HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER
Appellant

and

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KEVIN PATTINSON
First Respondent

CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION
Second Respondent

APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION

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

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PART II: ISSUES PRESENTED BY THE APPEAL

2. The issue presented by this appeal is whether the Full Federal Court erred by treating the statutory maximum penalty in s 546 of the *Fair Work Act 2009* (Cth) (**FW Act**) as a yardstick which requires the highest penalty to be reserved for contravening conduct of the most serious and grave kind, with the consequence that the maximum penalty cannot be imposed for contravening conduct that is not of that kind, even if that penalty is necessary in order to deter contravening conduct of the kind that in fact occurred.

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

3. The appellant does not consider that any notice is required to be given under s 78B of the *Judiciary Act 1903* (Cth).

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PART IV: REASONS FOR JUDGMENT BELOW

4. The reasons for judgment below are: *Australian Building and Construction Commissioner v Pattinson* (2019) 291 IR 286 (**J**) and *Pattinson v Australian Building and Construction Commissioner* (2020) 299 IR 404 (**AJ**).

PART V: RELEVANT FACTS

5. The Second Respondent (**Union**) is a large and well-resourced industrial organisation. At the relevant time, the First Respondent, Kevin Pattinson, was a delegate of the Union. In September 2018 Mr Pattinson (and, by virtue of s 363 of the FW Act, the Union itself) represented to two workers at a building site in Frankston, Victoria that they could not perform their work at the site unless they became union members. The representation was consistent with the Union's long-held "no ticket, no start" policy. As a result, those workers were prevented from performing any work on the site on that day. The representation contravened s 349(1)(a) of the FW Act, which makes it
10 unlawful for a person to knowingly or recklessly make a false or misleading representation about another person's obligation to engage in industrial activity (including by becoming a member of a union: s 347(a)). Mr Pattinson and the Union (the **Union Parties**) both admitted liability. As the representation was made to two workers, there were two contraventions of s 349(1)(a) by each of the Union Parties.

6. By 2019 the Union had been found by courts to have breached pecuniary penalty provisions on some 150 occasions, including on many occasions as a result of seeking to enforce its "no ticket, no start" policy. On numerous occasions penalties imposed on the Union had exceeded $40,000 (that being the total penalty ultimately imposed on Union in this case),[1] including for "no ticket, no start" contraventions.[2]

20 **(a)** ***ABCC v Pattinson* (2019) 291 IR 286 (J)**

7. The primary judge noted that the Union was a large, asset rich, and well-resourced industrial organisation that was well aware of the constraints imposed upon it and its members by the FW Act.

8. A central issue in dispute before the primary judge was the use that could properly be made of the Union's prior history of wrongdoing in determining the appropriate penalty for its admitted contraventions of s 349(1)(a) (J [32], [37]-[38]). Having analysed relevant authorities (J [39]-[69]), the primary judge identified the following

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[1] See, eg, the following cases in which at least some of the penalties exceeded that amount: *CFMMEU v ABCC* (2018) 265 FCR 208 (six penalties of $51,000); *ABCC v CFMMEU (No 2)* [2018] FCA 1211 (two penalties of $50,000); *ABCC v Ingham (No 2)* [2018] FCA 263 (eleven penalties of $46,000); *ABCC v CFMEU (No 2)* [2017] FCA 368 (penalties of $47,600 and $44,800); *ABCC v CFMMEU (No 2)* (2018) 280 IR 356 (a penalty of $50,000).

[2] See, eg, *ABCC v CFMEU (No 2)* (2018) 358 ALR 725 (penalties of $50,000 and $45,000); *ABCC v CFMEU* [2017] FCA 1235 (two penalties each of $45,000).

applicable principles: the Federal Court has power under s 546 of the FW Act to impose a penalty up to the statutory maximum (J [24], [109]); the sole object of imposing such penalties is to secure deterrence, which requires fixing penalties at a level that cannot be regarded by the contravener and others as "an acceptable cost of doing business" (J [28]-[29], [71], [76]-[77]); an appropriate penalty "should not be greater than is necessary to secure that object" (J [72]-[75]); a penalty can be imposed at or near the statutory maximum if necessary to deter the conduct of the kind in issue (J [71]-[72]); the statutory maximum does not limit such an outcome to cases where the gravity of the conduct itself is in the "worst category" (J [76]-[77]); and it is
10 permissible to consider a history of similar contravening conduct to assess the penalty necessary to achieve deterrence (J [75], [83]-[84]).

9. Applying those principles, the primary judge concluded that the Union regarded the penalties imposed for its many prior contraventions of the FW Act as no more than an acceptable cost of doing business (J [29], [33]-[34], [76]-[77], [83]-[84], [88]-[89]). In particular, his Honour concluded from the Union's prior history that it: (a) favoured a policy of "*no ticket, no start*" in preference to the law; (b) was "wholly unmoved" by the prospect of yet again using member funds to pay penalties; and (c) regarded such penalties as "an acceptable cost of the way it conducts its affairs" (J [84]). Those findings were not even challenged, let alone disturbed, on appeal (AJ [20]).

20 10. While Mr Pattinson had no prior contraventions, the primary judge considered that a penalty was required that would be sufficient to deter him and "the network of other delegates and officers of the Union who might themselves be minded to enforce its anachronistic 'no ticket, no start' philosophy" (J [86]).

