Form 27D
(rule 44.03.3)

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B45 of 2015

On Appeal From
the Federal Court of Australia

BETWEEN:

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION

First Appellant

and

COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED SERVICES UNION OF AUSTRALIA

Second Appellant

and

DIRECTOR, FAIR WORK BUILDING INDUSTRY INSPECTORATE

First Respondent

and

COMMONWEALTH OF AUSTRALIA

Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

PART I:

1 The First Respondent certifies that these submissions are in a form suitable for publication on the internet.

Filed on behalf of: The First Respondent
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PART II:

2 The First Respondent refers to and adopts the statement of issues outlined in Part II of the Annotated Submissions of the Appellants dated 9 September 2015 (**Unions' Submissions**).

PART III:

3 The First Respondent certifies that it has considered whether a notice should be given pursuant to section 78B of the *Judiciary Act 1903* (Cth) and that it considers that no notice needs to be given.

PART IV:

4 The First Respondent does not contest any of the facts set out or referred to in Part V of the Unions' Submissions or the Chronology of the Appellants dated 3 September 2015.

PART V:

5 In addition to the legislative provisions referred to by the Appellants, the First Respondent refers to sections 4, 5, 38, 48, 49 and 69 of the *Building and Construction Industry Improvement Act 2005* (Cth) (**BCII Act**).

PART VI:

6 The First Respondent does not oppose the appeal being allowed or the orders made by the Full Court on 1 May 2015 being set aside.

7 However, in relation to the orders otherwise sought in paragraphs 45(a)(i)-(vi) of the Unions' Submissions, the First Respondent submits that the orders set out at paragraphs 45(a)(i) – (iv) should not be made by this Court, but rather that the order set out at paragraph 45(a)(v) should be made.

8 In relation to the orders sought in paragraphs 45(a)(i) – (iv), the First Respondent considers that two issues are raised:

(a) whether a Court is bound by the amounts sought by way of penalty in that it is not able to make orders for penalties that exceed the amounts sought in the Originating Application and Statement of Claim ("the first issue"); and

(b) taking into account the answer to (a), whether the amounts sought by way of penalty are appropriate ("the second issue").

9 Neither of these issues has as yet been determined by the Federal Court of Australia, as the approach taken by the Full Court was to, after having considered the application of *Barbaro v R; Zirilli v R* (2014) 253 CLR 58 (**Barbaro**) to civil pecuniary penalty proceedings (**the Barbaro issue**), adjourn the proceeding to allow the parties to consider their reasons.[1]

10 The matters the subject of the orders sought in paragraphs 45(a)(i) – (iv) are matters that usually would be heard and determined by a single Judge of an "appropriate court" for the purposes of sections 48 and 49 of the BCII Act.

11 The matters the subject of the orders sought paragraphs 45(a)(i) – (iv) require, *inter alia*, the consideration of facts, the application of sections 38, 49 and 69 of the BCII Act to the facts and the determination, in an exercise of original jurisdiction, of the question of the appropriate penalties to be imposed on the respondents to the substantive proceeding. The Federal Court of Australia has not yet undertaken any of these tasks, which are conventionally performed by a single Judge.

12 The First Respondent submits that the Appellants appeal can be heard and determined without this Court hearing and deciding the matters set out as orders sought in paragraphs 45(a)(i) – (iv). The hearing and determination of those matters can then be remitted to be determined by the Federal Court of Australia, on the basis of the answer given to the *Barbaro* issue by this Court.

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[1] *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCAFC 59 at [244] - [254].

13 It is respectfully submitted that the Court should not hear and determine whether to make the orders originally sought by the First Respondent in the Originating Application dated 23 May 2013 and that it is appropriate to remit those matters to the Federal Court of Australia.

14 In the event that the Court is minded to hear and determine the matters the subject of paragraphs 45(a)(i) – (iv), the First Respondent's, submissions are as follows.

First issue

15 In relation to the first issue, the First Respondent submits that the starting point is that a Court acting under section 49 of the BCII Act is not bound by the amount of a pecuniary penalty sought by an applicant, as the Court's power to impose such a penalty is discretionary.

16 This position is consistent with the principles developed in *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72 at [47] to [60] and *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285 at 290 to 291, in respect of an agreed penalty, and such principles apply with equal weight where a penalty of a particular amount sought is, as here, agreed.

