FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union [2022] FedCFamC2G 574 (The Boggo Road Cross River Rail Case)

File number(s):	BRG 365 of 2020
Judgment of:	**JUDGE VASTA**
Date of judgment:	28 July 2022
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Legislation:	*Fair Work Act 2009* (Cth):s 500, s 793 *Work Health and Safety Act 2011* (Qld): s 117
Cases cited:	*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3 *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (the Bruce Highway Caloundra to Sunshine upgrade case) (No 2)* [2019] FCA 1737 *Australian Building and Construction Commissioner v Pattinson & Anor* [2022] HCA 13 *Bunning v Centacare* [2015] FCCA 280 *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46 *Mason v Harrington Corporation Proprietary Limited t/as Pangaea Restaurant & Bar* [2007] FMCA 7
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ORDERS

BRG 365 of 2020

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

BETWEEN:	**AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER** Applicant
AND:	**CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION** First Respondent
	ANDREW BLAKELEY Second Respondent
	LUKE GIBSON Third Respondent

ORDER MADE BY: **JUDGE VASTA**

DATE OF ORDER: **28 JULY 2022**

THE COURT DECLARES THAT:

The Second Respondent (Andrew Blakely)

1. On 15 April 2020, at the Cross River Rail Project, Andrew Blakeley contravened s.500 of the Fair Work Act 2009 (Cth), in that he acted improperly in exercising a right conferred by Part 3-4 of the Fair Work Act 2009 (Cth) by:

   (a) refusing to provide his entry permit despite multiple requests by the occupier;

   (b) making patronising counter-requests for excessive description of the entry permits, coupled with comments such as "I thought CPB would have trained you better to know what permits to ask for, unless you tell me what specific permits, I am not going to show them";

   (c) breaching the OHS requirements that applied on site, and acting contrary to instructions of the occupier, by entering the construction area of the site unaccompanied, and refusing to return;

   (d) standing in the path of a truck so as to delay it from proceeding down a road, whilst refusing requests to leave the area and claiming "I am just stretching my legs";

(e) walking towards a representative of the occupier on site with his chest puffed out in an aggressive stance;

(f) making a homophobic slur to Peter Cullen that suggested Mr Cullen was trying to look at his penis while in the toilet block; and

(g) accessing and inspecting crib rooms and meeting rooms against the requests of the occupier, and interrupting a site induction that was taking place.

The Third Respondent (Luke Gibson)

2. On 15 April 2020, at the Cross River Rail Project, Luke Gibson contravened s.500 of the Fair Work Act 2009 (Cth), in that he acted improperly in exercising a right conferred by Part 3-4 of the Fair Work Act 2009 (Cth) by:

(a) refusing to provide his entry permit despite multiple requests by the occupier;

(b) making patronising counter-requests for excessive description of the entry permits;

(c) insulting Peter Cullen with a homophobic slur that he was a "pumpkin eater";

(d) unreasonably refusing to deal with the occupier's industrial relations representative;

(e) breaching the OHS requirements that applied on site, and acting contrary to instructions of the occupier, by entering the construction area of the site unaccompanied, and refusing to return; and

(f) in response to a request that he return to the pre-start area, turning out his pockets and saying "what do you think I am a dog? You want me to pull my pocket out and lead me around like a dog?".

The First Respondent (CFMMEU)

3. The First Respondent contravened section 500 of the Fair Work Act 2009 (Cth) by the conduct of the Second Respondent, the subject of the contravention at Declaration 1.

4. The First Respondent contravened section 500 of the Fair Work Act 2009 (Cth) by the conduct of the Third Respondent, the subject of the contravention at Declaration 2.

THE COURT ORDERS THAT:

5. The Second Respondent (Andrew Blakeley):

(a) pay a penalty of $12,600 in respect of the contravention of section 500 of the Fair Work Act 2009 (Cth) dealt with in Declaration 1; and

(b) that penalty be paid personally in that he must not, whether before or after the payment of penalties:

(i) seek to have or encourage the First Respondent in any way whatsoever, directly or indirectly, to pay to him or for his financial benefit in any way whatsoever, any money or financial benefit referable to the payment of the penalty whether in whole or in part; and

(ii) accept or receive from the First Respondent in any way whatsoever, any money or financial benefit referable to the payment of the penalty, whether in whole or in part.

6. The Third Respondent (Luke Gibson):

(a) pay a penalty of $12,600 in respect of the contravention of section 500 of the Fair Work Act 2009 (Cth) dealt with in Declaration 2;

(b) that penalty be paid personally in that he must not, whether before or after the payment of penalties:

(i) seek to have or encourage the First Respondent in any way whatsoever, directly or indirectly, to pay to him or for his financial benefit in any way whatsoever, any money or financial benefit referable to the payment of the penalty whether in whole or in part; and

(ii) accept or receive from the First Respondent in any way whatsoever, any money or financial benefit referable to the payment of the penalty, whether in whole or in part.

