Master Builders Australia

SUBMISSION TO THE SENATE EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE

Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019

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MASTER BUILDERS AUSTRALIA

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CONTENTS

Introduction

1. This submission is made on behalf of Master Builders Australia Ltd.

2. Master Builders Australia (**Master Builders**) is the nation's peak building and construction industry association which was federated on a national basis in 1890. Master Builders' members are the Master Builder State and Territory Associations. Over 127 years the movement has grown to over 32,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association that represents all three sectors, residential, commercial and engineering construction.

3. The building and construction industry (**BCI**) is an extremely important part of, and contributor to, the Australian economy and community. It is the second largest industry in Australia, accounting for 8.1 per cent of gross domestic product, and over 9 per cent of employment in Australia. The cumulative building and construction task over the next decade will require work done to the value of $2.6 trillion and for the number of people employed in the industry to rise to 1.3 million.

4. The building and construction industry:

   - Consists of over 370,000 business entities, almost all of which (99%) employ fewer than 20 people;
   - Employs over 1.1 million people (almost 1 in 10 workers) representing the third largest employing industry behind retail and health services, and the largest industry for full time employment;
   - Represents over 8% of GDP, with contributing $142 billion Gross Value Added activity to the economy - the second largest sector in the economy;
   - Trains more than half of the total number of trades based apprentices every year, being well over 50,000 apprentices; and
   - Performs construction work each year to a value of over $220 billion.

Summary

5. Master Builders supports the *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019* (**EI Bill**) and urge the Committee to find as such while recommending it be swiftly passed into law.

6. The bases for this position are detailed within this submission and are founded in the long historical track record of building union unlawful and illegal conduct for which the BCI is, regrettably, renowned.

7. This conduct continues and, in many respects, has worsened. In the period since Master Builders last provided a submission to the Committee, there have been 99 judgments handed down in the Federal Court finding breaches of the Right of Entry, Freedom of Association and Anti-coercion provisions within the *Fair Work Act 2009* (**FW Act**). Building unions were found to have been responsible for committing these breaches in 87 of these 99 judgements.

8. Over the same period, an examination of judgements reveals that total penalties levied against building unions has exceeded $6 million ($6,189,620) and equating to over $8700.00 per day. The total number of instances in which breaches of the FW Act have been found involving building unions exceeds 400 (437) and involves 80 building union officials. For context, these figures confirm that building unions are 44 times more likely to break ROE, FOA and coercion laws than all other trade unions combined.

9. It is with reference to the conduct and data summarised above that Master Builders submits the passage of the Bill will bring marked improvements to the standard of industrial conduct displayed by registered organisations (**ROs**) within the BCI and that this will be of significant positive benefit to workers, business and the industry as a whole.

10. Other grounds on which Master Builders relies to support the Bill include:

- It gives legislative effect to several key recommendations set out in the Final Report of the Royal Commission into Trade Union Corruption (**Heydon Royal Commission**) to which Master Builders has long given support;
- Existing provisions within the FW Act are manifestly deficient, as evidenced by the judgement data referenced throughout this submission;
- It is appropriate and fair for the special privileges, standing and powers that ROs and officials thereof enjoy by virtue of Registration be placed into jeopardy if they fail to discharge the basic obligations that Registration requires them to maintain, such as ensuring member interests are paramount and compliance with basic workplace laws;
- The Bill will apply equally to all ROs, including both employee and employer organisations;
- The Bill strengthens existing obligations to ensure the interests of members remain paramount while ensuring greater levels of compliance with workplace laws;
- Additional powers created by the Bill are only able to be exercised by, and vested in, independent tribunals and courts;
- There are significant safeguards and tests to ensure that the provisions of the Bill are not open to exploitation or misuse;
- Nothing in the Bill will adversely affect workers, ensuring ROs and officials thereof remain free to advance the industrial interests of members;
- There will be no adverse consequence or negative consequence on any RO or official thereof who complies with the law and ensures member interests are paramount;
- The Bill utilises concepts that are already features of the FW Act and are familiar to ROs and officials thereof, and implements changes that are akin to those which apply to companies and directors thereof by virtue of the *Corporations Act 2001*;
- The Bill implements changes that are consistent with, and designed to uphold, basic community expectations in terms of the standards of workplace conduct and enables those who fail to meet those standards to be held accountable; and
- Only those ROs and officials thereof who break the law, or intend to break the law in the future, will have any concern about the operation of the Bill and its provisions.

11. Detail underpinning and evidencing the above grounds are set out in the remainder of this submission and dealt with by reference to each of the four schedules within the Bill.

12. To assist the Committee, this submission also seeks to address a number of criticisms levelled against the Bill and its provisions and factually demonstrates that they are either unfounded, incorrect or misguided.

Background

13. The genesis for this Bill comes from recommendations made within the Final Report of the Heydon Royal Commission. Throughout Royal Commission proceedings, it became clear that the BCI was most frequently identified as being home to the majority of instances causing the recommendations to which this Bill seeks to give legislative effect. Over one third of the Heydon Final Report (1160 pages) was specific to the building and construction sector, comprising 1.5 volumes of the Final Reports 5 volumes, and attracting 8 sector specific recommendations for law reform of the 79 outlined.

14. The Heydon Royal Commission was preceded by the *Royal Commission into the Building and Construction Industry 2003* (**Cole Royal Commission**) which likewise identified the same types

of unlawful and illegal conduct and too resulted in a series of similar recommendations for reform. Similar findings also arose from the *Royal Commission into Productivity in the Building Industry in New South Wales 1992* (**Gyles Royal Commission**) and the *Royal Commission into the activities of the Australian Building Construction Employees' and Builders Labourers' Federation 1982* (**Winneke Royal Commission**) and similar conduct types were observed in the Willcox Report and the Productivity Commission Inquiry into the Fair Work Laws.

15. While attempts to give successful legislative effect to the recommendations arising from these various reports have been mixed, one feature of each has been the findings and descriptions of the types of unlawful and illegal conduct which have remained constant and consistent.

16. The following passage is extracted from Volume 1 of the Winneke Royal Commission Final Report of 1982, in which the conduct of the (then BLF) was described as:

> *"The evidence is a clear demonstration, in my view, that this Union has remained uncontrite, notwithstanding its period of deregistration. It has, during the course of the last five to six years, assiduously applied itself to the task of procuring results by direct action and intimidation. Under the pretext of "militant unionism" this organization has conspicuously "thumbed its nose" at the process of conciliation and arbitration. It has consistently ignored the provisions of Awards applicable to it, and has used what it describes as "guerrilla tactics" to achieve its demands "on the job". Those tactics include sudden stoppages of work, banning of jobs or sections of jobs, banning of overtime, banning use of cranes and other equipment, stopping of concrete pours, etc. Resort to violence in numbers against both person and property has by no means been uncommon, and Counter-resort by building proprietors to the due processes of the law has been met with vindictive retaliation. In short, the leaders of this Union appear to have embarked upon a policy of asserting dominance over employers by "standing over" them and seeking to create an image of irresistible power. The targets of this Union's practices and policies are not confined to employers. It is manifest that the Federation has embarked upon a policy of "empire building" in the industry in which it operates. It asserts its entitlement to "recruit" every person who comes onto a building site to perform any type of physical labouring work, whether such person is self-employed or not, and whether such person is a financial member of another organization or not. This policy is pursued indiscriminately and without recourse to reason or common—sense, and has resulted in bitter inter—union disputation and recrimination - to such an extent in New South Wales that the Federation has been recently expelled from the Trades and Labour Council in that State. It is appropriate, and I think desirable, to say that the evidence given before the Inquiry indicates that the practices, which I have broadly described, have predominantly been carried on in the States of Victoria, New South Wales and Western Australia and in the Australian Capital Territory. But they have occurred in those arenas with such vigour and regularity that one is entitled to conclude that their pursuit is, indeed, union policy."*

17. The Gyles Royal Commission found in 1992 similar conduct and observed [1]:

> *"I have little doubt that the degree if disruption on building sites is directly proportional; to the activities of the BWIU organisations and activities, with their own special brand of militancy"*
>
> *"It is difficult for a person from outside the building industry, and from outside the militant trade union movement, to understand the motivation for the destructive actions of these officials and activities. There is no doubt that the actions and conduct of this relatively small band has, over the years since the demise of the BLF, cost the public of New South Wales*

[1] *Report of the Royal Commission into Productivity in the Building Industry in New South Wales, Final Report, Sydney, 1992, p.22-23*

literally billions of dollars, given the industry a reputation which is notorious, and imposed cost penalties on those wishing to do business in New South Wales or the build buildings in New South Wales that is quite indefensible. The personal aggressiveness, spite and abuse that many of these officials have exhibited time after time with whom they come into contact, and certainly anybody who crosses them, is indicative of unusual personalities. The consistency of this pattern indicates that it might be a criterion for selection as an official."

"All of this is only relevant to assessing whether or not it is likely that the Branch as presently constituted will change its ways. For various reasons I have mentioned, and recognising that in no sense is it a finding based upon evidence, I think the chances of any real change in policy as opposed to a tactical retreat are remote."

18. Gyles also found a range of broader illegal activities occurring in the building industry in New South Wales, ranging from:

"physical violence and the threat of physical violence at one end, to petty pilfering of building materials at the other…"[2]

19. The Final Report of the Cole Royal Commission observed:

"Underlying much of the conduct of unions, and in particular the CFMEU, is a disregard or contempt for the law and its institutions, particularly where the policy of the law is to foster individualism, freedom of choice or genuine enterprise bargaining. Overwhelmingly, industrial objectives are pursued through industrial conduct, rather than reliance on negotiation or the law and legal institutions." [3]

"Opposed to them are unions, especially the CFMEU, who know that engaging in unlawful industrial action causing loss to contractors and subcontractors will not attract criminal sanctions, will not attract penalties, cannot be stopped by the AIRC, will rarely be the subject of Federal Court proceedings and, if they are sued for loss, that litigation will be resolved without cost to them as part of future industrial negotiations. Governments have stood by and allowed this situation to eventuate." [4]

"They encapsulate a view that, even if it be that conduct by a union official is against the law of Australia, that law either has no application to or should not be enforced against a union official. Implicit in the disruptive demonstrations is that if the law, applicable to all other Australians, is applied against unionists, disruption to construction sites and normal civic life will occur. The demonstrations place implicit pressure on the judicial system to take account of consequences that might flow if, in accordance with proper principles of law, a union official were convicted of an offence. No other Australian citizen, charged with an offence, is entitled to disrupt commercial and civic life. No other Australian citizen is entitled to maintain a position that application of the law of this country against him or her will result in commercial and civil unrest. The attitude implicit in the statement 'Touch One – Touch All' in this context is that unions, and especially their officials, are immune from the normal law applicable to all Australians. Collective action, having as its purpose the defeat of the operation of the law, cannot be permitted to prevail over the will of the Australian people, expressed through the Parliament and applied through the courts. I acknowledge the rights, advantages and merits of collectivism, but where they conflict with the rule of law, the rule of law must prevail. Otherwise, there is anarchy." [5]

[2] *Report of the Royal Commission into Productivity in the Building Industry in New South Wales, Final Report, Sydney, 1992, p.133*
[3] *Royal Commission into the Building and Construction Industry, Final Report (2003), Vol 1, p 11, para 22.*
[4] *Cole Royal Commission, Volume 3, p13-14 + 16*
[5] *Ibid*

> *"The CFMEU has an attitude of dominance. It is fully aware of its capacity through unlawful industrial action to cause harm for which it will not be held responsible. It knows that it has a network of militant unionists throughout Australia who will adopt the direction, intimation or suggestion of union officials. It knows it can bring pressure to bear on major contractors operating throughout Australia by threatening action on projects unrelated to any dispute on a particular project. It knows it can ignore agreed dispute resolution mechanisms, favouring instead industrial action to achieve its objectives. It knows, ultimately, that that pressure will be so intense that even the most major contractors will ultimately surrender to the pressure. As Kingham said in relation to the Sun Metals dispute: 'Inevitably the company is going to have to back down very shortly and negotiate a settlement to this dispute'. This attitude permeates throughout the union structure, being exhibited at all levels."* [6]

> *".....exhibits an attitude that it is for the union and its officials to decide whether it will follow the law of a sovereign State, and further, that the union and its officials regarded it as appropriate to seek to pressure contractors to disregard the law."* [7]

20. The Heydon Royal Commission found:

> *"There is a longstanding malignancy or disease within the CFMEU. One symptom is regular disregard for industrial laws by CFMEU officials. Another symptom of the disease is that CFMEU officials habitually lie rather than 'betraying' the union. Another symptom of the disease is that CFMEU officials habitually show contempt for the rule of law. What can be done to cut out the malignancy and cure the disease?"* [8]

21. Put simply, the conduct described today is the same as conduct described 40 years ago and it shows no signs of change or improvement.

22. As such, implementing laws to arrest this conduct is considered by Master Builders and our members to be a necessary and crucial step for the BCI and its future. As a sector, the BCI makes a considerable contribution to the Australian community and economy. There are more small businesses within the BCI than any other economic sector and we have the highest rate of full-time employment with income levels sitting well above the national average.

23. The BCI is forecast to require an additional 300,000 skilled persons over the next five years (in addition to usual industry labour turnover) and yet we remain hamstrung by a disproportionately low number of females who constitute around only 12 per cent of the sector workforce. Addressing these challenges will be a significant task for the sector, but it is made worse given the poor standard of industrial conduct displayed by building unions which adversely impacts on the overall standing and reputation of the BCI.

24. Complicating this challenge is the adverse impact that building union conduct has on business entrepreneurship and construction costs. Master Builders regularly hears comments from members who deliberately resist business expansion for fear of attracting the attention of building unions, and that the costs of construction can be up to 30 per cent higher than they ought to be.

Recent Conduct involving Registered Organisations in the BCI

25. In a 2016 judgement, Justice White made the following observation:

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[6] *Ibid*
[7] *Ibid*
[8] *Heydon Royal Commission, Volume 5, p401*

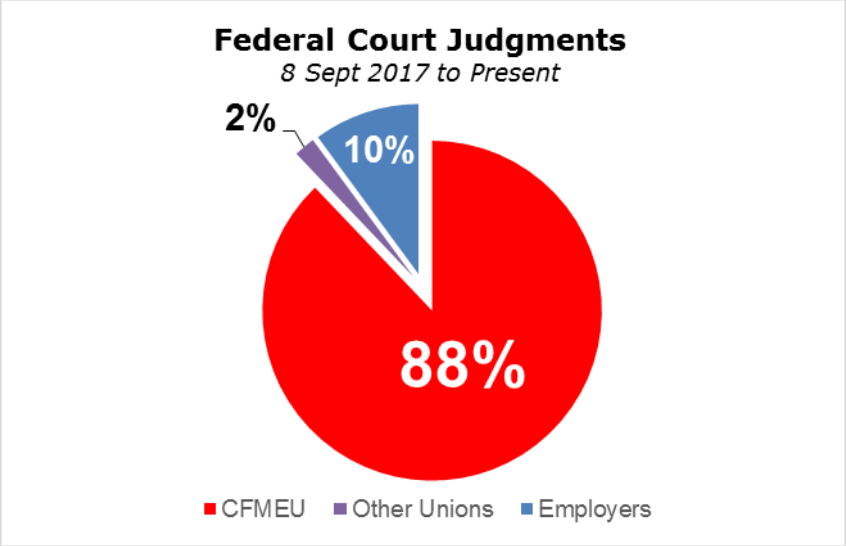
> *"In the period between 1 January 1999 and 31 March 2014, the CFMEU itself or through it officials had been dealt with for 17 contraventions of s 500 or its counterparts in earlier legislation, and for 194 contraventions of s 348 of the FW Act or other provisions proscribing forms of coercive conduct."* [9]

26. On the basis of the figures cited by the Court, there were an average of around 2 ROE contraventions and 13 coercion contraventions per year at that time. Since the start of 2017, ROE contraventions now average between 17-18 per year and coercion contraventions now average 15 per year.

27. These represent increases of 500%+ and 15%+ respectively.

28. Additional analysis of Federal Court judgments delivered in the period since the last time the Committee enquired into an earlier iteration of this Bill shows that during that time:

- Of the judgments in which the Court finds breaches of FOA, ROE and Coercion provisions, building unions are responsible for almost 90 per cent;
- Almost 9 out of every 10 breaches of FOA, ROE and coercion laws are by building unions;
- No other union has been found guilty of breaching Freedom of Association laws - building unions have been found guilty 12 times;
- No other union has been found guilty of breaching Right of Entry laws – building unions have been found guilty 38 times; and
- The CFMMEU have accounted for 88% of breaches of FOA, ROE and Coercion provisions of the Fair Work Act – this is 44 times higher than the breaches of all other unions combined.



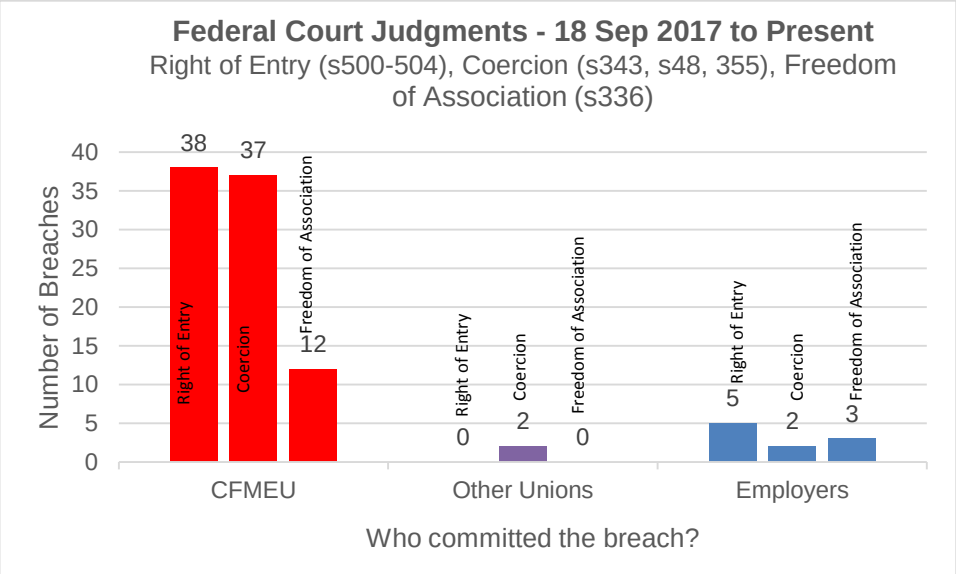
29. The penalties arising from these breaches exceed $6 million ($6,189,620.00). This equates to over $250k per month ($269,113.91) or over $60k per week ($61,283.37).

30. Over the same period, courts found that building unions were responsible for 437 separate instances involving ROE, FOA and anti-coercion contraventions – an average of 4.3 per week – involving 72 separate officials, 18 of whom were found responsible for multiple breaches.

31. Throughout the judgements analysed above there are further features relevant to the Committee's consideration of the Bill. These relate to the attitude of building unions who have been found guilty of breaking the FW Act, and include a disposition towards:

- Never expressing regret, or contrition;

[9] *White J, 22 April 2016, Director of the Fair Work Building Industry Inspectorate v O'Connor [2016] FCA 415*



- Never admitting wrongdoing or accepting fault despite judgements finding evidence to the contrary;
- Considering penalties to be nothing more than a "cost of doing business";
- Failing to take corrective action;
- Failing to provide undertakings about future compliance with the law;
- Expressions of public pride in breaking the law; and
- Encouragement of others to break the law.

32. These common features are dealt with later in this submission.

33. Similarly, there have been a number of other matters arising since 2017 in which building unions and/or officials thereof have been involved in legal matters outside of the Fair Work regime. These include one former official being found guilty of rape and sentenced to imprisonment[10], two current officials charged with drug possession and supply charges[11], one alleged assault charge[12], a fraud and extortion squad raid at a premises linked to a senior official[13], one convicted of using a carriage service to harass and of breaching a court order[14], criminal cartel conduct charges being brought against one building union division and its secretary[15] and the investigation of drive-by shooting incident at a residence belonging to an official.[16]

34. Other than those associated with building unions, we are not aware that any other RO or official(s) thereof who hold a similar record over a period of less than 2 years.