17 In the present case, the Appellants and the First Respondent have agreed upon penalties for specific amounts in resolution of the dispute between them [AB36/2015, pp 55-56].

18 As noted by the Full Court at [247] [AB36/2015, pp 186-187], the Appellants conceded that they had contravened the BCII Act and agreed to the proposed orders before the filing of the Originating Application. Those amounts were agreed in the context of the Federal Court, consistent with established authority, being entitled to exercise its discretion in relation to penalties regardless of agreement between the parties. Thus no issue as to procedural fairness arises.

19 Consistent with its discretion, a Court may choose to make an order for the proposed amount or a different (be it a higher or lower) amount.

20 However, given the agreement between the First Respondent and the Appellants, whilst noting that the Court is not bound to make orders in the amounts sought, the First Respondent does not seek that orders for higher penalty amounts are made and submits that the amounts agreed are appropriate in the circumstances.

Second issue

21 In relation to the second issue, the First Respondent submits that those orders, including the amounts sought by way of pecuniary penalty, are appropriate for the following reasons.

Conduct in relation to the QCH Project

22 Abigroup Contractors Pty Ltd (**Abigroup**) and its subcontractors had employees performing construction work on the Queensland Children's Hospital (**QCH**) Project (**QCH employees**). On 24 May 2011, the following organisers representing the First and Second Appellant:

(a) Joseph Myles (of the First Appellant);

(b) Shane Treadaway (of the First Appellant);

(c) Christopher Lynch (of the Second Appellant); and

(d) Gary O'Halloran (of the Second Appellant);

attended the QCH Project and stated to QCH employees to the effect that there would be no work that day.

23 A meeting attended by QCH employees was then convened by the organisers, at which QCH employees voted to cease work for 72 hours. No work was carried out by the majority of QCH employees on 24, 25 or 26 May 2011.

Conduct in relation to the BCEC Project

24 Laing O'Rourke Australia Construction Pty Limited (**Laing O'Rourke**) and its subcontractors had employees performing construction work on the Brisbane Convention & Exhibition Centre Project (**BCEC**) Project (**BCEC**

employees). On 24 May 2011, a meeting was held offsite which was convened by Peter Close (of the First Appellant). Mr Close had told representatives of Laing O'Rourke he was there to "*take the site out*".

25 The meeting was attended by 260 BCEC employees, who had to leave the site to attend the meeting. Following the meeting, the majority of the BCEC employees did not return to the BCEC Project site.

26 On 25 May 2011, the BCEC employees attended a 'call-back' meeting which voted to remain out until Friday, 27 May 2011. The majority of the BCEC employees remained out on 25 and 26 May 2011. Mr Close, along with three other organisers representing the First Appellant, Jamie McQueen, Edward Bland and Kevin Griffin, convened the call-back meeting.

27 Mr Bland, Mr Griffin and Gerard ('Bud') Neiland attended on 26 May 2011 and told employees there was no access to the site due to the strike agreed on 25 May 2011.

Conduct in relation to the QIMR Project

28 Watpac Construction (Qld) Pty Ltd (**Watpac**) and its subcontractors had employees performing construction work on the Queensland Institute of Medical Research Project (**QIMR**) Project (**QIMR employees**).

29 On 24 May 2011, a meeting was convened by following organisers representing the First and Second Appellants:

(a) Andrew Clark (of the First Appellant);

(b) Tony Kong (of the First Appellant); and

(c) Mark Bateman (of the Second Appellant).

30 The meeting on 24 May 2011 was attended by QIMR employees. Following the meeting, approximately 180 of the QIMR employees stopped work from 24 May 2011 to 26 May 2011, with only a minimal number of employees reporting for work.

31 Mr Kong and Mr Clark were also each involved on one of the following days of industrial action in that they respectively on 25 and 26 May 2011 gave indications to QIMR employees that restricted the number of QIMR employees carrying out work.

