HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

**AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER**

Appellant

and

**KEVIN PATTINSON**

First Respondent

**CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION**

Second Respondent

# RESPONDENTS' SUBMISSIONS

## PART I: CERTIFICATION

1. The respondents certify that these submissions are in a form suitable for publication on the internet.

## PART II: ISSUES PRESENTED IN THE APPEAL

2. The sole ground of appeal contends that:
   a. the Full Court erred by "treating the maximum penalty as a yardstick", which requires that the highest penalty be reserved for contravening conduct of the most serious and grave kind requiring the maximum level of deterrence; and
   b. a consequence of the adoption of the erroneous "yardstick" approach is that the maximum penalty cannot be imposed for contravening conduct that is not of the most serious and grave kind, "even if that penalty is necessary in order to deter contravening conduct of the kind that has in fact occurred".
3. The Appellant's Submissions (**AS**) also raise the following two issues:
   a. whether s 546(1) of the *Fair Work Act 2009* (Cth) (**FW Act**) permits the imposition of the maximum penalty in respect of contravening conduct other than that of the most serious and grave kind, and by reason only of the past contravening conduct of the contravener; and

b. whether a principle of proportionality has any role to play with respect to the imposition of penalties for contraventions of civil penalty provisions.

4. The respondents submit that the Full Federal Court correctly recognised that proportionality is not uniquely or solely associated with a retributive approach to punishment, and that it inheres also in the reasonable or "appropriate" (the terminology in s 546(1) of the FW Act) use of the Court's power to impose a civil penalty. An identification of the purpose for which civil penalties are imposed (deterrence) does not require abandoning all aspects of the retributive approach. For example, a consideration of the contravener's degree of culpability (a central concern of retributive punishment theories, and a factor long recognised by the Federal Court as relevant to the imposition of civil penalties) requires regard to be had to matters including the contravener's prior contraventions. Further, while retributive theories require that the punishment 'fit the crime', the utilitarian origins of deterrence models of punishment also demand a proportionate response, in order to ensure a gradation in the level of deterrence provided for as between relatively minor and serious contraventions.

## PART III: SECTION 78B OF THE *JUDICIARY ACT 1903 (CTH)*

5. The respondents agree that notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

## PART IV: FACTS

6. The relevant facts are summarised by the plurality in the Full Court in *Pattinson v ABCC*[1] (**AJ**) at [11]-[14]. The respondents point to the following matters additional to those referred to at AS [5]-[6]. There was no evidence of loss or damage from the contraventions (*ABCC v Pattinson*[2] (**PJ**) [101]-[102]; AJ [19], [218]). The respondents' cooperation with the appellant and early admissions had utilitarian value (AJ [209], [219]). It was uncontroversial before the primary judge and on appeal that the contravening conduct was not at the upper end of the scale of seriousness if assessed independently of the second respondent's history (PJ [68]; AJ [19]). The respondents' contravening conduct was objectively less serious than a number of previous 'no ticket, no start' cases (AJ [217], [220]; cf PJ [35]).

[1] (2020) 299 IR 404 (**AJ**).
[2] (2019) 291 IR 296.

## PART V: ARGUMENT

### Precis of the respondents' submissions

7. The appellant's submission is based upon an incorrect reading of the Full Court's reasons. The Court explicitly recognised the primacy of the purpose of deterrence, and was cognisant of the need to avoid an unthinking transposition of the proportionality principle from criminal sentencing jurisprudence to the civil penalty sphere. Rather, the Court had regard to proportionality as an aspect of the requirement for reasonableness which inheres in the exercise of the statutory power to impose a civil penalty (AJ [45], [92], [100], [107], [111]).

8. The approach of the Federal Court in fixing appropriate penalties for contraventions of civil penalty provisions has for many decades (both before and after this Court's decision in the *Commonwealth v DFWBII* (the ***Agreed Penalties Case***)[3] had regard to considerations derived both from retributive theories of punishment (in particular, considerations such as the contravener's culpability and the amount of harm inflicted by the contravention) and deterrence theories of punishment. Nothing in the *Agreed Penalties Case* suggests that by recognising deterrence as the principal protective purpose of civil penalty regimes, this Court intended to either jettison the traditional approach to ascertaining the seriousness of the instant contravention or to deny the relevance of proportionality in fixing civil penalties.

9. In any event, it is not the case that the recognition of deterrence as the purpose of fixing civil penalties has the result that there is no place for the operation of a principle of proportionality. The utilitarian underpinnings of deterrence theories of punishment in fact demand that only proportionate penalties be imposed.

### The appellant's mischaracterisation of the Full Court's reasons

10. The AS proceed on two flawed premises, asserting that the Full Court:
    a. concluded that the maximum penalty was available only in cases where the objective features of the contravening conduct are in the worst category (AS [31], [44]-[47]); and
    b. erroneously embraced retributive reasoning derived from criminal sentencing, which caused it to adopt a 'notion' of proportionality that ought not to be applied the context of civil penalties (AS [16]-[20], [34]-[43], [54]-[58]).

[3] (2015) 258 CLR 482.

11. Contrary to the AS, the Full Court explicitly recognised that retributive approaches to punishment developed in criminal jurisprudence are not directly transferable to the civil penalty sphere (AJ [92], [100], [107], [109], [112], [190]-[191], [197]). Further, the Full Court correctly understood that the maximum penalty is to be reserved for circumstances, including the nature and gravity of the instant contravention, that warrant the highest possible level of deterrence reasonably appropriate: AJ [106].

12. It is necessary to keep in mind that the Full Court was seized of an appeal from a primary judge who had expressed the conclusion that a contravention could be of the "gravest, most serious kind", warranting the imposition of the maximum penalty, *by reason only* of the contravener's antecedents ( PJ [68], [82], [84]; AJ [19]). In particular, the Primary Judge held that the second respondent's history was relevant in assessing the objective gravity of the contraventions before the Court, and that this history converted the contraventions from ones that were otherwise not objectively of the most serious kind, into contraventions of the gravest, most serious kind, warranting imposition of the maximum penalty (PJ [68], [76]-[77], [82]-[84]).

13. It was against this background that the appellant submitted before the Full Court that once a contravener's antecedents reach a particular point or level, the maximum penalty ought to be imposed for any contravention regardless of the objective seriousness of the acts and circumstances constituting the contravention, with the result that the penalty imposed need bear no rational or reasonable relationship to the contravening conduct. It was this approach that the Full Court rejected (AJ [198], [201]).