11. The total maximum penalty available for the two contraventions was $126,000 for the Union and $25,200 for Mr Pattinson. However, the primary judge fixed penalties on the basis that, because the contraventions involved the same misrepresentation made simultaneously to two workers, the total penalties should not exceed the statutory maximum for one contravention (J [103]-[113]). His Honour imposed total penalties of $63,000 on the Union and $6,000 on Mr Pattinson (J [115]-[118]).

30 **(b) *Pattinson v ABCC* (2020) 299 IR 404 (AJ)**

12. The Union Parties appealed on the central ground that the criminal sentencing principle of "proportionality" required the primary judge first to assess a penalty range by

reference to the objective seriousness of the instant contravention, without regard to the Union's history of wrongdoing, and only then to have regard to that history for the purposes of selecting a penalty within that range (AJ [20], [189]-[192], [227](1)).

13. A five member Full Court (Allsop CJ and White and Wigney JJ, with whom Besanko and Bromwich JJ agreed while adding brief additional reasons), rejected the Union Parties' primary argument as to "proportionality" (AJ [192]). However, their Honours upheld the appeal by construing s 546 as mandating attention to a "notion" of proportionality (AJ [62], [92], [98], [99], [104]-[107], [139], [158]).

14. That "notion" of proportionality was heavily dependent on the Full Court's analysis of this Court's decision in *Veen (No 2) v The Queen* (***Veen (No 2)***),[3] and what the Full Court took from that decision as to the role of the statutory maximum penalty. The Full Court held that the maximum penalty operated not just as a limit on the Court's power, but also as a "yardstick" against which the gravity of the instant contravention (ie, "what actually happened" (AJ [194]) or "the acts and circumstances that made up the contravention" (AJ [198])) must be assessed. In the Full Court's analysis, unless the actual contravening conduct was in the worst category, this "notion of proportionality" did not permit the imposition of a penalty at or near the maximum penalty. Further, while the Full Court accepted that a history of prior wrongdoing could be relevant to assessing the gravity of the contravening conduct (by evidencing an attitude of defiance of the law), it nevertheless held that such a history could not itself place a contravention in the worst category (AJ [160], [230]). To hold otherwise, the Full Court asserted, would be to punish again for past contraventions (AJ [201]).

15. It was not disputed before the Full Court that the Union had previously contravened the FW Act in the ways summarised by the primary judge, or that the penalties imposed with respect to those contraventions had been treated by the Union as no more than a cost of doing business (AJ [19]-[20]). The Full Court noted the level of penalties in those earlier cases (many of which exceeded $40,000); it accepted that the Union maintained its "no ticket, no start" policy despite those penalties; and it saw no evidence of contrition or an intention to change. Nevertheless, it imposed a total penalty on the Union of $40,000 (AJ [220]-[222]).[4]

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[3] (1988) 164 CLR 465 at 474-476.
[4] The total penalty represented 31.7% of the maximum available for the two admitted contraventions.

PART VI: ARGUMENT

(a) Introduction and summary

16. This appeal turns centrally on a question of statutory construction, being whether the discretion to impose an "appropriate" penalty under s 546(1) of the FW Act is constrained by a "notion of proportionality" such that the maximum penalty is available *only* in cases where the actual conduct that constitutes a contravention (ie, "what actually happened") is in the "worst category" of contravening conduct.

17. For the reasons that follow, the Full Court was wrong to construe s 546 as being subject to such a constraint. That constraint was inconsistent with the imposition of a penalty appropriate to achieve specific and general deterrence. It had the consequence that the penalty actually imposed in this case was very likely to be seen by the Union as no more than an "acceptable cost" of pursuing its industrial goals in defiance of the law.

18. The Full Court's essential error was in drawing by analogy on the criminal sentencing principle of proportionality. That principle is so tightly connected to the central role of retribution in the imposition of criminal sentences that it cannot safely be translated to the civil penalty context. Thus, while in *Veen (No 2)*[5] this Court recognised that the purposes of criminal punishment include "protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform", it went on to hold that the principle of proportionality required retribution be given controlling effect in criminal sentencing, that being necessary in order to avoid unjustified punishment by the State. The governing role of retribution in determining an appropriate punishment in the criminal sentencing context was explained in a letter from Professor C S Lewis published as "Punishment: A Reply" in *Res Judicatae*:

> All I plead for is the *prior* condition of ill desert; loss of liberty justified on retributive grounds *before* we begin considering other factors. After that, as you please. Till that, there is really no question of "punishment" ... (underlined emphasis added)

In *Veen (No 2)*[6], having cited this passage, the plurality said that that "plea has been heard in the courts of this country, by adopting the principle of proportionality".

19. Once it is recognised that the principle of proportionality in criminal sentencing is centrally concerned with retribution, it is a short step to conclude that that principle

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[5] (1988) 164 CLR 465 at 476.
[6] (1988) 164 CLR 465 at 474.

should not be used in determining an appropriate civil penalty. That follows because proportionality analysis has an inherent tendency to frame the imposition of a civil penalty as a punishment, and then to insist that the punishment must fit the crime. When applied in the civil penalty context, that analysis is likely to lead to error, because the purpose of civil penalties is deterrence, yet the use of proportionality is inherently likely to re-introduce retributive considerations into the analysis and to undermine the aim of deterrence. The Full Court recognised that danger. That it nevertheless failed to avoid it only serves to emphasise the undesirability of any use of a "notion of proportionality" in the civil penalty context.