Assessing penalty

32 A range of non-exhaustive factors, which may or may not be relevant to the circumstances of a particular case when assessing an appropriate penalty, and which are not to be used as a checklist,[2] have been identified by courts exercising jurisdiction in industrial penalty matters. These are as follows:[3]

(a) the nature and importance of the QCH, BCEC and QIMR Projects;[4]

(b) the nature and extent of the conduct which led to the contraventions;

(c) the circumstances in which that relevant conduct took place;

(d) the nature and extent of any loss or damage sustained as a result of the contraventions;

(e) whether there had been similar previous conduct by the contravener;

(f) whether the contraventions were properly distinct or arose out of the one course of conduct;

(g) the size of the business enterprise involved;

(h) whether or not the contraventions were deliberate;

(i) whether senior management was involved in the contraventions;

(j) whether the party committing the contravention had exhibited contrition;

(k) whether the party committing the contravention had taken corrective action;

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[2] *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 at [91].
[3] See, for example, *Kelly v Fitzpatrick* (2007) 166 IR 14 at [14], *Stuart v CFMEU* (2010) 185 FCR 308 at 331-332.
[4] *John Holland v CFMEU* (No. 2) (2009) 187 IR 400 at [65].

(l) whether the party committing the contravention had cooperated with the enforcement authorities; and

(m) the need for specific and general deterrence.

33 Each of the relevant projects the subject of the proceeding was significant in terms of nature and importance. The QCH Project has a project value of approximately $800 million and involved the construction of a multi-story building, consisting of four levels of car park, eight levels of hospital facilities and four levels of ward facilities. The BCEC Project has a value of approximately $120 million, involved an extension to the existing Brisbane Convention and Exhibition Centre and engaged up to 260 workers on any one day of construction. The QIMR Project involved the construction of a fifteen story medical research centre and engaged up to 180 workers on any one day of construction.

34 The assessment of the gravity of the conduct the subject of this proceeding should have regard to:

(a) the prominent role of the Appellants as significant industrial associations in the building and construction industry;

(b) the conspicuous public display of civil disobedience;

(c) the co-ordinated nature of the conduct (across the three geographically separate sites);

(d) the re-ignition of the conduct on successive occasions;

(e) the deliberate nature of the conduct on each occasion; and

(f) the delay caused to building work on each of the three project sites.

35 Similar relevant conduct on the part of the Appellants may be taken into account in assessing penalty, but it cannot be given such weight as to lead to the imposition of a penalty that is disproportionate to the gravity of the instant contravention.[5] It may demonstrate a history of engaging in the

[5] *Williams v CFMEU (No. 2)* (2009) 182 IR 327 at [13].

particular conduct in question, that the penalties previously imposed were insufficient to deter the contravener from re-engaging in that conduct and that the contravener has failed to take adequate steps to prevent further contraventions.[6]

36 The Appellants, through their representatives at various levels around the country, have an extensive history of engaging in unlawful conduct that is relevantly similar to the kind in question in this case. The conduct in this case occurred in May 2011, against a background of numerous other prior contraventions of industrial relations laws. In the circumstances, specific deterrence looms large as a relevant consideration.

37 The extent of the relevant prior conduct on the part of the Appellants is such as to give rise to a need for the Court to provide a particularly persuasive form of deterrence against similar future misconduct.[7]

38 The "*course of conduct*" or the "*one transaction principle*" recognises that "*where there is an interrelationship between the legal and factual elements of two or more offences for which an offender has been charged, the court must ensure that the offender is not punished twice for the same conduct.*"[8] The principle is discretionary and the Court is not compelled to take it into account.

39 In the present case, the factual circumstances are such that the contraventions occurred on three separate project sites, each of which was being constructed by different corporations. This means that there must be at least separate contraventions in respect of each site. The critical question in applying the course of conduct principle, however, concerns how many contraventions occurred over the respective three day stoppages on each site. The observations referred to in the Appellant's submissions at paragraph 29 are also relevant to this exercise.

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[6] *Stuart-Mahoney v CFMEU* (2008) 177 IR 61 at [44].
[7] *Stuart-Mahoney v CFMEU* (2008) 177 IR 61 at [44].
[8] *CFMEU v Cahill* [2010] FCAFC 39 at [41].

40 Taking into account the approach of the Federal Court in *Director, Fair Work Building Industry Inspectorate v Cradden,*[9] the conduct of the First Appellant should be regarded as constituting four contraventions (one for the QCH Project, being a three day stoppage that began on 24 March); two for the BCEC Project (the 24 March stoppage for one day and then the 25 March two day stoppage) and one for the QIMR Project (being a three day stoppage that began on 24 March).

41 The conduct of the Second Appellant can be regarded as constituting two contraventions, one for the QCH Project, and one for the QIMR Project.