Schedule 1 – Disqualification

35. Schedule 1 amends the Act by introducing new provisions that empower the Federal Court to disqualify an RO official from standing for, or holding, office within an RO. Such power would be available to the Court were it to be found that an official had:

- Deliberately flouted the law;
- Failed to act in the interests of their members;
- Breached their duties;

[10] *https://www.abc.net.au/news/2019-02-22/former-cfmeu-qld-president-dave-hanna-rape-verdict-brisbane/ 10834214*
[11] *https://www.smh.com.au/national/nsw/union-organisers-charged-with-supplying-cocaine-front-court-20190614-p51xth.html*
[12] *https://thewest.com.au/news/wa/convicted-cfmeu-official-to-face-court-on-new-common-assault-charge-ng-b88627743z*
[13] *https://www.theaustralian.com.au/nation/victoria-cfmeu-officials-home-raided-three-arrested-over-fraud/news-story/9228d5eeef10816ed316330a06169787*
[14] *https://www.theage.com.au/politics/federal/i-m-the-woman-at-the-centre-of-all-this-setka-s-wife-reveals-she-was-the-victim-20190626-p521b6.html*
[15] *https://www.accc.gov.au/media-release/criminal-cartel-charges-laid-against-cfmmeu-and-its-act-branch-secretary*
[16] *https://www.accc.gov.au/media-release/criminal-cartel-charges-laid-against-cfmmeu-and-its-act-branch-secretary*

- Stood for office while already disqualified; or
- Otherwise found to be not a fit and proper person to act or hold office as an official.

36. In addition, the proposed change will enable the Court to disqualify an official automatically where that official has been found guilty of an offence punishable by five or more years' imprisonment. Master Builders supports this measure and notes it is consistent with recommendations of the Heydon Royal Commission.

37. The Heydon Royal Commission[17] made a number of observations about the Act and its existing provisions relevant to officer disqualification, noting areas where it contained defects. These included:

- The existing list of prescribed offences relevant to disqualification is narrow and could see individuals who have committed significant criminal offences free to hold office in an RO;
- The definition of prescribed offence is largely redundant;
- Officials not eligible to hold right of entry permits remain eligible to run ROs;
- There is no mechanism to disqualify officials who repeatedly breach the Fair Work Act; and
- The existing laws only provide for 'automatic' disqualification.

38. The genesis behind these recommendations was overwhelmingly found with reference to evidence from the building and construction industry. The Commission found that:

> *"The Commission's inquiries have revealed a worrying and recurring phenomenon, particularly within the CFMEU, of union officials deliberately disobeying court orders or causing the union to disobey court orders. Officials who deliberately flout the law should not be in charge of registered organisations".*[18]

39. One of the many examples leading to the finding above was in evidence given by a CFMEU senior official during Commission proceedings as follows:

> *Q: You have no issue, do you, as the Divisional Branch Secretary, with officials of the CFMEU engaging in activities in the kind which I saw on that footage, despite orders having been made injuncting that sort of activity?*
>
> *A. At the end of the day, I don't have a problem with that, no. If the decision had been made of the workforce not to return to work, if they wanted to send a protest, if they wanted to send a message back to the company that they're not happy, I don't think that – I think that people have a right, whether it's the official or the workers that he is with, to send a message back to the company. These disputes are very robust in the construction industry and there is always a little bit of emotion and passion in it, but you've got to look at the circumstances of how this all came about. It was certainly set up by the company.*[19]

40. While noting that the last sentence of the statement above was eventually determined to be untrue, the Commission went on to find that the comments were *"entirely antithetical to the rule of law"*[20] as referenced against commentary of Merkel J:

> *"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*

[17] *Vol 5, 225-236.*
[18] *Heydon Vol 5 p226*
[19] *Michael Ravbar, 6/8/14, T: 347.25-39. Referenced Heydon Report, Volume 5, page 400.*
[20] *Heydon Report Volume 5, p401*

> *that parties are able to resort to courts to determine their disputes … it also requires that parties comply with the orders made by the courts in determining those disputes."*[21]

41. In considering various options to answer the above question, numerous options were canvassed including that special laws be established to prohibit officials of registered organisations from holding office in any such organisation or branch for a particular period of time.

42. The Report noted[22] that such a law would "*recognise that an organisation can only act by its officers and that the culture within an organisation is created in large part by its officers*" and provide better protection for members of registered organisations.

43. With specific reference to the CFMEU, the report noted[23] such a law would:

> *"protect the members of the CFMEU and the public more generally by disqualifying persons whom the Parliament determined were not fit and proper persons to be running organisations that have the range of statutory privileges conferred upon registered organisations"*

44. And

> *"in particular, seek to protect the members of the CFMEU and the public from the consequences of the culture of disregard for the law within the CFMEU by focusing on those in control of the CFMEU rather than on the membership of the union."*

45. The Committee should be clear that the above comments were made while considering the question of whether there was benefit in adopting legislation allowing the Parliament to disqualify officials. The Report noted a potential adverse consequence of taking such an approach was that it may be constitutionally invalid if seen to be an exercise in judicial power. While Master Builders has no view on the above constitutional question, we do note that the Bill under consideration avoids the need to consider it by vesting the same power in the Federal Court.

46. It is important to observe that matters before the Federal Court involving breaches of the FW Act frequently take significant periods of time to be determined, often around 12-18 months from lodgement to judgement. For this reason, there is merit in considering mechanisms to accommodate circumstances where factual evidence exists holding significant propensity, tendency or similar fact value.[24]

47. The amendments in Schedule 1 also have the benefit of introducing a meaningful consequence for Officials who have been found to repeatedly break the law. It is perplexing that there are no consequences for ROs and Officials who repeatedly break laws under the very same regime that allows those organisations to exist in the first place.

48. Master Builders understands that there are approximately 41 ABCC matters before the courts, with 93% of these involving matters against the CFMMEU. Since the ABCC laws originally commenced, courts have handed down almost $20 million in penalties against building unions with the CFMEU alone being penalised in excess of $16 million[25].

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[21] *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union [2000] FCA 629 at [79].*
[22] *Heydon Royal Commission, Volume 5, p402*
[23] *Heydon Royal Commission, Volume 5, p407*
[24] Such mechanism would also be relevant to the provisions of *Schedule 2* and could involve the approach set within the *NSW Industrial Relations Amendment (Industrial Organisations) Act 2012* No 27
[25] *"Latest penalty takes CFMEU fines past $10m mark" Courier Mail, August 4, 2017; Master Builders internal tracking of penalties awarded by Federal Courts.*

49. Despite the staggering nature of these figures, they fail to reveal other concerning aspects that are common throughout the judgements we have analysed. These concerns will be adequately addressed by the amendments in Schedule 1.

50. **No contrition:** At no time do building unions or officials ever express contrition for engaging in illegal and unlawful conduct, even after being found guilty by a Court. In at least 16 separate recent judgements, Courts have specifically referenced this concerning feature with increasing frustration and alacrity.

51. **No acknowledgement of wrongdoing:** Building unions and officials remain steadfast in their apparent unwillingness to comply with the law and even after being found guilty, no expressions of regret are offered, and no error or wrongdoing is ever acknowledged.

52. Justice Jaret in *Australian* Building *and Construction Commissioner v Moses & Ors (No.2) [2017] FCCA 2738* stated:

> *"The respondents have shown no contrition for their actions. No apology has been issued by any of the respondents, nor has there been any acknowledgement of any wrongdoing. Whilst this is not an aggravating circumstance that might increase the penalty, it precludes any mitigation of penalty on that basis. It is also relevant to the role of specific deterrence in this particular case."*

53. **No corrective action:** The judgments demonstrate that no undertakings to avoid repetition of the unlawful and illegal conduct are offered by building unions or officials. Except where ordered by the court, no steps are taken to ensure future compliance with the law.

54. Justice Bromberg, in *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union [2018] FCA 957*, stated:

> *"An organisation faced with a litany of contraventions over an extended period of time, which repeatedly incurs not only significant financial penalties but also pointed judicial criticism, would necessarily put in place measures to change the cultural or normative conduct and the contravening behaviours of its officers and employees. Unless, of course, the senior leadership of the organisation, or the relevant branch or division thereof, condones such behaviour. I am satisfied that that is the position of the senior leadership responsible for the CFMMEU's representation of building and construction employees in Victoria."*

55. **No deterrent effect:** The judgments frequently note that despite the penalties and fines being paid, they appear to have no deterrent effect on officials. In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2017] FCA 1269 (27 October 2017)*, Justice Vasta observed:

> *"If a Court has dealt with an employer who has contravened the FW Act in an appropriate manner, the use of the pecuniary penalty has deterred that employer from breaching the FW Act again. Very rarely has the FWO, or a union, had to bring a recalcitrant employer back to the Court for breaching the FW Act a second time.*
>
> *But this cannot be said of the CFMEU. The deterrent aspect of the pecuniary penalty system is not having the desired effect. The CFMEU has not changed its attitude in any meaningful way. The Court can only impose the maximum penalty in an attempt to fulfil its duty and deter the CFMEU from acting in the nefarious way in which it does. If I could have imposed a greater penalty for these contraventions, I most certainly would have done so."*

56. **Public defiance of the law:** The judgements note how common it is for Officials to publicly declare their intention to continue breaking the law, even when they are a party of legal

proceedings for such breaches. Building union officials appear resolute in choosing the laws they will obey and those they do not, and this is expressed commonly and frequently.

57. In *Australian Building And Construction Commissioner v Auimatagi & Anor (NO.2) [2018] FCCA 524,* Justice Emmet observed:

> *"In a liberal democracy, it is assumed that citizens, corporations and other organisations will comply with the law. Such compliance is not a matter of choice. The community does not accept that a citizen, corporation or other organisation may choose to break the law and simply pay the penalty. The courts certainly do not accept that proposition. Such acceptance would pose a serious threat to the rule of law upon which our society is based. It would undermine the authority of Parliament and could lead to the public perception that the judiciary is involved in a process which is pointless, if not ridiculous.*
>
> *The CFMEU can be seen to have chosen to pay penalties in preference to obeying the law"*

58. **Encourage others to break the law:** Perhaps the worst feature is the apparent disposition of building union officials to publicly encourage others to break the law and continue doing so.

59. The below comments published widely throughout media[26] are just one example:

> *"And if that sometimes brings us on the wrong side of a bad law - and there [are] bad laws - then so be it."*

And later:

> *"if you played by the laws you will never win".*

60. The above examples remain gravely concerning to Master Builders. Repeatedly breaking workplace laws, never expressing regret or contrition, never accepting wrongdoing, picking and choosing laws to obey, wearing fines as a badge of honour, publicly stating an intention to break the law and encouraging others to also break the law - cannot be considered acceptable under any circumstance.

61. The examples also demonstrate that individuals and officials within ROs are central to driving the culture displayed by ROs and highlights the importance of implementing consequences for Officials who foster a culture of defying the law.

62. It is for this reason that Master Builders submits that were the provisions in Schedule 1 to become law, the changes would be likely to improve the extent to which officers within building and construction industry ROs comply with law and boost the standard of overall industrial conduct. This would be of significant benefit to members of ROs within this sector and the public more broadly who would, as the Heydon report noted, be protected from the consequences of a culture that has little or no regard for the law.

63. The provisions of Schedule 1, as they appeared in an earlier iteration of the Bill, were the subject of some criticisms by various stakeholders. Master Builders submits that these criticisms were and remain without any basis in fact and/or have been considered and accommodated into the provisions of the current Bill into which the Committee inquires.

64. It has been alleged that Schedule 1 impinges on the rights of union members to decide who represents them. This is incorrect.

[26] *https://www.afr.com/policy/economy/cfmeu-secretary-john-setka-defends-breaking-the-law-after-failed-blackmail-case-20180517-h1067w*

a. Schedule 1 does not limit the ability or right held by members of ROs determining who represents them or prevent those members being able to elect representatives to Official roles.

b. The right to democratically elect a representative is not unfettered and the Bill maintains the long standing principle of ensuring those seeking election meet and maintain certain eligibility criteria – in much the same way individuals standing for election to the Commonwealth Parliament must meet basic criteria to stand and, if elected, remain so.

c. In various existing industrial relations laws, Officials who fail to meet and maintain certain criteria are automatically disqualified and must apply to a court for reinstatement or leave to remain an Official.

d. In the *1904 Conciliation and Arbitration Act*, the very first of its type to apply nation-wide, any Official or officer found guilty of breaching that same Act was automatically penalised thus *"He shall cease to be a member or officer of any organization, or of any association which is, or is part of, any organization, and shall not be qualified to become a member or officer of any organization or of any such association".*

65. Others have asserted that the range of parties who can bring an application to disqualify are too broad and this could allow for employer organisations, politicians or others to bring politically motivated claims. This too is incorrect.

a. Schedule 1 adopts and mimics provisions that are well known features within a range of industrial relations laws. For example:

i. the existing RO Act (s.28) allows for an application for deregistration to be brought by "*An organisation or person interested, or the Minister*".

ii. Under the Queensland Industrial Relations Act 2016, any "*person with a sufficient interest*" may object to registration (s.606) and any "*organisation, the Minister, the Registrar, or another person given leave by the Full Bench*" may bring an application to deregister (s.879).

iii. The equivalent laws in New South Wales provide that deregistration applications may be brought by "*An industrial organisation*" or *"a person who has sufficient interest in the matter*" (s.255).

iv. The Conciliation and Arbitration Act 1904, deregistration proceedings could be brought by "*any organisation or person interested*" (s.60).

b. Schedule 1 is akin to the provisions of the *Corporations Act 2001*, which allows for ASIC to bring applications to disqualify and ban a person from being a company director.

c. Schedule 1 only allows for applications to be made for disqualification or deregistration. The decision to grant or otherwise any application brought remains the decision of the Court.

66. A further criticism was that there are no safeguards against frivolous and vexatious claims being brought seeking disqualification. This is untrue.

a. The Federal Court has general power to make costs orders in circumstances involving claims that are frivolous and vexatious.

b. There is already a specific provision regarding costs in the existing RO Act.

67. Overall, given that Schedule 1:

- Implements a Heydon recommendation in a way that addresses constitutional questions with appropriate independent oversight;
- Would assist in changing a culture of disregard for the law by officers of employee ROs in an industry which is renowned for being a hotspot of such culture;
- Would better protect the public and members of ROs; and
- Would create an additional scheme of deterrent for those seeking to break the law;

it is **supported** by Master Builders and we recommend that the Committee find accordingly.

Schedule 2 – Cancellation of Registration

68. Schedule 2 amends the Act by introducing new provisions that empower the Federal Court to cancel the registration of an RO, or a part thereof, when that organisation or its officers:

- Repeatedly break the law;
- Breached duties to members; or
- Failed to act in the interests of members.

69. The Schedule also provides the Court with flexibility and discretion to make appropriate orders limited to a particular branch, division, or part of an RO in circumstances where it is found that the conduct described above emanates from a specific part of a wider RO.

70. As noted in earlier sections of this submission, the history and current activity of some ROs within the building and construction industry is well known. A significant concern to Master Builders is that there appears to be no indication that this ingrained culture will change.

71. The Heydon Royal Commission considered this history and noted[27] that:

> *"It points to both repeated unlawful conduct in the building and construction industry, and by the CFMEU in particular."*

72. Views akin to the above finding are regularly canvassed during court proceedings and have been the subject of much judicial commentary. A selection of this commentary follows:

> *"The union has not displayed any contrition or remorse for its conduct. The contravention is serious… Substantial penalties for misconduct, prior to that presently under consideration, have not caused the CFMEU to desist from similar unlawful conduct." [28]*

> *"The circumstances of these cases … nonetheless, bespeak a deplorable attitude, on the part of the CFMEU, to its legal obligations and the statutory processes which govern relations between unions and employers in this country. This ongoing willingness to engage in contravening conduct must weigh heavily when the need for both specific and general deterrence is brought to account." [29]*

> *"There is clearly, as other judges have recorded, a strong record of noncompliance on the part of the Union through its officers with provisions of industrial relations legislation, although that does not mean that a disproportionate penalty can or should be imposed. I note that significant past penalties have not caused the Union to alter its apparent attitude to compliance with the entry provisions and restrictions under the FW Act." [30]*

[27] *Heydon Report Chapter 5, p397*
[28] *Tracey J, 21 November 2013, Cozadinos v Construction, Forestry, Mining and Energy Union [2013] FCA 1243*
[29] *Tracey J, 1 May 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2) [2015] FCA 407*
[30] *Mansfield J, 14 August 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 3) [2015] FCA 845*

"The conduct has in common features of abuse of industrial power and the use of whatever means the individuals involved considered likely to achieve outcomes favourable to the interests of the CFMEU. The conduct occurs so regularly, in situations with the same kinds of features, that the only available inference is that there is a conscious and deliberate strategy employed by the CFMEU and its officers to engage in disruptive, threatening and abusive behaviour towards employers without regard to the lawfulness of that action, and impervious to the prospect of prosecution and penalties." [31]

"The schedule paints, one would have to say, a depressing picture. But it is more than that. I am bound to say that the conduct referred to in the schedule bespeaks an organisational culture in which contraventions of the law have become normalised." [32]

"…the litany of contraventions…[and] the many prior contraventions of relevant statutory proscriptions by the Union…indicating a propensity, on the part of the Union, to engage in proscribed conduct." [33]

"...the history tends to suggest that the Union has, with respect to anti-coercion and similar provisions of industrial laws, what the High Court in Veen described as 'a continuing attitude of disobedience of the law'..." [34]

"There is ample evidence of significant contravention by the CFMEU and its ideological fellow travellers. The CFMEU, as a holistic organisation, has an extensive history of contraventions dating back to at least 1999. The only reasonable conclusion to be drawn is that the organisation either does not understand or does not care for the legal restrictions on industrial activity imposed by the legislature and the courts." [35]

"The union has not displayed any contrition or remorse for its conduct. The contravention is serious… Substantial penalties for misconduct, prior to that presently under consideration, have not caused the CFMEU to desist from similar unlawful conduct." [36]

"The overwhelming inference is that the CFMEU, not for the first time, decided that its wishes should prevail over the interests of the companies and that this end justified the means." [37]

"The CFMEU is to be regarded as a recidivist rather than as a first offender." [38]

"The record indicates an attitude of indifference by the CFMEU to compliance with the requirements of the legislation regarding the exercise of rights of entry." [39]

"…the pattern of repeated defiance of court orders by the CFMEU revealed by those four cases is very troubling." [40]

73. A list of additional commentary is **attached** to this submission marked 'Appendix A'.

74. The issue of RO deregistration was also canvassed by the Heydon Royal Commission in a similar vein to its consideration of officer disqualification.[41] Once again, the Final Report noted the

[31] *Mortimer J, 13 May 2016, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2) [2016] FCA 436*
[32] *Jessup J, 4 November 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (The Mitcham Rail Case) [2015] FCA 1173*
[33] *Goldberg, Jacobson and Tracey JJ, 10 September 2009, Draffin v CFMEU & Ors [2009] FCAFC 120; (2009) 189 IR 145*
[34] *Jessup J, 29 May 2009, Williams v Construction, Forestry, Mining and Energy Union (No 2) [2009] FCA 548; (2009) 182 IR 327*
[35] *Burnett J, 28 February 2014, Director, Fair Work Building Industry Inspectorate v Myles & Ors [2014] FCCA 1429*
[36] *Tracey J, 21 November 2013, Cozadinos v Construction, Forestry, Mining and Energy Union [2013] FCA 1243*
[37] *Tracey J, 17 March 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2015] FCA 226*
[38] *Tracey J, 17 March 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2015] FCA 226*
[39] *White J, 23 December 2014, Director of the Fair Work Building Industry Inspectorate v Stephenson [2014] FCA 1432*
[40] *Cavanough J, 31 March 2014, Grocon & Ors v Construction, Forestry, Mining and Energy Union & Ors (No 2) [2014] VSC 134*
[41] *Heydon Report Chapter 5, p402-406*

history of the CFMEU and considered whether at that time steps should be taken to deregister the (then) CFMEU. The report canvassed a number of options by which this could occur.[42]

75. Like the Cole Royal Commission, the Heydon Royal Commission did not recommend at that time that the CFMEU be deregistered. The basis for this view included[43]:

- That there would be a disproportionate effect on union members who may not have been involved in illegal activity if moves to cancel the registration of the union as a whole were taken;
- Deregistration under the provisions of the Act is a costly and lengthy process;
- Previous moves to deregister building unions (via enactment of the *Builders Labourers' Federation (Cancellation of Registration) Act 1986* [Cth] and the *Builders Labourers' Federation (Cancellation of Registration – Consequential Provisions) Act 1986* [Cth]) which had the effect of cancelling the registration of the Australian Building Construction Employees' and Builders Labourers' Federation, gave rise the birth of the CFMEU; and
- Any merger between the MUA and CFMEU (expressed at that time to be merely "a real possibility") would mean deregistration under the Act as it was would prove ineffective.