14. The question before the Full Court was the proper use that could be made of a contravener's antecedents in determining an "appropriate" penalty under s 546(1) of the FW Act. The Full Court concluded that a contravener's antecedents were relevant in assessing the objective gravity of the contravening conduct (AJ [180], [194], [201]) and in revealing the need for specific deterrence (AJ [191]), but could not be accorded such overwhelming weight that there was no reasonable relationship between the instant contravention and the penalty imposed (AJ [100], [107]). It was in this context that the plurality found that the character and gravity of the contravening conduct was more serious in the hands of the second respondent, by reason of its history, and imposed different penalties on it than on the first respondent.[4]

[4] See AJ [219]–[222] (Allsop CJ, White and Wigney JJ). The primary penalty imposed on the second respondent was $38,000, about 60.3% of the maximum, which is to be contrasted with the primary penalty imposed on the

15. AS [18] asserts that the Full Court fell into error in drawing, by analogy, on the criminal sentencing proportionality principle. This error supposedly arose because the principle is "so tightly connected to the central role of retribution in the imposition of criminal sentences that it cannot be safely translated to the civil penalty context" (AS [18]-[20]). But it is clear that the Full Court appreciated that retributive theories ought not to be unthinkingly transposed to the arena of civil penalties (AJ [35], [39], [45], [92], [100], [107] - [109], [190]-[191], [197]). Further, the Full Court correctly recognised that the statutory task of imposing a penalty for the purpose of achieving both specific and general deterrence is to deter like contraventions (AJ [197]). Deterrence is, therefore, to be gauged by reference to the circumstances of the particular contravention, which requires assessment of all the circumstances, including the nature and gravity of the contravention. But the Court also emphasised that the assessment of gravity includes that which can properly be drawn from the contravener's antecedents (AJ [149], [193], [194], [201], [227(3)], [230], [231]).

16. In any event, the principle of proportionality in *Veen (No 2) v The Queen* (***Veen (No 2)***)[5] can be seen to possess two informing considerations which are not tied to retribution: (i) that deterrence is sought to be achieved in relation to offences of like kind; and (ii) that the maximum penalty assists to shape the penalty for that kind of contravening. As the plurality noted (at AJ [92]), these two features are "not wholly dependent upon the retributive source" and thus "survive the rejection of retribution as an object of the imposition of civil penalties".

17. Having traced the development of the principle of proportionality in the criminal law (AJ [46]-[91]), the plurality emphasised that retribution is not the only source of a principle "based on reasonableness and proportion of response in the infliction of a penal consequence for a statutory wrong". It also inheres in the notion of the reasonableness of an appropriate judicial response to the contravention in the imposition of a civil penalty in order to further the object of deterrence (AJ [104], [105], [107], [197]). In this context, their Honours (AJ [107]) referred to *NW Frozen Foods v ACCC* (***NW Frozen Foods***),[6] where the Court made reference to the need to secure a balance between the "insistence upon the deterrent quality of the penalty" and a requirement that the penalty not be greater than is necessary to achieve the object of deterrence.

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first respondent of $4,000, about 31.74% of the maximum. The respondents each received further penalties for the second contravention, of $2,000 and $500 respectively.

[5] (1988) 164 CLR 465.

[6] 71 FCR at 285 at [96] (***NW Frozen Foods***).

18. The Federal Court appreciated that while it would be erroneous to transpose the proportionality principle directly from the realm of criminal sentencing to the task of fixing civil penalties, the object of deterrence also demands that regard be had to both the seriousness of the instant contravention and the likelihood that a contravention *of that kind* will be repeated. Without an assessment of these matters, it would not be possible to make an informed decision in relation to what deterrence requires.

19. The plurality did not eschew having regard to the contravener's priors, emphasising (AJ [180]) that the "proportional response is not blind to wilful recidivism". Prior contraventions may be illuminative of an attitude of disobedience, the seriousness of the instant contravention and the degree of deterrence required to deter a repetition of a contravention of the kind before the Court (AJ [108], [149]).

20. AS [53] baldly asserts that there was no basis upon which the Full Court could have had "any confidence" that the penalties it imposed would achieve deterrence and that this suggests the penalties were not calibrated to achieve deterrence. But the reasons are replete with explicit acknowledgments of the primacy of the purpose of deterrence (AJ [91], [98], [100]-[112], [180]-[181], [191], [197]-[198], [222], [230]-[231]).

**The Agreed Penalties Case**

21. This Court decisively rejected the role of retribution as a rationale for the imposition of civil penalties in the *Agreed Penalties Case*.[7] The primacy of the purpose of deterrence was further emphasised in *ABCC v CFMEU* (the ***Penalty Indemnification Case***).[8] Subsequently, the Federal Court has, in a number of decisions, correctly recognised that the *Agreed Penalties Case* elucidated the primacy of the purpose of deterrence in fixing civil penalties. Nevertheless, the court has continued to use the traditional factors in *TPC v CSR Ltd*[9] as relevant to the 'overall assessment' of penalty.[10]

22. The continuing relevance of the factors in *TPC v CSR Ltd* (many of which find their origins in retributive theories of punishment) is not surprising. In recognising the primacy of the deterrent purpose, this Court was not doing anything more than rejecting retribution as a moral underpinning of regulatory regimes which penalise (by the imposition of civil

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[7] At [55].
[8] [2018] HCA 3; (2018) 262 CLR 157 at [42] (Kiefel CJ); at [55] (Gageler J); at [116] (Keane, Nettle and Gordon JJ) (***Penalty Indemnification Case***).
[9] [1990] FCA 762; [1991] ATPR ¶41-076 (***TPC v CSR Ltd***).
[10] See e.g. *CFMMEU v ABCC (The Non-Indemnification Personal Payment Case)* [2018] FCAFC 97; (2018) 264 FCR 68 at [19] and [20]-[21] (Allsop CJ, White and O'Callaghan JJ).

penalties) commercial and industrial conduct determined by the legislature to be unlawful. As this Court noted, civil penalties are part of a number of statutory regimes that possess the function of securing compliance with provisions designed to protect particular aspects of the public interest.[11] For that reason, it would be wrong to attempt to search for a moral dimension in the regulation of that conduct. But the Court said nothing in the *Agreed Penalties Case* about whether the factors traditionally treated as relevant considerations in fixing the appropriate quantum of a civil penalty (including those going to culpability of the contravener, and other such factors grounded in retributive analyses) remained relevant to fixing an appropriate civil penalty. Much less did this Court jettison the role of proportionality in the fixing of civil penalties.

**Conceptual underpinnings of retributive and deterrence theories**

23. The identification of the *rationale* for regulating commercial and industrial activity pursuant to a civil penalty regime is different from the *manner* in which the quantum of any particular penalty ought to be fixed. The appellant erroneously conflates two distinct questions: "why do we punish?" and "how much ought we to punish in the particular case?"[12] The appellant's (single) answer to the two questions treats retributive and deterrence models of punishment as mutually exclusive value systems.