10 20. That is particularly so because the role of courts in setting an "appropriate" penalty is subject to well-settled principles that have been applied for many years without evident difficulty. Those principles require no supplementation by the "notion of proportionality" that the Full Court sought to develop. Indeed, as this case illustrates, the introduction of that notion is apt to provoke disputes about whether minor or mid-range contraventions, when committed by a serial recidivist, can attract a penalty at or near the statutory maximum, even when the Court is satisfied that such a penalty is appropriate in order to attempt to deter further contraventions.

(b) The purpose, text and context of the statutory provisions

(i) Statutory purpose

20 21. In *Commonwealth v Director, Fair Work Building Industry Inspectorate* (the ***Agreed Penalties Case***),[7] French CJ, Kiefel, Bell, Nettle and Gordon JJ observed:

> In essence, civil penalty provisions are included as part of a statutory regime involving a specialist industry or activity regulator or a department or Minister of State of the Commonwealth (the regulator) with <u>the statutory function of securing compliance with provisions of the regime</u> that have the statutory purpose of protecting or advancing particular aspects of the public interest. (emphasis added)

22. Their Honours went on to explain the essential differences between civil penalty regimes and criminal offence provisions, observing that a civil penalty proceeding is "precisely calculated to avoid the notion of criminality as such".[8] Critically for present

30 purposes, the plurality stated that "whereas criminal penalties import notions of

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7 (2015) 258 CLR 482 at [24]. To similar effect, see [68] (Gageler J) and [79] (Keane J).
8 (2015) 258 CLR 482 at [54].

retribution and rehabilitation, the purpose of a civil penalty… is primarily, if not wholly protective in promoting the public interest in compliance".[9] It followed that "civil penalties are not retributive, but like most other civil remedies, essentially deterrent or compensatory and therefore protective".[10] The plurality also endorsed the analysis of French J in *Trade Practices Commission v CSR Ltd* (***CSR***),[11] who had said that "[t]he principal, and I think probably the only, object of the penalties imposed by s 76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravener and by others who might be tempted to contravene the Act." To similar effect, Keane J reiterated earlier statements in the authorities that a
10 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."[12]

23. The observations summarised above were made in a context where conflicting views had been expressed in the Federal Court concerning the differing roles of deterrence and retribution when imposing civil penalties (see AJ [29]-[37]). As such, this Court's observations that civil penalties are "not retributive", but are imposed primarily if not wholly to deter non-compliance, have particular significance in clarifying the law.

24. More recently, in *Australian Building and Construction Commissioner v CFMEU* (the ***Penalty Indemnification Case***),[13] this Court again referred (this time specifically in the context of s 546 of the FW Act) to the purpose of the imposition of penalties being
20 to put an appropriate "price on contravention". The plurality went on to state that a penalty must have the necessary "sting or burden" to secure "the specific and general deterrent effects that are the raison d'être of its imposition".[14] That said, of course, as Burchett and Kiefel JJ emphasised in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission*,[15] "the penalty should not be greater than is necessary to achieve this object".

9 (2015) 258 CLR 482 at [55].
10 (2015) 258 CLR 482 at [59].
11 [1991] ATPR 41-076 at 52,152 (emphasis added).
12 (2015) 258 CLR 482 at [110]. See also *Singtel Optus Pty Ltd v ACCC* (2012) 287 ALR 249 at [62], cited with approval in *ACCC v TPG Internet Pty Ltd* (2013) 250 CLR 640 at [64]-[66].
13 *Penalty Indemnification Case* (2018) 262 CLR 157 at [42] (Kiefel CJ), [55] (Gageler J) and [87] (Keane, Nettle and Gordon JJ).
14 *Penalty Indemnification Case* (2018) 262 CLR 157 at [116] (Keane, Nettle and Gordon JJ).
15 (1996) 71 FCR 285 at 293.

25. In light of the above, provisions authorising the imposition of civil penalties should be construed as requiring penalties to be imposed for the purpose of putting a price on contraventions which is sufficiently high to deter any repetition of the contravening conduct in question. The penalties imposed by the Full Federal Court in the judgment now under appeal manifestly fail to achieve that purpose. That speaks powerfully to the existence of error in the analysis that led to the imposition of those penalties.

(ii) Statutory text

26. *An "appropriate" penalty:* Section 546(1) of the FW Act relevantly provides that the Federal Court "may, on application, order a person to pay a pecuniary penalty that the
10 Court considers is appropriate if the court is satisfied that the person has contravened a civil remedy provision". That is, the task of the Federal Court acting under s 546(1) is to impose the penalty that "the Court considers is appropriate".

27. In the *Penalty Indemnification Case*, the plurality said of the word "appropriate" in s 545 (in an observation that applies equally to s 546) that it "is not to be artificially limited" and is "constrained only by limitations that are strictly required by the language and purpose of the section".[16] In support of that conclusion, the plurality cited authority recognising that it would be wrong "to read provisions … granting powers to a court by making implications or imposing limitations which are not found in the express words".[17] Instead, what is appropriate "falls to be determined in light
20 of the purpose of the section".[18] Applying that approach, and keeping in mind the deterrent purpose of s 546 identified above, a penalty imposed under that section will be "appropriate" only if, in all the relevant circumstances (and subject to the statutory maximum), it can reasonably be expected to deter repetition of contraventions of the relevant kind by the contravener and others.

28. The use of the word "appropriate" to govern the discretion to impose penalties has a long history in numerous civil penalty regimes. Across all such regimes it is well-recognised that what is "appropriate" to achieve deterrence will be informed by many factors. Those factors are commonly identified by reference to the judgment of

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16 *Penalty Indemnification Case* (2018) 262 CLR 157 at [103] (Keane, Nettle and Gordon JJ).