76. Master Builders notes that Schedule 2 of the Bill (along with measures elsewhere therein) accommodates and addresses the above factors which weighed against a recommendation to deregister the CFMEU. These include:

- First, Schedule 2 allows for action to be taken against a RO or a part thereof, creating flexibility that is not otherwise available. The result allows for the Federal Court to make orders applicable to part of an organisation, not necessarily the entire organisation, therefore removing the potential for adverse consequences on those members whom where part of an RO that acted in a manner that complies with the law.
- Second, other provisions of the Bill (e.g. Schedule 3) are designed to reduce the cost and complexity associated with the proceedings under the Act, addressing the second point.
- Third, Schedule 1 (officer disqualification) will alleviate any concern about individuals simply starting a new organisation when considered conjunctively with Schedule 2.
- Fourth, since the delivery of the Final Heydon Report, moves of the CFMEU to amalgamate with the MUA have crystallised and this information, considered in combination with Schedule 4 (Public Interest Test) and the Bill as a whole would pre-empt those concerns as held at that time.

77. Notwithstanding the barriers identified by the Royal Commission in deciding to not recommend CFMEU deregistration no longer exist and/or are addressed by other parts of the Bill, it is Master Builders' view that there are a range of other positive outcomes that would flow from the passage of this measure. The most significant of these are:

- That a further incentive is created for ROs and their officials to comply with the law;
- It would provide greater protections for members of an RO, and ensure (where relevant) that any consequence for breaking the law is targeted at the part of an RO so involved; and
- It would improve the standard of industrial conduct while protecting RO members and the public more generally.

78. For these reasons, the Schedule is **supported** by Master Builders and we recommend that the Committee find accordingly.

[42] *Ibid*
[43] *Ibid*

Schedule 3 - Administration

79. Schedule 3 amends the Act by introducing clarity to existing provisions as to how the Federal Court should approach the administration process of an RO, where it, or a part thereof, or its officers have:

- Repeatedly break the law;
- Breached duties to members;
- Failed to act in the interests of members; or
- Is otherwise dysfunctional.

80. Master Builders supports this clarification as it improves the Act by addressing gaps as identified in proceedings associated with the move to place HSU East Branch of the Health Services Union (HSU) and the NSW registered HSUeast into administration.

81. Historically, circumstances involving an RO in administration are rare and/or mostly occur in the context of proceedings or events that are either without controversy or involving parties between which agreement or situational commonality exists. After the court proceedings were finalised, the then Minister for Employment Relations stated [44]:

> *"The unprecedented intervention was motivated by concern that the interests of HSU East members across Victoria, New South Wales and the ACT were not being properly served by the current dysfunction within the HSU East Branch."*
>
> *"In intervening in this case, we noted the public interest in working Australians having effective and accountable union representation, and that because Australia's trade unions are overwhelmingly democratic and highly effective organisations, the need for such intervention is extremely rare."*

82. In the final decision, the Court agreed with the Minster's submissions, including that both the HSU East Branch and HSUeast were dysfunctional, approved the Minister's nominated Administrator and adopted the key elements of the scheme originally proposed by the Minister[45].

83. The HSU matter, however, did identify the absence of clarity within existing provisions and demonstrated the cost and complexity it generates, or has the potential to generate. As the associated EM notes, but for the eventual agreement between the then relevant parties, the time, complexity and expense associated when enlivening the existing provisions could be significant.

84. In such circumstances where financial resources are likely to be limited or otherwise cause significant strain, the interests of those members of an RO in administration are not served if forced to expend additional resources on legal proceedings that could otherwise have been avoided.

85. Neither, more importantly, are members industrial interests best met if there is uncertainty as to the status of their organisation or a delay in the identification of those responsible for representation.

86. It follows that addressing the uncertainty within existing legislation so as to minimise circumstances with potential for unnecessary expenditure, delay or uncertainty, will better suit the financial and industrial interests of relevant members. Such an outcome is not only desirable as a standalone policy proposition, it is also entirely consistent with the objects of the Act.

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[44] *Media Release – 21 June 2012 "Federal Court application successful: administrator appointed to HSU East Branch" The Hon Bill Shorten MP Minister for Employment and Workplace Relations, Financial Services and Superannuation*
[45] *Ibid*

87. For these reasons, the Schedule is **supported** by Master Builders and we recommend that the Committee find accordingly.

Schedule 4 – Public Interest Test

88. Schedule 4 amends the Act by giving the Fair Work Commission greater power to ensure that amalgamations of ROs are in the public interest. This occurs via the introduction of a test that ensures applications for amalgamation receive a greater level of third-party scrutiny prior to approval.

89. The test will require the FWC to be satisfied that any amalgamation is in the public interest prior to its approval. This gives the FWC greater discretion to consider a broader range of matters as part of this test and allows a broader range of entities to make submissions or be heard in relation to its consideration of the test.

90. Importantly, the test will also require FWC to consider the historical conduct of the applicant organisations, parts or officers thereof, in terms of complying with the law and otherwise discharging their obligations to members.

91. The consideration of this public interest test, and satisfaction thereof, are to occur at any point after an application to amalgamate is received and prior to the setting of an amalgamation date at section 73 of the Act.

92. This **proposal as a whole is strongly supported** by Master Builders Australia.

93. In the period since the Committee last inquired into an earlier iteration of this Bill, an application for amalgamation of the CFMEU, MUA and TCFUA was heard by the Fair Work Commission who determined there was no barrier that would prevent them from fixing an amalgamation date as required by s.73 of the RO Act. The new entity is known as the Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU)**.

94. The results of this amalgamation are now becoming clear. As earlier noted, since the start of 2017 to now, there has been a 500%+ increase in the number of instances in which building unions have been found to break ROE rules within the FW Act. The majority of this period has been subsequent to the amalgamation of the CFMEU, TCFUA and the MUA.

95. Master Builders submits that the provisions of the existing Act are deficient and, as the Bill Explanatory Memorandum observes, are in practice a 'rubber stamp' for any amalgamation so proposed.

96. This sentiment was echoed by the Fair Work Commission in its decision to approve the CFMEU, MUA and TCFUA amalgamation. When fixing an amalgamation date, His Honour Deputy President Gostencnik noted as follows (at paras 238-239):

> *"Lest it be said that, by discharging my duties under statute which I am bound to do by my oath of office and by law, I condone any of the conduct for which any of the Applicant organisations or various of their officials have been held to account by the courts, nothing could be further from the truth. On no view can it be said that the conduct is acceptable and judicial officers have, particularly over recent years, been unanimous in the strong and unequivocal language used to describe and condemn some of the conduct."*
>
> *"But if that is to be a bar to the fixing of an amalgamation day in connection with the amalgamation of organisations under the RO Act, then it is a matter for the Parliament to*

> *decide and legislate accordingly. On my reading of the statute it has not thus far done so."* [46]

97. Existing provisions operate to unnecessarily restrict interested parties from making submissions with respect to proposed amalgamations, and this prevents the Commission from being availed of all relevant circumstances, material and context that should otherwise be available in order for it to make an order that is appropriate and consistent with the objects of the Act more broadly.

98. Master Builders sought to involve itself in the CFMEU, TCFUA and MUA amalgamation proceedings and was granted leave to do so. However, evidence supplied by Master Builders was the subject of objection. Further, much of the material evidence regarding the history of CFMEU conduct was not considered by the Commission as the question to be determined was limited only to the nature of whether a particular proceeding was to be categorised as 'civil' as opposed to 'criminal'.

99. Schedule 4 will address this deficiency and ensure that the Commission is better able to inform itself ensuring more comprehensive regard is had to all impacts of an amalgamation order sought. This would include consideration of matters about which the existing provisions are unable to encompass.

100. The requirement for the FWC to have regard to the prior conduct of ROs before amalgamation is also welcome. There are numerous benefits that would flow from the introduction of such a measure. For example, it would have the effect of creating a new regime of consequence for those ROs that repeatedly break the law. This means that not only would a penalty be considered for particular individual instances of breach at the time they are found to have occurred, but that there would be a further additional consequence in the longer term. This incentive to comply with the law would have a positive impact upon the conduct of some ROs that are known to repeatedly break it without contrition or remorse.

101. In addition, the measure would ensure that ROs who repeatedly break the law are unable to grow larger in size and asset base. This would mean that those ROs that comply with the law and act in the interests of members would remain an attractive proposition for potential amalgamation while those that repeatedly break it would become less so. This outcome, combined with that in the preceding paragraph, would prevent those ROs who break the law from becoming larger and vice versa. This would cause an improved standard of industrial conduct and ensure member interests were better served.

102. Further, those ROs who regularly flout the law often consider any financial penalty associated with doing so as simply 'a cost of doing business.' The lack of deterrent associated with financial penalties available under the Fair Work regime is often linked to the asset size of a particular RO. i.e. financial penalties have less impact on those that are easily capable of absorbing the cost compared to those that are less capable. The proposed measure would ensure that those ROs which adopt the 'cost of doing business' attitude would be unable to grow larger and/or expand their asset base and financial pool. Not only would this preserve the integrity and intent of the existing Fair Work penalty regime, but it would render an RO unable to share any penalty imposed on it across any financial base arising from the amalgamation with another entity.

103. The building and construction industry is renowned for being home to numerous employee ROs that appear unfazed by financial penalty. [47] The Heydon Report noted that this was because some ROs are becoming more business-like, stating:

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[46] *[2018] FWC 1017*
[47] *See, for example, Tracey J, 21 November 2013, Cozadinos v Construction, Forestry, Mining and Energy Union [2013] FCA 1243*

> *"Large national unions, such as the CFMEU, MUA and the AWU, have substantial assets. They have many thousands of members. They operate branches across different jurisdictions. They employ large numbers of employees. They generate tens of millions in membership dues annually. They generate millions in commercial enterprise and agreements with third parties. They are trading corporations in the constitutional sense. They are big businesses."*[48]

104. A further notable feature of Schedule 4 is the adoption of a positively expressed test of public interest i.e. any amalgamation must be **in** the public interest and not merely contrary to it. As earlier noted, a 500%+ increase in ROE contraventions cannot in any circumstance be considered as being *in*, or even *favourable to*, the public interest.

105. The benefit of this approach is to ensure that any RO amalgamation will only be allowed when it is determined to be of benefit to the broader interest of the community and public generally. This is an important consideration as the interests of a RO will not always be the same as those held by the public and could in some circumstances be contrary to them.

106. In addition, the potential ramifications of an amalgamated RO for the public interest may not be discernible on their face and therefore it is appropriate for the Commission to have broader discretion to consider all relevant matters. It is also appropriate that the Commission have discretion as to when it ought to consider the public interest test so as to ensure it is capable of assessing the public interest at any point. For example, there may be a relevant circumstance arise that is within the public interest which occurs during the conduct of a ballot.

Conclusion

107. For the reasons set out above, Master Builders supports the provisions of this Bill.

108. It is clear to even the most casual of observers that the standard of industrial conduct displayed by some ROs within the building and construction industry is exceptionally deplorable and that this creates adverse consequences for workers, employers and workplaces. These adverse consequences flow on and affect both the Australian economy the community more generally and arise from an ingrained and toxic culture where some choose to think they are above the law.

109. This culture has existed for decades and shows only signs of becoming worse. The necessity for legislative amendment as provided by this Bill cannot be any clearer or more pressing. We therefore urge the Committee to find similarly and recommend its swift passage through the Parliament.

110. Master Builders appreciates the opportunity to make this submission and assist the Committee with its Inquiry.

111. Any further information relevant to this submission can be obtained by contacting Mr Shaun Schmitke, Deputy CEO, on 02 6202 8888 or shaun.schmitke@masterbuilders.com.au.

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[48] *Heydon Report Volume 5, p.194.*

Appendix A: Judicial Commentary Table - CFMEU

DATE	CASE	JUDGE(S)	OBSERVATION
9 May 2002	*Hamberger v Construction, Forestry, Mining and Energy Union* [2002] FCA 585	Cooper J	At [20]-[21]: If an industrial organisation turns a blind eye, or does not concern itself as to the manner and methods employed by officers, servants or agents of the industrial organisation to achieve what they see as the organisation's ends, the organisation is at risk of being heavily penalised where the means adopted are prohibited and exhibit the worst features of the proscribed conduct. In the present case, the first and second respondents have chosen to give no evidence as to what those in authority knew of the conduct of the third and fourth respondents at and prior to the matters complained of. Nor is there any evidence as to what, if any, action was taken by the organisation to counsel, or moderate the behaviour of, the officers for the future.
"If an industrial organisation turns a blind eye, or does not concern itself as to the manner and methods employed by officers, servants or agents of the industrial organisation to achieve what they see as the organisation's ends, the organisation is at risk of being heavily penalised where the means adopted are prohibited and exhibit the worst features of the proscribed conduct." **Cooper J, 9 May 2002, *Hamberger v Construction, Forestry, Mining and Energy Union* [2002] FCA 585**			
11 April 2008	*A & L Silvestri Pty Ltd v Construction, Forestry, Mining and Energy Union* [2008] FCA 466.	Gyles J	At [13]-[14]: A number of findings involving unlawful behaviour by officials related to the CFMEU have been made in recent years...[His Honour then cited 12 cases] ... ...These various cases illustrate that the federal body has not been effective in ensuring that officials act in accordance with the law. I note that there is no evidence of offending officials… suffering any serious disciplinary penalties. In my opinion, notwithstanding the purely vicarious nature of the liability of the CFMEU, the penalty in this case, when compared with the maximum penalty, should adequately reflect the systematic nature of the failure of the CFMEU to deter or prevent actions of the kind involved in this case and act as a spur towards effective action by the CFMEU and the State entities connected with it.[49]
"...These various cases illustrate that the federal body has not been effective in ensuring that officials act in accordance with the law. I note that there is no evidence of offending officials… suffering any serious disciplinary penalties." **Gyles J, 11 April 2008, *A & L Silvestri Pty Ltd v Construction, Forestry, Mining and Energy Union* [2008] FCA 466**			
19 September 2008	*Stuart-Mahoney v Construction, Forestry, Mining and Energy Union* [2008] FCA 1426; (2008) 177 IR 61 at [44].	Tracey J	At [41]: In my view the conduct was serious and was designed to coerce Hooker Cockram (or, through it, one of its sub-contractors) to meet the Employment Requirement. The ban was imposed in preference to alternative, lawful, actions such as negotiations or resort to dispute resolution procedures which were available to the CFMEU and its members. At [44]: ...Similar previous conduct demonstrates that the respondent has a history of engaging in the particular conduct in question, that the penalties previously imposed were insufficient to deter the respondent from re-engaging in that conduct and that the respondent has failed to take adequate steps to prevent further contraventions…
"The ban was imposed in preference to alternative, lawful, actions such as negotiations or resort to dispute resolution procedures which were available to the CFMEU and its members." **Tracey J, 19 September 2008, *Stuart-Mahoney v Construction, Forestry, Mining and Energy Union* [2008] FCA 1426**			
29 May 2009	*Williams v Construction, Forestry, Mining and Energy Union (No 2)* [2009] FCA 548; (2009) 182 IR 327 at [29].	Jessup J	At [29]: ...the history tends to suggest that the Union has, with respect to anti-coercion and similar provisions of industrial laws, what the High Court in Veen described as 'a continuing attitude of disobedience of the law'...
"...the history tends to suggest that the Union has, with respect to anti-coercion and similar provisions of industrial laws, what the High Court in Veen described as 'a continuing attitude of disobedience of the law'..." **Jessup J, 29 May 2009, *Williams v Construction, Forestry, Mining and Energy Union (No 2)* [2009] FCA 548; (2009) 182 IR 327**			

[49] *The maximum penalty applicable was $11,000 (see [6]).*

DATE	CASE	JUDGE(S)	OBSERVATION
10 September 2009	*Draffin v CFMEU & Ors* [2009] FCAFC 120; (2009) 189 IR 145 at [70, [79], [92].	Goldberg, Jacobson and Tracey JJ	At [70], [79], [92]: …the litany of contraventions [and] the many prior contraventions of relevant statutory proscriptions by the Union…indicating a propensity, on the part of the Union, to engage in proscribed conduct.
"…the litany of contraventions…[and] the many prior contraventions of relevant statutory proscriptions by the Union…indicating a propensity, on the part of the Union, to engage in proscribed conduct." **Goldberg, Jacobson and Tracey JJ, 10 September 2009, *Draffin v CFMEU & Ors* [2009] FCAFC 120; (2009) 189 IR 145**			
7 April 2011	*Cozadinos v CFMEU & Ors* [2011] FMCA 284.	Riethmuller FM	At [18]: Deterrence is clearly an important factor in this case as the applicant submits because the union is a repeat offender and, indeed, it seems it has quite an unenviable history of breaches as set out in the various cases. At [23]: Whilst the particular losses caused by the conduct imposed greater losses, it seems, on the members than anyone else it was nonetheless a breach in circumstances where there were real alternatives available and where the union has an unenviable history of past breaches.
"Whilst the particular losses caused by the conduct imposed greater losses, it seems, on the members than anyone else it was nonetheless a breach in circumstances where there were real alternatives available and where the union has an unenviable history of past breaches. **Riethmuller FM, 7 April 2011, *Cozadinos v CFMEU & Ors [2011] FMCA 284.***			
7 February 2012	*Hogan v Jarvis* [2012] FMCA 189.	Burnett FM	At [20]: …I have had referred to me, particularly in Schedule A to the submissions prepared by the applicant, material which identifies at least 38 occasions where the fourth respondent [CFMEU] has been adversely noted as a party to proceedings seeking imposition of penalties. It is fair to infer from that Schedule that, as was submitted, the fourth respondent does have a history of engaging in conduct that brings it adversely to the attention of the courts and, notwithstanding the imposition of significant or at least not insignificant penalties, it does not appear that the penalties imposed have, to date at least, been sufficient to deter it from re-engaging in that conduct. As I have noted in the course of debate with counsel, perhaps the union needs to review its enterprise risk management processes in order to do more to bring attention to this form of behaviour to those who manage the union.
"It is fair to infer from that Schedule that…the fourth respondent does have a history of engaging in conduct that brings it adversely to the attention of the courts and, notwithstanding the imposition of significant or at least not insignificant penalties, it does not appear that the penalties imposed have, to date at least, been sufficient to deter it from re-engaging in that conduct." **Burnett FM, 7 February 2012, *Hogan v Jarvis* [2012] FMCA 189.**			
20 August 2013	*Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2013] FCA 846.	Collier J	At [34]-[35]: On the material before the Court the CFMEU appears a worse offender than the CEPU, in that the CFMEU has been penalised approximately $1.2 million of members' money (in addition to penalties personally imposed on individual union officials) in respect of more than 40 contraventions of laws relating specifically to coercive conduct…the facts demonstrate the need to impose penalties which meet the objective of specific deterrence, particularly in relation to the CFMEU whose organisers appear to have shown a somewhat cavalier disregard both of the need to comply with the law and of penalties which have been previously imposed on the union for similar conduct.
"…the facts demonstrate the need to impose penalties which meet the objective of specific deterrence, particularly in relation to the CFMEU whose organisers appear to have shown a somewhat cavalier disregard both of the need to comply with the law and of penalties which have been previously imposed on the union for similar conduct." **Collier J, 20 August 2013, *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2013] FCA 846.**			
7 October 2013	*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2013] FCA 1014.	Gordon J	At [46]: The CFMEU has engaged in a significant number of prior contraventions of similar legislation.
"The CFMEU has engaged in a significant number of prior contraventions of similar legislation." **Gordon J, 7 October 2013, *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2013] FCA 1014**			
21 November 2013	*Cozadinos v Construction, Forestry, Mining and Energy Union* [2013] FCA 1243.	Tracey J	At [43]: There is also a need for any penalty to have a specific deterrent effect on the CFMEU. It has, as I have already outlined, a deplorable record of contraventions of the BCII Act and similar legislation. The union has not displayed any contrition or remorse for its conduct. The contravention is serious… Substantial penalties for misconduct, prior to that presently under consideration, have not caused the CFMEU to desist from similar unlawful