24. The essential concern of the retributive approach is that the offender (or contravener) should receive their just desserts for violating the law.[13] Retributive theorists treat punishment as its own end, because there exists a moral imperative for the offender or contravener to receive their 'just dessert'. The punishment (or penalty) must therefore be proportionate to the wrongfulness or seriousness of the unlawful conduct.[14] Further, it is necessary to provide criteria upon which to assess the seriousness of the unlawful conduct.[15] Generally, seriousness is measured having regard to matters including the offender's culpability and the harm caused by the conduct.[16] Culpability turns on factors which bear on the offender's degree of blameworthiness, such as intention and motive. [17] A concept of proportionality

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[11] At [24].
[12] Karen Yeung, 'Quantifying Regulatory Penalties: Australian Competition Law Penalties and Perspective' (1999) 22 *Melbourne University Law Review* 440 at 444 (**Yeung (1999)**), cited in *ACCC v ABB Transmission and Distribution Limited* [2001] FCA 383 at [11] (Finkelstein J).
[13] Yeung (1999) at 451.
[14] Yeung (1999) at 474.
[15] Yeung (1999) at 451-452.
[16] Yeung (1999) at 452.
[17] Yeung (1999) at 452.

inheres in this retributive theory of punishment, on the basis that offenders deserve to be punished proportionately to the gravity or blameworthiness of their conduct.[18]

25. In contrast, the conceptual origins of deterrence lie in utilitarian theories which justify punishment by reference to its beneficial effects in preventing or reducing future unlawful conduct. The utilitarian approach to punishment can be traced back to Plato,[19] as developed by classical utilitarian theorists including Jeremy Bentham.[20] The utilitarian approach posits that potential offenders (or contraveners) are rationally self-interested actors who will not engage in unlawful conduct if the cost (the pain of the punishment) exceeds the benefits.[21] According to this analysis, a punishment is simply the price of violating the law.[22] The deterrence model seeks to achieve economic efficiency by pricing the expected cost of unlawful conduct at a level high enough to dissuade potential offenders.[23] While civil penalties imposed on corporations have increased over recent decades, [24] empirical studies have failed to provide reliable findings about the relative deterrent effects of various types and levels of punishment for offences or contraventions.[25]

26. While the retributive approach involves punishment as an end in itself, specific deterrence also relies upon the pain or sting of punishment, as a means of seeking to deter future contraventions.[26] The deterrence model is a largely amoral, consequentialist model. It is

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[18] Yeung (1999) at 451-452.

[19] Plato, *Protagoras* (The Library of Liberal Arts, 1956) at 22: "No-one punishes the evildoer under the notion, or for the reason, that he has done wrong - only the unreasonable fury of a best is so vindictive. But he who desires to inflict rational punishment does not punish for the sake of a past wrong which cannot be undone; he has regard to the future and is desirous that the man who is punished, and he who sees him punished, may be deterred from doing wrong again. He punishes for the sake of prevention, thereby clearly implying that virtue is capable of being taught."

[20] Tony Draper, 'An Introduction to Jeremy Bentham's Theory of Punishment' (2000) 5 *Journal of Bentham Studies* 1 at 12-13 (**Draper (2000)**); Yeung (1999) at 445-446.

[21] Yeung (1999) at 445 and 452-453.

[22] Yeung (1999) at 445-447.

[23] See Draper (2000) at 12-13; Yeung (1999) at 473. See also Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Report 95, March 2003) (**ALRC Report 95**) at [3.24].

[24] Caron Beaton-Wells and Julie Clarke, 'Corporate Financial Penalties for Cartel Conduct in Australia: A Critique' in Pamela Hanrahan and Ashley Black (eds), *Contemporary Issues in Corporate and Competition Law: Essays in Honour of Professor Robert Baxt AO* (LexisNexis Butterworths, 2019); Caron Beaton-Wells, 'Recent Corporate Penalty Assessments under the Trade Practices Act and the Rise of General Deterrence' (2006) 14 *Competition and Consumer Law Journal* 1 at 1-2, 20.

[25] See e.g. Mirko Bagaric and Theo Alexander, 'Marginal General Deterrence Does not Work' (2011) 35 *Criminal Law Journal* 269 at 273-277; Christine Parker and Vibeke Lehmann Nielsen, 'Deterrence and the Impact of Calculative Thinking on Business Compliance with Regulation' (2011) 56(2) *Antitrust Bulletin* 377; M Tonry, 'Learning from the Limitations of Deterrence Research' (2008) 37(1) *Crime and Justice* 279, at 279-280, 293-294, 297-298; Australian Law Reform Commission, *Sentencing of Federal Offenders* (Issues Paper 29, January 2005) at [8.22]; Yeung (1999) at 453; 'Developments in the Law: Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions' (1979) 92(6) *Harvard Law Review* 1227 at 1365 (***Harvard Law Review***).

[26] See the *Penalty Indemnification Case*, where Kiefel CJ said (at [44]) that a personal payment order "brings home to a person the reality of a pecuniary penalty which is critical to the attainment of the deterrent effect which is the

primarily forward looking, as its principal concern is with preventing future unlawful conduct.[27] To ignore proportionality in the context of deterrence would be to stray from its utilitarian rationale. Any punishment that exceeds that which is necessary to achieve deterrence is capricious, excessive and unjustifiable.[28] For example, Bentham argued that punishment should be graduated to be commensurate with the seriousness of the offence because, absent this proportionality, potential offenders would not be deterred from committing serious offences any more than minor ones.[29]

27. It is instructive to consider the way in which the retributive and deterrence approaches respond to the recidivist. Under the retributive model, a higher punishment is required for the recidivist because the offender's culpability increases with each new contravention.[30] In contrast, adherents to the deterrence model generally explain increasing punishment for recidivists as a utilitarian response to the risk of re-offending, as evidenced by the offender's apparent propensity or willingness to re-offend.[31]

**Problems associated with the appellant's approach**

28. The appellant asserts (AS [55], [58]) that proportionality is not applicable where the purpose of imposing a penalty is deterrence, because "there is no necessary correlation between what is necessary to deter a contravention of a particular kind, and the objective seriousness of that kind of contravention". Relatedly, the appellant posits that there is nothing wrong with imposing a higher penalty for contravention A than for the objectively more serious contravention B, provided that contravention A is otherwise likely to be repeated, whereas contravention B is not.

29. Taken to its logical conclusion, the appellant's approach can be used to justify the imposition of the maximum penalty on relatively anodyne contraventions. It also requires that the object of deterrence trump all other purposes and principles in the task of fixing civil penalties. As a result, under this approach, the contravener's recidivism is to be accorded "determinative significance" (AS [53]), and all other circumstances (including the

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very point of the penalty". In a similar vein, Keane, Nettle and Gordon JJ said that specific deterrence inheres in the "sting or burden", see at [113], [116].

[27] Yeung at 453, 456.

