HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, GAGELER, KEANE, NETTLE AND GORDON JJ

Matter No B36/2015

COMMONWEALTH OF AUSTRALIA APPELLANT

AND

DIRECTOR, FAIR WORK BUILDING INDUSTRY INSPECTORATE & ORS RESPONDENTS

Matter No B45/2015

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION & ANOR APPELLANTS

AND

DIRECTOR, FAIR WORK BUILDING INDUSTRY INSPECTORATE & ANOR RESPONDENTS

Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate
Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate
[2015] HCA 46
9 December 2015
B36/2015 & B45/2015

ORDER

1. *In each matter, appeal allowed.*

2. *Set aside paragraph 1 of the order of the Full Court of the Federal Court of Australia made on 1 May 2015.*

3. *Remit the proceedings to the Federal Court for determination according to law.*

On appeal from the Federal Court of Australia

Representation

J T Gleeson SC, Solicitor-General of the Commonwealth with T M Begbie and R C A Higgins for the appellant in B36/2015 and the second respondent in B45/2015 (instructed by Australian Government Solicitor)

J K Kirk SC with E P White for the appellants in B45/2015 and the second and third respondents in B36/2015 (instructed by Hall Payne Lawyers)

C J Murdoch for the first respondent in both matters (instructed by Norton Rose Fulbright)

C A Moore SC with D M Tucker appearing as amici curiae in B36/2015 (instructed by Australian Government Solicitor)

CATCHWORDS

Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate
Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate

Practice and procedure – Civil penalties – Whether submissions as to agreed penalty permissible – Whether *Barbaro v The Queen* (2014) 253 CLR 58 applies to civil penalty proceedings.

Words and phrases – "agreed penalty", "appropriate penalty", "civil penalty".

Building and Construction Industry Improvement Act 2005 (Cth), ss 38, 49.

1 FRENCH CJ, KIEFEL, BELL, NETTLE AND GORDON JJ. These are appeals from an order of the Full Court of the Federal Court of Australia (Dowsett, Greenwood and Wigney JJ)[1] adjourning civil penalty proceedings before it under the *Building and Construction Industry Improvement Act* 2005 (Cth) ("the BCII Act") in which the parties had made submissions to the Court seeking the imposition of agreed penalties. The issue is whether the Full Court erred in adjourning the proceedings on the basis that the decision of this Court in *Barbaro v The Queen*[2] applies to a civil penalty proceeding brought under Pt 1 of Ch 7 of the BCII Act[3] and in particular whether *Barbaro* precludes a court from receiving an agreed or other submission as to the amount of a pecuniary penalty to be imposed under s 49 of the BCII Act. For the reasons which follow, the decision in *Barbaro* does not apply to civil penalty proceedings and a court is not precluded from receiving and, if appropriate, accepting an agreed or other civil penalty submission.

Legislative provisions

2 Section 9 of the BCII Act established the Australian Building and Construction Commissioner ("the Commissioner") and s 10 provided that the functions of the Commissioner included monitoring and promoting compliance with the BCII Act, the investigation of suspected contraventions of the BCII Act, and instituting or intervening in proceedings and making submissions in accordance with the BCII Act.

3 Section 38 of the BCII Act provided that "[a] person must not engage in unlawful industrial action". The section was stipulated to be a "Grade A civil penalty provision"[4]. "[U]nlawful industrial action" was defined in s 37 of the Act as building industrial action which was industrially-motivated, constitutionally-

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1 *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* (2015) 229 FCR 331 ("*FWBII v CFMEU*").

2 (2014) 253 CLR 58; [2014] HCA 2.

3 Part 1 of Ch 7 of the BCII Act has been replaced by the *Fair Work (Building Industry) Act* 2012 (Cth), Ch 7, Pt 1: see *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act* 2012 (Cth), Sched 1, item 52.

4 See BCII Act, s 4(1), which defined "Grade A civil penalty provision" and "civil penalty provision".

connected and not excluded action[5]. "[E]xcluded action" was defined as "protected industrial action", which had the same meaning as in the *Fair Work Act* 2009 (Cth)[6]. Section 40 provided that building industrial action in relation to a proposed building enterprise agreement was not protected industrial action if the action was engaged in in concert with one or more persons who were not "protected persons" for the action. The same section provided that the only "protected persons" were an employee organisation that was a bargaining representative for the proposed enterprise agreement, a member of such an organisation, an officer or employee of such an organisation acting in that capacity and an employee who was a bargaining representative for the proposed enterprise agreement.

4 The practical effect of those provisions was that only industrial action engaged in by employees and unions who were involved in bargaining, or would be covered by a proposed building enterprise agreement, would be "protected industrial action". Therefore, industrially-motivated action taken in concert with persons not involved in bargaining or who would not be covered by the proposed building enterprise agreement was "unlawful industrial action" within the meaning of ss 37 and 38 of the BCII Act[7].

5 Section 48 provided inter alia that, for the purposes of Pt 1 of Ch 7 of the BCII Act, a "person" in relation to the contravention of a civil penalty provision included an industrial association and that a person who was involved in a contravention of a civil penalty provision was to be treated as having contravened that provision.

6 Section 49(1) provided that, on application by an eligible person, an appropriate court could make one or more of the following orders in relation to a person (the defendant) who had contravened a civil penalty provision:

> "(a) an order imposing a pecuniary penalty on the defendant;

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5 BCII Act, s 36(1) defined "building industrial action", "industrially-motivated action", "constitutionally-connected action" and "excluded action".

6 BCII Act, ss 4(1), 36(1).

7 Provided that the requirement that the building industrial action was "constitutionally-connected" in s 37(b) was satisfied.

(b) an order requiring the defendant to pay a specified amount to another person as compensation for damage suffered by the other person as a result of the contravention;

(c) any other order that the court considers appropriate."

In the case of a Grade A civil penalty provision, the maximum pecuniary penalty was 1,000 penalty units for a body corporate and 200 penalty units for a person other than a body corporate.

7 Section 49(3) provided that the orders that could be made under s 49(1)(c) included injunctions and any other orders that the court considered necessary to stop the conduct or remedy its effects, including orders for the sequestration of assets. Section 49(5) provided that a pecuniary penalty was payable to the Commonwealth or to some other person if the court so directed, and could be recovered as a debt.

8 Section 49(6)(a) deemed the Commissioner to be an eligible person. Section 75(7) had the effect that the Federal Court was the only eligible court in relation to an act or omission for which an organisation, or a member of an organisation, was liable to be proceeded against for a pecuniary penalty.

Amendments and transitional provisions applicable to these appeals

9 By item 1 of Sched 1 to the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act* 2012 (Cth) ("the Transition Act"), the name of the BCII Act was changed to the *Fair Work (Building Industry) Act* 2012 (Cth) ("the FWBI Act"). Under s 9 of the FWBI Act, there was established the Director of the Fair Work Building Industry Inspectorate ("the Director") and, under s 10, functions broadly similar to those previously performed by the Commissioner were vested in the Director[8].

10 At the same time, by item 52 of Sched 1 to the Transition Act, Pt 1 of Ch 7 of the BCII Act was repealed and replaced by Pt 1 of Ch 7 of the FWBI Act with the effect that, thenceforth, all civil penalty provisions were removed from the legislation. Item 1 of Sched 2 to the Transition Act provided, however, for regulations dealing with matters of a transitional, saving or application nature relating to amendments made by that Act; and, by s 2.3 of the Building and Construction Industry Improvement Amendment (Transition to Fair Work)

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8 See Transition Act, Sched 1, item 49.

Regulation 2012 ("the Transition Regulation"), it was provided that, if a proceeding could have been started under the BCII Act in relation to conduct that happened before the commencement of the regulation, the BCII Act (other than Divs 1 and 2 of Pt 2 of Ch 7) would continue in force to the extent necessary to allow the proceeding to be started and dealt with. For the purposes of such proceedings, a reference to the Commissioner in the BCII Act is taken to be a reference to the Director under the FWBI Act[9].

11 As will be explained, this proceeding concerns conduct that occurred before the Transition Regulation commenced. The effect of the Transition Act and the Transition Regulation, therefore, is that Pt 1 of Ch 7 of the BCII Act applies to this proceeding unaffected by the subsequent amendments.

Procedural history

12 By originating application dated 23 May 2013, the Director brought civil penalty proceedings in the Federal Court against the Construction, Forestry, Mining and Energy Union ("the CFMEU") and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia ("the CEPU") (together, "the Unions") for contraventions of s 38 of the BCII Act alleged to have been committed in May 2011. The Director sought pecuniary penalties and declarations under s 49 of that Act. Subsequently, the parties filed an agreed statement of facts and submissions ("the Agreed Facts") as to the amounts of civil penalty which they agreed should be imposed. It was agreed that the Unions each contravened s 38 of the BCII Act by virtue of their involvement in contraventions by certain of their officers. The Agreed Facts recorded that the Director and the Unions "consent to and agree to seek from the Court" declarations as to the contraventions and pecuniary penalties of $105,000 against the CFMEU and $45,000 against the CEPU. The Agreed Facts also stated that, "subject to the discretion of the Court to fix an appropriate penalty", those penalty amounts are "satisfactory, appropriate and within the permissible range in all the circumstances".

13 At a pre-trial directions hearing, the primary judge expressed concern as to the possible application of *Barbaro* to the proceedings and, as a result, a direction was made under s 20(1A) of the *Federal Court of Australia Act* 1976 (Cth) that the issue be referred to a Full Court. The Commonwealth was subsequently given leave to intervene. Because the Director, the Unions and the

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9 Transition Regulation, s 2.3(3)(a).

Commonwealth each supported the making of the orders proposed in the Agreed Facts, the Full Court gave leave for separate counsel to appear as contradictors.

14 On 1 May 2015, the Full Court held that *Barbaro* does apply to civil penalty proceedings and, consequently, that the parties' agreed penalty submissions could not be received. On that basis the Court adjourned the further hearing of the matter to enable the parties to consider their positions. On 18 June 2015, the Commonwealth was granted special leave to appeal to this Court.

