Desert and deterrence – objects of punishment in criminal and civil law

Ann Bonnor reports on *Australian Building and Construction Commissioner v Pattinson* (2022) 96 ALJR 426; [2022] HCA 13

In *Australian Building and Construction Commissioner v Pattinson* (2022) 96 ALJR 426, the High Court canvassed the differences between criminal penalties and the civil penalty regime provided by the *Fair Work Act 2009* (Cth) (Fair Work Act). The court held that the primary, if not sole purpose of the power to impose pecuniary penalties conferred by s 546 of that Act is the promotion of the public interest in compliance by deterrence of further contraventions, and is not subject to constraints drawn from the criminal law.

Background

Mr Pattinson was employed by Multiplex at a building site in Frankston, Victoria. He was also an officer of the CFMMEU and was the union delegate on site.

On a day in September 2018, two employees of a subcontractor attended the site to install solar panels. During their induction, Mr Pattinson asked whether they were 'union' and had a 'ticket' showing membership. The CFMMEU had a 'no ticket, no start' policy. Implementation of such a policy has been unlawful since at least the advent of the *Workplace Relations Act 1996* (Cth).

Neither of the solar panel installers were CFMMEU members. Mr Pattinson misrepresented to them that in order to perform the work, they were required to become members of an industrial association.

The Australian building and construction commissioner brought civil penalty proceedings. It was accepted in those proceedings that Mr Pattinson twice contravened s 349(1) of the Fair Work Act, which prohibited knowingly or recklessly making a false or misleading representation. His actions were also attributable to the CFMMEU by force of s 363 of that Act.

The primary judge imposed pecuniary penalties totalling $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). The statutory maximum was $63,000.

The Full Court of the Federal Court of Australia upheld appeals by Mr Pattinson and CFMMEU and imposed lesser penalties, considering that the primary judge had erred by imposing on the CFMMEU what was, in effect, the maximum penalty.