17 Eg *Owners of Shin Kobe Maru v Empire Shopping Co Inc* (1994) 181 CLR 404 at 421; *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270 at [17].

18 *Penalty Indemnification Case* (2018) 262 CLR 157 at [103] (Keane, Nettle and Gordon JJ).

French J in *CSR*, where his Honour set out an indicative list of factors relevant to identifying a penalty of "appropriate deterrent value" under the *Trade Practices Act 1974* (Cth).[19] These factors include: the size of the contravening entity; the deliberateness of the contravention and the period over which it extended; whether the contravention arose out of senior management or at a lower level; whether the company has a corporate culture conducive to compliance with the Act; whether the company has shown a disposition to cooperate with the authorities; whether the contravener has engaged in similar conduct in the past; the financial position of the contravener; and whether the contravening conduct was systematic, deliberate or
10 covert. Nothing in that list requires the application of any "notion" of proportionality. As such, the Full Court's analysis would introduce a new layer of analysis into the assessment of "appropriate" civil penalties.

29. In some statutes, some or all of the above factors are listed as considerations that a court must take into account in setting an appropriate penalty. Such lists commonly include any history of prior contraventions found by a court,[20] without suggesting that consideration of that history is permissible only in the limited manner specified in the Full Court's judgment. Even in statutes where the factors are *not* listed (including the FW Act) the same kinds of factors are relevant, because they bear upon the assessment of the penalty necessary to secure deterrence by putting a sufficiently high price on a
20 contravention to deter the contravener and others.[21] It would be anomalous if the manner in which a history of prior contraventions informed the determination of an appropriate penalty varied depending on whether or not that history was a mandatory, as opposed to a permissible, relevant consideration.

30. Many of the factors that have long been accepted as being relevant to the determination of an "appropriate" penalty could be described as concerning the features of the actual contravention (ie with "what actually happened") only if that concept is understood widely so as to include consideration of the characteristics of the contravener (eg its

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[19] [1991] ATPR 41-076 at 52, 152.

[20] See eg *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), s 175(3)(d)-(g); *Australian Securities and Investments Commission Act 2001* (Cth), s 12GBB(5)(d); *Building and Construction Industry (Improving Productivity) Act 2016* (Cth), s 81(6)(d); *Competition and Consumer Act 2010* (Cth), s 76(1) and sch 2 ("*Australian Consumer Law*"), s 224(2)(c); *Corporations Act 2001* (Cth), s 1317G(6)(d); *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 481(3)(d); and *Taxation Administration Act 1953* (Cth), s 290-50(5)(h).

[21] *Volkswagen Aktiengesellschaft v ACCC* [2021] FCAFC 49 at [147]-[155].

size and financial position). But once "what actually happened" is understood widely enough to include consideration of matters of that kind, such that a penalty at or near the statutory maximum might be warranted simply because, for example, a large multinational corporation would not be deterred by anything less, it is arbitrary to exclude consideration of other features of a contravener that may likewise indicate that a penalty at or near the maximum is required in order to have the necessary deterrent effect (such as a long history of contravening conduct and lower penalties that have failed to deter).

31. *Statutory maximum penalty:* The penalty that may be imposed under s 546(1) is informed by s 546(2), which provides that the penalty the Court determines is appropriate "must not be more than" a maximum amount set by that sub-section. That language makes it clear that the maximum is a *limit* on the power conferred by s 546(1). It was aptly described by Gageler J in the *Penalty Indemnification Case* at [55] as being a "cap", his Honour referring to a court ordering "a person to pay the amount of pecuniary penalty which the court considers appropriate within the cap imposed by s 546(2)". Nothing in the language of s 546(2) suggests, let alone requires, that an otherwise appropriate penalty that is at or near the cap cannot be imposed, simply because the contravention that would attract that penalty is not in the worst category. Much less does the language require an appropriate penalty to be set by trying to place "what actually happened" somewhere on a notional "yardstick" representing increasingly serious hypothetical contraventions of the penalty provision.

(iii) Statutory context

32. It is implicit in the civil penalty provisions of the FW Act (including ss 349 and 363), that penalties will be important to regulate participants, including industrial associations, in relation to industrial activity. That must be understood as having been intended to regulate the activities of major, long-term, well-resourced participants which may be minded to pursue their industrial objectives persistently and vigorously (a prospect amply borne out in the Union's history of contraventions). In that context it would be surprising if Parliament had intended that the provisions be understood as containing implicit limits that prevented a court from imposing a penalty sufficient to deter a contravener that repeatedly demonstrated a willingness to treat lower penalties as a mere cost of doing business, notwithstanding the fact that the proposed penalty was within the statutory cap.

33. Additionally, to derive a limit of that kind from criminal sentencing is particularly inapt given how the FW Act differentiates civil penalties from criminal sentencing. A contravention of a civil remedy provision is not an offence (s 549) and a civil penalty proceeding must be conducted under the civil rules of evidence and procedure (s 551). Specific provision is made for how and when criminal and civil penalty proceedings can be brought in respect of the same conduct. These permit criminal proceedings to be brought for the same conduct as has already been the subject of a pecuniary penalty order (s 554), but prohibit the converse (ss 552-553), thereby reinforcing the general law position that different and more stringent protections are applicable in the criminal
10 sphere. The provisions also limit the extent to which the same or related conduct can be the subject of multiple civil penalties (ss 556-557). Nowhere in these provisions is there a suggestion that, when considering the appropriate penalty, a court is limited in considering a contravener's prior history because doing so would involve an impermissible double punishment.

