

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON, EDELMAN, STEWARD AND GLEESON JJ

AUSTRALIAN BUILDING AND CONSTRUCTION
COMMISSIONER

APPELLANT

AND

KEVIN PATTINSON & ANOR

RESPONDENTS

Australian Building and Construction Commissioner v Pattinson

[2022] HCA 13

Date of Hearing: 7 December 2021

Date of Judgment: 13 April 2022

M34/2021

ORDER

1. *Appeal allowed.*
2. *Set aside the orders of the Full Court of the Federal Court of Australia made on 16 October 2020 and, in their place, order that the appeal to that Court be dismissed.*

On appeal from the Federal Court of Australia

Representation

S P Donaghue QC, Solicitor-General of the Commonwealth, and
T M Begbie QC with J D Watson for the appellant (instructed by
MinterEllison)

R M Doyle SC with P A Boncardo and B Bromberg for the respondents
(instructed by Construction, Forestry, Maritime, Mining and Energy Union)

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formal revision prior to publication in the Commonwealth Law
Reports.

CATCHWORDS

Australian Building and Construction Commissioner v Pattinson

Industrial law (Cth) – Pecuniary penalties – Determination of appropriate penalty – Where s 349(1) of *Fair Work Act 2009* (Cth) ("Act") relevantly provided that person must not knowingly or recklessly make false or misleading representation about another person's obligation to engage in industrial activity – Where s 546 of Act empowered Federal Court of Australia to order person to pay pecuniary penalty that court considered "appropriate" in respect of contravention of civil remedy provision – Where first respondent union officer and second respondent union each contravened s 349(1) of Act twice – Where second respondent had longstanding history of contraventions of Act – Whether discretion under s 546 of Act constrained by notion of proportionality drawn from criminal law – Whether statutory maximum penalty for civil remedy provision may be imposed only for worst category of contravening conduct.

Words and phrases – "appropriate penalty", "civil penalty regime", "civil remedy provision", "deterrence", "discretion", "maximum penalty", "pecuniary penalty", "proportionality", "retribution".

Fair Work Act 2009 (Cth), ss 349, 546.

1 KIEFEL CJ, GAGELER, KEANE, GORDON, STEWARD AND GLEESON JJ.
This appeal concerns 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.

2 The contraventions in question occurred in September 2018 at a building
site in Frankston, Victoria. The site was occupied by Multiplex Constructions Pty
Ltd, the principal contractor. The first respondent ("Mr Pattinson") was an
employee of Multiplex. He was also an officer of the second respondent union
("the CFMMEU") and was the union delegate on site¹.

3 A subcontractor was engaged to install solar panels at the site. Two
employees of the subcontractor arrived at the site to carry out that work and
attended an induction conducted by Mr Pattinson. During the induction,
Mr Pattinson enquired whether the two employees were "union" and whether they
had a "ticket". This enquiry alluded to the CFMMEU's longstanding "no ticket, no
start" policy, pursuant to which all workers are required to hold union membership
in order to work on construction sites where the CFMMEU has a presence. Since
at least the advent of the *Workplace Relations Act 1996* (Cth), the implementation
of such a policy has been unlawful².

4 Neither employee was a member of the CFMMEU and they told
Mr Pattinson as much. In response, Mr Pattinson represented to the two employees
that, in order to perform the work they had attended the site to perform, they were
required to become a member of an industrial association ("the
misrepresentations"). As a result of the misrepresentations, the two employees
were prevented from performing any work on the site that day³.

1 *Pattinson v Australian Building and Construction Commissioner* (2020) 282 FCR
580 at 587 [9]-[10] ("*Pattinson v ABCC*").

2 *Australian Building and Construction Commissioner v Pattinson* (2019) 291 IR 286
at 291-292 [3]-[9] ("*ABCC v Pattinson*"); *Pattinson v ABCC* (2020) 282 FCR 580
at 587 [11].

3 *ABCC v Pattinson* (2019) 291 IR 286 at 292-293 [15]-[16], [18].

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Gleeson J

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5 In civil penalty proceedings brought by the Australian Building and Construction Commissioner ("the Commissioner") in the Federal Court of Australia, these matters of fact were admitted by Mr Pattinson and the CFMMEU. It was 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. It was also accepted that Mr Pattinson, in making the misrepresentations, acted in his capacity as a delegate of the CFMMEU, and therefore his action was attributable to the CFMMEU pursuant to s 363 of the Act. It followed that the CFMMEU itself also contravened s 349(1)⁴.

6 The primary judge (Snaden J) imposed civil pecuniary penalties in the amounts of \$6,000 in respect of Mr Pattinson (\$3,000 for each contravention) and \$63,000 in respect of the CFMMEU (\$31,500 for each contravention). His Honour was minded to fix the penalty for the CFMMEU at the statutory maximum of \$63,000 for each contravention, having regard to the CFMMEU's longstanding history of contraventions of the Act in furtherance of its "no ticket, no start" policy. However, because both contraventions occurred in the course of a single episode, the primary judge reduced each penalty by half, so that their total reflected a single maximum penalty⁵.

7 On appeal, the Full Court of the Federal Court of Australia (Allsop CJ, Besanko, White, Wigney and Bromwich JJ) held that the history of the CFMMEU's prior contraventions and the deterrent purpose of s 546 did not warrant the imposition of a penalty that was disproportionate to the nature, gravity and seriousness of the circumstances of the instant contraventions⁶. The Full Court considered that the primary judge had erred in imposing on the CFMMEU what was, in effect, the maximum penalty, which the Full Court considered ought to be reserved for the most serious examples of conduct in contravention of s 349(1) of

4 *ABCC v Pattinson* (2019) 291 IR 286 at 293 [17], [19]-[20]; *Pattinson v ABCC* (2020) 282 FCR 580 at 588 [13]-[14].

5 *ABCC v Pattinson* (2019) 291 IR 286 at 316-317 [115]-[118], 319 [128].

6 *Pattinson v ABCC* (2020) 282 FCR 580 at 636-637 [160]-[162], 642-643 [180]-[181], 655 [227], 656-657 [231].

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the Act⁷. The Full Court set aside the penalties imposed by the primary judge and, exercising afresh the discretion conferred by s 546, proceeded to impose penalties in the lesser amounts of \$4,500 in respect of Mr Pattinson (\$4,000 and \$500) and \$40,000 in respect of the CFMMEU (\$38,000 and \$2,000)⁸.

8 The Commissioner appealed to this Court, contending that the Full Court made two related errors: first, in regarding the discretion under s 546 of the Act as constrained by a "notion of proportionality"; and secondly, in regarding the statutory maximum civil penalty as providing a "yardstick" according to which the maximum may be imposed only in a case involving the worst category of contravening conduct.

9 The Commissioner's contentions should be accepted and the appeal allowed. Under the civil penalty regime provided by the Act, the purpose of a civil penalty 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. In that context, the penalties fixed by the primary judge were appropriate because they were no more than might be considered to be reasonably necessary to deter further contraventions of a like kind by Mr Pattinson, the CFMMEU or others. They represented a reasonable assessment of what was necessary to make the continuation of the CFMMEU's non-compliance with the law, amply demonstrated by the history of its contraventions, too expensive to maintain.

10 The Full Court's critical error was that it was distracted by a concern, drawn from the criminal law, that a penalty must be proportionate to the seriousness of the conduct that constituted the contravention. The power conferred by s 546 of the Act is not subject to constraints drawn from the criminal law and there is no place for a "notion of proportionality", in the sense in which the Full Court used that term, in a civil penalty regime. Further, and relatedly, their Honours were misled by the view that the Act required that the maximum penalty be reserved for only the most serious examples of the offending comprehended by s 349(1), and that this principle could prevent the court from imposing the maximum penalty

7 *Pattinson v ABCC* (2020) 282 FCR 580 at 636-637 [160]-[162], 642-643 [180]-[181].

8 *Pattinson v ABCC* (2020) 282 FCR 580 at 652 [211], 653-654 [219], 654-655 [222].

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even though a penalty in that amount might reasonably be considered to be necessary to deter future contraventions of a like kind. Nothing in the text, context or purpose of s 546 requires that the maximum penalty be reserved for the most serious examples of misconduct within s 349(1). What is required is that there be "some reasonable relationship between the theoretical maximum and the final penalty imposed"⁹. That relationship is established where the maximum penalty does not exceed what is reasonably necessary to achieve the purpose of s 546: the deterrence of future contraventions of a like kind by the contravenor and by others¹⁰.

11 Before turning to discuss the reasons of the primary judge and the Full Court in more detail, it is desirable first to set out the civil penalty provisions of the Act, and to refer to the authoritative and uncontroversial judicial exegesis of those provisions and analogous civil penalty provisions in other Commonwealth legislation.

Civil penalties pursuant to s 546 of the Act

12 Section 546(1) of the Act empowers the Federal Court to order a person to pay a pecuniary penalty that the court considers is "appropriate" in respect of a contravention of a civil remedy provision. Section 349(1) is one such civil remedy provision. It provides:

"A person must not knowingly or recklessly make a false or misleading representation about either of the following:

- (a) another person's obligation to engage in industrial activity;
- (b) another person's obligation to disclose whether he or she, or a third person:

9 *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25 at 63 [156].

10 *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 at 293.

5.

- (i) is or is not, or was or was not, an officer or member of an industrial association; or
- (ii) is or is not engaging, or has or has not engaged, in industrial activity."

13 By reason of s 546(2), a pecuniary penalty must not exceed the relevant "maximum penalty" specified by s 539(2). The maximum penalties for a contravention of s 349(1) are 60 penalty units for an individual and 300 penalty units for a body corporate¹¹. At the time of the contraventions, a penalty unit was \$210¹². Accordingly, the maximum penalties that could have been imposed in the present case were \$25,200 in respect of Mr Pattinson (\$12,600 for each contravention) and \$126,000 in respect of the CFMMEU (\$63,000 for each contravention).

14 In *The Commonwealth v Director, Fair Work Building Industry Inspectorate* ("the *Agreed Penalties Case*")¹³, French CJ, Kiefel, Bell, Nettle and Gordon JJ said that civil penalty provisions of the kind enacted in s 546 have a "statutory function of securing compliance with provisions of the [statutory] regime". Although it is accepted in the authorities that the courts may adapt principles which govern criminal sentencing to civil penalty regimes, "basic differences"¹⁴ between criminal prosecutions and civil penalty proceedings mean there are limits to the transplantation of principles from the former context to the latter. Indeed, the Act is emphatic in drawing a distinction between its civil penalty regime and criminal proceedings. For example: a contravention of a civil remedy provision is not an offence¹⁵; the rules of evidence and procedure for civil matters are applicable to proceedings relating to a contravention of a civil remedy

11 See s 546(2) of the Act.

12 s 4AA(1) of the *Crimes Act 1914* (Cth).

13 (2015) 258 CLR 482 at 495 [24].

14 *Agreed Penalties Case* (2015) 258 CLR 482 at 505 [51]. See 505-507 [52]-[57].