7. The First Respondent (the Construction, Forestry, Maritime, Mining and Energy Union) pay the following pecuniary penalties:

(a) $63,000 in respect of the contravention of section 500 of the FW Act dealt with in Declaration 3; and

(b) $63,000 in respect of the contravention of section 500 of the FW Act dealt with in Declaration 4.

8. All penalties imposed by these orders are to be paid to the Commonwealth of Australia as follows:

a. The First Respondent pay such penalty within 28 days.

b. The Second Respondent 120 days of the date of this order.

c. The Third Respondent 120 days of the date of this order.

Note: The form of the order is subject to the entry in the Court's records.

Note: The Court may vary or set aside a judgment or order to remedy minor typographical or grammatical errors (r 17.05(2)(g) *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to r 17.05 *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth).

REASONS FOR JUDGMENT

JUDGE VASTA

INTRODUCTION

1 On 30 June 2020, the Applicant, the Australian Building and Construction Commissioner ("ABCC"), applied to this Court seeking declarations and pecuniary penalties against the First Respondent, Construction, Forestry, Maritime, Mining and Energy Union ("CFMMEU"), the Second Respondent, Andrew Blakeley and the Third Respondent, Luke Gibson for contraventions of the *Fair Work Act 2009* (Cth) ("the FW Act"). There was originally a Fourth Respondent.

2 The matter had been set down for a four day trial commencing Tuesday, 12 July 2022. On 1 July 2022, the Applicant filed a notice of discontinuance against the Fourth Respondent and also filed an amended statement of claim. The three remaining Respondents each filed defences in which they admitted the facts contained in the amended statement of claim which thereby meant that they admitted the contraventions against the FW Act.

3 This meant that there was no need for a trial and the matter proceeded to a penalty hearing which was held on Thursday, 14 July 2022.

Background

4 The Cross River Rail project is one of the biggest infrastructure projects to proceed in Brisbane for decades. Part of the project involves building new train stations and tunnelling between those stations which will create a new train network. One of the sites of the project is the Boggo Road site.

5 CPB Contractors Pty Ltd ("CPB") are the principal contractor for the project. Peter Cullen is the safety advisor for CPB. Matthew Gallen is a senior supervisor for CPB. Tan Truong is the industrial relations advisor CPB.

6 Unsurprisingly, CPB had a duty to ensure the health and safety of any workers at the site as well as the health and safety of any visitors to the site. Again unsurprisingly, CPB had established and imposed Occupational Health & Safety requirements for the project that applied to the site. This included that all visitors to the site must:

- report to the site office,

- undertake induction training before leaving the pre-start area of the site,
- be escorted by fully inducted CPB representative at all times whilst on site and,
- not walk around the site unsupervised.

7 As there were workers who were engaged on the site who were eligible to be members of the CFMMEU, the CFMMEU was entitled to represent their interests and therefore was entitled to have its officers exercise rights pursuant to s 117 of the *Work Health and Safety Act 2011* (Qld) ("WHS Act") on that site.

15 April 2020

8 On 15 April 2020, the Second Respondent, Mr Andrew Blakeley, the Third Respondent, Mr Luke Gibson and another person, who were all organisers of the CFMMEU, arrived at the pre-start area of the Boggo Road site at about 7:45 AM. The trio were seen by representatives of CPB. Mr Gallen approached the trio and said, words to the effect of, "*How ya going, can I help you?*", to which the Third Respondent said that he wanted to use the toilet. Mr Gallen said "*Nah, who are you and what you want?*"

9 The Third Respondent became aggravated and spoke in a patronising way until Mr Gallen allowed him to use the toilet. Mr Gallen then left to locate Mr Cullen. Mr Gallen and Mr Cullen then approached the trio. The Second Respondent (in the presence of the Third Respondent) then advised Mr Cullen that they were "*here on some suspected contraventions*".

10 The following conversation then took place:

> **C**: Okay can I see your permits, please?
>
> **SR**: I have four permits, which ones do you want to see?
>
> **C**: I want to see the workplace health and safety permits and the permits you are authorised to show me.
>
> **SR**: I have four permits, which ones do you want to see?
>
> **C**: Okay, show me all four permits.
>
> **SR**: No, you don't get to see all four permits. I thought CPB would have trained you better to know what permits to ask for; unless you tell me what specific permits, I am not going to show them.
>
> **C** (turning to the Third Respondent): Can I see your workplace health and safety permits?
>
> **TR:** Which ones? I have four.
>
> **C**: Show me all four.

TR: You're not entitled to see all four.