(c) The Full Court's approach – a "notion of proportionality"

34. The essential question on appeal to the Full Court was whether and how a contravener's history of contraventions could be taken into account in assessing the appropriate penalties. The Union contended that the range of penalties must be determined by reference only to the gravity of the instant contravention (objectively
20 assessed), from within which range the contravener must be placed according to considerations relevant to him, her or it, such as prior offending and an unwillingness to obey the law (AJ [8]). This argument drew directly on the criminal sentencing principles explained by the High Court in *Veen (No 2)*.

35. The Full Court rejected this argument. In doing so, it correctly recognised that the scope of the power to impose a penalty was a question of statutory construction (AJ [23]-[24]); that the object of civil penalties was deterrence and not retribution (AJ [25]-[39]); that retribution lay at the heart of the principles discussed in *Veen (No 2)*, which limited the application of those principles to civil penalties (AJ [40]-[54]); that deterrence is achieved by putting a price on contravention that will ensure
30 the penalty is not regarded as an acceptable cost of doing business (AJ [103]), but that is not so high as to exceed what is required for that purpose (AJ [100]-[102]); and that

the Court must have regard to all relevant matters relevant to the deterrence of contraventions of the kind before the Court (AJ [99]-[100], [110]).

36. The genesis of the Full Court's error was its conclusion that, notwithstanding all of the above matters (including, in particular, its recognition that civil penalties do not have any object of retribution, and that the principle of "proportionality" in criminal law turns upon the object of retribution), it was necessary to ascertain whether any aspects of the principle of proportionality could survive in the civil penalty context and, if so, to apply those aspects of the principle.

37. It is not surprising that the Full Court was misled into a search for some role for "proportionality" in the civil penalty context, given the enthusiasm with which that concept was pursued by the Union in argument, and also in the various authorities considered at AJ [119]-[184]. Nevertheless, that search resulted in a complicated judgment that turns on subtle (perhaps illusory) distinctions, and which is apt to create difficulties in the daily practical task of courts in imposing penalties for contraventions of a wide range of regulatory regimes.

38. The Full Court's reasoning with respect to proportionality commenced with a recognition that it would be an error to apply the "principle of proportionality" from *Veen (No 2)* in determining an appropriate civil penalty. However, at AJ [45], the Full Court observed that the fact "that retribution can be seen as the (or a) source of the principle of proportionality does not necessarily lead to a conclusion that it is the only source of a principle based on reasonableness and proportion in the infliction of penal consequences for a statutory wrong". From AJ [55], the Court then proceeded to identify two principles from *Veen (No 2)* which were subsidiary to the principle of proportionality, but which it considered to be "of central importance to this appeal".

39. The first subsidiary principle concerned the role of antecedent criminal history. Addressing that topic at AJ [56], the Full Court quoted from *Veen (No 2)* at 477-478:

> [T]he antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. To do so would be to impose a fresh penalty for past offences: *Director of Public Prosecutions v. Ottewell* [[1970] AC 642 at 650]. The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. (emphasis added)

As becomes apparent later in its judgment, the Full Court considered that the concept of the "instant offence" is closely tied to the need to deter offences of "a like kind" to the instant offence (eg AJ [100]). Hence, it treated the need for a penalty to be imposed for "the instant offence" and to deter "offences of a like kind" as aspects of the first subsidiary principle.

40. The Full Court found that this first subsidiary principle was "reinforced" by a second subsidiary principle concerning the role of the maximum penalty. Addressing that topic at AJ [58], the Full Court quoted from *Veen (No 2)* at 478:

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> The second subsidiary principle material to this case is that the maximum penalty prescribed for an offence is intended for cases falling within the worst category of cases for which that penalty is prescribed: *Ibbs v. The Queen* [(1987) 163 CLR 447 at 451–52]. That does not mean that a lesser penalty must be imposed if it be possible to envisage a worse case; ingenuity can always conjure up a case of greater heinousness. A sentence which imposes the maximum penalty offends this principle only if the case is recognizably outside the worst category.

41. At AJ [61], the Full Court observed that "[r]unning throughout *Veen (No 2)* is the place of proportionality. Its source lies in the place of retribution for the gravity of the offending." Yet, despite recognising that central role of retribution, the Full Court went on at AJ [92] to state:

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> [T]he principle of proportionality in *Veen (No 2)* can be seen to have two informing considerations that were not tied to retribution (as distinct from deterrence): first, the deterrence was in respect of offences of "a like kind"; and secondly, the maximum penalty assisted to shape the punishment for such kind of offending. These two features were not wholly dependent upon the retributive source or upon a source of moral delinquency. <u>They can be seen to survive the rejection of retribution as an object of the imposition of civil penalties</u>. (emphasis added)

42. From that premise, the Full Court went on to build what it described as a "*notion of proportionality*" that it held governed the imposition of civil penalties (AJ [104]-[105]). The word "notion" was used to differentiate the Full Court's concept of proportionality as it related to civil penalties from the criminal sentencing "principle" of proportionality in the retributive sense that was explained in *Veen (No 2)* at 472-474 (AJ [107]). The content of this "notion" emerged incrementally in the Full Court's reasons. It has two interrelated components.

