IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
EMPLOYMENT & INDUSTRIAL LIST

Not Restricted

S CI 2017 04871

VICTORIA INTERNATIONAL CONTAINER TERMINAL LTD (T/A VICT) — Plaintiff

v

CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION — Defendant

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JUDGE:	McDonald J
WHERE HELD:	Melbourne
DATE OF HEARING:	17 October 2018
DATE OF JUDGMENT:	19 December 2018
CASE MAY BE CITED AS:	VICT v CFMMEU
MEDIUM NEUTRAL CITATION:	[2018] VSC 794

CONTEMPT – Sentence – Contumacious conduct in deliberate defiance of court order – Whether level of contumacy and overall seriousness of conduct warrant criminal conviction for contempt – Relevance of prior convictions for contempt of Construction, Forestry, Mining and Energy Union – Relevance of prior imposition of civil penalties for contravention of Commonwealth industrial legislation – $125,000 fine imposed for civil contempt.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr S Wood QC with Mr J Snaden	Seyfarth Shaw
For the Defendant	Mr H Borenstein QC with Mr Y Bakri	Maurice Blackburn Lawyers

HIS HONOUR:

Introduction

1 By a generally indorsed writ filed on 1 December 2017, the plaintiff ('VICT') commenced a proceeding against the Maritime Union of Australia ('MUA') and the Construction, Forestry, Mining and Energy Union ('CFMEU'). That proceeding arose out of the continual presence between 27 November 2017 and 15 December 2017 of obstructive pickets at VICT's premises at 78 Webb Dock Drive, Port Melbourne ('Webb Dock site'). On 1 December 2017, the Court granted an injunction restraining the MUA from preventing access to the Webb Dock site ('1 December order'). The MUA made no submissions in opposition to the grant of the injunction; its only submissions were directed to the form of the order and, in particular, opposing a 100 metre exclusion zone in the vicinity of the site.

2 Despite the 1 December order, the picketing activities continued and, on 8 December 2017, VICT applied for further interlocutory orders. On 12 December 2017, the Court granted a further interlocutory injunction against the MUA. Paragraph 2(i) of the Court's order was in the following terms:

> Until the trial of this proceeding or further order, the First Defendant, whether by itself, its officials, employees or agents (**MUA officers**), howsoever described, be restrained from:
>
> (i) being present within 100 metres of any access point to the site identified in the map attached as Annexure A and known as the Victoria International Container Terminal, with the street address of 78 Webb Dock Drive, Port Melbourne, in the state of Victoria (**Safe Space**), save and except that an MUA officer may be present in the Safe Space to the extent that such presence is necessary for the purpose of:
>
> 1. undertaking work that that person has been engaged to perform by or on behalf of the plaintiff;
>
> 2. entering the site, where that entry is authorised by law;
>
> 3. using a public road for reasons unconnected with the site; or
>
> 4. compliance with these orders;
>
> …

3 On 14 December 2017, three officials of the MUA (the Deputy National Secretary, Will Tracey; the National Presiding Officer and Branch Secretary of the Western Australian Branch, Christopher Cain; and the Branch Secretary of the Victorian Branch, Joseph Italia) attended within 100 metres of an access point to the Webb Dock site. By an amended summons and statement of charge dated 30 April 2018, VICT alleges that this conduct constituted contempt by reason of being in breach of paragraph 2(i) of the Court's order of 12 December 2017. On 17 September 2018, the defendant filed submissions in which it admitted the alleged contempt.

4 The conduct of the three MUA officials on 14 December 2017, which constituted a breach of the Court's orders, is not in dispute. On the afternoon of 14 December 2017, a picket was being maintained at the 'truck gate' at the Webb Dock site. The three MUA officials walked towards the picketers at approximately 3.15 pm. Each of the officials, in turn, addressed the picketers. Mr Tracey's address to the picketers included the following:

> And so we are here with the backing of the branch and the national union, and Chris is the National President as you all know but also the WA Branch Secretary, the Victorian Secretary and Deputy Secretary.
>
> We are here to ensure that those people who stood up inside that gate, to make sure the MUA maintains its presence in the waterfront in this country is allowed to go on. And so we've taken this dispute on and so we are where we are today. And we've seen this company go out and go for orders in the Supreme Court. And for one I'm hoping it won't be recorded when we go back there again they got injunctions on us both on the union but for the first time we've seen they've brought another union into it in the CFMEU and more importantly for the trade union movement in this State they've gone and sued the Secretary of Trades Hall. And so we have seen that is the first time in this country. We have seen a company come in and sue the head of the trade union movement as part of a campaign to try and destroy the MUA on the waterfront and our future in this industry. Because they have stood with us just as the community has stood with us to ensure that what's happening here can't take hold. And comrades we thank you for your support.
>
> But it's also important as a method of escalating this that the officials both at the Branch and the National level come down today and defy the Federal Court [sic] injunctions.
>
> [unintelligible] We've come down to address yas. We will see how the company escalates this and whether they get us in court for contempt and when that occurs come what may we'll address it then.

> Um so look I'll hand over to the Branch Secretary or the National President to say something but I wanna make the point, um, this union is not scared of having a fight. This union is not afraid to defend its rightful place on the waterfront in this country. This union is not afraid to take that agreement on when it expires but we can't do it without the support we receive from the broader trade union movement and the community who are here today and we thank you for that support.

5 Mr Cain's address to the picketers included the following:

> There is one union that works on the waterfront. One union! And that is the mighty fucking MUA and we won't, we don't care who fucking challenges us, whether it be governments, whether it be companies that wanna sue us, we're here today and we're here to fucking stay! [unintelligible] waterfront from all around here, they'll be bussed in, they'll be flown in, and we'll be here in solidarity with you guys and [unintelligible] from all around Australia from the waterfront farers, from port workers, from dockies, from wharfies, we needed your support you were here and we'll be defiant alongside yas with not a better bunch of team in you, shoulder to shoulder [break in video] these fucking maggots in here and that's what we're gonna be doing. Once again, stay strong, MUA here to stay, union solidarity and you're fantastic.

6 Thereafter, Mr Italia led the picketers in a series of chants:

> MUA! Here to stay.
>
> …
>
> I say community, you say justice.
>
> …
>
> I say O'Leary, you say dog.

7 It is not in dispute that the three MUA officials attended the picket for approximately 35 minutes.[1] At the time, there was no police presence at the picket. There were no members of the public in the vicinity of the picket, save for the picketers themselves.

8 The conduct comprising the defendant's contempt was engaged in by three officials of the MUA. The plaintiff's summons filed on 19 February 2018 sought orders against the MUA. However, by an amended summons filed 30 April 2018, the plaintiff seeks orders against the Construction, Forestry, Maritime, Mining and

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[1] Affidavit of John Siliato, 16 February 2018, Exhibit JS-1.

Energy Union ('CFMMEU'). In a judgment delivered on 20 April 2018,[2] I set out the background to the amalgamation of the MUA and the CFMEU. It is convenient to once again set out that part of the judgment:

> On 20 June 2017 the CFMEU, the MUA and the Textile, Clothing and Footwear Union of Australia ('TCFUA') jointly made an application under s 44(1) of the *Fair Work (Registered Organisations) Act 2009* (Cth) ('RO Act') for approval for submission to ballot a proposed amalgamation. The scheme of the amalgamation filed with the application proposed that upon the amalgamation taking effect the MUA and the TCFUA would be deregistered and the CFMEU would remain registered. On 31 August 2017 the submission of the proposed amalgamation to ballot members of the MUA and the TCFUA was approved. The members of each of the unions approved the amalgamation. On 6 March 2018 pursuant to s 73(2) of the RO Act, Gostencnik DP of the Fair Work Commission ('FWC') fixed 27 March 2018 as the day on which the amalgamation would take effect ('the Amalgamation Decision'). On 27 March 2018 Gostencnik DP signed instruments of deregistration in respect of the MUA and the TCFUA.
>
> Subsequent to the amalgamation the CFMEU continued to be a registered organisation. However, its name was changed. It is now the Construction, Forestry, Maritime, Mining and Energy Union ('CFMMEU'). The MUA has ceased to exist as a separate legal entity. However, there is now a Maritime Division within the CFMMEU.
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> Section 79 of the RO Act provides:
>
> > Where, immediately before the amalgamation day, a proceeding to which this Part applies was pending in a court or before the FWC:
> >
> > (a) the amalgamated organisation is, on that day, substituted for each de-registered organisation as a party; and
> >
> > (b) the proceeding is to continue as if the amalgamated organisation were, and had always been, the de-registered organisation.
>
> Section 80(1)(a) of the RO Act provides that s 79 must be given effect to despite anything in the *Fair Work Act 2009* (Cth) ('Fair Work Act'), or any other Commonwealth, State or Territory law.
>
> As at 27 March 2018 the MUA ceased to be a party to the current proceeding. The CFMEU continued to be a party to the proceeding albeit in the capacity of the amalgamated organisation, the CFMMEU.
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> As at 27 March 2018 the sole defendant in the current proceeding is the CFMMEU. Orders were made by the Court on 10 April 2018 to give effect to