15 The Commonwealth's appeal is B36 of 2015. The Commonwealth's Notice of Appeal contends in substance that the Full Court erred in ruling that *Barbaro* applies to civil penalty proceedings under the BCII Act. It seeks an order that the proceeding be remitted to the Federal Court to be determined in accordance with the decision of this Court. The Unions also filed a separate application for special leave to appeal from the orders of the Full Court, which this Court granted on 6 August 2015. The Unions' appeal is B45 of 2015[10]. Their Notice of Appeal seeks, as a preferable alternative to a remitter to the Federal Court, that this Court grant the declarations and orders that were sought in the Agreed Facts. Counsel who appeared as contradictor in the Full Court were given leave to appear in this Court as amici curiae.

The nature of civil penalty regimes

16 Part 1 of Ch 7 of the BCII Act is typical of civil penalty provisions enacted by the Commonwealth to facilitate the enforcement of various statutory civil regulatory regimes. Section 44 of the *Commonwealth Conciliation and Arbitration Act* 1904 (Cth) was one of the first such provisions to be enacted. As subsequently re-enacted and amended as s 119 of that Act, it fell for consideration by the Full Court of the Federal Court in *Gapes v Commercial Bank of Australia Ltd*[11].

17 In holding that s 119 created a civil penalty as opposed to criminal liability and, therefore, that the applicable procedure and standard of proof were civil procedure and proof on the balance of probabilities as opposed to criminal procedure and proof beyond reasonable doubt, J B Sweeney J (with whom Smithers, Evatt, Deane and Fisher JJ agreed) observed the clear distinction that

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10 The Unions are the second and third respondents in B36 of 2015 and the appellants in B45 of 2015.

11 (1979) 27 ALR 87.

had been maintained throughout the history of the *Conciliation and Arbitration Act* between s 119 (and its predecessors) and other provisions of the Act that imposed criminal liability and criminal penalties of lesser amount[12]. Sweeney J deduced that the legislature had quite consciously adopted the distinction and maintained it for the reason that "[c]onviction always carried a stigma ... [A] conviction and fine even though lesser in amount than a penalty ordered to be paid would be regarded as harsher treatment."[13]

18 Section 76 of the *Trade Practices Act* 1974 (Cth)[14], as enacted, was another instance of a civil penalty provision appearing in an Act which maintained a clear distinction between civil penalties and criminal penalties provided for elsewhere in the Act.

19 Section 76 provided inter alia that, if the court were satisfied that a person had contravened or attempted to contravene a provision of Pt IV of the Act (the restrictive trade practices provisions), the court could order the person to pay to the Commonwealth such pecuniary penalty (not exceeding $250,000 for a body corporate or $50,000 for a person not being a body corporate) as the court determined to be appropriate, having regard to all relevant matters, including the nature and extent of the act or omission, any loss or damage suffered as a result of the act or omission, the circumstances in which the act or omission took place and whether the person had previously been found to have engaged in similar conduct.

20 Section 78 added that criminal proceedings did not lie against a person for contravention of Pt IV, but s 79 provided that a person who contravened a provision of Pt V of the Act (the consumer protection provisions) other than s 52 was "guilty of an offence punishable on conviction" by a fine not exceeding $10,000 or imprisonment for six months for a person not being a body corporate and by a fine not exceeding $50,000 for a body corporate.

21 During the Parliamentary debates that preceded the enactment of the *Trade Practices Act*, the then Attorney-General of the Commonwealth (Senator

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12 *Gapes* (1979) 27 ALR 87 at 111.

13 *Gapes* (1979) 27 ALR 87 at 111; see also Gillooly and Wallace-Bruce, "Civil Penalties in Australian Legislation", (1994) 13 *University of Tasmania Law Review* 269 at 274.

14 Now s 76 of the *Competition and Consumer Act* 2010 (Cth).

Lionel Murphy QC) described the purpose of the Trade Practices Bill 1974 (Cth) in so distinguishing between civil penalties and criminal penalties as follows[15]:

> "There is a clear distinction between the trade practices provisions and the consumer protection provisions in the Bill. For the most part, the consumer protection provisions deal with conduct which amounts to a criminal offence. This is in cases where there are false representations or conduct which is obviously of some fraudulent type and which is of a kind ordinarily covered by the criminal law. In the trade practices area, the conduct is more commercial conduct dealing with competitors, driving them out of business and so forth. An endeavour has been made to treat this area in the civil sense. The nature of the penal provisions are such as to create what are called civil offences rather than criminal offences. ...
>
> We think it is important not to import into the trade practices area the notion of criminality as such. ... Inevitably, if the Opposition is successful in its bid to include in the clause the phrase 'beyond reasonable doubt', businessmen who are caught up by these provisions will be treated as criminals."

22 As will be appreciated, that explanation resonates with the terms of the Full Court's identification in *Gapes* of the purpose of the distinction between civil penalties and criminal penalties in the *Conciliation and Arbitration Act*. It is also to be noted that, as history transpired, the opposition were unsuccessful in their bid to include the phrase "beyond reasonable doubt" in cl 76 of the Trade Practices Bill and that, although s 76 as enacted did not state that either standard of proof was applicable, it was later held that it was the civil standard which applied[16].

23 Since 1974, the Commonwealth has enacted a considerable number of civil penalty provisions[17]. Some of those provisions are contained in legislation

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15 Australia, Senate, *Parliamentary Debates* (Hansard), 15 August 1974 at 984-985.

16 See *Trade Practices Commission v Nicholas Enterprises Pty Ltd* (1979) 26 ALR 609 at 642 per Fisher J.

17 See, eg, *Corporations Act* 2001 (Cth), Pt 9.4B; *Customs Act* 1901 (Cth), Pt XIII, Div 3; *Environment Protection and Biodiversity Conservation Act* 1999 (Cth), Pt 17, Div 15; *Space Activities Act* 1998 (Cth), Pt 6; *Spam Act* 2003 (Cth), Pt 4; *Superannuation Industry (Supervision) Act* 1993 (Cth), Pt 21, Div 2; *Sydney*

(Footnote continues on next page)

which provides for both civil penalties and criminal penalties, as in the *Conciliation and Arbitration Act* and the *Trade Practices Act* previously referred to, while, in other cases, of which the BCII Act was an instance, the legislation provides only for civil penalties[18]. In each case, however, the form of the civil penalty provisions is essentially similar.

24 In essence, civil penalty provisions are included as part of a statutory regime involving a specialist industry or activity regulator or a department or Minister of State of the Commonwealth ("the regulator") with the statutory function of securing compliance with provisions of the regime that have the statutory purpose of protecting or advancing particular aspects of the public interest. Typically, the legislation provides for a range of enforcement mechanisms, including injunctions, compensation orders, disqualification orders and civil penalties, with or, as in the BCII Act, without criminal offences. That necessitates the regulator choosing the enforcement mechanism or mechanisms which the regulator considers to be most conducive to securing compliance with the regulatory regime. In turn, that requires the regulator to balance the competing considerations of compensation, prevention and deterrence. And, finally, it requires the regulator, having made those choices, to pursue the chosen option or options as a civil litigant in civil proceedings.

Civil penalty procedure

25 Until the Full Court's decision in this matter, the practice followed in relation to civil penalty proceedings generally accorded with the decisions of the Full Court (Burchett, Carr and Kiefel JJ) in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission*[19] and the Full Court

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Airport Demand Management Act 1997 (Cth), Pt 3, Div 2; *Telecommunications Act* 1997 (Cth), Pt 31.

18 Except for s 52(6), which created an offence for a failure to respond to a notice from the Commissioner requiring a person to give information, produce a document, or answer questions before the Commissioner; and s 65(2), which prohibited certain officials from making a record of or disclosing protected information.

19 (1996) 71 FCR 285.

(Branson, Sackville and Gyles JJ) in *Minister for Industry, Tourism & Resources v Mobil Oil Australia Pty Ltd*[20] ("*Mobil Oil*").

26 *NW Frozen Foods* was concerned with a civil penalty proceeding brought by the Australian Competition and Consumer Commission ("the ACCC") under s 76 of the *Trade Practices Act*. As already noted, s 76 provided that, if the court were satisfied that a person had contravened or attempted to contravene a provision in Pt IV of the Act, the court could order the person to pay the Commonwealth a pecuniary penalty not exceeding a specified sum that the court determined to be appropriate having regard to all relevant matters. The provision thus placed responsibility on the shoulders of the court to determine the penalty, having regard to all relevant matters[21].

27 The Full Court observed that, because the effects of a contravention on the functioning of markets and other economic consequences were likely to be among the most significant relevant considerations in the determination of penalty, the court would be assisted by the views of the ACCC. Hence, as had earlier been accepted by Sheppard J in *Trade Practices Commission v Allied Mills Industries Pty Ltd (No 4)*[22] ("*Allied Mills*"), the Full Court held that it was not inappropriate for the parties to present the facts and analysis of market effects in the form of agreed statements and for the ACCC and the contravener to make joint submissions as to the appropriate level of penalty[23].

28 The Full Court further observed that, given the public interest in promoting the negotiated resolution of civil penalty proceedings, and that the fixing of the quantum of penalty is not an exact science, the task of a court in setting a pecuniary penalty was not necessarily to ask itself whether it would independently have come to the precise quantum proposed by the parties. Rather, the court should determine whether the parties' proposal could be

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20 (2004) ATPR ¶41-993.

21 *NW Frozen Foods* (1996) 71 FCR 285 at 290 per Burchett and Kiefel JJ, Carr J agreeing at 299.

22 (1981) 37 ALR 256.

23 *NW Frozen Foods* (1996) 71 FCR 285 at 290.

accepted as fixing an appropriate penalty[24]. Burchett and Kiefel JJ explained the reasons for that as follows[25]:

> "There is an important public policy involved. When corporations acknowledge contraventions, very lengthy and complex litigation is frequently avoided, freeing the courts to deal with other matters, and investigating officers of the Australian Competition and Consumer Commission to turn to other areas of the economy that await their attention. At the same time, a negotiated resolution in the instant case may be expected to include measures designed to promote, for the future, vigorous competition in the particular market concerned. These beneficial consequences would be jeopardised if corporations were to conclude that proper settlements were clouded by unpredictable risks. A proper figure is one within the permissible range in all the circumstances. The Court will not depart from an agreed figure merely because it might otherwise have been disposed to select some other figure, or except in a clear case."

29 Thereafter, the approach thus sanctioned in *NW Frozen Foods* was routinely followed until the matter was revisited by the Full Court in *Mobil Oil*.