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43. *First,* the Full Court held that a contravener's prior history of wrongdoing <u>can</u> be used for the limited purpose of ascertaining whether the contravening conduct was accompanied by an attitude of disobedience to the law (the first subsidiary principle).

In this limited way, prior contraventions might permissibly be taken into account when characterising the gravity of contravening conduct. However, the Full Court held that to use prior wrongdoing for any broader purpose would impermissibly penalise the contravener again for past contraventions. According to the Full Court, the result would be that a penalty would no longer be in respect of the "instant contravention" and would no longer be imposed to deter contraventions of a "like kind". It would therefore be unmoored or untethered from the penalty which was appropriate to the contravention before the court (see AJ [90], [97]-[98], [100], [104]-[105]). The Full Court reiterated this requirement – to make only that limited use of prior contraventions, so as to avoid re-punishing past wrongdoing – repeatedly throughout its analysis of the relevant authorities (see at [119] (quote at [22]), [157], [160], [170]-[171], [178]-[181], [183]-[184], [193]).

44. *Secondly*, the Full Court required that the maximum penalty be reserved for the "worst category" of case (the second subsidiary principle), with the result that the maximum operated as a mandatory "yardstick". The Court had identified the central importance it attached to the role of the statutory maximum early in its reasons (AJ [6] and [55]). At AJ [62], it then explained its view that two functions were served by the maximum penalty. The first is uncontroversial – the maximum penalty is a "limit on power". The second function, according to the Full Court, is that the statutory maximum "provides a statutory indication of the punishment for the worst type of case, <u>by reference to which the assessment of the proportionate penalty for other offending can be made</u>" (emphasis added). This second purpose was further described as requiring a penalty to deter contraventions of the kind before the court to be fixed "by reference to the frame of reference or yardstick provided by the maximum penalty as set by Parliament" (AJ [98]) and "set against the statutory maximum penalty" (AJ [99]).

45. The controlling nature of this "yardstick" principle was made explicit at AJ [139], where the Court held that the requirement to ensure that the penalty is not such as to be regarded as an acceptable cost of doing business:

> … cannot be a reason for imposing the maximum penalty in circumstances which are otherwise unwarranted by reference to the nature and gravity of the instant contravention (including by reference to any apparent unwillingness to obey the law), because of a perceived inadequacy of the level of penalties to deter. … The setting of penalties is a matter for Parliament, not the courts. The courts apply established principle by reference to the considerations set by Parliament, including the maximum penalty.

46. At AJ [160]-[162], the Full Court again referred to a requirement that the maximum penalty be "reserved" for contraventions falling within the "worst category", going so far as to endorse the apparent rule reflected in an earlier statement by Bromwich J that, while a prior history of contraventions may assist in the proper characterisation of the instant contravention, "a case will not be in the worst category merely by reason of such a history" (AJ [160]).

47. The Full Court then explained its view that the "statutory context of a maximum penalty for the worst type of contravening warranting the heaviest possible penalisation for the object of deterrence" requires a "proportional response" to the
10 nature and seriousness of the instant contravention (AJ [180]-[181]). It ultimately held the primary judge to have erred in failing to adhere to the limits imposed by this principle (AJ [193]-[195], [201]). In so concluding, the Full Court repeatedly emphasised the need for the penalty to reflect the seriousness of the actual contravening conduct (which it referred to as "what actually happened", "the objective characteristics of what occurred", "the human conduct that constituted the contravention in question" or "the actual reality of what constituted the contravention" (see AJ [194]-[195]). The Full Court held that the primary judge erred because (AJ [195]):

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> The past has been used beyond the point of characterising the nature of the contravening (which is the subject of the imposition of the penalty) and has become the reason for the maximum penalty irrespective of the nature and seriousness of the instant contravening.

(d) The errors with the Full Court's "notion of proportionality"

48. The Full Court's reasoning involves a number of errors (some of which overlap). It is convenient for the purposes of analysis to deal with them separately.

(i) The "notion of proportionality" may preclude an appropriate deterrent penalty

49. As already noted, this Court has held on a number of occasions that deterrence requires the imposition of penalties that put a price on contravention that is sufficiently high to deter repetition by the contravener and by others who might be tempted to contravene. This requires penalties to be imposed at a level that will ensure a wrongdoer cannot
30 treat them merely as an acceptable cost of doing business. It is the degree to which a penalty is calibrated to achieve deterrence of this kind that determines whether that penalty is "appropriate" within the meaning of s 546 of the FW Act.

50. As explained in paragraph 28 above, the identification of an "appropriate" penalty in this sense draws upon a wide range of factors. The relative significance of those factors varies between cases, but sometimes these factors may point to the need for a penalty at or near the maximum penalty to be imposed in order to have appropriate deterrent effect, even with respect to contraventions that are not objectively in the worst category. For example, penalties that are lower than the value of the benefit derived from a contravention (whether those benefits be direct financial benefits, or the avoidance of compliance costs) will readily be regarded as an acceptable cost of doing business. Accordingly, deterrence requires penalties to be imposed at a level that exceeds such benefits in order to ensure that actual and potential contraveners do not disregard their obligations in the knowledge that, even if they are caught and penalised, the benefits will outweigh the costs.[22] If the benefits that accrue from contraventions are large in comparison to the available statutory maximum, a penalty at or near the maximum may be required in order to deter contraventions of a particular kind, even if those contraventions are not in the worst category.