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2 *Victoria International Container Terminal Ltd v Construction, Forestry, Maritime, Mining and Energy Union* [2018] VSC 181.

this position.[3]

Civil or criminal contempt?

9 Prima facie, breach of a court order requiring a person to do or abstain from doing an act is a civil contempt. The breach may be converted into a criminal contempt if it is contumacious. Judicial consideration of the meaning of 'contumacy' has focused attention on the intent of the alleged contemnor, including:

- 'deliberate defiance';[4]
- 'an attitude of defiance';[5]
- 'non-compliant behaviour [that is] deliberately defiant';[6]
- 'where there is a specific intention to disobey a court order or undertaking to the court, which evidences a conscious defiance of the court's authority';[7]
- 'a direct intention to disobey the order';[8]
- 'when a party not only does the act, knowing it is a prohibited act, but has no reasonable cause for so doing or reasonable belief that the act can be excused';[9]
- 'Contumacy is perverse obstinate resistance to authority; see the *Shorter Oxford Dictionary*. Deliberate determination to defy the court for reasons founded upon Union policy in which it is sought to establish immunity from the law would seem to be within this concept of contumacy';[10]
- A 'stubborn refusal to obey or comply with authority, especially disobedience

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3 Ibid [4]–[9].

4 *Witham v Holloway* (1995) 183 CLR 525, 530.

5 *Grocon v Construction, Forestry, Mining and Energy Union (No 2)* (2014) 241 IR 288, 331 [109] ('*Grocon*'), quoting *W v Police (SA)* (2009) 197 A Crim R 143, 148 [22].

6 *Grocon* (2014) 241 IR 288, 328 [102].

7 Ibid 330 [106], quoting *Mosman Municipal Council v Kelly (No 3)* (2009) 167 LGERA 91, 110 [72].

8 *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd* (2014) 47 VR 527, 565 [151] quoting *Seymour v Migration Agents Registration Authority* (2006) 215 FCR 168, 194 [104].

9 *In the Marriage of Kitchener* (1978) 20 ALR 535, 541, cited in *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd* (2014) 47 VR 527, 565 [148].

10 *Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd (No 2)* (1985) 9 FCR 194, 207.

to a court order or summons.'[11]

10 The conduct of the three MUA officials on 14 December 2017 was contumacious. It involved deliberate defiance of the Court's order. However, it does not necessarily follow that the defendant is guilty of criminal contempt. In order to record a criminal conviction, I need to be satisfied beyond reasonable doubt that the level of contumacy and the overall seriousness of the contempt was such as to warrant a classification of the contempt as criminal.[12] For the reasons which follow, I am not satisfied that the level of contumacy and overall seriousness of the contempt justifies the defendant being convicted for a criminal contempt. First, the relevant conduct was of brief duration, approximately 35 minutes. Second, while the conduct occurred in a public place, there were no other members of the public present, save for the individual picketers. While the conduct of the MUA officials involved public defiance of the Court's order,[13] it did not take place in the presence of members of the public. Third, no members of the public were inconvenienced as a result of the conduct. Fourth, no resources of the police or any other agency had to be deployed in response to the conduct.

Relevant considerations in fixing penalty

11 In *Grocon*,[14] Cavanough J adopted the following factors as relevant to fixing a penalty for contempt:[15]

- The nature and circumstances of the contempt;
- The effect of the contempt on the administration of justice;
- The contemnor's culpability;
- The need to deter the contemnor and others from repeating the contempt;
- The absence or presence of a prior conviction for contempt;

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11 Oxford English Dictionary.

