IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY **NO B 36 OF 2015**

On Appeal From
the Federal Court of Australia

BETWEEN: **COMMONWEALTH OF AUSTRALIA**
Appellant

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

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION
Second Respondent

COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED SERVICES UNION OF AUSTRALIA
Third Respondent

SUBMISSIONS OF THE APPELLANT

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PART I FORM OF SUBMISSIONS

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

PART II ISSUES

2. The issue that arises on the appeal is whether the Full Federal Court erred in ruling that the decision in *Barbaro v R; Zirilli v R* (2014) 253 CLR 58 (***Barbaro***) applies to civil pecuniary penalty proceedings under the *Building and Construction Industry Improvement Act 2005* (Cth) (the **Act**), so as to constrain the making and consideration of submissions as to appropriate penalty amounts, including on an agreed basis.

3. Having regard to the text of the Act, within its statutory and general law context, the principles identified in *Barbaro* do not apply to civil pecuniary penalty proceedings and purposes under the Act. In particular, those principles do not: prevent parties to such proceedings from making separate, or agreed, submissions as to the penalty amounts which they contend would be appropriate; prevent the Court from having regard to such submissions; or require a departure from the practice described in the decisions of the Full Court of the Federal Court in *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285 (***NW Frozen Foods***) and *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* (2004) ATPR 41,993 (***Mobil Oil***).

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

4. The Appellant certifies that it has considered whether a notice should be given under s 78B of the *Judiciary Act 1903* (Cth) and that no notice needs to be given. (Notices were given for a potential issue arising at the special leave stage, as to whether the decision below was a judgment, decree or order for the purposes of s 73 of the Constitution. The Commonwealth submitted that it was.[1] Special leave having been granted that issue no longer arises.)

PART IV JUDGMENT OF COURT BELOW

5. The judgment of the Court below is reported as: *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* (2015) 105 ACSR 403; [2015] FCAFC 59.

PART V FACTS

6. The Director, Fair Work Building Inspectorate (**Director**) brought civil proceedings against the respondent unions (**Unions**) for contraventions of s 38 of the Act (by reason of s 48), seeking pecuniary penalties and declaratory relief. The parties filed agreed facts and made submissions in which they proffered penalty amounts which they agreed to be appropriate, subject to the Court's discretion.

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[1] The Commonwealth's submissions on this point were in the summary of argument in support of the alternative application for removal, dated 29 May 2015, at [30]-[36] (Proceedings B 25 of 2015).

7. At pre-trial directions, the Court expressed concerns about the possible application of *Barbaro* (an issue which had by that time been addressed by a number of single judges of the Federal Court, but not by a Full Court). The Chief Justice of the Federal Court then gave a direction under s 20(1A) of the *Federal Court of Australia Act 1976* (Cth) (**Federal Court Act**) that the original jurisdiction of the Court be exercised by a Full Court. As a result of that direction, the Commonwealth sought leave to intervene to make submissions about the application of *Barbaro*. It did so because many other civil regulatory regimes were expressed in relevantly similar terms to the Act, such that the finding of the Full Court regarding *Barbaro* would also impact upon those regimes.

8. The Commonwealth was given leave to intervene. It adduced evidence and made written and oral submissions on the question of whether *Barbaro* applied (as well as related issues raised by the Full Court). The Director and Unions adopted the Commonwealth's submissions. Accordingly, the Commonwealth engaged counsel to appear as contradictor, which it has done again.

PART VI ARGUMENT

A. THE EXERCISE OF CONSTRUCTION

9. The ultimate question for the Federal Court in this matter is whether to accede to the application of the First Respondent that an order be made imposing a pecuniary penalty on the Second and Third Respondents, and if so the quantum of that order. This gives rise to an intermediate question, which is the subject of this appeal: does the Act permit the Court to receive separate, or agreed, submissions from the parties as to the quantum of the pecuniary penalty?

10. Submissions as to the appropriate terms (including quantum) of relief serve a range of purposes that are well recognised in civil litigation including:

    10.1. *first*, the submission helps to identify the precise *claim* being made by the applicant, which engages the Court's judicial power. It in turn allows the respondent to know the case it has to meet and allows it to put its submission to the Court in the terms which best advance its interests. Thus, it both assists the Court in its function and provides procedural fairness to a civil respondent;

    10.2. *secondly*, it is a submission of *law*. It is founded upon, and expresses the conclusion of, anterior submissions concerning the correct principles of law and what they require or permit when applied to the facts of a particular case; and

    10.3. *thirdly*, where the submission as to the precise relief to be sought is agreed between the parties, it is also capable of being accepted as *evidence* of the basis upon which the parties are prepared to resolve a dispute (or part of it) that may be otherwise contested, which is itself a fact relevant to what order the Court should make.

11. The question whether such submissions are precluded in proceedings for pecuniary penalties under s 49 of the Act concerns the manner in which that discretionary

statutory power is to be exercised by the Court. It turns, in particular, upon the proper construction of s 49(1)(a).

12. As that provision does not in terms say what the Court may or may not receive, it is "necessary to look to the scope and purpose of the statute conferring the discretionary power and its real object" applying "the ordinary approach to statutory construction reiterated in *Project Blue Sky*".[2] This directs attention to the statutory text, within its statutory and general law context, and having regard to its apparent purpose.[3] These are addressed in turn.

(1) Statutory text

13. The salient features of s 49 are as follows.

14. *First, a broad jurisdiction is conferred.* Section 49 confers upon the Federal Court[4] a broad discretionary power to make a variety of orders, including pecuniary penalty orders, for contraventions of the Act. The provision is "taken to vest that court with jurisdiction" in such matters, which "is not limited by any limits to which the other jurisdiction of the court may be subject": ss 75(1)(a) and (c).

15. Beyond the jurisdictional limits prescribed by s 49, the section does not expressly limit, or restrict, the evidence, material or submissions to which the Court may have regard. Consistent with the use of "may"[5] and the unconfined language of the discretion,[6] this indicates that the Court may have regard to any such evidence, material or submissions as are relevant, subject only to express limitations in other legislation[7] or implied limitations in the Act. Regard should also be had to the rule of construction that provisions conferring powers on courts should be liberally construed.[8]

16. *Secondly, the jurisdiction is civil, not criminal.* The jurisdiction conferred by s 49 is a civil, not criminal, jurisdiction. A clear civil/criminal distinction is established and maintained in both s 49 and the Act more generally:

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2 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [67].

3 See generally *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39]; *Thiess v Collector of Customs* (2014) 250 CLR 664 at [22]-[23]; *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [43]-[45] and *Momcilovic v The Queen* (2011) 245 CLR 1 at [38].

4 Jurisdiction is also given to each other "appropriate court" as defined in s 48(1). The present case, as with most such cases, was brought in the Federal Court. Accordingly, these submissions focus on the powers, provisions and jurisdiction of that Court.

5 See *Acts Interpretation Act 1901* (Cth), s 33(2A).

6 The largely unconfined nature of broad discretionary powers is well-recognised. See, eg, in the administrative law context, *Plaintiff S156-2013 v Minister for Immigration and Border Protection* (2014) 309 ALR 29 at [42], citing Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40.

