IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B45/2015

BETWEEN: **CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION**
First Appellant

AND: **COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED SERVICES UNION OF AUSTRALIA**
Second Appellant

AND: **DIRECTOR, FAIR WORK BUILDING INDUSTRY INSPECTORATE**
First Respondent

AND: **COMMONWEALTH OF AUSTRALIA**
Second Respondent

SUBMISSIONS OF THE APPELLANTS

(the Two Unions)

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PART I: PUBLICATION

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

PART II: ISSUES

2. The Appellants ("**the Two Unions**") refer to and adopt the statement of issues submitted by the Commonwealth and the Unions in appeal No. B36/2015.

3. The additional issue in this appeal is whether the Full Court erred in declining to grant the orders sought jointly by the First Respondent ("**the Director**") and the Two Unions.

PART III: SECTION 78B NOTICE

4. The Two Unions certify that they have considered whether a notice should be given under s.78B of the *Judiciary Act 1903* (Cth) and consider that no notice needs to be given.

PART IV: JUDGEMENT OF THE COURT BELOW

5. The judgment of the Court below is reported as: *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* (2015) 229 FCR 331; [2015] FCAFC 59.

PART V: FACTS

6. The Two Unions refer to and adopt the facts set out in their submissions and the submissions of the Commonwealth in appeal No. B36/2015.

PART VI: ARGUMENT

7. The Two Unions refer to and adopt their arguments, along with those of the Commonwealth, in appeal No. B36/2015.

8. In addressing here the additional issue of whether the Full Court should have made the orders jointly sought, it is necessary first to make some additional submissions in relation to the approach to such cases addressed in *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285 ("***NW Frozen Foods***") and *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* (2004) ATPR 41, 993 ("***Mobil Oil***").

The approach adopted in *NW Frozen Foods* and *Mobil*

9. The amici curiae in their submission in No.B36/2015 ("**ACS**" at [17]) submit that the notion of a "permissible range" emerging from those cases has the same meaning as the notion of an "available range" referred to in *Barbaro v The Queen* (2014) 253 CLR 58 ("***Barbaro***"). That is not so. The Commonwealth addresses the amici's arguments in this respect its reply in No. B36/2015. The Two Unions add the following points.

10. The "available range" or the "bounds of the available range of sentences" discussed in *Barbaro* referred to the claimed range of available sentences, proffered by a prosecutor, that would not involve error as being manifestly excessive or inadequate (see [7] and [24]-[28] per French CJ, Hayne, Keifel and Bell JJ). As the plurality said at [26], "[i]t is, then, common to speak of a sentence as falling outside the *available* range of sentences" (emphasis in original). Purporting to identify the available range in this way was seen as objectionable by the plurality because a negative proposition about absence of appellable error cannot safely be transformed into a positive statement of the upper and lower limits of a sentence (at [27]), it would be a statement of opinion (at [7] and [28]-[29]), and it tends to cast the prosecutor as a surrogate judge (at [29] and [39]).

11. That type of predictive range-setting by parties is not what was referred to in *NW Frozen Foods* and *Mobil Oil*, nor what was suggested below in this case. On the contrary, the approach there being considered (and sought to be applied here) involved one proposed penalty figure, being supported jointly, in order to settle the dispute.

12. As the Commonwealth pointed out in its primary submissions in No. B36/2015 (at [59]), the statutory provisions in question in *NW Frozen Foods* and *Mobil Oil* each provided for the Court to set the "appropriate" penalty. Thus an aspect of the Courts acceding to the joint submission was a necessary consideration of whether the penalties sought could properly be regarded as appropriate in the circumstances disclosed. It is in that sense that references to the "appropriate" penalty or "permissible range" in those two judgments should be understood. A particular proposed penalty might be outside the "permissible range" if, *in the court's view*, it would not be an appropriate penalty in the circumstances disclosed. That does not involve proffering of a predictive determination of appellable error by one, the other, or both parties.

13. In those circumstances it is incorrect to submit, as the amici curiae have at ACS [17], that to adopt an agreed penalty unless it is outside the "permissible range" is to "apply notions

only applicable to what is properly viewed as an appellant or review function of determining whether a particular discretionary decision is miscarried and necessarily involves error". That error is further evidenced at ACS [19]. Courts applying the principles in *NW Frozen Foods* and *Mobil Oil* are not required to determine a permissible range of penalties in the sense described in *Barbaro* [24]-[28].