DATE	CASE	JUDGE(S)	OBSERVATION
			conduct. As a result this consideration must weigh heavily when determining an appropriate penalty.
"The union has not displayed any contrition or remorse for its conduct. The contravention is serious… Substantial penalties for misconduct, prior to that presently under consideration, have not caused the CFMEU to desist from similar unlawful conduct." **Tracey J, 21 November 2013, *Cozadinos v Construction, Forestry, Mining and Energy Union* [2013] FCA 1243**			
20 December 2013	*Director of the Fair Work Building Industry Inspectorate v McDonald* [2013] FCA 1431.	Barker J	At [73]: It was mentioned above that there are a number of prior incidents involving unlawful industrial action that have resulted in the imposition of penalties against the respondents. It is generally accepted by the parties that the penalties imposed for the conduct described in the cases listed in Sch B of the respondents' outline of submissions on penalty are relevant in this case, and I take them into account generally when setting penalty. Among other things, they confirm that the respondents are not "cleanskins" when it comes to compliance with industrial laws such as the BCII Act and know that repeated, calculated contraventions will be met with monetary penalties of some significance.
"…the respondents are not "cleanskins" when it comes to compliance with industrial laws such as the BCII Act and know that repeated, calculated contraventions will be met with monetary penalties of some significance." **Barker J, 20 December 2013, *Director of the Fair Work Building Industry Inspectorate v McDonald* [2013] FCA 1431.**			
28 February 2014	*Director, Fair Work Building Industry Inspectorate v Myles & Ors* [2014] FCCA 1429.	Burnett J	At [45]-[46]: There is ample evidence of significant contravention by the CFMEU and its ideological fellow travellers. The CFMEU, as a holistic organisation, has an extensive history of contraventions dating back to at least 1999. The only reasonable conclusion to be drawn is that the organisation either does not understand or does not care for the legal restrictions on industrial activity imposed by the legislature and the courts. My views on that matter are reinforced by my inquiries of the corporate respondents concerning measures of corrective action. This would appropriately involve the development of policy dealing with union entry to work sites, coupled with the training of employees in how to use that policy and undertake their duties responsibly. The unions would be required to supervise the implementation of those policies and provide for sanctions, possibly by way of re-training, for employees who failed to comply with those policies. This would also necessitate internal audit process to check that policies are being applied, are working and are modified if necessary. There is no evidence that any of this, or indeed any corrective action at all, takes place.
"There is ample evidence of significant contravention by the CFMEU and its ideological fellow travellers. The CFMEU, as a holistic organisation, has an extensive history of contraventions dating back to at least 1999. The only reasonable conclusion to be drawn is that the organisation either does not understand or does not care for the legal restrictions on industrial activity imposed by the legislature and the courts." **Burnett J, 28 February 2014, *Director, Fair Work Building Industry Inspectorate v Myles & Ors* [2014] FCCA 1429**			
5 March 2014	*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* (2014) 140 ALD 337.	White J	At [46]: … even if regard is had only to the CFMEU's contraventions of s 43 of the former BCII Act, its antecedent history must be regarded as significant." At [56]: The CFMEU's history and the nature of its present contravention indicate that deterrence, both general and specific, should be a significant consideration in the fixation of an appropriate penalty. The CFMEU is not, of course, to be punished again for its previous contraventions but its history does mean that it is not entitled to any leniency by reason of a previous good record, or by reason of a history of attempting to comply with provisions such as s 355. The penalty is to be fixed in the context of the CFMEU's previous record.
"The CFMEU is not, of course, to be punished again for its previous contraventions but its history does mean that it is not entitled to any leniency by reason of a previous good record". **White J, 5 March 2014, *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (2014) 140 ALD 337.***			
31 March 2014	*Grocon & Ors v Construction, Forestry, Mining and Energy Union & Ors (No 2)* [2014] VSC 134	Cavanough J	At [201]: …the pattern of repeated defiance of court orders by the CFMEU revealed by those four cases is very troubling. Specific deterrence must loom large in this case. I accept that a respondent is not to be punished a second time for prior conduct. And, as the CFMEU submitted, the concept of deterrence cannot be permitted to hijack the process…The Court must visit the defiance of the CFMEU with a penalty which will not only adequately respond to the scale of the defiance but also act as a general and specific deterrent. No fines of the level previously imposed could do that.
"…the pattern of repeated defiance of court orders by the CFMEU revealed by those four cases is very troubling." **Cavanough J, 31 March 2014, *Grocon & Ors v Construction, Forestry, Mining and Energy Union & Ors (No 2)* [2014] VSC 134**			

DATE	CASE	JUDGE(S)	OBSERVATION
2 October 2014	*Director of the Fair Work Building Industry Inspectorate v Cartledge* [2014] FCA 1047.	Mansfield J	At [93]: I consider that the CFMEU's record of contraventions also demonstrates that a particularly persuasive form of personal deterrence against similar conduct in the future is appropriate.
"I consider that the CFMEU's record of contraventions also demonstrates that a particularly persuasive form of personal deterrence against similar conduct in the future is appropriate.' **Mansfield J, 2 October 2014, *Director of the Fair Work Building Industry Inspectorate v Cartledge [2014] FCA 1047***			
23 December 2014	*Director of the Fair Work Building Industry Inspectorate v Stephenson* [2014] FCA 1432	White J	At [76]-[77]: The Director provided a schedule of the occasions on which the CFMEU has been dealt with by Courts for contraventions of industrial legislation. It is fair to describe the CFMEU record as dismal. Since 1999, the CFMEU has had penalties imposed on it by a Court on numerous occasions. Many of the Court decisions involved multiple contraventions. Of particular relevance presently is that before 1 March 2014, the CFMEU and/or its employees have been dealt with for contraventions of right of entry provisions on 13 occasions, involving some 40 separate contraventions. In addition, since the subject contraventions, Mansfield J in *Director of the Fair Work Building Industry Inspectorate v Cartledge…*imposed penalties on the CFMEU and its employees in respect of seven different contraventions of s 500 of the FW Act committed on 19 and 20 March 2014. The record indicates an attitude of indifference by the CFMEU to compliance with the requirements of the legislation regarding the exercise of rights of entry. It also indicates that deterrence must be a prominent consideration in the fixing of penalties in the present cases.
"The record indicates an attitude of indifference by the CFMEU to compliance with the requirements of the legislation regarding the exercise of rights of entry." **White J, 23 December 2014, *Director of the Fair Work Building Industry Inspectorate v Stephenson* [2014] FCA 1432**			
17 March 2015	*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 226	Tracey J	At [34]: In doing so it [the CFMEU] opted for a show of industrial force in preference to engagement in lawful dispute settling procedures. The CFMEU has failed to explain why it chose this course of action despite having undertaken to the Court that it would not so act less than a fortnight before these events occurred. The overwhelming inference is that the CFMEU, not for the first time, decided that its wishes should prevail over the interests of the companies and that this end justified the means. At [47]: In doing so it [the CFMEU] displayed, at best for it, a cavalier attitude which could only serve to undermine respect for Court processes. At [59]: [The relevant priors] do, however, expose a propensity, on the part of the CFMEU, to continue to commit contempt notwithstanding the imposition of significant sanctions. At [63]: The CFMEU is to be regarded as a recidivist rather than as a first offender.
"The overwhelming inference is that the CFMEU, not for the first time, decided that its wishes should prevail over the interests of the companies and that this end justified the means." *"The CFMEU is to be regarded as a recidivist rather than as a first offender."* **Tracey J, 17 March 2015, *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 226**			
20 April 2015	*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 353	Tracey J	At [96]-[98]: The present conduct of one of its officials adds to this depressing litany of misbehaviour. It evidences an ongoing disregard for the rule of law and highlights the need for the imposition of meaningful penalties within the limits imposed by the Act. The CFMEU … has not, however, deprecated Mr Berardi's conduct or expressed any contrition for failing to prevent his contraventions. Nor has it indicated any willingness to take steps to ensure that its officials in future comply with their legal obligations.
"The present conduct of one of its officials adds to this depressing litany of misbehaviour. *It evidences an ongoing disregard for the rule of law and highlights the need for the imposition of meaningful penalties within the limits imposed by the Act.* *The CFMEU … has not, however, deprecated Mr Berardi's conduct or expressed any contrition for failing to prevent his contraventions. Nor has it indicated any willingness to take steps to ensure that its officials in future comply with their legal obligations."* ***Tracey J, 20 April 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 353**			
1 May 2015	*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry,*	Tracey J	At [103]: In seeking to achieve its desired outcomes the CFMEU had available to it lawful processes which it could have pursued. It chose, instead, to prosecute its objectives by means which it must have known or, at least, should have known, were unlawful. Not for the first time the CFMEU sought to impose

DATE	CASE	JUDGE(S)	OBSERVATION
	Mining and Energy Union (No 2) [2015] FCA 407		its will by means of threats and coercion against employers. Its approach was one of entitlement: it was free, despite legal constraint, to deploy its considerable resources in order to achieve its industrial objectives. The concept of the rule of law was anathema to it. At [106]: The circumstances of these cases … nonetheless, bespeak a deplorable attitude, on the part of the CFMEU, to its legal obligations and the statutory processes which govern relations between unions and employers in this country. This ongoing willingness to engage in contravening conduct must weigh heavily when the need for both specific and general deterrence is brought to account. At [107]: Its continued willingness to engage in contravening conduct supports the view that earlier penalties, some of them severe, have not had a deterrent effect.
"The circumstances of these cases … nonetheless, bespeak a deplorable attitude, on the part of the CFMEU, to its legal obligations and the statutory processes which govern relations between unions and employers in this country. This ongoing willingness to engage in contravening conduct must weigh heavily when the need for both specific and general deterrence is brought to account." **Tracey J, 1 May 2015, *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 407**			
12 June 2015	*Director, Fair Work Building Industry Inspectorate v Cradden [2015] FCA 614*	Logan J	At [9]: With the representational role of industrial organisations comes particular privileges, as well as particular responsibilities. One cannot have one without the other. An industrial organisation, be it an employer organisation or an employee organisation, which persistently abuses the privilege by engaging in unlawful conduct cannot expect to remain registered. At [106]: The circumstances of these cases were not identical to those in the present case. They, nonetheless, bespeak a deplorable attitude, on the part of the CFMEU, to its legal obligations and the statutory processes which govern relations between unions and employers in this country. This ongoing willingness to engage in contravening conduct must weigh heavily when the need for both specific and general deterrence is brought to account. At [49]: As to the CFMEU, I am firmly of the view, having regard to its outrageous disregard in the past and also in the present case of Australian industrial norms, as set out materially for this case in s 44 of the BCII Act, that anything less than a penalty of the individual amounts for particular days and the total amount would not serve the main purpose of the Act and the particular public interest, described in the Royal Commission report, which this Act was designed to promote. Had there been evidence of particular economic loss at the site, or worse conduct, and had there not been at least something of the mitigation entailed in an acknowledgement of the contraventions, the penalties in respect of the CFMEU would have been much greater.
"An industrial organisation, be it an employer organisation or an employee organisation, which persistently abuses the privilege by engaging in unlawful conduct cannot expect to remain registered." *"They,* [circumstances of the case under consideration] *nonetheless, bespeak a deplorable attitude, on the part of the CFMEU, to its legal obligations and the statutory processes which govern relations between unions and employers in this country. This ongoing willingness to engage in contravening conduct must weigh heavily when the need for both specific and general deterrence is brought to account."* **Logan J, 12 June 2015, *Director, Fair Work Building Industry Inspectorate v Cradden [2015] FCA 614***			
3 July 2015	*Director of the Fair Work Building Industry Inspectorate v Upton [2015] FCA 672*	Gilmour J	At [61]: Whilst the CFMEU's record does not mean that a disproportionate penalty can or should be imposed, it is nonetheless relevant to the assessment of the level of penalty that is necessary for deterrence (see *Temple* at [64]). The CFMEU's long history of its officials conducting themselves unlawfully involving the very kind of conduct in which Upton engaged on 8 October 2012 calls for a significant component of specific deterrence.
"The CFMEU's long history of its officials conducting themselves unlawfully involving the very kind of conduct in which Upton engaged on 8 October 2012 calls for a significant component of specific deterrence." **Gilmour J, 3 July 2015, *Director of the Fair Work Building Industry Inspectorate v Upton [2015] FCA 672***			
14 August 2015	*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union(No 3) [2015] FCA 845*	Mansfield J	At [24]: As with Pearson and Olsen, there is no suggestion of penitence, corrective action, or cooperation in the investigation by the Director. There is clearly, as other judges have recorded, a strong record of noncompliance on the part of the Union through its officers with provisions of industrial relations legislation, although that does not mean that a disproportionate penalty can or should be imposed. I note that significant past penalties have not caused the Union to alter its apparent attitude to compliance with the entry provisions and restrictions under the FW Act. At [25]: There is clearly an ongoing need for an order to be made for a pecuniary penalty which has a deterrent effect upon the Union and signals to others who may consider engaging in such conduct or like conduct that it is

DATE	CASE	JUDGE(S)	OBSERVATION
			inappropriate to do so. In my view, in the circumstances, the appropriate pecuniary penalty to impose on the Union is $35,000.
"There is clearly, as other judges have recorded, a strong record of noncompliance on the part of the Union through its officers with provisions of industrial relations legislation, although that does not mean that a disproportionate penalty can or should be imposed. I note that significant past penalties have not caused the Union to alter its apparent attitude to compliance with the entry provisions and restrictions under the FW Act." ***Mansfield J, 14 August 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union(No 3) [2015] FCA 845***			
10 September 2015	*Director of the Fair Work Building Industry Inspectorate v Bragdon (No 2) [2015] FCA 998*	Flick J	At [21]: In the circumstances of the present case it is respectfully concluded that the latter of the two courses should be pursued. But for the past history of contraventions on the part of the CFMEU, a penalty would have been imposed of $175,000; when that past history is taken into account it is considered that the penalty should be $225,000. Approached in this manner, the reasoning at least has the advantage of transparency. The penalty of $225,000 is proportionate to the contraventions that have been found to have occurred. Rather than the penalty of $225,000 being seen as an increase in the penalty "*because of prior convictions*", it is more correctly characterised as a penalty that may better serve the objective of deterrence. To employ the language of Buchanan J in *Cahill*, a penalty in the sum of $225,000 is not "*to increase a sentence beyond what is considered to be appropriate having regard to the seriousness of the offence because of prior convictions*". A penalty in that amount, it is concluded, is appropriate having regard to all of the facts and circumstances relevant to the present case – including the past history of contraventions.
"But for the past history of contraventions on the part of the CFMEU, a penalty would have been imposed of $175,000; when that past history is taken into account it is considered that the penalty should be $225,000". ***Director of the Fair Work Building Industry Inspectorate v Bragdon (No 2) [2015] FCA 998***			
4 November 2015	*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (The Mitcham Rail Case) [2015] FCA 1173*	Jessup J	At [29]: As has become customary in cases such as this, the applicant has placed before the court a schedule of the Union's previous contraventions of civil penalty provisions in the FW Act, and of corresponding provisions in the *Building and Construction Industry Improvement Act 2005* (Cth). The pattern of contravention which emerges from material such as this has been the subject of comment by the court on a number of occasions. The schedule paints, one would have to say, a depressing picture. But it is more than that. I am bound to say that the conduct referred to in the schedule bespeaks an organisational culture in which contraventions of the law have become normalised. In this context, the following words of Tracey J in *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 407 at [99] have more than in-principle relevance in a case in which the Union is involved:
"The schedule paints, one would have to say, a depressing picture. But it is more than that. I am bound to say that the conduct referred to in the schedule bespeaks an organisational culture in which contraventions of the law have become normalised." **Jessup J, 4 November 2015, *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (The Mitcham Rail Case) [2015] FCA 1173***			
22 December 2015	*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2) [2015] FCA 1462*	Jessup J	At [10]: The case is devoid of any mitigating circumstances. The Union has shown no contrition, and has not cooperated with the regulator. I accept the submission made on behalf of the respondents that neither of these circumstances should be regarded as an aggravating one. On the other hand, on the facts of the case, and on the way it has been conducted, there is no circumstance to which counsel could point as tending to exert a moderating influence upon the level of the penalty which the court would otherwise impose.
"The Union has shown no contrition, and has not cooperated with the regulator." **Jessup J, 22 December 2015, *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2) [2015] FCA 1462***			
9 March 2016	*Director of the Fair Work Building Industry Inspectorate v Vink & Anor FCCA [2016] 488*	Vasta	At [1]: This is an application for the imposition of pecuniary penalties upon the First Respondent, Scott Vink, and the Third Respondent, Construction, Forestry, Mining and Energy Union (CFMEU). The First Respondent is an official of the Third Respondent as that term is defined by s.12 and s.793(1)(a) of the *Fair Work Act 2009* (Cth) ("FW Act"). The Third Respondent is "*an industrial association*" within the meaning given to that term by s.12 of the FW Act and "*an employee organisation*" within the meaning given to that term by the same section of the FW Act. At [40]: There was never any legitimate reason for the First Respondent to enter that shed. The only reason he did so was to intimidate the employees

DATE	CASE	JUDGE(S)	OBSERVATION
			and to reinforce to others at the building site, the notion that non-union membership is not going to be tolerated. At [41]: It is hard to imagine a more blatant single breach. The need for condign punishment is obvious. The maximum penalty for the First Respondent is $10,200.00 and the maximum penalty for the Third respondent is $51,000.00. At [43]: There is a great need for general deterrence and specific deterrence in this case. It would be apt to describe the behaviour of the First Respondent as "sheer thuggery". Such thuggery has no place in the Australian workplace. Contraventions of the FW Act that involve such thuggery cannot be tolerated. At [44]: The Third Respondent does have an unenviable history of breaching the FW Act. It seems to treat being caught conducting such breaches or as the present one simply as occupational hazards in the way in which they conduct their business. There has been no apology for such appalling behaviour.
"It would be apt to describe the behaviour of the First Respondent as "sheer thuggery". Such thuggery has no place in the Australian workplace. Contraventions of the FW Act that involve such thuggery cannot be tolerated. *"It seems to treat being caught conducting such breaches or as the present one simply as occupational hazards in the way in which they conduct their business. There has been no apology for such appalling behaviour."* **Vasta J, 9 March 2016, *Director of the Fair Work Building Industry Inspectorate v Vink & Anor FCCA [2016] 488***			
8 April 2016	*Director of the Fair Work Building Industry Inspectorate v Myles & Anor [2016] FCCA 772*	Jarrett J	At [42]: In previous applications, judges of the Federal Court have described that the CFMEU has a '...depressing litany of misbehaviour' .. a 'propensity to deliberately flout industrial legislation which proscribe coercive conduct' … 'a deplorable attitude, ... to its legal obligations and the statutory processes which govern relations between unions and employers in this country' … 'an attitude of indifference ... to compliance with the requirements of the legislation ...' … and 'an organisational culture in which contraventions of the law have become normalised'. At [59]: The CFMEU's history of unlawful industrial activity demands that the penalty imposed carries a very significant deterrent effect. I am conscious that I cannot and should not punish the CFMEU for its prior contravening conduct, but its woeful prior history demands that some attempt be made to deter future contraventions.
judges of the Federal Court have described that the CFMEU has a '...depressing litany of misbehaviour' .. a 'propensity to deliberately flout industrial legislation which proscribe coercive conduct' … 'a deplorable attitude, ... to its legal obligations and the statutory processes which govern relations between unions and employers in this country' … 'an attitude of indifference ... to compliance with the requirements of the legislation ...' … and 'an organisational culture in which contraventions of the law have become normalised'. ***Director of the Fair Work Building Industry Inspectorate v Myles & Anor [2016] FCCA 772***			
22 April 2016	*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2016] FCA 413*	White J	At [18]: A number of the authorities in this Court have emphasised that deterrence has both personal and general aspects… Deterrence is particularly important in the present case because of the CFMEU's record of non-compliance with industrial legislation. At [33]: I have previously described the CFMEU record of contraventions of industrial legislation as dismal: *DFWBII v Stephenson* [2014] FCA 1432 at [76]. That description is just as apt now as it was then. At [35]: he CFMEU's compliance with industrial legislation generally has been poor. The Director's summary shows that in the period from December 2000 to October 2013, the CFMEU and its officials were dealt with by courts on 80 separate occasions for contraventions of industrial legislation. On any reasonable measure that is an appalling record. It bespeaks an attitude by the CFMEU of ignoring, if not defying, the law and a willingness to contravene it as and when it chooses. This means that specific deterrence in particular must be a prominent consideration in the penalties imposed on the CFMEU in the present case. At [38]: Substantial penalties have been imposed on the CFMEU in the past. They have not been sufficient to deter the CFMEU from further contraventions. This suggests that the penalties to be imposed on it now must be even more severe.
"On any reasonable measure that is an appalling record. It bespeaks an attitude by the CFMEU of ignoring, if not defying, the law and a willingness to contravene it as and when it chooses." **White J, 22 April 2016, *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2016] FCA 413***			
22 April 2016	*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2016] FCA 414*	White J	At [50]: I accept the Director's submission that the CFMEU is a large, prominent and influential national union, that there is no evidence that it has an incapacity to pay penalties of the kind he has proposed, that it has not made any expressions of contrition or regret or even of a determination to ensure that both it and its officials comply with Pt 3-4 in the future, and that it has not provided any evidence of instructions or training to its officials with respect to the need to comply with the requirements of Pt 3-4. The CFMEU's dismal record