C: Until I see your permits, we won't be escorting you on site.

11 The Second Respondent advised Mr Cullen that he intended to contact WHS Queensland. He did this and requested that WHS send inspectors to the site.

12 Mr Cullen had told the trio that his name was "*Pete*". The following conversation then occurred:

SR: What do you do here, Pete?

C: I work in the Health and Safety Department and can I get your name?

SR: Not until you ask for the right permits.

G: Pete's giving you his name, can you give Pete your name?

SR: Not until you ask for the right permits.

TR: Well, what permits you want to see?

G: Your Workplace Health and Safety and Fair Work permits.

TR: Finally someone who knows what they're talking about.

TR: Pete, Pete pumpkin eater

G: Mate, no name-calling; we are not calling you guys names.

13 Mr Cullen then asked the Second and Third Respondents for their notice of entry. Both Respondents produced their WHS permit holder "Notice of Entry" pursuant to s 119 of the WHS Act. The notices were both dated 15 April 2020.

14 The notice of the Second Respondent listed the following suspected contraventions:

- safe systems of work into workers health (Covid-19)
- sufficient plant, pedestrian delineation
- adequate exclusion zone for high-risk works

15 The notice of the Third Respondent listed the following suspected contraventions:

- safe systems of works into workers health (Covid-19)
- access and egress
- safe systems of work in general work environment (SWIMS)

16 Mr Cullen then repeated his request to the Second and Third Respondents and the following conversation took place:

C: Can I see the other two permits that are required?

SR: What are those permits?

C: Unless you show me those permits we will not be walking around site to look at those contraventions.

17 At this time, Mr Truong arrived on site. He and Mr Gallen again approached the two respondents who were still in the pre-start area. The following conversation then took place:

T: Look, Matt has requested to see your Fair Work and Workplace Health and Safety permit. If you can't provide this, then you can't enter the premises. Are you refusing?

TR: No, I'm not refusing. Wait, who are you?

T: I'm Tan from IR.

TR: We don't deal with IR.

After a 10 second pause, the conversation continued:

T: Well, are you going to show your Fair Work and Work Health and Safety permits?

18 There was no response from either respondent.

T: Silence and no response is considered as a non-compliance.

19 The permits were not produced.

Entry into the site

20 At about 8:26 AM (which is approximately 40 minutes after the respondents arrived at the pre-start area of the site), the two Respondents simply left the pre-start area and entered the site.

Actions of the Second Respondent

21 Once the Second Respondent entered the worksite, he walked along a concrete path along the side of the site. Mr Gallen approached him and requested that he "*come back here*". The Second Respondent did not comply with the request.

22 Instead, the Second Respondent continued walking into the site and stopped in the middle of the roadway in front of the heavy vehicle gate opening. A truck approached the heavy vehicle gate but could not enter the gate because the Second Respondent was standing in the way.

23 Mr Cullen requested that the Second Respondent move out of the way of the truck so that the truck would be able to turn left. The Second Respondent moved in the opposite direction to that indicated by Mr Cullen, placing himself directly in the path of the truck's intended path to the left. Shortly afterwards, the Second Respondent did move so that the truck was able to turn left.

24 Throughout this incident, Mr Cullen had informed the Second Respondent that he needed to leave the area because heavy vehicles operated in that location. Mr Cullen had requested that the Second Respondent return to the pre-start area and repeated his request to see the entry permits of the Second Respondent. The Second Respondent ignored the requests and refused to comply but he did say that "*I am just stretching my legs*".

25 Mr Gallen then approached the area where the Second Respondent and Mr Cullen were. Mr Gallen said to the Second Respondent, "*Enough is enough; I need you to return back. You shouldn't be wandering around site*". The Second Respondent replied, "*I don't know where I was going, all these paths don't lead to where I want to go*".

26 With this, the Second Respondent walked directly towards Mr Gallen with his chest puffed and his arms bent at the elbows and raised from the sides of his torso in an imposing and aggressive stance. He stared at Mr Gallen and smirked.

27 In the toilet block on site, the Second Respondent made a comment in offensive terms to Mr Cullen that suggested Mr Cullen was trying to look at the penis of the Second Respondent.

28 The Second Respondent then accessed and inspected the crib rooms and meeting rooms on site. An induction was taking place inside one of the rooms. There were two staff inside. One was presenting the site induction to the other. The Second Respondent approached the room, opened the door, looked inside and interrupted the induction by saying "*See you are not keeping correct separation*". Mr Cullen said "*Yes we are. Please don't interrupt the induction*".

29 The Second Respondent walked away leaving the door open and entered the next room. He opened that door, looked around inside and then walked away, again leaving the door open. He did the same thing for another three rooms; opening the door, looking inside and then walking away leaving the door open.