51. Similarly, larger penalties may be required to deter a contravener that is large and well-resourced than will be necessary to have the same effect on a smaller and less well-resourced contravener. That is because a penalty that would be ample to deter conduct of a particular kind and character by a small contravener may simply be an acceptable cost of doing business for a large and well-resourced contravener. In such a case, even where the conduct constituting the instant contravention is identical, specific deterrence may require that a large and well-resourced contravener receive a penalty at or near the statutory maximum, despite the fact that the contravention in question is not in the worst category.[23] Cases of this kind illustrate that there is no reason why the same contravening conduct must attract the same penalty despite the fact that one contravener may be more readily deterred than another. Once retributive

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[22] *ACCC v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25 at [151]-[152], see also at [57], [148]-[153], [164], [176]; *Volkswagen Aktiengesellschaft v ACCC* [2021] FCAFC 49 at [149] and [152]; *ACCC v TPG Internet Pty Ltd* (2013) 250 CLR 640 at [64]-[66]. For an example of the specific correlation of penalty amounts being set by reference to the benefits to the wrongdoer, see *Registrar of Aboriginal and Torres Strait Islander Corporations v Matcham (No 2)* (2013) 97 ACSR 412 at [270], [280]-[283] and Table A. There the statutory maximum was $200,000 and the penalties varied from $1,000 to $200,000 by reference to the need to deter contraventions which resulted in different levels of benefit to the wrongdoer.

[23] *Volkswagen Aktiengesellschaft v ACCC* [2021] FCAFC 49 at [154], [157]; *ACCC v Telstra Corporation Ltd* [2021] FCA 502 at [61].

considerations are taken out of the equation, there is no injustice in the imposition of different penalties for identical contraventions, provided the penalties are in each case no more than is necessary for the purpose of deterrence (both specific and general).

52. A final example concerns the situation that arises in the present case, where an entity that disagrees with a particular law chooses to disregard and defy that law, and to treat any penalties that are imposed as an acceptable price of its desire to continue to conduct itself in a way that the law prohibits. The penalties that are "appropriate" for such a recidivist contravener may be very much greater than would be appropriate if another entity engaged in contraventions of the law of precisely the same kind, because the history of repeated contraventions evidences the inadequacy of lower penalties to achieve specific deterrence. The imposition of the maximum penalty in such a case does not involve additional punishment for prior contraventions. It is, instead, an attempt to deter future contraventions of the same kind, and thereby to "secure compliance with the regime".[24] That is particularly necessary in circumstances where the Union evidently lacks a culture of compliance.[25]

53. The effect of the Full Court's approach is to impose an unwarranted limit on deterrence in the last of these examples. In the earlier examples (value of benefits and size of contravener), it would not be doubted that the deterrent value of the penalty may be markedly informed and increased by the factor in question. However, the Full Court's insistence upon limiting the relevance of prior contraventions to an assessment of the seriousness of the instant contravention (prior contraventions being incapable of elevating the instant contravention into the "worst category") necessarily prevents a court from giving determinative significance to a contravener's demonstrated preparedness to continue to contravene particular norms despite previous penalties and where it is clear that the contravener has a culture which is not conducive to compliance. Yet the failure of previous penalties to deter the contravener may well be the most significant indicator of whether further penalties in the same amount are likely to be appropriate to achieve deterrence. The point is illustrated by the fact that this aspect of the Full Court's reasoning had the direct result that the Court set penalties at a level that had been regarded by the Union in the past as an acceptable cost of

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24 *Agreed Penalties Case* (2015) 258 CLR 482 at [24]. See also [68] (Gageler J) and [79] (Keane J).

25 See, by analogy, *Singtel Optus Pty Ltd v ACCC* (2012) 287 ALR 249 at [37] and [68].

continuing to enforce its "no ticket, no start" policy (as the primary judge had found at J [84]). There was no basis upon which the Full Court could have had any confidence that the penalties it imposed would achieve deterrence. That suggests that those penalties were not calibrated to achieve the purpose for which they were imposed.

(ii) The "notion of proportionality" remains grounded in retribution

54. As the Full Court recognised, "retribution for the gravity of the offending" lies at the heart of a criminal sentence (AJ [61]). For that reason, the principle of proportionality derived from *Veen (No 2),* and its subsidiary principles, are inherently bound up with retribution. They are directed to ensuring that a criminal sentence is no higher than what an offender deserves by reference to the instant circumstances of the offence.

55. This Court having made clear that retribution is <u>not</u> an objective of the imposition of civil penalties, proportionality in its criminal law sense has no relevance. Recognising that point, the Full Court attempted to develop a different "notion" of proportionality that could be applied to civil penalties, by importing from *Veen (No 2)* the idea of a mandatory proportionality between the gravity of the instant contravention and the maximum penalty. It was by that path that the Full Court concluded that only the worst category of contraventions could properly attract the maximum penalty. However, while proportionality of that kind makes sense in pursuit of a retributive purpose (as it ensures that the punishment fits the crime), it is not helpful in a context where the purpose of the imposition of a penalty is to deter, because there is no necessary correlation between what is necessary to deter a contravention of a particular kind, and the objective seriousness of that kind of contravention. That is the reason why, in a context where deterrence is the objective, there is nothing wrong with imposing a higher penalty for contravention A than is imposed for objectively more serious contravention B, provided that contravention A is otherwise likely to be repeated, whereas contravention B is not.

56. The Full Court's implicit rejection of the above proposition was the result of its attempt to give work to the analysis in *Veen (No 2)* in the civil penalty context. That attempt was misconceived because that analysis is fundamentally tied to the ascertainment of an appropriate retributive punishment. Despite the Full Court's attempt to separate its notion of proportionality from its retributive roots, its reliance upon that "notion"

ultimately imported into the civil penalty context considerations that are foreign to the purpose of deterrence (see, eg, AJ [139], [180]).

