IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY **NO B 45 OF 2015**

On Appeal From
the Federal Court of Australia

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

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

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

COMMONWEALTH OF AUSTRALIA
Second Respondent

SUBMISSIONS OF THE SECOND RESPONDENT

Filed on behalf of the Second Respondent by:

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PART I FORM OF SUBMISSIONS

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

PART II ISSUES

2. The second respondent refers to and adopts the statement of issues set out in the appeal proceedings B36/2015.

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

3. The second respondent certifies that it has considered whether a notice should be given under s 78B of the *Judiciary Act 1903* (Cth) and that no notice needs to be given.

PART IV FACTS

4. The second respondent refers to and adopts the facts set out in its submissions in the appeal proceedings B36/2015.

PART V LEGISLATIVE PROVISIONS

5. The legislative provisions are set out in Annexure B to the Commonwealth's submissions in the appeal proceedings B36/2015 (**CS**).

PART VI ARGUMENT

6. Three points only need be made.

7. *First*, in this appeal and in the appeal proceedings B36/2015, the Commonwealth addresses, at the level of principle, the question as to whether it was permissible for the Full Court to receive and have regard to submissions on agreed penalty amounts from the parties (CS [45]). It does not seek to address this Court concerning the Unions' submissions (**US**) at [23]-[33] as to whether the Full Court should have accepted the particular proposed penalty amounts in the circumstances of the case below.

8. *Secondly*, the submissions at US [15] appear to contend that the requirement identified in *NW Frozen Foods* and *Mobil Oil*, that the Court consider whether a proposed penalty is "appropriate", may be distinguishable on the basis that, respectively, s 76 of the (then) *Trade Practices Act 1974* (Cth) and s 13 of the *Petroleum Retail Marketing Sites Act 1980* (Cth) expressly referred to the imposition of a pecuniary penalty in such amount "as the Court determines to be appropriate". The Unions appear to contrast these provisions with s 49(1)(a) of the BCII Act, which provides that a court may make "an order imposing a pecuniary penalty on the defendant", without employing the word "appropriate".

9. If this is the Unions' submission, it is misplaced. The imposition of a penalty is, in each case, a discretionary remedy. While the discretion is broad (CS [14]-[15]), the Court's discretion as to quantum must be exercised judicially (see, for example, *House v R* (1936) 55 CLR 499). By implication, any penalty imposed must be in an appropriate amount, in the circumstances of the case (CS [61]-[62]). Further, the structural relationship between, on the one hand, ss 49(1) (a) and (b), and on the other, s 49(1)(c), with the latter's express reference to "any other order that the court considers appropriate", confirms this implication. The Court is governed by "appropriateness" in selecting which remedy, or remedies, to adopt, and in choosing how to tailor the remedies that are adopted.

10. *Thirdly*, the Unions' apparent submission that the upper limit of the amount of penalty to be imposed is a matter for the applicant, or parties, and not for the court, does not reflect the law in respect of claims for discretionary relief: US [20]-[22]. To expand on what the Commonwealth has said in its reply in the appeal proceedings B36/2015 (at [12], [21]): a civil penalty, like a declaration, is a form of relief that has a public element to it, beyond the immediate dispute between the parties. In the case of a civil penalty, the public element is principally that of general deterrence: a penalty must be set at a level that is sufficiently high to deter others from engaging in similar conduct. This public element does not preclude parties from putting a joint position before the court, in accordance with the principles set out in *NW Frozen Foods* and *Mobil Oil*, nor from making separate submissions as to appropriate relief (CS [42], [51]-[53], [60], [62]). However, the public element confirms that the determination of the relief must ultimately remain a matter for the court.

11. Perram J correctly identifies the applicable principles in *ACCC v MSY Technology Pty Ltd (No 2)* (2011) 279 ALR 609 at 612, [7], as follows:

> The parties' agreement on the proposed declarations and civil penalties does not, however, relieve the Court of the obligation to satisfy itself that they are appropriate. The need for the Court's satisfaction arises from the potentially public nature of those kinds of orders. Declaratory relief may affect or declare the state of the law which may, in some circumstances, affect parties not before the Court. So too, the imposition of a penalty serves the end, amongst others, of deterring similar conduct by others not before the Court. The gauging of that kind of consideration means that the fixing of a penalty cannot be solely a matter for the parties.

12. This passage was endorsed by the Full Court on appeal: *ACCC v MSY Technology Pty Ltd* (2012) 201 FCR 378 (at [3]), where Logan, Greenwood and Yates JJ said this:

> The MSY parties admitted the alleged contraventions. A statement of facts agreed as between the ACCC and the MSY parties was tendered before the learned primary judge. At the same time, the parties proposed to his Honour orders the terms of which had been agreed between them. These proposed orders provided for the imposition of penalties, the making of declarations, the granting of injunctions, the undertaking of a compliance programme and the publication of corrective advertising. His Honour, correctly, approached the question of whether to make the proposed orders on the basis that consent neither conferred power to make the same nor bound him in the way in which a discretion ought to be exercised.

13. This conforms with ss 21 and 23 of the *Federal Court of Australia Act 1976* (Cth). The power conferred by those provisions would not authorise the Court to grant a form of relief *not sought* by a party. That is so for reasons arising from the character of judicial power, as being to decide controversies, including between the Commonwealth and its citizens,[1] and as a matter of procedural fairness. However, once an applicant seeks a *kind* of relief, the Court has power to determine the *form* and *degree* of relief, of that kind, that it considers appropriate to grant. The quantum of relief may, in the Court's discretion, exceed, or be less than, that sought by the moving party.

PART VII ESTIMATED HOURS

10 14. It is estimated that an additional ten minutes (over the time required in the appeal proceedings B36/2015) will be required for the presentation of the oral argument of the second respondent in this appeal.

Dated: 18 September 2015

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Justin Gleeson SC Solicitor-General of the Commonwealth	Tim Begbie Australian Government Solicitor	Ruth C A Higgins Banco Chambers

[1] *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 (Griffith CJ)