15 s 549 of the Act.

<i>Kiefel</i>	<i>CJ</i>
<i>Gageler</i>	<i>J</i>
<i>Keane</i>	<i>J</i>
<i>Gordon</i>	<i>J</i>
<i>Steward</i>	<i>J</i>
<i>Gleeson</i>	<i>J</i>

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provision¹⁶; and a court must not make a pecuniary penalty order for a contravention of a civil remedy provision against a person who has already been convicted of an offence for substantially the same conduct¹⁷.

15 Most importantly, it has long been recognised that, unlike criminal sentences, civil penalties are imposed primarily, if not solely, for the purpose of deterrence. The plurality in the *Agreed Penalties Case* said¹⁸:

"[W]hereas criminal penalties import notions of retribution¹⁹ and rehabilitation, the purpose of a civil penalty, as French J explained in *Trade Practices Commission v CSR Ltd*, is primarily if not wholly protective in promoting the public interest in compliance²⁰:

'Punishment for breaches of the criminal law traditionally involves three elements: deterrence, both general and individual, retribution and rehabilitation. 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 Pt IV [of the *Trade Practices Act*] ... 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 contravenor and by others who might be tempted to contravene the Act.'

16 s 551 of the Act.

17 s 552 of the Act.

18 (2015) 258 CLR 482 at 506 [55].

19 *Gapes v Commercial Bank of Australia Ltd* (1979) 27 ALR 87 at 90; cf *Australian Securities and Investments Commission v Ingleby* (2013) 39 VR 554 at 565 [44].

20 [1991] ATPR ¶41-076 at 52,152; cf *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* (2015) 229 FCR 331 at 357-358 [65]-[67].

7.

16 In a similar vein, in *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner*²¹, the Full Court of the Federal Court cited the decision of French J in *Trade Practices Commission v CSR Ltd*²² and the reasons of the plurality in the *Agreed Penalties Case* as establishing that deterrence is the "principal and indeed only object" of the imposition of a civil penalty: "[r]etribution, denunciation and rehabilitation have no part to play".

17 In explaining the deterrent object of civil penalty regimes such as that found in the Act, the majority of this Court in *Australian Competition and Consumer Commission v TPG Internet Pty Ltd*²³ approved the statement by the Full Court of the Federal Court in *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission*²⁴ that a civil penalty:

"must be fixed with a view to ensuring that the penalty is not such as to be regarded by [the] offender or others as an acceptable cost of doing business".

18 In *CSR*²⁵, French J listed several factors which informed the assessment under the *Trade Practices Act 1974* (Cth) of a penalty of appropriate deterrent value:

"The assessment of a penalty of appropriate deterrent value will have regard to a number of factors which have been canvassed in the cases. These include the following:

1. The nature and extent of the contravening conduct.
2. The amount of loss or damage caused.

21 (2018) 264 FCR 155 at 167 [19].

22 [1991] ATPR ¶41-076.

23 (2013) 250 CLR 640 at 659 [66].

24 (2012) 287 ALR 249 at 265 [62].

25 [1991] ATPR ¶41-076 at 52,152-52,153.

<i>Kiefel</i>	<i>CJ</i>
<i>Gageler</i>	<i>J</i>
<i>Keane</i>	<i>J</i>
<i>Gordon</i>	<i>J</i>
<i>Steward</i>	<i>J</i>
<i>Gleeson</i>	<i>J</i>

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3. The circumstances in which the conduct took place.
4. The size of the contravening company.
5. The degree of power it has, as evidenced by its market share and ease of entry into the market.
6. The deliberateness of the contravention and the period over which it extended.
7. Whether the contravention arose out of the conduct of senior management or at a lower level.
8. Whether the company has a corporate culture conducive to compliance with the Act, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention.
9. Whether the company has shown a disposition to co-operate with the authorities responsible for the enforcement of the Act in relation to the contravention."

19 It may readily be seen that this list of factors includes matters pertaining both to the character of the contravening conduct (such as factors 1 to 3) and to the character of the contravenor (such as factors 4, 5, 8 and 9). It is important, however, not to regard the list of possible relevant considerations²⁶ as a "rigid catalogue of matters for attention"²⁷ as if it were a legal checklist. The court's task remains to determine what is an "appropriate" penalty in the circumstances of the particular case.

26 See also *Re HIH Insurance Ltd (in prov liq) and HIH Casualty and General Insurance Ltd (in prov liq)*; *Australian Securities and Investments Commission v Adler* (2002) 42 ACSR 80 at 114-116 [126]; *Kelly v Fitzpatrick* (2007) 166 IR 14 at 18-19 [14].

27 *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 at 580 [91].

The reasons of the primary judge

20 The material put before the primary judge by the Commissioner included information as to the revenue and assets of the CFMMEU. This material showed that the CFMMEU was well-resourced, having more than sufficient means to pay any penalty that the court might have been disposed to impose. The material also showed that it had a troubling history of contraventions of the Act, including s 349(1).

21 In this latter regard, the primary judge noted that the CFMMEU, since around the year 2000, had contravened civil remedy provisions of the Act or its predecessor on approximately 150 occasions, and s 349(1) on at least seven occasions²⁸. The primary judge observed that the CFMMEU was, notoriously, a "serial offender" in that it had historically acted in disregard of the law and appeared to treat the imposition of pecuniary penalties in respect of those contraventions as "little more than the cost of its preferred business model"²⁹. The primary judge found that the CFMMEU "favours a policy of 'no ticket, no start' and holds that philosophy ... as preferable to the law of the land" and that "the misconduct in this case is but the latest example of the Union's strategy '... to engage in whatever action, and make whatever threats, it wishes, without regard to the law ...'"³⁰.

22 On appeal to the Full Court, the CFMMEU did not dispute, and the Full Court did not disturb, these findings³¹. In this Court, the CFMMEU did seek to cavil with these findings, but identified no basis on which this Court might properly ignore them. It was also argued for the CFMMEU that the gravamen of the contraventions of s 349(1) of concern here was not the furtherance of the CFMMEU's "no ticket, no start" policy but rather misrepresentations about the existence and effect of such a policy. But the point is that the misrepresentations

28 *ABCC v Pattinson* (2019) 291 IR 286 at 298 [35].

29 *ABCC v Pattinson* (2019) 291 IR 286 at 297 [33].

30 *ABCC v Pattinson* (2019) 291 IR 286 at 310-311 [84], citing *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [No 2]* [2016] FCA 436 at [142].

31 *Pattinson v ABCC* (2020) 282 FCR 580 at 590 [20].

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were made with the evident intention of ensuring the de facto implementation of the CFMMEU's "no ticket, no start" policy on site. It is distinctly jejune to suggest that the contraventions were not in furtherance of the CFMMEU's policy.

23 As to the law, the primary judge noted a tension in recent decisions of the Full Court of the Federal Court³². On the one hand, there was the reasoning of the majority of the Full Court (Tracey and Logan JJ) in *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner* ("*Broadway on Ann*")³³. In that case, Tracey and Logan JJ held that, although the contraventions in question were not of themselves at the most serious end of the spectrum, the imposition of the maximum penalty for each contravention was justified when viewed in the context of the CFMMEU's long history of prior contraventions³⁴. On the other hand, the reasoning of Bromwich J in dissent in *Broadway on Ann*, and the reasoning of the Full Court in *Parker v Australian Building and Construction Commissioner*³⁵, emphasised the central importance of the seriousness of the offending conduct as a constraint upon an appropriate penalty. In those judgments, it was said that a history of prior contraventions, while relevant, could not lead to the imposition of a penalty that was disproportionate to the gravity of the instant contraventions³⁶.

24 The primary judge preferred the reasoning of Tracey and Logan JJ in *Broadway on Ann* over that of Bromwich J and of the Full Court in *Parker*. His Honour observed that *Parker* – which was delivered after *Broadway on Ann* – did not explain how the reasoning of the majority in *Broadway on Ann* was plainly wrong³⁷.

32 *ABCC v Pattinson* (2019) 291 IR 286 at 302-303 [53].

33 (2018) 265 FCR 208.

34 (2018) 265 FCR 208 at 211 [1], 226 [69], 228 [77], 230 [87].

35 (2019) 270 FCR 39.

36 *Broadway on Ann* (2018) 265 FCR 208 at 231 [93], 233 [105]; *Parker v Australian Building and Construction Commissioner* (2019) 270 FCR 39 at 146 [339].

37 *ABCC v Pattinson* (2019) 291 IR 286 at 306 [65], 307 [69].

11.

25 The primary judge explained his preference for the approach of the majority in *Broadway on Ann*³⁸:

"Civil penalties have only one objective: deterrence. The court is charged, simply enough, with fashioning a penalty that serves to deter, both generally and specifically, the conduct in respect of which it is levelled.

If the only way to deter even the most objectively inoffensive conduct (so assessed without reference to historical context) is to impose a penalty at or approaching the maximum amount available, then the imposition of anything less would necessarily result in a failure to achieve the only object to which the imposition of civil penalties is directed. That acknowledged, it is not apparent to me how a civil penalty that is fashioned at (and not beyond) a level that is necessary in order to deter the repetition of particular conduct might ever be impugned as disproportionate to its nature or gravity (or seriousness or character). To phrase that proposition as a question: how can a penalty be disproportionate to the nature or gravity of the conduct in respect of which it is imposed if it is no more than what is necessary to achieve the only objective that its imposition is meant to achieve?"

26 The primary judge adopted³⁹ the approach of Tracey J in *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union [No 2]* ("the *Bendigo Theatre Case [No 2]*")⁴⁰. In that case, Tracey J said that if "the maximum penalty prescribed for an offence is intended for cases falling within the worst category of cases for which that penalty

38 *ABCC v Pattinson* (2019) 291 IR 286 at 307 [71]-[72].

39 *ABCC v Pattinson* (2019) 291 IR 286 at 308 [77].

40 [2018] FCA 1211.

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is [prescribed]"⁴¹, then in the context of a civil penalty regime, with its strong focus on deterrence⁴²:

"the maximum penalty may be appropriate for a person who has repeatedly contravened the same or similar legislative provisions despite having been penalised regularly over a period of time for such misconduct. *The gravity of the offending, in such cases, is to be assessed by reference to the nature and the quality of the recidivism rather than by comparison of individual instances of offending*⁴³. Relevant matters will include the number of contraventions which have occurred over a period, whether the ongoing misconduct is the result of conscious decisions, whether the repeated contravenor has treated the payment of penalties as a cost of doing business and whether any attempt has been made to comply with the law as declared by the Court." (emphasis added)

27 The primary judge considered that to take into account a history of similar contraventions in order to assess the gravity, seriousness, nature or character of an instant contravention would not be to impose a fresh penalty for past offences or to impose a penalty that was disproportionate. Rather, it would "merely inform[] what is proportionate; that is to say, how serious or grave the instant contravention is"⁴⁴. Applying this approach, the primary judge considered that, when viewed against the backdrop of the CFMMEU's "sorry record of statutory contravention", the contraventions in the present case were "very much of the gravest, most serious kind"⁴⁵.