[28] See Mirko Bagaric, 'Proportionality in Sentencing: its Justification, Meaning and Role' (2000) 12(2) *Current Issues in Criminal Justice* 145 at 156-157 (**Bagaric (2000)**). Mirko Bagaric, 'The Punishment Should Fit the Crime—not the Prior Convictions of the Person that Committed the Crime' (2014) 51 *San Diego Law Review* 343 at 368 (**Bagaric (2014)**).

[29] Bagaric (2000) at 156.

[30] Yeung (1999) at 454-455.

[31] Bagaric (2014) at 345-347, 357-361, 366-372, 382-385; Andrew von Hirsch, 'Desert and Previous Convictions in Sentencing' (1981) 65 *Minnesota Law Review* 591, at 613-620.

factors which have long been considered and weighed in the balance by the courts when fixing civil penalties) are rendered of marginal or no significance.

30. The approach urged by the appellant also raises a real prospect of double punishment. The use of a contravener's antecedents as the reason for the imposition of the maximum penalty, regardless of the circumstances of the contravening conduct, necessarily involves re-penalising the contravener for past, already penalised contraventions. The rule against double punishment, whilst deriving from the criminal law,[32] has long been applied in a civil penalty context.[33] The plurality understood the problems associated with double punishment: if a grave contravention and a much less serious contravention are both said to require the imposition of the maximum penalty, it is difficult to conclude otherwise than that in respect of the latter contravention, the penalty is being imposed for both the present contravention and for the past contravention (AJ [201], [231]).

31. Abandoning any regard for proportionality also creates a situation where the maximum penalty will (after a certain point in time) be imposed on a recidivist for every contravention, no matter how minor. Indeed, the appellant appears to accept that from the point in time at which the second respondent had committed a certain number of contraventions (though neither the Primary Judge nor the appellant has identified when that Rubicon is said to have been crossed by the second respondent), henceforth the maximum penalty was bound to be applied for each new contravention regardless of its seriousness. The plurality exposed this problem (AJ [195]), saying that under the Primary Judge's approach, once a perceived threshold level of priors was reached, the maximum would be imposed for each and every contravention by a recidivist contravener. This would result, as their Honours explained (AJ [181]), in an interpretation of a statutory power to inflict a penal consequence untethered to the nature and seriousness of the contravention, such that the Court would no longer be penalising the instant contravention, but rather would be imposing penalties to bring about compliance generally, in effect treating the maximum penalty as always available against the recidivist for any contravention.

32. The object of deterrence would be undermined if relatively anodyne contraventions are treated in the same way as objectively grave ones. Absent any conception of proportionality

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[32] ***R v Hoar*** (1981) 148 CLR 32 at 38 (Gibbs CJ, Mason, Aickin and Brennan JJ); *Pearce v The Queen* (1998) 194 CLR 610 at [10], [40]-[41] (McHugh, Hayne and Callinan JJ); at [64], [68] (Gummow J); *Muldrock v The Queen* (2011) 244 CLR 120 at [18] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

[33] See *Stuart v CFMEU* (2010) 185 FCR 308 at [82]-[87] (Besanko and Gordon JJ). See also *Australian Ophthalmic Supplies v McAlary* 165 FCR 560 at [93] (Gray, Graham and Buchanan JJ) (***Ophthalmic***); *Auimatagi v ABCC* (2018) 267 FCR 268 at [176] (Allsop CJ, Collier and Rangiah JJ).

in connection with the fixing of civil penalties, there is a risk that potential contraveners would just as readily commit serious contraventions as less serious ones.[34] Further, the imposition of disproportionate punishments (whether too harsh or too lenient) may give rise to a loss of faith in the credibility and legitimacy of the system, which would further undermine the object of deterrence.[35] The plurality adverted to this, saying that without proportionality, the statutory power to inflict a penal consequence is "untethered to the nature and seriousness of the contravention" and might encourage or lead to inconsistent decision making, informed by personal perspective and opinion (AJ [181]).

33. The appellant's approach risks operating as a de facto fetter on judicial discretion.[36] The plurality cautioned (AJ [134]) against any "characterisation of the past" which is then applied as an "almost irrefutable" conclusion, and treated as if it were "applicable to any and all future factual circumstances". This approach risks "distorting the proper judicial task of fixing an appropriate penalty for the contravention in question".

34. Finally, to accept the appellant's insistence that principles traditionally associated with retributive theories must no longer be applied in fixing civil penalties, would require the abandonment of other settled precepts which also find their origins in the retributive approach, such as parity, totality and course of conduct. There was no hint in the *Agreed Penalties Case* that this Court intended that the fixing of civil penalties was, once uncoupled from a retributive rationale, to be seen as no longer subject to those principles which have historically been applied to the imposition of civil penalties.[37]

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[34] Bagaric (2000) at 156. In short, if the 'price' to be set for a contravention is to be the same for each contravention committed by a recidivist contravener, the disincentive for the contravener to engage in more objectively serious or flagrant conduct vanishes; one 'might as well be hung for a sheep as for a lamb.'

[35] Bagaric (2000) at 156; Yeung (1999) at 462-463, 474.

[36] Cf observations in *Magaming v The Queen* (2013) 252 CLR 381 at [27]-[28] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) (**Magaming**) in relation to the undesirability of such an outcome. See further Sir Anthony Mason, 'Mandatory Sentencing: Implications for Judicial Independence' [2001] 7 *Australian Journal of Human Rights* 21 at 23-24.

[37] See generally *Parker v ABCC* [2019] FCAFC 56; 270 FCR 39 at [266] (Besanko, Reeves and Bromwich JJ). **As to totality**, see: *QR Limited v CEPU* [2010] FCAFC 150; 204 IR 142 at [62]-[63] (Keane CJ, Gray and Marshall JJ); *ACCC v Yazaki Corporation* [2018] FCAFC 73; 262 FCR 243 at [236] (Allsop CJ, Middleton and Robertson JJ) (***Yazaki***) ; *ACCC v Valve Corporation (No 7)* [2016] FCA 1553 at [13], [17] (Edelman J); *ACCC v Oakmoore Pty Ltd (No 2)* [2018] FCA 1170 (Gleeson J) at [134] (***Oakmoore***); *ACCC v Air New Zealand Ltd (No 15)* [2018] FCA 1166 at [72]-[75] (Gleeson J) (***Air New Zealand***). **As to course of conduct**, see: *ABCC v CFMMEU (The Nine Brisbane Sites Appeal)* [2019] FCAFC 59; 366 ALR 398 at [124(7)] (Rangiah J). See also *ABCC v CFMEU* [2017] FCAFC 113; (2018) 254 FCR 68 at [82] (Dowsett, Greenwood and Wigney JJ); *Penalty Indemnification Case* at [116] (Keane, Nettle and Gordon JJ); *Mornington Inn v Jordan* (2008) 168 FCR 383 at [5]-[7] (Gyles J) and [41]-[46], [90]-[92] (Stone and Buchanan JJ); *ACCC v Coles Supermarkets Australia Pty Limited* (2015) 327 ALR 540 at [16]-[18] (Allsop CJ); *Yazaki* at [227], [229]-[232]; *CFMEU v Cahill* (2010) 269 ALR 1 at [39], [41]-[42] (Middleton and Gordon JJ).

