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 M 34 OF 2021**

BETWEEN: **AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER**

Appellant

AND: **KEVIN PATTINSON**

First Respondent

CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION

Second Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE APPELLANT

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

2. The question raised by this appeal is whether – having regard to this Court's repeated statements that the principal (if not only) purpose of civil penalties is to secure deterrence – the imposition of an "appropriate" penalty under s 546(1) of the *Fair Work Act 2009* (Cth) (**FW Act**) requires adherence to a "notion of proportionality" derived from criminal sentencing principles: **AS [2], [16], [59]; AR [2]**.

Facts and judgment at first instance – AS [5]-[11]

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3. Mr Pattinson, a delegate of the Construction, Forestry, Maritime, Mining and Energy Union (the **Union**), acting consistently with the Union's long-held "no ticket, no start" policy, represented to two individuals at a construction site in Victoria that, to work at the site, they had to be union members: **CAB 15 [15]-[16]**. This representation gave rise to two contraventions of s 349(1)(a) of the FW Act by each of Mr Pattinson and the Union.

4. The Union had incurred pecuniary penalties on some 150 previous occasions, including penalties in excess of $40,000 as a result of its implementation of its "no ticket, no start policy": **CAB 20-21 [33]-[35]; ABFM 39-109; AS [6] (fn 1-2)**.

5. The primary judge found that the Union: (i) favoured adherence to its policy in preference to the law; (ii) was "wholly unmoved" by the prospect of using member funds to pay penalties; and (iii) regarded such penalties as "an acceptable cost of the way it conducts its affairs": **CAB 37 [84]**. These findings were not challenged on appeal: **CAB 76 [20]**.

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6. The primary judge imposed penalties on the Union "equivalent of a single maximum penalty" (that is $63,000): **CAB 45 [115]**. Despite the unchallenged conclusions of the primary judge that the Union treated past penalties merely as a cost of doing business, the Full Court reduced the total penalties on the Union to $40,000: **CAB 151 [222]**.

Construction of the FW Act – AS [26]-[33]

7. Section 546(1) of the FW Act authorises the Federal Court, when satisfied that a person has contravened a civil penalty provision, to impose the penalty it "considers is <u>appropriate</u>". That power should not be "artificially limited".

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- *ABCC v Construction, Forestry, Mining and Energy Union (**Penalty Indemnification Case**)* (2018) 262 CLR 157 at [103] (Keane, Nettle and Gordon JJ) (**JBA 5, Tab 12**)

8. Section 546(2) states that a pecuniary penalty "must be no more than" certain numbers of penalty units. That language is indicative of a limit or "cap" on the power conferred by s 546(1). It does not suggest that the maximum penalty is unavailable in some cases even if that penalty is appropriate to deter contraventions of the kind that have occurred.

The purpose of civil penalties – AS [21]-[25]; AR [7], [15]

9. This Court has made it clear that: (i) provisions authorising the imposition of civil penalties are concerned principally, if not solely, with deterrence, and should be construed as requiring the imposition of penalties that put a sufficiently high price on contravention to deter repetition of the conduct in question; and (ii) retributive principles have no place when determining appropriate civil penalties (cf **RS [21], [36]**).

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- *Commonwealth v Director, FWBII (**Agreed Penalties Case**)* (2015) 258 CLR 482 at [24], [50]-[51], [54]-[55], [59]-[62] (French CJ, Kiefel, Bell, Nettle and Gordon JJ), [68] (Gageler J), [79], [88], [110] (Keane J) (**JBA 5, Tab 14**)
- *Penalty Indemnification Case* (2018) 262 CLR 157 at [87], [116] (Keane, Nettle and Gordon JJ); and at [41]-[42] (Kiefel CJ), [55] (Gageler J)

Errors made by the Full Court – AS [34]-[60]; AR [3]-[6]

10. The Full Court's judgment is lengthy and complex. It draws heavily on criminal sentencing principles, including two "subsidiary principles" derived from *Veen (No 2)* that are said to be of "central importance": the use of "antecedent criminal history" and "the place of the maximum penalty": **CAB 85 [46], 87 [55], 89-90 [63]-[65]**.

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- *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 473, 476, 477 (Mason CJ, Brennan, Dawson, Toohey JJ) (**JBA 5, Tab 15**)

11. Despite acknowledging its derivation from the retributive object of punishment, the Full Court sought to preserve a role for proportionality in the imposition of civil penalties. It identified two informing principles that it said "were not tied to retribution", being that deterrence was in respect of offences "of a like kind" and that the maximum penalty shapes the appropriate penalty: **CAB 98-99 [92]**. The Full Court developed its "notion of proportionality" from those two principles.

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12. The Full Court's "notion of proportionality" requires a distinction to be drawn between the "objective circumstances of the offending (as opposed to the offender)": **CAB 91 [70]-[71], 98 [90]-[91]**. Its reasoning also requires the maximum penalty to be a "frame of reference or yardstick" to guide the appropriate penalty: **CAB 89 [62], 102 [98].**

13. The Full Court's notion of proportionality" permits prior contraventions to be used as a "prism" to "assist in the proper characterisation" of the "objective characteristics of the contravening", but not "to overwhelm the process" by changing the character of the instant contravention. Further, it requires the maximum penalty to "reserved" for contraventions in the worst category of case, and holds that a case is not in the worst category merely by reason of a history of prior contraventions: **CAB 128-129 [157], [160]-[161], 136 [180], 140-142 [191]-[195], 153-154 [227(3)], [230]**.

14. The end result is that the penalty that can be imposed is controlled by the punishment though appropriate to the character of the instant contravention, rather than by what is "appropriate" to deter further contraventions of a like kind. Even if a contravener's record of prior contraventions indicates that the maximum penalty is required in order to prevent the penalty from being treated as a cost of doing business, that penalty is unavailable unless the objective circumstances of the contravention ("what actually happened") are in the "worst category". As such, the Full Court's notion of proportionality is apt to defeat the primary (if not only) purpose for which penalties may be imposed.

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Correct approach to setting appropriate penalty under s 546(1) – AS [50]-[53], [59]-[60]

15. The assessment of what is appropriate to deter does not require a distinction to be drawn between the circumstances of the offending and those of the offender. It recognises, for example, that with otherwise identical contraventions, larger penalties may be required to deter well-resourced contraveners or those who have profited from their contravention:

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- *Volkswagen Aktiengesellschaft v ACCC* [2021] FCAFC 49 at [150], [154], [157] (**JBA 6, Tab 22**)
- *ACCC v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25 at [151]-[156] (**JBA 6, Tab 16**)

16. Provided the penalty that is imposed is not greater than that required to deter contraventions of a like kind, it is not oppressive. There is no warrant to supplement that limitation with a "notion of proportionality" of the kind developed by the Full Court.

- *NW Frozen Foods v ACCC* (1996) 71 FCR 285 at 292-293F (Burchett and Kiefel JJ) (**JBA 6, Tab 18**)

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Dated: 7 December 2021

Stephen Donaghue　　Tim Begbie　　Julia Watson