7 For example, the admissibility requirements in the *Evidence Act 1995* (Cth).

8 See *The Owners of the Ship "Shin Kobe Maru" v Empire Shipping Company Inc* (1994) 181 CLR 404 at 420-421; *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue of the State of Victoria* (2001) 207 CLR 72 at [11]. As to the way in which other widely expressed discretions are construed as being confined only by the scope and subject matter of the power in question, see: *R v Anderson; ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177, 198-199 (Taylor and Owen JJ), 204-206 (Windeyer J); *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 496 (Latham CJ), 498 (Rich J), 504-506 (Dixon J), 507 (McTiernan J) and *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1 at 12-14 (Stephen J, with whom Barwick CJ, Gibbs and Jacobs JJ agreed).

16.1. the Court's jurisdiction under s 49 is enlivened only when the respondent has contravened a "civil penalty provision", being a provision which explicitly notes that a "civil penalty" applies.[9] The meaning of the term "civil penalty provision" (and its component terms) is affected by s 4. The term "civil" in "civil penalty provision" distinguishes such provisions from provisions that impose criminal liability: see J[15]. In particular, those civil penalty provisions are to be contrasted with provisions of the Act that specify penalties (including imprisonment) for criminal offences to which the *Criminal Code 1995* (Cth) applies;[10]

16.2. sections 50 and 51 (which, like s 49, fall within Chapter 7, Part 1) carry this distinction further by recognising that the same conduct may attract the civil penalty regime and the criminal law. The special protections for the integrity of criminal prosecutions which exist under the general law, and which do not exist in relation to civil proceedings, are here given statutory recognition.

17. Section 49 picks up the general law and statutory provisions governing civil proceedings and the grant of civil remedies. Conversely, it does *not* pick up the general law and statutory provisions regulating criminal prosecutions and sentencing. As explained in paragraphs 24 to 34 below, these bodies of law and procedure markedly differ. The provision thereby manifests a Parliamentary choice to engage and apply one of these bodies of law (civil) to the exclusion of the other (criminal). The making of submissions as to the quantum of final monetary relief sought is a conventional aspect of the civil system that Parliament has chosen.

18. *Thirdly, pecuniary penalties are treated as one of a range of the civil remedies available.* Pecuniary penalties are but one of a range of forms of civil regulatory relief which may be sought under s 49. Others include: compensation orders, injunctions, sequestration orders, remedial orders and other orders the Court considers appropriate: s 49(1)(b), 1(c) and (3). Except where Parliament has otherwise indicated,[11] applications for pecuniary penalty orders do not attract special procedural restrictions or requirements. Submissions as to the appropriate terms, including quantum, of these other forms of relief (amounts of compensation and sequestration, terms and duration of injunctions and the like) are conventional in civil proceedings. Accordingly, by treating pecuniary penalty orders compendiously with these forms of relief, there is no statutory warrant for taking a more restrictive course with submissions as to pecuniary penalty orders but not others.

19. *Fourthly, the particular remedies must be the subject of an application.* The power to make such orders is conditional upon the making of an "application". This reflects the basic principle of the civil justice system that an application must be made and must clearly specify not just a cause of action, or other assertion of right, but must identify with as much precision as possible the relief sought. In the Federal Court, an applicant must commence the proceeding with an originating application: r 8.01 of the *Federal Court Rules 2011* (Cth). This must state the relief claimed and the statutory provision

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9 The legislation enacts various civil penalty provisions: ss 28(3), 38, 43(1), 44(1), (3) and (4), 45(1), 46(1), 59(14), 62(14), and 63(14).

10 The criminal offence provisions are ss 52(6) and 65(2).

11 E.g. in ss 50 and 51.

under which it is claimed: r 8.03(1).[12] The Court's jurisdiction to grant that relief is thereby invoked. Thereafter, the Court knows what judicial power it is being asked to exercise and controls the proceedings accordingly. Likewise, the respondent knows the case it has to meet. The making and receipt of submissions as to the particular relief which the applicant seeks, as to what the respondent accepts or contests in response, is the logical and conventional endpoint of the application for civil relief (including pecuniary penalties) under s 49.

20. Section 49 provides that the applicant selects the form(s) of remedy pursued, whereas it is for the Court to determine whether to grant such remedy and, if so, its precise terms. Each of the forms of remedy provided in s 49 secures (primarily, though not exclusively) particular regulatory purposes.[13] The primary purpose of pecuniary penalties is that of securing compliance with the Act through deterrence.[14] Unlike a criminal sentence, the relief available under s 49(1)(a) will not be the sole means of redress. Parliament has also provided for regulatory objectives other than deterrence to be principally secured in other ways: compensation through compensation orders (s 49(1)(b)); remedial action through remedial orders (s 49(1)(c) and (3)); protection from unlawful conduct through injunctions(s 49(1)(c) and (3)). Having required the applicant to form a view and specify from the outset which *form* of relief is to be pursued under s 49, it is unlikely that Parliament would have implicitly precluded the parties from submitting to the Court what *degree* of relief was appropriate. Accordingly, in relation to pecuniary penalties, it is unlikely that Parliament would have expected the applicant, for a form of relief primarily intended to secure deterrence, to be precluded from indicating to the Court the penalty which was submitted to be of "appropriate deterrent value."[15]

21. *Fifthly, applications may be made by a variety of applicants.* Any "eligible person" may make applications under s 49. This includes the industry-specific regulator established by s 9 of the Act, the Australian Building and Construction Commissioner (the **Commissioner**). The Commissioner has substantial public interest functions under the Act.[16] Equally, an "eligible person", includes a person "affected by the contravention". Section 49 does not seek to confer upon those persons any different status from the Commissioner. Accordingly, Parliament has not indicated that it expects the principles to be applied by the Court in adjudicating applications by the Commissioner to differ from those brought by private litigants (although the Commissioner is otherwise subject to obligations such as the model litigant obligation). There is, accordingly, no Parliamentary indication that eligible persons are intended to be subjected to constraints (including as to the making of submissions) which do not apply to other civil litigants; much less of a kind which apply to criminal prosecutors.

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12 These requirements replicate the requirements of O 4 rr 1 & 3 of the *Federal Court Rules 1979* (Cth).

13 In the context of a different civil regulatory statute see, for example, the different purposes served by pecuniary penalties, disqualification orders and compensation orders as explained in *Registrar of Aboriginal and Torres Strait Islander Corporations v Matcham (No 2)* (2014) 97 ACSR 412 (***Matcham (No 2)***) at [263]-[264], [270] and [289].

14 *Trade Practices Commission v CSR Ltd* (1991) 13 ATPR 41-076 (***TPC v CSR Ltd***) at 52,152. This primary objective of deterrence has been reinforced in countless trade practices cases including *NW Frozen Foods* and, by the High Court, in *ACCC v TPG Internet Pty Ltd* (2013) 250 CLR 640 (***ACCC v TPG Internet***) at [65]-[66].