30 As appears from the latter decision[26], the need for reconsideration of the issue arose from obiter reservations expressed by Finkelstein J and Weinberg J in decisions at first instance. In *Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd*[27] ("*ABB Transmission*"), Finkelstein J had observed that consent might be coerced and therefore that the absence of a trial might lead to injustice. He had also posited that, because most matters were resolved without a full hearing on the merits, it was becoming more difficult for a court to determine whether an agreed penalty was appropriate[28]. In *Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd*[29]

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24 *NW Frozen Foods* (1996) 71 FCR 285 at 290-291.

25 *NW Frozen Foods* (1996) 71 FCR 285 at 291.

26 *Mobil Oil* (2004) ATPR ¶41-993 at 48,628-48,630 [59]-[70].

27 (2001) ATPR ¶41-815 at 42,936 [5].

28 *ABB Transmission* (2001) ATPR ¶41-815 at 42,936 [6].

29 (2002) ATPR ¶41-880 at 45,064 [32]-[34].

("*Colgate*"), Weinberg J had stated that agreed submissions as to a specific penalty figure were, in his view, undesirable because he found it difficult to conceive of parties proposing a pecuniary penalty so much beyond the permissible range of penalties that a court would depart from the proposed penalty submission and, hence, that there was a danger of the court being seen to "rubber stamp" decisions taken by the body charged with investigating and prosecuting contraventions. Weinberg J had also suggested that it would be preferable for parties to submit a range of penalties instead of an agreed figure[30].

31 In *Mobil Oil*, the Full Court rejected those concerns as unfounded. Taking them in turn, their Honours observed that when and if a poorly resourced respondent were party to a joint penalty submission, the court should scrutinise the submission and supporting statement of facts with particular care to ensure, so far as possible, that the statement of facts was accurate and the contravener's will had not been overborne[31]. In reality, there was no particular shortage of reported cases in which the question of penalties had been fully agitated in a contested hearing. In any event, each case depended on its own merits and, as *NW Frozen Foods* demonstrated, if a judge considered that previous cases provided insufficient guidance for the case to be determined, he or she was free to act on that view[32]. Contrary to the supposed improbability of a judge departing from an agreed penalty submission, Wilcox J had only recently done just that in *Australian Competition and Consumer Commission v FFE Building Services Ltd*[33]: in effect rejecting an agreed penalty submission of $1.5 million and imposing in its place a penalty of more than twice that amount. Contrary, moreover, to the supposed danger of the court being perceived as a "rubber stamp" for agreed penalty submissions, *NW Frozen Foods* required the court always to form its own view about the appropriate range of penalties[34]. Finally, there would be little advantage in limiting parties to an agreed range as opposed to an agreed figure. A better way of reinforcing the court's responsibility to determine an appropriate penalty was for the court to scrutinise the material

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30 *Colgate* (2002) ATPR ¶41-880 at 45,064 [35].

31 *Mobil Oil* (2004) ATPR ¶41-993 at 48,628-48,629 [63].

32 *Mobil Oil* (2004) ATPR ¶41-993 at 48,629 [66].

33 (2003) ATPR ¶41-969.

34 *Mobil Oil* (2004) ATPR ¶41-993 at 48,630 [70].

presented to it carefully and satisfy itself that it was sufficient to determine whether the agreed penalty was appropriate[35].

32 By way of explication, the Full Court added five observations, in substance as follows[36]:

(1) As noted in *Allied Mills* and *NW Frozen Foods*, the rationale for giving weight to a joint submission on penalty rests on the saving in resources for the regulator and the court, the likelihood that a negotiated resolution will include measures designed to promote competition and the ability of the regulator to use the savings to increase the likelihood of other contraveners being detected and brought before the courts.

(2) *NW Frozen Foods* does not mean that a court must commence its reasoning with the penalty proposed by the parties and then limit itself to a consideration of whether the penalty proposed is within the range of permissible penalties. That is one option, but another is to begin with an independent assessment of the appropriate range of penalties and then compare it with the proposed penalty.

(3) The decision in *NW Frozen Foods* represented a correct application of the approach enunciated by Sheppard J in *Allied Mills*[37]. As Sheppard J stated, the court is not bound by the figure suggested by the parties. Rather, the court has to satisfy itself that the submitted penalty is appropriate while acknowledging that, uninformed by the agreed penalty submission, the court might have selected a slightly different figure[38]. That approach is correct in principle and it has been cited with approval by the High Court of New Zealand in *Commerce Commission v New Zealand Milk Corporation Ltd*[39].

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35 *Mobil Oil* (2004) ATPR ¶41-993 at 48,632 [78].

36 *Mobil Oil* (2004) ATPR ¶41-993 at 48,627-48,628 [52]-[58].

37 *Mobil Oil* (2004) ATPR ¶41-993 at 48,625 [43].

38 See *Mobil Oil* (2004) ATPR ¶41-993 at 48,624 [38] quoting *Allied Mills* (1981) 37 ALR 256 at 259.

39 [1994] 2 NZLR 730 at 733.

(4) The decision in *NW Frozen Foods* is consistent with the imperative recognised in *Australian Competition and Consumer Commission v Ithaca Ice Works Pty Ltd*[40] that the regulator should explain to the court the process of reasoning that justifies a discounted penalty.

(5) The decision in *NW Frozen Foods* allows for the following possibilities:

(a) if the court is not satisfied that the evidence or information offered in support of an agreed penalty submission is adequate, it may require the provision of additional evidence, information or verification and, if that is not forthcoming, may decline to accept the agreed penalty;

(b) if the absence of a contradictor inhibits the court in the performance of its task of imposing an appropriate penalty, the court may seek the assistance of an amicus curiae or an individual or body prepared to act as an intervener;

(c) if the court is not prepared to impose the penalty proposed by the parties, it may be appropriate to allow the parties to withdraw their consent and for the matter to proceed on a contested basis.

Subsequent criticism of *NW Frozen Foods* and *Mobil Oil*

33 In *Australian Securities and Investments Commission v Ingleby*[41] ("*Ingleby*"), the Court of Appeal of the Supreme Court of Victoria refused to follow *NW Frozen Foods* and *Mobil Oil*. Weinberg JA, who by that stage had resigned from the Federal Court and been appointed to the Victorian Court of Appeal, delivered the leading judgment. His Honour stated that he regarded *NW Frozen Foods* and *Mobil Oil* as "bad law" and "wrongly decided"[42], because[43]:

> "they treat the trial judge, who is to impose the pecuniary penalty, as though he or she is exercising an appellate role. Under the approach

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40 (2002) ATPR ¶41-851.

41 (2013) 39 VR 554.

42 (2013) 39 VR 554 at 563 [28]-[29].

43 (2013) 39 VR 554 at 563 [29] (footnote omitted).

> adopted in those cases, the judge is not independently arriving at the appropriate penalty, but rather asking an entirely different question – whether the agreed figure falls within the range of penalties reasonably available. That is, in substance, an appellate question, and not a first instance question. If the judge is unable to say that the agreed penalty is 'wholly outside' the range, he or she is bound to impose that penalty irrespective of whether it is considered appropriate. That is, in my view, a fundamental departure from the judicial function in relation to sentencing, and one that simply ought not to be countenanced."

As will be seen, the Full Court in this case considered that Weinberg JA thereby substantially anticipated the decision in *Barbaro*.

Barbaro v The Queen

34 In *Barbaro*[44], a plurality of this Court held that the Victorian and Queensland practice of criminal prosecutors nominating a quantified range of sentences that the Crown considered as open to be imposed in the circumstances of each case ("a *MacNeil-Brown*[45] range") was wrong in principle and should no longer be followed.

35 As appears from the reasons of the plurality in *Barbaro*, that holding was principally informed by three considerations. The first was that it is impossible to define the precise limits of the "available range" of terms of imprisonment that may be imposed on a criminal offender. As McHugh J had observed in *Everett v The Queen*[46], the available range is a question on which reasonable minds may differ and therefore it is only when a court of criminal appeal is convinced that a sentence is plainly outside the available range that it is justified in intervening on the ground of manifest excessiveness or manifest inadequacy. It follows that to attempt to predict the "available range" would be to attempt to predict appealable error by means of an impermissible numerical approach to sentencing[47].

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44 (2014) 253 CLR 58.

45 *R v MacNeil-Brown* (2008) 20 VR 677.

46 (1994) 181 CLR 295 at 306; [1994] HCA 49; see also *Wong v The Queen* (2001) 207 CLR 584 at 592 [9] per Gleeson CJ; [2001] HCA 64.

47 *Barbaro* (2014) 253 CLR 58 at 70-71 [24]-[28], 73-74 [38]-[39], 75 [43] per French CJ, Hayne, Kiefel and Bell JJ.

36 The second reason was that, because it is impossible to define the precise limits of the available range, the essentially negative proposition deriving from *House v The King*[48] – that a sentence is so far outside the range that it must be the result of a misapplication of principle – cannot safely be transformed into a positive statement of the upper and lower limits within which a sentence may properly be imposed[49]. Since reasonable minds may differ as to the available range – not least because reasonable minds may differ as to the relative weights to be attributed to applicable sentencing considerations – a statement as to the available range of sentences can never be more than an expression of opinion[50]; and, in a criminal proceeding, the Crown's opinion is irrelevant.

37 Thirdly, it was considered that to permit the Crown to state the bounds of the available range could lead to erroneous views about the importance of such a statement in the sentencing process, with consequent blurring of what should be, and be perceived to be, the sharp distinction between the role of the judge and the role of the prosecutor in the criminal trial process[51]. It was also noted that the supposed usefulness to a sentencing judge of a *MacNeil-Brown* submission wrongly assumed that the prosecution would act dispassionately in determining the available range[52].

Subsequent consideration of the application of *Barbaro*

38 Several judges at first instance have expressed diverse views as to whether *Barbaro* applies to civil proceedings. Up to the time of the decision of the Full Court in this case, however, there were only two cases in which judges of the Federal Court undertook a reasoned analysis of the issue. In *Australian Competition and Consumer Commission v Energy Australia Pty Ltd*[53] ("*Energy Australia*"), Middleton J held that *Barbaro* does not preclude agreed penalty

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48 (1936) 55 CLR 499; [1936] HCA 40; see also *Hili v The Queen* (2010) 242 CLR 520 at 544 [76] per Heydon J; [2010] HCA 45.

49 *Barbaro* (2014) 253 CLR 58 at 70 [27].

50 *Barbaro* (2014) 253 CLR 58 at 75 [42].