**Principles drawn from retributive and deterrence models can properly co-exist**

35. The deterrence and retributive models of punishment ought not to be treated as competing, mutually exclusive theoretical bases for determining the quantum of civil penalties.[38] A system of punishment can properly reflect a plurality of values without falling into logical incoherence. As a result, the *reason* for the imposition of civil penalties admits of an answer derived from utilitarian deterrence theories, while the *manner* in which the task of fixing an appropriate penalty is carried out is influenced by principles developed from retributive approaches to punishment. The civil penalty regime in the FW Act reflects a hybrid of the deterrence and retributive approaches. The Federal Court has for decades appreciated that the purpose for which civil penalties are imposed is deterrence, and that the level of deterrence required in any particular case is ascertained having regard to matters including the seriousness of the instant contravention. A number of the factors to which regard is traditionally had in assessing the seriousness of a contravention find their origins in retributive theories, and have been adapted to respond to the context in which commercial and industrial relationships are regulated by the imposition of civil penalties. At the same time, the Federal Court has recognised that penalties must be set at a level sufficiently high to deter future contraventions, provided that any given penalty is not unfairly disproportionate to the seriousness of the contravention.[39] In this way, the proportionality principle has been treated as an important limiting principle circumscribing the outer limits of the range of acceptable penalties.[40]

36. The Federal Court has long adhered to this hybrid approach. In *TPC v CSR Ltd*, French J (as he then was) elaborated on the criteria relevant to the determination of appropriate levels of penalty under s 76 of the TP Act. His Honour enunciated nine criteria, including the nature and extent of the contravening conduct, the deliberateness of the contravention and the period over which it extended.[41] Some of the criteria identified by French J are factors relevant under retributive theories of punishment, as they are directed towards a consideration of the seriousness of the unlawful conduct and invoke notions of culpability. Other criteria to which his Honour refereed are consistent with adherence to the goal of deterrence.[42] French J said (at [40]) that:

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[38] Yeung (1999) at 462; *Harvard Law Review* at 1232-1233.
[39] Bagaric (2000) at 150; Yeung (1999) at 459-462, 474-475 (referred to with approval in ALRC Report 95 at [25.26]-[25.28], see further Recommendation [29-1]).
[40] Yeung (1999) at 461-462, especially at fn 98.
[41] At [42].
[42] Yeung (1999) at 468-469, 472.

> Neither retribution nor rehabilitation, within the sense of the Old and New Testament moralities that imbue much of our criminal law, have any part to play in economic regulation of the kind contemplated by Part IV…. The principal, and I think probably the only, object of the penalties imposed by s 76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravener and by others who might be tempted to contravene the Act.

37. In *Fox v St Barbara Mines Ltd*,[43] French J explicitly acknowledged the punitive character of civil penalties imposed under legislation regulating workplace relations, while also referring to the object of deterrence:

> There is ample authority in the area of criminal law for the proposition that the maximum penalty is reserved for the worst type of cases. But, as was pointed out in *Veen v R [No 2]* (1988) 164 CLR 465, this does not mean that a lesser penalty must be imposed if it be possible to envisage a worse case. Ingenuity can always imagine a case of greater heinousness. A sentence which imposes a maximum penalty offends the principle only if the case is recognisably outside the worst category.
>
> Broadly speaking the same approach can be applied to the imposition of penalties under the Workplace Relations Act. Whether paid to the Consolidated Revenue or to the employee, they are punitive in character and must be assessed having regard, inter alia, to the gravity of the conduct complained of, the existence of mitigating circumstances and the need to deter repetition of the conduct whether by the employer in question or generally.

38. It appears from the passages extracted above that French J saw no irreconcilable tension between acknowledging the punitive character of a civil penalty (and thus the need to have regard the principle of proportionality as derived from *Veen (No 2)*) and being cognisant of the primacy of the purpose of deterrence when imposing a civil penalty.

39. Further, the Federal Court has always regarded the proportionality principle as applicable to the fixing of civil penalties. In *TPC v Stihl Chainsaws*, Smithers J said:[44]

> The penalty should constitute a real punishment proportionate to the deliberation with which the defendant contravened the provisions of the Act. It should be sufficiently high to have a deterrent quality, and it should be kept in mind that the Act operates in a commercial environment where deterrence of those minded to contravene its provisions is not likely to be achieved by penalties which are not realistic. It should reflect the will of the parliament that the commercial standards laid down in the Act must be observed, but not be so high as to be oppressive. [45]

40. In *ACCC v Dataline.net.au Pty Ltd* (***Dataline***),[46] the Full Court approved the approach in *TPC v CSR Ltd* and *NW Frozen Foods*.[47] The Court also confirmed that the primary objective of imposing a pecuniary penalty is deterrence, and that any penalty ought not to

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[43] [1998] FCA 621 at 17.
[44] (1978) ATPR 40-1019 at 17,896 (emphasis added) (***Stihl Chainsaws***).
[45] Approved in *NW Frozen Foods* (Burchett and Kiefel JJ) at page 292. See also *ACCC v Australian Safeway Stores* (1997) 75 FCR 238, at page 249 (Goldberg J); *ACCC v Leahy Petroleum (No 3)* (2005) 215 ALR 301; [2005] FCA 265, at [39].
[46] (2007) 161 FCR 513.
[47] See at [58], and see also the discussion of the relevant factors at [61].

be so disproportionate as to be oppressive.[48] In *Ponzio v B & P Caelli Constructions Pty Ltd*[49] (***Ponzio***) Lander J said, in relation to contraventions of the civil penalty provisions in the *Workplace Relations Act 1996* (Cth) (**WR Act**), that 'the punishment must be proportionate to the offence and in accordance with the prevailing standards of punishment'. In *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (***Ophthalmic***),[50] the Full Court enunciated a set of criteria which have since served as an authoritative guide to the task of fixing civil penalties. Many of those criteria are derived from retributive approaches to punishment; and the principle of proportionality was also emphasised. Graham J said:

> The ultimate control on the judicial sentencing discretion is the requirement that the sentence be proportionate to the gravity of the offence committed. In pursuit of other sentencing purposes, a judge may not impose a sentence that is greater than is warranted by the objective circumstances of the crime. Both proportionality and consistency commonly operate as final checks on a sentence proposed by a judge (per McHugh J in *Markarian v The Queen* (2005) 228 CLR 357 ('*Markarian v The Queen*[51]') at [83]; see also *Veen v The Queen (No. 2)* (1988) 164 CLR 465 at 472).[52] [emphasis added]