15 To use the language of French J in *TPC v CSR Ltd* at 52,152.

16 Including monitoring compliance with the Act: s 10(a)(i); investigating suspected contraventions: s 10(b); instituting, or intervening in, proceedings: s 10(c), and assisting and advising building industry participants: s 10(d). Chapter 8 also confers a wide range of powers on the Commissioner: ss 67 and 71 – 73.

22. *Sixthly, the penalty may be payable to the Commonwealth or to some other person.* Under s 49(5), the Court will have to determine whether the recipient is the Commonwealth or some other person. The applicant must be able to identify who it asserts should receive the penalty. This may introduce a compensatory element into the penalty over and above its primary deterrent purpose. There is no reason why an applicant should be able to make submissions on that matter but not on what the amount of the penalty should be.

(2) Statutory and general law context

23. Parliament can be taken to have intended that the Act would be applied in accordance with the existing "general system of law"[17] and similar statutory regimes.[18] Three aspects of the general law context in which the Act was enacted are important in the present case: rules of civil practice and procedure, which are picked up; the contrasting rules of criminal practice and procedure, which are not picked up; and consistency with the broader suite of statutes providing for regulation by civil penalties.

(a) Civil practice and procedure

24. Various aspects of civil procedure, within the particular context of the Federal Court, are germane.[19] *First*, as explained above, court rules require that the regulator must contend not just for a finding of contravention, but for the specific regulatory relief or redress it contends should follow. The Court thereby knows what judicial power it is being asked to exercise, and the respondent knows the case it has to meet. Where the Commissioner institutes proceedings, it must comply with model litigant obligations that include endeavouring to limit the scope of proceedings wherever possible and keeping the costs of litigation to a minimum.[20] The practice of making submissions as to the quantum of an appropriate pecuniary penalty, with the consequent scope for reducing contest as to relief, conforms to these obligations.

25. *Secondly,* the proceedings are thereafter conducted in accordance with the rules of civil practice and procedure. Those rules proceed on the basis that respondents in civil proceedings will ordinarily be required to answer pleadings, discovery, interrogatories, subpoenas and notices to produce, to file evidence, to present submissions and so forth.[21] Submissions on quantum sit comfortably within this regime.

26. *Thirdly*, by providing for civil regulatory proceedings, Parliament is taken to engage the principles and practices that require civil litigation to be resolved quickly,

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17 *Potter v Minahan* (1908) 7 CLR 277 at 304. The same principle has been applied in numerous cases, see for example: *Bulog v Independent Commission Against Corruption* (1990) 169 CLR 625 at 635-6; *Bropho v State of Western Australia* (1990) 171 CLR 1 at 18; *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [18].

18 Absent contrary intention, Parliament is presumed to have "intended to attach the same meaning to the same words when used in a subsequent statute in a similar connection": *Lennon v Gibson and Howes Ltd* [1919] AC 709 at 711-712, on appeal from the High Court.

19 Proceedings can be brought in other courts: ss 39(4) and 48(1); in which similar processes generally apply.

20 Paragraph 4.2 and Appendix B (particularly paragraphs 2(d) and (e)) of the *Legal Services Directions 2005* (Cth).

21 There are exceptions. Thus, an individual respondent in a given case may be excused from compliance with certain obligations of civil procedure where necessary to protect his or her privilege against self-incrimination or self-exposure to a penalty: *ACCC v FFE Building Services Ltd* (2003) 130 FCR 37. This does not apply to corporations (see *CFMEU v Boral Resources (Vic) Pty Ltd* [2015] HCA 21 (***Boral Resources***)) and may be subject to modification by Parliament: *Lee v NSW Crime Commission* (2013) 87 ALJR 1082 at [3], [21], [125], [314]-[318].

inexpensively and efficiently: s 37M and 37N Federal Court Act.[22] In this respect, s 37M informs the manner in which parties should conduct proceedings involving the exercise of the power in s 49, as opposed to modifying the power *per se*. It is incumbent upon parties, where possible, crisply to identify the nature and extent of the issues in dispute, and to minimise the extent of dispute. Section 37N recognises the importance of settlement of civil disputes. An agreed submission is one way of satisfying these obligations.[23]

27. *Fourthly*, by enacting a civil regime, Parliament has chosen that the regulator will be required to prove its case only on the balance of probabilities, rather than beyond reasonable doubt.[24] This remains so even if the allegation is as serious as fraud or actual criminality.[25] Parliament has thus chosen to require no more of a regulator, by way of proof, than of any other applicant in a civil proceeding.

28. Overall, it is consistent with the ordinary incidents of a civil trial for separate or agreed submissions on penalty to be received on the bases identified in paragraph [10] above. Where the moving party identifies, with as much precision as possible, the relief it seeks, it does not bind the Court or compromise its independence. It instead *facilitates* the expeditious performance of the Court's role, consistent with s 37M of the Federal Court Act. It is conventional that submissions on relief identify relevant principles and apply those legal principles to the facts to yield a proposed form of relief. This permits evaluation of the whole submission – its premises and conclusion – against an opposing submission and the Court's appreciation of the law and the facts. Finally, it is conventional in civil litigation that opposing parties, at arm's length and properly advised, may resolve issues and ask the Court to act on that agreement. The Court, again, is not bound. It may reject the proposed resolution. It may request additional materials before accepting the proposed terms. To be asked to consider acting on an agreement does not compromise the Court's role or blur lines between it and either party.

(b) Criminal practice and procedure

29. It is not suggested that a bright line distinction between civil and criminal proceedings can be drawn for all purposes.[26] However, the criminal justice system has key features, developed over centuries by courts and legislatures,[27] which confer a recognisably distinct character upon criminal proceedings. Absent clear indicators in legislation defining the jurisdiction of a civil court, these distinctive criminal features should not be readily transposed, whether wholly or in a piecemeal fashion, to the civil trial.

30. *First,* each of the physical and fault elements of an offence must be proved beyond reasonable doubt. The process is strictly accusatorial. Rules protect an accused's right

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22 See further: *AON Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [111].

23 Cf J[177].

24 Although this requires consideration of the subject matter of the proceedings and the gravity of the allegations made: s 140 of the *Evidence Act 1995* and the requirements in *Briginshaw v Briginshaw* (1938) 60 CLR 336, at 361-362.

25 *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 170-171.

26 For example, *Rich v ASIC* (2003) 203 ALR 671 at [22] and [30]-[35] and *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161.