51 *Barbaro* (2014) 253 CLR 58 at 72 [33].

52 *Barbaro* (2014) 253 CLR 58 at 71 [29].

53 (2014) ATPR ¶42-469.

submissions in civil penalty proceedings. His Honour emphasised the utility and desirability of agreed penalty submissions as follows[54]:

> "The acceptance of agreed penalty amounts (providing always that the Court undertakes its duty to fix the appropriate penalty) increases the certainty of outcome for regulators and wrongdoers. This increases the predictability of outcomes for regulators and respondents and makes it more likely that proceedings will be resolved by agreement in an appropriate way and under the supervision of the Court. This in turn improves deterrence by encouraging the implementation of corrective measures and freeing up the resources of the regulator."

39 Similarly, in *Australian Competition and Consumer Commission v Mandurvit Pty Ltd*[55] ("*Mandurvit*"), McKerracher J concluded that, in the context of the plurality's reasoning as a whole, the holding in *Barbaro* that the prosecution in a criminal sentencing proceeding should not make a submission as to the bounds of the available range was not intended to apply to civil pecuniary penalty cases[56]. His Honour also endorsed Middleton J's observations as to the utility and propriety of a court receiving and, if appropriate, accepting agreed penalty submissions[57].

40 Apart from the Federal Court, the issue also received some reasoned attention in the Victorian Court of Appeal, in *Matthews v The Queen*[58], in which a majority concluded that the reasoning in *Barbaro* is concerned only with the role of the Crown in the sentencing process and therefore does not apply to civil proceedings. The reasoning in *Barbaro* was subsequently considered by this Court in *CMB v Attorney-General (NSW)*[59]. In that case, it was reaffirmed that in

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54 (2014) ATPR ¶42-469 at 44,192 [149].

55 (2014) ATPR ¶42-471.

56 (2014) ATPR ¶42-471 at 44,236 [48].

57 *Mandurvit* (2014) ATPR ¶42-471 at 44,241-44,242 [77]-[79]; see also at 44,238 [59] quoting *Australian Competition and Consumer Commission v AGL Sales Pty Ltd* (2013) ATPR ¶42-449 at 43,509 [42] per Middleton J.

58 [2014] VSCA 291 at [29] per Warren CJ, Nettle and Redlich JJA.

59 (2015) 89 ALJR 407 at 420-421 [63]-[64] per Kiefel, Bell and Keane JJ; 317 ALR 308 at 323-324; [2015] HCA 9.

criminal proceedings the determination of the appropriate sentence rests solely with the court, but that the prosecutor remains under a duty to assist the court to avoid appealable error where a sentencing judge indicates the form (as opposed to the duration) of a proposed sentencing order and the prosecutor considers it to be manifestly inadequate.

The decision below

41 In this matter, the Full Court began their consideration of the issue with what they conceived to be the ratio decidendi of *Barbaro*. Their Honours identified it correctly, albeit incompletely, as being that "the prosecution's opinion as to sentencing range is irrelevant to the sentencing process"[60]. Despite so recognising that *Barbaro* was confined to criminal proceedings, however, the Full Court also referred to Weinberg JA's criticisms in *Ingleby* of the approach taken to civil penalty proceedings in *NW Frozen Foods* and *Mobil Oil* as having "anticipated at least part of the reasoning of the High Court in *Barbaro*"[61].

42 The Full Court specifically rejected Middleton J's analysis in *Energy Australia* on the basis that the certainty of outcome for regulators and respondents to which Middleton J referred[62]:

> "could only be achieved if there were a very high level of expectation that the Court would adopt the agreed outcome. Such an expectation would belie the pious assertion, frequently made, that it is for the Court to make the final decision. It is not clear to us that it is possible to maintain the public perception that the Court imposes the penalty and, at the same time, lead the parties to believe that their agreement will probably be adopted.
>
> With all respect to Middleton J we conclude that his reasons do not offer a viable basis for limiting the applicability of the decision in *Barbaro* to criminal sentencing."

43 The Full Court rejected McKerracher J's reasoning in *Mandurvit* on the basis, they said, that they considered that "[his] Honour seems to have accepted

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60 *FWBII v CFMEU* (2015) 229 FCR 331 at 369 [106].

61 *FWBII v CFMEU* (2015) 229 FCR 331 at 371 [114].

62 *FWBII v CFMEU* (2015) 229 FCR 331 at 375 [133]-[134].

that he was effectively bound by the decision in *NW Frozen Foods*" and had agreed with the observations of Middleton J[63].

44 The Full Court acknowledged that there were "various differences" between the role of the prosecution in a criminal proceeding and the role of a regulator in civil penalty proceedings. But their Honours were of opinion that "none offered a principled basis for declining to apply the reasoning in *Barbaro* to proceedings for the imposition of a pecuniary penalty" and that, although *Barbaro* "arose in the context of a misguided assertion as to the prosecution's duty", the plurality's rejection of the proposition that the prosecution had a duty to offer a submission as to the available range "was based upon the view that it would, in any event, be inappropriate for the prosecution to do so"[64]. They added that the role of the regulator "would suggest that any view expressed by a regulator is also unlikely to be dispassionate, in the sense in which the High Court used that term", and that a regulator has "neither the history of independence nor detachment from the investigation which are generally characteristics of prosecuting authorities"[65].

45 The Full Court thus concluded that[66]:

> "the public interest in the imposition of pecuniary penalties ... leads to the conclusion that the fixing of the amount of such a penalty is a matter for the Court, and that the parties cannot, by agreement, bind it."

The application of *Barbaro*

46 The Full Court's reasoning in this matter should be rejected. Middleton J and McKerracher J were correct in their view that there is an important public policy involved in promoting predictability of outcome in civil penalty proceedings and that the practice of receiving and, if appropriate, accepting agreed penalty submissions increases the predictability of outcome for regulators and wrongdoers. As was recognised in *Allied Mills* and authoritatively determined in *NW Frozen Foods*, such predictability of outcome encourages

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63 *FWBII v CFMEU* (2015) 229 FCR 331 at 375 [137].

64 *FWBII v CFMEU* (2015) 229 FCR 331 at 376-377 [141].

65 *FWBII v CFMEU* (2015) 229 FCR 331 at 377 [141].

66 *FWBII v CFMEU* (2015) 229 FCR 331 at 378 [145].

corporations to acknowledge contraventions, which, in turn, assists in avoiding lengthy and complex litigation and thus tends to free the courts to deal with other matters and to free investigating officers to turn to other areas of investigation that await their attention.

47 Weinberg JA's criticisms in *Ingleby* of *NW Frozen Foods* and *Mobil Oil* did not anticipate the reasoning in *Barbaro*. As was earlier emphasised, *Barbaro* was concerned with submissions as to the available range of sentences in criminal proceedings, in the sense described in *Everett*. That range refers to the spread which notionally separates the indeterminate points beyond which a court of criminal appeal is persuaded that a sentence is so manifestly excessive or inadequate as to be affected by error of principle. In contrast, *NW Frozen Foods* and *Mobil Oil* were concerned with the very different conception applicable to civil penalty proceedings that, because fixing the quantum of a civil penalty is not an exact science, there is a permissible range in which "courts have acknowledged that a particular figure *cannot necessarily be said to be more appropriate than another*"[67]. It is only in that latter sense and only to that extent that the court will not depart from the submitted figure "merely because it might otherwise have been disposed to select some other figure"[68].

48 *NW Frozen Foods* and *Mobil Oil* do not suggest that the task of a judge faced with an agreed civil penalty submission is to determine whether the submitted penalty is "wholly outside" the "range of penalties reasonably available" or that the court is "bound to impose [an agreed] penalty irrespective of whether it is considered appropriate"[69]. To the contrary, as was emphasised in *Mobil Oil*, those cases make plain that the court is *not* bound by the figure suggested by the parties. The court asks "whether their proposal can be accepted as fixing an *appropriate* amount"[70] and for that purpose the court must satisfy itself that the submitted penalty is appropriate.

49 Nor is it "pious" to suppose that judges will do their duty, as they have sworn to do, and therefore reject any agreed penalty submission if not satisfied

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67 *Mobil Oil* (2004) ATPR ¶41-993 at 48,626 [51] (emphasis added). See also *NW Frozen Foods* (1996) 71 FCR 285 at 290-291.

68 *NW Frozen Foods* (1996) 71 FCR 285 at 291.

69 Cf *Ingleby* (2013) 39 VR 554 at 563 [29] per Weinberg JA.

70 *NW Frozen Foods* (1996) 71 FCR 285 at 291 (emphasis added).

that what is proposed is appropriate. It would be a travesty of justice if that were not the case. It may be presumed that a judge will do his or her duty according to the oath of office. The public may have confidence that it will be so.

50 Middleton J and McKerracher J were also correct in their view that what was said in *Barbaro* applies only to criminal proceedings and, consequently, that nothing said in *Barbaro* is antithetical to continuing the practice of agreed penalty submissions in civil penalty proceedings.

51 Contrary to the Full Court's reasoning, there are basic differences between a criminal prosecution and civil penalty proceedings and it is they that provide the "principled basis" for excluding the application of *Barbaro* from civil penalty proceedings.

52 A criminal prosecution is an accusatorial proceeding which is governed by the fundamental principle that the burden lies in all things upon the Crown to establish the guilt of the accused beyond reasonable doubt and by the companion rule that the accused cannot be required to assist in proof of the offence charged[71].

53 Civil penalty proceedings are civil proceedings and therefore an adversarial contest in which the issues and scope of possible relief are largely framed and limited as the parties may choose, the standard of proof is upon the balance of probabilities and the respondent is denied most of the procedural protections of an accused in criminal proceedings[72].

54 Granted, both kinds of proceeding are or may be instituted by an agent of the state in order to establish a contravention of the general law and in order to obtain the imposition of an appropriate penalty. But a criminal prosecution is

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71 *RPS v The Queen* (2000) 199 CLR 620 at 630 [22] per Gaudron ACJ, Gummow, Kirby and Hayne JJ; [2000] HCA 3; *Azzopardi v The Queen* (2001) 205 CLR 50 at 64-65 [34] per Gaudron, Gummow, Kirby and Hayne JJ; [2001] HCA 25; *Dyers v The Queen* (2002) 210 CLR 285 at 292 [9] per Gaudron and Hayne JJ; [2002] HCA 45; *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 134-135 [97]-[100] per Hayne and Bell JJ; [2013] HCA 29; *Lee v The Queen* (2014) 253 CLR 455 at 466-467 [32]-[33]; [2014] HCA 20.