41. The Full Federal Court's approach in each of *NW Frozen Foods, Dataline, Ponzio* and *Ophthalmic* was correct. In each of those appeals, a principle of proportionality was rightly regarded as relevant to the task of fixing an appropriate civil penalty, in circumstances where it was also regarded as necessary to have regard to matters drawn from retributive approaches to punishment, including the seriousness of the contravention, while being guided by the purpose of deterrence. This hybrid model has continued to characterise the approach of the Federal Court. It was the approach which prevailed at the time of the passing of the FW Act. The approach continued after this Court's decision in the *Agreed Penalties Case*. In *ACCC v Reckitt Benckiser*,[53] (***Reckitt***) the Court said that:

> If it costs more to obey the law than to breach it, a failure to sanction contraventions adequately de facto punishes all who do the right thing. It is therefore important that those who do comply see that those who do not are dealt with appropriately. This is, in a sense, the other side of deterrence, being a dimension of the general deterrence equation. This is not to give licence to impose a disproportionate or oppressive penalty, which cannot be done, but rather to recognise that proportionality of penalty is measured in the wider context of the demands of effective deterrence and encouraging the corresponding virtue of voluntary compliance.

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[48] See at [60] – [61], referring to *Stihl Chainsaws*. In this context, their Honours cited reliance upon a line of cases including: *TPC v CSR Ltd*; *Stihl Chainsaws*; *ACCC v George Weston Foods Ltd* [2000] ATPR 41-763 at 40,986 (Goldberg J); *NW Frozen Foods* at 294-295 (Burchett and Kiefel JJ).
[49] (2007) 158 FCR 543 at [93] (emphasis added).
[50] (2008) 165 FCR 560 at [54] (Graham J); [18]-[25] (Gray J); [94]-[103] (Buchanan J), noting that their Honours tended to treat proportionality and totality as synonymous.
[51] Gray J and Burchart J also referred to *Markarian v The Queen* [2005] HCA 25; 228 CLR 357, at [27] and [78].
[52] At [54].
[53] [2016] FCAFC 181; (2016) 340 ALR 25 at [152] (emphasis added); see also at [153]-[159] (Jagot, Yates and Bromwich JJ) (***Reckitt***).

42. Similarly, in *CFMMEU v ABCC (the **Non-Indemnification Personal Payment Case**)*,[54] the Full Court noted that recognising the overwhelming importance of deterrence as the protective purpose of the penalty does not exclude the need to determine a penalty that is proportionate to the contravening conduct. Again, in *Parker v ABCC*[55] (***Parker***) Besanko and Bromwich JJ (Reeves J agreeing) held that a contravener's history does not permit the imposition of a penalty disproportionate to the gravity of the contravention being considered.[56] Their Honours emphasised that while the role of past conduct "informs the need for deterrence", it cannot be used to transform the character of the instant contravention.[57]

43. The appellant has not addressed the decisions of the Full Federal Court which, if the appellant's contentions are correct, must have been wrongly decided, at least to the extent that those decisions involved an application of the principle of proportionality. It is submitted that the Full Court decisions thrown into doubt would include: *Dataline*;[58] *Ponzio*;[59] *Ophthalmic*;[60] *Reckitt*;[61] *ABCC v CFMEU*;[62] *Parker*;[63] the *Non-Indemnification Case Personal Payment Case*[64] and *Ultra Tune Australia Pty Ltd v ACCC*.[65]

**The role of the maximum penalty**

44. The Full Court correctly applied the conventional and accepted approach to maximum penalties described in *Markarian v The Queen* [2005] HCA 25; 228 CLR 357 at [31] (***Markarian***), namely that the maximum penalty set by the statute relevantly permits comparison between the worst possible case and the instant case.[66] See also *Reckitt*,[67] where

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[54] [2018] FCAFC 97; (2018) 264 FCR 68 at [22] (Allsop CJ, White and O'Callaghan JJ).
[55] [2019] FCAFC 56; (2019) 270 FCR 39.
[56] At [339] (Besanko and Bromwich JJ).
[57] At [348] (Besanko and Bromwich JJ).
[58] At [60] (Moore, Dowsett, Greenwood JJ).
[59] At [93] (Lander J), at [145] (Jessup J).
[60] At [27] (Gray J), [54]-[55] (Graham J), [108] (Buchanan J).
[61] At [152] (Jagot, Yates and Bromwich JJ).
[62] [2017] FCAFC 113; (2017) 254 FCR 68 at [107] (Dowsett, Greenwood and Wigney JJ).
[63] At [340] (Besanko and Bromwich JJ).
[64] At [22], [37] (Allsop CJ, White and O'Callaghan JJ).
[65] [2019] FCAFC 164 at [31].
[66] As recognised and developed in other decisions including *R v Hoar* (Gibbs CJ, Mason, Aickin and Brennan JJ); *Elias v R* [2013] HCA 31; (2013) 248 CLR 483 at [27] (French CJ, Hayne. Kiefel, Bell and Keane JJ); *Magaming* at [48] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), [103] (Keane J). See also the following applications thereof in the context of civil penalties: *Reckitt* at [154]-[156] (Jagot, Yates and Bromwich JJ); *ACCC v Gullyside Pty Ltd* [2006] ATPR 42-097 at [32] (Kiefel J); *Air New Zealand* at [61]-[62] (Gleeson J); *ACCC v Sony Interactive Entertainment Network Europe Limited* (2020) 381 ALR 531 at [62]-[63] (Steward J).
[67] At [154]-[156], see especially the cases cited at [155] (Jagot, Yates and Bromwich JJ).

the Full Court referred to the need to have regard to the maximum penalty when imposing civil penalties, referring to the numerous decisions in which *Markarian* had been applied.[68]

45. The 'worst case' in a civil penalty was observed by the plurality (AJ [105]) to be a case where the need for deterrence was strongest. In assessing whether a case fell within such a 'worst case', the Court did not regard itself as limited (as AS [31] erroneously suggests) to considering only the objective circumstances of the contravening. So much is apparent from AJ [106] where the plurality said that:

> … the place of the maximum penalty for the imposition of civil penalties may be better expressed as for circumstances, including the nature and gravity of the contravention, that warrant or call for the highest possible level of deterrence as reasonably appropriate.