28 On that basis, the primary judge held that it was appropriate to impose on the CFMMEU penalties set at the maximum amount, \$63,000, although reduced

41 *Bendigo Theatre Case [No 2]* [2018] FCA 1211 at [18], citing *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 478.

42 *Bendigo Theatre Case [No 2]* [2018] FCA 1211 at [20].

43 *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [No 2]* [2015] FCA 1462 at [8].

44 *ABCC v Pattinson* (2019) 291 IR 286 at 310 [82] (emphasis in original).

45 *ABCC v Pattinson* (2019) 291 IR 286 at 310 [84].

by half to reflect that the two contraventions arose from the same course of conduct. In the result, the primary judge imposed on the CFMMEU a penalty of \$31,500 for each of the two contraventions⁴⁶. His Honour was satisfied that a total penalty of \$63,000 in respect of the CFMMEU was "a proportionate response to the Union's wrongdoing and represent[ed] the best prospect that the court ha[d] of deterring its repetition"⁴⁷.

29 In relation to Mr Pattinson, the primary judge considered that although Mr Pattinson did not have a prior history of contraventions, it reflected poorly on him that he enforced the CFMMEU's "no ticket, no start" policy at the site. The primary judge considered that it was important that the penalty imposed on Mr Pattinson be sufficient to deter repetition of the conduct not only by Mr Pattinson himself, but also by other delegates and officers of the CFMMEU⁴⁸. The primary judge imposed on Mr Pattinson a penalty of \$3,000 for each of the two contraventions⁴⁹.

The reasons of the Full Court

30 The Full Court allowed the appeal by Mr Pattinson and the CFMMEU. Allsop CJ, White and Wigney JJ delivered the leading judgment, with which Besanko and Bromwich JJ agreed.

31 The Full Court recognised that the object of civil penalties is entirely protective, in that they are aimed at promoting compliance through general and specific deterrence, and concepts of punishment, retribution and rehabilitation from the criminal law have no role to play⁵⁰. Having said that, however, their Honours went on explicitly to confine the exercise of the discretion conferred

46 *ABCC v Pattinson* (2019) 291 IR 286 at 316-317 [115].

47 *ABCC v Pattinson* (2019) 291 IR 286 at 317 [117].

48 *ABCC v Pattinson* (2019) 291 IR 286 at 311 [85]-[86].

49 *ABCC v Pattinson* (2019) 291 IR 286 at 317 [116], [118].

50 *Pattinson v ABCC* (2020) 282 FCR 580 at 595 [35], 596 [39].

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by s 546 of the Act by reference to considerations relating to the importance of retribution in sentencing for breaches of the criminal law.

32 The constraint that the Full Court applied took the form of a "notion of proportionality". Their Honours derived⁵¹ this "notion" of proportionality from the "principle" of proportionality discussed in *Veen v The Queen [No 2]*⁵². Their Honours proceeded on the basis that, although the principle of proportionality discussed in *Veen [No 2]* was itself rooted in the central significance of the purpose of retribution in criminal sentencing and the need for the punishment to fit the crime, that did not mean that a "notion" of proportionality had no place in civil penalty regimes that had deterrence as their sole purpose⁵³. Rather, their Honours anchored their "notion" of proportionality in the civil penalty context by regarding that notion as inhering in the task, in s 546, of setting a penalty at a level that is "appropriate"⁵⁴.

33 An important aspect of this "notion" of proportionality that was said to have "survive[d]" the rejection of retributive considerations in the imposition of civil penalties was the Full Court's understanding of the role of the statutory maximum penalty in "shap[ing]" the appropriate punishment for offending of the relevant kind⁵⁵. In this regard, the Full Court considered that a statutory maximum penalty was intended to be reserved for cases in which the "circumstances, including the nature and gravity of the contravention, ... warrant or call for the highest possible level of deterrence as reasonably appropriate"⁵⁶.

51 *Pattinson v ABCC* (2020) 282 FCR 580 at 601 [61].

52 (1988) 164 CLR 465.

53 *Pattinson v ABCC* (2020) 282 FCR 580 at 598 [45], 616-617 [107].

54 *Pattinson v ABCC* (2020) 282 FCR 580 at 614 [104], 616-617 [107], 618-619 [111], 648 [197].

55 *Pattinson v ABCC* (2020) 282 FCR 580 at 609 [92].

56 *Pattinson v ABCC* (2020) 282 FCR 580 at 616 [106]. See also 601 [62], 613 [98], 636-637 [160]-[162].

34 In the Full Court's view, a case could not be in the worst category merely by reason of the contravenor having a history of prior contraventions: to impose the maximum penalty in such a case would be to impose a penalty disproportionate to the nature, gravity and seriousness of the instant contravention⁵⁷. Because the setting of statutory maxima is a matter for Parliament, any perceived inadequacy of those maxima to deter contraventions could not be a reason for imposing a maximum penalty in circumstances where it would not otherwise be warranted⁵⁸.

35 The Full Court considered that courts may have regard to wilful recidivism and intentional disobedience of the law⁵⁹. The Full Court emphasised, however, that any demonstrated attitude of non-compliance of a contravenor was relevant only to the extent that it coloured the nature, gravity and seriousness of the contravention⁶⁰, the focus remaining always on "the nature and the character of the human conduct that constituted the contravention in question"⁶¹. Allsop CJ, White and Wigney JJ observed⁶²:

"What is not permitted in the name of deterrence is to untether the penal response from the nature and character of the instant contravention such that the penalty imposed can be seen to be undifferentiated between grades of conduct assessed and characterised on a principled basis.

... to remove proportionality from the assessment of an appropriate penal response to a contravention or to make it a subsidiary consideration, would lead to an interpretation of a statutory power to inflict a penal consequence untethered to the nature and seriousness of the contravention. In such circumstances one is no longer penalising for an instant

57 *Pattinson v ABCC* (2020) 282 FCR 580 at 636 [160]-[161], 642-643 [180]-[181].

58 *Pattinson v ABCC* (2020) 282 FCR 580 at 631 [139].

59 *Pattinson v ABCC* (2020) 282 FCR 580 at 615 [106], 617-618 [108]-[110].

60 *Pattinson v ABCC* (2020) 282 FCR 580 at 637 [162], 642 [180], 645 [186], 646 [191], 647 [194], 649 [201].

61 *Pattinson v ABCC* (2020) 282 FCR 580 at 647 [195].

62 *Pattinson v ABCC* (2020) 282 FCR 580 at 642 [180]-[181].

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contravention, rather *one is imposing penalties to bring about compliance generally by, in effect, saying the maximum penalty is always available against the recidivist for any contravention since the penalty will always conform with the object of deterrence.*" (emphasis added)

36 To similar effect, Besanko and Bromwich JJ said that it was important to recognise⁶³:

"the subtle but fundamental difference between characterising what has happened, which is conventional and permissible, and changing the character of what has happened, which is impermissible because it has the effect of at least in part imposing a penalty for what has been sanctioned previously. It is the injustice of the latter approach that is precluded by the principle of proportionality identified in *Veen No 2*."

37 The Full Court concluded that the primary judge had committed such an error. While it was permissible for the primary judge to take into account the demonstrated unwillingness of the CFMMEU to obey the law as a factor bearing upon the seriousness of the instant contraventions, the Full Court considered that the CFMMEU's history of contraventions overwhelmed the primary judge's analysis such that his Honour did not make any real evaluation of the features of the instant contraventions. In effect, the primary judge was said to have determined that, because the CFMMEU's recidivism had reached some threshold level, future contraventions could be treated as being of the worst category and deserving of the maximum penalty, irrespective of the circumstances of the conduct that comprised the contraventions. Such a conclusion was said to be erroneous, since it would "jettison" the "notion of proportionality" their Honours regarded as inherent in the task required by s 546 to determine an appropriate penalty for a contravention⁶⁴.

Section 546 and the "notion of proportionality"

38 The "notion of proportionality" derived by the Full Court from *Veen [No 2]* is so closely connected to the central role of retribution in criminal sentencing that it cannot be translated coherently into the civil penalty context of the Act.

⁶³ *Pattinson v ABCC* (2020) 282 FCR 580 at 656-657 [231].

⁶⁴ *Pattinson v ABCC* (2020) 282 FCR 580 at 647-648 [194]-[195].

39 The proposition for which *Veen [No 2]* stands in the criminal law is that a sentence that is imposed with a view to protecting the community from a criminal offender must not be disproportionate to the seriousness of the offending for which the offender is being sentenced⁶⁵. That is because, in the criminal law, the purpose of retribution – that is, imposing a punishment that fits the crime and is proper because it is what the offender deserves – constrains the sentencing discretion⁶⁶. As noted above, it is well-settled that, in the civil penalty regime of the Act, retribution has no part to play.

40 Nothing in the text, context or purpose of s 546 of the Act suggests that the Full Court's "notion of proportionality" inheres in the court's task, pursuant to s 546, to fix a penalty which it considers to be an "appropriate" penalty. The discretion conferred by s 546 is, like any discretionary power conferred by statute on a court, to be exercised judicially, that is, fairly and reasonably⁶⁷ having regard to the subject matter, scope and purpose of the legislation⁶⁸. In a civil penalty context, Burchett and Kiefel JJ in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission*⁶⁹ said:

"[I]nsistence upon the deterrent quality of a penalty should be balanced by insistence that it 'not be so high as to be oppressive'. Plainly, if deterrence is the object, the penalty should not be greater than is necessary to achieve this object; severity beyond that would be oppression."

41 It may therefore be accepted that s 546 requires the court to ensure that the penalty it imposes is "proportionate", where that term is understood to refer to a penalty that strikes a reasonable balance between deterrence and oppressive severity. It is in this sense that the Full Court in *Australian Competition and*

65 (1988) 164 CLR 465 at 472-473.

66 (1988) 164 CLR 465 at 473-474.

67 *Comcare v Banerji* (2019) 267 CLR 373 at 403 [40].

68 *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 81 [22], 96 [65], 120-121 [134]; *Northern Territory v Sangare* (2019) 265 CLR 164 at 172-173 [24].

69 (1996) 71 FCR 285 at 293.

Kiefel	CJ
Gageler	J
Keane	J
Gordon	J
Steward	J
Gleeson	J

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*Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd*⁷⁰ used the term "proportionality", when their Honours said:

"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.*" (emphasis added)

42 However, the Full Court's "notion of proportionality" derived from *Veen [No 2]* is something quite different. That notion cannot be reconciled with the decisive statements in the *Agreed Penalties Case* that civil penalties are not retributive, but rather are protective of the public interest in that they aim to secure compliance by deterring repeat contraventions⁷¹. To introduce considerations drawn from theories of retributive justice into the application of s 546 of the Act undermines the primary significance of deterrence.

