authorising members of the* [CFMEU] *or other employees of* [BHP Steel] *to stop performing work in accordance with the applicable awards or certified agreements…;*
>
> *for the purposes of any dispute or disagreement about or concerning negotiations or the outcome of negotiations over export coal prices, until 4pm Wednesday 9 February 2000 or further earlier order.*
>
> *2. The* [CFMEU]...*whether by* [its] *servants or agents or otherwise howsoever be restrained from engaging in the following with respect to* [BHP Steel's] *coal mines* [in Queensland and New South Wales]:
>
> *(a) taking or continuing strike action;*
>
> *(b) commencing or continuing any ban on employees attending for and performing work in accordance with the applicable awards or certified agreements…;*
>
> *(c) directing, procuring, advising or authorising members of the* [CFMEU] *or other employees of* [BHP Steel] *to stop performing work in accordance with the applicable awards or certified agreements…;*

> *for the purposes of any dispute or disagreement about or concerning negotiations or the outcome of negotiations over export coal prices, until 4pm Wednesday 9 February 2000 or further earlier order."*

8 The meaning of the word "immediately" as used in different contexts has been the subject of judicial consideration. In *Dorsman v Nichol* (1978) 20 ALR 231 Forster CJ said (at 237):

> *"There is a good deal of authority concerning the meaning of the word 'immediately' in contexts other than the one presently under consideration. 'It has already been decided and necessarily so that the words 'immediately afterwards' in the statute cannot be construed literally; and if you abandon the literal construction of the words, what can you substitute but 'within a reasonable time' especially as an endorsement of the certificate* eo instanti *can be of no necessity whatever' (*Page v Pearce *(1841) 8 M & W 677, per Abinger CB at 678). 'There are, however, many cases in which it has been held that the word 'immediate' occurring in a statute is not to be construed in its strict sense 'on the instant' but that it means with reasonable promptness having regard to all the circumstances of a particular case' (*R v Aston *(1850) 19 LJMC 236, per Wightman J at 239). 'It is impossible to lay down any hard and fast rule as to what is the meaning of the word 'immediately' in all cases. The words 'forthwith' and 'immediately' have the same meaning. They are stronger than the expression 'within a reasonable time' and imply prompt, vigorous action without any delay and whether there has been such action is a question of fact having regard to the circumstances of the particular case' (*R v Justices of Berkshire *(1879) 4 QBD 469 per Cockburn CJ at 471). The last citation appears to differ from* Page v Pearce, supra*, and in so far as it does so* Page v Pearce *must be taken to have been overruled by that later case which is a decision of a Full Court of the Court of Queen's Bench. The two cases may be reconciled by paraphrasing Lord Cockburn to say that in most, if not all, circumstances a reasonable time implies prompt and vigorous action. In some situations ten days afterwards may be immediately and others one hour later might not be."*

9 In *Measures v McFadyen (*1910) 11 CLR 723 Isaacs J said (at 736):

> *" 'Forthwith' has been defined in several cases, and they are not altogether uniform, but the greater number and the most authoritative afford a clear idea of the meaning. In* Ex parte Lamb; In re Southam [19 ChD 169 at 172, 173] Jessel *M.R. and* Lush *L.J. pointed out that its meaning depends to a great degree upon the circumstances in which it is used. It is evident that a contract to forthwith deliver a ton of flour demands much more prompt performance than to forthwith construct an ironclad, and so the word cannot be said to have an invariable meaning, irrespective of the subject matter in connection with which it is used.*

' 'Forthwith' of course means', says Bowen *L.J. ' 'at once,' having regard to the circumstances of the case':* Lowe v Fox [15 QBD 667 at 679] Sir James Hannen *thought it meant 'with as little delay as possible*': Furber v Cobb [18 QBD 494 at 504], *and similarly in* Roberts v Brett [11 HLC 337 at 355] *Lord* Chelmsford *considered it meant* '*without delay or loss of time.*' *In the* Queen v Berkshire Justices Cockburn *C.J. said*:-

> *'The words 'forthwith' and 'immediately' have the same meaning. They are stronger than the expression 'within a reasonable time,' and imply prompt, vigorous action, without any delay, and whether there has been such action is a question of fact, having regard to the circumstances of the particular case.' "*

10 A court order to a union to withdraw "blacking" instructions forthwith was held to require the act to be done as soon as possible in the circumstances *(Kent Free Press v NGA* [1987] IRLR 267). In *BHP Steel (AIS) Pty Ltd v Construction, Forestry, Mining and Energy Union* (2000) 102 IR 275 Beaumont J construed an order that employees "immediately cease" industrial action as a requirement that there be compliance "as soon as reasonably possible in the circumstances".

11 Paragraph 1 of the Order did not require instant action by the CFMEU as soon as it was made or as soon as it was served on the CFMEU such that a failure to act at either moment would have put the CFMEU in technical breach of the Order. We do not understand her Honour to have considered otherwise when she said:

> *"The language of the first injunction here is in strong terms in its requirement to 'cease' and it is plain that some urgency attends the requirement for action in that regard because the CFMEU is to do so 'immediately'. It had a choice as to how it was to end the strike it had started, although some steps are so obvious that they go without saying. The requirements of the Order and the result to be achieved were clear.*
>
> ...
>
> *The Order reasonably construed requires cessation of the strike immediately upon the [CFMEU] having knowledge of the Order..."*

12 If her Honour had considered that "the result to be achieved" was the return to work "immediately" by members of the CFMEU and that there would be a breach of the Order and a contempt of the Court committed by the CFMEU if members did not so act, such an

approach would have involved an error in construction of the Order.

13 The question whether the Order was breached by the CFMEU depended upon what the CFMEU was required to do by the Order and what the CFMEU did, or failed to do, in response to the injunctions of the Court. Whether members of the CFMEU returned to work, and the time at which they did so, may have been relevant in ascertaining what the CFMEU did, or did not do, but could not, in itself, establish a breach of the Order by the CFMEU according to proper construction of the Order.

14 It is to be concluded, therefore, that the requirement to "immediately cease" obliged the CFMEU to comply as soon as reasonably possible in the circumstances. The imperative so imposed on the CFMEU needs to be understood in light of the conduct sought to be restrained (*i.e.* a 24 hour strike commencing in New South Wales just over an hour after the Order was made) and the time available for meaningful action if purported compliance was not to be partial and, in substance, token or illusory.

15 If it is accepted that the object of the mandatory injunction was to have the CFMEU terminate conduct engaged in that was said to breach the Commission order, then it follows that the conduct addressed by the injunction was the CFMEU call to its members to take "strike action". The injunction required the CFMEU to withdraw or cancel that direction to members. That required the CFMEU to take action as soon as reasonably possible in the circumstances to countermand the direction it had given to members to withdraw their labour at the Queensland and New South Wales mines. In the circumstances sufficient compliance with that requirement may have been effected by the CFMEU publishing a statement that it had withdrawn the direction to members to take "strike action". In the absence of express words in the Order to such effect, it could not be said that par 1 of the Order also required the CFMEU to carry out the further act of ensuring that publication of the statement was communicated to all members and/or Lodge Officers. To determine whether contempt of the Court was committed by disobedience of that part of the Order, an assessment had to be made as to when it had been reasonably possible in the circumstances for the CFMEU to carry out the act required of it by par 1 of the Order.

16 The material before her Honour did not suggest that subpars 1(a), (c) of the Order referred to separate acts committed by the CFMEU at the time of the mandatory injunction.

Therefore, the subparagraphs, conjunctively, ordered the CFMEU to take steps to "cease" the one act, namely, the instruction to members to stop work for the purpose of the dispute over export coal prices.

17 That is to say, insofar as the direction to stop work given to members by the CFMEU constituted engagement by the CFMEU in "strike action", or in directing, procuring, or authorising members to stop work, the CFMEU was to cease that conduct by bringing to an end the call to members to stop work.

18 Where subpar l(b) of the Order required the CFMEU to "cease any ban on employees attending for and performing work" at the mines, there was no evidence that the CFMEU had placed a ban on, or had directed members to "ban", other employees who attended for work. If the word "employees" as used in subpar l(b) referred to CFMEU members, the subparagraph did not go beyond conduct already covered by subpars l(a) and (c).

19 Paragraph 2 of the Order directed the CFMEU that from the commencement of, and for the period of, the Order it was restrained from committing any act specified in subpars 2(a), (b) or (c) of the Order, if that act were done for the purpose of the dispute between the CFMEU and BHP as to the price of exported coal.

20 Contempt of a court order will not arise unless the terms of the order are clear and unambiguous. (See: *Borrie & Lowe's Law of Contempt* (2nd ed. 1983 at p.379); *Iberian Trust Ltd v Founders Trust and Investment Co Ltd* [1932] 2 KB 87 at 95.) Therefore, if the order is a mandatory injunction, the respondent to the order must know exactly what act the order requires the respondent to perform, and if the injunction is prohibitory, the terms of the order must define clearly the acts the respondent is restrained from doing.

21 There is some force in the submission that par 1 of the Order left unclear what act the CFMEU was required to carry out. (See: *United Steelworkers of America Local 663 v Anaconda Company (Canada) Ltd* (1969) 67 WWR 744). The terms of the Order may be contrasted with the explicit terms of a similar injunction issued in *Austin Rover Group Ltd v AUEW (TASS)* [1985] IRLR 162. An injunction to "forthwith cease" a lock-out of employees was held not to define what was required of the respondent employer by the order and to be

incapable of grounding a complaint of contempt for disobedience of the order. (See: *Re Distillery, Brewery Union 604 v British Columbia Distillery* (1975) 57 DLR (3rd) 752. In that case it was considered that, in the absence of express definition of the act required to be carried out, the respondent would not know which of several acts it was required to perform to satisfy the order.

22 If it had been argued that the proper construction of par 1 of the Order required the CFMEU to take such steps as were necessary, or to use its best endeavours, to inform each member to whom the direction had been addressed that the direction to take "strike action" had been withdrawn; or to take all such steps as were necessary, or to use its best endeavours, to ensure that CFMEU members resumed their duties of employment as soon as practicable, the inescapable consequence of such a submission would have been that the terms of the Order were ambiguous and uncertain, and that an allegation that a contempt of the Court had been committed by alleged disobedience of that Order could not be sustained.

23 Although no public announcement was made by the CFMEU that the call to members to take "strike action" had been withdrawn, Lodge Officers at the Queensland mines were informed by the CFMEU at some time between 9.15 am and 10.45 am on 8 February of the terms of the Order and that the Lodges were "directed to comply with the orders". Members of the CFMEU employed at the Queensland mines began returning to work between 10.00 am and 6.00 pm on 8 February. No allegation that a contempt of the Court was committed by disobedience of the Order was made against the CFMEU in respect of the time at which, or manner in which, the CFMEU "ceased strike action" in respect of the Queensland mines.

24 The withdrawal of labour by members of the CFMEU at the New South Wales mines continued throughout 8 February and the alleged failure of the CFMEU to immediately cease "strike action" in respect of the New South Wales mines became the foundation of the contempt charge brought against the CFMEU.

25 In its defence to that charge the CFMEU contended that it had observed the requirement of the Order that it "immediately cease strike action" at the New South Wales mines when, at about 10.00 am on 8 February at a meeting of members, it informed the members employed at those mines that, pursuant to the Order, the CFMEU had withdrawn the call for "strike action" and the authorization of the stoppage of work in which the

members were then engaged. Mr Maher, General President of the Division, addressed the meeting on behalf of the CFMEU and so advised the members. The meeting was addressed in similar terms by another officer of the Executive, Mr Fisher. It did not seem to be in issue that in material respects the acts of Mr Maher were within the mandate of his office, done on behalf of the Executive, and represented the conduct of the CFMEU.

26 On the findings made by her Honour, at some time before the commencement of that meeting, the CFMEU could have published a statement that it had withdrawn the call for, and authorisation of, "strike action". Her Honour stated that Mr Maher had conceded, in effect, that the CFMEU could have brought an end to its "strike action" by about 7.00 am on 8 February. Therefore, the substance of the alleged contempt arising out of disobedience of par 1 of the Order was the failure of the CFMEU to act between 7.00 am and 10. 00 am on 8 February.

27 The grounds of appeal relied on by the CFMEU were first, that her Honour erred in law in construing the Order and in finding the charge of contempt proved beyond reasonable doubt and second, that the hearing miscarried because of circumstances that gave rise to a reasonable apprehension of bias in the conduct of the hearing. We agree with Merkel J, for the reasons stated by him, that the second ground of appeal cannot succeed.

28 Prosecution of a contempt requires more than proof of the technical breach of a court order notwithstanding that the requisite *mens rea* for a criminal contempt may be shown to have accompanied that breach. (See: *Adam Phones Ltd v Goldschmidt* [1999] 4 All ER 486 per Jacob J at 495). It may be assumed that the contempt alleged in this case was a civil contempt notwithstanding the confusion that now attends the distinction between civil and criminal contempt. (See: Lightman QC *A Trade Union in Chains: Scargill Unbound - The Legal Constraints of Receivership and Sequestration* (1987) CLP 25, 27-28). There has been academic commentary on the need to preserve the distinction between civil and criminal contempt, particularly for a contempt based on an injunction issued pursuant to an application made by a party to an industrial dispute. (See: Lord Wedderburn *Contempt Of Court: Vicarious Liability of Companies and Unions* (1992) 21 Ind.L.J. 51, 53-56). Liability for the imposition of a penalty on proof of a civil contempt, and the blurred distinction between civil and criminal contempt, make it appropriate that there be no distinction between the standard

of proof required for the proof of complaints of civil or criminal contempt. Therefore, the standard of proof required is proof beyond reasonable doubt. (See: *Witham v Holloway* (1995) 183 CLR 525; C. O'Regan *Contempt of Court and the Enforcement of Labour Injunctions* (1991) 54 MLR 385, 393-394; *Microsoft Corporation v Marks* (1996) 69 FCR 117).

29 As the usual outcome of successful contempt proceedings, whether classified as civil or criminal, is punishment, they ought be seen as essentially criminal in nature (*Hinch v Attorney-General for the State of Victoria* (1987) 164 CLR 15 at 49), so that correspondingly appropriate safeguards ought apply (*cf. Doyle v The Commonwealth* (1985) 156 CLR 510 at 516), though not necessarily such as would for all procedural and other purposes equate contempt proceedings with the trial of a criminal charge: (*Witham v Holloway* at 534).

30 It has long been accepted that a person should not be punished for contempt unless the specific charge against him or her be distinctly stated and an opportunity of answering it given to that person (*Coward v Stapleton* (1953) 90 CLR 573 at 579-580.) "[T]his principle must be rigorously insisted upon" (*Coward v Stapleton* at 580; *Doyle v The Commonwealth* at 516). It is reflected in 0 40 r 6 and r 8 of the Federal Court Rules which require that, on a proceeding for punishment of an alleged contempt a statement of charge "specifying the contempt of which the accused person is alleged to be guilty, shall be subscribed to, or filed with, the notice of motion or application" and that the "notice of motion or application, the statement of charge, and the affidavits [in support of the application] shall be served personally on the accused person".

31 The requirement that the statement of charge specify the contempt alleged is so as to allow the accused person to know the case he or she has to meet and to defend (*Concrete Constructions Pty Ltd v Plumbers and Gasfitters Employees' Union (No 2)* (1987) 15 FCR 64 at 73; see also: *Cotroni v Quebec Police Commission* (1977) 80 DLR (3rd) 490 at 497 "Precision is necessary if the accused is to be able to defend himself effectively"). The vehicle most commonly used to specify the conduct relied on to support the charge laid is the provision of appropriate particulars in, or annexed to, the statement of charge itself (*Concrete Constructions* at 73-74). If the statement of charge itself does not sufficiently specify the contempt, the affidavit evidence served with the statement cannot be relied upon to remedy

the deficiency (*Harmsworth v Harmsworth* [1987] 1 WLR 1676 at 1683).

32 Unless and until an application is allowed to alter a particularised statement of charge, the accused is entitled to insist that he or she is only required to meet the charge as made. As was observed by Evatt and Deane JJ in *Australian Building Construction Employees' and Builders Labourers' Federation v Minister of State for Industrial Relations* (1982) 43 ALR 189 at 206-207:

> *"The transcript indicates that senior counsel for the appellants made clear that objection was taken to any departure by the respondents from the charge of contempt as particularized in the statement of charge. The question whether the particularized statement of charge was adequate was adverted to by senior counsel for the respondents but no application was made to amend it and it remained unaltered in the form set out above. In these circumstances, the appellants were entitled to conduct their case on the basis that the only charge which they were required to meet was that which had been particularized against them. It is not for an appellate court to speculate whether, if the charge against a particular appellant had, either initially or by amendment, been differently framed or particularized, the evidence adduced would have been the same or the conduct of the particular appellant's case would have been unaltered.*
>
> ...
>
> *The appeal...falls to be determined by reference to the charge, as particularized in the statement of charge, which the...appellant was called upon to meet and to the finding of guilt which his Honour made."*

33 As discussed below, the essence of the case in contempt as presented by BHP Steel as prosecutor of the charge was that the CFMEU had failed to "inform" members employed at the New South Wales mines that the direction given by the CFMEU to members to take "strike action" had been withdrawn and further, that the CFMEU had procured and authorised members to stop performing work at the New South Wales mines in contravention of the terms of the Order.

34 The Statement of Charge set out the orders made by her Honour, albeit surprisingly inaccurately in relation to the prohibitory order (the purposive limitation on the scope of the injunction was simply omitted); particularised the manner in which the CFMEU was notified of the terms of the Order; and specified alleged breaches of the Order and gave particulars.

35 The relevant parts of the Statement of Charge read as follows:

"3. In breach of the Order, from the time of the making of the Order and continuously thereafter until 4pm on 9 February 2000, at the [New South Wales mines] *the* [CFMEU]*:*

(a) continued to take strike action for the purposes of a dispute or disagreement about or concerning negotiations or the outcome of negotiations over export coal prices;

(b) continued its ban upon employees attending for work and performing work in accordance with the applicable awards or certified agreements for the purposes of a dispute or disagreement about or concerning negotiations or the outcome of negotiations over export coal prices;

(c) continued to authorise members of the [CFMEU] *who were employees of* [BHP Steel] *to stop performing work in accordance with the applicable awards or certified agreements for the purposes of a dispute or disagreement about or concerning negotiations or the outcome of negotiations over export coal prices;*

(d) authorised members of the [CFMEU] *who were employees of* [BHP Steel] *to stop performing work in accordance with the applicable awards or certified agreements for the purposes of a dispute or disagreement about or concerning negotiations or the outcome of negotiations over export coal prices;*

(e) directed members of the [CFMEU] *who were employees of* [BHP Steel] *to stop performing work in accordance with the applicable awards or certified agreements for the purposes of a dispute or disagreement about or concerning negotiations or the outcome of negotiations over export coal prices;*

(f) procured members of the [CFMEU] *who were employees* of [BHP Steel] *to stop performing work in accordance with the applicable awards or certified agreements for the purposes of a dispute or disagreement about or concerning negotiations or the outcome of negotiations over export coal prices.*

The affidavits relied upon by the applicants in relation to these allegations are identified in the particulars below."

36 It is noteworthy that the allegations of the Statement of Charge relate to her Honour's Order globally. They do not specify expressly in each instance whether the alleged breach is of one or other, or both, of the mandatory and prohibitory orders contained in the Order. The

apparent premise of the allegations is that any continuation of the strike or bans, and any further authorising of members of the CFMEU to stop performing work, would breach both the mandatory cessation order and the prohibitory restraining order. This said, those particulars that relate to omissions to act relate more naturally in the first instance to the mandatory order, while those alleging subsequent positive conduct more naturally relate to the prohibitory order.

37 The particulars apparently relevant to subpars 3(a), (b) and (c) of the Statement of Charge, each of which was followed by a sequence of references to affidavits, read as follows:

> *"The employees of* [BHP Steel] *listed below...failed to return to work on their appointed shifts...because* [the CFMEU]:
>
> *(i)* *failed to inform such employees that the strike which it had required to begin at* [BHP Steel's New South Wales mines] *for 24 hours from midnight...on 7 February 2000 had ceased;*
>
> ...
>
> *(ii)* *failed, between the time the said Order was made and 4pm on 9 February 2000 to inform such employees that they should return to their duties;*
>
> ...
>
> *(iii)* *failed to cancel a meeting that had been called for 10 am...on 8 February 2000 at the Wonoona* [sic] *Bulli RSL Club, for the purposes of the strike;..."*

38 Where those particulars refer to "employees" it may be taken that they were intended to refer to members and where particular (i) recites that the CFMEU "failed to inform...employees that the strike...had ceased" it may be assumed that the particular was directed to an alleged failure by the CFMEU to take steps as soon as reasonably possible in the circumstances to withdraw the call to members to stop work, and not to a failure by the CFMEU to "ensure" that each member was so informed. If it were the latter then, as discussed earlier, the terms of the Order would be ambiguous as to the act the CFMEU had to carry out to comply with the Order and a complaint of contempt would not lie.

39 Particular (i) could suggest any one of three possibilities: (a) that no notification of

withdrawal of the direction to take "strike action" was made at all; (b) that any notification given was colourable; or (c) that whatever notification was given, it was, in light of the terms of the Order, a failure to act to withdraw the call for "strike action" as soon as reasonably possible in the circumstances. In our view, it is the third of those possibilities that expressed the purpose of the particular in the context of the Statement of Charge. The CFMEU was put on notice by the particular that the actions taken by it to immediately cease "strike action" after notice of the terms of the Order had been received by a person or persons having authority to act, were in issue and that central to that was whether it had acted as soon as reasonably possible in the circumstances to withdraw or cancel the direction to stop work.

40 With regard to particular (ii) the failure to act alleged therein does not appear to describe a failure to comply with the terms of par 1 of the Order. Insofar as par 1 of the Order directed the CFMEU to act, it did so by directing the CFMEU to cease "strike action". The act to be carried out by the CFMEU to comply with that Order has already been discussed. The Order did not direct the CFMEU to "inform" members that "they should return to their duties".

41 Particular (iii) recites a further circumstance of failing to act, namely, "failing to cancel a meeting" as an alleged breach of the Order. However, in its terms, par 1 of the Order did not direct the CFMEU to do the act the particular alleges that the CFMEU failed to do. The particular fails to identify a breach of the Order.

42 The remaining particulars appear to purport to be relevant to breaches of par 2 of the Order alleged in subpars 3(d)-(f) of the Statement of Charge. Those particulars read as follows*:*

> *"(iv) by its authorised officer, one Tony Maher, at about 8.30 am...on 8 February 2000 on ABC radio, represented that the strike was continuing in order to 'drive home a message to BHP';*
>
> …
>
> *(v) organised and conducted a union meeting at 10 am…on 8 February 2000 at the Wonoona* [sic] *Bulli RSL Club, at which a resolution was passed to extend strike action for a further 24 hours from midnight...on 8 February 2000;*
>
> ...

> *(vi)* *at about 10 am ... on 8 February 2000 at the Wonoona* [sic] *Bulli RSL Club, passed a resolution to extend strike action for a further 24 hours from midnight...on 8 February 2000.*
> *..."*

43 Particular (iv) on its face was not capable of supporting the contempt alleged in either subpar 3(d), (e) or (f) of the Statement of Charge. Her Honour did not find that a contempt as set out in that particular had been committed.

44 In some respects, as discussed later in these reasons, particulars (v) and (vi) became the nub of the case argued before her Honour.

45 Particular (v), though not saying so in express terms, necessarily implies both that the CFMEU was itself responsible for the resolution passed (whether because it authorised or procured it) and that the strike action so extended was for the purpose of any dispute or disagreement about, or concerning, negotiations or the outcome of negotiations, over coal export prices. So understood, independently it could support a finding of contempt.

46 Particular (vi) is a direct allegation that the CFMEU passed the resolution and probably adds little to particular (v).

47 In expressing the foregoing views regard has been given only to the terms of the particulars themselves. Particular (i) does incorporate by reference the employees and their hours of employment referred to in a large number of affidavits filed in support of BHP Steel's notice of motion and, to that extent, those affidavits can properly be said to be part of the Statement of Charge. But not otherwise. An accused person is entitled to be informed from within the four corners of the Statement of Charge what is the case to be met. A specific charge must be stated distinctly. And the accused cannot be expected to cull from numerous affidavits the actual case against him which has purportedly been particularised in the Statement of Charge (*cf. Harmsworth v Harmsworth* at 1683). In any event the expedient of referring to affidavit material after each particular was a practical response to a suggestion made by her Honour at the 27 April 2000 directions hearing that BHP Steel identify which affidavits were relied upon in relation to which issue. In the language of 0 40 r 7, the affidavits so referred to embodied the evidence in support of the charge as it was

particularised.

48 The comment to be made on the charges as particularised is that, in its Defence to the Statement of Charge, the CFMEU denied par 3 in its entirety. It likewise took the position in submissions filed prior to the hearing before her Honour that it was requiring BHP Steel to adhere to the charges as they had been particularised. No later amendment having been made to them, the CFMEU was entitled to insist both at trial and on this appeal that its conduct be judged by reference to the charges as particularised.

49 We turn now to her Honour's findings as they bear on the charges as particularised. First, compliance with the terms of the mandatory order presupposed that an officer or organ of the CFMEU having authority in the circumstances to take the action required, was aware of the terms of the Order. For this reason, as her Honour indicated:

> *"Critical issues in the proceedings are the extent of Mr Maher's knowledge and that of other members of the Executive, as to the existence of the Order and what it required, and when they received that knowledge. The issues arise because members of the CFMEU in the New South Wales mines referred to did not immediately return to work."*

50 Her Honour found (i) that Mr Maher was told of the Order at about 10.50 pm on 7 February as a result of a brief mobile phone call from Mr Humphreys, BHP Steel's then solicitor; (ii) that if Mr Maher remained unfamiliar with the terms of the Order, these were discussed with him by Mr Everill, the Lodge President of the Appin mine, in a phone call made by the latter to him shortly after 5.00 am on 8 February; (iii) that Mr Fisher, an office-bearer of the Central Executive and District President for the South-Western District of New South Wales had also been advised of the Order by Mr Everill; (iv) that Mr Fisher telephoned Mr Maher at 6.48 am on 8 February but "[n]o action was taken by either of them to bring the strike to an end"; and (v) that from about 7.00 am Mr Fisher and Mr Maher could have taken steps to bring the strike to an end, "as Mr Maher effectively conceded in his evidence". These findings resulted in a sequence of adverse credibility findings being made against Mr Maher whose own evidence was that he only heard of the injunction some time after 8.30 am on 8 February. They also required the drawing of several crucial inferences particularly in relation to the states of knowledge and the conduct of Mr Everill and Mr Fisher, neither of whom gave evidence. These inferences were clearly open to her Honour in light of what had

been proved about telephone communications between CFMEU and Lodge Officials and the service of the Order on officials, and in the absence of explanation or contradiction.

51 In relation, then, to charges 3(a), (b) and (c) of the Statement of Charge as particularised in particular (i), the findings so made justified a finding that the breaches as charged had been made out. And so her Honour found:

> *"Mr Maher was told about the Order by Mr Humphreys. He was told that an injunction had been obtained against the Union relating to the price dispute. Given Mr Maher's experience he would have understood that there had been an Order made by the Court prohibiting the strike action. It is not necessary that he be shown to be aware of its full terms:* Sun Newspapers Pty Ltd v Brisbane TV Ltd *(1989) 92 ALR 535, 538. The CFMEU had not at this point been personally served and it was not served until the following morning, but in these proceedings fines are sought and the embargo of 0 37 r 2(1) does not apply:* Windsurfing International Inc v Sailboards Australia Pty Ltd *(1986) 19 FCR 110, 113. In any event that rule contains an exception, in the case of notification by other means, such as is recognised by the common law: r 2(5) (and see* Windsurfing International Inc v Sailboards Australia Pty *Ltd (1986) 19 FCR 110). It is not necessary to determine whether other members of the Executive were aware. It was Mr Maher's obligation, on behalf of the Union to notify anyone necessary to effect an end to the strike. It is likely that he did so at the conference dinner and that others were then informed. If Mr Fisher was not told earlier, Mr Everill almost certainly would have told him when he spoke to him at 6.48 am. Even at this time* ***he and Mr Maher could have taken steps to bring the strike to an end,*** *as Mr Maher effectively conceded in his evidence.*
>
> *Lodge Officials and members of the Union were waiting for advice from the Executive. Without it they would not act upon BHP Steel's advices about the Order. It was not suggested that there was no action open to the Executive or Mr Maher to put matters in train.* ***Notification was clearly possible.*** *One may observe how promptly the strike had been notified the day before."* (Emphasis added.)