30 At 9:27 AM, Mr Truong saw the Second Respondent walking away from the pre-start area again and heading towards the work front. He followed the Second Respondent and said to him "*I need you to stop. You are not authorised to be here. I am giving you a reasonable direction. Mate, can I see your Fair Work and Workplace Health and Safety permit? You haven't shown this to as yet and therefore not allowed on site*". The Second Respondent replied "*Well, you two are up here, so I am allowed to be here as well*".

Actions of the Third Respondent

31 After the Third Respondent left the pre-start area, he was approached by Mr Gallen who requested that the Third Respondent return to the pre-start area. The Third Respondent replied, "*What do you think I am, a dog? You want me to pull my pocket out and lead me around like a dog*?"

32 The Third Respondent then turned out his pockets from his pants. Mr Gallen did not respond to this statement and the Third Respondent ignored the request from Mr Gallen. The Third Respondent remained where he was and made another phone call.

The WHSQ inspectors

33 The inspectors from WHS Queensland arrived about 9:39 AM. The Second Respondent and the Third Respondent actually produced their entry permits when requested to do so by these inspectors. CPB representatives, the inspectors and the two Respondents discussed the suspected safety breaches identified in the notices of entry.

34 Immediately following these discussions, the WHS inspectors and the two Respondents inspected various areas of the site.

35 The two Respondents left the site at approximately 10:55 AM.

Contravention of the FW Act

36 The three Respondents have admitted that they have contravened s 500 of the FW Act which states as follows:

> A permit holder exercising, or seeking to exercise, rights in accordance with this Part must not intentionally hinder or obstruct any person, or otherwise act in an improper manner.

37 The Second and Third Respondents were seeking to exercise rights under Part 3-4 of the FW Act when they sought to exercise their rights pursuant to s 117 of the WHS Act. The Second and Third Respondents both acted in an improper manner.

38 The First Respondent has contravened s 500 by the conduct of the Second Respondent pursuant to s 793 and s 550 of the FW Act.

39 The actions of the Second Respondent that were improper were:

- refusing to provide his entry permit despite multiple requests by the occupier;

- making patronising counter requests for excessive description of the entry permits;
- breaching OHS requirements that applied on site and acting contrary to the instructions of the occupier by entering the construction area of the site unaccompanied, and refusing to return;
- standing on the part of a truck so as to delay it from proceeding down the road whilst refusing request to leave the area;
- walking towards a representative of the occupier on site with his chest puffed out in an aggressive stance;
- making a homophobic slur to Peter Cullen that suggested that Mr Cullen was trying to look at his penis while in the toilet block; and
- accessing and inspecting crib rooms and meeting rooms against the requests of the occupier and interrupting a site induction that was taking place.

40 The First Respondent has contravened s 500 by the conduct of the Third Respondent pursuant to s 793 and s 550 of the FW Act.

41 The actions of the Third Respondent that were improper were:

- refusing to provide is entry permit despite multiple requests by the occupier;
- making patronising counter requests for excessive description of the entry permits;
- insulting Peter Cullen with a homophobic slur that he was a "*pumpkin eater*";
- unreasonably refusing to deal with the occupier's IR represented;
- breaching OHS requirements that applied on site and acting contrary to the instructions of the occupier by entering the construction area of the site unaccompanied, and refusing to return;
- responding to a request to return to the pre-start area by turning out his pockets and saying words to the effect of "*What do you think I am, a dog? You want me to pull my pocket out and lead me around like a dog?"*

Homophobic slur

42 There was some consternation at the Bar table when I expressed that the term "*pumpkin eater*" was a homophobic slur. Counsel, who may have had a somewhat sheltered existence, did not understand that this term could be used in this manner.

43 At the hearing, I did not wish to explain what the term means because it is quite disgusting and I believed that the use of this term was common enough knowledge. I have absolutely no doubt that it was meant as a homophobic slur to Mr Cullen.

44 It was submitted to me that the term was a reference to the nursery rhyme. I cannot accept this submission. Firstly, the nursery rhyme would reference "Peter, Peter, pumpkin eater" and not "Pete, Pete, pumpkin eater". If it were simply a reference to a nursery rhyme, then there would be no cause for anyone to be upset or offended. But the immediate response of Mr Cullen's colleague, Mr Gallen, was to say, "*Mate, no name-calling; we are not calling you guys names*".

45 If this were simply a play on names and referencing a children's nursery rhyme, such a reaction by Mr Gallen would be excessive. If this were simply a reference to a nursery rhyme, why would Mr Gallen need to explain that there should be no "name-calling", as such a reference could never amount to "name-calling". There would also be no need for Mr Gallen to point out that CPB representatives were not calling the union officials "names".

