



## HIGH COURT OF AUSTRALIA

13 April 2022

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER v PATTINSON &  
ANOR  
[2022] HCA 13

Today, the High Court allowed an appeal from a judgment of the Full Court of the Federal Court of Australia. The appeal concerned the scope of the power conferred on the Federal Court of Australia by s 546 of the *Fair Work Act 2009* (Cth) ("the Act") to impose civil pecuniary penalties in respect of contraventions of the civil remedy provisions of the Act.

The contraventions occurred in September 2018 on a building site in Frankston, Victoria. The site was occupied by Multiplex Constructions Pty Ltd ("Multiplex"), the principal contractor. The first respondent ("Mr Pattinson") was an employee of Multiplex and the site delegate of the second respondent union ("the CFMMEU"). Mr Pattinson told two employees of a subcontractor engaged by Multiplex that, in order to perform work on the site, they were required to become a member of an industrial association ("the misrepresentations"). The CFMMEU had a longstanding "no ticket, no start" policy, pursuant to which all workers were required to hold union membership in order to work on construction sites where the CFMMEU had a presence. Since at least the advent of the *Workplace Relations Act 1996* (Cth), the implementation of such a policy has been unlawful.

The appellant instituted civil penalty proceedings in the Federal Court. The respondents accepted that, by the misrepresentations, Mr Pattinson twice contravened s 349(1) of the Act in that he knowingly or recklessly made a false or misleading representation about the supposed obligation of the two employees to become members of an industrial association, and his actions were attributable to the CFMMEU such that it also contravened s 349(1). The primary judge imposed civil pecuniary penalties on each respondent. The total penalties imposed on the CFMMEU reflected the maximum penalty for a single contravention, with the primary judge having regard to the CFMMEU's longstanding history of contraventions of the Act in furtherance of its "no ticket, no start" policy. The Full Court overturned that decision, holding that the penalties were disproportionate to the nature, gravity and seriousness of the contraventions, and imposed lower penalties on each respondent.

The High Court unanimously held that the Full Court erred in concluding that it was not open to the primary judge to impose the maximum penalty on the CFMMEU. Under the civil penalty regime provided by the Act, the purpose of a civil penalty imposed under s 546 is primarily, if not solely, the promotion of the public interest in compliance with the provisions of the Act by the deterrence of further contraventions of the Act. The plurality reasoned that nothing in the text, context or purpose of s 546 of the Act requires that the maximum penalty be reserved for the most serious examples of misconduct within s 349(1) of the Act. What is required is that there be some reasonable relationship between the theoretical maximum and the final penalty imposed. The penalties imposed by the primary judge represented a reasonable assessment of what was necessary to make the continuation of the CFMMEU's non-compliance with the law, demonstrated by the history of its contraventions, too expensive to maintain. For the same reasons, the Court, by majority, held that the Full Court erred in reducing the penalty imposed on Mr Pattinson.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*