27 See most recently *Boral Resources* at [36], [42]-[46]; *X7 v Australian Crime Commission* (2013) 248 CLR 92 (*X7*); *Azzopardi v The Queen* (2001) 205 CLR 50 (*Azzopardi*) and *RPS v The Queen* (2000) 199 CLR 620 (*RPS*).

not to give or call any evidence and to prevent any suggestion that the absence of such evidence suggests guilt.[28] Numerous substantive, evidentiary and procedural protections are conferred upon a criminal accused. Protective rules and arrangements attach to the decision to prosecute, the laying of charges and the presentation of indictments.[29] Committal proceedings enable an accused to test the prosecution evidence before entering a plea (other than in summary matters).[30] In a Commonwealth prosecution on indictment, jury trials are constitutionally entrenched.[31]

31. *Secondly,* there is a flexible scheme of (largely mutually exclusive) statutory sentencing alternatives available to a sentencing judge once guilt is established, including: imprisonment; cumulative and concurrent sentences; suspended sentences; periodic detention; home detention; parole; community service orders; fines; good behaviour bonds; convictions and non-conviction orders.[32] The uniquely serious nature of a sentence of imprisonment is underscored by the requirement that it be imposed only as a last resort.[33] Even with lesser sentences, a finding of criminal guilt and conviction carries a well-recognised stigma, which includes the formal, institutional finding of moral turpitude.[34]

32. *Thirdly,* the Court has a distinctive role in selecting and fashioning relief. The objectives of criminal sentencing are various. They include denunciation, retribution, protection of society, deterrence and rehabilitation.[35] In each case, the various objectives must be considered by the Court and given such weight as the Court considers appropriate in the circumstances in fashioning the single sentence for each offence.

33. *Fourthly,* criminal prosecutors are subject to specific obligations and serve distinctive functions. They act under the control of independent statutory office-holders. They must present cases independently of the interests of any person or agency, rather than on instructions in accordance with an ordinary lawyer/client relationship. They prosecute across spheres of offending, not confined to specific subject matters. They do not have a broader role in regulating conduct generally, such as taking administrative action or conducting investigations. They are subject to positive obligations to make full disclosure to an accused of all potentially relevant material.[36] They are to be "ministers of justice, who ought not to struggle for a conviction".[37] It is not,

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28 Section 20 of the *Evidence Act 1995*, discussed in *RPS* and *Azzopardi*. See also *X7* at [116]-[117].

29 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (9 September 2004); Part IC of the *Crimes Act 1914* and *X7* at [110]-[115].

30 *X7* at [110]-[115].

31 Section 80 of the Constitution, discussed in *AK v Western Australia* (2008) 232 CLR 438 at [90]-[97].

32 For Commonwealth offences see generally ss 4AA-4D and Part IB of the *Crimes Act 1914*.

33 Section 17A(1) *Crimes Act 1914*.

34 *MFA v R* (2002) 213 CLR 606 at [48]; *Dinsdale v The Queen* (2000) 202 CLR 321 at [88]. Cf, in the civil penalty context: *Vines v ASIC* (2007) 62 ACSR 1 at [132].

35 *Veen v The Queen (No 2)* (1988) 164 CLR 465, cited in *Munda v The Queen* (2013) 249 CLR 600 at [53], *Bugmy v The Queen* (2013) 249 CLR 571 at [44] and *Attorney-General (NT) v Emmerson* (2014) 307 ALR 174 at [19]. See also ss 16A(2)(e), (j), (k) and (n) of the *Crimes Act 1914* (Cth), as well as the various State sentencing Acts, for example: s 5(1) of the *Sentencing Act 1991* (Vic) and s 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

36 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (9 September 2004) at 8.1 and the *Statement on Prosecution Disclosure* (30 April 2006).

37 *R v Lucas* [1973] VR 693 at 705.33, followed in *Subramanium v The Queen* (2004) 79 ALJR 116 at [54] and *R v Livermore* (2006) 67 NSWLR 659 at [47]-[48].

accordingly, their role to bring proceedings in order to pursue and secure a particular final form of relief. None of these special prosecutorial procedures applies as a matter of law or direct application in a civil penalty proceeding, although there may in some cases be certain similar processes, reflecting model litigant obligations or adopted as a means of discharging duties to the Court and respondents within civil litigation with a public interest flavour.

34. The legislative choice to confer, under the Act, power upon the Court to make a pecuniary penalty order *without* constituting the matter as a criminal trial, carries with it that the matter should not be subject to the distinctive requirements and limitations that attend criminal proceedings.[38]

(c) Cognate Commonwealth legislation

35. The above submissions derive further support from the manner in which the Act intersects with related Commonwealth legislation. The Act is one of a large number of civil regulatory schemes enacted to prevent conduct that is inimical to the public interest, usually in relation to an identifiable area of commerce, industry or activity. Such schemes are established and, at least since the *Trade Practices Act 1974* (Cth), have followed a generally consistent Parliamentary approach. Further, those schemes have been the subject of a well established judicial approach, including as to the making of submissions regarding a penalty of appropriate deterrent value, whether separately or on agreed basis (in accordance with *NW Frozen Foods* and *Mobil Oil*).

36. While each statute reflects particular legislative choices, which the Court must discern and give effect to in the exercise of construction,[39] certain similarities characterise Commonwealth civil regulatory statutes:

    36.1. a specialist regulator is tasked with securing compliance with provisions intended to protect and advance particular aspects of the public interest relevant to that regulator's functions;

    36.2. the regulator is able to secure that compliance by a range of mechanisms, including bringing civil proceedings, often as an alternative to criminal prosecution;

    36.3. in so doing, the regulator must determine the particular objectives it considers to be important in a given matter (e.g., deterrence, protection, reform, compensation) and make specific application to the Court for one or more remedies it considers appropriate to secure those objectives (e.g., pecuniary penalties, disqualification, injunctions, compensation orders);

    36.4. the regulator's pursuit of those remedies is undertaken by it as a civil litigant in accordance with the ordinary rules, requirements and practices of civil litigation; and

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38 See *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [43]-[44].

39 This point is commonly made by the Court in approaching the orders to be made under a civil regulatory regime: *Comcare v Post Logistics Australasia Pty Ltd* (2012) 207 FCR 178 (***Post Logistics***) at [59]-[61] and the cases there referred to.

36.5. all of the above occurs without preventing the Court from carrying out its discrete function in each case of deciding whether the forms of relief sought should be granted and in what terms.

37. Annexure A to these submissions sets out a range of civil regulatory regimes which share these features and were in place at the time the Act was introduced. These features reveal a coherent legislative approach to such regulation. By enacting the Act in accordance with this approach, Parliament should be understood as having required it to be construed and applied in accordance with the judicial approach taken to cognate provisions in similar statutes.[40] That judicial approach has long included the receipt of submissions regarding the amount of a penalty of appropriate deterrent value.

(3) Statutory purposes

38. Finally, the making and receipt of submissions as to an appropriate penalty amount is consistent with the statutory purposes of the Act.

39. The main object of the Act is to provide an improved workplace relations framework for building work, to ensure that such work is carried out fairly, efficiently and productively for the benefit of all building industry participants and the Australian economy as a whole: s 3. That object is to be achieved by means including: promoting respect for the rule of law: s 3(b); ensuring that building industry participants are accountable for their unlawful conduct: s 3(d); providing effective means for investigation and enforcement of relevant laws: s 3(e); and providing assistance and advice to building industry participants in connection with their rights and obligations under certain industrial laws: s 3(h).