14. As the Two Unions put in their submissions in No. B36/2015 at [51], whenever a court is asked to make orders by consent it is necessary for it to determine that it has jurisdiction and power to make the orders sought, including that any statutory criteria are fulfilled. It was incumbent on the Courts in *NW Frozen Foods* and *Mobil Oil* to consider whether the penalty proposed was "appropriate".

15. Here, as it happens, s.49 of the *Building and Construction Industry Improvement Act 2005* (BCII Act) does not speak of the court imposing an "appropriate" penalty (in contrast to s.49(1)(c), in relation to making "any other order", and s.39(1), in relation to the terms of any injunction against unlawful industrial action). Of course, the power to impose a pecuniary penalty is discretionary, and no doubt the court in question must be persuaded that imposing any penalty sought is a proper and available exercise of the statutory power. But the amici's focus on the word "appropriate" tends to distract here where it is not part of the statutory text.

16. The amici curiae submit at ACS [19] that "[t]he proper question for the Court is: what is the appropriate penalty in the circumstances of the present case, having regard to proper principles and precedents". They submit at ACS [30] that "there can be no confidence that the process of agreeing upon a penalty of itself tends to distil the appropriate, or correct, outcome" (see also ACS [32], [37]). These submissions seem to presuppose there is one right answer to the question of the proper penalty, to be divined by the court. The premise is incorrect.

17. The fact that there is no exact science in determining a pecuniary penalty figure means there is obviously a range of figures on which reasonable decision-makers might settle with respect to particular facts and circumstances. This recognition is implicit in *NW Frozen Foods* at 290-1. There is nothing remarkable about that. Where parties jointly propose an amount to settle the dispute before the court then so long as making of the orders would be within jurisdiction, and a proper and available exercise of the power in question, then there is good reason for the court to resolve the dispute by making the consent orders sought.

18. That parties in a civil penalty proceeding might agree a figure as an appropriate penalty having regard to their respective interests, or that an agreed penalty may be the product of a compromise, is neither distinctive nor inappropriate (cf ACS [29]). All parties who compromise civil proceedings do so having regard to their respective interests. The possibility of adverse publicity in a contested hearing is a not infrequent consideration for persons or entities considering settlement of civil claims (cf ACS [29]). And, as previously noted, the claimant in proceedings under s.49 of the BCII Act need not be a regulator. The amici also appear to suggest that there is something improper about "trade-offs" as to remedies, for example if an entity agreed to a higher penalty if an order for corrective advertising was not pursued (ACS [30]). There would be nothing improper about that. It reflects the fact that it is for the eligible person commencing a claim under s.49 of the BCII Act – and not for the court – to determine what relief is sought.

19. Whether there be a preponderance of matters resolved by the imposition of agreed penalties is irrelevant (cf ACS [13], [25]-[26]). Court lists would be far lengthier than they are if a substantial proportion of civil legal disputes did not resolve by agreement.

The significance of the specific pleading of amounts sought

20. Both the amici curiae (ACS [54]) and the Commonwealth in its reply in No.B36/2015 (at [23]) criticise the Two Unions' submission in that matter that if the originating application claims specified amounts as pecuniary penalties, then that delimits the relief that the court may order. The amici assert that no authority is cited in support of the proposition. But, as the Two Unions put in their submissions at [53]-[55], it is conventional principle that courts resolve disputes (within their jurisdiction) about claims presented to them, and that it is for the parties to makes choices "as to what claims are to be made and how they are to be framed" (cf *AON Risk Service (Aust) Ltd v ANU* (2009) 239 CLR 175 at [112], [71]).

21. The amici argue that a confined choice would be inconsistent with the statute. The Commonwealth argues that whilst an application may "delimit the kinds of relief sought, it does not delimit the content or quantum of that relief". The basis of the Commonwealth's distinction is not apparent. It is a characteristic of civil proceedings that the moving party is able to specify the relief sought. Here, s.49 of the BCII Act permits the eligible person choice as to what relief is sought. There is no reason why that choice should not extend to seeking only a pecuniary penalty of, or up to, a certain amount. Equally, there is no inconsistency with, say, ss.82 or 87 of the *Competition and Consumer Act 2010* if a

claimant only seeks identified damages or compensation caused by a contravention of a relevant part of the Act.

22. Here, the Director has chosen the claims he wished to make and the manner in which those claims were framed. The question before the Court was whether the relief sought by the Director should be granted.

The orders jointly sought should have been made

23. The Director sought below, and the Two Unions consented to, declarations of breach of s.38 of the BCII Act, and orders for pecuniary penalties of $105,000 (for the First Appellant) and $45,000 (for the Second Appellant). In the Two Unions' submission the Full Court should have made these orders.