43 That the Full Court's approach in this case is apt to undermine the primacy of deterrence as the objective of the civil penalty regime in the Act is amply demonstrated once regard is had to the failure of previous penalties to have any deterrent effect on the CFMMEU's repeated contraventions of s 349(1) of the Act. The circumstance that the CFMMEU has continued to breach s 349(1), steadfastly resistant to previous attempts to enforce compliance by civil penalties fixed at less than the permitted maximum, is a compelling indication that the penalties previously imposed have not been taken seriously because they were insufficient to outweigh the benefits flowing unlawfully to the contravenor from adherence to the "no ticket, no start" policy. To the contrary, the CFMMEU's continuing

70 (2016) 340 ALR 25 at 62 [152].

71 (2015) 258 CLR 482 at 495 [24], 506 [55], 507-508 [59], 523-524 [110].

defiance of s 349(1) indicates that it regards the penalties previously imposed as an "acceptable cost of doing business"⁷².

Adoption of factors from criminal sentencing

44 The CFMMEU submitted that although this Court's reasons in the *Agreed Penalties Case*⁷³ and *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union*⁷⁴ were decisive in emphasising the primacy of deterrence as the objective of civil penalty regimes, this Court did not decide that factors which were traditionally seen to be grounded in retributive analysis – including proportionality – could never be relevant to the fixing of an appropriate civil penalty. The answer to this submission is that the reasoning in those decisions of this Court proceeds, unmistakably, on the basis that considerations of retribution are indeed immaterial to the application of s 546, save insofar as they are also material to deterrence, specific and general. And, to the extent that some of the factors listed by French J in *CSR* might be said to echo retributive theories, his Honour also made clear that those factors were relevant only to the extent they related to deterrence. It is therefore idle to observe, as the CFMMEU does, that nothing in the discussion in this Court's decisions expressly denies the possibility that the Full Court's "notion of proportionality" could "survive the rejection of retribution" as a relevant consideration – that notion is denied by the fundamental premise of this Court's decisions.

45 It may be recognised that some concepts familiar from criminal sentencing may usefully be deployed in the enforcement of the civil penalty regime. In this regard, concepts such as totality, parity and course of conduct may assist in the assessment of what may be considered reasonably necessary to deter further contraventions of the Act. On behalf of the CFMMEU, the rhetorical question was asked, on several occasions, how it was that proportionality as a principle of sentencing did not translate to the civil penalty regime when other concepts

72 *Agreed Penalties Case* (2015) 258 CLR 482 at 524 [110], citing *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 at 659 [66] and *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249 at 265 [62]-[63].

73 (2015) 258 CLR 482 at 506 [55].

74 (2018) 262 CLR 157 at 173 [43]-[44], 185 [87], 195-196 [116].

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familiar in criminal sentencing such as totality, parity and course of conduct have been accepted as relevant. A compelling answer to that rhetorical question was provided by the Commissioner's counsel. Proportionality in this context has a normative character foreign to the purpose of the power, whereas concepts such as totality, parity and course of conduct are analytical tools⁷⁵ which assist in the determination of a reasonable application of the law. Although these analytical concepts have been developed in the context of the punishment of crime, unlike proportionality, they are not so closely tied to retribution as to be incompatible with a civil penalty regime focussed on deterrence.

The end of discretion?

46 It does not follow, as the Full Court suggested⁷⁶ and as the CFMMEU argued in this Court, from the rejection of the Full Court's "notion of proportionality" that s 546 must be taken to require the imposition of a penalty approaching the maximum in relation to any and every contravention by a recidivist offender. It is important to recall that an "appropriate" penalty is one that strikes a reasonable balance between oppressive severity and the need for deterrence in respect of the particular case. A contravention may be a "one-off" result of inadvertence by the contravenor rather than the latest instance of the contravenor's pursuit of a strategy of deliberate recalcitrance in order to have its way. There may also be cases, for example, where a contravention has occurred through ignorance of the law on the part of a union official, or where the official responsible for a deliberate breach has been disciplined by the union. In such cases, a modest penalty, if any, may reasonably be thought to be sufficient to provide effective deterrence against further contraventions.

47 The penalty that is appropriate to protect the public interest by deterring future contraventions of the Act may also be moderated by taking into account other factors of the kind adverted to by French J in *CSR*. For example, where those responsible for a contravention of the Act express genuine remorse for the contravention, it might be considered appropriate to impose only a moderate penalty because no more would be necessary to incentivise the contravenors to remain mindful of their remorse and their public expressions of that remorse to the

75 See *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* (2017) 258 FCR 312 at 447-448 [421]-[424]; *Australian Competition and Consumer Commission v Yazaki Corporation* (2018) 262 FCR 243 at 294 [226].

76 *Pattinson v ABCC* (2020) 282 FCR 580 at 647-648 [195].

<i>Kiefel</i>	<i>CJ</i>
<i>Gageler</i>	<i>J</i>
<i>Keane</i>	<i>J</i>
<i>Gordon</i>	<i>J</i>
<i>Steward</i>	<i>J</i>
<i>Gleeson</i>	<i>J</i>

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court. Similarly, where the occasion in which a contravention occurred is unlikely to arise in the future because of changes in the membership of an industrial organisation, a modest penalty may be appropriate having regard to the reduced risk of future contraventions.

48 It is not necessary to multiply examples further. It is sufficient to say that a court empowered by s 546 to impose an "appropriate" penalty must act fairly and reasonably for the purpose of protecting the public interest by deterring future contraventions of the Act.

Not the "worst case"

49 The Full Court erred in treating the statutory maximum as implicitly requiring that contraventions be graded on a scale of increasing seriousness, with the maximum to be reserved exclusively for the worst category of contravening conduct. Nothing in the text of s 546, or its broader context, requires that the maximum constrain the statutory discretion in this way.

50 This Court's reasoning in the *Agreed Penalties Case* is distinctly inconsistent with the notion that the maximum penalty may only be imposed in respect of contravening conduct of the most serious kind. Considerations of deterrence, and the protection of the public interest, justify the imposition of the maximum penalty where it is apparent that no lesser penalty will be an effective deterrent against further contraventions of a like kind. Where a contravention is an example of adherence to a strategy of choosing to pay a penalty in preference to obeying the law, the court may reasonably fix a penalty at the maximum set by statute with a view to making continued adherence to that strategy in the ongoing conduct of the contravenor's affairs as unattractive as it is open to the court reasonably to do.

51 In regarding the statutory maximum penalty as having a role in a civil penalty context as some kind of graduated scale by which contraventions are to be categorised in order of seriousness and corresponding penalty, the Full Court attempted to transplant a concept of retributive justice, the origins of which are to be found in the criminal law, into a civil penalty regime in which retribution has no role to play. This "yardstick" understanding of the maximum penalty, with its focus on the objective seriousness or gravity of a contravention, is reminiscent of

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retributive notions of "just deserts"⁷⁷ and the adage that the punishment should fit the crime.

52 It is also instructive to note that, even in the criminal law, the role of the maximum penalty as a yardstick is not controlling, and must instead be balanced with all other relevant factors. In *Markarian v The Queen*⁷⁸, Gleeson CJ, Gummow, Hayne and Callinan JJ said:

"[C]areful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, *taken and balanced with all of the other relevant factors*, a yardstick." (emphasis added)

53 In a civil penalty context, the relevance of a prescribed maximum penalty as a yardstick was explained by the Full Court of the Federal Court in *Reckitt Benckiser*⁷⁹, where their Honours, citing *Markarian*, said:

"The reasoning in *Markarian* about the need to have regard to the maximum penalty when considering the quantum of a penalty has been accepted to apply to civil penalties in numerous decisions of this Court both at first instance and on appeal. As *Markarian* makes clear, the maximum penalty, while important, is but one yardstick that ordinarily must be applied.

Care must be taken to ensure that the maximum penalty is not applied mechanically, instead of it being treated as one of a number of relevant factors, albeit an important one. Put another way, a contravention that is objectively in the mid-range of objective seriousness may not, for that reason alone, transpose into a penalty range somewhere in the middle between zero and the maximum penalty. Similarly, just because a contravention is towards either end of the spectrum of contraventions of its kind does not mean that the penalty must be towards the bottom or top of

⁷⁷ *Pearce v The Queen* (1998) 194 CLR 610 at 623 [40].

⁷⁸ (2005) 228 CLR 357 at 372 [31].

⁷⁹ (2016) 340 ALR 25 at 63 [155]-[156].

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the range respectively. However, ordinarily there must be some reasonable relationship between the theoretical maximum and the final penalty imposed." (citations omitted)

54 Two aspects of the Full Court's reasoning in this passage from *Reckitt Benckiser* deserve particular emphasis here. The first is their Honours' recognition that the maximum penalty is "but one yardstick that ordinarily must be applied" and must be treated "as one of a number of relevant factors". As has already been seen, other factors relevant for the purposes of the civil penalty regime include those identified by French J in *CSR*.

55 The second point is that the maximum penalty does not constrain the exercise of the discretion under s 546 (or its analogues in other Commonwealth legislation), beyond requiring "some reasonable relationship between the theoretical maximum and the final penalty imposed". This relationship of "reasonableness" may be established by reference to the circumstances of the contravenor as well as by the circumstances of the conduct involved in the contravention. That is so because either set of circumstances may have a bearing upon the extent of the need for deterrence in the penalty to be imposed. And these categories of circumstances may overlap.

Contravention vs contravenor

56 One way of characterising the error of the Full Court was that, in reasoning to the conclusion that the CFMMEU's contraventions were not deserving of the maximum penalty, it sought to draw a sharp distinction between the circumstances of the contraventions and the circumstances of the contravenor. In focussing upon this distinction, the Full Court concluded that, having regard to the circumstances of the contraventions, which were not examples of the worst sort of conduct comprehended by s 349(1), the primary judge erred in imposing the maximum penalty⁸⁰.

57 But on the approach in *CSR* and affirmed in the decisions of this Court referred to above, both the circumstances of the contravenor and the circumstances of the contravention may be relevant to the assessment of whether the maximum level of deterrence is called for. Indeed, as long ago as *Trade Practices*

⁸⁰ *Pattinson v ABCC* (2020) 282 FCR 580 at 647-648 [195].

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*Commission v Stihl Chain Saws (Aust) Pty Ltd*⁸¹, in a passage referred to with evident approval by French J in *CSR*⁸², Smithers J said that a civil penalty "should constitute a real punishment proportionate to the deliberation with which the defendant contravened the provisions of the Act".

58 The distinction upon which the Full Court sought to insist cannot control the balancing exercise required by s 546. Indeed, it is difficult to see how this distinction serves any useful purpose in this context. Once it is accepted, as it must be, that the maximum penalty is intended by the Act to be imposed in respect of a contravention warranting the strongest deterrence within the prescribed cap, there is no warrant for the court to ascertain the extent of the necessity for deterrence by reference exclusively to the circumstances of the contravention. The categories of circumstances may overlap, in that matters may bear upon both the seriousness of the contravention and the intransigence of the contravenor. Further, circumstances which can be said to relate exclusively to the contravenor may bear strongly on what level of deterrence will be "appropriate".