40. The Act stipulates a new statutory norm: that industrial action captured by the Act is unlawful unless it is protected industrial action within the meaning of the *Fair Work Act 2009* (Cth) (ss 4, 36). The Act prohibits unlawful industrial action (ss 37, 38) and applies these provisions broadly across the industry, reducing the concurrent regulation by state and federal systems. It seeks to improve the bargaining framework within the industry by prohibiting certain coercive and discriminatory conduct: ss 43-46. Centrally, for current purposes, the legislation seeks to secure compliance with these requirements through the mechanism of civil penalty provisions: ss 28(3), 38, 43(1), 44(1), (3) and (4), 45(1), 46(1), 59(14), 62(14), and 63(14).

41. The Second Reading Speech to the Act identified its overarching objective as "ensuring the law applies and is observed equally by all participants in the building and construction industry, regardless of whether they are union officials, employers or workers."[41] It also identified deficiencies in the previous regime: "...the current system for recovery of loss due to unlawful industrial action is difficult, costly and time consuming."[42] Concerning the enforcement powers, the Second Reading Speech said:

> This bill will provide a greater incentive for building industry unions to obey the law, particularly as the amount of compensation the court can order them

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40 See, e.g., *Bropho v State of Western Australia* (1990) 171 CLR 1 at 18.

41 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 March 2005, 5-7 (Kevin Andrews) at 5.

42 *Ibid.*

to pay will not be capped.[43]

42. The ability to make submissions as to civil penalty amounts is consistent with these objects. Within the scheme of the Act, the principal object of pecuniary penalty orders is to secure compliance through specific and general deterrence. Agreed submissions on penalty can be seen to further that object in the particular case, while at the same time potentially preserving the regulator's resources to be used to detect other contravenors (with the effect of increasing deterrence).[44]

B. ERRORS IN THE FULL COURT'S REASONING

43. *Barbaro* addressed criminal sentencing practices and principles in the particular context of the *duration* of sentences of *imprisonment*. It was not directed at pecuniary penalty orders or any other form of civil relief. The Full Court considered that it was nonetheless binding in relation to the imposition of a civil pecuniary penalty.

44. The Full Court's reasoning involved a number of errors which may be broadly categorised as follows:

44.1. it failed to appreciate, and give effect to, Parliament's intention. It focussed upon a limited number of perceived similarities between criminal sentencing and the imposition of pecuniary penalties. In doing so, it failed properly to recognise the significance of the Parliamentary choice of a civil, and not criminal, enforcement regime;

44.2. it misunderstood the concern in *Barbaro* regarding "available range" submissions, taking the case as authority for a larger prohibition on making submissions as to the quantum of a civil penalty; and

44.3. in the course of the above errors, it erred with respect to its treatment of evidence and a number of relevant authorities.

45. Each of these 3 categories of error is addressed below. Before doing so, it is well to recall that the Commonwealth addresses the question as to whether it was permissible for the Full Court to receive submissions on agreed penalty amounts from the parties at the level of principle. If receipt of such submission is permitted, they in no way bind the Court to accept that the proposed or agreed penalty is appropriate. They do not limit the Court in its enquiries into any matter bearing on the weight that should be attributed to the agreement in the particular case. Rather, the Court could seek further information on the agreement from the parties, including as to how, or on what legal and factual bases, the agreement was reached, if thought necessary.

(1) The erroneous focus upon mere similarities rather than Parliamentary intention (see [44.1] above)

46. The Full Court's task was to ascertain Parliament's intention with respect to the exercise of the discretion to impose a pecuniary penalty. While recognising this (J[173]), the Full Court failed to discharge that task fully. Instead, the Full Court's reasoning process seemed to involve 2 key steps, both of which were flawed:

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43 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 March 2005, 5-7 (Kevin Andrews) at 6.

44 *Mobil Oil* at [53].

46.1. the Act contained no *explicit* statutory imprimatur for making and receiving submissions as to quantum of penalty. Accordingly the real question in determining the application of *Barbaro* collapsed into whether the imposition of civil penalties was sufficiently similar to criminal sentencing;[45] and

46.2. such proceedings were in fact "similar if not identical" and the similarities were "obvious and compelling", such that *Barbaro* must apply.[46]

47. As to the first step (see [46.1] above), while the Full Court correctly identified that attention should be directed to the statutory text (J[14], [75], [173]) and recited aspects of the text (J[15]-[18]) it did not ultimately engage fully in the necessary exercise of construction.

48. Instead, the Full Court took as its point of departure the *absence* of an *explicit* statutory warrant for making and receiving submissions as to penalty amounts. However, this absence is unsurprising. As argued under Part A above, the imposition of pecuniary penalties under the Act is predicated upon the application of general law principles governing civil litigation. Under those principles (including in their application to similar civil pecuniary penalty regimes), the making of submissions as to relief has long been permitted and encouraged. That being so, provisions which explicitly permitted the making and receipt of submissions would have been otiose and would have invited contrast and inconsistency with numerous other similar civil regulatory regimes. Equally, the Act does not reveal a Parliamentary intention that common law limitations on the making and receipt of submissions as to the "available range" of a criminal sentence were intended to be picked up and applied to pecuniary penalties. Rather, as explained in Part A, the Act explicitly differentiates civil regulatory proceedings from criminal prosecutions. In looking to perceived similarities between them, and applying *Barbaro* accordingly, the Full Court undermined this Parliamentary choice.

49. The second step in the Full Court's reasoning (see [46.2]) also revealed error. The Full Court identified three similarities between civil penalties and criminal sentencing that required the application of *Barbaro*: (a) the need for an "instinctive synthesis" of various factors;[47] (b) the imposition of punishment,[48] and (c) questions of public interest and perceptions as to the judicial process.[49] However, these similarities do not have the significance the Full Court ascribed to them; nor are the similarities confined, as the Full Court appears to suggest, to pecuniary penalties.

50. *First*, even if there are some similarities in these areas, that does not grapple with the raft of differences identified at [24]-[34] above.

51. *Secondly,* the use of an "instinctive synthesis" to ascertain a criminal sentence was explained in *Wong v The Queen* (2001) 207 CLR 584 and *Markarian v R* (2005) 228 CLR 357. That process was there contrasted with an impermissible mathematical, or staged, approach to criminal sentencing in which various factors are given identified numerical value for sentencing purposes. The relevance of that process to the reasoning

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45 See especially J[208]-[213], [226], [240].

46 See J[209], [233], [239]-[243].

47 See J[3], [83], [143], [192], [212], [221], [239].

48 See J[3], [11]-[14], [82], [206], [212], [218], [239].

49 See J[3], [82], [133], [143], [165], [171], [183], [186], [205]-[206], [212], [214], [222]-[223], [239].

in *Barbaro* was solely that the positing of an available range necessarily required an implicit use of the mathematical approach that had previously been rejected.[50]

52. However, this does not entail that *any* discretionary judgment that involves a synthesising of various factors to achieve a single numerical result attracts the *Barbaro* principle; much less that this was Parliament's intention in enacting the Act. Such a synthesis is required not only in relation to civil pecuniary penalties but also, to a greater or lesser degree, in other s 49 remedies, and in a broad range of discretions affecting civil remedies beyond the Act. The duration of a disqualification order requires the weighing up of a wide variety of competing considerations. Likewise, a synthesising of many factors will be necessary to reach a final numerical result for the duration of injunctions, amounts which a court should quantify and award by way of compensation or various forms of damages (including exemplary damages), or an appropriate assessment of legal costs (including indemnity costs). Likewise with the terms of a control order.[51]

53. If such a process leads to the application of *Barbaro* to one civil remedy (a pecuniary penalty) some principled basis needs to be found for differentiating it from other civil remedies. The Full Court appeared to consider that this rested on a question of degree (J[221]). However, the decision in *Barbaro* did not rest upon any identified degree of synthesis. Further, as the Full Court accepted (J[221]) a lesser degree is involved in the case of a pecuniary penalty. Finally, it is by no means clear why any relevantly different degree is involved in making orders for disqualification, exemplary damages, a control order, or some injunctions.