DATE	CASE	JUDGE(S)	OBSERVATION
			means that deterrence must be a particularly important consideration in the penalties imposed on it. At [51]: The contravention of s 500 by the CFMEU constituted by Mr Stephenson's conduct is particularly serious. That seriousness arises from the circumstance that a senior official of the CFMEU had directed one of the employees for whom he was responsible to engage in unlawful conduct and that the employee committed the contravention by giving effect to that direction.
"The CFMEU's dismal record means that deterrence must be a particularly important consideration in the penalties imposed on it." **White J, 22 April 2016, *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2016] FCA 414***			
22 April 2016	*Director of the Fair Work Building Industry Inspectorate v O'Connor [2016] FCA 415*	White J	At [153]: The dismal record of contraventions of industrial legislation by the CFMEU to which I referred in the Lend Lease Sites Penalty Judgement had deteriorated still further by the time of the subject contraventions between late March and early May 2014. At [154]: In the period between 1 January 1999 and 31 March 2014, the CFMEU itself or through it officials had been dealt with for 17 contraventions of s 500 or its counterparts in earlier legislation, and for 194 contraventions of s 348 of the FW Act or other provisions proscribing forms of coercive conduct. At [155]: All in all, the CFMEU itself or through its officials had in the period between 1 January 1999 and 31 March 2014 been dealt with by courts on 42 separate occasions for some 211 contraventions of industrial legislation. This is a regrettable record of indifference to, or defiance of, the law. Substantial penalties have been imposed on the CFMEU in the past without deterring it from unlawful conduct. That suggests that even more severe penalties should be imposed now.
"In the period between 1 January 1999 and 31 March 2014, the CFMEU itself or through it officials had been dealt with for 17 contraventions of s 500 or its counterparts in earlier legislation, and for 194 contraventions of s 348 of the FW Act or other provisions proscribing forms of coercive conduct." **White J, 22 April 2016, *Director of the Fair Work Building Industry Inspectorate v O'Connor [2016] FCA 415***			
13 May 2016	*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2) [2016] FCA 436*	Mortimer J	At [104]: Given the history of contraventions of s 348 by both the CFMEU and Mr Myles, I am prepared to infer that both respondents (and the CFMEU's other responsible officers) well knew the conduct was unlawful, and did not care. At [140]: The conduct has in common features of abuse of industrial power and the use of whatever means the individuals involved considered likely to achieve outcomes favourable to the interests of the CFMEU. The conduct occurs so regularly, in situations with the same kinds of features, that the only available inference is that there is a conscious and deliberate strategy employed by the CFMEU and its officers to engage in disruptive, threatening and abusive behaviour towards employers without regard to the lawfulness of that action, and impervious to the prospect of prosecution and penalties.
"The conduct has in common features of abuse of industrial power and the use of whatever means the individuals involved considered likely to achieve outcomes favourable to the interests of the CFMEU. The conduct occurs so regularly, in situations with the same kinds of features, that the only available inference is that there is a conscious and deliberate strategy employed by the CFMEU and its officers to engage in disruptive, threatening and abusive behaviour towards employers without regard to the lawfulness of that action, and impervious to the prospect of prosecution and penalties." **Mortimer J, 13 May 2016, *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2) [2016] FCA 436***			
1 July 2016	*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (The Yarra's Edge Case) [2016] FCA 772*	Jessup J	At [48]: The CFMEU's record of non-compliance with legislation of this kind has now become notorious. That record ought to be an embarrassment to the trade union movement. It has been the subject of comment by this court so frequently in recent times as to make any further recitation quite unnecessary. At the level of specifics, my attention has been drawn to the fact that, before 17 February 2011, the CFMEU (acting through the Victorian Branch of its Construction and General Division) had been found to have contravened s 38 of the BCII Act, and penalised therefor, on 16 occasions. The BCII Act was substantially amended, and re-named, in 2012, but the CFMEU continued thereafter to contravene other relevant legislation. The schedule of contraventions handed up on behalf of the applicant is extensive, and runs well beyond those 16 occasions. In a submission from which counsel for the respondents was not heard to demur, it was said for the applicant that "at least 80 of the [Union's] previous contraventions were either dealt with (in court) before the events the subject of these proceedings, or involved contravening conduct which had occurred before the events the subject of these proceedings, but were finalised after." Quite obviously, over the years the CFMEU has shown a strong disinclination to modify its business model in order to comply with the law.

DATE	CASE	JUDGE(S)	OBSERVATION
"The CFMEU's record of non-compliance with legislation of this kind has now become notorious. That record ought to be an embarrassment to the trade union movement." **Jessup J, 1 July 2016, *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (The Yarra's Edge Case) [2016] FCA 772***			
19 July 2016	*Director, Fair Work Building Industry Inspectorate v Bolton (No 2) [2016] FCA 817*	Collier J	At [42]: There is also extensive material before the Court indicating a significant record of non-compliance with the provisions of the industrial legislation by the CFMEU. Penalties imposed on the CFMEU appear to have no impact – indeed the obvious inference to be drawn is that the CFMEU has ignored such penalties as inconsequential. At [46]: The CFMEU submits, in summary, that there is no material to support a finding that it was in any way an accessory to the contraventions by the individual respondents. In my view this is a nonsensical submission. At material times the individual respondents were all officials of the CFMEU. I am satisfied that they were acting with apparent, if not actual, authority of the CFMEU in respect of their conduct. At [57]: That the individual respondents no longer have entry permits does not mean that there is no role for specific deterrence, or that the principle of general deterrence has been satisfied. The individual respondents were officials of the union, and as such can be expected to be role models for other union members, not only in representing the CFMEU but in compliance with the law and fulfilment of their legal obligations. The conduct of the individual respondents, while at the lower end of the spectrum, demonstrates a demoralising lack of respect for either the law or their roles as officials. That a number of the individual respondents may no longer hold management positions in the CFMEU, or be union officials with the CFMEU, is irrelevant. The penalties proposed by the Director are a proper deterrent for such conduct.
"There is also extensive material before the Court indicating a significant record of non-compliance with the provisions of the industrial legislation by the CFMEU. Penalties imposed on the CFMEU appear to have no impact – indeed the obvious inference to be drawn is that the CFMEU has ignored such penalties as inconsequential." **Collier J, 19 July 2016, *Director, Fair Work Building Industry Inspectorate v Bolton (No 2) [2016] FCA 817***			
9 August 2016	*Director, Fair Work Building Inspectorate v J Hutchinson Pty Ltd & Ors [2016] FCCA 2175*	Vasta J	At [16]: What the First Respondent did was to either terminate the contract or, depending on that view of the facts, refuse to engage C & K. The First Respondent, in terminating the contract, has done so because C & K had a workplace right; that is, to enjoy the benefit of their agreement and they had not exercised a workplace right, being the right to make an enterprise agreement, because it already had in place an enterprise agreement that did not cover the CFMEU. At [25]: In this case, it seems to me that there is a blatant case of discrimination against C & K because they did not have an EBA that included the CFMEU. It is clear on the way that the facts have been presented by both parties that if C & K did have an agreement with the CFMEU, then they would have completed the contract for the tiling at Circa One. At [26]: Such conduct strikes at the heart of freedom of association. For subcontractors, such as C & K, a major pathway to growing their business is to be awarded contracts from large construction companies like the first respondent. If the only way in which they can break into those circles is to have made an agreement with the CFMEU, then the whole fabric of our industrial relations system will disintegrate
"Such conduct strikes at the heart of freedom of association. For subcontractors, such as C & K, a major pathway to growing their business is to be awarded contracts from large construction companies like the first respondent. If the only way in which they can break into those circles is to have made an agreement with the CFMEU, then the whole fabric of our industrial relations system will disintegrate." **Vasta J, 9 August 2016, *Director, Fair Work Building Inspectorate v J Hutchinson Pty Ltd & Ors [2016] FCCA 2175***			
19 January 2017	*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (No 3) [2017] FCA 10*	Besanko J	At [46]: General deterrence is clearly a relevant consideration and, in light of the CFMEU's poor record, specific deterrence is an important consideration.
"General deterrence is clearly a relevant consideration and, in light of the CFMEU's poor record, specific deterrence is an important consideration." **Besanko J, 19 January 2017, *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (No 3) [2017] FCA 10***			
8 Febru	*Australian Building and Construction Commissioner v*	Jessup J	At [65]: It is now well-established that deterrence, both specific and general, is the predominant purpose of civil penalties in a statutory regime such as that of the FW Act. The CFMEU is a registered organisation of substantial size,

DATE	CASE	JUDGE(S)	OBSERVATION
ary 2017	*Construction, Forestry, Mining and Energy Union (the Webb Dock case) [2017] FCA 62*		resources and influence. Any suggestion that it did not fully understand the operation of the provisions of the Act under which the Director proceeded could not be taken seriously. Indeed, its past record of encounters with these, or similar, provisions speaks loudly of its familiarity with them. That record, to which I refer further below, justifies only one inference: that the CFMEU has done nothing, over the years, to cause its own staff to comply with the law. Indeed, the inference that the CFMEU will always prefer its own interests, whatever they may be from time to time, to compliance with the law is a compelling one. This case presented yet another instance of that pattern of behaviour. The CFMEU and its members may be grateful that the staff of the banks and other financial institutions to whom it has, I presume, entrusted its considerable assets do not take the same approach to compliance with the law. At [66]: The CFMEU's record of contravention has become so extensive that it presents a challenge to convey, both accurately and comprehensively, the substance of the findings made in particular cases.
"That record, to which I refer further below, justifies only one inference: that the CFMEU has done nothing, over the years, to cause its own staff to comply with the law. Indeed, the inference that the CFMEU will always prefer its own interests, whatever they may be from time to time, to compliance with the law is a compelling one. This case presented yet another instance of that pattern of behaviour." ***Jessup J, 8 February 2017, Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (the Webb Dock case) [2017] FCA 62***			
29 March 2017	*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2017] FCAFC 53*	North, Dowsett and Rares JJ	At [99]: The conduct of the CFMEU seen in this case brings the trade union movement into disrepute and cannot be tolerated. At [100]: In a liberal democracy, it is assumed that citizens, corporations and other organisations will comply with the law. Such compliance is not a matter of choice. The community does not accept that a citizen, corporation or other organisation may choose to break the law and simply pay the penalty. The courts certainly do not accept that proposition. At [102]: The CFMEU can be seen to have chosen to pay penalties in preference to obeying the law. It is not entitled to any leniency in the circumstances of the conduct complained of.
"The conduct of the CFMEU seen in this case brings the trade union movement into disrepute and cannot be tolerated.". *"In a liberal democracy, it is assumed that citizens, corporations and other organisations will comply with the law. Such compliance is not a matter of choice. The community does not accept that a citizen, corporation or other organisation may choose to break the law and simply pay the penalty. The courts certainly do not accept that proposition."* ***North, Dowsett and Rares JJ, 29 March 2017, Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2017] FCAFC 53***			
11 April 2017	*Australian Building and Construction Commission v Construction, Forestry, Mining and Energy Union (The Kane Constructions Case) (No 2) [2017] FCA 368*	Jessup J	At [12]: In the case of the CFMEU, I have based my assessment upon the fact of the contravention, upon the seriousness of the impact of the contravention, upon the behaviour of the individual respondent whose conduct was attributed to the CFMEU and upon the CFMEU's own record of past contraventions of similar or analogous industrial laws. At [17]: …I also take into account the CFMEU's own record of lawlessness in the industrial context.
"I have based my assessment upon the fact of the contravention, upon the seriousness of the impact of the contravention, upon the behaviour of the individual respondent whose conduct was attributed to the CFMEU and upon the CFMEU's own record of past contraventions of similar or analogous industrial laws." ***Jessup J, 11 April 2017, Australian Building and Construction Commission v Construction, Forestry, Mining and Energy Union (The Kane Constructions Case) (No 2) [2017] FCA 368***			
11 May 2017	*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (Perth Childrens' Hospital Contraventions Case) [2017] FCA 491*	Barker J	At [82]: *As to the CFMEU*, the Contraventions Table (Annexure 3 to the Commissioner's submissions) discloses the CFMEU's extensive history of prior contraventions of industrial laws. This table lists 107 separate legal proceedings where the CFMEU was found to have contravened industrial legislation, or committed a civil or criminal contempt. At: [176]: This is a case where the prior extensive history of contraventions on the part of the CFMEU, in particular, and some of its key officials, must be regarded.
"This… lists 107 separate legal proceedings where the CFMEU was found to have contravened industrial legislation, or committed a civil or criminal contempt. ***Barker J, 11 May 2017, Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (Perth Childrens' Hospital Contraventions Case) [2017] FCA 491***			
17 May 2017	*Construction, Forestry, Mining and Energy Union v Australian Building and*	North, Besanko, Flick JJ	At [36]: The CFMEU was asserting that it could enter building sites simply because – given its position as a prominent Union – it could.

DATE	CASE	JUDGE(S)	OBSERVATION
	Construction Commissioner [2017] FCAFC 77		At [37]: Such a submission, if properly understood, is astounding. There could be no contravention of s 500 of the Fair Work Act, so the submission ran, because no "right" was being exercised but rather the exercise of industrial power and might and the exercise of industrial muscle.
"…no "right" was being exercised but rather the exercise of industrial power and might and the exercise of industrial muscle." ***North, Besanko, Flick JJ, 17 May 2017, Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner [2017] FCAFC 77***			
28 July 2017	*Australian Building And Construction Commissioner V Kurt Pauls & Ors [2017] FCA 843*	RANGIAH J	At [62]: …acceding to the CFMEU's industrial agenda must be regarded as a very serious matter. At [68]: The CFMEU has a very extensive history of contraventions of industrial laws, including ss 355 and 417 of the FWA. The Commissioner provided the Court with a schedule demonstrating that there have been 123 separate cases in which this Court or the Federal Circuit Court of Australia (or its predecessor) have imposed civil penalties upon the CFMEU for contraventions of the FWA, the BCIIA or the Workplace Relations Act 1996 (Cth). Of those cases, 52 have involved contraventions of s 417 of the FWA or equivalent provisions and 17 have involved contraventions of s 355 of the FWA. At [69]: There is no evidence of contrition by Pauls, Steele, Bland or the CFMEU. At [62]: The respondents' attempts to coerce Watpac into acceding to the CFMEU's industrial agenda must be regarded as a very serious matter. It is also a very serious infraction of the law to organise employees to engage in industrial action during the currency of enterprise agreements. At [68]: The CFMEU has a very extensive history of contraventions of industrial laws, including ss 355 and 417 of the FWA. At [74]: In particular, declarations are an appropriate vehicle to record the Court's disapproval of the contravening conduct, serve to vindicate the Commissioner's claim that the respondents contravened the FWA and may deter others from contravening the FWA: see Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union [2007] ATPR 42-140; [2006] FCA 1730 at [6].
"The respondents' attempts to coerce Watpac into acceding to the CFMEU's industrial agenda must be regarded as a very serious matter. It is also a very serious infraction of the law to organise employees to engage in industrial action during the currency of enterprise agreements." ***Rangiah J, 28 July 2017, Australian Building and Construction Commissioner v Kurt Pauls & Ors [2017] FCA 843***			
28 July 2017	*Australian Building And Construction Commissioner V Auimatagi & Ors [2017] FCCA 1772*	EMMETT J	At [208]: The first respondent's conduct in seeking to negate John Holland's choice to enforce its Two Longs Safety Policy, when it had a statutory duty in relation to the health and safety of its workers, was nothing short of unconscionable.
"The first respondent's conduct in seeking to negate John Holland's choice to enforce its…Safety Policy, when it had a statutory duty in relation to the health and safety of its workers, was nothing short of unconscionable." ***Emmet J, 28 July 2017, Australian Building and Construction Commissioner v Auimatagi & Ors [2017] FCCA 1772***			
5 September 2017	*Australian Building And Construction Commissioner V Dig It Landscapes Pty Ltd & Ors [2017] FCCA 2128 (5 September 2017)*	Vasta J.	At [55 – 56]: It is beggars belief that the CFMEU believe that they can act in a manner where they are the ones who dictate who can or cannot work on a construction site. The Parliament is the only entity that sets the law in this country and the Parliament is directly responsible to the people of this country. It seems that the CFMEU feel that they can usurp Parliament and that they can set the law in this country. There is no place for such an attitude in Australian society. At [58]: Amazingly, the Fifth Respondent [a CFMEU representative] knew that the contract between Polyseal and the First Respondent was at an end before Polyseal knew. This illustrates an inordinate amount of power wielded by the Fourth Respondent [the CFMEU]. The fact that the Fifth Respondent was the one who informed Mr Kalopulu [a representative of the aggrieved party] before the Third Respondent informed Mr Larkin or Mr Edgeworth of the fate of the contract, paints a compelling picture of how things can go wrong in the industrial landscape of this country. At [68]: Given the appalling history of the Fourth Respondent [the CFMEU], it is incumbent upon them to ensure that any person acting on their behalf conducts themselves according to law. There is no suggestion that the Fifth Respondent was acting against the wishes of the Fourth Respondent.
'It beggars belief that the CFMEU believe that they can act in a manner where they are the ones who dictate who can or cannot work on a construction site. *… It seems that the CFMEU feel that they can usurp Parliament and that they can set the law in this country. There is no place for such an attitude in Australian society'* ***Vasta J., 5 September 2017, Australian Building and Construction Commissioner v Dig It Landscapes Pty Ltd & Ors [2017] FCCA 2128 (5 September 2017)***			

DATE	CASE	JUDGE(S)	OBSERVATION
19 October 2017.	*Australian Building And Construction Commissioner V Hanna & Anor (No.3) [2017] FCCA 2519 (19 October 2017)*	Vasta J.	At [48–51]: For Mr Hanna to have acted in this most abhorrent way, would have been very concerning to those affected. To them, these were not the actions of some over-exuberant maverick from the CFMEU; these were the actions of the President himself. And even though Mr Hanna is no longer associated with the CFMEU , there has been no condemnation, or even apology, for the actions of Mr Hanna on this day from the CFMEU . It can only be inferred that the CFMEU condone such actions and approach the imposition of pecuniary penalties as occupational hazards in the performance of their business plan (whatever plan that may be). The past history of contraventions of the FW Act by the CFMEU is astounding. It is no understatement to describe the CFMEU as the most recidivist corporate offender in Australian history. Such a description is apt when all of the matters annexed to the submissions of the ABCC are examined. That annexure reveals approximately 120 occasions that Courts have sanctioned the CFMEU for breaches of industrial law over the past 10 years. I have carefully considered all of those entries in the annexure. Therefore, in assessing the gravamen of each contravention by the CFMEU, it must be borne in mind that the previous history of the CFMEU does put these contraventions into a category that defies easy comparison. While some may want to sanitize this behaviour as an unremarkable workplace contravention, it is far more than that. At [57]: The offending may have been of short duration but that does not derogate at all from how serious these contraventions are. I do consider that there was a safety concern because there had been no arrangements made for Mr Hanna to visit the construction site and, as such, there would necessarily have been a risk to safety posed. I have already mentioned how using the swipe card was a very big risk to safety. It was more good fortune than good management that there was no actual safety incident that occurred.
'It may have been expected that there would be righteous condemnation of any person compromising safety on the work site coming from a union that purportedly exists to ensure safety on worksites. The silence from the CFMEU, however, has been deafening. *There has been no remorse from the CFMEU. There has been no evidence of the CFMEU training any of its officers as to the provisions of the FW Act to ensure that such abominable behaviour is not undertaken by any of its representatives ever again.* *Given the nature of the contraventions, the recidivist nature of the CFMEU, the lack of acknowledgement of any wrong doing, the lack of any remedial action and the need to deter this kind of behaviour, I can see no reason to ameliorate any of the penalties that I will impose on the CFMEU .'* ***Vasta J., 19 October 2017, Australian Building and Construction Commissioner v Hanna & Anor (No.3) [2017] FCCA 2519 (19 October 2017)***			
27 October 2017	*Australian Building And Construction Commissioner V Construction, Forestry, Mining And Energy Union [2017]* FCA 1269 (27 October 2017)	Vasta J.	**Discussing specific breaches of the Fair Work Act, Vasta J said at [41-42]:** To group any of the contraventions together (even if I had the power to actually do such a thing, which I have already said that I do not) would be to minimise the appalling conduct of both Mr Hanna and the CFMEU These six contraventions are deserving of separate punishments so that the full context of what Mr Hanna and the CFMEU have done is both known to the general public and denounced by this Court. The breaches are noted at [20-25]: 1.1 …being in the premises without invitation and without having given a notice of entry, the CFMEU has acted in an improper manner. 1.2 … the CFMEU ignored the requests of Mr Livingston, Mr Gough and Mr Libke to leave the premises. 1.3 … the CFMEU behaving improperly by the squirting of water at Mr Neylan 1.4 … the verbal abuse by the CFMEU to Mr Neylan when the CFMEU said to Mr Neylan that the CFMEU would "fucking bury the phone" down Mr Neylan's throat. 1.5 … the CFMEU, through Mr Hanna, raising the middle finger in an obscene gesture when asked by Mr Libke to give him the permission notice that he had from Hindmarsh. 1.6 … the CFMEU using the swipe card in such a manner that Hindmarsh did not have a proper record of who was in the construction site and who was not. At [71]: If I could have imposed a greater penalty for these contraventions, I most certainly would have done so.
The past history of contraventions of the FW Act by the CFMEU is astounding. It is no understatement to describe the CFMEU as the most recidivist corporate offender in Australian history….			