52 Notwithstanding the foregoing comments on the findings made apparently with reference to particular (i), reading her Honour's reasons as a whole, the conclusion that the CFMEU committed a contempt of the Court by breaching the Order also rested on findings purportedly made with regard to particulars (v) and (vi) based on her Honour's perception of the conduct of the CFMEU at, and the outcome of, the meeting of members held on 8 February addressed by Mr Maher and Mr Fisher. In particular considerable weight seems to have been placed by her Honour on the failure of the members of the CFMEU employed at the New South Wales mines to return to work after that meeting concluded. It was implicit in

the case presented to her Honour that if the members had resumed employment after the meeting concluded, no distinction would have been drawn between the acts done by the CFMEU to comply with the Order by withdrawing the direction to members to take "strike action" in Queensland and in New South Wales, and the allegation that the CFMEU had committed a contempt of the Court would not have arisen. Members employed by BHP Steel at the Queensland mines commenced "strike action" on 7 February at least four hours before the members employed at the New South Wales mines. A return to work by members in New South Wales after conclusion of the meeting would have been, to a large extent, synchronous with the return to work by members at the Queensland mines which, as noted earlier, took place between 10.00 am and 6.00 pm on 8 February.

53 Notwithstanding the foregoing, it is apparent that her Honour was satisfied that the failure to act between 7.00 am and 10.00 am on 8 February in respect of the New South Wales mines amounted to disobedience by the CFMEU of par 1 of the Order in a degree that constituted contempt of the Court. As is discussed below, her Honour's assessment of the seriousness of the contempt was affected by her view of the conduct of the CFMEU at the meeting. However, the essence of the finding of contempt remained the failure to act between 7.00 am and 10.00 am to withdraw the direction to members to take "strike action" at the New South Wales mines.

54 Mr Maher's evidence in respect of the meeting was set out in an affidavit, the relevant part of which read as follows:

> *"45. Prior to the meeting I spoke to some CFMEU rank and file members. Complaints were made to me by members about the fact that process servers had knocked on their doors in the middle of the night to serve court documents, waking family members. Complaints were also made to me that members were told that they would lose their houses and other possessions if they did not obey the Court orders. It appeared to me from these comments that many of the members were in an angry mood.*
>
> *46. The meeting commenced shortly after 10am. I observed that some members were drinking alcohol at the meeting.*
>
> *47. At the commencement of the meeting I gave a report to the members. I spoke about recent developments concerning BHP. The main issues raised were the Log of Claims served by BHP on the CFMEU, the Pilbarra* [sic] *dispute, and coal prices. A national resolution was put*

to the meeting and passed by the members. A copy of that resolution is annexed ...

48. *I then spoke about the stoppage and about the Federal Court proceedings. I said words to the effect of:*

> Our action has brought about a legalistic response from the Company and now we've got a Federal Court injunction. I haven't seen the terms of the injunction but from what I have been told we have to return to work immediately. The Executive therefore directs you to return to work.

49. *Mr Fisher then addressed the meeting. Mr Fisher said words to the following effect:*

> Our position is that you go back to work.

50. *At the end of the reports by myself and Mr Fisher the meeting was thrown open for questions and comment from the floor. At this point a number of members spoke from the floor in an angry manner about the actions of BHP in sending process servers in the middle of the night to serve documents, and the effect that this had had on their families. Others objected to receiving telephone calls in the middle of the night. Some members also raised the fact that they had been threatened with loss of their houses and other possessions if they did not return to work.*

51. *During this discussion a resolution was moved from the floor. The resolution called for an extension of the stoppage for a further 24 hours in protest at BHP's harassment of employees.*

52. *In response to this resolution I said words to the following effect to the meeting:*

> You can't extend the stoppage because its *[sic]* a National stoppage called by the Executive. The Executive has now said that it should be ended immediately. Any further stoppage is not supported by the Executive.

53. *I recall that Mr Fisher made a similar comment to the meeting.*

54. *Another resolution was then moved from the floor which called for a further 24 hour stoppage. Annexed...is an extract from the Appin Lodge Union Book which records the resolution. This record accords with my recollection of the resolution. The resolution was passed on the voices. I did not speak further in the debate because I had already made clear the Executive's position that a further stoppage was not supported.*

> *55. The meeting ended at about ll.30 am and the members dispersed. It was apparent to me from the passing of the resolution moved from the floor that the members did not intend to return to work prior to the end of the 24 hours stoppage, notwithstanding the Executive direction. I was of the view that there was no further action which could effectively be taken by me to persuade the members to return to work prior to the end of the 24 hour stoppage. I did not believe that the members, having apparently rejected one direction by the Executive, would be willing to accept a further direction. I observed the latter part of the meeting to be dominated by expressions of anger from members at the perceived harassment by BHP of union members and officials the previous night."*

55 The cross-examination of Mr Maher on the foregoing evidence did not challenge his statement that members who assembled at the meeting were "very angry about [BHP Steel's] actions overnight". Nor was there any challenge to Mr Maher's account of the statements made by members at the meeting in support of the motion put to the meeting by members that there be a stoppage of work to protest at the perceived harassment and intimidation by BHP Steel of the officials elected by those members to represent them at the mines.

56 Her Honour did not reject Mr Maher's evidence. But in her reasons her Honour set out the following conclusions in respect of the involvement of the CFMEU in the meeting:

> *"Mr Maher's reference to the Court Order could not have impressed upon the members the Union's unqualified obligation to act in compliance with it and at once. After inflaming his audience he spoke of the Order as a 'legalistic response' which is far from explaining its seriousness. Rather than explaining the obligation to comply with an Order made by a Court, Mr Maher connected it with the company which was to be seen as callously inflicting harm on employees. In that context, the Order was presented as another such action. To say that Mr Maher was paying mere lip service to the CFMEU's obligation to bring the strike to an end may be something of an understatement.*
>
> …
>
> *There is no doubt, in my view, that the CFMEU's conduct at the meeting was designed to, and had the effect of, encouraging the employees not to cease the strike action and to take it further. Mr Maher's words were an active encouragement to continue an expression of anger against the company. One might expect rank and file members to have been seeking guidance from the Executive and the Branch. Their statements before the meeting to persons notifying them of the Order bear this out. It is not difficult to imagine that the address by Mr Maher to the meeting did nothing to lessen the anger which he was determined to keep alive. He took no serious steps to dissuade them from*

> *further strike action. If he did speak some words of non-support they were very few. They could hardly have been thought sufficient for that purpose. The members could not have been left in any doubt about Mr Maher's and the CFMEU's lack of sincerity in not supporting the strike. They would have understood they were being encouraged to do so.*
>
> *…*
>
> *The decision to continue with the meeting and the conduct of Mr Maher at it is evidence of a determination, on the part of the CFMEU, to continue the strike action.*
>
> *I am satisfied that the CFMEU through Mr Maher, acted at the meeting in such a way as to ensure a continuation of strike action."*

57 The passages in her Honour's reasons recited above suggest that her Honour may have misunderstood the limitations of the evidence presented to the Court as to the manner in which the meeting was conducted and further that her Honour may have confused the terms of the Order that the CFMEU do a specific act, with the outcome BHP Steel sought to achieve when it obtained the Order. The meeting had been convened for members employed at the New South Wales mines to receive a report from the CFMEU on a number of matters that were separate from the dispute to which the injunctions were directed. There was a pre-existing commitment by the CFMEU to report to members on those matters and the opportunity to conduct the meeting arose when all the members became available to attend such a meeting by reason of the "strike" called by the CFMEU for 8 February. Accordingly, the meeting had been convened when the direction to "strike" was given.

58 The question before her Honour was not whether anything had been done by the CFMEU to lessen the anger of members attending that meeting; nor whether any serious steps had been taken by the CFMEU to dissuade members from "further strike action". Under par 1 of the Order the CFMEU was required to act as directed by that paragraph and, under par 2 of the Order, the CFMEU was restrained by the Court from doing an act specified therein. Therefore, the question whether the CFMEU had committed a contempt of the Court could only arise if the CFMEU failed to act as directed or if it did an act the injunction prohibited it from doing.

59 The CFMEU is an organisation registered under the Act and, therefore, an entity separate from its members, whether or not the members act singularly or in combination. No

employee, being a member of the CFMEU who had withdrawn his or her labour in response to the CFMEU direction to do so, had been directed by the Court to return to work. Therefore, putting to one side questions of accessorial liability and the obligations of third parties - issues not raised in this case - an employee would not disobey the Order by failing to return to work and would not become liable to the imposition of a fine by the Court for a contempt of the Court. (See *Borrie and Lowe* at p. 403). It was not submitted that the CFMEU could be held liable in contempt vicariously if members of the CFMEU who had engaged in "strike action" for a proscribed purpose refused to cease that action.

60 No disobedience of the Order and contempt of the Court by the CFMEU would arise if the members attending the meeting decided to withdraw their labour in protest at conduct on the part of their employer that the employees perceived to be intimidatory. Her Honour seems to have regarded the resolution by the members that they withdraw their labour for 24 hours from 8 February as "a continuation of the strike action" and that such action by the members had been procured and authorised by the CFMEU in breach of the Order.

61 Clearly that could not be so unless a finding were made, on appropriate evidence, that the advice Mr Maher gave to the members at the meeting, that the CFMEU had withdrawn the direction to engage in "strike action" and that they were to return to work, and the resolution to stop work carried by the members at the meeting, was, in each case, a sham and that the true will of the members at the meeting, procured by acts of officers of the CFMEU, was that "strike action...for the purposes of any dispute or disagreement about, or concerning the negotiation or the outcome of negotiations over export coal prices" be continued.

62 The view her Honour took of what Mr Maher said suggests that she found that his action in directing CFMEU members to return to work was colourable. But if such was the case, then it would not have been open to her Honour to find that the continuation of the strike action was referable to the conduct specified in any particular. If the CFMEU was to be charged with continuing the strike action by acting colourably when notifying withdrawal of the direction to stop work, that allegation ought, as a matter of basic fairness, to have been brought home explicitly to the CFMEU in the Statement of Charge. It was not.

63 Significantly in this regard, while Mr Maher was questioned by her Honour as to why he had not advised members that the CFMEU had withdrawn its call for "strike action" until

after he had spoken of the bad faith of BHP Steel, the closest cross-examination of Mr Maher came to suggesting that the direction to return to work was colourable, was a suggestion put to him that he had later endorsed what the members had done in voting to engage in another "strike" and a question asked as to whether he had a smile on his face when he explained the position of the CFMEU. Mr Maher denied both matters. The prosecutor adduced no evidence to establish such a case. In the course of the cross-examination of Mr Maher, her Honour alluded to some of the matters the prosecutor would have had to prove if it had sought to present that case:

> *"Perhaps a lot of it depends upon how it's said and the tone you take and all of those matters which are a bit hard to assess now, of course."*

64 Irrespective of the absence of an appropriate particular, the evidence presented in respect of the conduct of the meeting was not capable of supporting a finding that the CFMEU acted colourably. Although her Honour found Mr Maher to be an unsatisfactory witness in his claims that he was unaware of the Order until the morning of 8 February and that he had not discussed the terms of the Order with other CFMEU officers, that alone did not permit a finding to be made beyond reasonable doubt as to the conduct of the CFMEU at the meeting. There had to be some evidence on that issue.

65 The only evidence in respect of the conduct of the meeting and of the attitude of the members was that provided by Mr Maher. Her Honour appeared to accept that the members were very angry before the meeting commenced but attributed that anger to the dissatisfaction of the members with the efforts BHP had made to maintain the price paid for the coal it exported. But there was unchallenged evidence that the members were angry because BHP Steel had directed copies of the Order to be served personally in the early hours of the morning of 8 February on members who were Lodge Officers, and that members understood that those officers had been told that if "they did not obey the Court orders" they would lose their houses and other possessions.

66 Her Honour appeared to form the view that occurrence of those events in the course of the preceding night would not have been sufficient to move the members attending the meeting to anger. Her Honour referred to the absence of any statement in depositions made by BHP Steel officers that members had expressed any anger when they had been contacted

by those officers by telephone at their homes late at night on 7 February and informed that a court order had been made, "ordering all striking workers back to work immediately".

67 Her Honour accepted that misrepresentations as to the requirements of the Order were made by officers of BHP Steel in those telephone calls, but considered that not to be relevant to the issue of the attitude of the members at the meeting, partly, it seems, because of what her Honour perceived to be a lack of reaction by members at the time those misrepresentations were made.

68 It appears to have been overlooked that it was likely that, upon members gathering for the meeting and discussing between themselves the events of the preceding night, they would have become aware that the terms of the Order had been misrepresented to them, and that such events may have been perceived as intimidatory action by the employer, giving them cause for anger. In addition, due regard had to be given to the fact that a number of the members called by officers of BHP Steel were said to have "hung up" on the caller after a brief conversation. In any event, it was likely that the real cause for anger was the decision of BHP Steel to effect personal service of the Order upon Lodge Officers late at night. The evidence before her Honour showed that Lodge Officers had been served personally at their residences between 2.50 am and 4.42 am on 8 February.

69 Her Honour did not deal with the inference presented by the foregoing material that if the members had not been angry beforehand, they became angry when they assembled for the meeting and learned that their local representatives had been subjected to personal service of a copy of the Order in the early hours of the morning and had been told that their homes would be in jeopardy if they did not obey the Order.

70 The resolution of the members to stop work, expressed to be because of the harassment and intimidation of "**our** elected union officials both at District and Lodge level" (emphasis added), could not support a conclusion that only Lodge and District officials, and not other members, were angry about the conduct of BHP Steel on the preceding evening.

71 The will of the meeting, as recorded in the resolution, was expressed in clear terms. Even if there had been evidence that Mr Maher encouraged the members to take the action so resolved, the genuineness of the resolution remained to be considered. The resolution could

not be regarded as the "continuation of strike action" by the CFMEU, nor the procuration or authorization thereof by the CFMEU, without determining whether the members had resolved to withdraw their labour for a purpose proscribed by the Order.

72 In the absence of any evidence to contradict the material adduced or to provide a foundation for a conclusion that the intent and purpose of the meeting was other than that recorded in the resolution, the evidence that the members had so resolved and the reasons expressed in the resolution for doing so, had to be given due weight in determining whether a contrary proposition had been proved beyond reasonable doubt.

73 Proof beyond reasonable doubt is not satisfied by presenting a court with a choice between competing inferences. As Lord Denning MR said:

> *"A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt. It is not proved by showing that, when the man was asked about it, he told lies. There must be some further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him. But there must be some other evidence. ...*
>
> [Where] *two possibilities are equally likely…*[it] *is not possible to say which of them is correct. …That would be conjecture rather than inference - surmise rather than proof. Where there are two equally consistent possibilities open to the court, it is not right to hold that the offence is proved beyond reasonable doubt."* (In re Bramblevale Ltd [1970] 1 Ch 128 at 137).

74 On the evidence, it was not open to her Honour to conclude beyond reasonable doubt that "the issue of coal prices" between the CFMEU and BHP was part of the purpose of the resolution of the members at the meeting that there be a 24 hour stoppage to protest at the conduct of BHP Steel, nor could it be concluded that the CFMEU had procured or authorised such action by the members for the purpose of the dispute over coal prices.

75 The resolution, and the intent and purpose of the members expressed therein, was consistent with the evidence adduced. There was no evidence to permit a conclusion that the resolution was a pretence, the real purpose of the meeting as procured or authorised by the CFMEU being to continue "strike action" over the issue of the price accepted by BHP for exported coal. The members were angry and resolved to withdraw their labour to express to

BHP Steel that the events that had caused that anger would not be tolerated then, or in future, by the "rank and file". The resolution stood on its own as an expression of the will of the members as to the manner in which that issue would be dealt with by them.

76 Her Honour seems to have taken the failure of the members to report for work at the New South Wales mines after the meeting ended, as evidence that the meeting must have been conducted by Mr Maher to procure the members to agree to continue to withdraw their labour for the purpose of the dispute over coal prices. As indicated above, if the members were aggrieved by the conduct of BHP Steel in directing copies of the Order to be served at the homes of Lodge Officers in the early hours of the morning, it was not inherently improbable that the members would decide on fresh action against BHP Steel by not returning to work after the meeting and by resolving to conduct a further 24 hour stoppage. If a finding were to be made that the CFMEU, through Mr Maher, procured or authorised continuation of a stoppage of work for the purposes of the dispute between the CFMEU and BHP over "export coal prices", there had to be evidence of acts of Mr Maher, and of the members, in the course of the meeting that showed, beyond reasonable doubt, that Mr Maher and the members had a joint purpose, namely, to promote the position of the CFMEU in a dispute with BHP about "export coal prices", that purpose to be effected by the members refusing to return to work, and by resolving to stop work for a further period of 24 hours. There was no evidence to that effect and no foundation of fact was provided from which such an inference could be drawn.

77 On the evidence adduced it could not have been concluded beyond reasonable doubt that, in breach of the Order, the CFMEU engaged in procuring or authorising members to stop work for the purposes of a dispute concerning the negotiation of "export coal prices".

78 It follows that the appeal by the CFMEU against the declaration made by her Honour succeeds to the extent that the declaration that the CFMEU committed a contempt of Court by procuring or authorising its members to take further strike action is set aside and the terms of the declaration varied accordingly. Otherwise, the appeal is dismissed.

79 Her Honour's assessment of the appropriate fine to be imposed, and the order made that the CFMEU pay BHP Steel's costs on an indemnity basis, depended upon findings made by her Honour that are to be set aside. Therefore, the appeal against the orders made by

her Honour for the imposition of a fine and for the payment of costs must be allowed, the orders set aside and the matter remitted to her Honour for re-determination of those issues in accordance with these reasons.

I certify that the preceding seventy-nine (79) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Lee & Finn JJ.

Associate:

Dated: 12 December 2001

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY **Q 1 OF 2001**
Q 68 OF 2001

BETWEEN:	**CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION** **APPELLANT**
AND:	**BHP STEEL (AIS) PTY LIMITED ACN 000 019 625** **RESPONDENT**
JUDGE:	**LEE, FINN AND MERKEL J**
DATE:	**12 DECEMBER 2001**
PLACE:	**PERTH (HEARD IN BRISBANE)**

REASONS FOR JUDGMENT

MERKEL J:

Introduction

80 The appellant ("the CFMEU") has appealed against orders made by the primary judge that:

- it be declared that the CFMEU

> *"…is guilty of contempt of this Court by its conduct in breaching the Order made against it on 7 February 2000 by continuing strike action and authorising its members to stop performing work and procuring and authorising its members to take further strike action."*

- a fine of $200,000 be imposed on the CFMEU for its contempt;
- the CFMEU pay the costs of the respondent ("BHP Steel") on an indemnity basis.

81 The CFMEU has appealed against conviction, penalty and the costs order. It has relied upon numerous grounds in its appeal and has made extensive written and oral submissions concerning those grounds. I propose to adopt an approach similar to that adopted in *Amadio v Henderson* (1998) 81 FCR 149 at 175 where a Full Court confined its reasons to the issues raised by submissions of the appellant that were both significant and consequential as to do otherwise would have made the reasons for judgment unnecessarily

long.

Background

82 BHP Steel employed members of the CFMEU in a number of coal mines in certain districts in Queensland and New South Wales. On 7 February 2000 the CFMEU became aware that BHP was about to agree to a reduction in the price of export coal thereby endangering the employment of its members. At about 3.00 pm the Central Executive of the CFMEU called a strike for twenty-four hours from the commencement of the night shift, which was 7.00 pm for employees at the Queensland mines and 11.00 pm for employees at the New South Wales mines.

83 In the meantime BHP Steel, anticipating the strike action, obtained orders from the Australian Industrial Relations Commission under s 127(1) of the *Workplace Relations Act 1996* (Cth) ("the Act") requiring the CFMEU and other unions not to take or continue the strike action. The Commission's order was served on, and its content notified to, the CFMEU but no attempt was made to comply with it.

84 At about 9.50 pm the primary judge granted injunctions pursuant to s 127(6) of the Act which, relevantly, ordered, inter alia, that the CFMEU, its servants, agents or howsoever:

> *"1. ...*
>
> *immediately cease ...with respect to the First and Second Applicants' coal mines in Queensland and New South Wales listed in Annexure 'A' hereto...*
>
> *...*
>
> *(a) strike action;*
>
> *(b) any ban on employees attending for and performing work in accordance with the applicable awards or certified agreements noted in Schedule 'B' hereto; or*
>
> *(c) directing, procuring or authorising members of the Respondents or other employees of the Applicants to stop performing work in accordance with the applicable awards or certified agreements listed in Schedule 'B' hereto;*
>
> *for the purposes of any dispute or disagreement about or concerning negotiations or the outcome of negotiations over export coal prices, until 4 pm Wednesday 9 February 2000 or further earlier order.*

> 2. *...be restrained from engaging in the following with respect to the Applicants' coal mines listed in Annexure 'A' hereto ...*
>
> *(a) taking or continuing strike action;*
>
> *(b) commencing or continuing any ban on employees attending for and performing work in accordance with the applicable awards or certified agreements listed in Schedule 'B' hereto;*
>
> *(c) directing, procuring, advising or authorising members of the Respondents or other employees of the Applicants to stop performing work in accordance with the applicable awards or certified agreements listed in Schedule 'B' hereto;*
>
> *for the purposes of any dispute or disagreement about or concerning negotiations or the outcome of negotiations over export coal prices, until 4 pm Wednesday 9 February 2000 or further earlier order.'*

85 Annexure "A" to the order referred, inter alia, to BHP Steel's Tower, Elouera, West Cliff, Appin and Cordeaux Collieries in New South Wales ("BHP Steel's New South Wales mines").

86 The order provided that, without limiting other means of service, it would be sufficient service of the order if:

> *"(a) a copy is served personally or by facsimile on the following:*
>
> *(i) National or State Secretary or relevant Lodge President or Secretary of the Construction, Forestry, Mining and Energy Union;*
>
> ...
>
> *(b) a copy of the Order is left at the National or State office of the Construction, Forestry, Mining and Energy Union,..."*

87 The CFMEU admitted that the order was served in accordance with its terms and, subject to certain exceptions, its content was notified substantially as alleged by BHP Steel in its Statement of Charge.

88 The strike at BHP Steel's Queensland mines ceased and the conduct of union officials in relation to that area was not the subject of contempt charges. The strike at BHP Steel's New South Wales mines did not cease and the conduct of union officials in relation to the strike at those mines became the subject of contempt charges against the CFMEU. It was

common ground that, in order to establish the contempt with which the CFMEU was charged, BHP Steel was required to prove beyond reasonable doubt (*Witham v Holloway* (1995) 183 CLR 525 at 534) that the CFMEU had deliberately breached the order of the primary judge in the sense that the disobedience is not "casual, accidental or unintentional" (*AMIEU v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 113). The prosecutor's onus does not apply to every evidentiary issue which arises in the case, but "only to the ultimate issues of the presence of the elements of the crime charged" (*R v Booth* [1983] 1 VR 39 at 47 per Lush J).

89 At the trial of the contempt proceeding the parties were in dispute as to the knowledge of members of the Central Executive of the CFMEU of the existence and content of the order of the primary judge, and when they received that knowledge. In particular, they were in dispute as to the role of Mr Maher, the General President of the Central Executive of the CFMEU, who was the only witness called by the CFMEU in support of its defence that it did not engage in conduct that constituted a wilful breach of the Court order.

90 Mr Maher said that he only became aware of the order at about 9.30 am on 8 February. He claimed that he decided that the appropriate way to comply with the order was to inform the members employed by BHP Steel at its New South Wales mines of the cessation of the strike at a "report back" meeting of members that had, prior to the making of the order, been scheduled for 10.00 am on 8 February at the Woonona-Bulli RSL Club. He said that the instruction given by him to members at the meeting that they were required to return to work was, in his view, the most effective and practicable way of achieving compliance with the order. Mr Maher claimed that, notwithstanding his instruction, the workers stayed out on strike in protest against the conduct of BHP Steel in intimidating and harassing members when it informed them of the orders made by the primary judge.

91 The primary judge described the issues arising in relation to Mr Maher's conduct as follows:

> *"The issues arise because members of the CFMEU in the New South Wales mines referred to did not immediately return to work. The requirements of the Order were first referred by Mr Maher to members of the Lodges in question at a meeting which commenced at about 10.00 am on the morning of 8 February 2000. The CFMEU, through Mr Maher, says that by the time those officers of the Union able to direct industrial action had heard of the Order,*

> *and what it required, it was too late to call off the meeting, which had been organised the day before. It was considered practicable to use the opportunity presented by the meeting to advise members of the terms of the Court Order and give them a direction to stop the strike, but that in the climate prevailing, fuelled by BHP Steel's conduct the previous evening in connection with the notification of the Order, that was not accepted by the meeting which instead resolved to have another strike. BHP Steel submits that the CFMEU should not be believed as to any of these explanations and that its disobedience to the Order was the result of a calculated decision. It further submits that it was also incumbent upon union officials at the District Branch level to take action."*

92 BHP Steel adduced evidence of numerous phone calls late in the evening of 7 February and in the early hours of 8 February between senior officers in the Mining and Energy division of the CFMEU, including Mr Maher, from which the primary judge inferred that Mr Maher, as well as other senior officers of the CFMEU, were aware of the Court order prior to 7.00 am on 8 February. BHP Steel also adduced evidence from its solicitor, Mr Humphreys, that, late in the evening of 7 February in a telephone conversation with Mr Maher, who was at a conference dinner in Canberra, he informed Mr Maher of the order. Mr Maher admitted having the conversation but claimed that his mobile phone had cut out prior to him being informed of the order.

93 It was for the primary judge, as the arbiter of fact, to accept or reject Mr Maher's evidence. Her Honour did not regard Mr Maher as a witness of credit and did not accept his version of the relevant events. Her Honour held that it had been established beyond reasonable doubt that the contempt with which the CFMEU had been charged had been made out.

94 The factual findings upon which her Honour acted may be summarised as follows. Mr Maher knew of the order after BHP Steel's solicitor had informed him of it shortly before 11.00 pm on 7 February but, in any event, knew of it by about 5.00 am on 8 February at the latest, after conversations with other CFMEU officials. Mr Fisher, another member of the Central Executive, was aware of the order by 6.48 am at the latest, after he had spoken to Mr Everill, a Union official who was Lodge President for one of the New South Wales mines. Notwithstanding those notifications Mr Maher and Mr Fisher took no immediate action to bring the strike to an end.

95 On 8 February, in an 8.30 am radio interview concerning the strike, Mr Maher made

no mention of the Court order or of any requirement that the strike must cease.

96 At the commencement of the meeting of members at 10.00 am on 8 February Mr Maher did not refer to the Court order nor did he take any action to call off the strike. Mr Fisher was also at the meeting but her Honour said it appears that Mr Fisher "did very little to bring the strike to an end and to ensure the Order was taken seriously".

97 The primary judge was scathing in her assessment of Mr Maher's conduct of the meeting. In substance, her Honour found that he manipulated the meeting by raising the level of anger towards and resentment against BHP Steel to put in the minds of the employees the prospect of further strike action and then driving the meeting "in the opposite direction from one which would result in the end of strike action". The primary judge found:

> *"70. Mr Maher's reference to the Court Order could not have impressed upon the members the Union's unqualified obligation to act in compliance with it and at once. After inflaming his audience he spoke of the Order as a 'legalistic response' which is far from explaining its seriousness. Rather than explaining the obligation to comply with an Order made by a Court, Mr Maher connected it with the company which was to be seen as callously inflicting harm on employees. In that context, the Order was presented as another such action. To say that Mr Maher was paying mere lip service to the CFMEU's obligation to bring the strike to an end may be something of an understatement.*
>
> *71. In my view, it is usually necessary in proceedings for contempt to consider whether a person or corporate body alleged to have wilfully breached an Order had a motive to do so. One would not expect deliberate breaches of Court Orders, not the least because of the consequences which may follow. In this case, these are strong reasons why Mr Maher and the CFMEU may have decided not to obey the Order. The strike was an important one, as Mr Maher reiterated at several points. It involved a matter of great principle. That was the reason for non-compliance with the Commission's Order. Whilst I accept that the CFMEU and Mr Maher would not take the same view towards compliance with an Order of the Court, because of the different and serious consequences which might follow, it is a strong indicator of the level of importance which was placed on this industrial action. There was also a real problem in calling off the meeting. There was a need to have the meeting, Mr Maher said, although clearly it was not to ensure compliance with the Court Order. There was the need on the part of Mr Maher and the Executive to maintain leadership and authority. I do not think that the influence this was likely to have had should be underestimated.*
>
> ...