72 See *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345 at 407-409 [153]-[155] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ, 436-437 [243] per Heydon J; [2012] HCA 17 ("*Hellicar*").

aimed at securing, and may result in, a criminal conviction. By contrast, a civil penalty proceeding is precisely calculated to avoid the notion of criminality as such[73].

55 No less importantly, whereas criminal penalties import notions of retribution[74] and rehabilitation, the purpose of a civil penalty, as French J explained in *Trade Practices Commission v CSR Ltd*, is primarily if not wholly protective in promoting the public interest in compliance[75]:

> "Punishment for breaches of the criminal law traditionally involves three elements: deterrence, both general and individual, retribution and rehabilitation. Neither retribution nor rehabilitation, within the sense of the Old and New Testament moralities that imbue much of our criminal law, have any part to play in economic regulation of the kind contemplated by Pt IV [of the *Trade Practices Act*]. ... The principal, and I think probably the only, object of the penalties imposed by s 76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act."

56 Moreover, in criminal proceedings the imposition of punishment is a uniquely judicial exercise of intuitive or instinctive synthesis of the sentencing facts as found by the sentencing judge (consistently with the jury's verdict) and the judge's relative weighting and application of relevant sentencing considerations in accordance with established sentencing principle[76]. There is no

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73 *Gapes* (1979) 27 ALR 87 at 111 per Sweeney J; *Hellicar* (2012) 247 CLR 345 at 436-437 [243] per Heydon J; cf *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 at 205-206 [133]-[136] per Hayne J, Gleeson CJ and McHugh J agreeing at 166 [1], [3]; [2003] HCA 49 ("*Labrador Liquor*").

74 *Gapes* (1979) 27 ALR 87 at 90 per Smithers J; cf *Ingleby* (2013) 39 VR 554 at 565 [44] per Weinberg JA.

75 (1991) ATPR ¶41-076 at 52,152; cf *FWBII v CFMEU* (2015) 229 FCR 331 at 357-358 [65]-[67].

76 *Wong v The Queen* (2001) 207 CLR 584 at 611 [75] per Gaudron, Gummow and Hayne JJ; *Markarian v The Queen* (2005) 228 CLR 357 at 373-375 [35]-[39] per Gleeson CJ, Gummow, Hayne and Callinan JJ; [2005] HCA 25; *Hili v The Queen*

(Footnote continues on next page)

room in an exercise of that nature for the judge to take account of the Crown's opinion as to an appropriate length of sentence. For the purposes of imposing a criminal sentence, the question is what the judge considers to be the appropriate sentence. Nor can there be any question of a sentencing judge being persuaded by the Crown's opinion as to the range of sentences open to be imposed. As was observed in *Barbaro*[77], apart from the conceptually indeterminate boundaries of the available range of sentences and systemic problems which would likely result from a criminal sentencing judge being seen to be influenced by the Crown's opinion as to the available range of sentences, the Crown's opinion would in all probability be informed by an assessment of the facts and relative weighting of pertinent sentencing considerations different from the judge's assessment. That is why it was held in *Barbaro* that it is inconsistent with the nature of criminal sentencing proceedings for a sentencing judge to receive a submission from the Crown as to the appropriate sentence or even as to the available range of sentences.

57 In contrast, in civil proceedings there is generally very considerable scope for the parties to agree on the facts and upon consequences. There is also very considerable scope for them to agree upon the appropriate remedy and for the court to be persuaded that it is *an* appropriate remedy. Accordingly, settlements of civil proceedings are commonplace and orders by consent for the payment of damages and other relief are unremarkable. So are court-approved compromises of proceedings on behalf of infants and persons otherwise lacking capacity, court-approved custody and property settlements, court-approved compromises in group proceedings and court-approved schemes of arrangement. More generally, it is entirely consistent with the nature of civil proceedings for a court to make orders by consent and to approve a compromise of proceedings on terms proposed by the parties, provided the court is persuaded that what is proposed is appropriate.

58 Possibly, there are exceptions to the general rule. There is, however, no reason in principle or practice why civil penalty proceedings should be treated as an exception. Subject to the court being sufficiently persuaded of the accuracy of the parties' agreement as to facts and consequences, and that the penalty which the parties propose is *an* appropriate remedy in the circumstances thus revealed,

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(2010) 242 CLR 520 at 538-540 [58]-[62] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

77 (2014) 253 CLR 58 at 72-73 [35]-[37].

it is consistent with principle and, for the reasons identified in *Allied Mills*[78], highly desirable in practice for the court to accept the parties' proposal and therefore impose the proposed penalty. To do so is no different in principle or practice from approving an infant's compromise, a custody or property compromise, a group proceeding settlement or a scheme of arrangement.

59 It is true that there is a public interest in the imposition of civil penalties as opposed to the purely private interests which are in issue in many civil proceedings. But civil penalty proceedings are by no means the only civil proceedings in which the public interest is involved. Custody disputes involve the public interest. So do group proceedings and schemes of arrangement. So also do taxation, customs and social security appeals, and detention orders; and examples can be multiplied. Yet in each of those cases, it is wholly unexceptionable for a court to accept an agreed submission as to the nature and quantum of relief, provided the court is persuaded that it is an appropriate remedy. Once it is understood that civil penalties are not retributive, but like most other civil remedies essentially deterrent or compensatory and therefore protective, there is nothing odd or exceptionable about a court approving an agreed settlement of a civil proceeding which involves the public interest; provided of course that the court is persuaded that the settlement is appropriate.

60 It is also true, as the Full Court observed, that the regulator in a civil penalty proceeding is not disinterested[79]. As has been seen, under the BCII Act, the Director's statutory functions include monitoring and promoting appropriate standards of conduct by building industry participants generally. It is, therefore, naturally to be assumed that the Director will fashion penalty submissions with an overall view to achieving that objective and thus perhaps, if not probably, with one eye to considerations beyond the case in hand. That consideration, however, supports, rather than detracts from, the propriety of a court receiving joint (or separate) submissions as to facts and penalty and imposing the proposed penalty if persuaded that it is appropriate. As was emphasised in *NW Frozen Foods*[80], it is the function of the relevant regulator to regulate the industry in order to achieve compliance and, accordingly, it is to be expected that the regulator will

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78 (1981) 37 ALR 256 at 259 per Sheppard J. See also *NW Frozen Foods* (1996) 71 FCR 285 at 291; *Mobil Oil* (2004) ATPR ¶41-993 at 48,627 [53].

79 *FWBII v CFMEU* (2015) 229 FCR 331 at 376 [139]; cf *Barbaro* (2014) 253 CLR 58 at 71 [29].

80 (1996) 71 FCR 285 at 290-295.

be in a position to offer informed submissions as to the effects of contravention on the industry and the level of penalty necessary to achieve compliance.

61 That being said, the submissions of a regulator will be considered on their merits in the same way as the submissions of a respondent and subject to being supported by findings of fact based upon evidence, agreement or concession. As was also said in *NW Frozen Foods*[81]:

> "Courts have learned to be suspicious of claims of secret knowledge; and justice should be done in the light, with the relevant facts exposed to view. It is the Court which bears the responsibility."

But, subject to that imperative, there is no indication in the purpose or text of the BCII Act that the court should be less willing to receive a submission as to the terms and quantum of penalty in a civil penalty proceeding than to receive a submission as to the terms and quantum of relief put up for approval by the court in any other kind of civil proceeding.

62 The BCII Act expressly provides that the Director's functions include intervening in proceedings and making submissions in accordance with the Act[82] and it does not impose any express limitation or restriction on the evidence, materials or submissions which may be received from the Director. By providing for civil penalty proceedings, it implicitly assumes the application of the general practice and procedure regarding civil proceedings and eschews the application of criminal practice and procedure[83].

63 That impression is fortified by the provision made in s 49 of the BCII Act for civil penalty proceedings to be instituted by a range of eligible persons[84], including persons who are affected by a putative contravention, and for a range of remedies, including an order requiring the defendant to pay a specified amount by way of compensation for damage suffered by another person as a result of the contravention. There can be no question that a person affected by a

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81 (1996) 71 FCR 285 at 298.

82 BCII Act, ss 10(c), 71.

83 See *Hellicar* (2012) 247 CLR 345 at 436-437 [243] per Heydon J; cf *Labrador Liquor* (2003) 216 CLR 161 at 205-206 [135]-[138].

84 BCII Act, s 49(6).

contravention who brought a civil penalty proceeding under s 49 would be entitled to make submissions to the court as to the terms and quantum of the relief sought, just as there can be no question that the respondent to such a proceeding would be entitled to make submissions as to the terms and quantum of any relief to be granted. And the legislation draws no distinction between the procedure applicable to such a proceeding and the procedure which is to apply to a proceeding instituted by the Director. Rather, by conditioning the court's power to make a civil penalty order on application by an eligible person in a civil proceeding, s 49 appears to contemplate that whoever be the eligible person will identify the relief which is sought, not only in the initiating process but also in final address.

64 The Full Court considered it to be significant that the BCII Act did not expressly provide for the Director to make submissions as to penalty[85]. But the absence of any express provision of that kind is unremarkable. It is to be presumed that Parliament intended that the civil penalty provisions of the BCII Act would be applied in accordance with the long-established "general system of law"[86]. There is nothing in the BCII Act which necessarily implies the exclusion of the prima facie entitlement of the Director as a party to a civil penalty proceeding to make submissions as to the form and quantum of the relief which is sought[87] and, contrary to the Full Court's reasoning[88], the phenomenon of a regulator making submissions as to the terms and quantum of a civil penalty does not lead to and is not likely to lead to erroneous views about the importance of the regulator's opinion in the setting of appropriate penalties. In contradistinction to the role of the Crown in criminal proceedings[89], it is consistent with the purposes of civil penalty regimes of which Pt 1 of Ch 7 of the BCII Act is typical, and therefore with the public interest, that the regulator take

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85 *FWBII v CFMEU* (2015) 229 FCR 331 at 388 [179], 391 [190], 401 [226].

86 *Potter v Minahan* (1908) 7 CLR 277 at 304 per O'Connor J; [1908] HCA 63; cf *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625 at 635-636; [1990] HCA 28.