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Therefore, in assessing the gravamen of each contravention by the CFMEU, it must be borne in mind that the previous history of the CFMEU does put these contraventions into a category that defies easy comparison…. *The present case falls into this pattern of repeated disregard for the law. …the misconduct forms "part of a deliberate and calculated strategy by the CFMEU, to engage in whatever action, and make whatever threats, it wishes, without regard to the law, and then, once a prosecution is brought, to seek to negotiate its way into a position in which the penalties for its actions can be tolerated as the price of doing its industrial business.* ***Vasta J., Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2017] FCA 1269 (27 October 2017)***			
27 October 2017	*Australian Building And Construction Commissioner V Construction, Forestry, Mining And Energy Union [2017]* FCA 1269 (27 October 2017)	Vasta J.	**Discussing the principles of sentencing, Vasta J said, at [76-81]:** In this matter, both specific and general deterrence is of the utmost importance. As I have noted, the approach of the CFMEU has been that the imposition of pecuniary penalties are nothing more than an occupational hazard. This Court has been asked to ensure that the industrial relations regime as created by Parliament is observed and complied with. The Parliament has given the Court only one weapon to ensure such compliance, and that is the ability to impose pecuniary penalties. In the main, this weapon has been of great value. If a Court has dealt with an employer who has contravened the FW Act in an appropriate manner, the use of the pecuniary penalty has deterred that employer from breaching the FW Act again. Very rarely has the FWO, or a union, had to bring a recalcitrant employer back to the Court for breaching the FW Act a second time. But this cannot be said of the CFMEU. The deterrent aspect of the pecuniary penalty system is not having the desired effect. The CFMEU has not changed its attitude in any meaningful way. The Court can only impose the maximum penalty in an attempt to fulfil its duty and deter the CFMEU from acting in the nefarious way in which it does. If I could have imposed a greater penalty for these contraventions, I most certainly would have done so.
If I could have imposed a greater penalty for these contraventions, I most certainly would have done so. *The Court can do no more with the tools available to it to ensure compliance with the industrial relations regime. If the community at large are not satisfied with the actions of the Court to ensure compliance with the FW Act, then the next step is a matter for the Parliament.* *…* *Having regard to the history of offending by the CFMEU to which I have referred, it may be doubted that any penalty falling within the available range for contraventions of the kind presently under consideration would be "sufficiently high to deter repetition". Any penalty will be paid and treated as a necessary cost of enforcing the CFMEU's demand that all workers on certain classes of construction sites be union members.* ***Vasta J., Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2017] FCA 1269 (27 October 2017)***			
27 October 2017	*Australian Building And Construction Commissioner V Moses & Ors (No.2)* [2017] FCCA 2738 (9 November 2017)	Jarrett J.	At [1]: … the First Respondent threatened to take action against 7 workers engaged at that Project with intent to coerce those workers to engage in industrial activity, namely to become a member of the Third Respondent [the CFMEU], by telling the workings: *a. if they did not join the CFMEU then:* *- no work would occur by the workers that day; and* *- they would be removed from the site;* *b. it was a union site and if they wanted to work on the site they had to join the CFMEU;* *c. the workers had five minutes to think about it; and* *d. after some discussion, that he would give the workers 48 hours to decide, and that he would return on Friday 13 September, 2013.*
The CFMEU is a large and well-established organisation. It has an extensive litigation history, both as an applicant seeking to enforce compliance with industrial laws, often successfully, and more notoriously as a respondent or defendant to proceedings in which the CFMEU and its officers have been found to have contravened industrial laws. It is highly active in the industrial sphere. Specific deterrence is relevant to the penalty to be imposed upon the CFMEU in this case. *… the CFMEU has a prior history in respect of threats being made to employees about joining that union. Counsel identified at least seven and perhaps eight previous matters in which conduct similar to that in this case was dealt with by a court…* ***Jarret J., Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2017] FCA 1269 (27 October 2017)***			
1 December 2017	*Construction, Forestry, Mining And Energy Union And Australian Building And Construction Commission (Freedom Of Information)* [2017]	T. Pilgrim, Australian Information Commissioner	At [101]: In relation to whether special circumstances exist, in its varied reasons for decision the ABCC said: ... special circumstances do exist. Regrettably, there is a long history of the ABCC and FWBC personnel being subjected to abuse and threats from various persons and organisations, including representatives of the CFMEU. For example, in 2014 police were called to protect agency

DATE	CASE	JUDGE(S)	OBSERVATION
	AICmr 125 (1 December 2017)		officials who were investigating possible breaches of workplace laws at the large Barangaroo construction site in NSW, after being subjected to abuse by various people, including a CFMEU official. ... These instances of abuse are but only a small example of the various kinds of threats and episodes of intimidation which have been directed at ABCC staff over a number of years. As a result, the ABCC takes a number of precautions in an effort to protect its employees. In a more recent example of the threats and intimidation that ABCC employees are subject, we refer to the comments of the Secretary of the Victoria/Tasmania Construction and General Division of the CFMEU on 20 June 2017 at a public rally in Melbourne. The Secretary made the following comments: *'Then we've got these ABCC inspectors.* *Let me give a dire warning to the ABCC inspectors: be careful what you do ... You know what we're going to do? We're going to expose them all.* *We will lobby their neighbourhoods. We will tell them who lives in that house. What he does for a living, or she.* *We will go to their local footy club. We will go to the local shopping centre. They will not be able to show their faces anywhere. Their kids will be ashamed of who their parents are when we expose all these ABCC inspectors.* *They're in for a big surprise.* The Prime Minister of Australia described these comments as follows: *... extraordinary threats where he threatened to track down inspectors of the Australian Building and Construction Commission, follow them to their homes, threaten them in the street, threaten their children. He was threatening violence to government official in an extraordinary way...* The Minister for Employment said in relation to the comments: *I can advise the Senate that, given the extremely serious nature of the threats made yesterday ... I have referred these threats to the Australian Federal Police and Victoria Police.* The Information Commissioner went on to say, at [105]: In this case, I agree with the ABCC that special circumstances exist in this case such that disclosure would be unreasonable. Absent any denials from the applicant, I reasonably accept the ABCC's contentions that ABCC personnel have been subjected to abuse and threats from various persons and organisations, including representatives of the applicant.
'Regrettably, there is a long history of the ABCC and FWBC personnel being subjected to abuse and threats from various persons and organisations, including representatives of the CFMEU' - A statement made by the ABCC during submissions, and agreed with by the Information Commissioner. ***T. Pilgrim, Australian Information Commissioner, in Construction, Forestry, Mining and Energy Union and Australian Building and Construction Commission (Freedom of information) [2017] AICmr 125 (1 December 2017)***			
9 November 2017	*Australian Building And Construction Commissioner V Moses & Ors (No.2) [2017] FCCA 2738 (9 November 2017)*	Jarret J.	At [32-35]: Nonetheless, the applicant submits that there is a recognised need for protection of industrial freedom of association. I accept that the coercion contravention is particularly significant. In Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2) [2016] FCA 436, Mortimer J commented at [136]: ○ *Coercion and intimidation as methods of achieving desired ends can occur in many walks of life, not only in industrial activity. Such conduct involves abuse, and misuse, of power. Coercive and intimidatory conduct is part of an 'end justifies the means' way of thinking which is frequently inconsistent and incompatible with the rule of law. The Court by its civil penalty orders should make it clear that coercion and intimidation contrary to law will not be tolerated and will be the subject of sanctions. Significant penalties are required to give some public confidence that those who administer the law will not condone coercive and intimidatory conduct, in this case in the sphere of industrial activity, but also more generally.* These remarks underscore the seriousness of the coercion contravention in respect of which I must assess a penalty in this case. The respondents have shown no contrition for their actions. No apology has been issued by any of the respondents, nor has there been any acknowledgement of any wrongdoing. Whilst this is not an aggravating circumstance that might increase the penalty, it precludes any mitigation of penalty on that basis. It is also relevant to the role of specific deterrence in this particular case.

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The respondents have shown no contrition for their actions. No apology has been issued by any of the respondents, nor has there been any acknowledgement of any wrongdoing. Whilst this is not an aggravating circumstance that might increase the penalty, it precludes any mitigation of penalty on that basis. It is also relevant to the role of specific deterrence in this particular case. ***Jarret J., Australian Building and Construction Commissioner v Moses & Ors (No.2) [2017] FCCA 2738 (9 November 2017)***			
	VICT V MUA & CFMEU; VICT V Hilakari [2017] VSC 762 (12 December 2017)	McDonald J.	At [14]: 'In the period post 1 December 2017, the CFMEU via its national office, Victorian Tasmania Branch, and Mr John Setka, have been active on social media, posting pejorative remarks, or endorsing pejorative remarks made by others, which denounce the Plaintiff's parent company, International Container Terminal Services Inc ('ICTSI'), as a 'scourge that was not needed in Australia', denouncing the Plaintiff's Director of Human Resources and Industrial Relations, Mr Michael O'Leary, as a rat, and accusing him of betraying Australian workers and Australian jobs, calling for worker solidarity against the Plaintiff, and calling upon people to attend the Webb dock 'peaceful assembly', and the rally at Webb dock on 8 December 2017 at 10.00 am.' At [43]: The inference is compelling that since 1 December 2017 the MUA has outsourced to other unions coordinated by the Victorian Trades Hall Council the task of maintaining an illegal picket.
The inference is compelling that since 1 December 2017 the MUA has outsourced to other unions [the CFMEU] … the task of maintaining an illegal picket.' ***VICT v MUA & CFMEU; VICT v Hilakari [2017] VSC 762 (12 December 2017)***			
19 December 2017	*Fair Work Commission V Stephen Long [2017] FWC 6867 (19 December 2017)*	Commissioner Saunders.	At [13]: '…I am satisfied that the CFMEU and its officials were engaged in a concerted campaign at Lend Lease sites in Adelaide in deliberate defiance of the requirements in the FW Act regarding the exercise of rights of entry. I agree that the conduct of the respondents on 30 and 31 October 2013 should be assessed in that light. It means that the contraventions are to be regarded as deliberate and premeditated. This is a significant matter of aggravation.'
'…I am satisfied that the CFMEU and its officials were engaged in a concerted campaign at Lend Lease sites in Adelaide in deliberate defiance of the requirements in the FW Act regarding the exercise of rights of entry ***Fair Work Commission v Stephen Long [2017] FWC 6867 (19 December 2017)***			
21 December 2017	*Australian Building And Construction Commissioner V Construction, Forestry, Mining And Energy Union (The Footscray Station Case) [2017] FCA 1555 (21 December 2017)*	Tracey J.	At [45], referring to previous commentary (*ABCC v CFMEU* [2017] FCAFC 113, at [98]): 'The CFMEU is a large, asset-rich and well-resourced industrial organisation. It has regularly been involved in litigation in which it has been found to have contravened provisions of the Act. The Commissioner has provided the Court with a table which records contraventions by the CFMEU of industrial legislation on more than 100 occasions over the 15 years from 1999 to 2014. These contraventions have led to the imposition of pecuniary penalties totalling millions of dollars. The CFMEU may, therefore, be taken to be well aware of the constraints imposed upon it and its members by such provisions. Despite this the contraventions have continued. In 2016 the table discloses that the courts found, or the CFMEU admitted, 56 separate contraventions by the CFMEU of industrial laws, which contraventions occurred between February 2011 and June 2014. Of those, 36 were contraventions of s 500. Thirty-one of the 56 separate contraventions occurred prior to 27 February 2014. Eighteen of the 36 contraventions of s 500 were committed prior to that date.' At [49 – 58]: The present case thus falls into a pattern of repeated disregard for the law. To adopt the language of Mortimer J in *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2016] FCA 436 at [142]: the ongoing misconduct evidences a willingness "by the CFMEU to engage in whatever action, and make whatever threats, it wishes, without regard to the law, and then, once a prosecution is brought, to seek to negotiate its way into a position in which the [penalties] for its actions can be tolerated as the price of doing its industrial business." … The officials who constitute the councils of the CFMEU and those holding full-time office in the organisation are, or should be, aware, of the many decisions in which the union has been found liable for contraventions of the Act and related legislation. They are also aware, or should be aware, of the many judicial pronouncements about the gravity and unacceptability of this ongoing misconduct. They are, or should be, aware that millions of dollars of union funds, which could otherwise be utilised for the benefit of the members, have had to be expended in paying penalties for these persistent contraventions. They are, or should be, aware of the considerable advantages and responsibilities conferred on registered organisations by the Act and the *Fair Work (Registered Organisations) Act 2009* (Cth). These include the right of officials … who held entry permits granted under the Act, to enter construction sites.

DATE	CASE	JUDGE(S)	OBSERVATION
			Despite this knowledge the contravening conduct has continued. At no point has the CFMEU expressed any remorse for the misconduct of its officials. Nor has it undertaken to take any steps to ensure that there will be no repetition of the contravening conduct. At no point has it expressed any contrition for the misconduct which has led to liability findings. In these circumstances an irresistible inference arises that the CFMEU, despite being well aware of the obligations which fall on it and its officials under the Act, has made a considered decision to continue to pursue its industrial ends by resort to conduct proscribed by the Act. Any resultant penalties are to be regarded as a "cost of doing business". The penalties, available under the Act, and imposed by the Court, have not been sufficient to persuade the union and its officials to obey the law. Such was the position when the contravening conduct, presently under consideration, occurred. Nothing has since changed. … Mr Myles has a deplorable personal history of offending. A table, which accompanied the Commissioner's submissions, disclosed that, prior to the events the subject of this proceeding, Mr Myles had been found to have been involved in two contraventions of s 500 occurring in 2010 … Mr Myles's conduct which contravened s 500 involved addressing workers, which delayed their return to work, and swearing at and insulting the site foreman … Mr Myles was also found to have committed, in 2010, a breach of s 44 of the *Building and Construction Industry Improvement Act 2005* (Cth) by organising employees not to commence work with the intent to coerce or apply undue pressure on an employer to accept a building enterprise agreement with the CFMEU. … Judicial determinations delivered in 2015 and 2016, record that Mr Myles committed nine contraventions of industrial laws in 2012 and 2013. … Mortimer J imposed penalties on Mr Myles following his admission that, in May 2013, he contravened s 348 three times by organising a vehicle blockade and by threatening to prevent a concrete pour with the intent to coerce an employer to put a CFMEU delegate on a particular project… Penalties were also imposed by Jessup J on Mr Myles after he again admitted that he contravened s 348 twice in August 2013 by threatening to disrupt normal work and by organising employees not to work with intent to coerce an employer to engage a CFMEU delegate on a site… Logan J imposed penalties on Mr Myles for four admitted contraventions of s 44 of the BCII Act in March 2012 whereby he parked vehicles to impede access onto a site and intimidated employees with intent to coerce and apply undue pressure on an employer to agree to make a building enterprise agreement. … Mr MacDonald has previously been penalised for contraventions of s 38 of the BCII Act. … Justice Gordon found that Mr MacDonald had contravened that section by being involved in unlawful strike action. In April 2014, Messrs Myles and MacDonald were involved in a picket line which was maintained by the CFMEU in contempt of court, although they were not named respondents to the Director's application… This conduct occurred after the commission of the contravening conduct in this proceeding. At [60]: Their contravening conduct on 27 February 2014 was arrogant and dismissive of warnings given to them that they were acting unlawfully. They abused their rights as permit holders and they impeded the concrete pouring which was planned for that afternoon. While espousing an interest in ensuring safety on the site, they deliberately placed themselves in dangerous positions in order to obstruct the movement of trucks carrying concrete to the site. At [62]: The CFMEU did not express any contrition for the offending conduct of its officials. Nor did it seek to assure the Court that it would put in place remedial measures to ensure that there would be no repetition of such misconduct.
The CFMEU did not express any contrition for the offending conduct of its officials. Nor did it seek to assure the Court that it would put in place remedial measures to ensure that there would be no repetition of such misconduct. ***Construction, Forestry, Mining and Energy Union (The Footscray Station Case) [2017] FCA 1555 (21 December 2017)***			
6 February 2018	*Australian Building And Construction Commissioner V O'connor (No 3) [2018] FCA 43 (6 February 2018)*	Besanko J.	At [131]: The threat of going to war was a threat of unlawful, illegitimate, unconscionable action, that is, to take a form of industrial action and would be reasonably understood as such… … I infer an intent to coerce on the part of Mr O'Connor, particularly as Mr Bleasdale had made it clear that he was not going to accede to the demands made.
The threat of going to war was a threat of unlawful, illegitimate, unconscionable action, that is, to take a form of industrial action and would be reasonably understood as such… ***Australian Building and Construction Commissioner v O'Connor (No 3) [2018] FCA 43 (6 February 2018)***			
7 Febru	*Australian Building And Construction*	Flick J	At [112]: It is accepted that … Mr Taylor [a CFMEU Official] intended to convey that there was no option other than to sign the enterprise agreement being