54. *Thirdly*, it may be accepted that both a criminal sentence and a pecuniary penalty have a penalising effect. The Full Court treated this as significant, apparently because in both cases it involved the "coercive power of the State".[52] However, this characteristic does not provide any principled basis for treating s 49 of the Act as attracting the application of *Barbaro*. The Act differentiates between punishment for criminal offences on the one hand and, on the other, the penalties and relief available through the civil provisions. Where private litigants seek pecuniary penalty orders under s 49, the relevance of the imposition of a punishment by the State becomes even more problematic.

55. In any event, the fact of an order having a penalising consequence does not make pecuniary penalties a distinctive form of relief; much less assimilate them to a punishment for criminal wrongdoing.[53] The Full Court's distinction between pecuniary penalties operating as "punishment" and other relief being "protective" (J[218] and [228]) also cannot be sustained. Pecuniary penalties can equally be described as "protective" because they protect the area of commerce in question by securing compliance with the law through deterrence. Sometimes they can also serve an additional compensatory purpose: s 49(6). Likewise, other forms of civil regulatory

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50 *Barbaro* at [34]-[37].

51 For example, as discussed in *Thomas v Mowbray* (2007) 233 CLR 307.

52 See J[3], [206], [239].

53 A similar contention in relation to contempt proceedings was dealt with by this Court in *Boral Resources*.

relief can have punitive and deterrent consequences.[54] Indeed, nearly all forms of regulatory relief could at some level be said to involve "[p]unishment, in the sense of the inflicting of involuntary hardship or detriment by the State",[55] or to have a denunciatory effect.[56]

56. The supposed distinction between "punitive" penalties and other forms of civil relief further erodes when one moves away from the civil regulatory context. Exemplary damages (sometimes called retributory damages) are awarded for the purposes of punishing a respondent for morally blameworthy conduct (such as violence, cruelty and malice) and to assuage an urge for revenge.[57] They involve an assessment of the circumstances and gravity of the wrongdoing and a quantification of an appropriate amount by way of punishment. However, like other civil relief, it will be open to parties to make submissions as to an appropriate amount to be awarded by way of such damages.[58] The Full Court's answer to this circumstance is to suggest that such submissions should perhaps not be made and that, as such cases are infrequent, they do not provide real assistance (J[219]). This highlights, rather than resolves, the problems with the comparison the Full Court draws between criminal punishment and pecuniary penalties.

57. *Fourthly,* the Full Court's concern with public interest and perceptions appears to be tied to the warnings of the plurality in *Barbaro* about the blurring of the respective roles of the prosecutor and sentencing judge.[59] The Full Court expressed concerns (which it appeared to consider cognate in kind) that the making of submissions as to penalty amounts by a regulator may undermine the proper public perception of the Court's role because it would involve a fetter on the Court's discretion and/or suggest some form of improper influencing of that discretion. The Court's role was to fix the "appropriate" penalty and it could not perform that task if it was informed what either or both parties considered was "appropriate".[60]

58. To apply *Barbaro* on the basis of such perceived similarities is to misunderstand the plurality's reasons. Those reasons dealt at their core with a particular form of submission (the bounds of the appellable range) made by a particular party (the prosecution) in a particular context (a criminal sentencing proceeding). Those general common law principles for criminal sentencing are not picked up so as to apply to penalties under s 49 of the Act. On the contrary, that provision contemplates a wide range of (public and private) parties seeking a variety of civil remedies (not limited to a pecuniary penalty) using the ordinary processes of the civil law (in which submissions as to appropriate relief are conventional and desirable). The making and reception of submissions as to appropriate final relief could not sensibly undermine the public perception of the Court's independence in matters such as the present.

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54 For example, in relation to disqualification of directors see *Rich v ASIC* (2004) 220 CLR 129 (especially at [41]) and in relation to regulatory injunctions see *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 at [21]-[26].

55 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at [17] per Gleeson CJ.

56 Cf J[11].

57 See *Lamb v Cotogno* (1987) 164 CLR 1.

58 See eg *Facton Ltd v Rifai Fashions Pty Ltd* (2012) 199 FCR 569 at [83]-[86].

59 See *Barbaro* at [29]-[33].

60 J[3], [48], [53], [62], [145], [183], [206], [211], [225], [240]-[241].

59. The Full Court's concern with a "fetter" seems to stem from its reading of the decisions in *NW Frozen Foods* and *Mobil Oil* as having the effect of making agreed submissions as to penalty operate as a limit or fetter on the Court's discretion. However, those cases were not concerned with submissions as to an "available range" in the *Barbaro* sense (as the Full Court concluded at J[229]), but rather as to an "appropriate" penalty (being the legislative requirement in each case).[61] The decisions make clear that the Court is not obliged to impose an agreed amount.[62] Rather, they recognise that: (i) setting an appropriate penalty is ultimately a task for the Court; (ii) as no exact science is involved, there would inevitably be a range of penalties which might be "appropriate" in any given case; (iii) provided the agreed amount was "appropriate", the public interest in deterrence and early resolution may make it desirable that the Court impose that agreed penalty, even if it might otherwise have selected a different figure; however (iv) the Court is never bound to do so.[63] It is clear from the many decisions which have followed, that this is the way in which *NW Frozen Foods* and *Mobil Oil* have been consistently (if not universally) understood.

60. *Fifthly*, in relation to the making of declarations[64] and the granting of injunctions,[65] the Court must also be independently satisfied about the appropriateness of the order even if sought by consent (such as whether the Court has jurisdiction to make the orders, whether they lack certainty and whether the public interest demands that the Court should not give its imprimatur to the parties' agreement).[66] The Full Court appeared to accept this (J[222]-[225]) but did not give a principled basis for treating the public perception associated with imposing pecuniary penalties as being so different that this civil remedy (but not others) should be construed as attracting the *Barbaro* limitation.