12 *Grocon* (2014) 241 IR 288, 352 [176].

13 Cf *Bovis Lend Lease Pty Ltd v Construction, Forestry, Mining and Energy Union (No 2)* [2009] FCA 650 [35]−[37].

14 (2014) 241 IR 288.

15 *Grocon* (2014) 241 IR 288, 325–6 [91], quoting *Alfred v Construction, Forestry, Mining and Energy Union (No 2)* [2011] FCA 557 [14] (*'Alfred'*).

- The contemnor's financial means; and
- Whether the contemnor has exhibited general contrition and made a full and ample apology.

12 The first three matters set out above are interrelated and are conveniently dealt with together. The conduct in contempt was contumacious and had a significant adverse effect upon the administration of justice. The defendant is highly culpable for that conduct. The observations of Merkel J in *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* are apposite:[16]

> The rule of law in a democratic society does not permit any member of that society, no matter how powerful, to pick and choose the laws or court orders that are to be observed and those that are not. Maintenance of the rule of law in our society does not only require that parties are able to resort to courts to determine their disputes (*Patrick Stevedores Operation (No 2) Pty Ltd v Maritime Union of Australia* (1998) 153 ALR 641 at [1] per Hayne J), it also requires that parties comply with the orders made by the courts in determining those disputes.
>
> If the individual respondents believed that the orders of Whitlam J were wrongly made, then it was open to them to appeal, or apply for leave to appeal, against those orders. Instead, they breached them. The fact that the breaches are by union leaders holding important offices in a federation of national trade unions makes them more, rather than less, serious: see *Gallagher v Durack* (1983) 152 CLR 238 at 244.

13 The conduct of the three MUA officials, although of limited duration and of relatively low public profile, was incompatible with the due administration of justice. The conduct involved an arrogant disregard for the rule of law. There is a significant need to deter the defendant and others from repeating the conduct in contempt. Notwithstanding my finding that the conduct constitutes a civil contempt, it is nevertheless conduct which warrants the imposition of a significant penalty.

The presence or absence of a prior conviction for contempt

14 The conduct in contempt was engaged in by three officials of the MUA. The MUA ceased to exist as a separate legal entity on 27 March 2018 when it was subsumed within the CFMMEU. The three MUA officials who engaged in the relevant conduct

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16 [2000] FCA 629 [79]–[80].

on 14 December 2017 became officials of the CFMMEU, working in the maritime division of the amalgamated union. Immediately prior to 27 March 2018, the plaintiff's application for the MUA to be punished for contempt was pending. By virtue of s 79(a) of the *Fair Work (Registered Organisations) Act 2009* (Cth), the CFMMEU was substituted as defendant in the current proceeding in lieu of the MUA. Pursuant to s 79(b), the proceeding was continued post 27 March 2018 as if the CFMMEU was, and had always been, the deregistered organisation.

15 Mr Wood QC, who appeared for Mr Snaden for the plaintiff, submitted that, by reason of the amalgamation of the MUA and CFMEU, the Court should have regard to any prior findings of contempt in respect of both the MUA or the CFMEU. He also submitted that the Court could have regard to numerous proceedings[17] in which the MUA and the CFMEU have been held liable to pay civil penalties for breaches of the *Fair Work Act 2009* (Cth) and other Commonwealth industrial legislation.

16 Prior to the current proceeding, there has been only one finding of contempt against the MUA. In *Patrick Stevedores Operations Pty Ltd v Maritime Union of Australia*,[18] Beach J found that the MUA was in contempt of court by reason of its failure to promulgate an order made by the Court on 20 April 1998. Prior to the current proceeding, there have been seven findings of contempt against the CFMEU.[19]

17 I do not consider that it is legitimate to have regard to previous findings of contempt in respect of the CFMEU when considering the quantum of penalty to be imposed upon the defendant. The conduct on 14 December 2017 was engaged in by officials of the MUA in breach of a court order binding the MUA. It is only the MUA's prior conviction for contempt in May 1998 which is relevant to the question of specific deterrence. This approach is consistent with that adopted by Jagot J when determining the quantum of penalty to be paid by the CFMMEU for a contravention of s 417(1) of the *Fair Work Act 2009*, which had been committed by the MUA prior to

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17 See Plaintiff, 'VICT's submissions on contempt penalty', 1 October 2018, Appendix A.