46 Furthermore, if what was said by the Third Respondent was simply referencing a children's nursery rhyme, one would think that he would react to the rebuke from Mr Gallen along the lines of "*Why are you getting so upset? It's only a silly nursery rhyme*". The fact that there was no reaction to the admonition by Mr Gallen speaks volumes.

47 This illustrates that what was said by the Third Respondent was clearly meant to be an insult and it was taken that way by Mr Gallen (and presumably Mr Cullen).

48 The other aspect that points to this being a homophobic slur is that the Second Respondent, whilst in the toilet block with Peter Cullen, then made "offensive comment" to Mr Cullen that suggested that Mr Cullen was trying to look at the penis of the Second Respondent. This was clearly a reference to the earlier description by the Third Respondent of Mr Cullen being a "*pumpkin eater*" and was a homophobic slur in itself.

49 These actions speak to a targeting of Mr Cullen; one calls him a pumpkin eater and the other follows up with insinuations that Mr Cullen is trying to look at a penis. There cannot be any other realistic way to understand this behaviour.

50 Counsel for the Applicant quite properly conceded that he had not made any submission to suggest that the term "*pumpkin eater*" was a homophobic slur. With all due respect to Counsel, it was proper for him to inform the Court of this, however, that does not mean that the Court is

fettered by the fact that Counsel has not understood the words that were said and what the term "*pumpkin eater*" actually refers to.

51 I am not criticising either Counsel in any way; I wish that I did not know what this term actually means because it is so disgusting. But I do know what the term means and given all of the surrounding circumstances (especially the later slur by the Second Respondent), I am in no doubt that this term was uttered by the Third Respondent as an insult of the homophobic kind.

52 Since reserving this decision, I thought back to an earlier decision of mine in *Bunning v Centacare* [2015] FCCA 280. In that decision, I unfortunately had to use terms identifying a number of paraphilias including copraphilia, urophilia and necrophilia. There were many queries afterwards by persons whom I would have considered "worldly" as to what these terms meant. It may be the same is true of "*pumpkin eater*". Whilst I do not wish to explain this term in the body of these Reasons, I have given an explanation in Annexure 1 to this judgement.

The Law regarding assessment of pecuniary penalties

53 Because the three Respondents have admitted contravening s 500 of the FW Act, the Court must now assess what the appropriate pecuniary penalty should be. When assessing the quantum of pecuniary penalties in the past, much of what the Court had done was a reflection of sentencing principles that applied in criminal law.

54 The decision of the High Court in *Australian Building and Construction Commissioner v Pattinson & Anor* [2022] HCA 13 has been called a "game changer". This is because the High Court ruled that the notion of "proportionality" is so closely connected to the central role of retribution in criminal sentencing that it could not be translated coherently into the civil penalty context of the FW Act. The proposition of the criminal law, that a sentence must not be disproportionate to the seriousness of the offending for which the offender is being sentenced, is part of the retributive aspect of sentencing which has no part to play in the civil penalty regime of the FW Act.

55 It is instructive to reiterate what the High Court had earlier said in *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46 at paragraph 55 of that judgment,

> No less importantly, whereas criminal penalties import notions of retribution and rehabilitation, the purpose of a civil penalty, as French J explained in Trade Practices Commission v CSR Ltd, is primarily if not wholly protective in promoting the public interest in compliance:

> "Punishment for breaches of the criminal law traditionally involves three elements: deterrence, both general and individual, retribution and rehabilitation. Neither retribution nor rehabilitation, within the sense of the Old and New Testament moralities that imbue much of our criminal law, have any part to play in economic regulation of the kind contemplated by Pt IV [of the Trade Practices Act]. ... The principal, and I think probably the only, object of the penalties imposed by s 76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act."

56 The High Court had also earlier said in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3, at paragraph 116 of that judgment:

> As has been observed, the principal object of an order that a person pay a pecuniary penalty under s 546 is deterrence: specific deterrence of the contravener and, by his or her example, general deterrence of other would-be contraveners. According to orthodox sentencing conceptions as they apply to the imposition of civil pecuniary penalties, specific deterrence inheres in the sting or burden which the penalty imposes on the contravener. Other things being equal, it is assumed that the greater the sting or burden of the penalty, the more likely it will be that the contravener will seek to avoid the risk of subjection to further penalties and thus the more likely it will be that the contravener is deterred from further contraventions; likewise, the more potent will be the example that the penalty sets for other would-be contraveners and therefore the greater the penalty's general deterrent effect. Conversely, the less the sting or burden that a penalty imposes on a contravener, the less likely it will be that the contravener is deterred from further contraventions and the less the general deterrent effect of the penalty. Ultimately, if a penalty is devoid of sting or burden, it may not have much, if any, specific or general deterrent effect, and so it will be unlikely, or at least less likely, to achieve the specific and general deterrent effects that are the raison d'être of its imposition.