61. *Finally*, it seems that the Full Court may have over-read what is involved in s 49 authorising the Court to fix an "appropriate" penalty. The Court considered in the passages noted above[67] that to allow the Court to be informed of, and take into account, what one or both parties considered would be "appropriate" would be to introduce a fetter, or a bind, on the Court's discretion which did not appear in the Act and no such implication should be made. However, when one attends to the language of s 49, the reference to "appropriate" does not come in s 49(1)(a) as such, but only in the catch-all provision of s 49(1)(c) ("any other order that the Court considers appropriate"). No doubt, one could read into s 49(1)(a), by implication, a requirement that the amount of the penalty be "appropriate" so as to generally accord with the exercise of judicial power. But equally this would occur under s 49(1)(b) with compensation orders. The point is that "appropriateness" is equally applicable to any and all orders to be made under s 49. Accordingly, logically, "appropriateness" cannot be the textual basis for

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61 See e.g., the references to the "appropriate" penalties which might be available, the "range considered by the Court to be appropriate" and the "appropriate range" in *Mobil Oil* at [48], [51(i)-(ii) and (iv)] and [54] and in *NW Frozen Foods* at 290F-291A, 291G-292A and 298G-299A.

62 *Mobil Oil* at [47]-[48] and [58] and the passages from *NW Frozen Foods* there discussed. See also the answer given in *Mobil Oil* at [81]-[82] to the separate question posed.

63 See *Mobil Oil* at [51].

64 See the limits on the making of declarations by consent as discussed in *ACCC v MSY Technology Pty Ltd* (2012) 201 FCR 378.

65 *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 163-164.

66 PW Young, *The Law of Consent* (Law Book Company, Sydney, 1986) at 182-185.

67 See footnote 60.

preventing the Court being informed what one or both parties consider should be the ultimate quantum of the pecuniary penalty, unless one takes the further step, which the Full Court declined to take, of preventing the parties ever making submissions on the precise and ultimate terms of any and all orders under s 49.

62. In the end, where Parliament gives a civil court the power to make an order which, expressly or by implication, must be "appropriate", that provides no basis for a conclusion that the Court is precluded from receiving submissions from one or both parties, separately or agreed, as to precise terms of the order that the Court should make.

(2) Errors as to the form of submissions prohibited by *Barbaro* (see [44.2] above)

63. The Full Court considered that *Barbaro* required it to treat the parties' submissions as to an appropriate penalty - indeed to treat *all* submissions as to penalty amounts - as being impermissible opinion, relevant only to remorse: J[3], [115], [158], [217], [233], [239]-[243], [246]. In finding such a submission to be precluded by the plurality judgment in *Barbaro*, the Full Court failed to appreciate that there the particular concern was with submissions as to available range (in the sense of the upper and lower bounds of the sentences that could be imposed without appellable error), not the making of prosecution submissions on sentencing disposition more generally. As much can be seen from the following.

64. *First*, the sole issue between the parties, and before this Court in *Barbaro*, was the absence of a submission from the prosecution as to available range. It was this particular practice, arising from *R v MacNeil-Brown* (2008) 20 VR 677, which the plurality squarely rejected and said should no longer be followed.[68] *Secondly*, the judgment consistently and specifically refers to "range", "available range", "bounds of the available range of sentences", "statement of bounds" and the like, rather than submissions as to sentencing outcomes more generally.[69] *Thirdly*, a distinctive vice seen in submissions as to the available range was that they involve trying to predict, before a sentence is passed, whether it will involve appellable error.[70] That vice does not necessarily attend other forms of sentencing submissions. *Fourthly*, a perceived danger of a submission which seeks to delimit in advance what the trial judge may properly do, is that it "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".[71] The same issue does not ordinarily arise with submissions that do not purport to delimit the sentencing discretion. *Fifthly*, such a submission implicitly involves the impermissible, numerical approach to sentencing, by seeking to identify the precise mathematical limits beyond which the Court will err.[72] This difficulty does not attend a properly articulated submission as to the appropriateness of a particular civil penalty amount or range (where the range is not equated to that needed to avoid appellable error).

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68 *Barbaro* at [20]-[23].

69 See the language used by the plurality at [3], [4], [5], [6], [7], [15], [17], [20], [21], [22], [23], [24], [26], [27], [28], [29], [30], [31], [33], [34], [35], [36], [37], [38], [39], [40], [41], [42], [43], [44], [48], [49] and [50].

70 *Barbaro* at [24]-[28], [38]-[39] and [43].

71 *Barbaro* at [33]. As to the separate role of the prosecutor and judge see [29]-[32], [35]-[37] and [47].

72 *Barbaro* at [34]-[35] and [43].

65. This Court has recently reaffirmed that it remains proper for prosecutors in criminal proceedings to make submissions that indicate their views as to the appropriate disposition of a matter and, in particular, if they consider a proposed disposition would be erroneously lenient.[73] This confirms that the plurality's concerns in *Barbaro* were specific to submissions as to the available range understood in the above sense. Likewise, on appeal against a sentence which is considered to be manifestly inadequate or excessive, a party must necessarily contend that a particular sentencing result was, or was not, appropriate. Such a conclusion is, however, materially different from an attempt to specify in advance the "available range".[74] *Barbaro*, properly understood, does not lead to the Full Court's general conclusion that *all* submissions as to penalty amounts, in any context, are an "impermissible expression of an opinion" (J[239]).

66. The Full Court placed heavy reliance on the single reference in the plurality's reasons (at [39]) that it was not a prosecutor's duty "to proffer some statement of the specific result". The Full Court relied upon this as establishing the broader principle which it applied: J[12], [47], [98], [139], [194], [239]-[241]. However, the plurality's reference to a "specific result" must be read in the immediate context of the expression "the bounds within which that result should fall" and in the broader context described above. So read, it, by way of obiter, may place particular limitations on a prosecutor, but has no broader application.

(3) Other errors as to law and evidence (see [44.3] above)

67. The Full Court's reasoning also involved a range of errors in its treatment of evidence and previous authorities. These can be summarised shortly.

68. *Commonwealth's evidence*: The Commonwealth filed evidence explaining why the ability to make such submissions in the civil regulatory context provides a means of resolving enforcement proceedings efficiently, and highlighting concerns held by various regulators as to the regulatory consequences of a reduced capacity to reach such agreement in future cases. The affidavit provided detailed information to inform the Court of the practices and experience of regulators. There was no objection to the affidavit, no cross-examination and no contrary evidence. Despite this, the Full Court was critical of the evidence and departed from it without proper basis.[75]

69. *Use of previous penalties*: The Full Court disagreed with the "not infrequent suggestion, in pecuniary penalty cases, that earlier decisions are of little value" (J[252]). This suggests an erroneous approach for 3 reasons. *First*, those earlier decisions included numerous previous Full Court cases that explained that, in dealing with previous decisions, it was the consistent application of principle, not numerical equivalence, which was important.[76] Those earlier decisions not having been found to be plainly wrong, the Full Court's approach should not lead to a departure from them. Certainly it should not lead to the calculation of penalty predominantly by reference to

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73 *CMB v Attorney-General (NSW)* (2015) 89 ALJR 407 at [63]-[64] and *Barbaro* at [57], affirming the principles in *Everett v The Queen* (1994) 181 CLR 295 and *R v Wilton* (1981) 28 SASR 362.

74 *Barbaro* at [27]-[28].

