



Express law

fast track information for clients

16 OCTOBER 2019

‘Proportionality’ in civil penalty cases – important developments

A number of recent cases in the Federal Court have wrestled with whether, and how, the concept of ‘proportionality’, which controls criminal sentencing, should apply to civil penalties. The latest decision on this issue provides a careful analysis of the tension inherent in the Federal Court civil penalty authorities, and how the issue should be addressed. The decision is important for all Commonwealth regulators.

Australian Building and Construction Commissioner v Pattinson [2019] FCA 1654 (14 October 2019)

Background

Mr Pattinson was an officer of the Construction, Forestry, Maritime, Mining and Energy Union who had breached a civil penalty provision by misrepresenting that workers on a building site needed to be union members. In the course of considering the civil penalties to be imposed on Mr Pattinson and the Union for that conduct, the Federal Court (Snaden J) considered the extent to which the penalties could reflect the Union’s lengthy prior history of contraventions, and whether that was limited by the concept of proportionality as explained by the High Court in the criminal sentencing case of *Veen v The Queen (No 2)* (1988) 164 CLR 465. In that case it was held that the prior offences could not be given such weight as to lead to the imposition of a penalty which was disproportionate to the gravity of the instant offence.

Snaden J analysed a number of recent decisions of the Federal Court and Full Federal Court which discussed the application of the *Veen* principle of proportionality to civil penalties. His Honour identified a difference of approach in those authorities, broadly as follows:

- some considered *Veen* to require that a civil penalty be limited to the range which would be proportionate to the gravity of the instant contravention, with prior wrongdoing only relevant to where in that range the penalty should fall
- others did not treat proportionality as controlling in this way, but considered the prior history of wrongdoing as an integral matter to be considered in setting a penalty appropriate to secure the objective of deterrence.

His Honour ultimately preferred, and considered himself bound by, the latter approach, which reflected High Court statements that the purpose of civil penalties is to secure deterrence. Consistent with this, Snaden J stated (at [72]): *‘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.’*

Implications

The application and scope of the proportionality principle in the civil penalty context is a matter of potential significance to all civil penalty regulators. As this latest decision illustrates, a respondent may seek to rely on the principle to constrain what might otherwise be considered to be the magnitude of a civil penalty necessary to secure deterrence. And as the

operation of the principle does not turn upon specific features of a single statutory regime, but rather on more fundamental principles as to the imposition of civil penalties, decisions on the issue will affect regulators in general. It is therefore important that regulators act consistently on this issue.

The proportionality principle should not be confused with a number of other principles which are borrowed in civil penalty cases (sometimes inappropriately) from the criminal sentencing sphere: for example, it is separate from questions of 'totality', 'parity', 'comparable cases' and 'course of conduct'. However, as with all criminal sentencing principles which are sought to be applied in the civil penalty area, it is necessary to be mindful of the differing purposes of criminal sentencing and civil penalties. The proportionality question highlights one such difference.

- In *Veen (No 2)* the limits of proportionality were explained (at 473-4) by reference to the retributive theory of punishment – proportionality operates to ensure that the offender is not sentenced beyond what is appropriate to what they deserve as a punishment for the instant offence. Accordingly, proportionality is closely tied to the criminal sentencing objective of retribution.
- In *Commonwealth v Director, Fair Work Building Industry Inspectorate (2015) 258 CLR 482*, the High Court overturned a decision in which certain criminal sentencing principles had been held to be applicable in the civil penalty context. In rejecting the application of those principles, the High Court emphasised the significant differences between criminal sentencing and the imposition of civil penalties. In particular, it explained that, unlike a criminal sentence, the purpose of a civil penalty did not extend to securing retribution but was directed primarily, if not wholly, to deterrence: see [55] and [59].

While the High Court is yet to consider the issue, it would seem inconsistent with the decision in *Commonwealth v Director, FWBII* to treat proportionality as limiting the magnitude of a civil penalty which is otherwise appropriate for the primary purpose of securing deterrence.

The decision in *Pattinson* reflects a considered approach to what is required in this area, both by reference to the recent decisions in the Federal Court and by reference to the primacy of deterrence as emphasised by the High Court.

Text of the decision is available at:

[Australian Building and Construction Commissioner v Pattinson \[2019\] FCA 1654](#)

For further information please contact:

Tim Begbie

Senior General Counsel

T 02 6253 7521

tim.begbie@ags.gov.au

Matthew Blunn

National Leader

T 02 6253 7424

matthew.blunn@ags.gov.au

Katrina Close

Senior Executive Lawyer

T 03 9242 1230

katrina.close@ags.gov.au

Important: The material in *Express law* is provided to clients as an early, interim view for general information only, and further analysis on the matter may be prepared by AGS. The material should not be relied upon for the purpose of a particular matter. Please contact AGS before any action or decision is taken on the basis of any of the material in this message.

This message may contain confidential or legally privileged information. Only the addressee has the right to use or disseminate this information. If you think it was sent to you by mistake, please delete all copies and advise the sender. For the purposes of the *Spam Act 2003*, this email is authorised by AGS. Find out more about AGS at <http://www.ags.gov.au>.

If you do not wish to receive similar messages in the future, please reply to: unsubscribe@ags.gov.au