> *77. There is no doubt, in my view, that the CFMEU's conduct at the meeting was designed to, and had the effect of, encouraging the employees not to cease the strike action and to take it further. Mr Maher's words were an active encouragement to continue an expression of anger against the company. One might expect rank and file members to have been seeking guidance from the Executive and the Branch. Their statements before the meeting to persons notifying them of the Order bear this out. It is not difficult to imagine that the address by Mr Maher to the meeting did nothing to lessen the anger which he was determined to keep alive. He took no serious steps to dissuade them from further strike action. If he did speak some words of non-support they were very few. They could hardly have been thought sufficient for that purpose. The members could not have been left in any doubt about Mr Maher's and the CFMEU's lack of sincerity in not supporting the strike. They would have understood they were being encouraged to do so."*

Her Honour concluded:

> *"83. Mr Maher was told about the Order by Mr Humphreys. He was told that an injunction had been obtained against the Union relating to the price dispute. Given Mr Maher's experience he would have understood that there had been an Order made by the Court prohibiting the strike action. It is not necessary that he be shown to be aware of its full terms:* Sun Newspapers Pty Ltd v Brisbane TV Ltd *(1989) 92 ALR 535, 538. The CFMEU had not at this point been personally served and it was not served until the following morning, but in these proceedings fines are sought and the embargo of O 37 r 2(1) does not apply:* Windsurfing International Inc v Sailboards Australia Pty Ltd *(1986) 19 FCR 110, 113. In any event that rule contains an exception, in the case of notification by other means, such as is recognised by the common law: r 2(5) (and see* Windsurfing International Inc v Sailboards Australia Pty Ltd *(1986) 19 FCR 110). It is not necessary to determine whether other members of the Executive were aware. It was Mr Maher's obligation, on behalf of the Union to notify anyone necessary to effect an end to the strike. It is likely that he did so at the conference dinner and that others were then informed. If Mr Fisher was not told earlier, Mr Everill almost certainly would have told him when he spoke to him at 6.48 am. Even at this time he and Mr Maher could have taken steps to bring the strike to an end, as Mr Maher effectively conceded in his evidence.*
>
> *84. Lodge Officials and members of the Union were waiting for advice from the Executive. Without it they would not act upon BHP Steel's advices about the Order. It was not suggested that there was no action open to the Executive or Mr Maher to put matters in train. Notification was clearly possible. One may observe how promptly the strike had been notified the day before. It would also have been prudent to call off the meeting in the circumstances. The decision to continue with the meeting and the conduct of Mr Maher at it is evidence of a determination, on the part of the CFMEU, to continue the strike action.*

> *85. I am satisfied that the CFMEU through Mr Maher, acted at the meeting in such a way as to ensure a continuation of strike action. The resolution to effect further strike action was in large part the result of that conduct, even if one allows for the expression of some annoyance about service on union officials. It does not seem possible reasonably to draw any other inference, given the course Mr Maher undertook and in the absence of a credible explanation on his part or other evidence providing that explanation.*
>
> *86. The CFMEU continued the strike action, the ban upon work implicit in it and the authority to members to stop performing work. It procured and authorised members to further do so at the meeting. Charges (a), (b), (c), (d) and (f) are therefore made out. The conduct involved a breach of the Orders to cease the strike and not to continue or take further strike action. It was not only deliberate in the sense referred to in the authorities, it must have resulted from a considered decision.*
>
> *87. It was suggested by senior counsel for the CFMEU in argument that the Order must be read strictly, in its requirement that the action to be undertaken commence from the time of the making of the Order. Since the CFMEU could not be shown to have knowledge of the terms of the Order from the time it was made, it could not be guilty of contempt and the charges must fail. The Order reasonably construed requires cessation of the strike immediately upon the Union having knowledge of the Order and its restraints continue until the time nominated."*

98 It is appropriate, at the outset, to consider what the original order of the primary judge required of the CFMEU.

The order of the primary judge

99 The primary judge construed the first injunction as requiring the CFMEU to immediately cease strike action. Her Honour said:

> *"The language of the first injunction here is in strong terms in its requirement to 'cease' and it is plain that some urgency attends the requirement for action in that regard because the CFMEU is to do so 'immediately'. It had a choice as to how it was to end the strike it had started, although some steps are so obvious that they go without saying. The requirements of the Order and the result to be achieved were clear."*

100 In reaching that conclusion her Honour relied on the reasoning of Wilcox J in *Concrete Constructions Pty Ltd v Plumbers & Gasfitters Employees' Union (No 2)* (1987) 15 FCR 64. In that case the order restrained the respondent "from maintaining, giving effect to or enforcing any ban …". In a contempt proceeding for breach of the order Wilcox J accepted that a party cannot be committed for contempt on the ground that, upon one of two

possible constructions of an order, it had been breached: see *Australian Consolidated Press Limited v Morgan* (1965) 112 CLR 483 at 515-6. However, Wilcox J (at 72) explained the distinction between such an order and the one he was considering:

> *"However, there is a fundamental difference between an order which is uncertain and an order which, being certain in its meaning, leaves to the addressee a choice as to the manner of compliance .... Provided that the order specifies with certainty the result to be achieved it is not normally for the applicant to suggest, or for the Court to prescribe, a particular method of complying with the order. As Chitty J said in* Walthamstow [Attorney-General v Walthamstow Urban Council *(1895) 1 TLR 533], 'it was the duty of the defendants to find out the proper means of obeying the order'."*

101 Wilcox J held that the order specified what was to be done, by requiring that the Union, its servants and agents, not maintain, give effect to, or enforce any ban which had been imposed before that date.

102 The CFMEU submitted that her Honour erred in construing the order as requiring the CFMEU to take any positive steps. It contended that the order was cast in negative terms, lacked specificity and wrongly assumed the union had the capacity to "cease" the strike action in the sense of compelling employees to return to work.

103 In Australian Industry Group v Automotive, Food, Metals, Engineering, Printed and Kindred Industries Union [2000] FCA 629 ("AIG") at [33] I stated:

> *"Orders of the Court must be in 'clear and unambiguous terms which leave no room for the persons to whom they are directed to wonder whether or not their future conduct falls within the scope or boundaries of the injunction' (*ICI Australia Operations Pty Ltd v Trade Practices Commission *(1992) 38 FCR 248 at 259 per Lockhart J). Although it is the duty of a defendant to ascertain the proper means of obeying an order, a defendant will not be committed for contempt where the order is not clear and therefore, on one construction of it, there may not have been a breach. In such cases the breach will not have been established beyond reasonable doubt: see* Iberian Trust Ltd v Founders Trust and Investments Co *[1932] 2 K.B. 87 at 95,* Redwing Ltd v Redwing Forest Products Ltd *(1947) 177 L.T. 387,* John Fairfax & Sons Pty Ltd v Australian Consolidated Press Ltd *(1960) SR (NSW) 413 at 416,* Australian Consolidated Press Ltd v Morgan *(1964) 112 CLR 483 at 503, 506, 515-516,* Re Bramblevale Ltd *(1969) 3 All ER 1062 at 1064,* Concrete Constructions *at 71-72 and* Nexus Mortgage Securities Pty Ltd v Ecto Pty Ltd *(1998) 4 VR 220 at 222-223."*

104 If it is intended that positive steps are to be taken under an order it will usually be preferable for the order to specify the steps that are required to be taken. Such an order will limit the scope for argument as to the meaning of the order, what the order requires and whether it has been complied with. The different outcomes of the contempt proceedings against the union (where no steps were specified) and its officers (where steps were specified) in *AIG* affords a good example of the benefit of specificity.

105 The injunctions ordered by the primary judge clearly and unambiguously required the CFMEU to immediately cease the strike action that it had started, the bans it had imposed, its authorisation to members to stop performing work and not to continue or extend that action, the bans or the authorisation for the purpose of the export coal price dispute ("the proscribed purpose"). It is clear from the terms of the injunctions that their subject matter is industrial action *by* the unions and that the proscribed purpose is the purpose *of* the unions in taking that action. The injunctions are not directed at and do not prohibit strike action by the members of the unions nor are the injunctions directed at any purpose of those members in engaging in strike action.

106 I agree with the primary judge's conclusion that the order required the CFMEU to "immediately" take positive steps to bring about a result, namely cessation of the CFMEU's strike action in relation to the export coal price dispute. The CFMEU had a duty to decide how it would take the necessary steps to immediately cease the union's strike action but it was not entitled to do nothing or to delay calling off the strike it had called. In the context of the twenty four hour strike that had already commenced, the word "immediately" was clearly intended, and would be understood by the union, to bear its ordinary dictionary meaning, that is:

> *"without lapse of time, or without delay; instantly; at once."* (The Macquarie Dictionary)

107 The CFMEU was not required to procure its members to return to work. Rather, the CFMEU was to immediately take the necessary steps to bring the strike it had called to an end and give appropriate directions to ensure that any bans on work or authorisations to stop work were, likewise, at an end. The orders also restrained the CFMEU from taking, procuring or authorising any further strike action or imposing any further bans for the

proscribed purpose.

108 Accordingly, I do not accept the CFMEU's argument that there was ambiguity, uncertainty or lack of specificity in the terms of the order or that it required the CFMEU to bring about a result it could not achieve.

The contempt charges

109 BHP Steel's Statement of Charge stated that the CFMEU be fined for its "contempt in failing to comply with the Order" of the primary judge made on 7 February 2000. Paragraph 1 recited the terms of the Court orders but omitted (presumably inadvertently) any reference to the proscribed purpose in para 2 of the orders. Paragraph 2 provided details of some thirty-seven verbal, facsimile and personal service notifications of the terms of the order as well as notification of the order by the broadcast of its terms over local radio.

110 Paragraph 3 of the Statement, relevantly, stated:

> *"3. In breach of the Order, from the time of the making of the Order and continuously thereafter until 4 pm on 9 February 2000, at the Applicant's Tower Colliery, Elouera Colliery, West Cliff Colliery, Appin Colliery and Cordeaux Colliery the Respondent:*
>
> *(a) continued to take strike action for the purposes of a dispute or disagreement about or concerning negotiations or the outcome of negotiations over export coal prices;*
>
> *(b) continued its ban upon employees attending for work and performing work in accordance with the applicable awards or certified agreements for the purposes of a dispute or disagreement about or concerning negotiations or the outcome of negotiations over export coal prices;*
>
> *(c) continued to authorise members of the Respondents who were employees of the Applicants to stop performing work in accordance with the applicable awards or certified agreements for the purposes of a dispute or disagreement about or concerning negotiations or the outcome of negotiations over export coal prices;*
>
> *(d) authorised members of the Respondents who were employees of the Applicants to stop performing work in accordance with the applicable awards or certified agreements for the purposes of a dispute or disagreement about or concerning negotiations or the outcome of negotiations over export coal prices;*

(e) *directed members of the Respondents who were employees of the Applicants to stop performing work in accordance with the applicable awards or certified agreements for the purposes of a dispute or disagreement about or concerning negotiations or the outcome of negotiations over export coal prices;*

(f) *procured members of the Respondents who were employees of the Applicants to stop performing work in accordance with the applicable awards or certified agreements for the purposes of a dispute or disagreement about or concerning negotiations or the outcome of negotiations over export coal prices.*

The affidavits relied upon by the applicants in relation to these allegations are identified in the particulars below.

PARTICULARS OF CHARGE

The employees of the Applicant listed below in Schedule A failed to return to work on their appointed shifts as set out in Schedule A because the Respondent:

(i) *failed to inform such employees that the strike which it had required to begin at the Respondent's said collieries for 24 hours from midnight AEDST on 7 February 2000 had ceased;*
…

(ii) *failed, between the time of the said Order was made and 4 pm on 9 February 2000 to inform such employees that they should return to their duties;*
…

(iii) *failed to cancel a meeting that had been called for 10 am AEDST on 8 February 2000 at the Wonoona* [sic] *Bulli RSL Club, for the purposes of the strike;*
…

(iv) *by its authorised officer, one Tony Maher, at about 8.30 am AEDST on 8 February 2000 on ABC radio, represented that the strike was continuing in order to 'drive home a message to BHP Steel';*
…

(v) *organised and conducted a union meeting at 10 am AEDST on 8 February 2000 at the Wonoona* [sic] *Bulli RSL Club, at which a resolution was passed to extend strike action for a further 24 hours from midnight AEDST on 8 February 2000;*
…

(vi) *at about 10 am AEDST on 8 February 2000 at the*

> *Wonoona* [sic] *Bulli RSL Club, passed a resolution to extend strike action for a further 24 hours from midnight AEDST on 8 February 2000.*
> *...".*

111 Schedule A, which appeared under sub-paras (i) and (ii) of the Particulars, described and set out the paragraphs in the Applicant's Affidavits which identified the employees who allegedly failed to return to work (para (i)) or who were not informed that they should return to work (para (ii)). Under each of the other sub-paragraphs particulars were given of the paragraphs of the Applicant's affidavits upon which reliance was being placed.

112 One of the main grounds of the CFMEU's appeal was that the primary judge failed to make findings in respect of the charges as particularised and, to the extent findings were made, it contended that the Particulars could not have constituted a contempt. In substance, the CFMEU submitted it was convicted of a contempt with which it had not been charged. It contended:

> *"In the Statement of Charge in the present matter the charge itself is in the broadest possible terms. The charges are broken into six sub paragraphs each alleging positive conduct on the part of the appellant in breach of the order.*
>
> *The conduct/omissions alleged to constitute the contempt were identified, and only identified, in six particulars of charges. It is not clear to which if any of the sub paragraphs of the charge each particular of charge is directed.*
>
> *It was to the charge as particularized, and only to the charge as particularized, that the appellant was required to and did direct its evidence.*
>
> *Her Honour erroneously failed to make findings with respect to:*
> *(a) Whether any of the particulars were established;*
> *(b) Which particulars went to establishing which count, if any, of the charge;*
> *(c) Whether if established the particulars could constitute contempt of the orders.*
>
> *The particulars of the charge were either not provided (Particulars (i) – (ii) and (vi)), or could not on any view have constituted (and were not found by her Honour to constitute) contempt of the Order (particulars (iii) – (v) inclusive)."*

113 The contempt with which a person is charged must be sufficiently explicit in the Statement of Charge, read fairly and as a whole. If it is not, a contempt conviction can be set aside, even if the facts found may have otherwise justified the conviction: see *Coward v*

Stapleton (1953) 90 CLR 573 at 579-580 and *Australian Building Construction Employees' and Builders' Labourers' Federation v Minister of State for Industrial Relations* (1982) 43 ALR 189 ("*the BLF case*") at 211-212.

114 As was stated *Coward v Stapleton* at 579-580 by Williams ACJ, Kitto J and Taylor J:

> *"…it is a well-recognized principle of law that no person ought to be punished for contempt of court unless the specific charge against him be distinctly stated and an opportunity of answering it given to him: In* re Pollard*;* R v Foster*;* Ex parte Isaacs*. The gist of the accusation must be made clear to the person charged, though it is not always necessary to formulate the charge in a series of specific allegations:* Chang Hang Kiu v Piggott*. The charge having been made sufficiently explicit, the person accused must then be allowed a reasonable opportunity of being heard in his own defence, that is to say a reasonable opportunity of placing before the court any explanation or amplification of his evidence, and any submissions of fact or law, which he may wish the court to consider as bearing either upon the charge itself or upon the question of punishment."*

See also *Doyle v The Commonwealth* (1985) 156 CLR 510 at 516.

115 In *Concrete Constructions* at 73 Wilcox J, in analogous circumstances, discussed the role of particulars in a Statement of Charge:

> *"The second question is whether the statements of charge sufficiently specify the alleged breaches. I think that they do. In each case the charge sets out the relevant orders and then alleges, in positive terms, that the respondent did the enjoined act. In essence, the complaint is that, the respondent being told to refrain from particular conduct, the respondent in fact committed that conduct. This is a clear enough allegation. It is true that, without more, the respondent would not know whether it is the case of the applicant that it carried out some positive act amounting to breach, and if so what act, or whether it is said that there was a contravention by the failure of the respondent to take a positive step necessary to bring to an end the condition of maintaining the ban. But that is the function of particulars; and in each of these cases particulars were included in the charge. In relation to omissions it is difficult to do more than to say that no action was taken. But this is sufficient. The respondent then knows the case it has to meet and that it will be an answer to that part of the case to show, if it can, either that no positive action was, under the circumstances, required or that it did take the relevant step. …*
>
> *In the case of allegations of positive actions in contravention of an order particulars of a charge should inform the recipient of the substance of the case sought to be made. It is not necessary to set out the evidence which will establish that case; that will normally be contained in the affidavits."*

116 On appeal in The Plumbers and Gasfitters Employees' Union of Australia v John Holland Constructions Pty Limited (1988) 10 ATPR 40-849 at 49,141 the Full Court observed:

> *"In each matter the essence of the charge is that the Union committed conduct which it had been ordered not to commit. We agree with the trial Judge that, so far as unions are concerned, it is difficult to do more than to say no action was taken and that this is sufficient. Allegations of positive conduct by the Union in contravention of the Court's orders were stated in the particulars sufficiently, precisely and clearly to inform the Union of the charges and to give it a proper opportunity to answer them. We think each charge was stated with sufficient precision, and was supported by adequate particulars. We should, however, make some reference to the particulars given of the charge in the Concrete Constructions and John Holland matters. It was submitted that particular (a) was defective in that it could not be said that the Union refused to inform employees that bans had been lifted when the bans had not in fact been lifted. We agree that the form in which this particular is cast is a little curious, but we think it sufficiently conveyed to the Union the substance of the allegation being made. In effect, it conveyed to the Union that what was alleged was that it had decided not to lift the relevant bans and, accordingly, not to inform the men on the job of any change in the Union's attitude. We think that, taken as a whole, the particulars left the Union in no doubt as to what was alleged against it."*

117 In the present case the CFMEU, as it was fully entitled to do, made clear that it was called upon to meet and was meeting the charge as particularised, and not otherwise. When an issue arises as to the sufficiency of the charge, as particularised, the Court is to discern the gist or the substance of the contempt alleged and determine whether that was sufficiently conveyed to the alleged contemnor in the Statement of Charge.

118 The CFMEU's written and oral submissions on the Statement of Charge sought to analyse each sub-paragraph of the Particulars out of context with little regard to the sub-paragraphs of para 3 which were being particularised. Further, little or no regard was had to the various paragraphs of BHP Steel's affidavits which were being relied upon by BHP Steel. In that regard it can be accepted that the affidavit evidence served with the Statement of Charge cannot be relied upon to remedy any deficiency in the Statement of Charge and also that an alleged contemnor cannot be required to extract and cull from the material relied upon or referred to in the Particulars the conduct alleged to constitute the contempt being charged: see *Harmsworth v Harmsworth* (1987) 1 WLR 1676 at 1683 and 1686.

119 Nonetheless, the test remains whether the gist or substance of that conduct has been

sufficiently conveyed in the Statement of Charge to enable the alleged contemnor to meet the charge. While incorporation of documents by reference in the Statement of Charge is, in general, undesirable there is no rule that a document may not be so incorporated. In that regard, Order 40 r 5 provides for an application for punishment for an alleged contempt to be made by motion on notice. Rule 6 provides:

> *"A statement of charge, that is, a statement specifying the contempt of which the accused person is alleged to be guilty, shall be subscribed to, or filed with, the notice of motion or application."*

120 Under Rule 8 the affidavit evidence relied upon is to be served with the notice of motion and the statement of charge.

121 In the present case, the procedure of incorporating paragraphs from the affidavits as part of the Particulars appears to have come about as a result of a suggestion by her Honour and does not appear to have been the subject of complaint by the CFMEU.

122 The questions raised by the CFMEU's submissions are whether:

- the contempt charged and found to have been established was sufficiently explicit in the Statement of Charge, read fairly and as a whole;
- the facts found by the primary judge established beyond reasonable doubt that the CFMEU had engaged in the conduct alleged in the Statement of Charge to have constituted the contempt.

123 Paragraph 1 of the Statement of Charge sets out the orders made by the primary judge. Paragraph 2 sets out the details of the notifications "of the terms" of the order. The notifications, given late in the evening of 7 February and in the early morning hours of 8 February, include an alleged notification of the terms of the order to Mr Maher by telephone late in the evening of 7 February 2000.

124 Paragraph 3 alleges that in breach of the order "from the time of the making of the Order and continuously thereafter until 4 pm on 9 February 2000" at BHP Steel's New South Wales mines:

- the CFMEU continued to take the strike action and continued its bans and authorisations to stop performing work for the purpose of its dispute with BHP Steel over coal export prices (sub-paras (a), (b) and (c));

- the CFMEU authorised, directed and procured members to stop performing work for the purpose of that dispute (sub-paras (d), (e) and (f)).

125 The contempt alleged in sub- paras (a), (b) and (c), is alleged to be, inter alia, a breach of the order requiring the CFMEU to immediately cease and not to continue strike action, bans and authorisations for the proscribed purpose. The charge is essentially one of omission or failure to act as required by the order.

126 Subject to a question relating to purpose, the contempt alleged in sub-paras (d), (e) and (f) is alleged to be a breach of the order requiring the CFMEU not to continue strike action, bans and authorisations for the proscribed purpose and to refrain from taking, procuring, advising or authorising any further strike action, bans or authorisations for the proscribed purpose. Although there is some overlap between the two sets of charges, the charges in sub-paras (d), (e) and (f) allege the taking of positive steps in breach of the order prohibiting and restraining such conduct. As explained above the Statement of Charge inadvertently omitted any reference in para 2 of the orders relating to the proscribed purpose. The deficiency in that regard was rectified in the particulars of the contempt charges each of which explicitly referred to the proscribed purpose.

127 It is plain that the reference to purpose in sub-paras (a), (b) and (c) is a reference to the purpose of the CFMEU, and not that of its members. Arguably, there is some ambiguity as to whether the reference to purpose in sub-paras (d), (e) and (f) is a reference to the purpose of the CFMEU or to the purpose of its members. A difficulty confronting an argument that the purpose referred to is that of the members is that it requires that, notwithstanding the identical form the particulars take, the purpose in sub-paras (a), (b) and (c) is to read as the purpose of the unions and the purpose in sub-paras (d), (e) and (f) is to read as the purpose of the members.

128 As explained above the orders were directed at the conduct and purpose of the CFMEU, and not that of its members. Further, the industrial action alleged to have been

taken in breach of the orders was that taken by the CFMEU. Finally, a breach of the order based on acts rather than omissions would require action *by* the CFMEU for the proscribed purpose. In that context, a fair reading of the relevant paragraphs as a whole demonstrates that the purpose being referred to in all of the sub-paragraphs is that of the CFMEU. Any doubt about that matter is resolved by the particulars that were provided of the positive steps allegedly taken in breach of the order by the CFMEU (in sub-paras (iv), (v) and (vi) of the Particulars) which all refer to conduct of the CFMEU or of its officers without any reference to the conduct or purpose of its members.

129 Accordingly, I am satisfied that the charges relate, and would be taken by the CFMEU to relate, only to acts or omissions to act, for the proscribed purpose, by the CFMEU or by its officers.

130 Particulars (i) and (ii) specify a failure to inform the relevant employees that the strike had ceased and that they should return to their duties. The paragraphs in the affidavits referred to as part of the particulars are to the effect that notwithstanding the Court order the employees referred to did not return to work on their appointed shifts.

131 On a fair reading of the Statement of Charge as a whole the gist or substance of the breach alleged in paras 3(a), (b) and (c) and in sub-paras (i) and (ii) of the Particulars is the breach by CFMEU, as from the making of the order, of continuing *its* existing strike action, bans, and stop work authorisations to its members by failing to immediately cease the action, the bans and the authorisations. The breach found and declared by the primary judge that is relevant to that charge is the CFMEU's conduct of "continuing strike action and authorising its members to stop performing work". In my view that contempt, in respect of which the CFMEU was convicted, was sufficiently explicit in the Statement of Charge.

132 The main findings of the primary judge were summarised earlier in these reasons. Her Honour found that, as from shortly before 11 pm on 7 February, Mr Maher was aware of the Court order and, at the latest, by 5.00 am on 8 February he was aware that it required the cessation of the CFMEU's strike action. Her Honour also found that, at the latest, by shortly prior to 7.00 am on 8 February Mr Fisher (a member of the Central Executive in a position to comply with the order) was also aware of the order. Messrs Maher and Fisher took no immediate action to bring the strike to an end and for so long as Mr Maher and Mr Fisher did

not act to call an end to the strike, as they were well aware, it continued. Her Honour noted that Mr Maher effectively conceded in his evidence that from 8.48 am on 8 February he could have taken steps to bring the strike to an end. A breach of omission to act in the manner required by the orders was clearly established by those findings.

133 The CFMEU's defence was that the strike was called off by Messrs Maher and Fisher at the meeting of members of the union on 8 February. On the finding made by her Honour that there was a failure to immediately cease strike action the acceptance of that defence would not have the consequence that the orders were not breached. Rather, they may have the consequence that the breach was not a wilful or serious breach so that there was either no contempt or, if there was, it did not warrant punishment. Her Honour, however, rejected the defence.

134 The primary judge accepted that Messrs Maher and Fisher said to the meeting that, as a result of the Court order, the employees were required to return to work. However, after having regard to the context in which the statements were made and to, inter alia, her view that the CFMEU's conduct at the meeting was designed to encourage the workers not to cease strike action, her Honour concluded that to say what occurred "was paying mere lip service to the CFMEU's obligation to bring the strike to an end may be something of an understatement". Her Honour found that Mr Maher's conduct at the meeting evidenced "a determination, on the part of the CFMEU, to continue the strike action". Her Honour said that the members attending the meeting "could not have been left in any doubt about Mr Maher's and the CFMEU's lack of sincerity in not supporting the strike. They would have understood they were being encouraged to do so".

135 It was open to the primary judge to conclude that the conduct of Messrs Maher and Fisher at the meeting fell short of taking steps to bring the strike called by the CFMEU to an end. Thus, her Honour's findings, which were open to her on the evidence, amply supported the conclusion that she was satisfied beyond reasonable doubt that the charge of contempt in paras 3(a), (b) and (c), as particularised in sub-paras (i) and (ii) of the Particulars, had been made out. Accordingly, BHP Steel was entitled to a declaration that the CFMEU breached the Court order by "continuing the strike action and its authorisation to members to stop performing work".

136 As explained above the contempt alleged in paras 3(d), (e) and (f), as particularised in sub-paras (v) and (vi) of the Particulars, is that the order of the primary judge was breached by the CFMEU, for the proscribed purpose, authorising, directing and procuring members employed at BHP Steel's New South Wales mines to extend strike action for a further 24 hours from midnight on 8 February 2000. The particulars are to the effect that the CFMEU organised and conducted a union meeting which resolved "to extend strike action for a further 24 hours from midnight … on 8 February 2000". The plain implication is that the CFMEU breached the order as:

- it had organised and conducted the meeting which authorised, directed or procured the extension of "strike action";
- that conduct was engaged in by the CFMEU for the proscribed purpose.

137 In my view, the gist or substance of the contempt alleged was made sufficiently explicit in the Statement of Charge, as particularised, without the necessity of resorting to the paragraphs of the affidavits specified in the Particulars. In any event, reference to those paragraphs adds little to the particulars already given. The most that can be said is that the Affidavit material referred to, which exhibits a transcript of proceedings before the Industrial Relations Commission, shows that:

- the extension of the strike was alleged by the CFMEU to be in protest against BHP Steel's harassment and intimidation of its workers when it informed them of the Court orders;
- BHP Steel contended, but the CFMEU disputed, that the extension breached the Court order and the union's reliance upon extension of the strike as being for a purpose other than the proscribed purpose was misplaced.