75 J[147]-[150], [164], [186], [235]-[237], [242].

76 See, for example, *NW Frozen Foods* at 295–296; *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 [12]–[14], [56]–[57], [87]; *Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union* (2008) 171 FCR 357 at [36], [60]; *Singtel Optus Pty Ltd v ACCC* (2012) 287 ALR 249 at [60]; *McDonald v Australian Building and Construction Commissioner* [2011] FCAFC 29 at [23]-[30].

perceived comparisons with amounts in earlier cases. *Secondly*, the Full Court appears to have been concerned that a dearth of reported cases has led to insufficient use of comparison with earlier decisions.[77] The basis of this concern is not clear, given there have been many hundreds of published civil penalty decisions. *Thirdly*, the Full Court appears to contemplate the setting of penalties not only by reference to previous penalties for breaches of the relevant provisions, but "the development of sentencing information" which draws upon "other pecuniary penalty regimes or the criminal law".[78] Such an approach should not be encouraged, as it runs obvious and serious risks of confounding different regimes and Parliamentary choices as to what conduct is wrong, what forms of sanction are appropriate and what maximum penalties or sanctions should apply.

70. *Other decisions not followed*: Finally, the Full Court departed from a range of decisions that were either established at Full Court level or consistently considered and applied decisions of single judges. In doing so, it departed from an established and consistent body of law built up over a considerable period of time. In relation to intermediate appellate decisions it did so without finding them to be plainly wrong. These include:

70.1. *cases as to reception of agreed penalty submissions:* The Full Court departed from *Mobil Oil* and *NW Frozen Foods*. While stating that it did so only because of its conclusions as to the application of *Barbaro* (J[243]), it elsewhere, and somewhat inconsistently, made substantial free-standing criticisms of those authorities and the practices which they have long supported: see J[22]-[23], [27]-[30], [31]-[37], [48]-[63], [113], [126], [137], [203], [210]-[211], [240]. These criticisms are not well founded and are based upon the Full Court's misunderstanding of those authorities and practices;

70.2. *cases as to the effect of Barbaro:* The Full Court departed from, and was dismissive of, a significant body of authority to the effect that *Barbaro* did not apply to civil pecuniary penalty proceedings. These included carefully reasoned authority of single judges and a majority of the Victorian Court of Appeal in *Matthews v R* [2014] VSCA 291: see J[99]-[142]. For the reasons explained in these submissions and in those cases, they were correctly decided;

70.3. *cases as to the primacy of deterrence:* The Full Court indicated its disagreement with a generally (though not universally) accepted understanding that pecuniary penalties are intended principally, but not exclusively, to secure the objective of deterrence: J[64]-[75]. While the Full Court's reasoning is not clear, it appears to have in mind that pecuniary penalties under the Act operate, like a statutory portmanteau, to blend and represent the various objectives of criminal sentencing. For example, it considers it to be "entirely orthodox" to view pecuniary penalties as being intended to secure rehabilitation: J[68]-[69]. However, the mere payment of a monetary sum could not sensibly "rehabilitate" a contravener, even in the unlikely event that the breach in question had resulted from some moral, personal or social flaw capable of being rehabilitated. In taking this approach, the Full Court appears to have departed from well-reasoned authority in *TPC v CSR Ltd* that has been long accepted across a range of civil penalty regimes including at

[77] See J[252].

[78] See J[198].

High Court and Full Court level.[79] Those authorities are correct. In particular, they properly reflect that, in civil regulatory proceedings such as those under the Act, the different regulatory purposes are to be principally secured through the various other forms of regulatory relief for which Parliament has provided; and

70.4. *cases as to the imposition of penalties for courses of conduct*: The Full Court has indicated a provisional view that a single penalty amount could not be imposed for multiple contraventions which are considered to comprise a course of conduct: J[38]-[46]. As this is still subject to final decision, it is enough for present purposes to note that, under the Act as under many other regimes, there is no statutory requirement that a single, separate penalty be imposed for each legally distinct contravention found. Accordingly, it is both permissible and conventional for courts to take this approach to civil penalty breaches that form a course of conduct.[80]

PART VII LEGISLATIVE PROVISIONS

71. The relevant provisions of the Act are set out in full in Annexure B to these submissions.

PART VIII ORDERS SOUGHT

72. The appellant seeks the following orders:

72.1. The appeal be allowed.

72.2. The orders made by the Full Court on 1 May 2015 be set aside.

72.3. The proceedings be remitted to the Federal Court to be further heard by a single Judge in accordance with the decision of this Court.

72.4. Such further or other order as the Court deems appropriate.

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[79] See for example *Minister for Sustainability, Environment, Water, Population and Communities v Woodley* [2012] FCA 957 at [47]-[50], dealing with the imposition of pecuniary penalties under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth); *Clean Energy Regulator v MT Solar Pty Ltd* [2013] FCA 205 (***CER v MT Solar***) at [70], dealing with the imposition of pecuniary penalties under the *Renewable Energy (Electricity) Act 2000* (Cth); *Secretary, Department of Health and Ageing v Export Corporation (Australia) Pty Ltd* (2012) 288 ALR 702 at [66], dealing with the imposition of pecuniary penalties under the *Therapeutic Goods Act 1989* (Cth); *Matcham (No 2)* at [225]-[230], dealing with the imposition of pecuniary penalties under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*; *ACMA v Clarity1 Pty Ltd* (2006) 155 FCR 377 at [41], dealing with the imposition of pecuniary penalties under the *Spam Act 2003* (Cth); *Tax Practitioners Board v HP Kolya Pty Ltd* [2015] FCA 472 at [22], [71], dealing with the imposition of pecuniary penalties under the *Tax Agents Services Act 2009* (Cth); *Post Logistics* at [73]-[75], dealing with the imposition of pecuniary penalties under the *Occupational Health and Safety Act 1991* (Cth); *ASIC v Adler* (2002) 42 ACSR 80 at [125], dealing with the imposition of pecuniary penalties under the *Corporations Act 2001* (Cth). See in particular the following cases in the industrial law context: *Stuart v CFMEU* (2010) 185 FCR 308 at [57] and *Alfred v CFMEU* [2011] FCA 556 at [89]-[91] (both dealing with the imposition of pecuniary penalties under the BCII Act); *Finance Sector Union v Commonwealth Bank of Australia* (2005) 224 ALR 467 at [41]-[44], [60], [72]; *McIlwain v Ramsey Food Packaging Pty Ltd (No 4)* (2006) 158 IR 181 at [94]-[95], [108]; *Hadgkiss v Aldin* (2007) 164 FCR 394 at [63]-[65]; *DP World Sydney Pty Ltd v Maritime Union of Australia (No 2)* (2014) 318 ALR 22 at [18], [32]; *Standen v Feehan (No 2)* (2008) 177 IR 276 at [16].

[80] See, for example, *NW Frozen Foods* at 295–296; *Singtel Optus Pty Ltd v ACCC* (2012) 287 ALR 249 at [71]; *ACCC v TPG Internet* at [60]–[61], [70] (restoring the primary judge's orders). The correct approach to multiple contraventions is explained in *CER v MT Solar* at [75]–[89] and *Matcham (No 2)* at [195]–[201].

PART IX ESTIMATED HOURS

73. It is estimated that 2 hours will be required for the presentation of the oral argument of the appellant.

Dated: 22 July 2015

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