DATE	CASE	JUDGE(S)	OBSERVATION
ary 2018	*Commissioner V Construction, Forestry, Mining And Energy Union [2018] FCA 42 (7 February 2018)*		proposed by the CFMEU or risk the business operations of the formwork company being ruined or "*smashed*". It was intended … as a threat. At [150]: The account of these events as given by Mr O'Sullivan is accepted. In particular, it is accepted that Mr Kera said that "[*a*]*fter pulling something like that normally we would smash your jobs*" … At [203 – 204]: The more generally expressed conclusion that is reached is that the CFMEU persons achieved their objective … being to disrupt scheduled work as much as possible and to exert as much pressure as possible on BKH to agree to the **CFMEU**'s proposed enterprise agreement. It was not part of the CFMEU objective when entering the premises to genuinely address concerns as to safety. This conclusion … is only further supported by the fact that after 17 March 2015, when agreement had been reached with the CFMEU there was no later inspection of the Site by the CFMEU**.** The expressed concerns as to safety which had warranted such peremptory and immediate access being granted to the premises on the morning of 11 March 2015 had, inexplicably, been resolved without the need for any further inspection being carried out to see if any of the expressed concerns had been satisfactorily addressed. Had the expressed concerns as to safety been genuinely held it would only have been expected that a subsequent inspection would have been carried out. There was no such inspection. And there was no subsequent inspection, it is concluded, because by 17 March 2015 the CFMEU had achieved the objective it had from the outset; it had secured agreement to the payment of a site allowance. At [226 – 227]: …It is accepted that Mr Garvey deliberately kicked the handrail until it fell. … In respect to this expressed concern as to safety, it is concluded that there was no reasonable basis upon which any opinion could be formed that the handrail was unsafe. Any safety issue that did arise was caused by the conduct of Mr Garvey [the CFMEUs Health and Safety Representative].'
…It is accepted that Mr Garvey deliberately kicked the handrail until it fell. … In respect to this expressed concern as to safety, it is concluded that there was no reasonable basis upon which any opinion could be formed that the handrail was unsafe. Any safety issue that did arise was caused by the conduct of Mr Garvey [the CFMEU Safety Inspector]. ***Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2018] FCA 42 (7 February 2018)***			
14 Febru ary 2018	*Australian Building And Construction Commissioner V Construction, Forestry, Mining And Energy Union [2018] HCA 3 (14 February 2018)*	Kiefel CJ; Gageler, Keane, Nettle And Gordon JJ.	At [85 - 86]: Between 1999 and 2015, the CFMEU was shown to have committed 106 separate contraventions of industrial laws and, in 2015 alone, there were ten decisions of the Federal Court which involved findings of contraventions by the CFMEU in relation to conduct occurring between 2012 and 2014. The Victoria/Tasmania Branch of the Construction and General Division of the CFMEU had been involved in 23 separate proceedings involving proved contraventions dating back to 2004, and, in 2015, there had been four such proceedings relating to conduct between 2012 and 2014. Additionally, there had been four separate sets of proceedings in which orders had been made against Myles, the first in 2013 and the most recent in 2015. Three of those proceedings related to conduct that occurred in Queensland and the most recent concerned conduct that occurred in Victoria. … the evidence demonstrated a continuing attitude of disobedience to the law manifested by conduct having common features of abuse of industrial power and the use of whatever means were considered likely to achieve outcomes favourable to the CFMEU. … her Honour found that Myles and the CFMEU had engaged in the contravening conduct in the belief that any penalties that were imposed would be satisfied from funds which the CFMEU received from members … Her Honour concluded that there was a conscious and deliberate strategy on the part of the CFMEU and its officers to engage in disruptive, threatening and abusive behaviour towards employers, without regard to the lawfulness of their actions, in the belief that they were impervious to the effects of prosecution and penalties.
Between 1999 and 2015, the CFMEU was shown to have committed 106 separate contraventions of industrial laws and, in 2015 alone, there were ten decisions of the Federal Court which involved findings of contraventions by the CFMEU in relation to conduct occurring between 2012 and 2014. ***Australian Building and Construction Commissioner v Construction, Forestry, Mining And Energy Union [2018] HCA 3 (14 February 2018)***			
26 Febru ary 2018	*Australian Building And Construction Commissioner V Construction, Forestry, Mining And Energy Union*	Tracey J	At [29]: Mr Farrugia's impugned acts on both 17 and 31 March 2014 were directed to enforcing a "no ticket no start" regime on the site. They involved the making of threats and false representations to the two workers. They were told, in substance, that, unless they paid their arrears in subscriptions within a relatively short period, they would not be allowed to work on the site. When

DATE	CASE	JUDGE(S)	OBSERVATION
	(The Quest Apartments Case) (No 2) [2018] FCA 163 (26 February 2018)		one of the workers failed to comply with the demand he was told by Mr Farrugia that he could not work on the site and was directed to leave. … These were not isolated incidents. The Commissioner provided a list of cases in which the **CFMEU** and its officials had been found to have contravened the Act and its predecessors by insisting on financial union membership as a necessary pre-condition to working on construction sites. The contraventions in 14 of these cases had occurred over a 15 year period prior to the events presently under consideration. Liability and penalties in 13 of those cases had been judicially determined prior to 2014. At any point during that period the **CFMEU** could have, but did not, direct its officials not to enforce "no ticket no start" regimes, monitor the conduct of its officials in order to ensure that the directive was complied with and so advise the Court. It has not done so in the present proceeding. The irresistible inference is that the **CFMEU,** acting through its site-based officials, persists in insisting on union membership as a condition for working on construction sites which it regards as "union sites". At the very least it condones the actions of its onsite officials… At [33]: Resort to coercion and other proscribed conduct in order to undermine this objective of the Act must be deprecated. Coercion is, as Dowsett and Rares JJ observed in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 53… [is] "a particularly serious form of industrial (mis)conduct." The unsatisfactory nature of such conduct was emphasised by Mortimer J in *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2016] FCA 436 at [136], her Honour their said: *'Coercion and intimidation as methods of achieving desired ends can occur in many walks of life, not only in industrial activity. Such conduct involves abuse, and misuse, of power. Coercive and intimidatory conduct is part of an 'end justifies the means' way of thinking which is frequently inconsistent and incompatible with the rule of law. The Court by its civil penalty orders should make it clear that coercion and intimidation contrary to law will not be tolerated and will be the subject of sanctions. Significant penalties are required to give some public confidence that those who administer the law will not condone coercive and intimidatory conduct, in this case in the sphere of industrial activity, but also more generally.'* At [40]: More recently… Dowsett and Rares JJ made general observations about the need for industrial laws to be obeyed and the penal consequences of breaches: *'In a liberal democracy, it is assumed that citizens, corporations and other organisations will comply with the law. Such compliance is not a matter of choice. The community does not accept that a citizen, corporation or other organisation may choose to break the law and simply pay the penalty. The courts certainly do not accept that proposition. Such acceptance would pose a serious threat to the rule of law upon which our society is based. It would undermine the authority of Parliament and could lead to the public perception that the judiciary is involved in a process which is pointless, if not ridiculous.* *The Parliament's purpose in legislating to provide that particular proscribed conduct will attract a civil penalty was to deter persons, including but not limited to trade unions or corporations, from engaging or continuing to engage in such conduct. A civil penalty would lose its utility if the person on whom it was imposed simply treated it as a cost of continuing to carry on with the very conduct that had just been penalised.'* At [45]: … The present contraventions were not isolated. They have given rise to an addition to what is a very long list of contraventions of the Act and its predecessors which arose from attempts to enforce closed union sites. At all relevant times it was within the power of the CFMEU to take corrective action. It has chosen not to do so. Rather it has chosen to pursue its industrial ends in disregard of the Act and to pay the penal consequences of the unrestrained acts of its officials. At [49]: Neither the CFMEU nor Mr Farrugia exhibited any contrition for their misconduct; nor, as has already been noted, did they acknowledge error and undertake to avoid any repetition.

At all relevant times it was within the power of the CFMEU to take corrective action. It has chosen not to do so. Rather it has chosen to pursue its industrial ends in disregard of the Act and to pay the penal consequences of the unrestrained acts of its officials.
Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Quest Apartments Case) (No 2) [2018] FCA 163 (26 February 2018)

DATE	CASE	JUDGE(S)	OBSERVATION
8 March 2018	*Australian Building And Construction Commissioner V Auimatagi & Anor (No.2) [2018] FCCA 524 (8 March 2018)*	Emmet J.	At [16]: It is common ground that the second respondent has been found to have contravened some 136 pieces of industrial law legislation between 2000 and 2018. That is more than 7 contraventions a year on average… [This demonstrates] a complete disregard for obeying the law in the area of industrial relations. As [other judges]: *'100. In a liberal democracy, it is assumed that citizens, corporations and other organisations will comply with the law. Such compliance is not a matter of choice. The community does not accept that a citizen, corporation or other organisation may choose to break the law and simply pay the penalty. The courts certainly do not accept that proposition. Such acceptance would pose a serious threat to the rule of law upon which our society is based. It would undermine the authority of Parliament and could lead to the public perception that the judiciary is involved in a process which is pointless, if not ridiculous.* *… 102. The CFMEU can be seen to have chosen to pay penalties in preference to obeying the law'* At [18 – 19]: The actions of the first respondent were deliberate and intentional and designed to apply significant pressure on John Holland to change its Two Longs Safety Policy at a time and in a manner determined by the respondents, rather than by way of lawful avenues available. … The first respondent's actions were found to have been engaged in with the intent to coerce John Holland not to exercise its workplace right. The first respondent's actions were found to be "*nothing short of unconscionable*". At [34]: The attitude of the second respondent has been found to be "*deplorable*" in relation to its legal obligations and the statutory processes that govern the relations between unions and employers in Australia (see *Director of the Fair Work Building Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 407 at [106]). As Tracey J stated in that case at [106]: "*this ongoing willingness to engage in contravening conduct must weigh heavily when the need for both specific and general deterrence is brought to account*." … continued at [107]: "*The **CFMEU** is not to be punished again for its earlier misconduct. It is, however, to be punished more severely than it would have been had it had no adverse record or been responsible for only a few isolated incidents over a period of many years. Its continued willingness to engage in contravening conduct supports the view that earlier penalties, some of them severe, have not had a deterrent effect: cf* Veen v R (No 2) *[1988] HCA 14; (1988) 164 CLR 465 at 477-8."* 35. Further, in *Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1213 at [63], Tracey J stated as follows: "*The longer such recidivism continues the more likely it is that this consideration will carry greater weight than the principle that the maximum available penalty must be reserved for the worst possible offending.*" 36. In *Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1173, Jessup J observed at [29]: "*...The pattern of contravention which emerges from material such as this has been the subject of comment by the court on a number of occasions. The schedule paints, one would have to say, a depressing picture. But it is more than that. I am bound to say that the conduct referred to in the schedule bespeaks an organisational culture in which contraventions of the law have become normalised.*" 37. In *Australian Building and Construction Commissioner v Dig It Landscapes & Ors* [2017] FCCA 2128, Vasta J stated as follows at [55]-[56]: "*It beggars belief that the **CFMEU** believe that they can act in a manner where they are the ones who dictate who can or cannot work on a construction site.* *The Parliament is the only entity that sets the law in this country and the Parliament is directly responsible to the people of this country. It seems that the C**FMEU** feel that they can usurp Parliament and that they can set the law in this country. There is no place for such an attitude in Australian society.*" 38. In *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2) (The Red & Blue Case)* [2015] FCA 1462, Jessup J said at [7]-[8]: "*This record, and the judicial observations to which I have referred, suggests that the penalties heretofore imposed upon the Union have been inadequate to provide the specific deterrence which is so conspicuously required in this area of the law. Counsel for the respondents submitted that, however bad may be*

DATE	CASE	JUDGE(S)	OBSERVATION
			the Union's prior record of contravention, it would be wrong for the court to impose a penalty which was disproportionate to the gravity of the particular contravention under consideration. I accept that a principle in these terms has found expression in the past, but never, so far as I am aware, in a situation in which the previous record is as egregious as that of the Union in the circumstances presently facing the court. *In giving weight to the Union's record of contravention, as I shall do, the court is not using the present occasion to supplement the penalties imposed for different conduct on previous occasions. Rather, the court is giving appropriate recognition to what is, on any view, an important purpose of the regime of penalties for which the legislation provides: deterrence. Of all purposes, that is the most strongly linked to the public interest in compliance with the law. If contravention of a law is visited with penal outcomes which are demonstrably inadequate to achieve the purpose of the law, it might as well not be a law at all. It is in this sense, in my view, that the principle of proportionality is amply reflected in the imposition of a penalty which takes due account of the importance of specific deterrence."*
It is common ground that the second respondent has been found to have contravened some 136 pieces of industrial law legislation between 2000 and 2018. That is more than 7 contraventions a year on average… [This demonstrates] a complete disregard for obeying the law in the area of industrial relations. In a liberal democracy, it is assumed that citizens, corporations and other organisations will comply with the law. Such compliance is not a matter of choice. The community does not accept that a citizen, corporation or other organisation may choose to break the law and simply pay the penalty. The courts certainly do not accept that proposition... The CFMEU can be seen to have chosen to pay penalties in preference to obeying the law. ***Australian Building and Construction Commissioner v Auimatagi & Anor (NO.2) [2018] FCCA 524 (8 March 2018)***			
9 March 2018	*Australian Building And Construction Commissioner V Ingham (No 2) (The Enoggera Barracks Case) [2018] FCA 263 (9 March 2018)*	Rangiah J	At [75]: [In the past] the Full Court noted that the **CFMEU**'s past contraventions revealed a "lamentable, if not disgraceful, record of deliberately flouting industrial laws". The Court further noted at paragraph [159]: 'The most significant point to emerge from the schedules of past cases is that the **CFMEU** is a recidivist when it comes to contravening industrial laws. No penalties that have been imposed in the past have appeared to reduce its willingness to breach the law. It continues to thumb its nose at the industrial laws, including the BCII. The Court should nevertheless not shy away from imposing stern sentences with a view to attempting to deter the **CFMEU** from engaging in, or encouraging others to engage in, further unlawful industrial action. Considerations of deterrence, both specific and general, undoubtedly loom large in fixing the appropriate penalties.' At [80]: The applicant placed before the Court schedules setting out details of breaches of industrial legislation by the CFMEU and certain individual respondents… The schedules show 135 occasions on which Courts imposed civil penalties on the CFMEU between 1999 and 2017. Approximately 90 of these occasions concern conduct occurring prior to the contraventions in this case. Many of the cases involved organising or threatening to organise unlawful industrial action or coercive conduct.
The applicant placed before the Court schedules setting out details of breaches of industrial legislation by the CFMEU and certain individual respondents… The schedules show 135 occasions on which Courts imposed civil penalties on the CFMEU between 1999 and 2017. ***Australian Building And Construction Commissioner v Ingham (NO 2) (The Enoggera Barracks Case) [2018] FCA 263 (9 March 2018)***			
30 April 2018	*Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Nine Brisbane Sites Case) (No 3) [2018] FCA 564 (24 April 2018)*	Collier J	At [73]: I accept the submission of the ABCC that the history of prior contraventions on the part of the CFMMEU demonstrates a strong need for specific deterrence. As Jessup J observed in The Mitcham Rail Case at [29], the record of contraventions on the part of the CFMMEU bespeaks an organisational culture in the union in which contraventions of the law have become normalised. It is questionable whether the imposition of pecuniary penalties in previous cases has affected the conduct of the CFMMEU.
'The record of contraventions on the part of the CFMMEU bespeaks an organisational culture in the union in which contraventions of the law have become normalised.' ***Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Nine Brisbane Sites Case) (No 3) [2018] FCA 564 (24 April 2018)***			

DATE	CASE	JUDGE(S)	OBSERVATION
25 May 2018	*Construction, Forestry, Maritime, Mining and Energy Union-Construction and General Division, WA Divisional Branch (RE2018/116)*	Binet DP	At [28]: A majority of the Federal Court … found that the conduct of Mr Molina, Mr Buchan, Mr McDonald, Mr McCullough, Mr Harris and Mr Joshua was: *".. a clear instance of them taking the law into their own hands and flouting the protection from coercion that s 348 is intended to provide. On the agreed facts, the respondents deliberately engaged in coercion, knowing that their conduct was unlawful.* *They intended to bully each of the 22 businesses working at the site until their demands were met, as exemplified by the attitude of Mr Buchan when he said, "we don't care where it comes from". The conduct was premediated and orchestrated, as it is plain from the organisation required to ensure that 100 people were present to conduct the blockage."* At [38]: It is a matter of public record that the CFMMEU has a long and extensive history of contravention of industrial and other relevant laws. According to the ABCC, within the last five years, the CFMMEU and its officials have had penalties totalling $1,301,480 imposed for contraventions of industrial laws (including penalties for contempt of court) in Western Australia alone 26
… the CFMMEU has a long and extensive history of contravention of industrial and other relevant laws… [W]ithin the last five years, the CFMMEU and its officials have had penalties totalling $1,301,480 imposed for contraventions of industrial laws … in Western Australia alone. ***Construction, Forestry, Maritime, Mining and Energy Union-Construction and General Division, WA Divisional Branch (RE2018/116)***			
1 June 2018	*Australian Competition and Consumer Commission v The Construction, Forestry, Mining and Energy Union (No 4) [2018] FCA 684*	Middleton J	At 63: There is no doubt that the CFMEU has displayed a general disregard for the law. The ACCC referred to a number of instances demonstrating this fact. The CFMEU has been found to have contravened other Commonwealth legislation such as the Fair Work Act 2009 (Cth) on a very large number of occasions. At 66: The CFMEU has displayed no relevant contrition or cooperation which has in this proceeding been relied upon by the CFMEU. The conduct of the CFMEU referred to later in these reasons relevant to costs was not relied upon the CFMEU (or the ACCC) as relevant to my consideration of the penalty to impose.
'The CFMEU has displayed no relevant contrition or cooperation…' ***Australian Competition and Consumer Commission v The Construction, Forestry, Mining and Energy Union (No 4) [2018] FCA 684***			
22 June 2018	*Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union ("Cardigan St Case") [2018] FCA 957*	Bromberg J	At [76]: [T]he CFMMEU has regularly been involved in litigation in which it has been found to have contravened provisions of the FW Act or the BCCII Act which attract pecuniary penalties. [The ABCC's evidentiary] table shows that the CFMMEU has been ordered to pay significant penalties in relation to those contraventions, including very close to (or at) the maximum available penalty. The table has 135 entries dating back to 2000. At [83]: … [T]he CFMMEU has an extensive history of prior contraventions of industrial laws. That history, even if limited to the building and construction industry in Victoria, is so egregious as to enable an inference to be drawn that the senior leadership of the CFMMEU responsible for governing those activities, either expressly or impliedly condones the breach by its officers or employees of industrial laws as a necessary incident of the industrial activities those persons are expected to perform. That inference is able to be drawn from the combination of the extensive and consistent record of prior contraventions and the absence of evidence that the senior leadership has taken any steps to address either the prior history of contraventions or the instant contraventions. At [86]: An organisation faced with a litany of contraventions over an extended period of time, which repeatedly incurs not only significant financial penalties but also pointed judicial criticism, would necessarily put in place measures to change the cultural or normative conduct and the contravening behaviours of its officers and employees. Unless, of course, the senior leadership of the organisation, or the relevant branch or division thereof, condones such behaviour. I am satisfied that that is the position of the senior leadership responsible for the CFMMEU's representation of building and construction employees in Victoria. At [90]:As explained already, the available inference is that the CFMMEU, at least in relation to its building and construction related activities in Victoria, condones noncompliance with industrial laws by its officers and employees. Furthermore, no contrition or remorse has been demonstrated.
… [T]he CFMMEU has an extensive history of prior contraventions of industrial laws. That history … is so egregious as to enable an inference to be drawn that the senior leadership of the CFMMEU … condones the breach by its officers or employees of industrial laws as a necessary incident of the industrial activities those persons are expected to perform. ***Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union ("Cardigan St Case") [2018] FCA 957***			