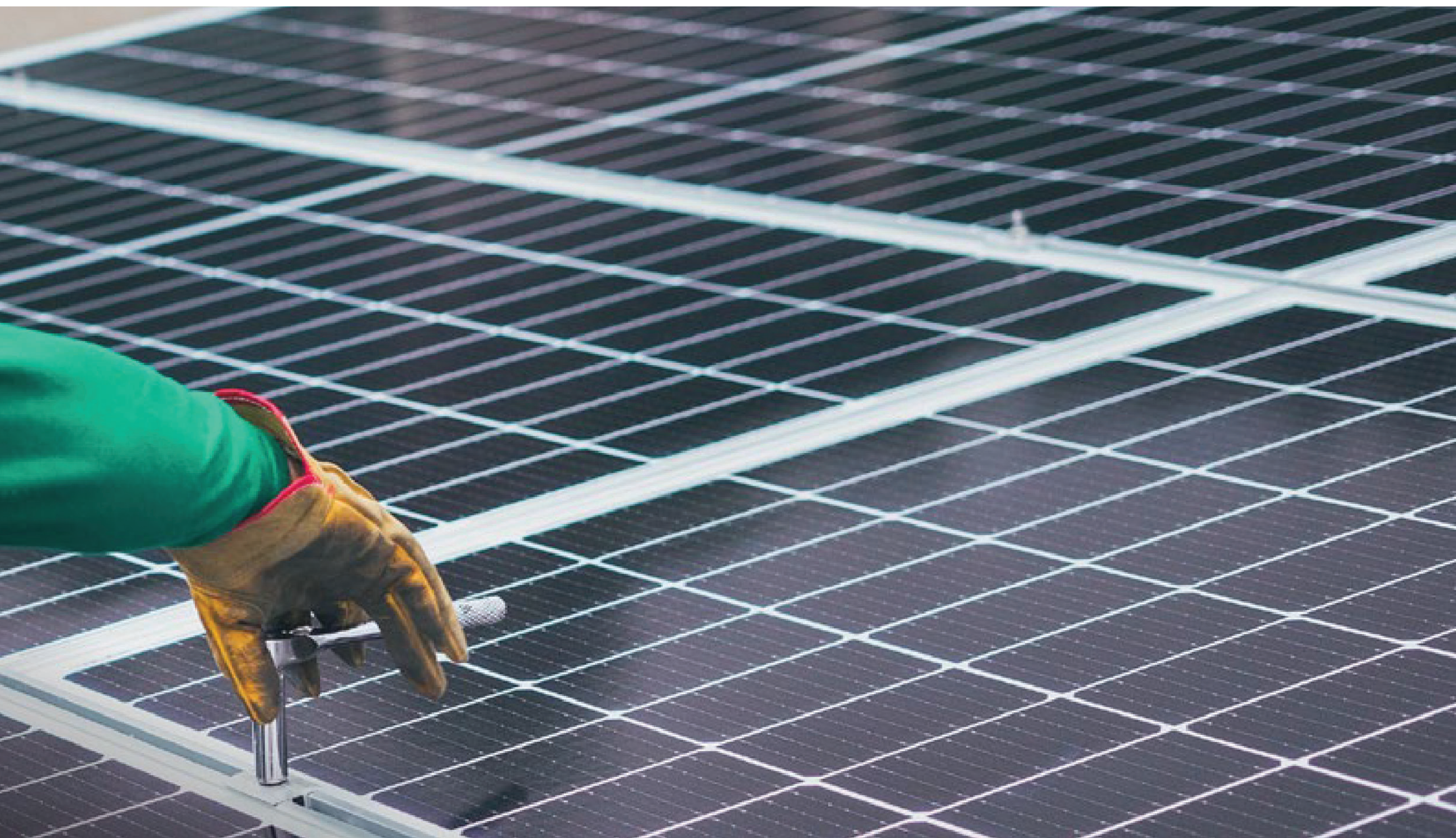
The High Court

The commissioner appealed to the High Court, contending that the Full Court erred in regarding the discretion under s 546 of the Act as constrained by a 'notion of proportionality', and also in regarding the statutory maximum penalty as providing a 'yardstick'. The High Court upheld the commissioner's appeal.

The power conferred by s 546 of the Act enables a court to order a person to pay a pecuniary penalty that the court considers is 'appropriate' in respect of a contravention. A pecuniary penalty must not exceed the relevant 'maximum penalty'.

The majority (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ) found that the purpose of a civil penalty provided under the Act 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. 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. The CFMMEU had a longstanding history of contraventions of the Act in furtherance of its 'no ticket, no start' policy. The penalties imposed by the primary judge represented a reasonable assessment of what was necessary to make the continuation of the CFMMEU's non-compliance with the law too expensive to maintain: at [9].

The majority also found that 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 the Full Court used that term) in a civil penalty regime. That notion, derived by the Full Court from *Veen v The Queen [No 2]* (1988) 164 CLR 465, 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: at [38].

In the criminal law, the purpose of retribution – imposing a punishment that fits the crime and which is proper because it is what the offender deserves – constrains the sentencing discretion: at [39]. In the civil penalty regime of the Act, however, retribution has no part to play: at [39]. While s 546 requires the court to ensure that the penalty it imposes is 'proportionate', in context that term is to be understood to refer to a penalty that strikes a reasonable balance between deterrence and oppressive severity: at [41]. By deriving a 'notion of proportionality' from *Veen (No 2)*, the Full Court introduced considerations drawn from theories of retributive justice into the application of s 546, which undermined the primary significance of deterrence: at [42].

Some concepts familiar from criminal sentencing (such as totality, parity and course of conduct) may usefully be deployed in the enforcement of the civil penalty regime, but as analytical tools to assist in the assessment of what may be considered reasonably necessary to deter further contraventions of the Act: at [45].

Further, and relatedly, the High Court found that the Full Court erred in having assumed that the maximum penalty is reserved for only the most serious examples of offending, in some kind of graduated scale by which contraventions are to be categorised in order of seriousness and corresponding penalty. This attempted to transplant a concept of retributive justice, with criminal law origins, into a civil penalty regime in which retribution has no role to play: at [51]. Such a 'yardstick' understanding of the maximum penalty is reminiscent of retributive notions of 'just deserts' and the adage that the punishment should fit the crime: at [51].

However, the maximum penalty did not constrain the exercise of the statutory discretion under s 546, beyond requiring that there be 'some reasonable relationship between the theoretical maximum and the final penalty imposed': at [10], [55] citing *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* (2016) 240 ALR 25 at [156]. That relationship is established where the maximum penalty does not exceed what is reasonably necessary to achieve the deterrence of future contraventions: at [10]. In the minority judgment, Edelman J agreed that the Full Court should have applied deterrence as the principal object at the expense of just deserts: at [83].

The High Court explained that the theory of s 546 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: at [66]. The court's function being to give effect to the intention of the Act, the court must do what it can to deter non-compliance: at [66]. Where it is evident, as in this case, 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: at [67]. It was so open to the primary judge reasonably to conclude in this case: at [72], and at [81] (Edelman J).

Edelman J dissented in the outcome concerning Mr Pattinson. The majority found that the penalty fixed by the primary judge on Mr Pattinson was appropriate, noting that the primary judge did not impose on him anything like the maximum penalty that might have been imposed: at [65]. Edelman J found that on any view of the law, Mr Pattinson did not deserve a substantial penalty: at [82]. By the time of the High Court decision, Mr Pattinson was 70 years old (and retired) with more than two decades' experience as a site delegate. His reckless misrepresentation to two people only deprived them of a single day of work, and it was his first contravention of the Fair Work Act: at [82]. This, Edelman J found, contrasted with the CFMMEU, which committed the breaches in wilful defiance of the law and had against it 150 previous findings of contravention: at [81]. BN