87 Cf *Coco v The Queen* (1994) 179 CLR 427 at 437 per Mason CJ, Brennan, Gaudron and McHugh JJ; [1994] HCA 15.

88 *FWBII v CFMEU* (2015) 229 FCR 331 at 385 [171], 403 [234], 404 [239].

89 See *R v Lucas* [1973] VR 693 at 705; *Subramaniam v The Queen* (2004) 79 ALJR 116 at 127-128 [54]; 211 ALR 1 at 16; [2004] HCA 51; *R v Livermore* (2006) 67 NSWLR 659 at 669 [47]-[48].

an active role in attempting to achieve the penalty which the regulator considers to be appropriate and thus that the regulator's submissions as to the terms and quantum of a civil penalty be treated as a relevant consideration.

The Unions' further submissions

65 The Unions pressed two submissions which went beyond the Commonwealth's submissions. First, it was submitted that, in the absence of an amendment to the regulator's initiating process, a court which rejects an agreed penalty nonetheless may not impose a penalty greater than that sought in the initiating process. Given that these appeals are from a decision of the Full Court adjourning the penalty proceedings and that no penalty orders have in fact been made, that issue is not within the scope of the matter and is therefore inappropriate to decide. It is sufficient to record that, as was said in *Mobil Oil*[90], if a court is disposed not to impose the agreed penalty, it may be appropriate to give the parties an opportunity to withdraw their consent or otherwise be heard.

66 Secondly, it was submitted that the agreed penalty orders sought in the Full Court should be granted by this Court. That submission must be rejected. As the Director points out, the task of determining an appropriate civil penalty is usually performed by a single judge at first instance. That task has not yet been performed in this proceeding and should not be performed for the first time by this Court on appeal.

Conclusion and orders

67 For these reasons, the appeals should be allowed. The order of the Full Court adjourning the further hearing of the matter should be set aside and the matter should be remitted to the Federal Court for determination according to law.

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90 (2004) ATPR ¶41-993 at 46,628 [58].

68 GAGELER J. The joint reasons for judgment conclude that the reasoning of the plurality in *Barbaro v The Queen*[91] has no application to a civil penalty proceeding and that the principles applicable to agreed penalty submissions in a civil penalty proceeding remain those articulated in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission*[92] and *Minister for Industry, Tourism & Resources v Mobil Oil Australia Pty Ltd*[93]. I agree with that conclusion and join in the proposed orders.

69 The argument in the appeals involved no challenge to the reasoning of the plurality in *Barbaro*. The only issue agitated was whether what was there said in the context of a criminal proceeding was transferable to the context of a civil penalty proceeding.

70 At the forefront of the argument of the amici curiae, who appeared in support of the judgment under appeal, was the submission that the reasoning of the plurality in *Barbaro* is transferable to the context of a civil penalty proceeding because it rests on a proposition which applies as much to a civil proceeding as to a criminal proceeding. They submitted that it was essential to the reasoning of the plurality[94] that the notion of an "available range" is wrong in principle because it introduces, into the making of a discretionary judgment, considerations relevant only to review of a discretionary judgment in an appeal governed by the principles in *House v The King*[95].

71 Underlying the reasoning of the plurality in *Barbaro*, according to the amici curiae, is therefore the same proposition as that which underlay the reasoning of Weinberg JA in *Australian Securities and Investments Commission v Ingleby*[96] when he said:

> "*NW Frozen Foods* and *Mobil Oil* were ... wrongly decided because they treat the trial judge, who is to impose the pecuniary penalty, as though he or she is exercising an appellate role. Under the approach adopted in those cases, the judge is not independently arriving at the appropriate penalty, but rather asking an entirely different question –

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91 (2014) 253 CLR 58; [2014] HCA 2.

92 (1996) 71 FCR 285.

93 (2004) ATPR ¶41-993.

94 (2014) 253 CLR 58 at 70-71 [24]-[28], 73 [36]-[38], 75 [42]-[43].

95 (1936) 55 CLR 499 at 505; [1936] HCA 40.

96 (2013) 39 VR 554 at 563.

> whether the agreed figure falls within the range of penalties reasonably available. That is, in substance, an appellate question, and not a first instance question."

72 Expressed by reference to the language of the statutory provision relevant to the present appeals and the statutory provision relevant to the decision in *Barbaro*, the substance of the proposition which the amici curiae argued is to be drawn from the reasoning of the plurality in *Barbaro* is that the notion of an available range can no more inform the making of a discretionary judgment as to the civil penalty that a court "considers appropriate" within the meaning of s 49(1) of the *Building and Construction Industry Improvement Act* 2005 (Cth) than it can inform the making of a discretionary judgment as to the sentence "that is of a severity appropriate in all the circumstances of the offence" within the meaning of s 16A(1) of the *Crimes Act* 1914 (Cth). In either case, the court is distracted from its statutory function of exercising its own judgment, arrived at through a process of synthesising potentially competing considerations to produce a single result.

73 Were such a proposition to be drawn from the reasoning of the plurality, I would consider it erroneous for the reasons I have already given in *Barbaro*[97]. I do not repeat them.

74 On reflection, I do not think that such a proposition is to be drawn from the reasoning of the plurality. The proposition would apply to prevent a sentencing court receiving any submission as to the appropriate numerical range of sentence from either party to a criminal proceeding. There are statements of the plurality which could be interpreted as going that far. Nevertheless, as the Victorian Court of Appeal noted in *Matthews v The Queen*[98], the holding is best understood as directed only to what could be said to the sentencing court by the prosecution.

75 It follows that what was said by the plurality in *Barbaro* as to the notion of an available range cannot be read as expressing an independent basis for the holding in that case. The basis for the holding is rather to be found in what was said about the respective roles of the judge and of the prosecution in the overall context of rejecting the holding in *R v MacNeil-Brown*[99] that "the making of submissions on sentencing range is an aspect of the duty of the prosecutor to assist the court".

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97 (2014) 253 CLR 58 at 78-80 [59]-[61].

98 [2014] VSCA 291 at [22]-[25].

99 (2008) 20 VR 677 at 678 [2].

76 The view of the prosecution, the plurality said in *Barbaro*, cannot be "dispassionate"[100], and "[t]he statement by the prosecution of the bounds of an available range of sentences may lead to erroneous views about its importance in the process of sentencing with consequential blurring of what should be a sharp distinction between the role of the judge and the role of the prosecution in that process"[101]. The holding was expressed in terms that "[i]t is neither the role nor the duty of the prosecution to proffer some statement of the specific result which counsel then appearing for the prosecution ... considers should be reached or a statement of the bounds within which that result should fall"[102].

77 The reasoning of the plurality in *Barbaro* is therefore best understood as having gone no further than to recognise a qualification to the common law duty of a prosecutor to assist a criminal court to avoid appealable error, founded on a consideration of legal policy. The qualification is that the prosecutor cannot state that a custodial sentence of a specified numerical length or of a length within a particular numerical range is appropriate. The policy reason is that for the prosecutor to speak of numbers would give rise to what was assessed to be an unacceptable risk of breaking down the sharp distinction which must exist within the criminal justice system between the roles of the prosecution and the court in exercising the coercive power of the state in the punishment of criminal guilt.

78 So understood, *Barbaro* has nothing to say about the conduct of any party to a civil penalty proceeding. Assuming without deciding, as in *Australian Securities and Investments Commission v Hellicar*[103], that a regulator bringing civil penalty proceedings is "subject to some form of duty ... that can be described as a duty to conduct litigation fairly", the position of the regulator cannot be equated with the position of a prosecutor. The regulator is not bound by the nature of the proceeding to be dispassionate in the relevant sense. Subject to its statutory charter, the regulator is permitted to advocate for a litigious outcome which the regulator considers to be in the public interest.

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100 (2014) 253 CLR 58 at 72 [32].

101 (2014) 253 CLR 58 at 72 [33].

102 (2014) 253 CLR 58 at 74 [39].

103 (2012) 247 CLR 345 at 407 [152]; [2012] HCA 17.

79 KEANE J. I agree that these appeals should be allowed for the reasons given by French CJ, Kiefel, Bell, Nettle and Gordon JJ. I seek only to make some additional observations upon the nature of proceedings for the recovery of a civil penalty under s 49 of the BCII Act and the reasons why this Court's decision in *Barbaro v The Queen*[104] does not affect the conduct of such proceedings.

80 The Full Court held that this Court's conclusion in *Barbaro* that the "prosecution's opinion as to sentencing range is irrelevant to the sentencing process"[105] is not appurtenant solely to criminal proceedings, but extends to proceedings for the recovery of a civil penalty under the BCII Act. The Full Court held that submissions as to penalty in such proceedings are an impermissible attempt to "supplement the evidence by opinions ... [notwithstanding that] the judge can only act upon the law and the evidence."[106]

81 The Full Court proceeded on the footing that there is no relevant distinction between proceedings for the recovery of a civil penalty for the contravention of a civil penalty provision and proceedings for the imposition of criminal punishment[107]. In doing so, the Full Court erred in failing to give effect to the BCII Act.

The BCII Act

82 The objects of the BCII Act are set out in s 3:

> "(1) The main object of this Act is to provide an improved workplace relations framework for building work to ensure that building work is carried out fairly, efficiently and productively for the benefit of all building industry participants and for the benefit of the Australian economy as a whole.
>
> (2) This Act aims to achieve its main object by the following means:
>
> …
>
> (b) promoting respect for the rule of law;
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> …

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104 (2014) 253 CLR 58; [2014] HCA 2.

105 *FWBII v CFMEU* (2015) 229 FCR 331 at 369 [106].

106 *FWBII v CFMEU* (2015) 229 FCR 331 at 388 [180].

107 *FWBII v CFMEU* (2015) 229 FCR 331 at 357 [64]-[66].

(d) ensuring that building industry participants are accountable for their unlawful conduct;

(e) providing effective means for investigation and enforcement of relevant laws;

…

(h) providing assistance and advice to building industry participants in connection with their rights and obligations under relevant industrial laws."

83 In pursuit of these objects, the Commissioner was established, one of the Commissioner's functions being the pursuit of proceedings for the recovery of civil penalties for contraventions of the BCII Act[108]. In this regard, s 49 provides relevantly:

"(1) An appropriate court, on application by an eligible person, may make one or more of the following orders in relation to a person (the ***defendant***) who has contravened a civil penalty provision:

(a) an order imposing a pecuniary penalty on the defendant;

(b) an order requiring the defendant to pay a specified amount to another person as compensation for damage suffered by the other person as a result of the contravention;

(c) any other order that the court considers appropriate.

