HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER
Appellant

and

10 KEVIN PATTINSON
First Respondent

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

APPELLANT'S REPLY

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: REPLY

20 2. The respondents' submissions (**RS**) do not answer the central contentions advanced in the appellant's submissions (**AS**). They do not demonstrate how the Full Court's "notion of proportionality" arises as a matter of statutory purpose, text and context: cf AS [21]-[33]. They do not reveal any purpose to be served by the "notion of proportionality" that is not already served by the well-understood judicial approach to setting an "appropriate" penalty: cf AS [8], [59]-[60]. And, most fundamentally, they do not explain how the "notion of proportionality" adopted by the Full Court could do anything other than frustrate the deterrence of contraveners who have a demonstrated and unabashed history of defiance of the law: cf AS [6], [9], [15], [52]-[53].

(a) The Full Court's reasons: RS [10]-[20]

30 3. It is true, but not to the point, that the Full Court judgment contains numerous correct statements of principle, including many passages referring to the primacy of deterrence, and the need to avoid unthinking transposition of principles deriving from criminal sentencing: RS [11], [15], [18]-[20]. The appellant has always acknowledged as much: AS [35]. But the fact that a judgment is correct in part does not demonstrate that it does not contain the errors that the appellant has identified, the significance of which was made manifest by the penalties that the Full Court ultimately imposed.

4. Contrary to RS [12]-[13], the primary judge was not focused on the bare existence of antecedents *per se*, but what they revealed about the level of penalty necessary to prevent any penalty imposed from being treated as a cost of doing business. Similarly, contrary to RS [13]-[14] and [18], the appellant does not argue for an approach that permits a penalty that bears "no rational or reasonable relationship to the contravening conduct". Instead, the appellant contends that a penalty should be able to be imposed by reference to what is necessary to deter contravening conduct of that kind. An appropriate penalty should not be greater than is necessary to achieve that object: *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285 at 293. The essential error in the Full Court's reasons was to adopt a "notion of proportionality" that will in some cases prevent the imposition of the penalty that is necessary to achieve that object.

5. The respondents start at the wrong point in submitting that a form of proportionality can "survive the rejection of retribution" (eg RS [16], [54]). The real question, never answered by the Union, is why proportionality reasoning of the form adopted in criminal sentencing should be transplanted to the context of statutory civil penalties in the first place. The statutory requirement for an "appropriate" penalty imports a requirement of reasonableness; there is no need to overlay a further notion of proportionality: cf RS [17], [54].

6. Contrary to RS [20], the appellant's submission that the penalties ultimately imposed by the Full Court were not calibrated to achieve deterrence does not involve bald assertion. The appellant invites the Court to draw that conclusion from the unchallenged facts that: (i) penalties at the level imposed by the Full Court had repeatedly been defied by the Union; and (ii) the Union remained wholly unmoved by such penalties and treated them as a cost of doing business. The listing of paragraphs in the reasons where the Full Court acknowledges the theoretical primacy of deterrence does not answer that point, for the issue in this appeal is whether the Full Court's notion of proportionality is consistent with the primacy of deterrence. The Full Court gives no explanation, in the passages cited or anywhere else, as to how the penalties it imposed could reasonably be expected to deter contraventions of the kind that occurred. Unsurprisingly, the Union likewise attempts no such explanation.

(b) The Agreed Penalties Case: RS [21]-[22]

7. At RS [21], the respondents correctly acknowledge that the role of retribution was "decisively rejected" in the *Agreed Penalties Case*. Their subsequent submissions that

civil penalties involve a "hybrid approach" cannot be reconciled with that proposition. The criticism that, on the appellant's approach, deterrence will "trump all other purposes" (RS [29]) leaves unstated what those "other purposes" are said to be, and how those unstated purposes are to be reconciled with the *Agreed Penalties Case*.

(c) Philosophical underpinnings: RS [23]-[27]

8. The academic articles upon which the respondents rely are of little assistance. The conceptual account of deterrence in RS [25] is in fact consistent with the appellant's case. To the extent that these articles are said to demonstrate that retribution is a necessary object of civil penalties, they cannot be reconciled with the *Agreed Penalties*
10 *Case* (which they pre-date). If they are said to demonstrate that penalties should not be imposed at a level greater than is required to deter, that is not in dispute: cf RS [26].

(d) "Problems" with the appellant's approach: RS [28]-[34]

9. At RS [28]-[34] the respondents endeavor to show that rejecting the Full Court's approach would lead to undesirable or absurd consequences. The problems of which they complain are no doubt problems for the Union, given its history of recidivism unparalleled in Australian civil penalty jurisprudence. However, for the following reasons, they are not problems of principle.

10. *First*, the appellant does not submit that recidivism is to be given "determinative significance": cf RS [29]. It submits only that, contrary to the Full Court's reasoning,
20 the nature and seriousness of "what actually happened" does not have determinative significance. All matters logically relevant to deterrence remain relevant. On that approach, the court has the option of imposing the maximum penalty for contraventions that are not of the objectively worst kind, if the court considers such a penalty appropriate to prevent well-resourced contraveners from treating civil penalties as a cost of doing business.