138 The breach of the Court order found and declared by the primary judge that is relevant to the charge in paras 3(d), (e) and (f) is the conduct of the CFMEU in "procuring and authorising its members to take further strike action". For the reasons set out above the conduct alleged to constitute that contempt was sufficiently explicit in the Statement of Charge. The CFMEU has not demonstrated that it was not allowed a reasonable opportunity of being heard in defence of that charge.

139 The CFMEU, as it was fully entitled to do, elected to file an affidavit by Mr Maher and rely upon her Honour's acceptance or rejection of his evidence in defence of the charges. The affidavit was to the effect that Messrs Maher and Fisher directed members to return to work but that the members, acting on their own initiative, resolved that a 24 hour stoppage take place from midnight "due to the harassment and intimidation towards our elected union officials… by BHP Management". If Mr Maher's evidence was accepted it constituted a complete defence to the contempt charged in sub-paras (d), (e) and (f).

140 The concern I have with this aspect of the appeal is whether the findings of the primary judge supported the declaratory relief her Honour granted, or whether they amounted to a finding that Mr Maher's, or the CFMEU's, conduct of the meeting of 8 February was calculated to defeat or frustrate the effect of the Court order (see *Seaward v Paterson* (1897) 1 Ch 545), a contempt that was not specified in the Statement of Charge.

141 The declaratory relief granted in respect of the CFMEU's conduct at the meeting on 8 February, which was based primarily on Mr Maher's conduct, was that the CFMEU procured and authorised the members to extend the existing strike. Of course, for that conduct to have breached the orders it must have been engaged in by the CFMEU for the proscribed purpose.

142 Although it is clear that the primary judge found that the steps taken by Messrs Maher and Fisher at the meeting fell short of bringing the strike action called by the CFMEU to an end, whether her Honour found that, for the proscribed purpose, they procured and authorised an extension of the CFMEU's strike action is not quite as clear. The relevant findings, therefore, are those relating to the conduct and purpose of Mr Maher at the meeting, rather than findings in relation to the conduct and purpose of the members attending the meeting. Relevantly, her Honour made the following findings (the emphasis added is mine):

- Mr Maher:

  "…spoke of the current and highly volatile issue of coal prices, which was the basis for the current strike action. An obvious purpose of a meeting in these circumstances is to determine what action is now to be taken. Members of the Union would be waiting for guidance from the Executive and Mr Maher in particular." [63]

- *"I find it impossible to view the report of issues relating to BHP, the first matters drawn*

to the members attention, as serving some pacifying purpose…The resolution Mr Maher brought to the meeting would also have solidified anger and resentment towards the company and put in the minds of the employees present the prospect of further strike action… It was submitted that one should not regard the reference in the resolution to the giving of mandate for further action to the Union as referrable to the resolution for further strike action which is said to have come shortly afterwards from the floor. I accept that that might be the case. ***It seems to me however that Mr Maher was driving the meeting in the opposite direction from one which would result in the end of strike action.*** *I am only able to infer that the undertaking of that course of action was the result of a determination that the CFMEU prevail against the company."* [69]

- One of Mr Maher's motives at the meeting was:

  > *"**the need on the part of Mr Maher and the Executive to maintain leadership and authority.** I do not think that the influence this was likely to have had should be underestimated."* [71]

- After the meeting Mr Maher said words to the effect that the workers had expressed their anger at BHP's betrayal of them and that "the future of the district is at the core of their anger at this meeting". Her Honour regarded the statements as relating to the export coal price dispute and said they were "relevant to the question of the true purpose of the further strike" [73]-[74].

- On the purpose of the further strike action:

  > *"…It is, in my view, clear that the issue of coal prices was an important one at the meeting and that it explained much of the anger which drove the employees to determine upon this course of action. Mr Maher's own statements confirm this.* ***The inescapable conclusion is that the strike action was directed at this even if it was also a response to the notification and service of the Orders****….It is likely, in my view, that it was recognised by some persons present at the meeting that any further strike action must be distanced from the prohibited purpose…."* [76]

- *"**There is no doubt, in my view, that the CFMEU's conduct at the meeting was designed to, and had the effect of, encouraging the employees not to cease the strike action and to take it further**. **Mr Maher's words were an active encouragement to continue an expression of anger against the company.** …It is not difficult to imagine that the address by Mr Maher to the meeting did nothing to lessen the anger he was determined to keep alive. He took no serious steps to dissuade them from further strike action. If he did speak some words of non-support they were very few. They could hardly have been thought sufficient for that purpose. The members could not have been left in any doubt about Mr Maher's and the CFMEU's lack of sincerity in not supporting the*

strike. ***They would have understood they were being encouraged to do so**.”* [77]

- ***"The decision to continue with the meeting and the conduct of Mr Maher at it is evidence of a determination, on the part of CFMEU, to continue the strike action."*** [84]

- ***"I am satisfied that the CFMEU through Mr Maher, acted at the meeting in such a way as to ensure a continuation of strike action. The resolution to effect further strike action was in large part the result of that conduct, even if one allows for the expression of some annoyance about service on union officials."*** [85]

143 I have set out the main findings of the primary judge on this issue in detail because of my concern as to whether her Honour was satisfied beyond reasonable doubt that Mr Maher, acting on behalf of the CFMEU, for the proscribed purpose procured and authorised an extension of "strike action" or whether, in an endeavour to defeat or frustrate the orders, he procured and authorised a new strike for a different purpose. Her Honour's findings appear to have been directed at both questions. A fair summary of her Honour's findings is that she was satisfied beyond reasonable doubt that:

- Mr Maher's purpose in conducting the meeting was to continue and extend strike action by procuring the workers to *resolve* to strike in protest at BHP Steel's harassment and intimidation of union members and officials;

- in truth, Mr Maher procured the workers to direct their anger and the strike at BHP Steel's conduct in relation to the coal export price dispute "even if it was also a response to the notification and service of the orders";

- Mr Maher breached the Court order by procuring the extension of strike action for purposes that included the export coal price dispute.

144 The findings to which I have referred, including those relating to Mr Maher's purpose, were open to her Honour on the evidence and supported her conclusion that she was satisfied beyond reasonable doubt that the charge of contempt in para 3(d), as particularised in sub-paras (vi) and (vi) of the Particulars, had been made out. It follows that BHP Steel

was entitled to a declaration that the CFMEU breached the Court order by "procuring…its members to take further strike action". To the extent her Honour may be taken to have also held that the purpose of the members in resolving to strike included the proscribed purpose, I would have difficulty in concluding that such a finding was reasonably open on the evidence. However, for the reasons outlined above the purpose of the members was not an element of the conduct alleged in the Statement of Charge to have breached the orders and was therefore not a relevant issue.

145 The basis for the declaration that Mr Maher's conduct also authorised the members to extend strike action is more problematic. The findings against Mr Maher on this issue were based on the same conduct. Her Honour, however, did not appear to address the legal and factual complexity of whether what occurred was capable of constituting an authorisation by the CFMEU to its members to extend strike action by the members.

146 I have concluded that it is appropriate to allow the appeal in part on this limited issue. I have arrived at that conclusion as I doubt that her Honour's findings extended to authorisation and that doubt ought to be resolved in favour of the CFMEU. For the above reasons, it is appropriate to excise from the declaration made by her Honour the words "and authorised". I would add that, in the present case, whether the conduct in question breached two aspects, or only one aspect, of the Court order is not of significance to the nature of the contempt committed or the appropriate penalty.

147 It follows that, save for one aspect of no real consequence, in my view the CFMEU has failed in its appeal in relation to the Statement of Charge and whether her Honour's findings were sufficient to establish the contempt charged.

Inferences

148 The CFMEU did not challenge the primary facts found by the primary judge. Rather, it contended that her Honour erred in drawing inferences adverse to the CFMEU on the basis of those findings. The CFMEU contended that, as it did not challenge the primary findings of fact, the Full Court is in as good a position as the trial judge to decide on the proper inferences to be drawn from them.

149 The adverse inferences drawn by her Honour were based, in part, on her rejection of

critical aspects of Mr Maher's evidence *and* her Honour's adverse impressions of Mr Maher as a witness. In that regard her Honour found that Mr Maher was "false in his denials of knowledge and of communications" concerning the Court orders and was not "bona fides" in his conduct of the meeting of 8 February. As explained above, that led her Honour to hold that Mr Maher's conduct of the meeting on 8 February was designed to, and had the effect of, encouraging BHP Steel's employees not to cease, but rather to extend, strike action by them.

150 A further difficulty confronting the CFMEU's submissions is the need for appellate caution before reversing a trial judge's evaluation of the facts. As the Full Court said in *Esso Australia Resources Ltd v Commissioner of Taxation* (1998) 84 FCR 541 at 554:

> *"…even in cases where the primary facts are not in dispute and the trial judge's evaluation of the facts does not depend on an assessment of the credibility of witnesses there is nevertheless a need for appellate caution in reversing the trial judge's evaluation of the facts. As was said recently by Lord Hoffmann (with the agreement of all other members of the House of Lords) in* Biogen Inc v Medeva plc *[1997] RPC 1 at 45:*
>
> > 'The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, *la vérité est dans une nuance*), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.'"

151 The primary judge explained her general approach to the inferences she was entitled to draw at [78]-[79]:

> *"78. In my consideration of the evidence I have drawn inferences which do not assist the CFMEU. In many cases, no evidence to the contrary was put forward to dispel a possible inference. The witnesses in question were available. If one was overseas, arrangements could have been made for the reception of his evidence. I am therefore somewhat fortified in my view that the inferences I have drawn are likely to be correct. It was submitted by senior counsel for the CFMEU that the Court is not in a position to draw any inferences about aspects of the evidence for the reason that a number of witnesses to the events in question, indeed directly involved in them, were not called by it. Reliance was sought to be placed upon cases concerning inferences available where an accused has not given evidence. It was then submitted that since the CFMEU did elect to give some evidence, no such*

> *adverse inference was possible. I do not consider this to be a correct approach. The question is not whether an inference of guilt may be drawn, as sometimes arises in criminal cases. It is whether inferences are available from the evidence presented which may be confirmed to an extent by a failure to rebut them by calling available witnesses.*
>
> *79. The rule in* Jones v Dunkel *(1959) 101 CLR 298 requires that there be inferences available from the evidence which favour the other party. The failure of the CFMEU to call evidence in these circumstances does not provide positive evidence of a fact or circumstance, but, unexplained, leaves the Court in a position where opposing inferences can be more confidently drawn because they stand uncontradicted by the person who could say something about the true state of the facts:* Jones v Dunkel, 308; Minister for Aboriginal & Torres Strait Islander Affairs v State of Western Australia *(1996) 67 FCR 40, 62. It was also submitted, in connection with the application of the rule, that BHP Steel could have called the witnesses in question. I do not accept the submission. The rule looks to the party who might reasonably be expected to call the witness in question in their case."*

152 The CFMEU contended that her Honour's reliance on *Jones v Dunkel* (1959) 101 CLR 298 ("*Jones v Dunkel*") was misplaced. In particular, it submitted:

- the inferences her Honour drew from the extensive telephone conversations between union officials, particularly in the early morning hours of 8 February, were wrongly drawn;
- her Honour ought not to have been "fortified" in drawing adverse conclusions against the CFMEU's case by its failure to call certain witnesses.

153 As was recently emphasised in *RPS v The Queen* (2000) 199 CLR 620 at 631-632 ("*RPS*") drawing inferences from proved facts is "plain commonsense". That is no less so in a criminal matter, although a *Jones v Dunkel* inference ought only to be drawn in a criminal matter after taking into account the onus on the prosecution to prove its case beyond reasonable doubt without the accused being bound to give evidence (see *RPS* at 633). As was observed by the primary judge, this qualification is not relevant in the present case as Mr Maher, in his capacity as General President of the Central Executive of the CFMEU, elected to give evidence.

154 In response to Mr Maher's statement that he only became aware of the Court order at about 9.30 am on 8 February, BHP Steel adduced evidence of extensive telephone

communications between union officials late into the night of 7 February and early in the morning of 8 February. Almost all of the conversations occurred after the Court order, out of normal working hours, and involved CFMEU officials who could be expected to be concerned with the CFMEU's response to the Court order. They included telephone communications between Mr Maher and CFMEU officials and telephone communications between those officials and other CFMEU officials. No satisfactory explanation was given by Mr Maher as to the content of the calls. The CFMEU did not call any official who participated in the calls, other than Mr Maher, although it was well aware that BHP Steel was inviting the Court to draw the inference that the calls were concerned with the CFMEU's response to the Court order. In those circumstances, it was open to her Honour to rely upon the calls, together with other evidence, to infer that Mr Maher's denials of knowledge of the Court order prior to 9.30 am on 8 February were false. I would add that on the basis of the findings her Honour had made and the reasons she gave for those findings, it was "plain commonsense" for her Honour to do so.

155 The primary judge, in reliance on *Jones v Dunkel*, was fortified in making those adverse findings. *Jones v Dunkel* looks to the party who might reasonably be expected to call a witness who *would* ordinarily be expected to shed light on the subject in question: see *RPS* at 632. A critical matter in issue related to the time at which Mr Maher became aware of the Court order. A number of the union officials participating in the various telephone conversations would be expected to be able to shed light on that issue but they were not called by the Union. The failure to call any of those officials plainly falls within the principles enunciated in *Jones v Dunkel*. In my view her Honour did not erroneously state or apply the principles she discussed.

156 Her Honour also drew certain inferences in arriving at her finding that Mr Maher was not bona fides in his conduct of the meeting on 8 February [[61]-[77]]. The finding, including the inferences upon which the finding was based, was plainly open on the evidence and, as with her Honour's findings concerning Mr Maher's knowledge of the Court order, were carefully explained and reasoned by her and have not been shown to be erroneous.

157 Accordingly, the grounds of appeal based on the inferences drawn by the primary judge have not been made out.

Reasonable apprehension of bias

158 The CFMEU also claimed that the primary judge erred in law in not acceding to its application that she should disqualify herself from hearing the matter on the grounds that certain statements made by her had given rise to a reasonable apprehension of bias. The statements relied upon were made on the first day of the hearing of the contempt application, which had been case managed by her Honour. They were in the following passages of the transcript:

> *"HER HONOUR: I've got no particular view, I hasten to add, about anyone. It's not at all clear to me what part anyone in particular played in relation to this. The only thing that it is apparent is that the order was breached. Now we have to deal with how that came about and what steps were taken.*
>
> *MR KENZIE: Well, your Honour - - -*
>
> *HER HONOUR: I appreciate your arguments about the terms of the order and I'll hear from you in relation to that.*
>
> *MR KENZIE: Yes, well, can I say that - - -*
>
> *HER HONOUR: I appreciate that you've got legal technical arguments about whether or not there was an obligation to do anything. That's really what you're referring to now.*
>
> *MR KENZIE: Yes, it is.*
>
> *HER HONOUR: But it is the case that the order said discontinue strike and the strike continued; that's all I'm referring to.*
>
> *MR KENZIE: I know, your Honour, but there are substantial arguments about that flowing from recent - - -*
>
> *HER HONOUR: All I'm saying is that the order said discontinue strike and the strike continued. I'm saying no more than that. I'm conscious of the argument set out in your outline but I'm concerned that someone might be unwittingly putting themselves in a position where they could be exposed to difficulties later.*
>
> *MR KENZIE: Well, your Honour, I must say I am concerned at what your Honour just said. There is a substantial argument about breach of the order.*
>
> *HER HONOUR: I appreciate that. I've read your submissions; I've said that. But at a very simple level the order said discontinue and there was a continuation or a separate strike. There's another argument about whether or not it was a strike for a different purpose. I appreciate all of that. I'm not*

giving a concluded view about the legal outcome. I'm saying at a factual level a strike continued, that's all.

MR KENZIE: Yes. Can your Honour just pardon me a moment? Your Honour, I seek a short adjournment to deal with that matter, only a brief adjournment.

HER HONOUR: Yes, certainly."

159 After requesting a short adjournment senior counsel for the CFMEU announced that he had been instructed to ask her Honour not to sit further in the matter as her statements that the Court order had been breached might give rise to a reasonable apprehension of bias. In the course of dealing with that application the primary judge explained her use of the word "breached' in relation to the order as follows:

"…I can understand lawyers having a concern that a judge is actually using the legal conclusion whereas it is painfully clear to me that what the order required to be done as I said was not – that was not the outcome reached, and certainly in relation to the material, there seems to be some argument. But as I've said, beyond that I have not got a full grip on the facts and I'm aware and have read your submissions in relation to the meaning of the order and I am open to persuasion on all those matters."

160 The primary judge refused the application of the CFMEU and said that she did not propose to disqualify herself. The CFMEU is appealing against that refusal.

161 The CFMEU contended that the primary judge's comments involved an unequivocal conclusion that her order had been breached, a matter critical to the outcome of the proceeding. BHP Steel disputed that contention. Relying upon the context in which her Honour's remarks were made, BHP Steel contended that it was clear that her Honour was merely expressing her preliminary view that the desired result of the Court order had not been achieved, as the strike had continued.

162 The category of apprehended bias raised by the CFMEU's application to her Honour is that of a reasonable apprehension of bias by prejudgment. The underlying principle, which is now well established, is:

"that a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it." (Livesey v. New South Wales Bar Association (1983) 151 CLR 288 at 293-4)

The apprehension referred to is that of the "reasonable observer" who is -

> *"presumed to approach the matter on the basis that ordinarily a judge will so act as to ensure both the appearance and the substance of fairness and impartiality."* (*Livesey* at 299).

In *Re JRL, ex parte CJL* (1986) 161 CLR 342 at 352 Mason J (as he then was) said:

> *"It seems that the acceptance by this Court of the test of reasonable apprehension of bias in such cases as* Watson *and* Livesey *has led to an increase in the frequency of applications by litigants that judicial officers should disqualify themselves from sitting in particular cases on account of their participation in other proceedings involving one of the litigants or on account of conduct during the litigation. It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party. ...In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be 'firmly established':* Reg. v. Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group; Watson; Re Lusink; Ex parte Shaw. *Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."*

163 These principles were recently restated in *Johnson v Johnson* (2000) 201 CLR 488 at 492 by Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ:

> *"...the test to be applied in Australia in determining whether a judge is disqualified by reason of the appearance of bias (which, in the present case, was said to take the form of prejudgment) is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide."*

164 In the course of considering observations made by a judge in the course of a hearing, their Honours said (at 493).

> *"... the reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice. The rules and conventions governing such practice are not frozen in time. They develop to take account of the exigencies of modern litigation. At the trial level, modern judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx. In Vakauta v Kelly... Brennan, Deane*

> *and Gaudron JJ, referring both to trial and appellate proceedings, spoke of 'the dialogue between Bench and Bar which is so helpful in the identification of real issues and real problems in a particular case.'… Judges, at trial or appellate level, who, in exchanges with counsel, express tentative views which reflect a certain tendency of mind, are not on that account alone to be taken to indicate prejudgment. Judges are not expected to wait until the end of a case before they start thinking about the issues, or to sit mute while evidence is advanced and arguments are presented. On the contrary, they will often form tentative opinions on matters in issue, and counsel are usually assisted by hearing those opinions, and being given an opportunity to deal with them."*

165 Their Honours also pointed out (at 494) that it is not reasonable to isolate certain words used by a judge from their context and then proceed to parse and analyse their meaning in order to establish that they might have created the impression that the judge has already pre-determined a critical issue in the case. If her Honour's observations about a "knowing contempt" or a "knowing breach" of her order are removed from their context they might well create an impression of prejudgment in the reasonable bystander. However, when the context and the totality of the relevant passages are considered a quite different impression emerges. Her Honour's initial comments expressed concern that witnesses be made aware that the Court was taking the contempt proceeding very seriously and any person "who did take part in a knowing breach of the orders" might themselves be dealt with for contempt notwithstanding that BHP Steel had not joined that person as a party. Her Honour hastened to add, however, that she had "no particular view" as to the part anyone had played in the matter but, as it was apparent that the order was breached, the Court had to deal with how that came about and what steps were taken. The primary judge later explained that she used "breached" in the sense that the order said "discontinue the strike" and a strike continued, although her Honour accepted there was an argument about whether it was a strike for a different purpose. In that context her Honour said that she had not expressed a "concluded view about the legal outcome". Rather, she had been saying that "at a factual level a strike continued". Later, her Honour re-iterated that, although the outcome sought by the order (ie cessation of the strike) had not been achieved, she did not have a "full grip on the facts" and was "open to persuasion" on the matters raised by the CFMEU in its submissions.

166 In my view the fair minded lay observer would reasonably apprehend that the views expressed by her Honour were that, in so far as the strike had not ceased, prima facie, the Court order appears to have not been complied with, but that that was only a tentative view as she did not have a "full grip" on the facts and was open to persuasion on the issues raised in

the submissions of the CFMEU. In these circumstances, a fair-minded lay observer would not reasonably apprehend that her Honour might not bring an impartial and unprejudiced mind to the resolution of the questions she was required to decide.

167 Accordingly, the appeal by the CFMEU on this ground must fail.

Penalty

168 The CFMEU instituted a separate appeal on penalty. The CFMEU's main contention was that the primary judge erred in imposing a penalty of $200,000 in respect of conduct that was qualitatively different to the conduct that constituted the contempt. It also claimed that, as a result of erroneous findings made by her Honour, she regarded the contempt committed by the CFMEU to be more serious than was warranted.

169 The difficulty with the CFMEU's submissions in relation to her Honour's findings is that they substantially overlap with a number of submissions that I have rejected in respect of her Honour's findings in relation to the CFMEU's conviction for contempt. As a consequence, the submissions did not face up to the seriousness of the contempt with which the CFMEU had been charged and convicted.

170 In substance, the primary judge found that the CFMEU, acting in its own interests substantially through its President, Mr Maher, wilfully disobeyed the Court order by not only continuing the strike but by procuring an extension of strike action in respect of the New South Wales mines. The extension of the strike was found to have been brought about by Mr Maher's manipulation of the meeting of employees held on 8 February for the proscribed purpose. The observations made by her Honour, in explaining why she considered the contempt to be "especially serious", included:

- the CFMEU, through officers of the highest level, acted cynically in encouraging its members not to comply with the Court order;

- the CFMEU's officers determined from the outset "not to permit or encourage compliance with the order";

- "[k]nowing full well of the seriousness of non-compliance with an order", the union engaged in "calculated and devious attempts to disguise any knowledge of the order's existence" and even then it "persisted with a deliberate disregard of the order";

- the CFMEU breached the order as "maintenance of the strike action was considered more important than compliance with a Court order";

- the denial of the existence of the order was "dishonest and cynical, as was the conduct of these proceedings".

171 Save for the observation concerning the CFMEU's conduct of the proceedings before the primary judge, the other observations made by her Honour were a qualitative assessment or evaluation by her of the conduct she found constituted the contempt committed by the CFMEU, of the motivation of the CFMEU for engaging in that conduct, and of the contemporaneous surrounding circumstances. It has not been established that her Honour's conclusions were not open to her on the evidence and, in so far as the observations related to the conduct of the union and its officials on 7 and 8 February, they amply justified her Honour's conclusion that the contempt was "especially serious" and called for a penalty to be imposed that acted as a deterrent and made it plain that such approaches are to be "condemned".

172 The CFMEU contended that her Honour, in part, punished the CFMEU for determining "not to permit" compliance with the order, a contempt with which the CFMEU had not been charged or convicted. When her Honour's observation in that regard is read in context it is clear that the determination her Honour was referring to was the determination of the CFMEU, through its officers, to act in a manner that would ensure that there was no prospect that the order would be obeyed in respect of the New South Wales mines. That determination was not a new or further contempt; rather, it was one of the bases for her finding that the CFMEU had acted wilfully in breaching the Court order. Further, the statement that the CFMEU would not "permit" its members to comply with the order appears to be the consequence of her Honour's finding that the strike had not ceased. The consequence of the strike not ceasing is that the bans for workers attending for work during the strike continued.

173 Accordingly, I do not accept that the CFMEU was punished for conduct that was qualitatively different to the conduct that constituted the contempt. Rather, in punishing the CFMEU for the contempt with which it had been charged and convicted, her Honour, correctly in my view, had regard to the conduct in question and the relevant surrounding circumstances.

174 There is a question as to the relevance of the union's conduct of its defence to the contempt charge. While it may be accepted that a sentencing court in a criminal proceeding may have regard to the conduct of the offender at or in connection with the trial as an indication of remorse or lack of remorse (see, for example, Sentencing Act 1991 (Vic) s 5(2C), and the Crimes Act 1914 (Cth) s 16A(2)(f)), it has been said to be axiomatic that "neither a refusal by an accused person to admit an alleged offence, nor a plea of not guilty, nor even the telling of a deliberate lie by way of the maintenance of a claim of innocence, can properly be treated as aggravatory, for the purpose of penalty, in the event that a finding of guilt is ultimately made": see *Hanneberry v Legal Ombudsman* [1998] VSC 142 at [21], *R v Gray* [1977] VR 225 at 231, and *Cho Hung Yam* (1991) 55 A Crim R 116 at 117.

175 Little turns on this issue as it does not appear to have been relied upon by the CFMEU and, in any event, I am not satisfied that the primary judge treated the union's conduct of the proceeding as an "aggravatory" factor in relation to penalty.

176 The CFMEU also criticised the primary judge's failure to take into account a number of factors in determining penalty. Those factors were said to be no previous convictions; the order had been complied with in respect of the Queensland mines; the contempt was of short duration; no injury was suffered by BHP Steel; no meaningful apology could be expected to be proffered prior to appeal; there was no public defiance of the order; and the circumstances in which the order was brought to the attention of the CFMEU officers, particularly Mr Maher.

177 There is no substance in the CFMEU's submissions on this issue. In so far as the matters relied upon were relevant to the question of penalty I am not satisfied that, on a fair reading of her Honour's reasons, she failed to consider those matters. Rather, it appears that her Honour gave them such weight as she considered appropriate in the particular circumstances of the present case. In any event, the factors relied upon by the CFMEU do

not undermine the critical finding of her Honour, for the reasons she gave, that the contempt was "especially serious" and warranted a substantial penalty.

178 I would add that the CFMEU's submissions fail to have regard to a number of matters, including:

- it was plainly open to her Honour to regard compliance with the order in relation to the Queensland mines as not being relevant to penalty in respect of the wilful breach of the order in relation to the New South Wales mines;

- in any event, it does not follow from the fact that the CFMEU was not prosecuted for contempt in respect of the Queensland mines that it did not breach the Court order in respect of those mines; it may well be that the CFMEU's conduct in calling off the strike at those mines, whether it did so "immediately" or not, did not warrant a contempt proceeding or alternatively, was no more than a technical contempt that did not warrant punishment;

- the short period in which the order was to operate made more, rather than less, immediate the need for action by the CFMEU to respond to it;

- it is far from clear that BHP Steel suffered no injury or loss;

- exercising a right of appeal against conviction for contempt need not be inconsistent with the proffering of a genuine apology;

- there was "public defiance" in the sense that the CFMEU's conduct found to be in contempt was intended to and did create the impression in public that the strike action at the New South Wales mines had not ceased.