57 At paragraph 46 (and following) of *Pattinson* (Supra), the High Court said:

> [46] It is important to recall that an "appropriate" penalty is one that strikes a reasonable balance between oppressive severity and the need for deterrence in respect of the particular case. …
>
> [47] The penalty that is appropriate to protect the public interest by deterring future contraventions of the Act may also be moderated by taking into account other factors … where those responsible for a contravention of the Act express genuine remorse for the contravention, it might be considered appropriate to impose only a moderate penalty because no more would be necessary to incentivise the contravenors to remain mindful of their remorse and their public expressions of that remorse to the court. Similarly, where the occasion in which a contravention occurred is unlikely to arise in the future because of changes in the membership of an industrial organisation, a modest penalty may be appropriate having regard to the reduced risk of future contraventions.

> [48] It is not necessary to multiply examples further. It is sufficient to say that a court empowered by section 546 to impose an "appropriate" penalty must act fairly and reasonably for the purpose of protecting the public interest by deterring future contraventions of the Act.
>
> …
>
> [50] This Court's reasoning in the Agreed Penalties Case is distinctly inconsistent with the notion that the maximum penalty may only be imposed in respect of contravening conduct of the most serious kind. Considerations of deterrence, and the protection of the public interest, justify the imposition of the maximum penalty where it is apparent that no lesser penalty will be an effective deterrent against further contraventions of a like kind. Where a contravention is an example of adherence to a strategy of choosing to pay a penalty in preference to obeying the law, the court may reasonably fix a penalty at the maximum set by statute with a view to making continued adherence to that strategy in the ongoing conduct of the contravenor's affairs as unattractive as it is open to the court reasonably to do.
>
> …
>
> [55] The maximum penalty does not constrain the exercise of the discretion under s 546 (or its analogues in other Commonwealth legislation), beyond requiring "some reasonable relationship between the theoretical maximum and the final penalty imposed". This relationship of "reasonableness" may be established by reference to the circumstances of the contravenor as well as by the circumstances of the conduct involved in the contravention. That is so because either set of circumstances may have a bearing upon the extent of the need for deterrence in the penalty to be imposed. And these categories of circumstances may overlap.

58 In *Mason v Harrington Corporation Proprietary Limited t/as Pangaea Restaurant & Bar* [2007] FMCA 7, which is known as the *Pangaea case*, the Court went through, in effect, a number of factors the Court should be mindful of when imposing pecuniary penalties. One must be careful, though, in looking at the *Pangaea case* (Supra), that one does not simply look at those matters as some form of checklist to see whether or not the facts of the case with the particular factors either aggravate or mitigate the penalty. As such, the list compiled in *Pangaea* (Supra) is extremely useful, but it should not be a formula used by the Court to slavishly come up with some sort of almost mathematical guide for the imposition of penalties.

59 Notwithstanding what has now been said in *Pattinson* (Supra), there is still a place for a Court to consider these aspects. This is so given that the Court must look at both the circumstances of the contravention and the circumstances of the contravenor.

Deterrence and seriousness

60 The maximum penalties that apply in this case are $12,600 for the Second Respondent and $12,600 for the Third Respondent. For each of those contraventions, the maximum penalty for the First Respondent is $63,000 giving a total maximum penalty for the First Respondent of $126,000.

61 It has been submitted to me that the seriousness of the conduct of the Second and Third Respondents is not particularly great when one analyses what it is that they have done.

62 It has been submitted that the conduct of the Second and Third Respondents was not a result of prior planning. It was submitted that the behaviour was a spontaneous response to the initial interaction where the Third Respondent was denied use of the toilet. I cannot accept this submission. Such a submission attempts to reverse what truly happened and put the blame on Mr Gallen and Mr Cullen.

63 The Respondents were visitors and were asked to tell the occupier who they were and why they were there. There is no excuse for the failure to do so. The belligerent response and subsequent behaviour of the two Respondents speaks of a sense of entitlement and a recalcitrance to behaving as ordinary decent human beings.

64 It was submitted that the conduct was limited in scope and occurred over a period of less two hours. Whilst the conduct may have caused aggravation and inconvenience to the CPB staff, the conduct itself did not cause any stoppage of work at the site, any financial loss to CPB or any significant involvement of CPB's workforce.

65 It was submitted that the conduct of the Third Respondent was less serious than that of the Second Respondent. It was submitted that neither the Second Respondent nor the Third Respondent profited or benefited in any way from the contravention.

66 All of this ignores the blatant homophobic slur uttered by the Third Respondent to Mr Cullen and the subsequent homophobic slur to Mr Cullen by the Second Respondent. This behaviour is not just "*improper*"; it is illustrative of a bullying and demeaning of Mr Cullen that simply cannot be tolerated in a civilised society.