18 (Unreported, Supreme Court of Victoria, Beach J, 14 May 1998).

19 See Plaintiff, 'VICT's submissions on contempt penalty', 1 October 2018, 24–33.

the amalgamation with the CFMEU taking effect.[20] The Fair Work Ombudsman had submitted that, by reason of the amalgamation of the MUA and the CFMEU, prior conduct of the CFMEU which had resulted in the imposition of civil penalties was relevant to the determination of the penalty arising out of the conduct of the MUA. Jagot J rejected this submission:

> I do not accept the FWO's submission. Section 79(b) requires that the CFMMEU (that is, the amalgamated organisation) be treated "as if it were, and always had been" the MUA (that is, the deregistered organisation) for the purpose of all pending proceedings. Given this statutory construct, I do not consider the conduct of the CFMEU or the fact that it is part of the CFMMEU can be relevant to specific deterrence in this case. To take into account the CFMEU's conduct or the fact that it is part of the CFMMEU as relevant to specific deterrence, in my view, would involve an error of law because s 79(b) creates a statutory fiction under which the proceeding is to continue, the fiction being that the amalgamated organisation, the CFMMEU, is and always has been the deregistered organisation, the MUA. It follows that it is the MUA alone, under this statutory fiction, which is to be the subject of any specific deterrence consideration. General deterrence, however, involves different considerations because its purpose is not to deter the contravener but all those who may contravene the statute, which necessarily includes organisations of the same kind as the CFMMEU. As such, I have given weight in the determination of penalty to specific deterrence of the respondent "as if it were, and had always been" the MUA and general deterrence of all participants in the industrial relations system, including organisations of the same kind as the CFMMEU. For convenience given the terms of s 79 I also continue to refer to the respondent as the MUA, although it is in fact now the CFMMEU.[21]

18 I was informed by Mr Wood that Jagot J's judgment is subject to an appeal. However, the reasoning set out above has not been challenged. I agree with her Honour's approach. Applying this approach to the current proceeding has the result that, in respect of the question of specific deterrence, previous findings of contempt against the CFMEU should not be taken into consideration.

19 The plaintiff submits that the Court should have regard to numerous proceedings in which civil penalties have been imposed against the MUA and the CFMEU for breaches of industrial legislation.

20 I reject this submission. There is a considerable body of authority, most recently that of Cavanough J in *Grocon*, in support of the proposition that the Court should treat

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20 *Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union* [2018] FCA 934.
21 Ibid [9].

as entirely irrelevant the existence of prior convictions other than for contempt.[22] I am bound to follow the judgment of Cavanough J unless I conclude that it is plainly wrong.[23] I do not consider Cavanough J's judgment to be attended by any doubt.

21 The CFMMEU has substantial financial resources. There is no issue that it has the capacity to pay a significant penalty. The CFMMEU has made no apology for its conduct. The absence of an apology is not an aggravating circumstance. 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.[24]

22 Although the defendant offered no apology, it did admit liability. As a result, the necessity for a contested hearing has been avoided. The defendant submits that its cooperation should be viewed as a significant mitigating factor.[25]

23 The defendant admitted liability in written submissions filed on 17 September 2018. The contempt proceeding was commenced by summons filed 19 February 2018. When liability was admitted, a contested hearing had been scheduled for early October 2018. The defendant's admission of liability came late. VICT filed an affidavit of John Siliato dated 16 February 2018 which exhibited video footage which, as noted in the defendant's written submissions, depicts the conduct in contempt. Accordingly, the defendant had evidence of the contempt (which it has now admitted) for some seven months prior to its admission of liability.

24 The progress of the plaintiff's contempt summons between February 2018 and September 2018 was characterised by a number of interlocutory disputes. In particular, on 10 August 2018, the defendant filed a summons seeking orders that the contempt proceeding be stayed as an abuse of process. This summons was rendered inutile by the defendant's subsequent admission of liability on 17 September 2018.