179 The seriousness with which her Honour regarded the contempt and the purposes for which she imposed the fine of $200,000 meant it was well within the range of penalties that were appropriate and open to her to impose. I would add that even if, contrary to my view, it had been established that her Honour erred in some minor respect, and the quantum of the penalty become a matter for the Full Court, I would regard a penalty of $200,000 as

appropriate in any event. In that regard it is appropriate to repeat certain observations I made in *AIG* (at [78]-[81]), in response to a submission that certain breaches of a Court order by senior union officials were only "technical" breaches:

> *"Unions have sought, and obtained, injunctive relief from the Court to protect the rights conferred under [the* Workplace Relations Act 1996 *(Cth)] in respect of employees: see for example* Patrick Stevedores No 2 Pty Ltd v Maritime Union of Australia *(1998) 195 CLR 1,* Davids Distribution Pty Ltd v National Union of Workers *(1999) 91 FCR 463,* BHP Iron Ore Pty Ltd v Australian Workers Union *[2000] FCA 430. I pointed out in* ACI Operations Pty Ltd *at [63] that there is no special rule relating to injunctive relief in industrial disputes or actions. Plainly, the protection of legal rights is severely undermined if parties to a dispute act on the basis that they can apply for court orders to protect their rights, but ignore court orders which protect the rights of other parties to the dispute, simply because compliance with such orders is seen to be adverse to their interests or objectives, or that of their members.*
>
> *The rule of law in a democratic society does not permit any member of that society, no matter how powerful, to pick and choose the laws or court orders that are to be observed and those that are not. Maintenance of the rule of law in our society does not only require that parties are able to resort to courts to determine their disputes (*Patrick Stevedores Operation No 2 Pty Ltd v Maritime Union of Australia *(1998) 153 ALR 641 at [1] per Hayne J), it also requires that parties comply with the orders made by the courts in determining those disputes.*
>
> *If the individual respondents believed that the orders of Whitlam J were wrongly made, then it was open to them to appeal, or apply for leave to appeal, against those orders. Instead, they breached them. The fact that the breaches are by union leaders holding important offices in a federation of national trade unions makes them more, rather than less, serious: see* Gallagher v Durack *(1983) 152 CLR 238 at 244.*
>
> *If such breaches are treated as no more than 'technical' breaches, then the carefully prescribed processes provided for under the Act, available to, or to be observed by, unions, employees, employers and employer organisations alike, will quickly erode. Also, if aspects of the statutory scheme or of the orders made by Whitlam J were seen to be contentious, the political and legal processes of our democratic society provide remedies other than those chosen by the individual respondents."*

180 Putting to one side the indemnity costs order, with which I will shortly deal, for the above reasons the CFMEU has not made out its grounds of appeal in relation to penalty.

Indemnity costs

181 When the primary judge handed down her initial judgment convicting the CFMEU of contempt, without having heard the parties on the question of costs, her Honour ordered that the CFMEU pay BHP Steel's taxed costs of the proceeding. Subsequently, BHP Steel sought an order that her Honour vacate that order and replace it with an order for indemnity costs in its favour. For reasons that need not be explored for present purposes, the original costs order was entered but was subsequently set aside by her Honour. Her Honour, however, acceded to BHP Steel's application and vacated her original costs order and replaced it with an order that the CFMEU pay BHP Steel's "costs of the whole of the proceedings, such costs to be taxed on an indemnity basis".

182 The CFMEU claims that her Honour erred in making those orders and, if they stand, in failing to take the burden of the costs order into account on the issue of penalty.

183 The primary judge said she would vacate her original costs order because:

- the basis upon which costs should be taxed had not been raised or argued before her;

- although the application for indemnity costs had not been foreshadowed by BHP Steel such an application would have had to await findings in relation to the conduct of the CFMEU before meaningful submissions could be made on the question of indemnity costs;

- her Honour had not forewarned the parties that final orders, as distinct from findings, would be made at the conclusion of her reasons for judgment on the issue of whether contempt had been committed.

184 The question of vacating the original costs order was a matter of discretion for the primary judge. The reasons her Honour gave for vacating the order are compelling and no error of principle has been demonstrated in relation to the exercise of her discretion.

185 Her Honour's reasons for granting indemnity costs were expressed by her as follows:

> *"Parties who prosecute contempt cases are often recognised as performing a*

public duty and an order for indemnity costs is made so that they will not be out of pocket because they have undertaken that role. This is such a case. And it is a case where the applicant was put to considerable expense in adducing evidence and piecing together what occurred because of the decision made by the respondent not to explain the events which took place and to call only one witness in answer to the charges. There are strong reasons why the applicant should have its order for indemnity costs in relation to the proceedings culminating in the declaration, as well as the penalty and costs proceedings.

In relation to the points raised by the respondent, I add only the following: the applicant was almost entirely successful in its prosecution. This is not a case for dealing separately with charges made out. It acted properly, in my view, in putting forward the evidence relating to the conduct of the respondent in Queensland and could not have been expected to think, if it is realistic in hindsight, that the facts would have been agreed to in whole or in part. In any event, this is a matter for the taxing officer to assess on account of reasonableness.

The applicant conceded, in light of one of the respondent's contentions, that the order for indemnity costs should carry the rider that it is not to include costs unreasonably incurred. Such an order was made in Degmam v Wright. *I would not have thought a taxing officer needed this reminder."*

186 The question of costs was also a matter of discretion for her Honour. Save for one aspect of that order, I am not satisfied that any error has been demonstrated in relation to the exercise of the discretion. The aspect, about which I have some concern, was her Honour's decision to leave the issue of reasonableness to the taxing officer. In *North Australian Aboriginal Legal Aid Services Inc v Bradley* [2001] FCA 908 at [90]-[92] Wilcox J made the following observations on the appropriate form of an order for indemnity costs in a contempt proceeding:

"I am prepared to make an order for costs in favour of NAALAS against Mr Burke; but not on an indemnity basis. I have an aversion to orders for indemnity costs. I expressed my view in Coshott v Learoyd *[1999] FCA 276 at para 51 in these words:*

> '… one of the difficulties about an order for indemnity costs is its open-ended nature. Because the underlying concept is one of indemnity, the order allows recovery even of costs that have been unreasonably incurred, or incurred in an unreasonable amount. The Court will rarely know whether such costs have been incurred. So the Court risks making an order that is unreasonable in effect. This is not a proper course to take, even as a response to unreasonable behaviour on the other side.'

Callinan J, of the High Court of Australia, recently expressed a similar view

> *in* Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation *[2001] HCA 26 at para 40.*
>
> *In* Coshott v Learoyd *I made a costs order that was modelled on that of the Full Court in* Re Wilcox; Ex parte Venture Industries Pty Ltd *(1996) 72 FCR 151. That order allowed recovery of 'all costs except insofar as they are of an unreasonable amount or were unreasonably incurred so that, subject to such exceptions, (the successful party) will be completely indemnified by (the unsuccessful party)'. I propose to make a similar order in this case."*

187 I respectfully agree with his Honour's observations. In my view her Honour's order for indemnity costs should have specifically dealt with the issue of reasonableness. Accordingly, it is appropriate to allow the appeal in part on this issue and replace her Honour's order for indemnity costs with the form of order made by the Full Court in *Re Wilcox; Ex parte Venture Industries Pty Ltd (No 2)* (1997) 72 FCR 151 at 159 ("*Re Wilcox*").

188 As the costs order is to be qualified in that way the complaints of the CFMEU about the problematic and potentially unreasonable quantum of costs for which it may be liable under the original costs order, fall away. The qualification is also relevant to the contention that her Honour ought to have had regard to the burden of her costs order as a mitigating factor in relation to penalty.

189 It was open to her Honour and, if it be relevant, to this Court, to have regard to the burden of the costs order in fixing penalty. However, it is also open, as a matter of discretion, to regard each as a separate issue. Once the indemnity costs order has been qualified as set out above there is no reason, in the circumstances of the present case, to regard the burden of that order as a matter that ought to reduce the penalty of $200,000 to some lesser amount.

190 Accordingly, save for variation of the indemnity costs order as set out above, the grounds of appeal in relation to her Honour's costs orders have not been made out.

Costs of the appeal

191 BHP Steel also sought an order for indemnity costs of the appeal. There is some force in BHP Steel's contention that, as the public duty aspect of its role in upholding her Honour's orders on appeal is not qualitatively different from the public duty aspect of the role it fulfilled in prosecuting its case for those orders, the same indemnity costs order should be

made on the appeal. On the other hand the CFMEU's appeal was against a conviction and penalty in a matter of a criminal nature. In such cases there ought not to be any prima facie rule in favour of indemnity costs. Rather, each case must be considered by having regard to the particular circumstances of the case.

192 There are some distinguishing features in relation to the appeal. The CFMEU acted bona fide and properly in the conduct of its appeal. That may be contrasted with her Honour's finding that the conduct of the proceedings below by officers of the CFMEU was "dishonest and cynical". Also, the CFMEU has succeeded in part on two aspects of the appeal, albeit that they may not be significant aspects.

193 In the particular circumstances of the present case I have concluded that it is appropriate that the CFMEU be ordered to pay BHP Steel's taxed costs of the appeal, but not on an indemnity basis.

Conclusion

194 For the above reasons I would order that the appeal be allowed in part by the deletion of the words "and authorised" from the declaration made by the primary judge and by the order her Honour made for indemnity costs being replaced with an order for such costs in the form of the order of the Full Court in *Re Wilcox*. Otherwise, I would order that the appeal be dismissed with costs.

I certify that the preceding one hundred and fifteen (115) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Merkel.

Associate:

Dated: 12 December 2001

Counsel for the Appellant:	R Kenzie QC; C Howell
Solicitor for the Appellant:	R L Whyburn & Associates
Counsel for the Respondent:	W Sofronoff QC; L Kelly
Solicitor for the Respondent:	Blake Dawson Waldron
Date of Hearing:	17, 18 May 2001
Date of Judgment:	12 December 2001

ANNEXURE “JDF-12”

FEDERAL COURT OF AUSTRALIA

AGL Energy Limited v Hardy [2017] FCA 420

File number:	VID 176 of 2017
Judge:	**O'CALLAGHAN J**
Date of judgment:	26 April 2017
Catchwords:	**CONTEMPT OF COURT** – search order made pursuant to r 7.43 of the *Federal Court Rules 2011* (Cth) – order concerned predominantly with electronic documents – respondent refused to permit search party to enter premises – whether respondent guilty of contempt of court – whether order clear, unambiguous and capable of compliance
Legislation:	*Federal Court of Australia Act 1976* (Cth), s 31 *Federal Court Rules 2011* (Cth), rr 7.42, 7.43, 7.45 42.02(d)
Cases cited:	*Advan Investments Pty Ltd v Dean Gleeson Motor Sales Pty Ltd* [2003] VSC 201 *Australian Competition and Consumer Commission v ACN 117 372 915 (in liq)* [2015] FCA 1441 *Hurd v Zomojo Pty Ltd* [2015] FCAFC 148 *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 *Kirkpatrick v Kotis* (2004) 62 NSWLR 567 *Sydney Medical Service Co-operative Ltd v Lakemba Medical Services Pty Ltd (No 2)* [2016] FCA 1188 *Universal Music Australia Pty Ltd v Sharman Networks Ltd* (2006) 150 FCR 110 Biscoe P, *Freezing and Search Orders: Mareva and Anton Piller Orders* (2nd ed, LexisNexis Butterworths Australia, 2008) *Practice Direction (Mareva Injunctions and Anton Piller Orders)* [1994] 1 WLR 1233
Date of hearing:	27 March 2017
Registry:	Victoria
Division:	Fair Work

National Practice Area:	Employment and Industrial Relations
Category:	Catchwords
Number of paragraphs:	106
Counsel for the First Prospective Applicant:	Mr CJ Murdoch QC
Solicitor for the First Prospective Applicant:	Minter Ellison
Counsel for the First Prospective Respondent:	Mr EP White and Ms R Shann
Solicitor for the First Prospective Respondent:	Slater and Gordon Lawyers

Table of Corrections

2 May 2017	In the heading to page 16 of the Annexure, the First Prospective Respondent's street address has been redacted.

ORDERS

VID 176 of 2017

BETWEEN:	**AGL ENERGY LIMITED** (and others named in the Schedule) First Prospective Applicant
AND:	**GREGORY THOMAS HARDY** (and another named in the Schedule) First Prospective Respondent
JUDGE:	**O'CALLAGHAN J**
DATE OF ORDER:	**26 APRIL 2017**

THE COURT ORDERS THAT:

1. Gregory Thomas Hardy is guilty of contempt of court, in that on 2 March 2017, after being served with the Search Order made by the Court on 28 February 2017, he failed to comply with paragraph 11 of that order by refusing to permit members of the Search Party to enter the Premises so that they could carry out the search and other activities referred to in the order.

2. The hearing of the interlocutory application dated 9 March 2017 be held over for a penalty hearing on 30 May 2017.

3. On or before 10 May 2017, Mr Hardy file and serve any affidavit or affidavits and any written submission on which he intends to rely in respect of penalty.

4. On or before 24 May 2017, AGL Energy Limited, AGL Loy Yang Pty Ltd and AGL Loy Yang Marketing Pty Ltd file and serve any affidavit or affidavits and any written submission on which they intend to rely in respect of penalty.

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

REASONS FOR JUDGMENT

O'CALLAGHAN J:

1 This is an application seeking an order that Mr Gregory Thomas Hardy (**Mr Hardy**) be found in contempt of court, for refusing to comply with a search order made under r 7.42 of the *Federal Court Rules 2011* (Cth) (the **Rules**).

INTRODUCTION

The 28 February 2017 search order

2 On 28 February 2017, on the ex parte application of AGL Energy Limited, AGL Loy Yang Pty Ltd and AGL Loy Yang Marketing Pty Ltd (collectively, **AGL**) I made a search order under r 7.42 of the Rules permitting a search of the home of Mr Hardy in Traralgon, Victoria (the **premises**), by an independent lawyer, an independent computer expert and a lawyer at the law firm Minster Ellison, who are AGL's lawyers (the **order**), according to the terms of the order.

3 AGL Energy Limited (**AGLE**) wholly owns AGL Loy Yang Pty Ltd (**AGL LY**), which operates the Loy Yang Power Station at Traralgon. AGL Loy Yang Marketing Pty Ltd (**AGL LYM**) markets and receives revenue on behalf of AGLE and AGL LY for the power generated by AGL LY at the Loy Yang Power Station.

4 Mr Hardy is a Unit Controller for AGL LY and is the Secretary of the Loy Yang Lodge of the Construction, Forestry, Mining and Energy Union (**CFMEU**).

5 I made the order because I was persuaded: (i) of the existence of a strong prima facie case that between 12 and 18 January 2017, Mr Hardy organised industrial action at the Loy Yang Power Station in breach of the general protections provisions of the *Fair Work Act 2009* (Cth); (ii) that the potential loss or damage to AGL would be serious if the order was not made; and (iii) that there was sufficient evidence in relation to Mr Hardy that he possessed important evidentiary material and that there was a real possibility that he might destroy such material or cause it to be unavailable for use in an anticipated proceeding by AGL in relation to the general protections provisions of the *Fair Work Act 2009* (Cth).

Alleged non-compliance

6 Mr Hardy does not dispute that he was served with the order by the independent lawyer at approximately 9.00 a.m. on 2 March 2017, and also with the other documents

required by the terms of the order to be served, including the material that AGL relied upon at the hearing on 28 February 2017, the transcript of the hearing, the draft originating process against Mr Hardy and the Rules of the CFMEU Mining and Energy Division.

7 Mr Hardy also does not dispute that he refused to allow members of the search party, other than the independent lawyer, to enter the premises.

8 On 9 March 2017, AGL filed an interlocutory application seeking an order, among others, that, pursuant to r 42.02(d) of the Rules and s 31 of the *Federal Court of Australia Act 1976* (Cth), Mr Hardy be found in contempt of court (the **interlocutory application**).

9 By a statement of charge also filed on 9 March 2017 (the **statement of charge**), AGL alleges against Mr Hardy that:

> On 2 March 2017, after being served with the Search Order, you failed to comply with Order 11 of the Search Order by refusing to permit members of the Search Party to enter the Premises so that they could carry out the search and other activities referred to in the Search Order.

10 The statement of charge contains particulars, which detail the circumstances in which the alleged failure to comply occurred.

11 AGL relied upon:

(1) the interlocutory application;

(2) the statement of charge;

(3) an affidavit of the independent lawyer, Mr Daniel Marquet, a partner of the law firm Corrs Chambers Westgarth, sworn 9 March 2017, deposing to the circumstances in which Mr Hardy declined to allow the search party to enter the premises; and

(4) paragraphs 1, 2, 3, 4 and 5 of an affidavit of Mr Daniel Williams, sworn 9 March 2017, deposing to the documents referred to in the search order with which the independent computer expert and independent lawyer were provided prior to service of the order on Mr Hardy.

12 Through his counsel at the hearing before me on 28 March 2017 Mr Hardy pleaded not guilty to the charge of contempt. He also reserved his right to make a "no case" submission at the conclusion of the applicants' case. Ultimately, no such submission was made.

Terms of the search order

13 The order is substantially based on the "Example Form of Search Order" contained in Annexure A to the Court's *Search Orders Practice Note* (GPN-SRCH) (the **template order**). The Practice Note supplements Div 7.5 in Pt 7 of the Rules relating to search orders, which was inserted in 2006 in accordance with advice of the Rules Harmonisation Committee appointed by the Council of Chief Justices.

14 Rule 7.42 within Div 7.5 relevantly empowers the Court, upon satisfaction of the matters prescribed by r 7.43, to make a search order in any proceeding or in anticipation of any proceeding in the Court, with or without notice to the respondent, for the purpose of securing or preserving evidence and requiring a respondent to permit persons to enter premises for the purpose of securing the preservation of evidence that is, or may be, relevant to an issue in the proceeding or anticipated proceeding. Nothing in Div 7.5 diminishes the inherent, implied or statutory power of the Court to make a search order: r 7.44.

15 Pursuant to r 7.45, the Court has broad powers to tailor the terms of a search order to the circumstances of a particular application. Rule 7.45 relevantly provides:

> **7.45 Terms of search order**
>
> (1) A search order may direct each person who is named or described in the order:
>
> (a) to permit, or arrange to permit, other persons named or described in the order:
>
> (i) to enter premises specified in the order; and
>
> (ii) to take any steps that are in accordance with the terms of the order; and
>
> (b) to provide, or arrange to provide, other persons named or described in the order with any information, thing or service described in the order; and
>
> (c) to allow other persons named or described in the order to take and retain in their custody any thing described in the order; and
>
> (d) not to disclose any information about the order, for up to 3 days after the date the order was served, except for the purposes of obtaining legal advice or legal representation; and
>
> (e) to do or refrain from doing any act as the Court considers appropriate.
>
> (2) Without limiting the generality of subparagraph (1) (a) (ii), the steps that may be taken in relation to a thing specified in a search order include:
>
> (a) searching for, inspecting or removing the thing; and

> (b) making or obtaining a record of the thing or any information it may contain.
>
> (3) A search order may contain other provisions the Court considers appropriate.

16 At the hearing on 28 February 2017, senior counsel for AGL handed up a draft order that contained certain modifications to the template order, in accordance with the Court's broad powers under Div 7.5, because the evidence sought to be preserved by the application was predominantly in digital or electronic form. I made the order in the form of the proffered draft.

17 The order permitted a search of Mr Hardy's home by Mr Sisk, an independent computer expert, and Mr Zielinksi of the law firm Minter Ellison, under the supervision of Mr Marquet.

18 The search permitted by the order was in substance limited to a search for the purposes of preserving evidence on Mr Hardy's laptop computer and mobile telephone, as well as any other hardware, email accounts or online storage devices. Because it will later become necessary to refer to the terms of the order in some detail, I have annexed to these reasons a copy of it, with certain personal information redacted.

19 Paragraph 11 of the order (or "Order 11" as that part of it is referred to in the statement of charge) provided:

> Subject to paragraphs 13 to 23 below, upon service of this order you must permit members of the Search Party to enter the Premises so that they can carry out the search and other activities referred to in this order.

20 Having "permitted members of the Search Party to enter the Premises", paragraph 12 of the order required Mr Hardy then to do the following things:

(1) permit the search party to leave and re-enter on the same and the following day until the search and other activities referred to in the order were complete;

(2) permit the search party to search for and inspect the "Listed Things" and to make or obtain a digital image, copy, photograph, film, sample, test or other record of those things;

(3) disclose to the search party the whereabouts of all the "Listed Things" in his possession, custody or power, whether at the premises or otherwise;

(4) disclose to the search party the whereabouts of all "Storage Devices" or systems at the premises in which any "Electronic Documents" (both as defined in the order) among the "Listed Things" were or may have been stored, located or recorded;

(5) do all things necessary to enable the search party to access the "Listed Things", including opening or providing keys to locks and enabling them to access and operate "Storage Devices" and providing them with all necessary user names, passwords or other credentials;

(6) permit the independent lawyer to remove from the premises into the independent lawyer's custody any things the subject of dispute as to whether they are "Listed Things";

(7) permit the independent computer expert to search any "Storage Device" in which any "Electronic Documents" among the "Listed Things" were or may have been stored, located or recorded and make a copy or digital copy of any such "Storage Device"; and

(8) permit the independent computer expert or the independent lawyer to remove any such "Storage Device" from the premises as set out in paragraphs 23 and 24 of the order.

21 Paragraphs 13 to 22 of the order were headed "Restrictions on Entry, Search and Removal". Those paragraphs contained:

(1) preconditions to entry, which, if not satisfied, entitled Mr Hardy to refuse entry: paragraphs 13-15 (by reference to 16 and 17); and

(2) restrictions on the search and removal powers of various members of the search party: paragraphs 18, 20 (subject to 21) and 22.

22 Paragraphs 19, 23 and 24 related to functions of the independent computer expert. Like paragraphs 18 and 20-22, those paragraphs did not impose any restriction on the search party's right to enter the premises under paragraph 11.

Restrictions on entry: paragraphs 13, 14 and 15 (by reference to 16 and 17)

23 The obligation imposed on Mr Hardy by paragraph 11 of the order, to permit entry to the premises so that the search party could carry out the search and other activities referred to in the order, would not have been engaged in the following circumstances.

24 First, where the order had purportedly been executed at the same time as a search warrant (or similar process): paragraph 13.

25 Secondly, if Mr Hardy had not been served with copies of the order and the affidavit of Mr Williams referred to in the order: paragraph 14(a).

26 Thirdly, if Mr Hardy had not been given an opportunity to read the order and, if the independent lawyer did not, if asked, explain the terms of the order to him: paragraph 14(b).

27 Fourthly, if Mr Hardy had exercised his right to refuse entry to anyone except the independent lawyer – for a period not exceeding two hours, or such longer period as the independent lawyer permitted – in order to seek legal advice, ask the Court to vary or discharge the order and/or gather together certain material subject to legal professional privilege or client legal privilege and hand them to the independent lawyer in a sealed envelope or container: paragraph 15(a), (b) and (c).

28 The circumstances detailed in paragraph 15(a), (b) and (c) of the order supplied a basis for refusing access to the premises, to anyone other than the independent lawyer, during the period referred to in paragraph 15.

29 During that period Mr Hardy remained obliged to:

(1) inform and keep the independent lawyer informed of the steps being taken;

(2) permit the independent lawyer to enter the premises but not to start the search;

(3) not disturb or remove any document or material the subject of the order (defined as "Listed Things" in paragraph 6 of the order); and

(4) comply with paragraph 28 of the order (by not destroying, tampering or parting with possession, custody or control of the "Listed Things"): paragraph 17(a), (b), (c) and (d).

30 The order further precluded the independent lawyer from inspecting, or permitting others, including AGL and its lawyers, to inspect, anything handed to the independent lawyer in accordance with paragraph 15(c) (being documents subject to legal professional privilege or client legal privilege): paragraph 16. This prohibition would not have extended to Mr Hardy or his lawyer had he exercised the right conferred by paragraph 25 to inspect anything removed from the premises (including to copy and claim privilege in respect of those things). Anything handed to the independent lawyer in accordance with paragraph 15(c) was required to be delivered to the Court at or prior to the hearing on the Return Date.

General restrictions on search and removal: paragraphs 18, 20 (subject to 21) and 22

31 Once permitted to enter the premises, the order provided that the search party could then search and remove certain things from the premises, to the extent provided for in the order. To that end, paragraphs 18, 20 (subject to 21) and 22 of the order imposed certain constraints on the search party's search and removal powers.

32 Paragraph 18 provided that if a dispute arose as to whether a thing was a "Listed Thing", within the meaning of paragraph 6 of the order, that thing was to be handed to the independent lawyer pending resolution of the dispute or further order of the Court.

33 Paragraph 20 provided that the premises were not to be searched, and things were not to be removed from the premises, except in the presence of Mr Hardy or a person who appeared to the independent lawyer to be Mr Hardy's partner, employee, agent or other person acting on Mr Hardy's behalf or instructions. However, the independent lawyer was empowered to permit a search to occur otherwise than in accordance with the requirements of paragraph 20: paragraph 21.

34 Paragraph 22 imposed an obligation on AGL's lawyers and the independent lawyer to prevent AGL from inspecting or having copies of anything removed from the premises during the search until the Return Date or other time fixed by the Court. Similarly, AGL's lawyers and the independent lawyer were forbidden from communicating to AGL information about the contents of anything removed from the premises or about anything observed at the premises.

Search and removal by the independent computer expert: paragraphs 19, 23 and 24

35 Paragraphs 19, 23 and 24 made specific provision for the search and removal powers of the independent computer expert.

36 Paragraph 19 provided that before removing any "Listed Thing" from the premises, other than a thing about which there was a dispute as to whether it was a Listed Thing (for the purposes of paragraph 18), the independent computer expert, through the independent lawyer, would be required to provide Mr Hardy with a list of such things and a reasonable time to check the correctness of the list, before providing both Mr Hardy and AGL's lawyers with a signed copy of the list.

37 Paragraph 23 provided for the role of the independent computer expert within the search party: paragraph 23(a). The various subparagraphs of paragraph 23 both conferred

discretions and imposed obligations on the independent computer expert with respect to search, copying and removal of relevant facilities, accounts and devices.

38 Paragraph 23(b) provided that any search of a "Storage Device" was to be carried out only by the independent computer expert, while subparagraph (e) provided that such search (of the Storage Device or a copy thereof) might occur at and/or away from the premises.

39 Paragraph 23(c) provided that the independent computer expert was required, without inspecting the material contained therein, to make a copy or digital copy of any "Online Storage Facilities, Email Accounts or Storage Devices" (each within the meaning of paragraph 7 of the order) in which "Listed Things" were or may have been stored, located or recorded. Paragraph 23(e) provided that the independent computer expert could copy – electronically, in hard copy or both – any Listed Things found during a search conducted in accordance with than paragraph. Paragraph 23(f) required the independent computer expert to deliver a copy or digital copy of Online Storage Facilities, Email Accounts or Storage Devices to the independent lawyer, together with a report of what the independent computer expert had done, including a list of such electronic or hard copies. The independent lawyer was then required, by paragraph 23(g), to deliver all things received from the independent computer expert to the Court and serve a copy of the independent computer expert's report on the parties.

40 Paragraph 23(c) further provided that a copy or digital copy taken in accordance with that paragraph was to be removed from the premises. Paragraph 23(d)(i) empowered the independent computer expert to remove any Storage Device referred to in paragraph 23(c) from the premises. If such a Storage Device was removed from the premises pursuant to paragraph 23(d)(i), the independent computer expert was obliged to return the Storage Device as soon as practicable, once satisfied that a complete digital image of the Storage Device had been accurately generated: paragraph 23(d)(ii).

41 Paragraph 24 prescribed a specific objection procedure for claiming the privilege against self-incrimination or civil penalty privilege in response to a purported exercise of the powers and discretions provided for in paragraph 23: paragraph 24(a)(i), (ii). Paragraph 24 is consistent with the procedure prescribed by s 128A of the *Evidence Act 1995* (Cth), which further prescribes the process for determination of a claim made in accordance with that provision. Were such an objection to have been made by Mr Hardy, paragraph 24(b) would have required him to do certain things, namely to:

(1) disclose so much of the information required to be disclosed to which no objection was taken; and

(2) prepare an affidavit containing so much of the information required to be disclosed to which objection was taken, and deliver it to the Court in a sealed envelope; and

(3) file and serve on AGL a separate affidavit setting out the basis for the objection.

ISSUES AND EVIDENCE

42 It was common ground between the parties that in order to prove a civil contempt constituted by a breach of a court order, the moving party must prove beyond reasonable doubt that:

(1) the relevant order was made by the Court;

(2) the terms of the order are clear, unambiguous, and capable of compliance;

(3) the order was served on the alleged contemnor;

(4) the alleged contemnor had knowledge of the terms of the order; and

(5) the alleged contemnor breached the terms of the order.