24. The maximum penalty for a contravention of s.38 by a body corporate was 1000 penalty units (see ss.38 and 49(2)(a)). Section 4AA of the *Crimes Act 1914*, as it stood in May 2011 (at the time of the relevant conduct), provided that a penalty unit was $110. Thus the maximum penalty for one breach was relevantly $110,000. The increase in the value of a penalty unit to $170 by Schedule 3, Item 7 of the Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012 (No.167,2012) did not apply to the contraventions by reason of Item 9 which provided that increase was applicable for offences committed after the commencement of the item.

25. The Director chose to seek one declaration of contravention of s.38 of the BCII Act against each of the Two Unions in relation to courses of conduct undertaken by them (Originating Application, prayers 1 and 3). The penalties sought against each Union were "in respect of *that breach*" (Originating Application, prayers 2 and 4, emphasis added).

26. In the Statement of Claim ("**SOC**") the Director alleged:

(a) that each of the Appellants contravened s.38 with respect to conduct at the QCH Project Site on 24 May 2011 (SOC paragraphs 24-43);

(b) that the First Appellant contravened s.38 with respect to conduct at the BCEC Project Site on 24-26 May 2011 (SOC paragraphs 44-80)

(c) that each of the Appellants contravened s.38 with respect to conduct at the QIMR Project Site in the period 24-26 May 2011 (SOC paragraphs 81-108).

27. Relevant admissions were made by the Two Unions: Statement of Agreed Facts, paragraphs 47, 84 and 113.

28. Whether regarded formally as an allegation of one contravention by each Union (as suggested by the relief sought in the Originating Application), or as three contraventions by the First Appellant and two contraventions by the Second Appellant (as suggested by the SOC and the Statement of Agreed Facts), in substance the conduct pleaded could properly be considered a single course of conduct by each of the Two Unions, as there was a significant inter-relationship between the legal and factual elements: see *CFMEU v Cahill* (2010) 194 IR 461 at [38]-[44]; see also *CFMEU v Williams* (2009) 191 IR 445 at [45]. The conduct was at essentially the same time, and of approximately the same duration, in respect of or referable to the same industrial concern, namely a concern about "sham contracting" on Queensland Government building projects (see SOC paragraphs 28, 33, 37, 51-52, 60, 61, 70, 73, 90, 91, 100).

29. In any event, the Court, as a matter of discretion, could "take into account ... the circumstance that the same act or omissions have resulted in multiple contraventions ... by imposing a lesser penalty or even no penalty in respect of breaches of some terms, while imposing a substantial penalty in respect of breaches of other terms": *QR Ltd v CEPU* (2010) 204 IR 142 at [49].

30. The conduct was of relatively short duration, and with no allegations of involvement of senior officials. The Two Unions co-operated with the Director. As in *NW Frozen Foods*, that co-operation occurred before the institution of proceedings. That co-operation necessarily carries with it an acknowledgement of the importance of declarations and the disapprobation of the Court. The agreed figures are comparable with previous penalties imposed and are proportionate in all the circumstances.

31. As the Agreed Statement of Facts was directly referable to the Statement of Claim, the Court was in the same position it would have been after a trial and making findings as to the matters pleaded in being able to determine the appropriate penalty having regard to the facts alleged and found to be established.

32. The Director and the Two Unions provided substantial submissions to the Court below as to why the penalties agreed upon should be made:

(a) written submissions of the Director dated 11 July 2014 – Annexure A to these submissions;

(b) written submissions of the Two Unions dated 25 July 2014 – Annexure B to these submissions.

33. Those submissions, and the proposed outcome, should have been accepted.

34. The Full Court made certain criticisms of the Agreed Statement of Facts at [247]-[253]. To a significant extent those criticisms proceeded upon the Full Court's earlier conclusion that the decision in *Barbaro* precluded the approach adopted in *NW Frozen Foods* and *Mobil* being adopted. The criticisms presuppose, much as the amici curiae suggested, that it was for the Court and Court alone to ascertain the correct penalty outcome, fully apprised of all conceivably relevant circumstances. That was not so. Similarly, the Full Court stated at [251] that "[w]e have not been told how the relevant considerations were weighed [by the parties], or how the relevant principles have been taken into account". The considerations taken into account by parties to settlement of a civil claim are not relevant to the Court's consideration of whether to make the orders sought. They were not necessary for the Court to determine if the proposed orders were a proper and available exercise of the s.49 power.