59 The majority in *Broadway on Ann* and the primary judge in this case were correct in concluding that the need for deterrence in each case, demonstrated by a persistent adherence to a strategy of non-compliance, warranted the imposition of the maximum penalty. They were also correct to reject the proposition that the court's assessment of what was reasonably necessary for deterrence was subject to the constraint that the maximum penalty could not be imposed in any case where the contravening conduct was not the worst example of contravening conduct. But to the extent that the majority in *Broadway on Ann* and the primary judge reached these conclusions by reasoning that the contravenor's history of contraventions was relevant only because it was a factor that made the circumstances of the contraventions of the most serious kind, their Honours might be said to have adopted an unnecessarily strict focus on the seriousness of the contravening conduct as distinct from the circumstances of the contravenor. It is not necessary that the task of setting a penalty that is "appropriate" to deter further contraventions should proceed by considering characteristics of the contravenor only to the extent that they can be said to bear upon the seriousness of the contravening conduct.

81 [1978] ATPR ¶40-091 at 17,896.

82 [1991] ATPR ¶41-076 at 52,153.

The circumstances of the contravenor

60 Indeed, in some cases, the circumstances of the contravenor may be more significant in terms of the extent of the necessity for deterrence than the circumstances of the contravention. In this regard, it is simply undeniable that, all other things being equal, a greater financial incentive will be necessary to persuade a well-resourced contravenor to abide by the law rather than to adhere to its preferred policy than will be necessary to persuade a poorly resourced contravenor that its unlawful policy preference is not sustainable. It is equally obvious that, the more determined a contravenor is to have its way in the workplace and the more deliberate its contravention is, the greater will be the financial incentive necessary to make the contravenor accept that the price of having its way is not sustainable⁸³.

61 In the present case, the CFMMEU's determination and financial ability to adhere to its "no ticket, no start" policy in defiance of the law are indisputably the most significant considerations in the assessment pursuant to s 546 of what is reasonably necessary to deter further contraventions of a like kind.

The circumstances of the contraventions

62 As to the circumstances of the contraventions of concern here, too much should not be made of the fact that the contraventions were not attended by violent or intimidatory behaviour that might have made the contraventions appear more serious. The public interest directly protected by s 349(1) of the Act lies in ensuring the maintenance of rights of association in the workplace. It is the interference with those rights by the making of false or misleading representations that is the gravamen of a contravention of s 349(1). To the extent that circumstances of aggravation such as violent or intimidatory behaviour might attend contraventions of s 349(1), those aggravating circumstances might well engage other laws concerned to protect peace and good order.

Mr Pattinson's position

63 It was argued on behalf of Mr Pattinson that, even if the Commissioner's appeal were otherwise successful, this Court should not set aside the penalty fixed by the Full Court in respect of Mr Pattinson and restore the penalty fixed by the primary judge. It was said that since the determination of the primary judge,

83 See *Trade Practices Commission v Stihl Chain Saws (Aust) Pty Ltd* [1978] ATPR ¶40-091 at 17,896.

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Mr Pattinson has retired. It was also said that he was merely a site delegate, not a senior official of the CFMMEU responsible for its policy and strategies. On that footing, it was said that considerations of specific deterrence did not support the penalty fixed by the primary judge.

64 This argument should be rejected. The circumstance that Mr Pattinson has retired since the judgment of the primary judge says nothing against the appropriateness, as a matter of specific deterrence, of the penalty fixed by the primary judge. In addition, as is apparent from the primary judge's reasons, that penalty reflected considerations of general deterrence relevant to other delegates and officers of the CFMMEU.

65 The reasons of the Full Court identify no reason for reducing the penalty fixed by the primary judge in relation to Mr Pattinson. It is noteworthy that the primary judge did not impose on Mr Pattinson anything like the maximum penalty that might have been imposed upon him. If the Full Court's interference with the primary judge's exercise of discretion in relation to Mr Pattinson is explicable on the same basis as that which led to the Full Court's interference with the penalty imposed on the CFMMEU, then, for the reasons set out above, there was no basis for that course. The penalty imposed by the primary judge in relation to Mr Pattinson should be restored.

Conclusion

66 The theory of s 546 of the Act is that the financial disincentive involved in the imposition of a pecuniary penalty will encourage compliance with the law by ensuring that contraventions are viewed by the contravenor and others as an economically irrational choice. Whether or not experience vindicates the theory of the Act is a matter for Parliament. The court's function is to give effect to the intention of the Act. In this regard, the court must do what it can to deter non-compliance with the Act.

67 Where it is evident that a contravention has occurred as a matter of industrial strategy pursued without regard for the law, it is open to a court acting under s 546 reasonably to conclude that no penalty short of the maximum would be appropriate. The circumstance that the imposition of the maximum penalty might not prove in fact to be effective to deter further contraventions is not a reason to impose a lesser penalty or no penalty at all.

68 The judicial task of setting an "appropriate" penalty under s 546 of the Act is informed by well-settled principles that have been applied without difficulty,

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and which require no supplementation by the Full Court's "notion of proportionality", drawn from the criminal law context of *Veen [No 2]*.

69 The Full Court expressly acknowledged that "we are not in the domain of crime" and that "[t]he imposition of civil penalties is free from notions of retribution and denunciation, its object is deterrence"⁸⁴. But it is impossible to square these acknowledgements with their Honours' conclusions, from which it is apparent that their Honours were distracted by their "notion of proportionality" from coming to grips with the central question: whether, in light of the CFMMEU's strategy of non-compliance with the law, the penalties imposed by the primary judge were reasonably necessary to deter further contraventions.

70 To say, as the Full Court did, that on the approach taken by the primary judge "[t]he penalty becomes imposed not for the instant contravention but, to some degree, for the past, again"⁸⁵ is to fail to appreciate that the significance of the CFMMEU's past offending is that it demonstrates a fixed "intention of promoting a no-ticket no-start policy"⁸⁶. It is to fail to appreciate that the CFMMEU's tenacity in adhering to that policy reflects a calculation on its part that the industrial benefits from that adherence are such that the lesser penalties previously imposed are a price worth paying so that it can continue to have its way.

71 The Full Court's unwarranted complication of the court's task pursuant to s 546, by introducing a "notion of proportionality" as a control on that discretion and by reserving the statutory maximum for an imagined "worst case", is apt to divert a court from its real task under s 546 of fixing the penalty which it considers fairly and reasonably to be appropriate to protect the public interest from future contraventions of the Act.

72 In the circumstances of this case, it was open to the primary judge reasonably to conclude that the maximum penalty was necessary to deter the CFMMEU from further contravening conduct of the kind in which it had engaged. The Full Court erred in holding otherwise.

84 *Pattinson v ABCC* (2020) 282 FCR 580 at 646 [191].

85 *Pattinson v ABCC* (2020) 282 FCR 580 at 647 [195]. See also 657 [231].

86 *Pattinson v ABCC* (2020) 282 FCR 580 at 647 [195].

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Gageler *J*
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Orders

73 The appeal must be allowed.

74 The orders of the Full Court should be set aside and, in their place, the
appeal to the Full Court should be dismissed.

EDELMAN J.

The problem with deterrence

75 It is "sometimes just to hang an innocent" person⁸⁷. That is where the logic of general deterrence leads. The logic of specific deterrence can also lead to gross injustice. It can create a legal position where, as Professor Zedner has observed, the "utterly repentant offender, unlikely to repeat their crime, would not need to be punished however serious the offence for which they stand convicted, whereas the unrepentant offender who appears unlikely to change might attract a penalty greatly disproportionate to the present offence"⁸⁸.

76 Consider two hypothetical examples. First, a billion-dollar corporation commits multiple related contraventions of a civil remedy provision over a lengthy period. The contraventions are extremely serious. Although the contraventions are unknown, unintended, and undesired by any person in the company, they result in many millions of dollars of losses to the general public and they threaten public health and safety. The extreme disapprobation from the general public leads the corporation, and others like it, to put systems in place to ensure that there is almost no likelihood that the corporation, or any others like it, will commit any contravention of that general nature again. The maximum penalty for a single infringement by the civil penalty provision for a corporation is \$63,000 but the effect of the multiple contraventions is that the maximum penalty is in the region of many millions of dollars. The court concludes that very little, if any, penalty is needed to ensure that the corporation or others in a similar position do not commit a contravention of this nature again.

77 Secondly, an individual of modest means commits a single contravention of the same civil remedy provision. The contravention is extremely minor and results in no losses to anyone and no threat to anyone's health or safety. The maximum penalty for a single infringement by the civil penalty provision for an individual is \$12,600. There is evidence that many other individuals exhibit an attitude of extreme defiance of the civil remedy provision and the court concludes that, unless the penalty imposed upon the individual is set at a level close to the maximum of \$12,600, many others will contravene the provision.

78 The contraventions by the corporation deserve a substantial penalty. The contravention by the individual does not. But, if the principal purpose of imposing civil penalties for a breach of this provision were deterrence then, as the

87 Moore, *Placing Blame: A General Theory of the Criminal Law* (1997) at 96, quoting Dennett and Lambert, *The Philosophical Lexicon*, 7th ed (1978) at 8. See also Voltaire, *Candide* (1759) at 211-212.

88 Zedner, *Criminal Justice* (2004) at 95.

Solicitor-General of the Commonwealth submitted in oral argument on this appeal, only a token penalty should be imposed on the hypothetical corporation. It would be hard to justify even a penalty of \$1,000 if no specific or general deterrence were thought to be required. But a focus principally upon the purpose of deterrence might be thought to justify a penalty of around \$10,000 upon the individual for the purpose of general deterrence.

79 Something is wrong with the law if, solely due to the future propensity of action by others, the law could tolerate a penalty of ten times *more* for (i) an individual who commits a single, minor contravention of a civil remedy provision than (ii) a billion-dollar corporation which commits far more serious contraventions on multiple occasions.

80 The force of the reasons of the Full Court of the Federal Court of Australia in this case lies in that Court's valiant attempt to reconcile (i) the difficult requirement that the principal focus of a court be upon deterrence with (ii) ordering a penalty which a contravener, in justice, deserves for their past conduct. The latter has a powerful claim to be the principal focus required of a court exercising its power under s 546(1) of the *Fair Work Act 2009* (Cth), upon finding a contravention of that Act, to "order a person to pay a pecuniary penalty that the court considers is appropriate". It is hard to imagine that Parliament intended, by that reference to "appropriate", to set the foundations of punishment by civil penalties in utilitarian notions of deterrence, rather than in the principle of just desert that has for so long formed the foundations of the approach to punishment in the criminal law. Nevertheless, the present doctrine of this Court is that the principal object of civil penalties is not desert but deterrence, the latter being an economic approach to punishment that uses the offender as an instrument of social policy and has been described even by its defenders as one that has not been favoured for the last hundred years⁸⁹.