(See *Advan Investments Pty Ltd v Dean Gleeson Motor Sales Pty Ltd* [2003] VSC 201; cited with approval by the Full Court in *Hurd v Zomojo Pty Ltd* [2015] FCAFC 148 at [28] per Besanko and Gilmour JJ (Beach J agreeing at [164]), by Flick J in *Sydney Medical Service Co-operative Ltd v Lakemba Medical Services Pty Ltd (No 2)* [2016] FCA 1188 at [13] and by Moshinsky J in *Australian Competition and Consumer Commission v ACN 117 372 915 Pty Ltd (in liq)* [2015] FCA 1441 at [51].)

43 It was also not disputed that a person who refuses to comply with a search order is in contempt of court.

44 Mr Hardy conceded that the search order was made and that it was served on him at about 9.00 a.m. on 2 March 2017. Items (1) and (3) above are therefore not in dispute.

45 Mr Hardy put in issue items (2), (4), and (5). He submitted that:

(1) certain terms of the search order were unclear, ambiguous and incapable of compliance;

(2) the evidence did “not exclude the reasonable possibility that Mr Hardy did not know the terms of the search order – i.e. that he did not know what was required of him” (Mr Hardy’s written submissions at [52]);

(3) he did not breach the search order.

46 Mr Marquet was cross-examined by counsel for Mr Hardy. But counsel did not challenge his evidence about the circumstances in which Mr Hardy declined to allow the search to occur. Mr Marquet deposed to the following facts, set out at [47] to [57] below, each of which I am satisfied beyond reasonable doubt occurred.

47 Shortly after 9:00 a.m. on 2 March 2017, Mr Marquet attended the premises with the other members of the search party. Mr Marquet served the order and the documents required to be served with the order on Mr Hardy. The other documents were the application for the search order filed on 27 February 2017; Mr Williams’ affidavit date 27 February 2017; the applicants’ written submissions in support of the order dated 28 February 2017; a draft originating application; the Rules of the CFMEU Mining and Energy Division; and the transcript of the hearing before me on 28 February 2017: see the affidavit of Mr Williams sworn 9 March 2017. The documents were contained in two lever arch folders. Mr Hardy invited Mr Marquet to enter the premises for the purpose of explaining the terms of the order, which he did. The other members of the search party remained outside.

48 Once inside the premises, Mr Marquet explained the terms of the order to Mr Hardy and told him that he had a two hour window within which to seek legal advice, apply to the Court to vary or discharge the order and to gather together privileged material. Mr Marquet asked Mr Hardy whether he had a lawyer or could contact a lawyer through the CFMEU, to which Mr Hardy responded that he did not. Mr Hardy said words to the effect that he did not want to comply with the order, to which Mr Marquet responded with words to the effect that he had two hours to consider the documents and seek legal advice.

49 Mr Hardy said that he needed to consult with the people he represented and asked Mr Marquet for an electronic copy of the documents with which he had been served.

Mr Marquet left the premises briefly to speak with Mr Zielinski to make arrangements for this to occur and then went back into the premises.

50 Mr Marquet sat with Mr Hardy in the front room of the premises, until around 10:50 a.m., while Mr Hardy read the order and reviewed the accompanying documents. From time to time Mr Hardy asked questions about the order, which Mr Marquet answered. Mr Marquet said words to the effect that if Mr Hardy did not comply with the order he could be in contempt of court and suggested that he seek legal advice before taking steps that could constitute a contempt.

51 At around 10:00 a.m., Mr Hardy said that he was concerned that the terms of the order permitted the search party to search areas of the premises such as his wife's bedroom drawers. Mr Marquet responded that, while that was so, the focus of the search was on electronic documents stored on devices such as Mr Hardy's computer and mobile phone. Mr Marquet also told him that only electronic documents could be removed from the premises.

52 At around 10:10 a.m., Mr Zielinski informed Mr Marquet by text message that emails had been sent to Mr Hardy attaching the documents with which he had been served. Mr Hardy took no steps in Mr Marquet's presence to access those documents.

53 Several times during the course of his discussions with Mr Marquet, Mr Hardy queried the independence of Mr Marquet, the law firm of which he is a partner, and the firm by which the independent computer expert is employed. Mr Marquet said that he was an independent lawyer with no interest in the proceeding and that the order had been made to preserve evidence. Mr Marquet informed Mr Hardy of the undertakings he had provided to the Court, namely, that he would hold any material obtained during the search pending further order of the Court and that AGL would not be provided with such material until the Return Date (namely, 10 March 2017), at which Mr Hardy would have an opportunity to be heard. Mr Marquet told Mr Hardy that the independent computer expert was in the same position. In response, Mr Hardy said words to the effect that he did not accept this.

54 Mr Marquet drew Mr Hardy's attention to paragraph 26 of the order and said that it required him to prepare an affidavit before the Return Date.

55 As the end of the two hour period referred to in paragraph 15 drew near, Mr Marquet sought to clarify Mr Hardy's response to paragraph 11. Mr Hardy said words to the effect

that he "was not prepared to let AGL have [his] stuff" and that there was confidential material on his laptop relating to employees of AGL. Mr Marquet said to Mr Hardy words to the effect that there appeared to be three options available to him: permit the search; not permit the search; or, as a middle ground, permit the search of his computer devices and then discuss the need for further searches. Mr Maquet cautioned Mr Hardy about the consequences of being in contempt and suggested that it may be preferable partially to comply with the order. Mr Hardy said words to the effect that he "did not see any difference between being in contempt by not complying with the [o]rder partially or not complying at all". Mr Marquet then asked Mr Hardy whether he would permit the search, to which he replied that he would not. Mr Marquet indicated that if that was Mr Hardy's position, he would leave the premises. He then did so.

56 From around 11:00 a.m. to 11:56 a.m., Mr Marquet waited outside the premises with the search party. Mr Zielinski spoke with his supervising lawyer, Mr Williams, with whom Mr Marquet also spoke.

57 At around 11:56 a.m., Mr Williams called Mr Zielinski to tell him that he wanted Mr Marquet to go back to the premises to ask Mr Hardy to confirm his position in respect of the order. Mr Marquet then returned to the front room of the premises with Mr Hardy, where Mr Marquet said words to the effect that that would be his final opportunity to comply and that, if he did not, it was likely that AGL would take contempt proceedings. Mr Hardy responded by again saying words to the effect that he "was not letting AGL search his stuff" and that he understood the potential for contempt proceedings. Mr Marquet informed Mr Hardy that if he changed his mind he should call Mr Marquet. They exchanged contact details and Mr Marquet left the premises.

58 During cross-examination, Mr Marquet agreed with counsel for Mr Hardy that throughout Mr Marquet's time with Mr Hardy, Mr Hardy was polite and respectful.

59 I am satisfied on the evidence beyond reasonable doubt, and Mr Hardy did not contest, that he did not permit the search party to enter his home during the period provided for in the order or during the additional period offered by Mr Marquet so that the search party could carry out the search and other activities referred to in the order.

60 At no time since 2 March 2017 has Mr Hardy sought to discharge or vary the order or otherwise sought to assert that the order should not have been made.

61 Mr Hardy's principal submission in support of the proposition that he did not commit a contempt, by refusing to permit the search party to enter the premises so that they could carry out the search and other activities referred to in the order as required by paragraph 11 of the order, is that certain terms of the order (but not paragraph 11) are unclear, ambiguous and incapable of compliance. His other submissions – that the evidence does not exclude the reasonable possibility that he did not know the terms of the search order, and that he did not breach it – largely stand or fall on that principal submission. So much is clear from both the written and oral submissions made to the Court by counsel on Mr Hardy's behalf.

CONSIDERATION

Whether the terms of the order are clear, unambiguous, and capable of compliance

62 There is no dispute between the parties about the applicable legal principles. Search orders, like any other injunction, "should be granted in clear and unambiguous terms which leave no room for the person to whom they are directed to wonder whether or not their future conduct falls within the scope of the injunction": *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 at 259 per Lockhart J. Further, "the Court approaches the question of whether the order is ambiguous on the basis that the recipient is expected to try to understand it and obey it": *Kirkpatrick v Kotis* (2004) 62 NSWLR 567 at 578, [55] per Campbell J.

63 But an order will not be incapable of founding a charge of contempt "merely because it leaves a respondent with room to wonder whether future conduct falls within it. At least where the true construction of the order is one which ought fairly to have been in the contemplation of the person to whom the order was directed … the Court which entertains the charge of contempt will be required to determine that construction": *Universal Music Australia Pty Ltd v Sharman Networks Ltd* (2006) 150 FCR 110 (***Universal Music***) at [38] per Branson J.

64 Counsel for Mr Hardy submitted, by way of summary, that the order was unclear, ambiguous and incapable of compliance because it:

(1) contained internally contradictory paragraphs; and

(2) provided Mr Hardy with "important safeguards which the order state[d] he [could] assert to prevent or limit the search but provide[d] impossible means to activate them in circumstances of a search entirely focussed on electronic documents".

65 A number of the submissions made on Mr Hardy's behalf in support of these propositions laboured under the misapprehension that many of the matters contemplated by the order to be done after the search party was permitted to enter the premises (something that did not occur in this case) were required to occur within the two to three hour "windows" provided for in paragraphs 3 and 15 of the order. Counsel submitted, for example, that the removal and search orders contained in paragraph 23 of the order, and the provision entitling Mr Hardy to prepare an affidavit containing information required to be disclosed to which he took objection under paragraph 24, required Mr Hardy's compliance within "the two or three hours on the morning of [2 March 2017]". Mr Hardy's counsel submitted that "the practicality of compliance during the time the Court is here concerned with, is virtually nil".

66 But that is simply not so. Other critical parts of the order made it abundantly clear that, had Mr Hardy chosen to permit the search party entry to the premises to conduct the search, he would have had ample time to invoke whatever rights given to him under the order that he chose to invoke. The order did not contemplate that the invoking of claims to privilege were to be done within two or three hours of the order being served. Paragraph 12(a) allowed the search party to leave and re-enter the premises "on the same and the following day until the search and other activities referred to in [the] order [were] complete". Those "other activities" obviously included the matters the subject of paragraphs 23 and 24. Further, paragraph 15 permitted the independent lawyer to extend the two hour time limit provided for in paragraph 15 within which Mr Hardy was entitled to seek legal advice and ask the Court to vary or discharge the order. And, in any event, paragraph 3 of the order provided that Mr Hardy could have applied to the Court to vary (or discharge) the order, by calling my chambers on the telephone number given in that paragraph.

67 Mr Hardy's counsel also submitted that because paragraph 24 of the order "is not time limited", there cannot be a breach of the obligation to permit entry provided for in paragraph 11 of the order. Counsel submitted in oral argument that "if the period [within which Mr Hardy was to permit the search to occur] is limited, as… is clear… then if there is capacity to claim privilege at a later time, then how can there be a breach [of paragraph 11] where that claim is either – has been made or might be made? It might be made as I stand here today".

68 That contention is, with respect, also misconceived, because, like many of the other submissions made on Mr Hardy's behalf (which are dealt with below), it ignores the obvious

fact that "the capacity to claim privilege" referred to in paragraph 24 could only arise if and when Mr Hardy permitted the search party to enter the premises to carry out the search. That is something that he did not permit, so the question of whether Mr Hardy ever had "the capacity to claim privilege" under paragraph 24 during the period of any search permitted by the order never arose.

69 Mr Hardy further submitted that paragraph 24 of the order was unclear and/or incapable of compliance. He submitted that the steps required to be taken by paragraph 24(b) were incapable of being completed at the time at which the independent computer expert would be purporting to exercise his powers under paragraph 23, because:

(1) Mr Hardy lived in Traralgon and was required by the order to be at his home while the search was conducted and "at the same time" prepare an affidavit and deliver it to the Court and "do all other matters he was ordered to do";

(2) the Listed Things were contained on a Storage Device; he could not, so it was submitted, disclose "some" of the information in accordance with paragraph 24(b)(i), assuming privilege was not claimed over all of it;

(3) Mr Hardy would risk altering the documents' properties, and thus breaching paragraph 17, were he to segregate and/or review certain documents for the purposes of preparing an affidavit under paragraph 24(a)(ii).

70 Mr Hardy further submitted that paragraph 15(c) was "incapable of compliance", because it required Mr Hardy to put documents subject to legal professional privilege in an envelope or container, which is impossible when all of the relevant Electronic Documents were contained in a Storage Device. Rhetorically, his Counsel asked, "is [he] to put his computer in an envelope? Is he to review the contents of his electronic documents and print those over which he wishes to make a claim?"

71 Mr Hardy next submitted that paragraph 18 was incapable of compliance, because all of the Listed Things were electronic and:

(1) Paragraph 23(b) provided that only the independent computer expert was permitted to search the relevant Storage Devices on which the Listed Things were contained, yet paragraph 23(c) prohibited the independent computer expert from inspecting such Storage Devices before removing them from the premises.

(2) It would have constituted a breach of paragraph 17(c) for Mr Hardy to review each Electronic Document to determine whether it was a Listed Thing.

72 Mr Hardy also submitted that paragraph 12(b) and paragraph 19, respectively, contradicted paragraph 23. In the first instance, it was submitted, this is because paragraph 12(b) empowered all members of the search party to search for and inspect the Listed Things, while paragraph 23(b) empowered only the independent computer expert to search a Storage Device (and all of the Listed Things are contained on a Storage Device). Mr Hardy would, it was submitted, thus have been unable to identify who should be permitted to search his Electronic Documents. In the second instance, the contradiction was said to arise from paragraph 19 providing a process for removal of Listed Things from the premises (namely, by the independent computer expert providing Mr Hardy with a list of those things for his verification) while paragraph 23 provided for the removal of Storage Devices and copies thereof: paragraph 23(c), (d). A "tension", Mr Hardy submitted, arose from the individual treatment of Listed Things in paragraph 19 with the bulk treatment of such things (as contained on Storage Devices) in paragraph 23.

73 Mr Hardy also submitted that paragraph 3 contradicted paragraph 15(b), because those paragraphs provided two different mechanisms for seeking variation or discharge of the order. The former entitled Mr Hardy to seek variation or discharge on the giving of three hours' written notice to AGL. The latter entitled him to seek variation or discharge, before permitting entry to the premises, during the period prescribed by that paragraph. It was submitted that paragraph 8 of the "Important Notice to the First Prospective Respondent/Occupier of the premises at [street address], Traralgon, Victoria" on page 18 of the order compounded this contradiction. Relevantly, that paragraph notified Mr Hardy of his right to seek variation or discharge "provided that you do so at once, and provided that meanwhile you permit the independent lawyer (who is a lawyer acting independently of the Prospective Applicant) and one of the Prospective Applicants' representatives to enter, but not start to search, the premises".

74 Finally, Mr Hardy submitted that paragraph 23 was "internally contradictory, inconsistent with other [o]rders and is unworkable" because:

(1) Paragraph 23(c) required the independent computer expert, inter alia, to make a copy of Storage Devices and remove any copy from the premises, without making inspection of

the material contained therein. Paragraph 23(e), however, conferred a discretion on the independent computer expert to search a Storage Device at the premises.

(2) Paragraph 23(c) was inconsistent with paragraph 19, because, presumably, it would not be possible for the independent computer expert to create a list of all Listed Things without inspecting the material contained on a Storage Device.

(3) Only the independent computer expert was empowered to search a Storage Device, but "the subject and nature of the definition of Listed Things require[d] someone with knowledge of the workplace and dispute to consider scope (particularly in identifying documents falling within Order 6(c))".

75 I will deal with the submissions set out at [69] to [74] above in turn.

Paragraph 24

76 Counsel for Mr Hardy submitted that the order was unclear, ambiguous or incapable of compliance. Counsel contended that because paragraph 11 was "*Subject to*" paragraph 24 (it being "picked up" by paragraph 23), paragraph 24 qualified what otherwise would have been an unqualified obligation to comply with the order to permit the search contained in paragraph 11.

77 In other words, Mr Hardy contended that the process for objection prescribed by paragraph 24 provided a basis for refusing entry to the premises.

78 I reject that submission. The words of paragraph 11 admit of no doubt. That paragraph states: "Subject to paragraphs 13 to 23 below, upon service of this order you must permit members of the Search Party to enter the Premises so that they can carry out the search and other activities referred to in this order." The words "Subject to" mean that Mr Hardy was required to permit entry into the premises, unless one of the circumstances in paragraphs 13 to 23 (and 24) was engaged, such that he was entitled to refuse to permit entry. It is readily apparent that not all of those paragraphs are capable of giving rise to a right to refuse entry to the search party. Paragraph 24 is one such paragraph. Paragraphs 18 to 23 also have nothing at all to do with the obligation to permit entry. All of those paragraphs involved considerations or matters that could only have arisen if and when entry to the premises was permitted.

79 The obligation to permit the independent computer expert to make the searches provided for in paragraph 23 obviously becomes inoperative to the extent of any objection

made under paragraph 24. But an objection pursuant to paragraph 24, if made, would not have alleviated Mr Hardy of the obligation to permit entry under paragraph 11. It is clear from the terms of paragraph 24 that it applied to the functions and powers of the independent computer expert under paragraph 23. Relevantly, Mr Hardy was to permit (unless he had made an objection under paragraph 24) the independent computer expert's search of a relevant Storage Device (paragraph 23(b), (e)), copying of any relevant "Online Facilities, Email Accounts or Storage Device" (paragraph 23(c), (d)(ii), (f)) and, if the independent computer expert had so decided, removal, of any relevant Storage Device from the premises. Paragraph 24 was, therefore, a basis for objecting to the disclosure that would have been effected by permitting the independent computer expert to exercise the powers or discretions conferred on him by paragraph 23 – something that could only be done once entry to the premises had been permitted.

80 Paragraphs 11 and 12 drew a distinction between obligations imposed on Mr Hardy to: permit entry to the premises (paragraphs 11, 12(a)); permit the search to occur (paragraph 12(b)-(e), (g)); and permit certain things to be removed from the premises (paragraph 12(f), (g)). The opening words of the chapeau to paragraph 12 ("Having permitted entry…") make these distinctions abundantly clear.

81 The submission (see [69(1)] above) that Mr Hardy could not have prepared an affidavit pursuant to paragraph 24(b)(ii) of the order, and thus could "not comply" with the order, because he lived in Traralgon and could not be present for the search and do "other things" he was ordered to do all at the same time, is misconceived. As I have explained, had he chosen to permit entry into the premises to permit the search to occur, Mr Hardy would have had ample time under the clear and express terms of the order to invoke whatever rights, including making claims to privilege, that he chose to invoke.

82 The submission (see [69(2)] above) that, because the Listed Things were contained on a Storage Device, Mr Hardy could not disclose "some" information if privilege was not to be claimed over all of it, was not developed during oral argument and it is difficult to understand. I can see no reason, and none was given to explain, why documents contained on a Storage Device (that is, on a computer, a digital device, a removable storage device, a hard drive and the like) could not be separated from each other. I accordingly reject the submission.

83 The submission (see [69(3)] above) that Mr Hardy would risk altering the documents' properties, and thus breaching paragraph 17 of the order, were he to segregate and/or review certain documents for the purposes of preparing an affidavit under paragraph 24(a)(ii) is a regrettable submission. It is inconsistent with Mr Hardy's counsel's own assertion at the directions hearing before me on 10 March 2017 that whatever changes or alterations are made to the electronic properties of a document when it is on a computer could not constitute "destroying" of "tampering" with the document because such changes as may be effected by the computer by such reviewing would not be intentional acts of the recipient of the order. It was on that basis that counsel said that he had "no difficulty" with the Court making an order that:

> 1. Until 4.30pm on 27 March 2017 (or such further time as the court may allow) the First Prospective Respondent must not (whether by himself, his directors, officers, employees or agents, or otherwise howsoever) destroy, tamper with, cancel or part with possession, power, custody or control of the 'Listed Things' referred to in the order dated 28 February 2017 in this proceeding otherwise than in accordance with the terms of the order made on 28 February 2017 or further order of the Court.

84 I accordingly reject that submission.

Paragraph 15(b) and/or 3

85 Mr Hardy submitted that the interaction between paragraphs 3, 15(b) and/or the notice in paragraph 8 on page 18 of the order created ambiguity as to Mr Hardy's entitlement to seek variation or discharge of the order. This ambiguity was said to arise from the different time periods specified in each section.

86 In my view, no relevant ambiguity arises.

87 Paragraph 3 imposed an obligation on Mr Hardy to provide three hours' written notice of any intention to seek variation or discharge of the order. Paragraph 15(b) entitled Mr Hardy to refuse entry to the premises for the purpose of seeking variation or discharge of the order, but only if he did so within the period specified in that paragraph. Plainly, in order to allow Mr Hardy to comply with his notice obligation under paragraph 3, the independent lawyer would have needed to extend the initial two-hour window in accordance with his power to do so under paragraph 15. Such an extension could readily have been given, had Mr Hardy communicated to the independent lawyer an intention to seek variation or discharge of the order (which he did not).

88 Although paragraph 8 of the notice on page 18 of the order is not an operative section of the order, like paragraphs 3 and 15(b), it too can be read consistently with the scheme prescribed by those paragraphs. The notice informed Mr Hardy that, unless he had an entitlement under the order to refuse entry (for example, if it was during the period provided for in paragraph 15(b) or one of the requirements of paragraph 14 had not met), he was required to permit the independent lawyer and a representative of AGL to enter, but not search, the premises while he sought variation or discharge of the order.

Paragraph 15(c)

89 I do not accept Mr Hardy's submission with respect to paragraph 15(c). It is, with respect, frivolous. While paragraph 15(c) does refer to Mr Hardy placing certain electronic documents in an envelope, it also entitled him to place them in a "container". If relevant documents had been contained on a storage device that would fit in an envelope (like a USB drive), then he could have put the device in an envelope. But, plainly, larger storage devices would have had to have been put in a container, as the order expressly provided.

Paragraph 18

90 Paragraph 18 was a restriction on search, which did not in terms vest in Mr Hardy an entitlement to refuse entry to the premises. A dispute as to whether a thing was a Listed Thing could only have occurred once the search was permitted and under way. The question of the construction of paragraph 18, therefore, has no bearing on whether Mr Hardy was entitled to refuse entry to the premises; is irrelevant to the question of whether order 11 is clear, unambiguous and capable compliance; and cannot meaningfully be considered in an evidentiary void. In any event, there is no substance in the submission that paragraph 18 of the order was unclear, ambiguous or incapable of compliance and I reject it.

Paragraph 23

91 Similarly, the independent computer expert's powers of search, copy and removal, as set out at [35]-[41] and [79] above, would have been enlivened or engaged only once the independent computer expert had been permitted entry to the premises. Mr Hardy's contentions with respect to paragraph 23 generally (see [74] above) and its interaction with paragraphs 12(b) and 19, respectively (see [72] above), thus do not advance his broader submission that paragraph 11 is unclear, ambiguous and/or incapable compliance.

Whether Mr Hardy had knowledge of the terms of the order

92 Mr Hardy acknowledged that the evidence disclosed that he knew that not complying with the order could be a contempt of court with serious consequences: Mr Hardy's submissions at [54]. He submitted, however, that that does not mean that he had the requisite knowledge of the terms of the order and that "the evidence does not exclude the reasonable possibility" that he did not: Mr Hardy's written submissions at [52]-[58]. It does not assist AGL, Mr Hardy submitted, that he declined, despite the advice of the independent lawyer, to seek urgent legal advice or avoid taking steps that would place him in contempt. Ultimately, Mr Hardy's counsel submitted in oral argument as follows:

> …by the end of [his time with the independent lawyer] he clearly expressed he did not understand who would be privy to his documents. He further exhibited no understanding of how he could resist the [order] despite stating from the outset he did not wish to comply…and that he was concerned about his computer having confidential material on it relating to employees…

93 Mr Hardy's counsel also submitted that in determining whether the search order was of uncertain application in the circumstances giving rise to the alleged disobedience, the Court should take into account that the order was "not directed to a person with legal training, or a [person] who has some particular knowledge of the law, but … [was] addressed to a worker from the [Latrobe] Valley – an employee of AGL". It was also put that "the legality, the formality and the formal legal language…hasn't really been addressed such that the order was expressed in simple language of everyday people" and that the search order "has to be clear [and] unambiguous…to the person [against whom it is directed]".

94 Mr Hardy's counsel did not cite any authority for those propositions. Search orders (also referred to as Anton Piller orders) "inevitably, are complicated": see, e.g., *Practice Direction (Mareva Injunctions and Anton Piller Orders)* [1994] 1 WLR 1233. The same may be said of the template order, of which Counsel for Mr Hardy made no criticism and on which the order was largely based. Search orders must necessarily anticipate a wide variety of possible circumstances or contingencies, which partly explains their "inevitable complexity". However, there is no authority for the proposition that orders of this type should be tailored differently when they are addressed to people who are unlikely to have legal knowledge or who are "workers". Such an approach to the drafting of orders would, it seems to me, be entirely unworkable. It is precisely because complexities are inevitably involved with such orders that, by their terms, they provide time and opportunity to the recipient to have the order explained to them by the independent lawyer, to seek legal advice

and to ask the Court to vary or discharge the order, before having an obligation to permit entry into the premises. As to safeguards for recipients of search orders introduced in Australia in harmonised rules of court generally, see: Biscoe P, *Freezing and Search Orders: Mareva and Anton Piller Orders* (2nd ed., LexisNexis Butterworths Australia, 2008) at 7.53-7.56.

95 I do not accept Mr Hardy's submission that the evidence "does not exclude the reasonable possibility" that he did not know the terms of the order or that he had "no understanding of how he could resist the order". It is clear from Mr Marquet's unchallenged evidence set out at [46] to [58] above, and I am satisfied beyond reasonable doubt, that Mr Marquet provided to Mr Hardy a sufficient explanation of the terms of the order; that he gave him ample opportunity throughout the morning of 2 March 2017 to seek legal advice; that he told Mr Hardy that he could ask the Court to vary or discharge the order; and that in such circumstances he would not be at risk of being in contempt of the order (in this context, the order that he permit members of the search party to enter the premises so that they could carry out the search and other activities referred to in the order). I do not accept that "the evidence does not exclude the reasonable possibility" that Mr Hardy did not have knowledge of the terms of the order. On the contrary, the evidence establishes beyond reasonable doubt that he did.

96 It was also contended on Mr Hardy's behalf that the evidence does not exclude the reasonable possibility that he did not know the terms of certain parts of the order, including paragraphs 15(c), because they were ambiguous or unclear. For the reasons given above, I do not accept that there was any ambiguity or relevant lack of clarity in that or any other relevant part of the order.

97 I should also address one final point made by Mr Hardy's counsel during oral argument. The order contained an error. At page 2 of the order, Mr Hardy was told that the Court had made the order, among other things, after having "read the affidavit in Schedule B to this order". There is no Schedule B, only a Schedule C, at page 15, which reads:

SCHEDULE C

AFFIDAVITS RELIED ON

	Name of deponent	Date affidavit made
1.	Daniel Charles Williams	27 February 2017

98 That is the affidavit in fact served upon Mr Hardy together with the order and the materials. Mr Hardy's counsel submitted that it was not "mere typographical error"; that the error was substantive; and was "important".

99 I disagree. The error was manifestly typographical and could not possibly have been the source of any relevant or sufficient ambiguity or lack of clarity. Any reasonable person would have read "C" to mean "B" at page 15, because there was no other possibility. In any event, the matter has nothing to do with Mr Hardy's obligation to permit entry under paragraph 11.

Whether Mr Hardy breached the terms of the order

100 Mr Hardy submitted that he cannot be taken to have breached paragraph 11 on 2 March 2017, because paragraph 24 did not prescribe a time within which the steps required by paragraph 24(b) were to be taken. This is the same point that is dealt with at [67]-[68] above.

101 Mr Hardy's counsel's written submission on the issue of whether Mr Hardy breached the order further asserted that "[i]t is common ground between the parties that reliance on [paragraph] 24 would affect any requirement to permit the search pursuant to [paragraph] 11". First, that proposition was most certainly not common ground. Secondly, the submission again conflates the obligation imposed by paragraph 11, to permit entry, with the obligations imposed by paragraph 12, to do various things directed to facilitating the search. For the reasons given at [76]-[79] above, an objection taken pursuant to paragraph 24 would not have alleviated Mr Hardy of the obligation to permit entry that was imposed by paragraph 11 and could only have occurred if and when he permitted the search party to enter the premises – something he did not do.