46. The approach to the maximum penalty for contraventions of the WR Act detailed by French J in *Fox v St Barbara Mines Ltd* was endorsed by Gordon J in *Sterling Commerce (Australia) Pty Ltd v Iliff*.[69] Similarly, in *Mornington Inn Proprietary Limited v Jordan*, Stone and Buchanan JJ said that the maximum penalty is reserved for the 'worst conceivable offence' in imposing civil penalties under the post-*WorkChoices* WR Act.[70]

47. It was well-settled by the time the FW Act was enacted that the maximum penalty for a contravention of civil penalty provisions, including those contained in the predecessors to the FW Act, operated as a yardstick inviting comparison between the instant case and a case in the worst category. The legislature must be taken to have been aware of this settled approach to the statutory maximum when it enacted s 546.[71] Nothing in the text of the FW Act or in the Explanatory Memorandum to the *Fair Work Bill 2009* (Cth) suggests otherwise.[72]

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[68] Referring to *Director of Consumer Affairs, Victoria v Alpha Flight Services Pty Ltd* [2015] FCAFC 118 at [43] (Barker, Katzmann and Beach JJ); *ACCC v BAJV Pty Ltd* [2014] FCAFC 52; (2014) ATPR 42-470 at [50]-[52] (Rares, Jessup and Flick JJ); *Setka v Gregor (No 2)* [2011] FCAFC 90; (2011) 195 FCR 203 at [46]-[47] (Lander, Tracey and Yates JJ); *McDonald v ABCC* [2011] FCAFC 29; (2011) 202 IR 467 at [28]-[29] (North, McKerracher, Jagot JJ)).

[69] [2008] FCA 702 at [14] (Gordon J).

[70] (2008) 168 FCR 383 at [88], [122]-[123] (Stone and Buchanan JJ). See also *Ophthalmic* in imposing civil penalties under the *Workplace Relations Act 1996* (Cth) at [108] (Buchanan J).

[71] *Brisbane City Council v Amos* [2019] HCA 27; (2019) 372 ALR 366 at [24] (Kiefel CJ and Edelman J), (citing *Attorney-General for NSW v Brewery Employees Union of NSW* [1908] HCA 94; (1908) 6 CLR 469 at 531); *Platz v Osborne* [1943] HCA 39; (1943) 68 CLR 133 at 141, 146-147; *Thompson v Judge Byrne* [1999] HCA 16; (1999) 196 CLR 141 at 157 [40] (Gleeson CJ, Gummow, Kirby and Callinan JJ); *Aubrey v The Queen* [2017] HCA 18; (2017) 260 CLR 305 at 323 [34] (Kiefel CJ, Keane, Nettle and Edelman JJ); *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at [81] (McHugh J), [162] (Gummow, Hayne and Heydon JJ).

[72] Explanatory Memorandum, *Fair Work Bill 2009* (Cth) at [2155]-[2156].

**Statutory construction: section 546**

48. That proportionality inheres in the task of imposing a civil penalty under the FW Act also emerges from the proper construction of s 546(1). The section is in Division 2 of Part 4-1. Section 546 is entitled 'Pecuniary penalty orders'. Section 546(1) confers power on prescribed courts to order that a person pay a penalty the court considers is appropriate, if satisfied the person has contravened a 'civil remedy provision'. 'Civil remedy provisions' are defined by s 12 to be those detailed in ss 539(1) and (3). Section 546(2) provides that the pecuniary penalty must not be more than the maximum set by s 539(2) for individuals or, if a person is a body corporate, five times that amount.

10 49. A number of observations may be made about s 546(1). *First*, the provision contains an express conferral of jurisdiction with respect to the making of a pecuniary penalty order.[73] *Second*, that jurisdiction is conditional on the Court being satisfied that a person has contravened a civil remedy provision. In other words, the jurisdiction is exercisable only if the Court has found that a person has contravened one or other of the provisions described in s 539(2). *Third*, the power to impose a penalty is not at large but is rather dependent on what the Court considers is *appropriate*. The adjective "appropriate" connotes an evaluative judgment directed to determining a 'suitable' or 'proper' penalty to achieve a particular object. It is uncontroversial that the object is deterrence (both specific and general).

50. Section 546(2) imposes a limit on the exercise of the jurisdiction conferred by s 546(1),
20 prescribing that a penalty must not be more than the maximum prescribed for the particular civil remedy provision set out in s 539(2). That section sets out each of the civil remedy provisions in the FW Act and prescribes a maximum penalty for contraventions of each. Three classes of maximum penalties are prescribed. While some civil remedy provisions attract a maximum penalty of 30 penalty units,[74] the majority of civil remedy provisions bear a maximum penalty of 60 penalty units. However, some provisions attract a substantially higher maximum of 600 penalty units.[75] Further, the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth)[76] created a class of serious contraventions, for which the maximum penalty prescribed in s 539(2) is ten times the amount otherwise applicable. Those amendments embodied a legislative purpose of seeking to increase the

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[73] *Penalty Indemnification Case* at [39] (Kiefel CJ). As to the history of provisions imposing civil penalties in relation to industrial parties, see the analysis by Jessup J of the FW Act and its predecessors in CFMEU v ABCC (2016) 247 FCR 339; [2016] FCAFC 184 at [38] to [45].

[74] Items 17, 18, 20, 28, 31, 33 and 37 of s 539(2) prescribe a maximum penalty of 30 penalty units.

[75] For example, item 32A of s 539(2) prescribes a maximum penalty of 600 penalty units for a contraventions of s 712B(1) of the FW Act.

[76] See *Fair Work Ombudsman v IE Enterprises Pty Ltd* [2020] FCA 848 at [52]-[54].

effectiveness of the deterrent value of available penalties for certain contraventions, but only when systematic patterns of conduct are alleged, and proven to the requisite standard.[77]

51. Inherent in the provision by the legislature of different maximum penalties for different contraventions is an intention that certain conduct rendered unlawful by the FW Act may attract a higher penalty than other conduct. The prescription of penal responses tailored to particular contraventions is a legislative indication that Parliament regards transgressions of certain provisions more seriously than others, and as requiring the need to provide for higher levels of deterrence.

52. Division 4 of Part 4-1 also sets out a number of general provisions relating to civil remedies. Relevantly for present purposes, s 556 deals with 'civil double jeopardy' and provides that, where a person is ordered to pay a pecuniary penalty under a civil remedy provision in relation to particular conduct, a person is not liable to be ordered to pay a pecuniary penalty under some other law of the Commonwealth in relation to the same conduct. [78] Next, s 557 is a statutory variant of the common law course of conduct principle,[79] designed to ensure against double punishment for the same conduct, and to avoid penalties being imposed that are disproportionate to the contravening conduct.[80] Sections 556 and 557 evince a legislative concern that in imposing civil penalties, a contravener is to be penalised once only for the same conduct. This is consistent with a policy against double punishment.