(2) The maximum pecuniary penalty is:

(a) for a Grade A civil penalty provision – 1,000 penalty units if the defendant is a body corporate and otherwise 200 penalty units; and

(b) for a Grade B civil penalty provision – 100 penalty units if the defendant is a body corporate and otherwise 20 penalty units.

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108 Pursuant to s 2.3(3)(a) of the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Regulation 2012 (Cth), the Director of the Fair Work Building Industry Inspectorate under the *Fair Work (Building Industry) Act* 2012 (Cth) is taken to be the Commissioner under the BCII Act and is entitled to bring proceedings under the BCII Act.

(3) The orders that may be made under paragraph (1)(c) include:

(a) injunctions (including interim injunctions); and

(b) any other orders that the court considers necessary to stop the conduct or remedy its effects, including orders for the sequestration of assets.

...

(5) A pecuniary penalty is payable to the Commonwealth, or to some other person if the court so directs. It may be recovered as a debt."

84 An "eligible person" for the purposes of s 49(1) is defined by s 49(6) to include the Commissioner and "a person affected by the contravention".

85 It is important for present purposes to note that, under s 49(1), the jurisdiction of an "appropriate court" arises "in relation to a person (the ***defendant***) who has contravened a civil penalty provision". The BCII Act contains provisions each of which specifically notes that it is a "civil penalty provision"[109]. In contrast, other provisions impose criminal liability which attracts penalties that include imprisonment[110].

86 An application under s 49(1) may be initiated under r 8.01 of the Federal Court Rules 2011 (Cth). The Rules require that the application state the relief claimed and the statutory provision under which it is claimed[111].

Criminal proceedings and civil penalties

87 In *Barbaro*[112], French CJ, Hayne, Kiefel and Bell JJ held that where a court is called upon to pass sentence on an offender in criminal proceedings, "[t]he prosecution's statement of what are the bounds of the available range of sentences is a statement of opinion" which a sentencing judge may not take into account "in finding the relevant facts, deciding the applicable principles of law or applying those principles to the facts to yield the sentence to be imposed." Their Honours concluded that "the prosecution is not required, and should not be permitted, to make such a statement of bounds to a sentencing judge."

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109 See ss 28(3), 38, 43(1), 44(1), 44(3), 44(4), 45(1), 46(1), 59(14), 62(14), 63(14).

110 See ss 52(6), 65(2).

111 Rule 8.03(1) of the Federal Court Rules 2011 (Cth).

112 (2014) 253 CLR 58 at 66 [7].

88 The decision in *Barbaro* concerned convicted offenders being sentenced to terms of imprisonment by way of punishment for the crime of which they had been convicted after a criminal trial. The proceeding of present concern is for the recovery of what is designated by the BCII Act to be a penalty recoverable for a contravention of a "civil penalty" provision.

89 It must be acknowledged immediately that the distinction between criminal and civil cases does not hold for all purposes[113]. As Hayne J, with whom Gleeson CJ and McHugh J agreed, said in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd*[114], the classification of proceedings as "civil" or "criminal" is:

> "at best, unstable. It seeks to divide the litigious world into only two parts when, in truth, that world is more complex and varied than such a classification acknowledges. There are proceedings with both civil and criminal characteristics: for example, proceedings for a civil penalty under companies[115] and trade practices[116] legislation. The purposes of those proceedings include purposes of deterrence, and the consequences can be large and punishing."

90 But distinctions are regularly drawn for particular purposes between criminal proceedings and civil proceedings[117]; and these distinctions have proved to be sufficiently stable to serve the purposes for which they have been drawn. For example, it is now well understood that the various procedural protections of the position of an accused, developed as aspects of "the accusatorial nature of a criminal trial in our system of criminal justice"[118], are not equally applicable in

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113 *Witham v Holloway* (1995) 183 CLR 525 at 534, 549; [1995] HCA 3; *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 at 172-173 [29]-[30], 180-181 [62]-[63], 195 [107], 198-199 [114], 200 [119]-[121]; [2003] HCA 49; *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at 141 [22], 144-146 [30]-[35]; [2004] HCA 42.

114 (2003) 216 CLR 161 at 198-199 [114].

115 *Corporations Act* 2001 (Cth), Pt 9.4B (ss 1317DA-1317S).

116 *Trade Practices Act* 1974 (Cth), s 77.

117 *Hinch v Attorney-General (Vict)* (1987) 164 CLR 15 at 88-89; [1987] HCA 56; *Witham v Holloway* (1995) 183 CLR 525 at 534, 549; *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2015) 89 ALJR 622 at 630-631 [40]-[47]; 320 ALR 448 at 456-457; [2015] HCA 21.

118 *Lee v The Queen* (2014) 253 CLR 455 at 467 [32]; [2014] HCA 20. See also *Mallan v Lee* (1949) 80 CLR 198 at 217-218; [1949] HCA 48; *Sorby v The*

(Footnote continues on next page)

civil proceedings[119]. Further, it is not suggested that either the availability or the exercise of the power to award exemplary damages in proceedings for tort for the purpose of punishing the tortfeasor rather than compensating the victim[120] alters the civil character of the proceedings. And, more importantly, for a court to ignore the legislature's designation of statutory proscriptions as civil penalty provisions on the basis of the court's view that it is a misleading label is distinctly inconsistent with the deference due by the judicial branch of government to the legislative branch under constitutional arrangements whereby the respective powers of those branches are separated[121].

91 Changes in criminal practice and procedure that took place in the common law from the end of the 17th century to the end of the 19th century culminated in the recognition of the special accusatory character of the criminal trial as part of the adversarial system. Rules for the protection of the accused, such as, for example, the requirement that the prosecution prove its case without any assistance from the accused, emerged in the course of the historical evolution towards the recognition of the criminal trial as an essentially accusatory proceeding within the adversarial system[122].

92 It is not necessary here to elaborate the detail of these developments[123]; it is sufficient to note that they reflected the concern of the judiciary that an individual accused of a crime, with life and liberty at stake, could not match the power of the agents of the State responsible for the prosecution. In such cases, the response of the judiciary was that the protection of the individual accused against any possibility of oppressive conduct by those agents required a special

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Commonwealth (1983) 152 CLR 281 at 294; [1983] HCA 10; *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 at 166 [2]; *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 118 [42], 136 [101]-[102], 153 [159]; [2013] HCA 29.

119 *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2015) 89 ALJR 622 at 629-630 [36]-[37]; 320 ALR 448 at 455.

120 *Lamb v Cotogno* (1987) 164 CLR 1; [1987] HCA 47.

121 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; [1956] HCA 10.

122 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 497-498; [1993] HCA 74.

123 See Langbein, "The Historical Origins of the Privilege Against Self-Incrimination at Common Law", (1994) 92 *Michigan Law Review* 1047 at 1083.

approach to the administration of criminal justice within the adversarial system. In *Lee v The Queen*[124], this Court said:

> "Our system of criminal justice reflects a balance struck between the power of the State to prosecute and the position of an individual who stands accused. The principle of the common law[125] is that the prosecution is to prove the guilt of an accused person. This was accepted as fundamental in *X7*[126]. … The principle is an aspect of the accusatorial nature of a criminal trial in our system of criminal justice[127]."

93 Judicial insistence upon the accusatorial nature of a criminal trial was accompanied by an insistence that the "adjudgment and punishment of criminal guilt" has "become established as essentially and exclusively judicial in character."[128] But the historical concern to control the coercive power of the State exercised in criminal jurisdiction in relation to life and liberty did not extend to that aspect of the power of the State deployed in civil proceedings to vindicate the pecuniary interests of a plaintiff who has invoked that jurisdiction. The initiation and pursuit of criminal proceedings is the exclusive function of the executive government of the State, whereas, for civil proceedings, that is not so. And where, in civil proceedings, the plaintiff does happen to be an agent of the State, that circumstance does not alter the essential nature of the proceedings. In particular, it does not engage the concerns which led, as a matter of history, to the recognition of the special character of criminal proceedings within the adversarial system and the exclusivity of the role of the judiciary in fixing a just punishment for a criminal offence.

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124 (2014) 253 CLR 455 at 466-467 [32].

125 *Woolmington v Director of Public Prosecutions* [1935] AC 462; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

126 (2013) 248 CLR 92 at 119-120 [46], 135-136 [100]-[102], 153 [159]; see also *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 266 [176], 313 [318]; [2013] HCA 39.

127 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 119-120 [46], 136 [101]-[102], 142-143 [124], 153 [159]-[160]; *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 261 [159].

128 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27; [1992] HCA 64.

94 The Full Court was persuaded to apply the approach taken in *Barbaro* to the present case by reason of[129]:

> "the similarity between the 'instinctive synthesis' necessarily involved in both the sentencing task and the task [of fixing pecuniary penalties], the fact that each process involves invocation of the coercive power of the State, the associated public interest and public perceptions as to the judicial process."

95 It should be understood, however, that these considerations informed the decision in *Barbaro* in the light of the development of criminal practice and procedure, and as appurtenances of the exercise of criminal jurisdiction.

96 In *Barbaro*, the plurality made the point that an opinion proffered by the prosecutor, an officer of the executive government, as to the proper sentence, is an unwarranted intrusion upon the performance of an exclusively judicial task[130]. Their Honours said[131]:

> "It is neither the role nor the duty of the prosecution to proffer some statement of the specific result which counsel then appearing for the prosecution … considers should be reached or a statement of the bounds within which that result should fall."

97 Their Honours also said of the assumption that the prosecution's proffering of a statement of the bounds of the available range of sentences will assist a sentencing judge to come to a just sentence[132]:

> "That assumption depends upon the prosecution determining the supposed range dispassionately. It depends upon the prosecution acting not only fairly (as it must) but in the role which Buchanan JA rightly described [in *R v MacNeil-Brown*][133] as that of 'a surrogate judge'. That is not the role of the prosecution."

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129 *FWBII v CFMEU* (2015) 229 FCR 331 at 335 [3].

130 (2014) 253 CLR 58 at 70-71 [25]-[28], 72-74 [34]-[41].

131 (2014) 253 CLR 58 at 74 [39].