102 Mr Hardy further submitted that he did not breach paragraph 11 of the order because paragraph 14(b) entitled him to refuse entry until he was provided with an opportunity to read the order and, in circumstances where he had been served with two lever arch folders of

documents (the documents that were served are the documents listed at [47] above), two hours was an insufficient period of time within which to read and understand that material. I do not accept that submission.

103 Contrary to Mr Hardy's submission, paragraph 14(b) of the order did not entitle Mr Hardy to refuse access until he had read and understood all of those documents. That subparagraph is directed squarely to Mr Hardy understanding, with the assistance of the independent lawyer, if necessary, the terms of the order, not the other documents. During the time provided for in paragraph 15, Mr Hardy was entitled to refuse entry to anyone other than the independent lawyer, for the purposes of seeking legal advice, seeking discharge or variation of the order or dealing with documents subject to legal professional privilege. Had two hours been an insufficient time for Mr Hardy to consider his position as to whether to seek discharge or variation of the order, plainly the independent lawyer was empowered by paragraph 15 to extend that time. Had the independent lawyer refused that request for some reason, Mr Hardy would well have understood that he could approach the Court to request a variation to the terms of the order accordingly, by telephoning my chambers. But an understanding of each of the documents served with the order was not a precondition to the obligation under paragraph 11 to permit entry to the search party.

CONCLUSION

104 In accordance with the terms of the order, Mr Hardy was required by paragraph 11 to allow the search party entry to the premises to carry out the search and other activities referred to in the order unless a circumstance provided for in the order entitled him to refuse. For the reasons given above, only paragraphs 13, 14 and 15 supplied bases for refusing entry to the premises. None of those paragraphs is relevant here, for reasons I have explained. Had Mr Hardy permitted entry, paragraphs 18, 19, 20 (subject to 21), 22 and/or 23 (by reference to paragraph 24) may have supplied bases for constraining search and removal. However, because he refused entry, such questions did not then arise, and they are not relevant now to the single charge of contempt in respect of Mr Hardy's refusal to comply with paragraph 11. In any event, for the reasons I have given above, the paragraphs of the order about which Mr Hardy complains are not, in my view, unclear, ambiguous or incapable of compliance.

105 The evidence establishes beyond reasonable doubt that Mr Hardy refused the search party entry to the premises when he had no entitlement under the order to do so. It follows that Mr Hardy breached paragraph 11 of the order.

106 I find Mr Hardy guilty of contempt of court, in that on 2 March 2017, after being served with the search order made on 28 February 2017, he failed to comply with paragraph 11 of that order by refusing to permit members of the search party to enter the premises so that they could carry out the search and other activities referred to in the order. The proceeding will be re-listed for a penalty hearing.

I certify that the preceding one hundred and six (106) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice O'Callaghan.

Associate:

Dated: 26 April 2017

SCHEDULE OF PARTIES

VID 176 of 2017

Prospective applicants

Second Prospective Applicant	AGL LOY YANG PTY LTD
Third Prospective Applicant	AGL LOY YANG MARKETING PTY LTD

Prospective respondent

Second Prospective Respondent	CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION

ANNEXURE

Federal Court of Australia

District Registry: Victoria

Division: Fair Work — No: VID176/2017

AGL ENERGY LIMITED and another/others named in the schedule
Prospective Applicant

ORDER

JUDGE: JUSTICE O'CALLAGHAN

DATE OF ORDER: 28 February 2017

WHERE MADE: Melbourne

THE COURT ORDERS THAT:

PENAL NOTICE

TO: Gregory Thomas Hardy

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

(A) REFUSE OR NEGLECT TO DO ANY ACT WITHIN THE TIME SPECIFIED IN THE 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.

TO: Gregory Thomas Hardy

This is a '*search order*' made against you on 28 February 2017 by Justice O'Callaghan at a hearing without notice to you after the Court was given the undertakings set out in Schedule A to this order and after the Court read the affidavit listed in Schedule B to this order.

THE COURT ORDERS:

INTRODUCTION

1. (a) The application for this order is made returnable immediately.

   (b) The time for service of the application, supporting affidavit and draft originating process is abridged and service is to be effected by 5:00pm on 3 March 2017.

2. Subject to the next paragraph, this order has effect up to and including 10 March 2017 ('the **Return Date**'). On the Return Date at 11.00 am there will be a further hearing in respect of this order before Justice O'Callaghan.

3. On the giving of 3 hours' notice in writing to the Prospective Applicants, you may apply to the Court at any time to vary or discharge this order, including, if necessary, by telephone to the judge referred to in the immediately preceding paragraph (phone no. (03) 8600 4118).

4. This order may be served only between 9:00am and 2:00pm on a business day.

KEY TERMS

5. In this order, 'Electronic Document' means any record of information stored on any Storage Device, in any Online Storage Facilities and/or in any Email Accounts, and includes:

(a) anything on which there is writing; or

(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; or

(c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or

(d) a map, plan, drawing or photograph.

6. In this order, 'Listed Thing' means:

(a) Any Electronic Document containing or consisting of:

(i) correspondence, communications or other evidence of exchanges between Mr Hardy and employees of the Second Prospective Applicant during the period from 12 to 18 January 2017 inclusive relating to:

(A) the performance of work by any employee of the Second Prospective Applicant in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work;

(B) a ban, limitation or restriction on the performance of work by any employee of the Second Prospective Applicant or on the acceptance of or offering for work by any employee of the Second Prospective Applicant;

(C) a failure or refusal by employees of the Second Prospective Applicant to attend for work or a failure or refusal to perform any work at all by employees of the Second Prospective Applicant who attend for work;

(ii) correspondence, communications or other evidence of exchanges between Mr Hardy and officers, employees or members of the Second Prospective Respondent during the period from 12 to 18 January 2017 inclusive relating to:

(A) the performance of work by any employee of the Second Prospective Applicant in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee of the Second Prospective Applicant, the result of which is a restriction or limitation on, or a delay in, the performance of the work;

(B) a ban, limitation or restriction on the performance of work by any employee of the Second Prospective Applicant or on the acceptance of or offering for work by any employee of the Second Prospective Applicant;

(C) a failure or refusal by employees of the Second Prospective Applicant to attend for work or a failure or refusal to perform any work at all by employees of the Second Prospective Applicant who attend for work;

(iii) (D) records relating to the personal/carer's leave of employees of the Second Prospective Applicant during the period from 12 to 18 January 2017 inclusive;

(iv) records relating to the hours or work and availability of employees of the Second Prospective Applicant during the period from 12 to 18 January 2017; and/or

(v) digital records, data or other electronic traces that demonstrate that the things listed in paragraphs 6(a)(iv)-(iv) were once contained on any Storage Device, in any Online Storage Facilities and/or in any Email Accounts;

(vi) emails passing between the following:

(A) any electronic mail account relating to [redacted] [redacted]; and

(B) any Email Account;

(b) Any Electronic Document recording telephone calls or sms communications made, sent or received by Mr Hardy during the period from 12 to 18 January 2017 inclusive.

(c) Any other Electronic Documents not listed in paragraphs 6(a) or (b) relating to, or containing information regarding, the following aspects of the Second Prospective Applicant's business:

(i) information relating to the availability of members of the Second Prospective Respondent to work overtime for the Second Prospective Applicant; and/or

(ii) information relating to the personal leave patterns of members of the Second Prospective Respondent who work for Second Prospective Applicant.

(d) Any Electronic Document demonstrating the use of software or other means to delete, in bulk, any Electronic Documents referred to in paragraphs (6)(a) to (c).

7. In this order:

(a) 'Email Accounts' means any Email Accounts owned, used or operated by Mr Hardy, including, but not limited to:

(i) [redacted]; and

(ii) [redacted];

(b) 'Independent Computer Expert' means Martin Sisk of PWC;

(c) 'Independent Lawyer' means Daniel Marquet of Corrs Chambers Westgarth;

(d) Online Storage Facility' means any online storage facilities or file sharing platforms used or operated by Mr Hardy, including, but not limited to:

(i) cloud based resources (for example Dropbox or Gmail); and

(ii) cloud based servers (for example virtual servers running software in Amazon Cloud); and

(e) 'Premises' means the premises located at [redacted], Traralgon, Victoria, being the residential premises of Mr Hardy, including any vehicle or vehicles under Mr Hardy's control on or about those premises;

(f) 'Prospective Applicants' means the persons who applied for this order;

(g) 'Mr Hardy' means the First Prospective Respondent;

(h) 'Search Party' means the Independent Lawyer, Independent Computer Expert (assisted by Chris Tolentino of PwC) and Pawel Zielinski of Minter Ellison;

(i) 'Storage Device' means any electronic storage device possessed by Mr Hardy, including, but not limited to:

(i) any computers with accessible hard drives (including Mr Hardy's personal or laptop computer);

(ii) mobile or smart phones and digital devices without accessible hard drives (for example tablet devices such as iPads);

(iii) removable data storage devices including CDs/DVDs, USB flash drives,

(iv) USB hard drives and SD Media cards;

(v) server computers.

8. This order must be complied with by:

(a) yourself;

(b) any partner, employee or agent of yourself; or

(c) any other person having responsible control of the premises.

9. Any requirement that something be done in your presence means in the presence of you or of one of the persons described in paragraph 8 above.

10. This order must be served by, and be executed under the supervision of, the Independent Lawyer.

ENTRY, SEARCH AND REMOVAL

11. Subject to paragraphs 13 to 23 below, upon service of this order you must permit members of the Search Party to enter the Premises so that they can carry out the search and other activities referred to in this order.

12. Having permitted members of the Search Party to enter the Premises, you must:

    (a) permit them to leave and re-enter the Premises on the same and the following day until the search and other activities referred to in this order are complete;

    (b) permit them to search for and inspect the Listed Things and to make or obtain a digital image, copy, photograph, film, sample, test or other record of the Listed Things;

    (c) disclose to them the whereabouts of all the Listed Things in your possession, custody or power, whether at the Premises or otherwise;

    (d) disclose to them the whereabouts of all Storage Devices or systems at the Premises in which any Electronic Documents among the Listed Things are or may be stored, located or recorded;

    (e) do all things necessary to enable them to access the Listed Things, including opening or providing keys to locks and enabling them to access and operate Storage Devices and providing them with all necessary user names, passwords or other credentials;

    (f) permit the Independent Lawyer to remove from the Premises into the Independent Lawyer's custody any things the subject of dispute as to whether they are Listed Things;

    (g) permit the Independent Computer Expert to search any Storage Device in which any Electronic Documents among the Listed Things are or may be stored, located or recorded and make a copy or digital copy of any such Storage Device (eg, a complete digital image) and permit the Independent

Computer Expert or the Independent Lawyer to remove any such Storage Device from the Premises as set out in paragraphs 23 and 24 below.

RESTRICTIONS ON ENTRY, SEARCH AND REMOVAL

13. This order may not be executed at the same time as a search warrant (or similar process) is executed by the police or by a regulatory authority.

14. You are not required to permit anyone to enter the Premises until:

    (a) the Independent Lawyer serves you with copies of this order and the affidavit referred to in Schedule B (confidential exhibits, if any, need not be served until further order of the Court); and

    (b) you are given an opportunity to read this order and, if you so request, the Independent Lawyer explains the terms of this order to you.

15. Before permitting entry to the Premises by anyone other than the Independent Lawyer, you, for a time (not exceeding two hours from the time of service or such longer period as the Independent Lawyer may permit):

    (a) may seek legal advice;

    (b) may ask the Court to vary or discharge this order;

    (c) may gather together any Electronic Documents that passed between you and your lawyers for the purpose of obtaining legal advice or that are otherwise subject to legal professional privilege or client legal privilege, and hand them to the Independent Lawyer in (if you wish) a sealed envelope or container.

16. Subject to paragraph 25 below, the Independent Lawyer must not inspect or permit to be inspected by anyone, including the Prospective Applicants and the Prospective Applicants' lawyers, any thing handed to the Independent Lawyer in accordance with subparagraph and (c) above and the Independent Lawyer must deliver it to the Court at or prior to the hearing on the Return Date.

17. During any period referred to in paragraph 15 above, you must:

    (a) inform and keep the Independent Lawyer informed of the steps being taken;

    (b) permit the Independent Lawyer to enter the Premises but not to start the search;

    (c) not disturb or remove any Listed Things; and

(d) comply with the terms of paragraph 28 below.

18. Any thing the subject of a dispute as to whether it is a Listed Thing must promptly be handed by you to the Independent Lawyer for safekeeping pending resolution of the dispute or further order of the Court.

19. Before removing any Listed Things from the Premises (other than things referred to in the immediately preceding paragraph), the Independent Computer Expert, through the Independent Lawyer must supply a list of them to you, give you a reasonable time to check the correctness of the list, and give you and the Prospective Applicants' lawyers a copy of the list signed by the Independent Computer Expert.

20. The Premises must not be searched, and things must not be removed from the Premises, except in the presence of you or of a person who appears to the Independent Lawyer to be your partner, employee, agent or other person acting on your behalf or on your instructions.

21. If the Independent Lawyer is satisfied that full compliance with the immediately preceding paragraph is not reasonably practicable, the Independent Lawyer may permit the search to proceed and the Listed Things to be removed without full compliance.

22. The Prospective Applicants' lawyers and the Independent Lawyer must not allow the Prospective Applicants to inspect or have copies of anything removed from the Premises nor communicate to the Prospective Applicants information about its contents or about anything observed at the Premises until 4.30pm on the Return Date or other time fixed by further order of the Court.

COMPUTERS

23. (a) The Search Party is to include a computer expert who is independent of the Prospective Applicants and of the Prospective Applicants' lawyers.

(b) Any search of a Storage Device must be carried out only by the Independent Computer Expert.

(c) The Independent Computer Expert is to, without making inspection of the material therein contained, make a copy or digital copy of any Online Storage Facilities, Email Accounts or Storage Device (eg, a complete digital image) in

which Listed Things are or may be stored, located or recorded and remove that copy or digital copy from the Premises.

(d) The Independent Computer Expert:

(i) may remove from the Premises any Storage Device referred to in clause 23(c); and

(ii) must, as soon as practicable after he is satisfied that a complete digital image of any such Storage Device has been accurately generated, return the Storage Device to you.

(e) The Independent Computer Expert may search Storage Device or the copy of the Storage Device at the Premises and/or away from the Premises for Listed Things and may copy the Listed Things electronically or in hard copy of both.

(f) The Independent Computer Expert must as soon as practicable and, in any event, prior to the hearing on the Return Date, deliver the copy or digital copy of any Online Storage Facilities, Email Accounts or Storage Device in which Listed Things are or may be stored, located or recorded to the Independent Lawyer, together with a report of what the Independent Computer Expert has done including a list of such electronic and hard copies.

(g) The Independent Lawyer must, at or prior to the hearing on the Return Date, deliver to the Court all things received from the Independent Computer Expert and serve a copy of the latter's report on the parties.

24. (a) This paragraph 24 applies if you are not a body corporate and you wish to object to complying with paragraphs 23 on the grounds that some or all of the information required to be disclosed may tend to prove that you:

(i) have committed an offence against or arising under an Australian law or a law of a foreign country; or

(ii) are liable to a civil penalty.

(b) You must:

(i) disclose so much of the information required to be disclosed to which no objection is taken; and

(ii) prepare an affidavit containing so much of the information required to be disclosed to which objection is taken, and deliver it to the Court in a sealed envelope; and

(iii) file and serve on the Prospective Applicants a separate affidavit setting out the basis of the objection.

INSPECTION

25. Prior to the Return Date, you or your lawyer or representative shall be entitled, in the presence of the Independent Lawyer, to inspect anything removed from the Premises and to:

    (a) make copies of the same; and

    (b) provide the Independent Lawyer with a signed list of Things which are claimed to be privileged or confidential and which you claim ought not to be inspected by the Prospective Applicants.

PROVISION OF INFORMATION

26. Subject to paragraph 27, on being served with this order, the First Prospective Respondent must within 96 hours (4 days):

    (a) disclose in writing to the Independent Lawyer the whereabouts of all the Listed Things in the First Prospective Respondent's possession, custody, power or control, including all Listed Things held on Storage Devices, in Online Storage Facilities, Email Accounts or systems in which any Listed Things are or may be stored, located or recorded;

    (b) deliver up (or cause to be delivered-up) to the Independent Lawyer any Storage Devices on which any Listed Things are or may be stored, located or recorded;

    (c) do all things necessary to enable the Independent Computer Expert access to the Listed Things delivered up, including enabling access and providing all necessary user names, passwords or other credentials; and

    (d) within five (5) working days after being served with this order, make and serve on the Prospective Applicants an affidavit setting out the information referred to above in paragraph (a).

27. (a) This paragraph 27 applies if you are not a body corporate and wish to object to your complying with paragraph 26 on the grounds that some or all of the information required to be disclosed may tend to prove that you:

(i) have committed an offence against or arising under an Australian law or a law of a foreign country; or

(ii) are liable to a civil penalty.

(b) You must:

(i) disclose so much of the information required to be disclosed to which no objection is taken; and

(ii) prepare an affidavit containing so much of the information required to be disclosed to which objection is taken, and deliver it to the Court in a sealed envelope; and

(iii) file and serve on the Prospective Applicants a separate affidavit setting out the basis of the objection.

PROHIBITED ACTS

28. Until 4.30pm on the Return Date (or such further time as the Court may allow), you must not (whether by yourself, your directors, officers, partners, employees or agents, or otherwise howsoever) destroy, tamper with, cancel or part with possession, power, custody or control of the Listed Things otherwise than in accordance with the terms of this order or further order of the Court.

COSTS

29. The costs of this application are reserved to the Court hearing the application on the Return Date.

SCHEDULE A

UNDERTAKINGS GIVEN TO THE COURT

Undertakings given to the Court by the Prospective Applicants

(1) The Prospective Applicants undertake to submit to such order (if any) as the Court may consider to be just for the payment of compensation (to be assessed by the Court or as it may direct) to any person (whether or not a party) affected by the operation of the order.

(2) The Prospective Applicants will not, without leave of the Court, use any information, Electronic Document or thing obtained as a result of the execution of this order for the purpose of any civil or criminal proceeding, either within or outside Australia, other than this proceeding.

(3) The Prospective Applicants will insure the things removed from the Premises against loss or damage for an amount that reasonably appears to the Prospective Applicants to be their full value.

Undertakings given to the Court by the Prospective Applicants' lawyer

(1) The Prospective Applicants' lawyer will pay the reasonable costs and disbursements of the Independent Lawyer and of any Independent Computer Expert.

(2) The Prospective Applicants' lawyer will provide to the Independent Lawyer for service on the First Prospective Respondent copies of the following documents:

  (a) this order;

  (b) the application for this order for hearing on the Return Date;

  (c) the following material in so far as it was relied on by the Prospective Applicant at the hearing when the order was made:

    (i) affidavits (or draft affidavits);

    (ii) exhibits capable of being copied (other than confidential exhibits);

    (iii) any written submission; and

    (iv) any other document that was provided to the Court.

(d) a transcript of the hearing before Justice O'Callaghan on 28 February 2017; and

(e) the draft originating process produced to the Court.

(3) The Prospective Applicants' lawyer will answer to the best of the lawyer's ability any question as to whether a particular thing is a Listed Thing.

(4) The Prospective Applicants' lawyer will use the lawyer's best endeavours to act in conformity with the order and to ensure that the order is executed in a courteous and orderly manner and in a manner that minimises disruption to the First Prospective Respondent.

(5) The Prospective Applicants' lawyer will not, without leave of the Court, use any information, Electronic Document or thing obtained as a result of the execution of this order for the purpose of any civil or criminal proceeding, either within or outside Australia, other than this proceeding.

(6) The Prospective Applicants' lawyer will not disclose to the Prospective Applicants any information contained in a Listed Thing that the lawyer acquires during or as a result of execution of the search order, without the leave of the Court.

(7) The Prospective Applicants' lawyer will use best endeavours to follow all directions of the Independent Lawyer.

Undertakings given to the Court by the Independent Lawyer

(1) The Independent Lawyer will use his or her best endeavours to serve the First Prospective Respondent with this order and the other documents referred to in undertaking (2) of the above undertakings by the Prospective Applicants' lawyer or lawyers.

(2) Before entering the Premises, the Independent Lawyer will:

(a) offer to explain the terms and effect of the search order to the person served with the order and, if the offer is accepted, do so; and

(b) inform the First Prospective Respondent of his right to take legal advice.

(3) Subject to undertaking (4) below, the Independent Lawyer will retain custody of all things removed from the Premises by the Independent Lawyer pursuant to this order until delivery to the Court or further order of the Court.

(4) At or before the hearing on the Return Date, the Independent Lawyer will provide a written report on the carrying out of the order to the Court and provide a copy to the Prospective Applicants' lawyers and to the First Prospective Respondent's lawyers. The report will attach a copy of any list made pursuant to the order and a copy of any report received from an Independent Computer Expert.

(5) The Independent Lawyer will use best endeavours to ensure that members of the Search Party act in conformity with the order and that the order is executed in a courteous and orderly manner and in a manner that minimises disruption to the First Prospective Respondent, and will give such reasonable directions to other members of the Search Party as are necessary or convenient for the execution of the order.

(6) The Independent Lawyer will not, without leave of the Court, use any information, Electronic Document or thing obtained as a result of the execution of this order for the purpose of any civil or criminal proceeding, either within or outside Australia, other than this proceeding.

(7) The Independent Lawyer will not inform any other person of the existence of this proceeding except for the purposes of this proceeding until after 4:30pm on the Return Date.

Undertakings given to the Court by the Independent Computer Expert

(1) The Independent Computer Expert will use his or her best endeavours to act in conformity with the order and to ensure that the order, so far as it concerns the Independent Computer Expert, is executed in a courteous and orderly manner and in a manner that minimises disruption to the First Prospective Respondent.

(2) The Independent Computer Expert will not, without leave of the Court, use any information, Electronic Document or thing obtained as a result of the execution of this order for the purpose of any civil or criminal proceeding, either within or outside Australia, other than this proceeding.

(3) The Independent Computer Expert will use his or her best endeavours to follow all directions of the Independent Lawyer.

(4) The Independent Computer Expert will use his or her best endeavours to follow all directions of the Independent Lawyer.

SCHEDULE C

AFFIDAVITS RELIED ON

	Name of deponent	Date affidavit made
1.	Daniel Charles Williams	27 February 2017

NAME AND ADDRESS OF PROSPECTIVE APPLICANT'S LAWYERS

The Prospective Applicants' lawyers are:

Minter Ellison
Attention: Daniel Williams
Level 22, 1 Eagle Street
Brisbane QLD 4000
Reference: DCW 1156280
Fax Number: (07) 3119 1340
Phone number (office hours): (07) 3119 6340
Phone number (out of office hours): 0414 241 264
Email: dan.williams@minterellison.com

IMPORTANT NOTICE TO THE FIRST PROSPECTIVE RESPONDENT/OCCUPIER OF THE PREMISES AT █ ████████ ███████, TRARALGON, VICTORIA:

1. This Court order orders you to allow the persons mentioned in the order to enter the premises described in the order and to search for, examine and remove or copy the items specified in the order. The persons mentioned will have no right to enter the premises, or to remain on the premises, unless you give your consent to their doing so. If, however, you do not give your consent you will be in breach of the order and may be held to be in contempt of court. This order also requires you to hand over certain items which are under your control and to provide information to the Prospective Applicant's lawyers, and it prohibits you from doing certain acts.

2. You should read the terms of the order very carefully. You should consult a lawyer as soon as possible.

3. Before you allow anybody onto the premises to carry out this order you are entitled to have the lawyer who serves you with the order, or the independent lawyer appointed in accordance with the order, explain to you what it means in everyday language.

4. You are entitled to insist that there is nobody present who could gain commercially from anything they might read or see on your premises.

5. You are entitled to refuse entry before 9.00am or after 2.00pm or at all on Saturday and Sunday.

6. You may be entitled to refuse disclosure of any documents which may incriminate you or to answer any questions if to do so may incriminate you. It may be prudent to take advice, because if you so refuse, your refusal may be taken into account by the Court at a later stage.

7. You are entitled to refuse disclosure of documents passing between you and your lawyers for the purpose of obtaining advice.

8. You are entitled to seek legal advice, and to ask the Court to vary or discharge this order, provided that you do so at once, and provided that meanwhile you permit the independent lawyer (who is a lawyer acting independently of the Prospective

Applicant) and one of the Prospective Applicants' representatives to enter, but not start to search, the premises.

9. If you disobey this order you may be found guilty of contempt of court.

10. If any person with knowledge of this order procures, encourages or assists in its breach, that person may also be guilty of contempt of court.

IN THE FAIR WORK COMMISSION

Matter No.: D2022/10

Application by Grahame Patrick Kelly – withdrawal from amalgamated organisation – Mining and Energy Division – Construction, Forestry, Maritime, Mining and Energy Union

STATEMENT OF MALCOLM MCDONALD

I, Malcolm McDonald, retired union official , c/o 540 Elizabeth Street, Melbourne, Victoria, 3000 state:

1. I am a former official of the union now known as the Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**).

2. I am authorised to make this statement on behalf of the CFMMEU.

3. I was Victorian State Secretary of the Federated Engine Drivers' and Firemen's Association of Australasia (**FEDFA**) from 1983 until 1991. I was also a Federal Councillor of FEDFA during that period.

4. From 1988 to 1992, I was Federal President of FEDFA.

5. From 1992 to 1996, I was State President of the Victorian Branch of the FEDFA Division of the Construction, Forestry, Mining and Energy Union (**CFMEU**).

FEDFA's amalgamation was intended to be permanent

6. I was a FEDFA official throughout the process of the amalgamation of FEDFA with the Construction, Forestry and Mining Employees Union (the **old CFMEU**) which took effect in 1992, including:

    a. the discussions and deliberations that took place prior to amalgamation;

b. the process of seeking FEDFA members' views about the proposed amalgamation; and

c. the negotiation of the scheme of amalgamation.

7. A copy of the scheme of amalgamation between the old CFMEU, FEDFA and the OPPFW is attached to this statement and marked **MM-1**.

8. As Victorian State Secretary, and in my federal roles within the union, I was privy to the deliberations at the federal level about the proposed amalgamation before it took place. I was also aware of the views held by the officials of other branches of FEDFA, and the other federal officials, about the proposed amalgamation.

9. The general view among the FEDFA officials was that amalgamation would be permanent. We regarded it as a permanent decision. There wasn't any thought of getting out of the amalgamated union after it took effect, nor any desire to do so. Even if there had been, it was not legally possible to withdraw from an amalgamation at that time.

10. As such, the scheme of amalgamation does not contemplate that either FEDFA or the OPPFW might later withdraw from the merged union.

11. There was initially some reticence on the part of the Victorian branch of FEDFA to the proposed amalgamation. When the Victorian branch made the decision to accept the amalgamation, it was on the basis that it would be a permanent thing. As far as we were concerned, that was it. And we never told the members anything to the contrary.

Malcolm McDonald

11 October 2022

ANNEXURE MM-1

SCHEME FOR AMALGAMATION OF THE CONSTRUCTION, FORESTRY AND MINING EMPLOYEES UNION (CFMEU) AND THE FEDERATED ENGINE DRIVERS AND FIREMENS ASSOCIATION OF AUSTRALASIA (FEDFA) AND THE OPERATIVE PLASTERERS AND PLASTER WORKERS FEDERATION OF AUSTRALIA (OPPWF)

Parties to the Amalgamation

1. The parties to the amalgamation are the existing organisations of the Construction, Forestry and Mining Employees Union (herein after called the old CFMEU) and the Federated Engine Drivers and Firemens Association of Australasia (herein after called the FEDFA) and the Operative Plasterers and Plaster Workers Federation of Australia (herein after called the OPPWF).

   Note: The CFMEU came into existence on 10/2/92 as a result of the recent amalgamations of the:
   Building Workers Industrial Union of Australia,
   Australian Timber and Allied Industries Union, and
   United Mineworkers Federation of Australia.

