HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY No. M34/2021

BETWEEN:

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER

Applicant

and

KEVIN PATTINSON

First Respondent

CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION

Second Respondent

OUTLINE OF ORAL SUBMISSIONS FOR THE FIRST AND SECOND RESPONDENTS

Part I: Internet Publication

This outline is in a form suitable for publication on the internet.

Part II: Outline of Propositions

1. The appellant erroneously conflates two questions **(RS [23], [35])**:

   Q1: Why do we punish contraventions of civil penalty provisions?

   A1: *For the purpose of deterring contraventions of a like kind.*

   Q2: How much ought we to punish in the particular case?

   A2*: An appropriate penalty ought to be fixed by having regard to factors relevant to both the circumstances of the contraventions and the circumstances of the contravener, and by taking into account principles including proportionality*.

2. Proportionality inheres in the task of imposing a penalty under s 546(1) of the FW Act because:
   a. s 546(1) empowers the Court to impose an *appropriate* penalty in respect of the instant contravention, having regard to the prescribed maxima. A penalty which is disproportionate to the instant contravention could not be appropriate: **RS [15]-[17], [48]-[49]**;
   b. the judicial discretion to impose a penalty must be exercised *reasonably*, which necessitates a proportionate response to the instant contravention: **RS [7], [54]-[55]**; and
   c. the object of deterrence is directed to deterring contraventions of *a like kind*: **RS [9], [26]; AJ [98]**.
3. The appellant's approach does not adequately explain how a penalty that is disproportionate to the instant contravention (assessed in all its circumstances, including that which can properly be drawn from a contravener's history of contravening: **RS [15]; AJ [97], [149], [193], [194], [201], [227(3)], [230], [231]**) is:
   a. appropriate within the meaning of s 546(1) of the FW Act;
   b. consistent with the reasonable exercise of the judicial discretion to impose a penalty for that contravention; and

c. directed at the purpose of deterring contraventions of a like kind: **RS [25]-[27]**.

4. The appellant's approach confuses the purpose of imposing a civil penalty (general and specific deterrence) with a judicial obligation (as posited by the appellant) to objectively achieve specific deterrence. The question of whether the exercise of the judicial discretion to impose a civil penalty has miscarried in a particular case does not involve interrogating supervening events in a search for empirical proof of effective deterrence. Further, it is the sole province of Parliament to determine whether to improve the deterrent effect of penalties by increasing the applicable maxima: **RS [53**].

5. Deterrence is the principal purpose of fixing civil penalties: *Agreed Penalties Case* at [55]); *Penalty Indemnification Case* at [42], [116]; **RS [21]; AJ [98]**. Nothing in the *Agreed Penalties Case* (or in its rejection of retribution as a purpose for the imposition of civil penalties) suggested that the recognition of the primacy of deterrence necessitates jettisoning considerations of proportionality: **RS [22], [34], [40], [42]**. This Court has not called into question:
   a. the relevance of proportionality in fixing civil penalties: **RS [8], [22]**;
   b. the appropriateness of a multi-factorial assessment of the type adopted by French J in *TPC v CSR Ltd*: **RS [22], [36]**; or
   c. the relevance of other criminal sentencing principles (eg totality, parity and course of conduct), which are also premised on the concept of proportionality and, in the context of fixing civil penalties, are also well settled.

6. The Federal Court has long fixed civil penalties having regard to proportionality (*Stihl Chainsaws*) and by reference to factors traditionally associated with retributive theories and other factors whose origins lie in deterrence (*TPC v CSR* at 52,152): **RS [21]-[22], [35]-[36], [39]**.

7. The hybrid approach evident in *TPC v CSR* was the prevailing approach when the FW Act was enacted: *Fox v St Barbara Mines* at 17; *Dataline* at [58], [61]; *Ponzio* at [93]; *Ophthalmic* at [54]: **RS [36], [37], [40], [41]**. It has continued to be applied since the *Agreed Penalties Case:* **RS [40]-[43]**; *Reckitt* at [152], [153]-[159]; *Non-Indemnification Personal Payment Case* at [22].

8. The utilitarian origins of deterrence also demand a proportionate response and provision for different levels of deterrence in response to relatively minor contraventions compared with more serious contraventions: **RS [4], [9], [24]-[27], [56]**; Bagaric (2000) at **Joint Book** 1807, 1816-1821; Yeung (1999) at **Joint Book** 1774-1776, 1781-1782, 1785-1786, 1791. Further, deterrence and retributive models of punishment need not be treated as competing, mutually exclusive theoretical bases for determining the quantum of civil penalties: **RS [35]**; Yeung (1999) at **Joint Book** 1788-1789, 1791, 1799-1804.

9. Parliament has characterised some contraventions of the FW Act as more serious than others, by enacting higher maxima for particular contraventions, and thereby making provision for higher levels of deterrence: **RS [50], [51], [53]**. The FW Act also evinces a policy against double punishment: **RS [52]**.

10. Having regard to the maximum permits a comparison between the worst possible case and the instant case: *Markarian* at [31]; *Fox v St Barbara Mines* at 17 (per French J); **RS [37], [45]-[47]**. In that context, the term 'yardstick' is conventional: *Markarian* [31]; *Reckitt* at [154]-[156]. See **AJ [104]-[106]**.
11. The appellant's approach creates these risks:
    a. *double punishment:* if grave and much less serious contraventions both require the imposition on a recidivist of the maximum penalty, there is a risk that the penalty in respect of the latter is being imposed for both the present and the past contraventions: **RS [30], [52]**;
    b. *one 'might as well be hung for a sheep as for a lamb':* the object of deterrence may be undermined if all contraventions by a recidivist, including relatively anodyne ones, are met with the imposition of the maximum penalty: **RS [28]-[29], [32]**; Bagaric (2000) at **Joint Book** 1818; and
    c. if, once a recidivist contravener has 'crossed the Rubicon' the maximum penalty must be imposed for every subsequent contravention, the past may overwhelm consideration of other relevant factors, and this may operate as a *de facto fetter on judicial discretion:* **RS [31], [33], [36]**.
12. The appellant accepts that course of conduct and totality (which are directed to avoiding double punishment and ensuring that a proportionate penalty is imposed for multiple contraventions), remain relevant to the imposition of civil penalties (**App Reply [13]**), but has not explained how those principles have been safely transposed from criminal jurisprudence, yet proportionality (also concerned with avoiding double punishment) has not: **RS [43], [54]-[55]**.
13. There was no error in the Full Court's approach. It held that:
    a. a contravener's antecedents are relevant in assessing the objective gravity of the contravening conduct (AJ [149], [180], [194], [201]) and in revealing the need for specific deterrence (AJ [191]), but ought not to be accorded such overwhelming weight that there is no reasonable relationship between the instant contravention and the penalty imposed (AJ [100], [104], [107], [227(3)], [230]-[231]);
    b. proportionality is relevant to the imposition of an appropriate civil penalty pursuant to s 546 (AJ [104], [107], [111], [181], [197], [201], [230]; and
    c. the contravening conduct in this case was more serious in the hands of the CFMMEU, by reason of its history. Accordingly, the Full Court imposed on the CFMMEU a penalty at a level almost double the percentage of the maximum that it imposed on Mr Pattinson: AJ [219]-[222].

Dated: 6 December 2021

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Rachel Doyle SC	**Phillip Boncardo**	**Benjamin Bromberg**