132 (2014) 253 CLR 58 at 71 [29].

133 (2008) 20 VR 677 at 710 [128].

98 The plurality emphasised the importance of the strict separation of the functions of the executive and judicial organs of government in relation to the integrity of the sentencing process because[134]:

> "[T]he prosecution forms a view which (properly) reflects the interests that the prosecution is bound to advance. But that view is not, and cannot be, dispassionate."

99 Their Honours explained that the associated public interest in, and public perceptions of, the integrity of the judicial process in criminal proceedings were directly connected with the exercise of criminal jurisdiction. Their Honours said[135]:

> "The statement by the prosecution of the bounds of an available range of sentences may lead to erroneous views about its importance in the process of sentencing with consequential blurring of what should be a sharp distinction between the role of the judge and the role of the prosecution in that process. If a judge sentences within the range which has been suggested by the prosecution, the statement of that range may well be seen as suggesting that the sentencing judge has been swayed by the prosecution's view of what punishment should be imposed. By contrast, if the sentencing judge fixes a sentence outside the suggested range, appeal against sentence seems well-nigh inevitable."

100 In this case, no party sought to challenge *Barbaro*, or to suggest that it took an unduly strict view of the special nature of criminal proceedings within the adversarial system. The point to be made here is that the view taken in *Barbaro* is grounded in the special nature of criminal proceedings as they have developed historically. In contrast, as a matter of legal history, the concept of a "penalty" has long been recognised as describing a sanction for a wrong done to the public interest that was neither entirely criminal nor entirely civil. As Professor Kenneth Mann has noted[136], Blackstone "discussed penalty cases in his volume on private wrongs"[137].

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134 (2014) 253 CLR 58 at 72 [32].

135 (2014) 253 CLR 58 at 72 [33].

136 Mann, "Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law", (1992) 101 *The Yale Law Journal* 1795 at 1820-1821.

137 Blackstone, *Commentaries on the Laws of England*, (1768), bk 3 at 2.

101 In this case the Full Court observed[138] that, in *Naismith v McGovern*[139], the High Court had said of a proceeding for the recovery of penalties for offences relating to the provision of an income tax return: "The most that can be said is that the proceedings being for the recovery of penalties are of a penal nature." But more *can* be said of the nature of the proceedings here precisely because the legislature has said that the proceedings are for the recovery of a pecuniary penalty for the contravention of a "civil penalty provision". Such a provision is deliberately distinguished by the legislature from provisions which impose criminal sanctions. As has already been noted, the BCII Act maintains a distinction between those provisions. Under the BCII Act, s 49 is apt to pick up the general law regarding civil proceedings but not considerations peculiarly appurtenant to criminal prosecution and sentencing.

102 The Full Court declined to ascribe any significance to the legislative descriptor "civil" in relation to penalty, save to accept a suggestion that it is apt to mislead[140] by concealing or misrepresenting the punitive purpose for which a civil penalty may be imposed. But it is well settled that proceedings for the recovery of a civil penalty are civil proceedings even though "[t]he purposes of those proceedings include purposes of deterrence, and the consequences can be large and punishing."[141] The legislative choice to designate proceedings for the recovery of a civil penalty may not be ignored by a court. The legislature has explicitly decided that a claim by an eligible person for the recovery of a pecuniary penalty for the contravention of a civil penalty provision is to be brought as a civil proceeding; and within the paradigm of civil proceedings, a regulator who brings such proceedings is to be viewed (like any other eligible person) not as a prosecutor but as a plaintiff[142].

103 In proceedings under s 49 of the BCII Act, as indeed in any civil proceedings, it is the right and duty of the plaintiff to mark out the extent of its claim against the defendant. The plaintiff's claim establishes the scope of the controversy to be resolved by the judgment of the court. When a plaintiff asserts a claim to the grant of a particular remedy, it is not proffering an opinion on a

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138 *FWBII v CFMEU* (2015) 229 FCR 331 at 339 [12].

139 (1953) 90 CLR 336 at 341; [1953] HCA 59.

140 *FWBII v CFMEU* (2015) 229 FCR 331 at 338-339 [11]-[12].

141 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 at 198-199 [114].

142 It is convenient to refer to "plaintiffs" and "defendants" to make this general point, even though the Federal Court Rules use the expressions "applicant" and "respondent".

matter of fact or law; it is stating the basis on which a controversy between it and the defendant may be quelled by the exercise of judicial power. When a defendant agrees to a civil penalty in a particular amount, it is assenting to the grant of relief to that extent. And an agreement of the parties as to the basis on which they seek to resolve the controversy between them is not merely an opinion proffered by either or both of them as to how the proceedings should justly be resolved: it is a resolution of the controversy between them insofar as the quelling of that controversy is in their power.

104 In addition, as the Full Court rightly appreciated[143], a defendant's agreement to meet a plaintiff's claim for a penalty is relevant as an indication of the defendant's acceptance of responsibility, in a way which is meaningful to the fixing of a proper penalty, for its departure from legal norms which gave rise to the claim. It has significance, of such weight as the court considers appropriate, as an assurance that the defendant may be relied upon not to transgress in that way again. It is relevant to the court's assessment of what is required by way of specific deterrence to prevent departures by the defendant from those standards in the future. To accept that this is so, as the Full Court did, is to acknowledge a point of difference between this case and *Barbaro*. To acknowledge this difference is to acknowledge an indication that the considerations of principle which underpin the reasons in *Barbaro* do not apply to proceedings under s 49 of the BCII Act. That indication should have been heeded.

105 There are further points of contrast which may be noted between the considerations discussed in the passages cited from *Barbaro* and the considerations which arise under the BCII Act that are material to proceedings for the recovery of a civil penalty under that Act. First, whether the plaintiff in proceedings for the recovery of a civil penalty is an agent of the State or not, a plaintiff in civil proceedings, unlike a prosecutor in a criminal trial, is not expected to be dispassionate in its submissions. Generally speaking, a plaintiff in a civil proceeding has an obvious interest in the outcome of proceedings. More particularly, under the BCII Act it is the Commissioner's direct, immediate and manifestly partisan interest which drives the proceeding as an aspect of the Commissioner's role in relation to the enforcement of the BCII Act in accordance with the objective in s 3(2)(e).

106 Secondly, a plaintiff in proceedings for the recovery of a penalty under the BCII Act may or may not be an agent of the State. Any "eligible person" may make an application under s 49. No distinction is drawn by the BCII Act between "eligible persons" in relation to any constraints to which they might be subjected, in terms of their participation in proceedings under s 49. It would be a distinctly odd state of affairs if the Commissioner were not permitted to make

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143 *FWBII v CFMEU* (2015) 229 FCR 331 at 335 [3], 402 [231].

submissions as to penalty but other eligible persons might do so. That state of affairs seems even more odd when one recalls that the Commissioner's role in the enforcement of the BCII Act includes an entitlement of the Commissioner to intervene, in the public interest, in civil proceedings commenced by others[144]. An obvious, perhaps the most obvious, reason for an intervention by the Commissioner in the public interest in proceedings commenced by another eligible person would be to make submissions as to the appropriate penalty for a contravention of the Act. It would make little sense to hold that the Commissioner may intervene in proceedings to make submissions which the court is obliged steadfastly to ignore.

107 In addition, recovery of a penalty for breach of a civil penalty provision is only one aspect of the relief which may be granted under s 49[145] in relation to a contravention of a civil penalty provision. Submissions as to the various forms of relief sought by a plaintiff are a familiar part of civil proceedings. Nothing in the statute reveals an intention to preclude submissions as to civil penalty orders but not as to other forms of relief.

108 Finally, the view which prevailed in the Full Court would restrict the role of the Commissioner under the BCII Act in a way that cannot have been intended by the legislation. Under the BCII Act, the Commissioner is tasked with the systematic enforcement of the standards of conduct established by the BCII Act. In determining whether to commence, continue or compromise proceedings in pursuit of that task, the Commissioner may be expected to weigh broad considerations of cost and benefit in order to maximise the impact of the performance of the Commissioner's functions given the relative scarcity of resources available for that purpose.

109 In proceedings under s 49 of the BCII Act for the recovery of a civil penalty by the Commissioner, the willingness of the Commissioner to accept a particular sum by way of civil penalty in discharge of the Commissioner's claim against the defendant can be expected to reflect a considered estimation that, given the hazards and expense of litigation, satisfaction of the Commissioner's claim against the defendant on such terms is apt to advance the public interest in the enforcement of the regulatory regime more effectively and efficiently than the continued prosecution of the claim. Those considerations may include the cost of proceeding to a judgment against a defendant who is willing to acknowledge its contravention upon terms, and the risk of failure involved in

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144 BCII Act, s 71.

145 Such other forms of relief include compensation orders (s 49(1)(b)), injunctions (s 49(3)(a)), and other orders that the court considers appropriate (ss 49(1)(c), 49(3)(b)).

pursuing the case to a successful conclusion if a compromise cannot be reached. Modest successes may be regarded by the Commissioner as of greater value to the public interest in general deterrence of wrongdoing than the exhaustion of its resources upon an egregious but isolated example of wrongdoing. The Commissioner's stance can be expected to reflect a pragmatic assessment by the authority charged by the legislature with the effective investigation and enforcement of the regulatory regime that the public interest is best served by bringing the proceedings to a conclusion on agreed terms as to penalty. That course may be informed by a perceived need to conserve resources for the pursuit of other wrongdoing and wrongdoers, and to avoid the risks and uncertainties usually associated with litigation.

110 It is because the Commissioner may, on occasion, be too pragmatic in taking such a stance that the court must exercise its function to ensure that the penalty imposed is just, bearing in mind competing considerations of principle, including that of equality before the law and the need to maintain effective deterrence to other potential contraveners. In this latter regard, in *Australian Competition and Consumer Commission v TPG Internet Pty Ltd*[146], French CJ, Crennan, Bell and Keane JJ approved the statement by the Full Court of the Federal Court in *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission*[147] that a civil penalty for a contravention of the law:

> "must be fixed with a view to ensuring that the penalty is not such as to be regarded by [the] offender or others as an acceptable cost of doing business".

111 I agree with the orders proposed by French CJ, Kiefel, Bell, Nettle and Gordon JJ.

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146 (2013) 250 CLR 640 at 659 [66]; [2013] HCA 54.

147 (2012) 287 ALR 249 at 265 [62]-[63].