57. As has already been explained, nothing in the text of s 546 supports a requirement that the maximum penalty be treated as a yardstick in this way. In its terms it imposes a cap on the penalty that can be imposed in pursuit of deterrence. It does not imply the existence of a mandatory scale against which the gravity of the wrongdoing must be measured[26] (gravity of wrongdoing being a consideration that is critical to retribution, but not necessarily and in all cases to deterrence). So much is illustrated by the large number of civil penalty cases in which the courts have been satisfied that a penalty is appropriate because it will be sufficient to deter further contraventions, despite that penalty being only a low proportion of the available statutory maximum.[27] Were the maximum penalty to be used as a mandatory scale in such cases, that would drive penalties to levels higher than was necessary to deter. By parity of reasoning, if the penalty that is necessary to deter further contraventions in the objectively median range of seriousness happens to be near the available maximum, that maximum cannot properly be used to drive the penalty down so as to limit the appropriate penalty to one that is inadequate to deter.

58. Nor does it assist to point out that the imposition of civil penalties under s 546 is controlled by the common law principle of statutory construction that Parliament intends that statutory powers be exercised reasonably within limits set by the subject matter, scope and purposes of the statute (cf AJ [106]).[28] That principle does not support any requirement that a penalty be proportionate to the objective seriousness of the instant contravention, because that would assume that a reasonable exercise of the power to impose a penalty is governed by retributive considerations. However, once it is recognised that penalties are imposed for the purpose of deterrence, it follows that a penalty will be "reasonable" provided it is no more and no less than is appropriate to

[26] Even in the criminal law, the proposition that the maximum penalty should be reserved for the worst cases does not have such an inflexible role: see *Markarian v The Queen* (2005) 228 CLR 357 at [27]-[31] (Gleeson CJ, Gummow, Hayne and Callinan JJ); *Elias v The Queen* (2013) 248 CLR 483 at [27].

[27] To take three examples from different regulatory regimes see: *Australian Building and Construction Commissioner v CFMEU* (2017) 254 FCR 68 at [151]-[153], [174], [182]; *ACCC v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25 at [157]; *CEO of the Australian Transaction Reports and Analysis Centre v Westpac Banking Corporation* (2020) 148 ACSR 247, [50]-[56] and [191].

[28] *Minister of Immigration and Citizenship v Li* (2013) 249 CLR 332 at [28] (French CJ), [63] (Hayne, Kiefel and Bell JJ), [90] (Gageler J).

deter contraventions of the kind that in fact occurred. That will be so even if the contravention in question is not in the worst category yet the penalty imposed is at or near the maximum.

(iii) Utility of the Full Court's "notion" of proportionality

59. Finally, there was no necessity for the Full Court to import a "notion" of proportionality into the task of setting civil penalties. The well-settled principles that govern the ascertainment of an "appropriate" penalty already ensure that penalties must be set at a level that is no more and no less than is necessary to achieve specific and general deterrence of the relevant conduct. In those circumstances, there was no
10 need to supplement those principles by adding a proportionality analysis, particularly where that supplementation carried with it an inherent risk of distorting the proper approach.

60. The simplicity of the primary judge's approach to determining the appropriate penalty has much to commend it. As his Honour put it, "[i]f 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 the penalties is directed" (J [72]). The trial judge was correct to impose the penalties in the amount that he did and the appeal to the Full
20 Court should have been dismissed.

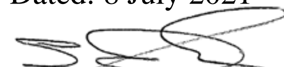
PART VII: ORDERS SOUGHT

61. The orders that are sought are: (a) the appeal is allowed; (b) the orders of the Full Court be set aside, and, in their place, order that the appeal to the Full Court be dismissed.

PART VIII: ORAL ARGUMENT

62. The appellant estimates that no more than 2 ½ hours will be required for oral argument, including reply.

Dated: 8 July 2021



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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

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

and

Kevin Pattinson
10 First Respondent

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

ANNEXURE

LIST OF STATUTORY PROVISIONS REFERRED TO IN SUBMISSIONS

Legislation	***Version as at relevant date***
Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) – s 175	Current (Compilation 50 – 30 June 2021)
Australian Securities and Investments Commission Act 2001 (Cth) – s 12GBB	Current (Compilation 79 – 3 May 2021)
Building and Construction Industry (Improving Productivity) Act 2016 (Cth) – s 81	Current (Compilation 4 – 3 September 2019)
Competition and Consumer Act 2010 (Cth) – s 76 and sch 2 ("*Australian Consumer Law*"), s 224	Current (Compilation 135 – 1 July 2021)
Corporations Act 2001 (Cth) – s 1317G	Current (Compilation 104 – 10 May 2021)

Environment Protection and Biodiversity Conservation Act 1999 (Cth) – s 481	Current (Compilation 56 – 19 April 2021)
Fair Work Act 2009 (Cth) – ss 347, 349, 363, 545-546, 549, 551-554, 556-557	Relevant date – 13 September 2018 (Compilation 34 – 19 December 2018[1])
Taxation Administration Act 1953 (Cth) – s 290-50	Current (Compilation 179 – 6 May 2021)
Trade Practices Act 1974 (Cth) – s 76	Relevant date – 20 December 1990 (Reprint No. 3 – 29 February 1988)

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