67 What has occurred is that the two Respondents have arrived at a worksite and decided to do anything and everything to frustrate and annoy Mr Cullen, Mr Gallen and Mr Truong or any other representative of the occupier. When I asked why the two Respondents didn't just simply

show the staff their permits when asked, there was no answer from Counsel for the Respondents.

68 The two Respondents knew that they could not wander around the site unless they had been inducted or were accompanied by CPB staff. Yet, they endangered themselves as well as staff, who had to try to corral them back to the pre-start area, by wandering off as they pleased. They had absolutely no regard for anyone else on the site and acted as if their desires trumped the safety and good order of the worksite.

Mitigation

69 It has been submitted that there should be some mitigation for the fact that the Respondents admitted the contraventions. It was conceded by the Applicant that the case against the three Respondents did change; such is evident by the amended statement of claim filed on 1 July 2022. That document shows exactly what allegations were now not relied upon by the Applicant; most notably that the Applicant did not wish to proceed further against the person who was originally the Fourth Respondent.

70 However, I am not of the view that this circumstance is a factor that is significant in looking at the matter as a whole. While it is true that the case against the First Respondent changed in a significant way (in that it was responsible for two of its employees and not three), the main allegations against the Second and Third Respondents remained the same. There was no explanation as to why the bulk of these allegations were originally pleaded by the Second and Third Respondents as "not admitted" but were re-pleaded as "admitted". It defies logic to suggest that this reason was simply because other allegations were withdrawn.

71 It begs the question why the original pleadings of the Second and Third Respondents did not "admit" the allegations that have now been admitted and "not admit" the allegations that were subsequently withdrawn.

72 Whilst I acknowledge that there has been cooperation with the administration of justice, this aspect carries little weight in the consideration of the appropriate penalty.

Antecedents

73 The antecedents of the First Respondent are notorious. I have previously described them as the "*greatest recidivist offenders in Australian corporate history*" and many other judges have also noted their infamous past.

74 Their conduct can be compared and contrasted with that of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU). The CEPU has a very proud history of representing its members and vigorously standing up for their rights but doing it in a lawful and responsible way. When there have been transgressions of the law, the CEPU put in place education programs to ensure that their members understand their rights but also their responsibilities under the law. Those transgressions can be seen as "aberrations". In contrast, the First Respondent treats contraventions of the FW Act as "occupational hazards" in the way it conducts business while transgressions are seen as "a way of life".

75 The Applicant has provided a large document which describes the unenviable history of the First Respondent before the courts. There is no pleasure in reading such a document.

76 The Second Respondent is no stranger to these Courts either. The actions in the current matter occurred on 15 April 2020.

77 On 30 April 2020, the Second Respondent also contravened s 500 of the FW Act. On that occasion, he entered into a worksite at Marine Parade in Labrador. The Second Respondent entered into an exclusion zone and a concrete pump zone. The Second Respondent stood between a concrete truck and the concrete pump. He was physically blocking the truck from reversing back to the concrete pumps. This delayed the delivery of concrete to the site.

78 On 5 November 2020, the Second Respondent again contravened s 500 of the FW Act. On that occasion, he entered the worksite at the Southbank new performing arts complex project. He entered the site without giving 24 hours written notice and remained on site in circumstances where he had no lawful basis to do so. He failed to comply with the Occupational Health & Safety requirements on that site and attended the meeting which was not authorised to be held on the site. He facilitated the entry of 10 to 12 people onto the site in circumstances where he knew that those people were not authorised to be on the site.

79 On 3 February 2022, His Honour Judge Egan awarded a pecuniary penalty of $7,992 against the Second Respondent for the contravention which occurred on 5 November 2020.

80 On 11 March 2022, I awarded a pecuniary penalty of $7,000 against the Second Respondent for the contravention which occurred on 30 April 2020.

81 On 28 July 2022, I will be imposing the present pecuniary penalty against the Second Respondent for this contravention which occurred on 15 April 2020.

82 This means that the Second Respondent had contravened s 500 of the FW Act on three separate occasions during 2020. He has been extremely fortunate that the courts have dealt with him in "reverse order". Even though the contravention before Judge Egan was the third occasion in which the Second Respondent had contravened s 500 of the FW Act, it was the first in time which was dealt with by the Courts. The Second Respondent had the benefit of being treated by His Honour Judge Egan as having committed no previous contraventions.

83 I noted this fact at the time I was dealing with the Second Respondent on 11 March 2022.

84 The Third Respondent is also no stranger to these Courts. As noted, the events that led to the present contravention occurred on 15 April 2020.