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22 *Grocon* (2014) 241 IR 288, 355–356 [187]; *R v Vasiliou (No 2)* [2012] VSC 242 [5], [8]; *Scott v Evia Pty Ltd* [2007] VSC 15 [179].

23 *W E Pickering Nominees Pty Ltd v Pickering* [2016] VSC 71 [91] and the cases cited therein.

24 *BHP Steel (AIS) Pty Ltd v Construction, Forestry, Mining and Energy Union* [2001] FCA 336 [10].

25 Defendant, 'Defendant's outline of submissions on penalty,' 12 October 2018 [44].

25 I accept that the defendant's admission of liability is a mitigating factor to which I have had regard. However, I do not consider that it is a significant mitigating factor. In *Director of Public Prosecutions (Vic) v Dalgliesh*,[26] the plurality stated:

> a plea of guilty may ameliorate the sentence otherwise appropriate to the gravity of the offence for reasons which may be utilitarian or because the plea reflects well on the offender's prospects of rehabilitation.[27]

No submission was advanced on behalf of the defendant that its admission of liability reflected well on its prospects of not engaging in conduct in contempt of court in the future. In the present case, the amelioration of the sentence which would otherwise apply is solely 'utilitarian'. Although made late, the admission of liability has avoided the necessity for a contested hearing. As against this, it is necessary to observe that the evidence comprising the video footage of the conduct engaged in by the three MUA officials on 14 December 2017 pointed very strongly to a conclusion that a contempt of the Court's orders had been committed.

26 The defendant submits that sentencing principles of proportionality, consistency and parsimony should be applied in determining an appropriate penalty. As to proportionality, the defendant submits, 'once proper regard is had to the actual conduct which constitutes the contempt, its gravity is low and a commensurately low penalty is appropriate.'[28]

27 I do not accept the defendant's characterisation of the conduct which constitutes the contempt. The conduct involved deliberate defiance of the Court's orders, incompatible with the rule of law. Although not warranting a conviction for criminal contempt, the conduct constituted a very serious civil contempt.

28 The defendant submits that:

> the Court is required to have regard to the principle of consistency which requires the Court to have regard to "current sentencing practice" or sentences given in prior

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26 (2017) 349 ALR 37 ('*Dalgliesh*').
27 Ibid 51 [67].
28 Defendant, 'Defendant's outline of submissions on penalty,' 12 October 2018 [48].

comparable cases.[29]

29 Section 5(2)(b) of the *Sentencing Act 1991* provides that, in sentencing an offender, a court must have regard to current sentencing practices. The *Sentencing Act* does not apply to the fixing of a penalty for contempt.[30] Nevertheless, I accept that I should approach the task of assessing penalty in a manner consistent with the approach of a court dealing with criminal conduct.[31]

30 In *Dalgliesh*, the High Court allowed an appeal from a judgment of the Victorian Court of Appeal, which had held that a sentence for incest was within the range indicated by current sentencing practice, notwithstanding the Court's conclusion that the range was so low as to be disproportionate to the objective gravity of the offending or the moral culpability of the offender.[32] In the High Court, the plurality cited with approval the following passage from *Elias v The Queen*:[33]

> As this Court has explained on more than one occasion, the factors bearing on the determination of sentence will frequently pull in different directions. It is the duty of the judge to balance often incommensurable factors and to arrive at a sentence that is just in all the circumstances.

31 The plurality then stated:

> The balancing of the factors listed in s 5(2) of the *Sentencing Act* in order to arrive at a sentence that is just in all the circumstances is a matter of instinctive synthesis, as explained in *Wong v R*[34] by Gaudron, Gummow and Hayne JJ:
>
> > "[T]he task of the sentencer is to take account of *all* of the relevant factors and to arrive at a single result which takes due account of them all. That is what is meant by saying that the task is to arrive at an "instinctive synthesis". This expression is used, not as might be supposed, to cloak the task of the sentencer in some mystery, but to make plain that the sentencer is called on to reach a single sentence which, in the case of an offence like the one now under discussion, balances many different and conflicting features."[35]

32 The plurality stated that s 5(2) of the *Sentencing Act*:

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29 Ibid [49] (citations omitted).
30 *Grocon* (2014) 241 IR 288, 320 [77].
31 Ibid.
32 *DPP (Vic) v Dalgliesh* [2016] VSCA 148, [64], [128].
33 *Dalgliesh* (2017) 349 ALR 37, 39 [4], quoting *Elias v The Queen* (2013) 248 CLR 483, 494 [27].
34 (2001) 207 CLR 584.
35 *Dalgliesh* (2017) 349 ALR 37, 40 [5] (emphasis in original), quoting *Wong v The Queen* (2001) 207 CLR 584, 611 [75].