81 The conduct of the second respondent union ("the CFMMEU") does not expose the problems with a principal focus upon deterrence in the way that the above hypothetical examples do. The conduct of the CFMMEU would have required a very substantial penalty on a view of the law based on either desert or deterrence. The circumstances of the CFMMEU's breaches were serious (for the reason that they were committed in wilful defiance of the law and preceded by 150 previous findings of contravention). The CFMMEU is also very likely to continue to commit these or similar contraventions of the *Fair Work Act*. As the CFMMEU has significant resources, a small penalty would have little or no effect. The primary judge imposed a substantial penalty: for the two contraventions

89 Compare Becker, "Crime and Punishment: An Economic Approach", in Becker and Landes (eds), *Essays in the Economics of Crime and Punishment* (1974) 1 at 45.

together, the CFMMEU was ordered to pay the maximum penalty for a single contravention, \$63,000.

82 By contrast, the circumstances of the first respondent in this case, Mr Pattinson, point to anomalies with the application of a primary criterion of deterrence. Mr Pattinson is a 70-year-old, now retired, builder with more than two decades' experience as a site delegate whose reckless misrepresentation to two people, depriving each of them of a single day of work, was his first contravention of the *Fair Work Act*. On any view of the law, he did not deserve a substantial penalty. And yet, with the application of a principal purpose of deterrence, and without any evidence of his assets or income, Mr Pattinson was ordered by the primary judge to pay a substantial penalty of \$6,000, around half of the maximum amount for a single contravention by an individual.

83 The Full Court of the Federal Court followed the longstanding and basic principle of justice that focuses upon just desert – that penalty which, in justice, is no more than is deserved – and reduced the penalties imposed on both the CFMMEU and Mr Pattinson. Despite the injustice and anomalies in the application of deterrence rather than desert as a principal object of punishment, and despite the inconsistencies in the present state of the law, the Full Court should have applied deterrence as the principal object at the expense of desert. If deterrence, rather than desert, had been applied as a primary principle, the penalty imposed upon the CFMMEU by the primary judge should not have been reduced. Nevertheless, on any view, the Full Court was correct to reduce the penalty imposed upon Mr Pattinson.

The circumstances of this case

84 The facts and background to this case are fully set out in the joint judgment. In short, the two contraventions by each of the respondents, Mr Pattinson and the CFMMEU, involved a brief incident in September 2018. Mr Pattinson was an officer of the CFMMEU, in the sense that he was a worker who was an elected representative of the workers on the site at which his employer was contracted to perform work.

85 The contraventions of the *Fair Work Act* were committed by Mr Pattinson and attributed to the CFMMEU⁹⁰. The contraventions involved a misrepresentation made by Mr Pattinson to two employees of a subcontractor engaged by Mr Pattinson's employer. Mr Pattinson represented to the two employees that, in order to perform their contracted work under the subcontract, they were required to be members of an industrial organisation. It was admitted by the respondents that this misrepresentation was made knowingly or recklessly and was a contravention of s 349(1) of the *Fair Work Act*. Since the misrepresentation was

90 *Fair Work Act 2009* (Cth), s 363.

made to two employees, Mr Pattinson and the CFMMEU committed two contraventions each.

86 During more than 20 years of work as a site delegate, Mr Pattinson had never previously contravened the *Fair Work Act* or its predecessor. There was no evidence of Mr Pattinson's income or assets but there was no suggestion that he was a man of any considerable wealth. Nor was there any evidence of his ability to pay any penalty.

87 By contrast, since 2000 the CFMMEU had contravened civil remedy provisions of the *Fair Work Act* or its predecessor on at least 150 occasions and had contravened s 349(1) on at least seven occasions⁹¹. For reasons explained below, the primary judge correctly reasoned that, "in assessing the nature, character and seriousness (and/or gravity) of the Union's Agreed Contraventions, regard may properly be had to its history of contravening conduct"⁹². That history, as his Honour held, established the contraventions as "very much of the gravest, most serious kind"⁹³. The primary judge also observed that the CFMMEU is extremely well resourced⁹⁴.

Desert and deterrence: primary and secondary criteria of justice

Primary and secondary criteria of justice

88 There is a fundamental difference between (i) a penalty that focuses upon "just desert", that is, the penalty that, in justice, is no more than the law treats as deserved by a defendant for their past conduct, and (ii) a penalty that focuses upon deterrence, that is, the penalty that is necessary to prevent a defendant or others in a similar position from contravening in the future. The former is concerned with the seriousness of what the defendant *has done*. The latter is concerned with what the defendant or others in a similar position *might do*. For so long as penalising and punishing are seen as a necessary response to breaches of legal rules, basic notions of justice, which recognise the dignity and moral worth of individuals,

91 *Australian Building and Construction Commissioner v Pattinson* (2019) 291 IR 286 at 298 [35].

92 *Australian Building and Construction Commissioner v Pattinson* (2019) 291 IR 286 at 310 [83].

93 *Australian Building and Construction Commissioner v Pattinson* (2019) 291 IR 286 at 310 [84].

94 *Australian Building and Construction Commissioner v Pattinson* (2019) 291 IR 286 at 313 [96].

usually require that the range of available penalties should be primarily set by reference to what a person has done rather than what the person or others might do in the future. As H L A Hart observed, "[l]ong sentences of imprisonment might effectually stamp out car parking offences, yet we think it wrong to employ them"⁹⁵. Nevertheless, as a secondary criterion, an assessment of what the person, or others like them, might do in the future might assist in setting the appropriate penalty within the range of what the person justly deserves for their past conduct⁹⁶.

89 The primary criterion of justice in penalising should therefore be desert. In other words, in penalising a person, the primary focus should be upon ensuring that they are not punished any more than what the law requires that they deserve based on the seriousness of their past conduct, considered in light of all of the circumstances. In criminal law, this fundamental principle is sometimes expressed as a principle of "reasonableness", "appropriateness", or "proportionality". As Mason CJ, Deane, Dawson, Toohey and McHugh JJ said in *Hoare v The Queen*⁹⁷, "a basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its *objective* circumstances". Or, as expressed by the Australian Law Reform Commission, "[t]he principle of proportionality requires courts to impose sentences that bear a reasonable, or proportionate, relationship to the criminal conduct in question ... considered in light of its objective circumstances"⁹⁸.

90 The label "proportionality", which is described as "one of the fundamental principles of sentencing law", is nothing more than the basic principle that a court must, by focusing upon what the law requires that a person deserves, "make a judgment concerning the relationship of the penalty to the facts ... after taking into account all the facts and circumstances of the case"⁹⁹. Stripped of a requirement of proportionality, a court would be free to order a penalty which is outside the range of what a person deserves for what they have done. Even without language

95 Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd ed (2008) at 25.

96 Morris, *Madness and the Criminal Law* (1982), ch 5. Compare von Hirsch, "Proportionality in the Philosophy of Punishment" (1992) 16 *Crime and Justice: A Review of Research* 55 at 89-90.

97 (1989) 167 CLR 348 at 354 (emphasis in original).

98 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) at 150 [5.3].

99 *Markarian v The Queen* (2005) 228 CLR 357 at 385 [69].

requiring a "reasonable", "appropriate", or "proportionate" punishment, the principle is so basic that it is ordinarily implied in the grant of a judicial discretion to punish¹⁰⁰.

Desert in criminal law and civil law

91 Civil punishment usually requires an application of the same notions of proportionality as in the criminal law. For instance, an award of punitive damages to punish for civil wrongdoing must not be "disproportionate" to the seriousness of the wrong¹⁰¹. As Stevens J, for the Supreme Court of the United States, said in *BMW of North America Inc v Gore*¹⁰², "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct". The award must not be "wholly disproportioned to the offense"¹⁰³.

92 In *Comcare v Banerji*¹⁰⁴, in discussing the operation of s 15 of the *Public Service Act 1999* (Cth), which permits the imposition by an employer of penalties including fines on an Australian Public Service employee, Kiefel CJ, Bell, Keane and Nettle JJ said that s 15 requires a "lawful, proportionate response to the nature and gravity of [the] misconduct" governed by a principle that a "[b]reach of the impugned provisions renders an employee of the APS liable to no greater penalty than is proportionate to the nature and gravity of the employee's misconduct". It is difficult to see why a civil penalty provision imposing only monetary penalties should be treated any differently. As Gleeson CJ, McHugh, Gummow and Hayne JJ said in *Gray v Motor Accident Commission*¹⁰⁵, after referring to matters including "[t]he increasing frequency with which civil penalty provisions are enacted", such matters "deny the existence of any 'sharp cleavage' between the criminal and the civil law".

100 See also *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 491.

101 *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 471. See also *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 10-12 [26]-[31].

102 (1996) 517 US 559 at 575.

103 (1996) 517 US 559 at 575, citing *St Louis, Iron Mountain & Southern Railway Co v Williams* (1919) 251 US 63 at 66-67.

104 (2019) 267 CLR 373 at 398 [27], 403-404 [40].

105 (1998) 196 CLR 1 at 7-8 [16] (footnotes omitted).

93 In lucid and cogent submissions, senior counsel for the CFMMEU and Mr Pattinson pointed to three instances where the law concerning civil penalties replicates the approach of the criminal law in ensuring that a penalty does not exceed what the law requires that an offender deserves. Each of these instances ensures that the penalty imposed is what the law requires that a contravener deserves, whether described as reasonableness, appropriateness, or proportionality.

94 The first instance is the totality principle. In criminal law, an aspect of that principle is to prevent an outcome where "the imposition of a cumulative sentence [is] incommensurate with the gravity of the whole of [the offender's] proven criminal conduct or ... due deserts"¹⁰⁶. A second aspect of the totality principle in criminal law is that the penalty should not be "crushing" in light of the offender's record and prospects¹⁰⁷. Both aspects of this principle have been repeatedly applied in relation to civil penalties to ensure that the penalty is "proportionate to the gravity of the [contraventions]"¹⁰⁸ or, put differently, to ensure that the penalty is not "out of proportion to the overall misconduct"¹⁰⁹ and is "just and appropriate"¹¹⁰.

95 The second instance is the principle of consistency of punishment. In criminal law, the principle of consistency exists because an assessment of the penalty that an offender deserves includes systemic considerations: the administration of criminal justice "should be systematically fair, and that involves, amongst other things, reasonable consistency"¹¹¹. One aspect of the principle of

106 *Mill v The Queen* (1988) 166 CLR 59 at 63, quoting *R v Knight* (1981) 26 SASR 573 at 576.

107 *Postiglione v The Queen* (1997) 189 CLR 295 at 304, 308, 340-341.

108 *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 at 572 [54]. See also at 567 [23], 583 [102]; *QR Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2010) 204 IR 142 at 166-167 [62]. See further *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2016] FCA 413 at [61]-[62]; *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner* (2018) 265 FCR 208 at 212 [7].

109 *QR Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2010) 204 IR 142 at 166 [62].

110 *McIver v Healey* [2008] FCA 425 at [30]-[31].