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[77] 'Serious contraventions' is defined in s 557A(1) as a case where a person has knowingly contravened a provision and the person's contravention was part of a *systematic pattern of conduct*. In determining whether a person's conduct is part of a systematic pattern of conduct, the court may have regard to a number of factors set out in s 557A(2), including the number of contraventions of the FW Act committed by the person. The Bill's object was described by the Explanatory Memorandum to the *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* (Cth) at [12] as 'being consistent with the Principled Regulation: Federal Civil and Administrative Penalties in Australia, Australian Law Reform Commission Report 95, Chapter 26. They have been set with a view to achieving the aim of deterrence, which is the principal purpose of the penalties'. The outline to the Explanatory Memorandum detailed that 'The Bill will increase relevant civil penalties to an appropriate level so the threat of being fined acts as an effective deterrent to potential wrongdoers'. There are also examples of sentencing regimes which treat certain types of prior contraventions as aggravating factors: see *Crimes Sentencing Procedure Act 1999* (NSW) s 21A(2)(d); *Penalties and Sentencing Act 1992* (Qld) ss 9(10), 11. See also the *Sentencing Act 1991* (Vic) Part 2A, especially ss 6C and 6D(b), which make provision for "serious offenders," and empowers the court in certain circumstances to impose a sentence on a serious offender for the purpose of the protection of the community which is "longer than that which is proportionate to the gravity of the offence considered in the light of its objective circumstances." See also the *Environment Protection Act 2017* (Vic), s 137. Cf the *Sentencing Act 1995* (WA) s 7(2)(b)-(c), which specifically provides that a criminal record, and a previous sentence has not achieved the purpose for which it was imposed, are not aggravating factors.

[78] *CFMMEU v ABCC* (2019) 272 FCR 290 at [26] (Bromberg, Wheelahan and Snaden JJ).

[79] *Attorney-General v Tichy* (1982) 30 SASR 84 at 92-93 (Wells J).

[80] *TWU v ROC (No 2)* [2018] FCAFC 203; (2018) 267 FCR 40 at [91], [128] (Allsop CJ, Collier and Rangiah JJ); *Yazaki* at [236] (Allsop CJ, Middleton and Robertson JJ); *Mill* at 63 (Wilson, Deane, Dawson, Toohey and Gaudron JJ).

53. In circumstances where it is the legislature that assigns the applicable statutory maximum penalty to classes of contraventions, and where the FW Act makes specific provision in relation to serious contraventions involving proven patterns of systemic conduct, it is important not to confuse the proper purpose of a Court in imposing a civil penalty (namely, deterrence) with a judicial quest to achieve the outcome of specific deterrence. It is solely the province of Parliament to seek to improve the deterrent effect of the applicable maxima.

**A notion of proportionality**

54. The Full Court correctly concluded (at AJ [45], [55]-[56], [92]) that features of the proportionality principle can be seen to have survived the rejection of retribution as an object of the imposition of civil penalty. In this context, the Full Court used the phrase a *"notion of proportionality*" to distinguish this from the proportionality principle in the retributive sense used in criminal decisions such as *Veen (No 2)* (AJ [104]-[105], [107]). This notion of proportionality inheres in the common law principle of reasonableness.[81] It is part of an evaluative response to the instant contravention in light of the object of deterrence and the need to impose a penalty that is no more than reasonably necessary to achieve this object.[82] The Full Court recognised that an implied condition of reasonableness applies to the exercise of power under s 546(1) (AJ [92], [100], [107], [109], [111]).[83]

55. The Federal Court correctly appreciated that identifying deterrence as the purpose for which civil penalties are imposed does not require abandoning all aspects of the retributive approach to punishment. An assessment of the seriousness of the instant contravention and of the contravener's degree of culpability (including that which may be gleaned from any prior contraventions), are matters have long been treated by the Federal Court as relevant factors--and both of which have their origins in retributive theories. Their Honours also correctly recognised that proportionality is not uniquely associated with a retributive approach. It also inheres in the reasonable or "appropriate" use of the Court's power under s 546(1) of the FW Act to impose a civil penalty.

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[81] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [28] (French CJ), [63] (Hayne, Kiefel and Bell JJ); at [90] (Gageler J) (***Li***). See also the following cases referred to in *Li*: *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 36; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 650 [126]; *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 at 1127 [15]; 259 ALR 429 at 433.

[82] See by analogy *Comcare v Banerji* [2019] HCA 23; (2019) 272 ALR 42 at [40] (Kiefel CJ, Bell, Keane and Nettle JJ); see also Gageler J at [84]. Referred to by the Full Court here at AJ [111].

[83] AJ at [96]; *CFMEU v ABCC* [2016] FCAFC 184; (2016) FCR 339, at [14]-[15] (Allsop CJ); [60] (Jessup J).

56. It is submitted that even if the purpose of deterrence is required to be afforded primacy, a correct understanding of its utilitarian origins illuminates the reality that deterrence demands a proportionate response, so that more serious contraventions are met with higher levels of deterrence than relatively minor contraventions.

**PART VI: NOTICE OF CONTENTION OR CROSS-APPEAL:**

N/A

**PART VII: ORAL ARGUMENT**

10 57. The respondents estimate 2.5 hours for their response.

Dated 6 August 2021

**Rachel Doyle SC** **Philip Boncardo** **Benjamin Bromberg**

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Signed by Elyane Palmer

**CFMMEU – Construction and General Division**
Lawyer at the CFMMEU
The respondents are represented by the CFMMEU

**IN THE HIGH COURT OF AUSTRALIA**
**MELBOURNE REGISTRY**

BETWEEN: **Australian Building and Construction Commissioner**
Appellant

and

**Kevin Pattinson**
First Respondent

**Construction, Forestry, Maritime, Mining and Energy Union**
Second Respondent

## ANNEXURE

## LIST OF STATUTORY PROVISIONS REFERRED TO IN SUBMISSIONS

| ***Legislation*** | ***Version as at relevant date*** |
|---|---|
| *Crimes Sentencing Procedure Act 1999* (NSW) – s 21A(2)(d) | Current (27 March 2021) |
| *Environment Protection Act 2017* (Vic) – s 137 | Current (Authorised Version No. 005 – 1 July 2020) |
| *Fair Work Act 2009* (Cth) – ss 539(1)-(3), 546(1)-(2), 557A(1)-(2) | Relevant date – 13 September 2018 (Compilation 34 – 19 December 2018[84]) |
| *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth) | Current (Authorised Version C2017A00101 – 14 September 2017) |
| *Penalties and Sentencing Act 1992* (Qld) – ss 9(10), 11 | Current (Reprint as at 30 April 2021) |
| *Sentencing Act 1991* (Vic) – Part 2A, especially ss 6C and 6D(b) | Current (Authorised Version No. 216 – 1 July 2021) |
| *Sentencing Act 1995* (WA) – s 7(2)(b)-(c) | Current (Version 10-h0-00 – 1 January 2021) |
| *Trade Practices Act 1974* (Cth) – s 76 | Relevant date – 20 December 1990 (Reprint No. 3 – 29 February 1988) |

[84] Note that even though this compilation was not registered until 19 December 2018, it was compiled on 1 January 2018 and shows the text of the law as amended and in force on that compilation date.