> contemplates that current sentencing practices must be taken into account, but only as one factor, and not the controlling factor, in the fixing of a just sentence.[36]

33 In a joint judgment, Gageler and Gordon JJ stated:

> Section 5(2)(b) does not in terms provide that current sentencing practices set boundaries on what a court may reasonably impose as a sentence. The court must have regard to current sentencing practices, as well as every other matter listed in s 5(2). Current sentencing practices stand in the same position as every other matter listed in s 5(2). There is nothing to suggest that current sentencing practices should be treated in a conceptually different manner from any of the other listed matters. Of course, an express purpose of the *Sentencing Act* is to promote consistency of approach in the sentencing of offenders, to which the requirement in s 5(2)(b) may contribute. But that purpose, which reflects the well-recognised importance of consistency in the application of sentencing principles, provides no basis for treating s 5(2)(b) as though it were a statutory command to sentence within a "band" derived from current sentencing practices.
>
> Sentences are not binding precedents, but are merely "historical statements of what has happened in the past". As was said in *Hili v The Queen*, "[t]hat history does not establish that the range is the *correct* range, or that the upper or lower limits to the range are the *correct* upper and lower limits" (emphasis added). Examination of sentences imposed in comparable cases may inform the task of sentencing but such examination goes beyond its rationale when it is used to fix boundaries that, as a matter of practical reality, bind the court.
>
> The Court of Appeal's treatment of current sentencing practices as fixing quantitative boundaries within which future sentences were required to be passed evidently infected its consideration of manifest inadequacy in the present case. Having accepted that a significantly higher sentence was warranted in the circumstances of the case "but for" current sentencing practices, the Court of Appeal was not correct to end its task by treating those current sentencing practices as a complete answer to the question whether the sentence imposed was manifestly inadequate. It was required to determine that question, and to sentence, according to law. The earlier decisions of the Court of Appeal to the contrary are wrong and are not to be followed or applied.[37]

34 As set out above, Gageler and Gordon JJ stated that three Court of Appeal decisions were 'wrong and are not to be followed or applied.' The three judgments referred to by their Honours are: *Hasan v The Queen*,[38] *Ashdown v The Queen*[39] and *Harrison v The Queen*.[40] One of these decisions, *Ashdown*, was cited with approval in *Nash v The*

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36 *Dalgliesh* (2017) 349 ALR 37, 51 [68].
37 Ibid 54–55 [82]–[84] (citations omitted).
38 (2010) 31 VR 28, 38 [42]−[43].
39 (2011) 37 VR 341, 345 [4], 358 [48], 359 [55].
40 (2015) 49 VR 619, 635–636 [71], 638 [86].

Queen,[41] a judgment relied upon by the defendant in its written submissions on the question of consistency as a relevant consideration in the sentencing process.[42]

35 The High Court judgment in *Dalgliesh* is authority for the proposition that current sentencing practice is a factor to be taken into account in sentencing an offender. It is one factor and it is not a controlling factor. The consistency that is necessary in the administration of justice is consistency in the application of relevant legal principles, not numerical equivalence.[43]

36 The defendant points to a range of penalties which have been imposed upon the CFMEU in contempt proceedings:

Bovis Lend Lease Pty Ltd v Construction, Forestry, Mining and Energy Union (No 2):[44]	$75,000
Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union:[45]	$125,000
Alfred v Construction, Forestry, Mining and Energy Union (No 2):[46]	$150,000

37 The defendant submits that, in *Grocon*, Cavanough J fixed penalties against the CFMEU for seven serious contempts. In relation to the criminal contempts which his Honour described as 'flagrant, prolonged and deliberate defiance of the orders of this Court',[47] his Honour fixed penalties as follows:

- 28 August 2012: $250,000;
- 29 August 2012: $250,000;

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41 (2013) 40 VR 134, 135 [1], 136 [2].
42 Defendant, 'Defendant's outline of submissions on penalty,' 12 October 2018 [51].
43 See also *Barbaro v The Queen* (2014) 253 CLR 58, 74 [40].
44 [2009] FCA 650.
45 [2015] FCA 226.
46 [2011] FCA 557.
47 *Grocon* (2014) 241 IR 288, 345 [144].