85 On 2 May 2018, the Third Respondent contravened s 500 of the FW Act. The circumstances of this contravention were the subject of discussion by Her Honour Justice Collier in *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (the Bruce Highway Caloundra to Sunshine Upgrade Case) (No 2)* [2019] FCA 1737. Her Honour gave her judgement on 23 October 2019.

86 The Third Respondent also contravened s 500 of the FW Act on 30 April 2020. He was involved in the same incident in which the Second Respondent also contravened s 500 of the FW Act that same day. The Third Respondent also stood behind a concrete truck to disrupt the pouring of concrete. His behaviour was aggravated by his taunting of workers on the site to "hit" him. On that occasion, I ordered that the Third Respondent pay a pecuniary penalty of $10,000.

87 This means that the Third Respondent has also contravened s 500 of the FW Act in a reasonably short period of time.

Discussion

88 As the High Court have said *Pattison* (Supra), the Court must consider the circumstances of the contravenor as well as a circumstances of the contravention.

89 The submission has been made that when one looks at the circumstances of the contravention, the Court would consider that it is in a "less serious" category. Whilst acknowledging that the actions of both the Second and Third Respondents did not have the same potential for damage

and harm as their actions at Labrador on 30 April 2020, the actions in the present case were still serious in, and of, themselves.

90 The behaviour of uttering quite disgusting homophobic slurs has been consigned to the chapters of the dark history of Australia where the hurling of vitriolic insults which targeted a person's sexuality, race or religion were unfortunately tolerated as if such belittling and bullying was something that a victim just "*had to cop*". Those days are thankfully gone and only troglodytes would attempt to resurrect them. For the Second and Third Respondents (who are supposedly fit and proper persons to hold an entry permit pursuant to s 512 of the FW Act) to utter such slurs to bully and belittle a person simply must be deterred by all means available to a Court.

91 Even though the Second Respondent has been dealt with in "reverse order" chronologically with respect to his commission of contraventions of s 500 of the FW Act, and even though the Third Respondent has committed one of his contraventions after he committed the present contravention, the fact is that both the Second and the Third Respondent have now committed three contraventions of s 500 of the FW Act.

92 It is within the power of the Court to order that the Second and Third Respondents personally pay the penalty imposed upon them. The penalty that will be imposed upon both the Second and Third Respondent must be such that the order acts as a deterrent both specifically and generally. This simply cannot be achieved if the First Respondent "picks up the tab" because this is simply part of the "cost of doing business".

93 There will be no "sting" to any penalty and no sufficient deterrent effect to prevent repetition by them, or like-minded others, of the appalling behaviour they displayed in this case unless the Second and Third Respondents personally pay the penalty. I acknowledge that there will be a real "sting" in the penalties that I award against these two Respondents and for this reason I have allowed a far longer than usual period in which the penalties must be paid.

Conclusion

94 I have taken into account both the circumstances of the contravention itself and of each of the contravenors. There is clearly a persistent adherence to a strategy of non-compliance by all three Respondents. As the High Court said in *Pattison* (Supra),

> A greater financial incentive will be necessary to persuade a well-resourced contravenor to abide by the law rather than to adhere to its preferred policy and will be necessary to persuade a poorly resourced contravenor that it is unlawful policy preference is not sustainable. The more determined a contravenor is to

> have its way in the workplace and the more deliberate its contravention is, the greater will be the financial incentive necessary to make the contravenor except that the price of having its way is not sustainable.

95 There is no other "appropriate" penalty that will achieve the deterrent effect necessary other than the imposition of the maximum penalty.

96 I acknowledge that this penalty will still be insufficient to deter the First Respondent who will, as I remarked during the hearing, regard such a sum as "chump change". But this is the only tool that the Parliament has given to the Court to deter such contraventions. It is a matter for the Parliament as to whether they wish to give the Court sufficient power to actually deter such contraventions of the FW Act or whether they are content with the status quo.

Orders

97 I order that the First Respondent pay a pecuniary penalty of $126,000. I order that this penalty be paid within 28 days.

98 I order that the Second Respondent pay a pecuniary penalty of $12,600 and that this be paid personally by the Second Respondent. I order that this penalty be paid within 120 days.

99 I order that the Third Respondent pay pecuniary penalty of $12,600 and that this be paid personally by the Third Respondent. I order that this penalty be paid within 120 days.

100 I will make the declarations that are appropriate.

I certify that the preceding one hundred (100) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Vasta.

Dated: 28 July 2022

ANNEXURE 1

Pumpkin Eater

When a person commits an act of anal cunnilingus upon another, the stimulation of the muscles of the receiver of this act, will sometimes lead to an accidental release of faecal material.

A "pumpkin eater" is a person who, when committing an act of anal cunnilingus upon another, will not cease that act even if there is an involuntary discharge of faecal material by the receiver of the act.