Name of the Amalgamated Union

2. It is proposed that upon the amalgamation becoming effective by the merging of the old CFMEU and the FEDFA and the OPPWF the name of the amalgamated body shall be the "Construction, Forestry, Mining and Energy Union" (herein after referred to as the new CFMEU) or as otherwise agreed by the parties.

Nature of the Amalgamation

3. It is proposed that the FEDFA and the OPPWF shall be amalgamated with the old CFMEU and that amalgamation shall be effected by the FEDFA and OPPWF being merged with the old CFMEU whose registration shall be used as the vehicle to achieve the amalgamation.

4. All members of the FEDFA and the OPPWF and the old CFMEU at the date of such amalgamation shall thereafter become members of the new CFMEU without payment of any entrance fee.

Proposed Change to the Description of Industry and Eligibility

5. The industry and eligibility rules of the new CFMEU will incorporate the existing (old) CFMEU rules and the existing rules of the FEDFA and OPPWF and other persons eligible for membership of any of the amalgamating unions before the amalgamation shall be eligible for membership of the new amalgamated Union after amalgamation.

Existing Agreements

6. All existing agreements of the amalgamating Union/s shall be binding on the new amalgamated Union on the basis that the new amalgamated Union shall to the extent possible, fulfil the obligations and obtain the benefits through the division of the Union corresponding to the amalgamating Union that entered the agreement.

Definitions

7. "Union" means the Nationally registered new CFMEU.

   "National Conference" means the supreme governing body of the Union which shall be made up of each of the divisional executives on a national basis.

   "National Executive" means the governing committee of the union in between meetings of the National Conference.

   "National Executive Committee" means the administrative body having care, control and management of the Union on a day to day basis.

   "Branch Conference" means the governing body of the new CFMEU at the Branch level being a state, territory or district basis and the Branch Executive is the governing body when the Branch Conference is not in session.

   "Divisional Branch" means the branch of the division as defined on a state, territory, district or occupational basis.

Property and Liability

8. The property and other assets and liabilities of the old CFMEU, FEDFA and OPPWF will become those of the new CFMEU.

   The management of the property and assets of the new CFMEU shall be vested in the Division on the following basis:

   (i) The property and assets of the former FEDFA shall be under the control of the FEDFA Division, where prior to the amalgamation it was under the control of the Federal Council of the FEDFA and vested in the appropriate FEDFA Divisional Branch where it was prior to the amalgamation under the control of the corresponding branch of the former FEDFA.

   (ii) The property and assets of the former OPPWF shall be under the control of the BWIU/Plasterers Division, where prior to the amalgamation it was under the control of the National Conference of the OPPWF and vested in the appropriate BWIU/Plasterers Divisional Branch where it was, prior to the amalgamation under the control of the corresponding branch of the former OPPWF.

   In WA the appropriate BWIU/Plasterers Divisional Branch shall be the separate Plasterers Divisional Branch of the BWIU/Plasterers Division in that State.

(iii) The property and assets of the BWIU Division and Divisional Branches of the old CFMEU shall be under the control of the BWIU/Plasterers Division where prior to amalgamation it was under the BWIU Division control and vested in the appropriate BWIU/Plasterers Divisional Branch as was previously the case.

(iii) The property and assets of the ATAIU Division and Divisional Branches of the old CFMEU shall be under the control of the ATAIU Division where prior to amalgamation it was under the ATAIU Division control and vested in the appropriate ATAIU Divisional Branch as was previously the case.

(iii) The property and assets of the UMW (UMFA) Division and Divisional Branches of the old CFMEU shall be under the control of the UMW Division where prior to amalgamation it was under the UMW Division control and vested in the appropriate UMW Divisional Branch as was previously the case.

Contributions and Capitation Fees

9. Members' Contributions and entrance fees shall be determined by each Division and shall, on amalgamation, be the same amount as existed immediately prior to the amalgamation.

A capitation fee shall be paid by the divisional branch to the division in accordance with the rules of the new CFMEU. Each division on a national basis shall pay to the National Conference of the Union pro rota an amount that is determined by National Conference to enable it to fulfil its functions. Likewise, each divisional branch shall pay to the branch of the union pro rota, an amount determined by the branch executive to enable it to fulfil its functions.

Structure

10. The new CFMEU will consist of four national divisions (BWIU/Plasterers and ATAIU and UMW and FEDFA) and each division shall consist of a number of divisional branches (state and district).

11. There shall be a division created in the new amalgamated union entitled the "FEDFA" Division.

The BWIU Division name shall be changed to the BWIU/Plasterers Division.

The existing "Mining" Division and the "ATAIU" Division shall continue to exist as is provided for in the rules of the old CFMEU except till the name of the Mining Division will be changed to the UMW (ie. United Mine Workers) Division.

12. For a period of up to three (3) years the Plasterer members in WA of the new amalgamated CFMEU shall have a separate Plasterers Divisional Branch of the BWIU/Plasterers Division.

13. (a) All persons who are or who become members of the new CFMEU who are covered by that part of the eligibility rule which was formally that of the BWIU Division of the old CFMEU shall be assigned to the "BWIU/Plasterers" Division.

(b) All persons who are or who become members of the new CFMEU who are covered by that part of the eligibility rule which was formally that of the Mining Division of the old CFMEU shall be assigned to the "UMFA" Division.

(c) All persons who are or who become members of the new CFMEU who are covered by that part of the eligibility rule which was formally that of the ATAIU Division of the old CFMEU will be assigned to the "ATAIU" Division.

(d) All persons who are or who become members of the new CFMEU who are covered by that part of the eligibility rule which was formally that of the OPPWF shall be assigned to the "BWIU/Plasterers" Division.

(e) All persons who are or who become members of the new CFMEU who are covered by the eligibility rule which was formally that of the FEDFA shall be assigned to the "FEDFA" Division.

Industry Divisions

14. It is proposed that subsequent to amalgamation the union divisions i.e. (BWIU/Plasterers, UMFA, ATAIU and FEDFA Divisions) will be restructured into industry divisions, i.e. CONSTRUCTION, FORESTRY, FOREST & BUILDING MANUFACTURING PRODUCTS, MINING and ENERGY Divisions.

Members, officers, executive members, organisers etc will be attached to the appropriate industry division by agreement between the union divisions effected by the restructuring.

Government

15. **National Leadership**

(a) The National Office of the new CFMEU will be located at 361 Kent Street, Sydney, New South Wales.

(b) The supreme governing body of the new CFMEU shall be the National Conference which will comprise members of the National Conference of the old CFMEU and members of the Federal Executive of the former FEDFA and the Secretaries of the NSW, WA, QLD and SA Branches of the former OPPWF at the date of amalgamation.

(c) The Governing Committee between National Conferences shall be the National Executive which is made up of all the National Full-Time elected Officers and the Secretaries of each Divisional Branch of each Division throughout Australia and the Federal President and Federal Secretary of the former OPPWF.

(d) The National Executive Committee shall be the administrative body which shall consist of the five (5) National Officers and the full-time elected National Officers of each Division.

(e) The General President of the former UMFA, who is currently the Joint National President of the old CFMEU shall continue to be a Joint National President of the new CFMEU.

(f) The National Secretary of the former ATAIU, who is currently the Joint National President of the new CFMEU shall continue to be a Joint National President of the new CFMEU.

(g) The National Secretary of the former BWIU and currently National Secretary of the old CFMEU shall be a Joint National Secretary of the new CFMEU.

(h) The General Secretary of the former FEDFA as at the date of amalgamation shall be a Joint National Secretary of the new CFMEU.

(i) Assistant National Secretary of the former BWIU who is currently Assistant National Secretary of the old CFMEU shall on amalgamation continue to be the National Assistant Secretary of the new CFMEU.

(j) The National President of the former BWIU who is currently the Senior National President of the old CFMEU shall continue to be the Senior Vice President of the new CFMEU.

(k) The Joint National Secretary (Pulp & Paper) of the former ATAIU who currently is a National Senior Vice President of the old CFMEU shall on amalgamation continue to be a National Senior Vice President of the new CFMEU.

(l) The General Vice President (Mechanical) of the former UMFA who currently is a National Vice President of the old CFMEU shall on amalgamation continue to be a National Vice President of the new CFMEU.

(m) The National Secretary of the former OPPWF on amalgamation shall be a National Vice President of the new CFMEU.

(n) The General President of the former FEDFA at the date of amalgamation shall be a National Vice President of the new CFMEU.

Divisional Leadership

16. (a) The BWIU/Plasterers Divisional Executive shall be comprised of the Divisional President, Divisional Senior Vice President, four (4) Vice Presidents, Divisional Secretary, two (2) Divisional Assistant Secretaries and such Divisional Branch Secretaries who are not elected to any of the aforementioned positions on the Divisional Executive. Until 1st July 1997 the former National Secretary and National President of the OPPWF shall be members of the Divisional Executive.

(b) The principal officers/executive members of the old CFMEU, ATAIU Division at the date of amalgamation shall continue to be principal officers/executive members of the ATAIU Division of the new CFMEU.

(c) The principal officers/executive members of the old CFMEU, Mining Division at the time of amalgamation shall continue to be the principal officers/executive members of the UMW Division of the new CFMEU.

(d) The principal officers/executive members of the former FEDFA at the time of amalgamation shall be the principal officers/executive members of the FEDFA Division of the new CFMEU.

Divisional Branch Leadership

17. (a) The principal officers/executive/council members of the old CFMEU, BWIU Divisional Branch at the date of amalgamation shall continue to be the principal officers/executive members of the Divisional Branch of the BWIU/Plasterers Division of the CFMEU.

In NSW and SA the State Secretary/s of the former OPPWF shall become a BWIU/Plasterers Divisional Branch Assistant Secretary/s.

In respect of the separate WA Plasterers Divisional Branch the principle officers and executive members of the former OPPWF (WA) branch shall be the principle officers and executive members of the WA Plasterers Divisional Branch of the BWIU/Plasterers Division.

(b) The principal officers/executive members of the old CFMEU, Mining District Branch at the date of amalgamation shall continue to be the principal officers/executive members of the District/Branch of the UMW Division of the new CFMEU.

(c) The principal officers/executive members of the old CFMEU, ATAIU Divisional Branch at the date of amalgamation shall continue to be the principal officers/executive members of the Divisional Branch of the ATAIU Division of the new CFMEU.

(d) The principal officers/executive members of the former FEDFA Branch at the date of amalgamation shall be the principal officers/executive members of the Divisional Branch of the FEDFA Division of the new CFMEU.

List of Officers

18. A full list of the officers holding office under the principles embodied in paragraphs 13, 14 and 15 is annexed hereto.

Elections

19. (a) The new CFMEU, BWIU, ATAIU and UMFA Divisions (including Divisional Branches) elections shall take place as originally scheduled in the old CFMEU (ie. in 1992-93) and will not be affected by the creation of the new CFMEU.

(b) These rules propose subject to 19 (a) that all of the Divisions (including Divisional Branch/District) elections including the FEDFA Division elections shall be synchronised and will take place March/April 1997.

Proportional Voting

20. The rules of the union, except where otherwise agreed, shall provide that voting shall be on a card system in respect of proportional representation of the amalgamated unions, divisions, and divisional branches of the amalgamating Unions or Divisions.

Industrial Disputes and Agreements

21. Each division shall have authority under the rules in relation to industrial disputes and agreements that do not directly affect the members of the other division provided that any such decision are consistent with the polices of the new CFMEU.

Environment

22. The new CFMEU will seek to develop a positive and balanced approach to issues affecting the environment. Each division shall have the responsibility for determining environment polices that affect employment and/or other conditions of members of that division.

Divisional and Divisional Branch Officers

23. Each division shall have authority under the rules in relation to the election or appointment and duties of the numbers of officials necessary to service the division or divisional branch of the new CFMEU.

Rules of the Division and Divisional Branches

24. (a) The rules of the new BWIU/Plasterers Division and BWIU/Plasterers Divisional Branch shall be consistent with the rules of the old CFMEU, BWIU Division and Divisional Branches provided that they are not in conflict with the National Rules of the new CFMEU.

    (b) The rules of the new CFMEU, UMW Division and UMW Divisional Branch/District shall be consistent with the rules of the old CFMEU, Mining Division and Divisional Branch/District provided they are not in conflict with the National Rules of the new CFMEU.

    (c) The rules of the new CFMEU, ATAIU Division and ATAIU Divisional Branches shall be consistent with the rules of the old CFMEU, ATAIU Division and Divisional Branches provided they are not in conflict with the National Rules of the new CFMEU.

    (d) The rules of the new FEDFA Division and FEDFA Divisional Branches shall be consistent with the rules of the former FEDFA provided they are not in conflict with the National Rules of the new CFMEU.

Alteration of Rules

25. Rules of the Union that affect the autonomy or existence of a division or its rights shall not be changed without the agreement of that division.

Staffing

26. The new CFMEU agrees that all staff and employees of the amalgamated unions will maintain the positions, duties and responsibilities they previously held unless otherwise agreed between the principal officers of the new CFMEU, BWIU/Plasterers, ATAIU, UMW and FEDFA divisions.

Disputes, Settlement

27. Disputes between divisions or divisional branches of different divisions shall be dealt with by the appropriate Branch Executive with an appeal to the appropriate Divisional Executive and by the National Executive of the Union where it has been requested to deal with the matter by the Division or Branch Executive.

Principles

28. In discussions between the old CFMEU (formally BWIU, ATAIU and UMFA) and the FEDFA and OPPWF agreement has been reached on a number of principles upon which the intended amalgamation of the unions rest.

The rights, history and tradition of the members of each union should be fully respected and provisions made for continuity of membership and existing rights in the new CFMEU.

The establishment of a new union based on four divisions, each with its own committee to lead the work of the division, is designed to achieve two basic objectives. One is to give the members of the new union the benefit of industrial unionism including more extensive, new, better and more efficient services to the members. The second objective is to establish a union structure which will enable other unions to join in circumstances where they will be able to maintain their identity, whilst at the same time being part of a larger, more influential, more efficient and dynamic union.

The proposed amalgamation is based on the principles of proportional representation of each industry division on decision making bodies.

The new CFMEU will be based on democratic control by the rank and file.

Each division will have extensive power and authority which will ensure that the members are involved in determining issues that affect their wages, employment, safety, work rights and conditions of employment.

Provisions have been written into the rules of the new CFMEU that allow each division to have autonomy over all matters that do not directly affect the members of the other divisions.

It has been agreed that there will be a transitional period after the formal amalgamation. During this period and up to the next national and branch elections all persons holding office in the old CFMEU and the FEDFA and OPPWF at the date of amalgamation will hold office unless otherwise agreed.

Furthermore, any further proposed amalgamations will be based upon the principles contained within the scheme of amalgamation negotiated by the old CFMEU, FEDFA and OPPWF as set out in this agreement.

Alternative Scheme/s

A. Changes in the rules of the new CFMEU will take place along the following lines in the event of the FEDFA membership deciding against amalgamation and the old CFMEU and OPPWF members deciding in favour of amalgamation.

(1) The constitution of the new CFMEU shall not include the constitution of the FEDFA.

(2) The property, assets and liabilities of the FEDFA shall not become the property, assets and liabilities of the new CFMEU.

(3) The CFMEU, FEDFA Division and Divisional Branches shall not exist nor will the positions exist that would have been held in the CFMEU by the FEDFA Division and Divisional Branches.

(4) There shall be only one National Secretary of the CFMEU.

(5) The name of the old CFMEU shall remain the name of the new CFMEU.

(6) Parties to the amalgamation shall not include the FEDFA.

B. Changes in the rules of the new CFMEU will take place along the following lines in the event of the OPPWF membership deciding against amalgamation and the old CFMEU and FEDFA members deciding in favour of amalgamation.

(1) The constitution of the new CFMEU shall not include the constitution of the OPPWF.

(2) The property, assets and liabilities of the OPPWF shall not become the property, assets and liabilities of the new CFMEU.

(3) The name of the old CFMEU, BWIU Division and Divisional Branches shall remain the unchanged and shall not include the word Plasterers.

(4) The rules of CFMEU, BWIU Division and Divisional Branches shall be same as the rules of the BWIU Division and Divisional Branch of the old CFMEU and will not include the changes contemplated as a result of an OPPWF amalgamation.

(5) The rules of the new CFMEU shall not include within them provisions for representatives of the OPPWF to be represented on the National Conference, National Executive or any other bodies of the new CFMEU.

(6) Parties to the amalgamation shall not include the OPPWF.

IN THE FAIR WORK COMMISSION

Matter No.: D2022/10

Application by Grahame Patrick Kelly – withdrawal from amalgamated organisation – Mining and Energy Division – Construction, Forestry, Maritime, Mining and Energy Union

STATEMENT OF NOEL WASHINGTON

I, Noel Washington, retired union official, c/o 540 Elizabeth Street, Melbourne, Victoria, 3000 state:

1. I am a former official of the union now known as the Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**).

2. I am authorised to make this statement on behalf of the CFMMEU.

3. I was an employed organiser of the Federated Engine Drivers' and Firemen's Association of Australasia (**FEDFA**) from 1991 until it was deregistered in 1992.

4. From 1992 to 2001, I was an employed organiser of the Construction, Forestry, Mining and Energy Union (**CFMEU**) in the Victorian Branch of the FEDFA Division.

5. In 2001, I became the Branch President of the FEDFA Division Victorian Branch.

6. I remained in that position after the FEDFA Division Victorian Branch became a Divisional Branch of the Construction and General Division (**C&G**).

7. In 2005, the two Victorian Divisional Branches of C&G merged, and I became Senior Vice President of the Victorian Building Unions Divisional Branch. I held that position in the Divisional Branch until 2016.

FEDFA's amalgamation was intended to be permanent

8. I was a FEDFA official throughout the process of integrating FEDFA with the industry-based Divisions of the CFMEU.

9. In my role as an official, I was responsible for negotiating the division of FEDFA's Victorian members and assets between C&G, the Mining and Energy Division (**M&E**), and the Forestry and Furniture Products Division (**FFPD**), along with Tommy Watson, the Branch Secretary of the FEDFA Division Victorian Branch.

10. The division of FEDFA's Victorian members and assets between the other Divisions is set out in a translation agreement that is dated 1 August 2003 (the **Translation Agreement**). Attached to this statement and marked **NW-1** is a copy of the Translation Agreement.

11. The translation agreement provided for the allocation of members and assets. For example, under the Translation Agreement, M&E received FEDFA's building in Morwell, Krozen House, which had been developed over many generations by FEDFA members.

12. It was also part of my role to report back to FEDFA members on the progress of those negotiations, including to put the Translation Agreement to them for approval. I convened numerous mass meetings of members for this purpose.

13. At the time, all the officials involved in the amalgamation considered it would be permanent. That was the whole concept of the CFMEU, as the first "super union".

14. As officials, we would not have agreed for the FEDFA Division to be dissolved and its members and assets divided up among the other Divisions of the CFMEU if we thought that the other Divisions would one day leave the union and take those members and assets with them.

15. We would never have been able to get the members' support for integration if that had been on the agenda at the time. It would not have washed as it would have been agreeing to FEDFA being broken up and its assets being given away to another union.

16. Based on my discussion and reports with members of FEDFA, those members would not have agreed for FEDFA to be dissolved and have its members and assets carved up among the other Divisions of the CFMEU if they had thought that the other Divisions would one day leave the union and take those members and assets with them.

17. At the time, in nearly all cases of union amalgamations, the amalgamating unions retained their pre-existing structures within the amalgamated union. FEDFA was one of the relatively few examples where an amalgamating union was broken up after merging.

18. This was a very contentious issue with FEDFA's members, particularly in Victoria. The membership saw it as breaking up the union, not amalgamating. They considered that the proposed amalgamation involved a loss of FEDFA's identity and autonomy.

19. This was one of the major reasons that:

    a. Previous ballots for FEDFA to amalgamate with other unions, including the CFMEU, had failed;

    b. the scheme of amalgamation provided for additional time for the integration of FEDFA's Victorian branch compared to the other branches (eight years rather than four); and

    c. the integration of FEDFA's Victorian branch took even longer than that (twelve or thirteen years).

20. As officials, we were alive to the members' concerns in this respect, including because the issue went to the CFMEU National Executive at one stage. We absolutely did not want to force anyone to leave FEDFA.

21. Given those concerns, I had meetings with members that were proposed to be allocated to any Division other than C&G, where there was going to be a separate

FEDFA Divisional Branch. The purpose of those meetings was to explain the scheme of amalgamation and seek the members' specific approval before we went ahead with the translation.

22. It was a particular bone of contention with FEDFA's members at Australian Paper who were allocated to FFPD. It was so contentious that those members, feeling as though they were being forced out of the union, resigned their membership and joined the Electrical Trades Union for a time. I believe they returned to the CFMEU eventually.

Noel Washington
11 October 2022

ANNEXURE NW-1

Translation Agreement FEDFA Victoria Divisional Branch

Agreement between

CFMEU, FEDFA Division;
and
CFMEU, FEDFA Div, Victorian Divisional Branch;
and
CFMEU, Construction and General Division;
and
CFMEU, C&G Div, Victorian Divisional Branch;
and
CFMEU, Forest and Furniture Products Division;
and
CFMEU, F&FP Div, Pulp and Paper Divisional Branch;
and
CFMEU, F&FP Div, Victorian Divisional Branch;
and
CFMEU Mining & Energy Division;
and
CFMEU, M&E Div, Victorian Divisional District.

Regarding

the translation of current FEDFA, Victorian Divisional Branch members in accordance with CFMEU National Rule 42(iii) to:

- Forest and Furniture Products Division
- Mining & Energy Division;
- Construction and General Division

1. Background

In 1992 and 1993, the membership of a number of National Unions including the FEDFA voted to amalgamate to form the CFMEU.

The rules of the CFMEU provided, inter alia, for the establishment of a Construction & General Division, a Forest & Furniture Products Division, and a Mining & Energy Division and for the transfer of FEDFA members over time to those Divisions ("the translation provisions").

The translation provisions, specifically National Rule 42(xii), provided that the FEDFA Divisional members in the State of Victoria were to be given additional time to effect the translation.

The relevant parties have been negotiating and now have reached agreement on an orderly translation of members in accordance with the rules and as reflected in this document.

2. Membership

Membership transfers will be in accordance with Rule 42(iii) as follows:

2.1 Forest and Forest Products Division;

All FEDFA Division members eligible under CFMEU National Rule 42(iii)(b), shall transfer to either of the 2 existing branches, ie Victorian Divisional Branch and Pulp and Paper Divisional Branch. This membership includes:

- Paper mills at Maryvale and Melbourne
- Amcor plantations (Latrobe Valley)

2.2 Mining and Energy Division;

1214 FEDFA Division members eligible under CFMEU National Rule 42(iii)(a), have transferred to a newly created Divisional District, known as Mining and Energy Division, Victorian Divisional District. (see M&E Division and Divisional District Rules)
This membership includes:

- 944 members at the mines and powerhouses (02/01/01);
- 265 contractors dedicated to the mines (post 31/03/03);
- 5 members at Energy Brix (confirmed 24/06/03)

2.3 Powerstation contractors and further mine contractors yet to be transferred are subject to the agreement contained in annexure A

2.4 Construction And General Division

The remaining 4318 FEDFA Divisional Branch members, under CFMEU National Rule 42(iii)(c), shall transfer to a newly created Divisional Branch, to be known as Construction and General Division, Victorian FEDFA Divisional Branch, (see C&G Division and Divisional Branch rules).

3. Financial Issues

Based on the CFMEU Principle of proportionality the parties' agree that those members who translate to a Division are entitled to their proportionate share of the FEDFA Div, Victorian Divisional Branch assets. The Forest and Forest Products Division is not claiming any proportional share of assets.

3.1 FEDFA Division, Victorian Divisional Branch finances

The assets of the FEDFA Division, Victorian Divisional Branch shall be transferred in accordance with the principal of proportionality to the relevant party subject to the following:

a. It is agreed that the Forestry and Furniture Products shall not claim a proportional share of assets

b. The Victorian Divisional Branch assets as at 1/1/2001, include:

• Net assets	$ 1,414,978.00	
• Less buildings at book value	$ 1,073,442.00	
		$ 341,536.00
• Barry St Office, Carlton at value 5/2003		$ 1,225,000.00
• Krozen House, Morwell at value 5/2003		$ 120,000.00
	total	$ 1,686,356.00

c. Based on the agreed transferring membership numbers"

• M&E Division	1214	21.94%	
		agreed at 22%	$ 370,998
• C&G Division	4318	78.06%	
		agreed at 78%	$ 1,315,358
Total	5532		$ 1,686,356

d. The 22% proportional share owed to the M&E Division will be realised by the transfer of ownership of Krozen House and cash. The attached spreadsheet, annexure B gives a detailed calculation of the proportional shares. It has been agreed that the M&E Victorian Divisional Branch will accept $220,000.00 in cash, payable within 28 days.

3.2 FEDFA Division finances

The assets of the FEDFA Division, shall be transferred in accordance with the principal of proportionality to the relevant party subject to the following calculations:

The assets of the Division as at the 31/12/00 are $ 518,560.00

Using the proportional percentages calculations for the Victorian Divisional Branch:

- M&E Division 22% $ 114,083.00
- C&G Division 78% $ 404,477.00

See attached exchange of correspondence between the Divisions.

4. Translation issues

4.1 Officials

- No official has transferred to the M&E Division, Victorian Divisional Branch, subject to annexure A, concerning Tom Malone.
- All officials will be transferred to the C&G Division, Victorian FEDFA Branch along with all entitlements and accruals.

4.2 Staff

- Ms P O'Kane has transferred to the Mining & Energy Victorian District with her entitlements and accrued leave. The District has received $41,738.00 as full payment.
- All remaining staff will be transferred to the C&G Division, Victorian FEDFA Branch along with all entitlements and accruals

4.3 Offices

- Krozen House transferred to M&E Div
- Barry St, Offices to be transferred to C&G Division, Victorian FEDFA Branch.

4.4 Rule changes, at National and Divisional level

to be determined and finalised in accordance with NEC resolutions passed at the meeting held 30 May 2003.

5. Dispute resolution

Any dispute arising in relation to any matter within this agreement or in relation to the process of translation shall be dealt with, expeditiously, by a senior official nominated by each of the relevant parties.

In the event that the dispute is unable to be resolved within a reasonable period, each party agrees to refer the matter in dispute to the CFMEU National Secretary for resolution.

6. Date of Agreement

1 August 2003

7. Signatures

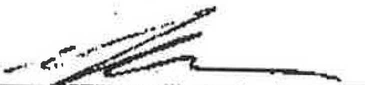
John Maitland
National Secretary

John Sutton
C&G Division, National Secretary

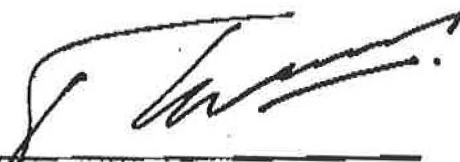
Trevor Smith
F&FP Division, National Secretary

Tony Maher
M&E Division, General President

Tom Watson
FEDFA Victoria Divisional Branch
Secretary



Martin Kingham
C&G Victoria Divisional Branch
Secretary



Tim Woods
F&FP, Pulp & Paper Branch
Secretary

Jane Calvert
F&FP Victoria Divisional Branch
Secretary

Luke van der Meulen
M&E Victorian District
President

What is a fair M & E share of the Vic FEDFA assets?

(Based on the CFMEU principle of asset splitting proportionate with membership numbers)

Membership	Vic FEDFA	**5532**
(as at 31/12/00)	Vic Mining & Energy	**1214**

% of Mining & Energy members upon translation:- **22%**

Nett Assets	
(as at 31/12/00)	**$ 1,686,356**
An M&E asset share based on proportionate membership =	**$ 370,998**

Asset Share received so far by Mining & Energy:-	**Value**
Krozen House, Morwell	**$ 120,000**
Office Equipment	**$ 10,000**
Total =	**$ 130,000**

The result is a shortfall of:- **$ (240,998)**

agreed to accept $220,000 payable within 28 days

Shortfall of M&E share to be paid upon final divisionalisation of FEDFA

Employees entitlements - Trish ($4160 A/L, S/L, $13267 LSL, $19310 F **$ 41,738** PAID 6/6/01

Annexure B