42 Each of the agreed contraventions involved calculated and deliberate acts in contravention of the BCII Act. The agreed contraventions involved a number of organisers or officials of the Appellants, each of whom attended the projects with the deliberate intention to achieve a withdrawal of labour in support of the Appellants' campaign in relation to alleged sham contracting.

43 Post-contravention conduct is relevant in that Courts may look to whether that the contravener has exhibited contrition, taken corrective action and co-operated with the relevant enforcement authorities. Co-operation can be exhibited in a range of ways, such as, in the present case, agreeing on facts or agreeing on penalty. The timing of any such agreement, and the impact it has on the conduct of the trial and witnesses who would have been likely to be called at trial, are relevant.[10]

44 In the present case, the Appellants agreed upon contraventions and penalty at a very early stage, in advance of the Originating Application being filed.

45 The circumstances of this case warrant penalties that meet the objective of general deterrence.[11]

46 The circumstances of this case also require that penalties meet the objective of specific deterrence, particularly in respect of the First Appellant

[9] [2015] FCA 614 at [16] to [18].
[10] See, for example, *Stuart-Mahoney v CFMEU* (2008) 177 IR 61 at [52].
[11] *FSU v Commonwealth Bank of Australia* (2005) 147 IR 462 at [41]; *Alfred v CFMEU* [2011] FCA 556 at [89] to [90].

in light of its previous contraventions of the BCII Act and other industrial legislation.

47 In the present case, the First Respondent submits that:

(a) the behaviour of the First Appellant was serious in that its behaviour involved widespread and premeditated industrial action across three sites over several days; and

(b) the behaviour of the Second Appellant was also serious, albeit not as widespread as the behaviour of the First Appellant, as it was not involved in industrial action occurring on BCEC Project, and further, because the First Appellant, and not the Second Appellant, appears to have been the driving force behind the campaign. The First Respondent also notes that the Second Appellant does not have as extensive a history of breaches of industrial law as the First Appellant.

48 It is respectfully submitted that these observations in respect of the objective seriousness of the behaviour of the Appellants are compelling factors to be taken into account by the Court in assessing the appropriate penalty, together with each of the other relevant considerations previously referred to in these submissions, including the very early co-operation of the Appellants.

49 As a final check on the assessment as to the appropriateness of any penalty to be imposed, the Court is required to consider whether the overall penalty is appropriate for the conduct in question.[12] Accordingly, after determining a penalty appropriate for each individual contravention (in the present case, four contraventions on the part of the First Appellant and two on the part of the Second Appellant), the Court should, at the end of the process, consider whether the aggregate is appropriate for the total contravening conduct involved.[13]

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[12] *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 at [94].
[13] Ibid at [67]-[71] and [95]-[97]; *Director, Fair Work Building Industry Inspectorate v Cradden* [2015] FCA 614 at [34].

50 The industrial activity on each of the three projects is similar in objective seriousness in that:

(a) they were all significant infrastructure projects being built on behalf of the State of Queensland;

(b) all involved a three-day stoppage of work, commencing at approximately the same time, on the same date and continuing for roughly the same length of time;

(c) all involved a stoppage by a significant number of workers; and

(d) each stoppage was organised by one or both of the Appellants;

(e) the stoppages were all related to alleged sham contracting.

51 These factors indicate that an application of the totality principle is appropriate as the aggregate of individual penalties for each contravention may not appropriately reflect the interrelationship of the conduct.

52 The maximum available penalty for a contravention of section 38 of the BCII Act pursuant to section 49(2)(a) of the BCII Act was $110,000 at the relevant time.

53 The First Appellant contravened section 38 of the BCII Act at three project sites. Applying the course of conduct principle there are four contraventions, as set out above. Once an aggregate for the four contraventions is determined, the next step would be to consider reduction of those amounts by application of the totality principle. The Second Appellant contravened section 38 twice. The aggregate amount for the two individual contraventions would then be subjected to the totality principle.

54 Accordingly, it is submitted that upon the application of the totality principle, the total amount of the penalties agreed between the parties was appropriate having regard to the entirety of the conduct and circumstances in question.

PART VII:

55 The First Respondent has not filed a notice of contention or notice of cross-appeal.

PART VIII:

56 The First Respondent estimates that no more than 45 minutes will be required for the presentation of its oral argument in this appeal.

Dated: 24 September 2015

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for

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