- 30 August 2012: $250,000;
- 31 August 2012: $250,000; and
- 5 September 2012: $150,000.

These criminal contempts were found to have caused major disruption to members of the general public in the very heart of the central business district, attracted extensive media coverage, involved crowds of 1,000 persons or more and required a significant allocation of police resources to maintain public order.[48] In relation to the Cambar/Hollow Core civil contempts which occurred on 29 April 2013, his Honour fixed a penalty of $100,000.

38 I place little weight upon the quantum of the penalty in *Alfred*.[49] In *Alfred*, the parties had jointly submitted to Tracey J that an appropriate penalty for the contempt would fall within the range of $100,000 to $175,000. The figure of $150,000 selected by his Honour fell within that range. I agree with the conclusion of Cavanough J in *Grocon* that, since the judgment of the High Court in *Barbaro v The Queen*,[50] a significant question arises as to the weight which can be given to a penalty which falls within a range which has been suggested by the parties.[51]

39 As to the reliance placed by the defendant upon the $100,000 penalty imposed by Cavanough J for the Cambar/Hollow Core civil contempts, I have had regard to the following matters. First, as found by Cavanough J, the CFMEU's breaches of the Supreme Court's orders which gave rise to findings of contempt were constituted by omissions rather than positive acts.[52] Second, Cavanough J concluded that the conduct which constituted the contempt was not sufficiently tied to the bitter industrial dispute referred to in his reasons for liability.[53] Neither of these considerations apply in the present case. The breach was constituted by a positive act of three MUA officials. The conduct was directly linked to the industrial dispute between the MUA and VICT. These observations reinforce two points. First, the

48 Ibid 344–345 [142]-[143].
49 [2011] FCA 557.
50 (2014) 253 CLR 58, 72 [34].
51 *Grocon* (2014) 241 IR 288, 317 [70].
52 Ibid 347–348 [152].
53 Ibid 351–352 [176].

importance of undertaking the sentencing task by reference to the specific facts of a case at hand. Second, the importance of seeking to achieve consistency in the application of relevant legal principles, rather than numerical equivalence.

40 The defendant submits that the Court is required to have regard to the principle of parsimony, to impose the least severe penalty which achieves the purpose of punishment in the case before the Court. I have had regard to this principle in determining an appropriate penalty.

41 The defendant submits that the appropriate penalty to be imposed is in the range of $20,000 to $40,000. The plaintiff submits that 'anything less than $1,000,000 to $1,500,000 would fall short of what is necessary to vindicate the authority of the court.' The Court is not assisted by either of these submissions.

42 A penalty of $125,000 will be imposed upon the defendant. The defendant will also be ordered to pay the plaintiff's costs on an indemnity basis. I consider this to be an appropriate penalty for the following reasons.

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 this decision was made by the three officials, confident that the union would readily be able to meet the expense of any penalty imposed by the Court. 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.

44 In fixing a penalty of $125,000, I have taken into consideration the impact of the order which I propose to make requiring the defendant to pay the plaintiff's costs on an indemnity basis. It is the usual practice that a party found to be in contempt will

be ordered to pay the applicant's costs of the proceeding on an indemnity basis.[54] By bringing the proceeding, the plaintiff has vindicated the public interest in upholding the rule of law. I was informed by Mr Wood that the costs incurred by VICT in the contempt proceeding are approximately $500,000 to 600,000. I have not ordered the defendant to pay VICT's costs on a full indemnity basis. As such, VICT's entitlement to costs will be subject to scale. Consequently, it is unlikely that VICT will be able to fully recoup the legal expenses it has incurred.

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[54] *Deputy Commissioner of Taxation v Gashi* (2011) 85 ATR 262, 270–271 [20]; ibid 359 [209].