35. In any event, the Full Court's criticisms were unwarranted. It was unnecessary for the Court to know of the "dealings between the Director and the Respondents" during the period from the conduct in question to the date the application was filed (cf Full Court [247]). The Two Unions accepted liability prior to proceedings to be issued. Had the Director desired to issue proceeding at any time after the conduct in question or at any time during their investigations he was at liberty to do so.

36. As to the knowledge of the conduct comprising the contraventions (Full Court [247]), the Agreed Statement of Facts is directly referable to the case pleaded against the Two Unions. The detail of the conduct, the documents circulated, or the meetings held (Full Court [248]), provide no further information necessary for the Court to determine the appropriate penalty.

37. The Director chose to proceed against the Two Unions and not individual officers, employees or agents. That is a matter for the Director. It is not an issue for the Court to speculate on, or to seek further information about. By operation of s.69 of the BCII Act the Two Unions are liable for the conduct of officers or agents or members of the association in particular circumstances. In this case the Director pleaded in respect of each

individual who was alleged to have done a contravening act that they were officers or agents of the respective Unions (see SOC paragraphs 3(e), 4(c), 5(e), 6(e)). Each of those matters was the subject of the Statement of Agreed Facts. Each of those allegations was agreed.

38. Whether the individuals were "foot soldiers" or carrying out a "grand strategy" (Full Court [248]) makes no difference to the liability under s.49 of the BCII Act.

39. As to the nature of any "adverse effect", whilst it might be relevant to the question of "punishment", such punishment is not equivalent to the making of any compensatory remedies such that it might impact on any application made by a person affected (cf Full Court [249]). And there was no evidence before the Court of the head contractors seeking compensatory remedies; for the Court to refer to this possibility at [249] was not relevant. Further, whilst detriment to others might be taken into account in fixing a penalty (Full Court [249]), it is up to the Director to plead any such detriment to the extent he considers it relevant or to the extent he is able to establish such detriment.

40. The Schedule of Penalties previously imposed on one or other of the Two Unions, included in the Director's submissions below, contained details of the relevant matters in which penalties were imposed, the sections of the relevant Acts under which the penalties were imposed and brief details of the conduct giving rise to the funding of contravening conduct. It is not the Court's role in the imposition of penalties to engage in a specific factual comparison of previous cases (cf Full Court [253]).

41. The orders sought were within jurisdiction, and were clearly a proper and available exercise of the power in s.49 of the BCII Act in light of the Agreed Facts. They should have been made.

PART VII: LEGISLATIVE PROVISIONS

42. In addition to the legislative provisions set out in Annexure B to the Commonwealth's submissions in No. B36/2015, the following provisions are also relevant.

43. Section 4AA of the *Crimes Act 1914* (Cth), as it stood in May 2011:

> **4AA Penalty units**
>
> (1) In a law of the Commonwealth or a Territory Ordinance, unless the contrary intention appears:
>
> ***penalty unit*** means $110.

44. *Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012*, Schedule 3, Items 7 and 9 (indicating the increase in the penalty unit to $170 in November 2012 only applied to offences committed after commencement, and thus is not applicable here):

> **Crimes Act 1914**
>
> **7 Subsection 4AA(1) (definition of penalty unit)**
>
> Omit "$110", substitute "$170".
>
> ...
>
> **9 Application of amendments**
>
> (1 The amendment made by item 7 of this Schedule applies in relation to an offence committed after the commencement of this item.
>
> Note: Subitem (1) mirrors subsection 4F(1) of the *Crimes Act 1914*.

PART VIII: ORDERS SOUGHT

45. The Appellants seek the following orders:

(a) The appeal be allowed, the orders made by the Full Court on 1 May 2015 be set aside, and in lieu thereof the following orders be made:

(i) A declaration that the First Respondent [being the First Appellant in this appeal] breached s.38 of the BCII Act;

(ii) An order under s.49 of the BCII Act imposing a penalty of $105,000 on the First Respondent in respect of that breach;

(iii) A declaration that the Second Respondent [being the Second Appellant in this appeal] breached s.38 of the BCII Act;

(iv) An order under s.49 of the BCII Act imposing a penalty of $45,000 on the Second Respondent in respect of that breach;

(v) In the alternative to (i)-(iv), that the matter be remitted to the Federal Court for determination according to law;

(vi) Such further or other order as the Court deems appropriate.

46. No order as to costs is sought either in this Court or the Court below.

PART IX: ORAL ARGUMENT

47. It is estimated that approximately an additional 1 hour (beyond that in the appeal in No.B36/2015) will be required for the presentation of the oral argument of the Two Unions in this appeal.

3 September 2015

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