11. *Secondly*, contrary to RS [30], this does not involve "double punishment"; it simply involves paying attention to the level of penalty which is necessary to deter future contraventions of the same kind as that before the court. The contravener is not re-punished for past contraventions, as antecedent contraventions are relevant only in
30 so far as they shed light on what is appropriate to achieve deterrence.

12. *Thirdly*, the inevitabilities and absolutes posited at RS [31]-[33] are exaggerated. There is no number of past contraventions that results in a "crossing of the Rubicon",

nor do the appellant's submissions involve "untethering" the penalty from the instant contravention. If, for example, a court is satisfied that a particular contravention by an official of the Union was genuinely inadvertent (eg a mistake by a new official), the Union's record of recidivism may be of little or no relevance in imposing a penalty. By contrast, if deliberate defiance of the law is met with the repeated imposition of the maximum penalty, that would not reveal any error of principle. Indeed, the error would be to reduce the penalty significantly in cases where, for example, the Union pursues a policy of deliberate defiance of the law, but in most cases does so politely. The Union's submission to the contrary amounts to saying that, if the Union occasionally behaves extremely badly (illustrating the worst case), regular but less egregious contraventions must attract a lower penalty irrespective of the adequacy of that lower penalty to deter future contraventions of that kind. If that is the law, it will inevitably undermine faith in the credibility and legitimacy of the system far more than the imposition of an appropriate deterrent penalty: cf RS [32].

13. *Finally*, there is no substance to the submission at RS [34] that the appellant's argument must result in the abandonment of principles such as parity, totality and course of conduct. The fact that an analytical tool is used in criminal sentencing does not automatically render it a retributive principle. The principles invoked by the respondents remain relevant to ensure consistency (parity), the proper characterisation of events (course of conduct) and the appropriateness of an overall result (totality).

(e) Civil penalty principles do not otherwise depend on retribution: RS [35]-[43]

14. At RS [35]-[43] the respondents seek to demonstrate the continuing role for "retributive models" as part of a "hybrid approach" in determining the quantum of civil penalties in two ways. *First*, they contend at RS [36] (and also RS [8] and RS [22]) that retributive principles must apply because some of the penalty factors in *CSR* have their "origins in retributive theories" (RS [35]). However, as French J made clear, despite any overlap with sentencing considerations, the factors listed in *CSR* are relevant only to the extent that they relate to deterrence. So, for example, flagrancy informs the level of penalty not to punish the flagrant offender, but because it is harder to deter a willful contravener than a person who was merely careless.

15. *Secondly*, RS [39]-[43] asserts that the relevance of retributive proportionality is settled in many civil penalty cases. Those cases, most of which precede the *Agreed Penalties Case*, include cases decided on the basis that the objects of the imposition of

civil penalties <u>include</u> retribution (eg *Ponzio v B & P Caelli Constructions Pty Ltd*[1]). They also include cases in which the Union persuaded the Full Federal Court to make the same error as it made here.[2] Finally, they include cases which, while containing the word "proportionate", do not adopt reasoning that is reflective of the Full Court's "notion of proportionality".[3]

(f) Role of the maximum penalty: RS [44]-[47]

16. RS [44]-[47] do not grapple with the Full Court's ultimate requirement that the maximum penalty operates as a mandatory yardstick against which to place the gravity of the actual contravening conduct (see AS [42]-[47]). That erroneous approach was not avoided by what was said at AJ [106] (cf RS [45]). So much is evident from the amount of the penalties actually imposed, which are plainly insufficient to deter future contraventions of the same kind. The Union has not, and could not, submit otherwise.

(g) Statutory construction and a notion of proportionality: RS [48]-[54]

17. Having left the central question of statutory construction to the end, the respondents do not actually explain how the Full Court's "notion of proportionality" is a necessary feature of the penalty discretion. Indeed, their submissions are largely consistent with AS [26]-[33]. The further submission (or observation) at RS [50] that the FW Act enacts different penalties for different classes of contravention takes things no further. It is not in dispute that it is for Parliament to set the statutory maximum for each class of contravention, but this creates no obstacle to imposing penalties at or near the maximum for the applicable class, if that is appropriate to deter contraventions of the particular kind that have occurred. Finally, the suggested distinction between the <u>purpose</u> of deterrence and seeking to "achieve" deterrence is opaque: cf RS [53].

Dated: 26 August 2021

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[1] (2007) 158 FCR 543 at [93] (Lander J).

[2] *CFMMEU v ABCC* (2018) 264 FCR 155; *Parker v ABCC* (2019) 270 FCR 39.

[3] Eg *TPC v Stihl Chainsaws (Aust) Pty Ltd* (1978) ATPR 40-091; *CSR*; *NW Frozen Foods*; *ACCC v Dataline.Net.Au Pty Ltd* (2007) 161 FCR 513; *ACCC v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25; *Ultra Tune Australia Pty Ltd v ACCC* [2019] FCAFC 164.