DATE	CASE	JUDGE(S)	OBSERVATION
25 June 2018	*Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Non-Indemnification Personal Payment Case) [2018] FCAFC 97*	Allsop CJ, White and O'Callaghan JJ.	At [23]: The prior contraventions are notable for their number and frequency. The conduct is varied but contains contraventions similar to these, including intended coercion, blockades and obstruction of access to sites. The conduct has a theme of deliberateness in contravention of the Act. It is difficult, if not impossible, not to come to the conclusion that the Union is prepared, when it suits it, to contravene the Act and, as here, seek to coerce employers to comply with its demands. Without evidence to the contrary, it is a natural inference that those officials of the Union, such as Mr Myles here, tolerate and facilitate this attitude and approach of contraventions of the Act at the choice and will of the Union. At [29]: The first contravention, the blockade in the morning, was extremely serious. It involved the loss of a large quantity of concrete; it caused loss and damage of a significant amount to those conducting the works; it was a form of coercion on a building site of the utmost weight and force; it was deliberate and continued over a period of time; it was known to be a serious contravention of the Act; and, it was done with an apparent sense of impunity by Mr Myles as a Union official directing it. We take into account the utilitarian value of the (late) admissions and agreement on facts. The Union is a large organisation with significant financial resources. Given the prior history of the Union, its apparent willingness to contravene the Act in a serious way to impose its will, and the need for deterrence of an organisation of its size, we would impose a penalty of $46,000 on the Union for the first contravention. At [30]: We take into account… [The Union officials] conduct in directing the blockade and the attitude displayed to the management of the site reflected a disregard for the Act, for the interests of those on the site, for the public and private interests in the work being done, and a disregard for anyone's interests other than the Union's demand for a site representative. We would impose a [personal] penalty of $8,500 … for the first contravention. At [40]: The Union acts through its officials…[therefore] the penalty against the individual must be a burden or have a sting to be a deterrent. The history of contravening by the Union, all undertaken through its officials, reflects a willingness to contravene the Act and to pay the penalties as a cost of its approach to industrial relations. Mr Myles has a history of significant contravention. A personal payment order of the kind to which we will come will bring home to him, and others in his position, that he, and they cannot act in contravention of the Act knowing that Union funds will always bale him, or them, out.
'It is difficult, if not impossible, not to come to the conclusion that the Union is prepared, when it suits it, to contravene the Act and, as here, seek to coerce employers to comply with its demands.' ***Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Non-Indemnification Personal Payment Case) [2018] FCAFC 97***			
14 August 2018	*Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (the Bendigo Theatre Case) (No 2) [2018] FCA 1211*	Tracey J	At [57]: 'Mr Tadic had acted rudely, aggressively and abusively towards one of the site managers. This verbal attack took place in the presence of others and continued for some minutes. The catalyst was a lawful and reasonable query regarding his presence on the site.'. At [73 – 74]: Despite this repeated and ongoing misconduct on the part of its officials, the CFMEU has failed to acknowledge any wrong doing or to take corrective steps to ensure that such conduct ceases. These failures lead to the irresistible inference that the officials are acting in accordance with the instructions or policies adopted by those responsible for the governance of the organisation. The union has adopted the attitude that it will not comply with any legislative constraints, placed on its operations, with which it disagrees. Such an approach is an anathema in a democratic society. Given this long history of recidivism [by the CFMEU] there will, inevitably, be cases in which it will be appropriate, in the exercise of its discretion, for the Court to impose the maximum available penalty on the CFMEU because of the extensive litany of blatant contraventions... Unless the Court adopts such an approach when necessary to mark its dissatisfaction within this serial misconduct, the objectives of the civil penalties regime will not be realised.'
'Given this long history of recidivism [by the CFMEU] there will, inevitably, be cases in which it will be appropriate, in the exercise of its discretion, for the Court to impose the maximum available penalty on the CFMEU because of the extensive litany of blatant contraventions... ' ***Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (the Bendigo Theatre Case) (No 2) [2018] FCA 1211***			
	Australian Building and Construction Commissioner v Construction, Forestry,		At [100 – 101]: The personal abuse directed at Mr Reynolds by Mr Hassett occurred as Mr Hassett was leaving the site having accomplished all that he had set out to achieve. It amounted to unnecessary and gratuitous abuse. There is no evidence as to Mr Reynolds' reaction to what was said. I

DATE	CASE	JUDGE(S)	OBSERVATION
	Maritime, Mining and Energy Union (The Parliament Square Case) (No 2) [2018] FCA 1201		infer, however, that Mr Hassett's demeanour, as he spoke, was aggressive rather than jocular. His utterance occurred at a time at which, he said, Mr Reynolds was seeking to prevent him from signing out on the visitor register. Mr Hassett did, in fact, sign out that afternoon at about 1.02 pm. Mr Hassett was exercising an important statutory right. The abuse was personal. It was also wholly unnecessary. I consider that Mr Hassett's conduct, in this instance, breached the standards of conduct that would be expected of a permit holder by reasonable persons who had relevant knowledge of the duties and responsibilities attaching to such an office. Whilst this may not be one of the more egregious acts of impropriety it, nonetheless, constituted a contravention of s 500 of the Act.
'The personal abuse directed at Mr Reynolds by Mr Hassett occurred as Mr Hassett was leaving the site having accomplished all that he had set out to achieve. It amounted to unnecessary and gratuitous abuse… the abuse was personal. It was also wholly unnecessary' ***Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Parliament Square Case) (No 2) [2018] FCA 1201.***			
14 August 2018.	*Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (the Broadway on Anne Case)* [2018] FCAFC126	Tracey, Logan and Bromwich JJ.	At [2]: 'In contravention of s 50 of the FW Act, … Mr Hanna, who in the exercise or attempted exercise of [a right of entry under the FWA] … acted in an improper manner by: (a) entering the Project without having given a notice of entry under s 487 of the FW Act; (b) remaining on the premises despite requests to leave; (c) when asked if he had a right of entry permit, responding by raising his hand with his middle finger extended and saying that he did not need one; (d) squirting water at a person validly engaged to work on the Project, which struck the person's face, shirt and mobile phone; (e) stating, "Take that phone away or I'll fucking bury it down your throat, you ask me if you want to take a picture of me, you ask me"; and (f) using an employee's swipe card to swipe out a number of employees engaged on the Project, the effect of which was that the occupier of the premises did not have a record of which employees had left the premises and which had not. At [23]: The contravening conduct has continued unabated to a point where there is an irresistible inference that the CFMEU has determined that its officials will not comply with the requirements of the FW Act with which it disagrees. If this results in civil penalties being imposed they will be paid and treated as a cost of the union pursuing its industrial ends. The union simply regards itself as free to disobey the law. At [26 – 27]: The absence of contrition does not justify the imposition of a higher penalty than might otherwise be appropriate. It is, however, relevant, in considering the extent of the CFMEU's recidivism. These considerations combine, in my view, to emphasise the objective seriousness of the CFMEU's conduct, acting through its officials. They bespeak deliberate abuse of the CFMEU's privileged position as a registered organisation in the Federal industrial relations system…' At [34 – 36]: Shortly thereafter and while Mr Hanna was still on the basement level, Mr Gough approached him. Mr Gough said to him: "You are trespassing. Why don't we go upstairs and talk about it?" Mr Hanna replied to the effect that he had come to meet with his members. Mr Gough then said: "What are you doing here? You are here illegally. Why don't you go through the right channels?" Mr Hanna replied: "I can do what I like." Mr Thomas Neylon, who was Hindmarsh's contracts manager for the project, then approached Mr Hanna with Mr Liddington. Mr Liddington again said to Mr Hanna that he was to leave the site as he did not have permission to be there and that no entry permit had been sent to Hindmarsh. Mr Hanna's response was to the effect that he did not need to get permission to enter a building site to talk to the men with whom he had an enterprise bargaining agreement. During this discussion between Mr Liddington and Mr Hanna, Mr Neylon activated the video recorder function on his mobile phone. Mr Hanna, seeing this, then moved towards Mr Neylon. Mr Hanna, who had in his hand a plastic water bottle, squirted water from the plastic water bottle at Mr Neylon. This hit Mr Neylon in the face, wet his shirt and went over his mobile phone. Mr Hanna then moved to Mr Neylon and said: "Take that phone away or I'll fucking bury it down your throat. You ask me if you want to take a picture of me. You ask me."

DATE	CASE	JUDGE(S)	OBSERVATION
			Mr Hanna then spoke to some of the employees who were there in the basement level of the project. This conversation was not heard by any of the persons in authority for Hindmarsh. At about 12 noon, Mr Hanna and a number of the employees left the basement level of the project and made their way out of the premises. Mr Hanna used the swipe card of one of those employees to swipe out a number of the employees through the turnstiles at the exit of the premises. That had the effect of a number of employees leaving under the one swipe card. This meant that Hindmarsh did not have a record of which employees had left the premises and which employees had not. The employees were all similarly dressed. There is no evidence that any employee in a position of authority for Hindmarsh was in any way then able to check who it was had left the site and where they were. Of this the learned primary judge, permissibly and understandably, observed at [17] "The safety aspects of such an action should be quite obvious." At [64 - 65]: The learned primary judge made reference (at para 50) to the past history of contraventions of the FWA by the CFMEU. The submissions made to him on behalf of the Commissioner included a table of occasions over the past decade in which civil penalty sanctions had been imposed on the CFMEU. His Honour (ibid) described the approximately 120 occasions thus recorded as "astounding". He added: "It is no understatement to describe the CFMEU as the most recidivist corporate offender in Australian history." It is not clear to me what the evidentiary foundation for the latter observation was. A similar tabulation was annexed to the Commissioner' submissions on the appeal. A study of the table for the purpose of resentencing does though provoke concurrence with his Honour's description of the penal history as "astounding" but more than that. It is disgraceful and shameful. At [69]: To view the conduct of the CFMEU on 10 February 2015 in isolation from the past and to penalise on the basis that there have been worse cases is to fail to recognise that the conduct is but a further manifestation of a lengthy and repeated pattern of unrepentant, outlaw behaviour by the CFMEU. At [70]: All of the features of unrepentant, outlaw behaviour are present in Mr Hanna's conduct on 10 February 2015. The statement which he made to Mr Gough: "I can do what I like." is pregnant with these features, as is each other of his studied refusals to leave the site when requested. These refusals were reinforced by a contemptuous gesture (the 'single finger salute') and by what the learned primary judge rightly concluded was conduct which might equally have been charged under the criminal law as an assault (the squirting of water). At [71]: … Hanna's swiping out of workers from the premises under the one card was not just contemptuous of Hindmarsh's responsibility, as occupier, for entry to and egress from the premises. It was also subversive of the responsibilities under the Work Health and Safety Act 2011 (Qld) of Hindmarsh as the person in control of the premises and employer of some of the workers there and of the subcontractors who had employees there. … [T]he conduct was subversive of workplace health and safety responsibilities, responsibilities of the very kind with which, historically and legitimately, trade unions have been deeply concerned in the interests of workers. At [73]: the CFMEU, via Mr Hanna, had a choice on several occasions on 10 February 2015 at the premises to abide by s 500 of the FWA. Its deliberate choice was completely and pithily summed up in Mr Hanna's words: "I can do what I like." At [77]: Once the contraventions on the day, deplorable in themselves, are viewed in context, they are, in my view, of the worst possible kind. … Laws which may be ignored at will on the basis of a persistent, self-arrogated, alternative standard of behaviour are no laws at all, only empty aspirational statements. At [83 – 86]: The present case and those in the tabulation provoke, strongly, the thought that there is a persistence within the CFMEU of the former Australian Building Construction Employees' and Builders Labourers' Federation (the BLF). That thought is hardly novel. Systemic unlawful conduct with historic precedent in the activities of the BLF is one feature of the CFMEU remarked upon in the report of the Royal Commission into Trade Union Governance and Corruption, Volume 5, Chapter 8 (see paras 1 to 3). That the contravening conduct charged was that of a senior official and but another manifestation of a lengthy history of unlawful conduct revealed by the tabulation inferentially suggests that, in its internal governance, the CFMEU has been unable or unwilling to restrain aberrant behaviour within its Construction Division. When the BLF was a separate, federally registered industrial association, a past lengthy history of unlawful conduct led ultimately to its deregistration by

DATE	CASE	JUDGE(S)	OBSERVATION
			Parliament: Builders Labourers' Federation (Cancellation of Registration) Act 1986 (Cth).Amalgamation and the concentration of unlawful conduct in the Construction Division undoubtedly makes the subject of deregistration more complex but an organisation which manifests an inability by its internal governance to rein in aberrant behaviour cannot expect to remain registered in its existing form. As it is, deregistration is not the subject of the present proceeding but a recollection of history underscores why it is that deterrence and compliance with statutory obligations are so overwhelmingly important in the fixing of penalties in the present case. At [87]: … So recalcitrant is the contravening conduct charged having regard to the past history in the tabulation and such is the importance of deterrence and compelling conformity with the requirements of the FWA my view is that only the most condign penalisation of a cumulative maximum punishment is warranted in the circumstances of this case. I would impose that so as to bring home emphatically to the CFMEU that, in its internal governance, it must force systemic behavioural change upon its Construction Division. That penalisation is necessary but it can be viewed as a cruel necessity. The cruel element is that there is an opportunity cost in the payment of the total penalty in terms of other activities, beneficial to members, to which the union's funds might otherwise be deployed. It is to be hoped that the realisation of that promotes change in the internal governance of the CFMEU.
'[T]he conduct was subversive of workplace health and safety responsibilities, responsibilities of the very kind with which, historically and legitimately, trade unions have been deeply concerned in the interests of workers.' 'Amalgamation and the concentration of unlawful conduct in the Construction Division undoubtedly makes the subject of deregistration more complex but an organisation which manifests an inability by its internal governance to rein in aberrant behaviour cannot expect to remain registered in its existing form.' ***Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (the Broadway on Anne Case) [2018] FCAFC126***			
2 October 2018	*Australian Building and Construction Commissioner v Gava [2018] FCA 1480*	White J.	At [61-62]: However, neither Mr Gava nor the CFMMEU has made any expression of regret or contrition. Nor has the CFMMEU provided the Court with any evidence of steps it has taken with the view to ensuring that neither it nor its officials contravene s 503 again. I will refer again shortly to the CFMMEU's appalling record of contraventions of industrial legislation. I refer to it presently because of its significance to the attitude and culture of the CFMMEU. In this respect, I respectfully agree with the following remarks of Barker J in Australian Building and Construction Commissioner v Upton (The Gorgon Project Case) (No 2) [2018] FCA 897: [128] [I]t has to be said that the CFMEU, given its history of involvement in industrial disputation and prior contraventions, has to take responsibility for the conduct of its officials and surely, at one point or another, must begin to take positive steps to educate its officials not to contravene the law and as to proper standards of conduct. … [130] There is no evidence that any corrective action has been taken, either by Mr Upton or the CFMEU. As I say, it really is time where large and influential unions such as the CFMEU, like any other responsible entity in Australia that has been found responsible for contraventions of a regulatory system, acknowledge misconduct and take positive steps to correct it in the public interest. … At [71-72]: The CFMMEU's record of contraventions of industrial legislation is appalling. Since 2000, it has been found to have contravened industrial legislation on more than 140 separate occasions; in the period between 2008 and 2015, there were 23 separate proceedings brought against the CFMMEU for contraventions of Div 4 (ss 500-504) of Pt 3-4 of the FW Act or its predecessor, Div 7 of Pt 15 of the WR Act. Those proceedings involved 106 separate contraventions. There is one previous instance in which the CFMMEU has been found to have contravened s 768 of the WR Act, the predecessor provision to s 503 in the FW Act. In addition, the CFMMEU and its officials have previously been found to have contravened other provisions of the FW Act or the predecessor provisions of the WR Act proscribing misrepresentations on five occasions. These comprise four contraventions of s 349 of the FW Act and

DATE	CASE	JUDGE(S)	OBSERVATION
			two contraventions of s 790 of the WR Act (the predecessor to s 349 of the FW Act). On any view, this is a deplorable record of contraventions. It must be taken into account in assessing proportionate penalties in the present case.
'The CFMMEU's record of contraventions of industrial legislation is appalling. Since 2000, it has been found to have contravened industrial legislation on more than 140 separate occasions... … On any view, this is a deplorable record of contraventions' ***Australian Building and Construction Commissioner v Gava [2018] FCA 1480***			
7 December 2018	*Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining And Energy Union (No 2) [2018] FCA 1968 (7 December 2018)*	O'Callaghan J.	Citing the ABCC's submissions at [38]: Turning to Myles, no different considerations apply. Myles has a terribly long record, although not as inordinately long as that of the CFMMEU . Prior to the imposition of his most recent penalties (of $19,500), Myles was described as having a "deplorable personal history of offending". Prior contravening conduct of Myles is set out in a table at Attachment C to this outline, totalling in excess of $136,000 in penalties levied on Myles personally. Much of that misconduct involves similar contraventions and similar behaviour to that in issue in this case (coercive threats/conduct, counselling or procuring work stoppages and improper behaviour whilst exercising rights of entry). At [53]: As the Full Court said of Mr Myles in The Non-Indemnification Personal Payment Case at [30]): "His record of contraventions is not as inordinately long as that of the CFMMEU. Nevertheless, his contraventions have included serious matters of a blockade and obstruction of a site. We would take into account that the conduct for which he has last been penalised was in March 2015 ..."
'[The Union Official] has a terribly long record, although not as inordinately long as that of the CFMMEU.' ***Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining And Energy Union (No 2) [2018] FCA 1968 (7 December 2018)***			
19 December 2018.	*VICT v CFMMEU [2018] VSC 794 (19 December 2018)*	McDonald J.	At [21]: The CFMMEU has made no apology for its conduct... Had an apology been made and found to be genuine, this would have been a matter properly taken into account in reduction of penalty, at least where it could be seen to have rendered it unlikely that the conduct will be repeated in the future. At [43]: The conduct in contempt was engaged in by three senior officials of the MUA in deliberate defiance of the Court's order of 12 December 2017. Although the duration of the offending conduct was brief and out of the public eye, it nevertheless constituted a serious civil contempt. The conduct struck at the heart of the administration of justice. The MUA made a calculated decision that its industrial interests in its dispute with VICT would be well served by defying the orders of the Supreme Court of Victoria. … I infer that the MUA made a calculated decision that the risk of financial penalty for engaging in conduct in contempt of court was simply a cost of doing business.
'[The Union Officials conduct]' constituted a serious civil contempt. The conduct struck at the heart of the administration of justice. The MUA made a calculated decision that its industrial interests in its dispute with VICT would be well served by defying the orders of the Supreme Court of Victoria'. ***VICT v CFMMEU [2018] VSC 794 (19 December 2018)***			
6 June 2019	*ABCC v Hasset* [2019] FCA 855	O'Callaghan J	At [56]: In my view, the conduct of Mr Hassett on 5 June 2017 was a serious breach of both ss 499 and 500, despite counsel's attempts to minimise it by asking that it be viewed "in context" (including that for some time that day Mr Hassett was on the Site not causing trouble). It was serious because it was very dangerous, which Mr Hassett must have known, and it was serious because Mr Hassett gained entry to the site purportedly in respect of safety concerns – only to place the crane operator and others potentially in harm's way. And it was made all the more serious by the fact that when he was told to get off the crane, he refused. At [60]: The CFMMEU is, as the cases have said time and time again, a large organisation with significant financial resources which exhibits apparent

DATE	CASE	JUDGE(S)	OBSERVATION
			willingness to contravene the FW Act in a serious way to impose its will. In light of those factors, and of the need for deterrence of an organisation of its size, I will impose a penalty of $40,000 on the CFMMEU for each of the contraventions on 5 June 2017.
'[The union officials breach] was serious because it was very dangerous, which Mr Hassett must have known, and it was serious because Mr Hassett gained entry to the site purportedly in respect of safety concerns – only to place the crane operator and others potentially in harm's way.' ***ABCC v Hasset* [2019] FCA 855**			
21 June 2019	*Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Laverton North and Cheltenham Premises Case) (No 2)* [2019] FCA 973	Bromberg J	At [63]: '…the conduct was part of a deliberate and orchestrated campaign which had the express or tacit approval of more senior officials of the CFMMEU…' At [76]: 'The CFMMEU, and in particular the [Construction General] Divisional Branch, has an appallingly long history of prior contraventions of industrial laws…' At [77]: 'There is no evidence before me of the CFMMEU taking any compliance action to counsel, educate, or inform [the officials] in order to prevent the reoccurrence of contravening conduct by them in the future. Nor is there any evidence before me of any compliance regime ever put in place by the CFMMEU to address its long history of prior contraventions. As I said in the Cardigan Street Case at [85] "[t]he absence of any evidence of compliance systems within the CFMMEU is particularly alarming given the heavily critical comments of the CFMMEU made by this Court in many cases over recent years". As I also there said at [86] "[a]n organisation faced with a litany of contraventions over an extended period of time, which repeatedly incurs not only significant financial penalties but also pointed judicial criticism, would necessarily put in place measures to change the cultural or normative conduct of the contravening behaviours of its officers and employees" unless such behaviour was condoned by the senior leadership of the organisation. That inference, made in the Cardigan Street Case, is equally available here. All of that is demonstrative of a compelling need for specific deterrence.'
'…the conduct was part of a deliberate and orchestrated campaign which had the express or tacit approval of more senior officials of the CFMMEU…' 'The CFMMEU, and in particular the [Construction General] Divisional Branch, has an appallingly long history of prior contraventions of industrial laws…' ***Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Laverton North and Cheltenham Premises Case) (No 2)* [2019] FCA 973**			
21 June 2019	*Australian Building and Construction Commissioner v Powell (No 2)* [2019] FCA 972	Bromberg J	At [47]: The difficulty for Mr Powell is that he has an extensive history of prior contraventions of the law in relation to industrial activities in which he was involved. Those contraventions relate to conduct occurring in 2004, 2005, 2008, 2009, 2010 and 2014. There are 20 contraventions, including one contravention in 2008 involving Mr Powell exercising his statutory right of entry in an improper manner. In total, pecuniary penalties of $127,600 have been imposed upon Mr Powell for his contravening conduct.
'Mr Powell [a CFMEU Official] … has an extensive history of prior contraventions of the law in relation to industrial activities in which he was involved'. ***Australian Building and Construction Commissioner v Powell (No 2)* [2019] FCA 972**			