111 *Wong v The Queen* (2001) 207 CLR 584 at 591 [6].

consistency is that "careful attention to maximum penalties will almost always be required"¹¹². This involves consideration of whether a person's past conduct, when viewed in light of all the circumstances, including the person's past contraventions, can be regarded as in the most serious category. Broadly the same approach has been taken to civil penalties, with the principle applied so that the imposition of "a maximum penalty offends the principle only if the case is recognisably outside the worst category"¹¹³.

96

The third instance is the course of conduct principle, which applies in two circumstances: first, where multiple offences are founded on the same facts "it is necessary to ensure that the appropriate penalty for the same act or omission is not imposed twice"; and, secondly, where the offences are part of a series it is necessary to ensure that the punishment is for "the entirety of the criminal conduct of the same or similar character, rather than the several acts or omissions constituting the separate offences"¹¹⁴. To punish an offender twice for what is properly characterised as the same conduct is to punish other than "according to their just deserts"¹¹⁵. This principle has been repeatedly applied in civil penalty cases as an aspect of proportionality¹¹⁶ on the premise that, if the contraventions arose from a course of conduct, "the penalties imposed in relation to the contraventions should generally reflect that fact, otherwise there is a risk that the respondent will be doubly punished in respect of the relevant acts or omissions that make up the multiple contraventions"¹¹⁷.

112 *Markarian v The Queen* (2005) 228 CLR 357 at 372 [31].

113 *Fox v St Barbara Mines Ltd* [1998] FCA 621 at 18. See also *QR Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2010) 204 IR 142 at 166 [58]; *Parker v Australian Building and Construction Commissioner* (2019) 270 FCR 39 at 146-147 [342].

114 *Ryan v The Queen* (1982) 149 CLR 1 at 22.

115 *Pearce v The Queen* (1998) 194 CLR 610 at 623 [40].

116 See eg *Australian Competition and Consumer Commission v Yazaki Corporation* (2018) 262 FCR 243 at 294 [226], 296 [236].

117 *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68 at 99-100 [148]; *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Registered Organisations Commissioner* (2020) 283 FCR 404

97 Each of these instances – totality, consistency, and course of conduct – is concerned to ensure that an offender or contravener is not punished more than the law requires that they deserve in all of the circumstances of their past conduct. Each instance aims "to ensure that the penalties imposed overall are proportionate to the conduct"¹¹⁸. In other words, each is concerned with the reasonableness, appropriateness, or proportionality of the penalty in relation to the seriousness of the contravention in light of all of the circumstances. Each is independent of deterrence.

The role of prior contraventions in assessing desert and deterrence

98 There is an important difference between, on the one hand, taking repeated contraventions into account for the purpose of assessing the seriousness of the instant contravention and, on the other hand, taking repeated contraventions into account for the purpose of assessing the need for general and specific deterrence. The former uses the past contraventions as evidence of the attitude with which the contravention was committed. It is part of the circumstances in which the contravener committed the offence: "repeat violations will lead to an escalation in penalty levels, so as to express moral outrage at the offender's apparent wilful disregard of the law"¹¹⁹. The latter uses the past contraventions only as part of a calculus to predict future behaviour by the contravener or others in a similar position.

99 The difference can be illustrated by an example. Suppose that a person has committed, and been penalised for, contraventions on 150 separate occasions. A 151st contravention will generally be much more serious than the first contravention because on the 151st occasion the court will readily, and far more confidently, draw the inference that the contravener acted in conscious and complete defiance of the law. The seriousness of the contravention is unaffected by predictions of whether the contravener is likely to contravene again or whether others are likely to contravene. Hence, without reducing the seriousness of the 151st contravention, it is possible that the court might also conclude that, on this 151st occasion, there is little need for specific deterrence because following this contravention the contravener has finally changed their course and specific procedures have been put in place to ensure that the contravention does not happen

at 428 [81]. See also *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* (2017) 258 FCR 312 at 447 [421].

118 *Parker v Australian Building and Construction Commissioner* (2019) 270 FCR 39 at 127 [266].

119 Yeung, "Quantifying Regulatory Penalties: Australian Competition Law Penalties in Perspective" (1999) 23 *Melbourne University Law Review* 440 at 455.

again. Although the contravention remains just as serious, the need for specific deterrence is greatly reduced.

100 An example of past contraventions being used to establish both the seriousness of instant contraventions and the need for deterrence is the case of *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner* ("*Broadway on Ann*")¹²⁰. In the Full Court of the Federal Court¹²¹, Tracey J in the majority referred to the history of contraventions by the CFMEU and said that the repeated contraventions "emphasise the objective seriousness of the CFMEU's conduct, acting through its officials. They bespeak deliberate abuse of the CFMEU's privileged position as a registered organisation in the Federal industrial relations system." Also in the majority, Logan J, after referring to the "disgraceful and shameful"¹²² history of the CFMEU's contraventions of the *Fair Work Act*, said that "[o]nce the contraventions on the day, deplorable in themselves, are viewed in context, they are, in my view, of the worst possible kind"¹²³. Their Honours imposed the maximum available penalty for each of the six contraventions.

101 With notions of deterrence reinforcing the need for the maximum penalties, the decision of the majority in *Broadway on Ann* was one that was open. The error in the dissenting decision was to divorce the past contraventions from the circumstances of the instant contraventions, leading to the erroneous conclusion that the instant contraventions could not be treated as being in the most serious category of offending¹²⁴.

The abandonment of desert as the primary criterion in the law of civil penalties

102 In *The Commonwealth v Director, Fair Work Building Industry Inspectorate* ("the *Agreed Penalties Case*")¹²⁵, French CJ, Kiefel, Bell, Nettle and Gordon JJ applied to civil penalties the remarks of French J, made in the context

120 (2018) 265 FCR 208.

121 (2018) 265 FCR 208 at 216 [27].

122 (2018) 265 FCR 208 at 225 [65].

123 (2018) 265 FCR 208 at 228 [77].

124 (2018) 265 FCR 208 at 249 [163]-[164].

125 (2015) 258 CLR 482 at 506 [55].

of trade practices legislation¹²⁶, that "[n]either 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 Pt IV [of the *Trade Practices Act*]" In a later decision, Keane, Nettle and Gordon JJ reiterated this point in relation to s 546 of the *Fair Work Act*¹²⁷.

103 The effect of these remarks by their Honours – rejecting notions of retribution or desert, together with rehabilitation – was radical. The effect was that deterrence, not desert, became the "principal and indeed only object"¹²⁸ or the "principal, ... probably the only, object"¹²⁹ of the imposition of civil penalties. However, although this secondary principle of justice (deterrence) replaced the primary principle of justice (desert), other manifestations of the primary principle of justice – totality, consistency, and course of conduct – have never been abolished. The continued recognition of these manifestations of the concept of desert means that although deterrence might be the principal purpose it cannot be the only purpose for the imposition of civil penalties.

104 The state of the Australian law of civil penalties is therefore that, with the exception of various manifestations of the primary principle of justice in punishment, the seriousness of a contravention is to be assessed primarily for the purpose of deterrence, general and specific. Deterrence is focused upon the future. So any focus upon the events of the past can only be primarily relevant to illuminate the likelihood of contraventions in the future by the contravener or others in a similar position.

105 Unless, and until, either (i) a direct challenge is brought in this Court to the notion that deterrence, rather than desert, is the principal object of civil penalties, or (ii) Parliament enacts new language, such as "proportionality", to replace the concept of "appropriateness" that has been treated as requiring the principal object to be deterrence, Australian law will remain that deterrence, rather than desert, is the principal object of civil penalties. Subject to statutory provision to the contrary,

126 *Trade Practices Commission v CSR Ltd* [1991] ATPR ¶41-076 at 52,152.

127 *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157 at 195 [116].

128 *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner* (2018) 264 FCR 155 at 167 [19], citing *Trade Practices Commission v CSR Ltd* [1991] ATPR ¶41-076 at 52,152.

129 *Agreed Penalties Case* (2015) 258 CLR 482 at 506 [55], quoting *Trade Practices Commission v CSR Ltd* [1991] ATPR ¶41-076 at 52,152.

or a judicial re-interpretation of the meaning of an "appropriate" penalty, it is only within the ranges of available penalties based upon deterrence that some manifestations of the principle of desert – such as totality, consistency, and course of conduct – can have a role to play. An example of legislative strengthening of a principle of desert is the provision in s 557(1) of the *Fair Work Act*, in relation to some contraventions that do not include s 349, which converts the course of conduct principle into a rule that deems the course of conduct to be a single contravention.

The approach to penalties based on deterrence

106 On the questionable assumption that monetary penalties do operate in many cases to deter generally or specifically¹³⁰, any general deterrence provided by those penalties is not binary. It is the experience of every judicial officer who has sentenced offenders or imposed civil penalties that even the largest and most extreme penalties will not deter everyone in a similar position. It is also an unfortunate truth that many potential contraveners, or their officers or advisers, do not spend many hours each week carefully reading the wisdom collected on AustLII, Jade, and other databases containing legal decisions on penalties. At best, general deterrence can only be used to identify a range of penalties in which, in pure utilitarian theory, at the lower end of the range, fewer potential contraveners will be deterred and, at the higher end of the range, more potential contraveners will be deterred. The maximum penalty provides the maximum deterrence that is permitted by law. It provides the maximum psychological impact for the decision calculus of a contravener even if that penalty might not ultimately deter the contravener or other potential contraveners in similar circumstances.

107 In the realm of pure, abstract utilitarian theory, the penalty required by specific deterrence would be more precise than the broad range of possibilities that arise from general deterrence. In the abstract realm, where the premises of utilitarianism hold true, it is theoretically possible for a precise point to be identified below which other potential contraveners will not be deterred but at which specific deterrence will be achieved. But we do not live in that realm. Even upon the very large assumption that the relevant premises of utilitarianism hold true for a contravener – so that their actions are based upon a mechanical calculation of costs and benefits with an identifiable tipping point at which costs will exceed benefits – the information before a court is almost always woefully inadequate to identify that point with any degree of precision. In the real world, a regression analysis which attempted to identify that point would be the legal equivalent of searching in a haystack for a needle that probably does not exist.

108 It is possible, however, that courts might rely upon specific deterrence to attempt to estimate a range of possible penalties, again on the assumptions of

130 Compare Zedner, *Criminal Justice* (2004) at 94.

utilitarian theory, with an increasing likelihood that, as the penalty increases, the contravener will be deterred in the future. It may be that this exercise is a fool's errand in the absence of expert evidence of (i) behavioural psychology concerning the motivations and systems of the contravener or its officers and (ii) behavioural economics concerning the relevant marketplace. The exercise is nearly certain to be a fool's errand without evidence of the income and assets of the contravener. But, whilst deterrence is regarded as the principal object of civil remedy provisions that give rise to penalties, a court must do the best it can to identify a speculative range of penalties that might reflect increasing degrees of specific deterrence.

109 The practical operation of a penalty regime based principally upon the object of deterrence, therefore, is that a court's assessment of both general and specific deterrence cannot be precise. The assessment can only identify potentially overlapping ranges of penalties, based on general and specific deterrence, that may achieve a reasonable deterrent effect in any decision calculus. Within those ranges, it must be assumed that the increasing penalties will increase the deterrent effect upon the contravener, and others like them, in the future. By definition, and on the assumptions of utilitarianism, the penalty with the greatest deterrent effect will be the maximum penalty available.

110 Within the ranges of reasonable deterrent effect provided by each of general and specific deterrence, there are other factors that assist a court in imposing a particular penalty. In this way, proportionality or desert plays a role as a secondary criterion of justice. In the imposition of an appropriate penalty within the overlapping ranges provided by specific and general deterrence, a court can have regard to considerations including totality, consistency, and course of conduct. For instance, within the range of penalties that must be assumed to exist, from more than a minimal deterrent effect up to the maximum available deterrence, secondary considerations of desert can apply so that the penalty is not crushing or oppressive¹³¹. In this secondary sense, the "proportionality of penalty is measured in the wider context of the demands of effective deterrence"¹³².

The need for deterrence in the present case

111 As the primary judge explained, quoting from earlier decisions, (i) the prior and instant conduct of the CFMMEU revealed that "it favours a policy of 'no ticket, no start' and holds that philosophy ... as preferable to the law of the land" and (ii) its

131 See *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 at 293.

132 *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25 at 62 [152].

misconduct is part of a strategy "to engage in whatever action, and make whatever threats, it wishes, without regard to the law"¹³³. The result of this anthropomorphising of the CFMMEU reflects the systemic culture of positive defiance of the law which exists within the organisation, requiring a high penalty for the purposes of specific and general deterrence.

112 A further, and central, matter relevant to deterrence is the vast resources of the CFMMEU. The Construction and General Division Victoria/Tasmania Divisional Branch of the CFMMEU alone had a revenue of more than \$30 million over the year before the contraventions and more than \$68 million in net assets.

113 The Solicitor-General correctly submitted that, analytically, the need for specific deterrence of the CFMMEU did not require the primary judge to impose only half of the maximum available penalty, with the reduction due to "course of conduct" considerations. The appellant's case was presented before the primary judge on the basis that a need for reasonable deterrence required a penalty in a range close to the maximum penalty. On such a case it is difficult to find fault in the submission of the Solicitor-General in this Court that, despite the course of conduct principle, it was at least open for the primary judge to order that the CFMMEU pay the combined maximum penalty for the two contraventions of \$126,000 for the purpose of achieving specific deterrence. Indeed, if a penalty in that region were necessary to achieve more than a minimal deterrent effect in any decision calculus, it would not be relevant that this penalty might be more than double the amount that the CFMMEU deserved for the conduct attributed to it. But no ground of appeal on this basis was raised before the Full Court of the Federal Court or before this Court.

114 Mr Pattinson's circumstances stand in stark contrast with those of the CFMMEU. There was no suggestion at any stage of this proceeding that Mr Pattinson had wilfully adopted the culture of defiance of the law that permeated the CFMMEU. As observed earlier in these reasons, in over two decades as a site delegate, Mr Pattinson had never previously contravened the *Fair Work Act* or its predecessor. There was no evidence before the primary judge or before the Full Court of Mr Pattinson's assets or his ability to pay any penalty. Senior counsel for Mr Pattinson submitted, without demur, that Mr Pattinson was a 70-year-old man who was now retired. An estimate of the minimum penalty necessary to achieve a reasonable effect of specific deterrence, at least on the material before this Court, would be a nominal amount. The only deterrent justification for imposition of more

133 *Australian Building and Construction Commissioner v Pattinson* (2019) 291 IR 286 at 310-311 [84], citing *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* ("the Werribee Shopping Centre Case") [2017] FCA 1235 at [23], [28] and *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [No 2]* [2016] FCA 436 at [142].

than a nominal amount upon Mr Pattinson would be the need to punish him as an instrument to deter others in his position, that is, for the purpose of general deterrence.

The decision of the Full Court and the orders that should be made

115 The Full Court of the Federal Court allowed the appeal of the CFMMEU and Mr Pattinson on two separate grounds. The first ground, which raised the issues discussed above, was that the primary judge erred by failing to approach the imposition of civil penalties on the CFMMEU by characterising the nature and gravity of the contraventions by reference only to the objective characteristics of the contraventions and without regard to the CFMMEU's history of contraventions of the statute. In the Full Court, Allsop CJ, White and Wigney JJ, with whom Besanko and Bromwich JJ relevantly agreed, overturned the decision of the primary judge on the basis that the penalties imposed by the primary judge were disproportionate to the nature and gravity of the conduct, which was not in the most serious category of contraventions¹³⁴.

116 The reasoning of Allsop CJ, White and Wigney JJ relied upon criminal law decisions of this Court such as *Veen v The Queen [No 2]*¹³⁵, which treated proportionality as a primary consideration of justice. The approach of their Honours was also fortified by the decision of Kiefel CJ, Bell, Keane and Nettle JJ in *Comcare v Banerji*¹³⁶, to which reference was made earlier in these reasons.

117 It may be that, in light of the lengthy history of contraventions by the CFMMEU and its "systematic pattern of conduct"¹³⁷, the primary judge was not in error to conclude that the instant contraventions by the CFMMEU were in the most serious category of contravention. As explained above, a history of contraventions is relevant to the assessment of the seriousness of an instant contravention. But the only ground of appeal before this Court is, relevantly, whether the Full Court erred by reasoning 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

134 *Pattinson v Australian Building and Construction Commissioner* (2020) 282 FCR 580 at 636-637 [160]-[162], 642-643 [180]-[181]. See also at 655 [227], 656-657 [231].

135 (1988) 164 CLR 465. See *Pattinson v Australian Building and Construction Commissioner* (2020) 282 FCR 580 at 596 [40]. See also at 598-609 [46]-[93], 636 [160]-[161].

136 (2019) 267 CLR 373 at 398 [27], 403-404 [40]. See *Pattinson v Australian Building and Construction Commissioner* (2020) 282 FCR 580 at 616 [106].

137 See *Fair Work Act*, s 557A.

necessary in order to deter contravening conduct of the kind that has in fact occurred". More precisely, the issue is whether the upper limit of the range of penalties necessary to achieve deterrence must be below the maximum penalty if the conduct, in all the circumstances, is not within the most serious category.

118 It is an unfortunate state of affairs where this Court is required to conclude that the Full Court was in error by treating the longstanding principle of basic justice – that an offender or contravener should be punished according to what the law requires that they deserve for their conduct – as a principal or primary criterion. But, for the reasons above, the conclusion that the Full Court was in error is required by the present state of the law in Australia.

119 The second ground upon which the Full Court allowed the appeal included, among other things, that the primary judge erred in so far as his Honour determined that the respondents in this Court "should not receive any material discount on penalty by reason of their admissions and co-operation rendering a trial unnecessary". The Full Court held that the second ground of appeal was made out.

120 This Court granted special leave to appeal from the decision of the Full Court limited to the first ground¹³⁸. The effect of refusing special leave to appeal on the second ground is that there is no dispute that the primary judge erred by imposing penalties without giving due account for the material discount for co-operation to which the respondents were entitled. Therefore, by allowing an appeal in relation to the decision of the Full Court on the first ground, this Court cannot mechanically affirm a decision of the primary judge that has been held, without further appeal, to be erroneous. On this appeal, this Court must either re-exercise the penalty discretion or remit the matter to the Full Court for the discretion to be re-exercised.

121 If this Court were to re-exercise the discretion to impose penalties on the basis that, contrary to what the Full Court found, the primary judge did not err in relation to the first ground, it would be surprising if this Court were to impose the very same penalty as the primary judge in circumstances where the primary judge did not allow a discount for co-operation and there was no dispute that the range of penalties should be constrained by the course of conduct principle. But how much less should the penalty be? No submissions were made by the parties in this Court as to such an exercise. Indeed, if deterrence were truly to be treated as the primary criterion of justice, then it would surely be highly relevant in the re-exercise of the discretion to know whether the CFMMEU had committed any similar contraventions in the three years since the contraventions in this case. The appropriate order is to remit the matter to the Full Court for consideration of the

138 See *Australian Building and Construction Commissioner v Pattinson* [2021] HCATrans 90.

appropriate penalty to be imposed upon the CFMMEU in light of the reasons of this Court.

122 There are further and more significant problems with this Court re-exercising the discretion to impose a different penalty upon Mr Pattinson. In relation to Mr Pattinson, the Full Court re-exercised its discretion only upon the basis that Mr Pattinson had made out the second ground of appeal, that is, the ground that was not before this Court. In the re-exercise of that discretion the Full Court said¹³⁹:

"[W]e consider that an appropriate penalty for the object to deter contraventions of this kind would be penalties for the two contraventions of \$4,000 and \$500 in a total of \$4,500. We would consider these penalties as appropriate to deter Mr Pattinson and others in his position from repetition of such contravening conduct."

123 Very few submissions were made in this Court about the exercise by the Full Court of its discretion to impose penalties upon Mr Pattinson. Senior counsel for Mr Pattinson submitted, without demur, that there was no need for any specific deterrence of Mr Pattinson because he was a 70-year-old man who had since retired from the building industry. If there were evidence to that effect, it would have provided a powerful justification for the re-exercise of discretion to impose a penalty at a level far below that which was imposed by the primary judge. In any event, it effectively became common ground that, even if the Full Court had erred in its reasoning concerning the re-exercise of discretion to impose a penalty on Mr Pattinson, it had not erred in the result.

124 Senior counsel for Mr Pattinson submitted that, since Mr Pattinson had only prosecuted the second ground of appeal, a ground which was not the subject of the grant of special leave to appeal to this Court, the penalty imposed by the Full Court should not be disturbed. And when the Chief Justice of this Court asked senior counsel for the appellant what the appellant's position was in relation to the penalties imposed on Mr Pattinson, the reply was that, since the submissions of the appellant had been focused upon the position of the CFMMEU, "[i]f the Court felt that it was not appropriate to disturb the Full Court's orders with respect to Mr Pattinson, we do not wish to be heard against that". It is unsurprising that no submission was made by the appellant that there should be an increase in the penalties imposed by the Full Court of \$4,000 and \$500 in order to deter Mr Pattinson and others like him, including other septuagenarian retirees of likely modest means who have never previously contravened the *Fair Work Act* or its predecessor over decades of work.

139 *Pattinson v Australian Building and Construction Commissioner* (2020) 282 FCR 580 at 654 [219].

125 The concession by the appellant, and the common ground between the parties, should be accepted with the conclusion that, whether or not the Full Court erred in its reasoning concerning the re-exercise of the discretion in relation to Mr Pattinson, it did not err in the result. The appeal should be dismissed in relation to Mr Pattinson. The following orders should be made:

- (1) The appeal be allowed in part.
- (2) Orders 1 (in so far as it relates to the second respondent) and 2(b) of the Full Court made on 16 October 2020 be set aside and the matter be remitted to the Full Court for determination in accordance with the reasons of this Court.
- (3) The appeal otherwise be dismissed.

