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

REPLY OF THE APPELLANT

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FORM OF SUBMISSIONS

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

ISSUES

A *NW FROZEN FOODS* AND *MOBIL OIL*

2. The Full Court below did not merely hold that submissions on the range or quantum of a pecuniary penalty were unhelpful to a court (see at [115], [127], [180], [241]); it also held that such submissions "could not properly be advanced" (at [242]; see also at [115], [191], [239]-[241]). Indeed, this is the key import of the decision. As such, the written submissions of the amici curiae (**ACS**) start at the wrong end. Instead of explaining why the statute at hand (or any like civil penalty statute) on its proper construction precludes the parties from putting contentions (whether agreed or opposing) as to the specific relief by way of penalty that the Court should grant, ACS start with a tendentious reading of *NW Frozen Foods* and *Mobil Oil* followed by an attack on those decisions.

3. Nevertheless, responding in the order of ACS, the amici's attack on those two cases proceeds from the incorrect premises that: (a) there is a single, correct penalty that is appropriate in civil penalty matters; and (b) agreed submissions as to penalty fetter the Court's discretion and divert it from the proper determination of a penalty.

(1) An appropriate penalty

4. ACS [8], in speaking of "*the* appropriate penalty in each particular case", mistakenly posits one single, correct answer to the question of penalty (see also [12]).[1] There is no single, appropriate penalty in civil penalty matters. Fixing a penalty is not an exact science. The Full Court in *NW Frozen Foods* speaks, in the passage extracted at ACS [8], of "an appropriate amount". Burchett and Kiefel JJ at 291 (Carr J concurring) cite Burchett J in *TPC v TNT* [1995] ATPR 40,161 at 40,165:

> it cannot be denied that the fixing of the quantum of a penalty is not an exact science. It is not done by the application of a formula, and, within a certain range, courts have always recognized that one precise figure cannot be incontestably said to be preferable to another.

5. ACS [12] develops this error. It suggests that only a single figure that the court would have been disposed to select attracts "the proper exercise of its discretionary judgment." This begs the question. The references in ACS [22] to "the exercise of its discretion in accordance with the function given to it by the statute" and in [23] to "the legislative choice to repose in the Court and the Court alone the task of fixing an appropriate penalty", similarly beg the question. The correct question asks: is there anything in the statute which would make it an improper exercise of judicial discretion to consider (and accept, reject or modify) a penalty advanced in agreed submissions, tendered by opposing parties in a civil penalty proceeding? This much is reflected in *NW Frozen Foods*, where the Court concluded, at 298-299:

> ...it is not actually useful to investigate whether, unaided by the agreement of the parties, we would have arrived at the very figure they propose. The question is not

[1] Emphasis added. Cf ACS [16], which correctly acknowledges that sentencing is not a mathematical exercise and thus cannot yield a single correct answer.

that; it is simply whether, in the performance of the Court's duty under s 76, this particular penalty, proposed with the consent of the corporation involved and of the Commission, is one that the Court should determine to be appropriate. In our opinion, it is appropriate.[2]

(2) The relationship between agreed penalty submissions and fetter

6. ACS [10]-[11] misstate the extent of the qualification in *Mobil Oil* to the question there referred. Two significant qualifications were applied to the question asked in *Mobil Oil*, each founded on the recognition, reflected in *NW Frozen Foods*, that the burden of assessing penalty rests upon the Court.

7. The *first Mobil Oil* qualification is that the Court may commence with its own assessment of appropriate range, rather than the figure proposed by the parties: at [69].

8. The *second Mobil Oil* qualification is that the Court is not bound to consider the proposed penalty only on the basis of information provided by the parties. As to this, *Mobil Oil* states, at [70]:

> The Court must form its own view about the appropriate range of penalties, on the basis of the agreed facts or evidence. If the Court considers that the information supplied by the parties is inadequate, or requires elaboration or verification, it is free to request more detailed information or to ask that the information, or any aspect of it, be verified on oath or affirmation. In the unlikely event of the parties being unwilling to respond to the Court's request, the Court might well take the view that it is not prepared to act on the agreed material in the manner sought by the parties.

9. If the Court is not satisfied as to the information before it, "there are steps it can take to ensure that it is more fully informed" (*Mobil Oil*, [72]). The Court can invite, and regularly has invited, the parties to provide further information.[3]

10. ACS [9] and [23] adopt an observation made by the present Full Court (at [22], AB 106). As put at [23], it is that, "one cannot have both a proper and independent exercise of discretion by the Court and any degree of certainty for the contravener."

11. That is not so. One significant risk that is eliminated is that the applicant will advance a different and higher penalty sum. More fundamentally, the criticism does not accommodate the earlier Full Court's reference to "proper settlements" and a "proper figure" (*NW Frozen Foods* at 290-292). That language indicates that the court will only countenance figures that it considers appropriate in all the circumstances. This places constraints upon the parties to advance a figure reached in a principled manner, by reference to admissible evidence or agreed facts, and authority. Advancing a penalty

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2 This passage is the source of the "sixth principle" referred to in *Mobil Oil*, extracted at ACS [11]-[12]. It is a proper principle that does not derogate from the Court's role.

3 This process is not always reflected in the Court's reasons. It occurred, *inter alia*, in: *ACCC v Roche Vitamins Australia Pty Ltd* [2001] ATPR 41-809, (Lindgren J sought further material from the parties as to benefit and market harm); *ACCC v Admiral Mechanical Services Pty Ltd* [2007] ATPR 42-174 (Nicholson J); *ACCC v FChem (Aust) Limited* [2008] FCA 344 (Cowdroy J); *ACCC v Qantas Airways Limited* (2008) 253 ALR 89 (Lindgren J sought further submissions from the parties, before making the penalties jointly proposed); *Minister for Environment Heritage and the Arts v Lamattina* (2009) 258 ALR 107; *ACMA v Radio 2UE Sydney Pty Ltd* [2009] FCA 214 (in which the Court sought further material from the parties, as well as the assistance of a contradictor / intervenor); *ACCC v Apple Pty Ltd* [2012] ATPR 42-404 (Bromberg J); *ACCC v Avitalb Pty Ltd* [2014] FCA 222 (Griffiths J sought further information from the parties as to the circumstances under which the respondents had cooperated in resolving the proceedings); *ACCC v Origin Energy Electricity Ltd* [2015] FCA 278.

that is too high, or too low, having regard to all of the relevant factors, would not provide any certainty. It would give rise to a real prospect that the Court would not accept that the penalty was appropriate. It would not, in the language of ACS [25], be "efficacious".

12. In accordance with the principles set out in *NW Frozen Foods* and *Mobil Oil*, the Court is not obliged to impose a penalty jointly submitted to it by the parties, if it does not consider the amount appropriate. Courts can and do reject agreed penalties.[4] Contrary to ACS [13], [17], [22], [23], [26], [32] and [34], advancing such penalties does not fetter a court, and having regard to such proposed penalties does not amount to exercise by a court at first instance of a "quasi-appellate or review function" (at [17]).

13. ACS [29]-[37] make various assertions about the manner in which agreed penalties are negotiated and concluded; including a suggestion that they are often a consequence of bargaining or compromise, by which seems to be suggested some "trade-offs" as to the true legal position (cf ACS [29]-[31]). A generalised assertion to that effect lacks any factual foundation in this matter. Indeed, in *Mobil Oil*, the Full Court observed of *NW Frozen Foods* that: "There was no suggestion that the admissions or statement had been tailored or modified to reflect the difficulties faced by the ACCC in proving its case."([55])[5] Moreover, it is not to the point to seek to identify infirmities in the penalty agreed *in this particular case*: ACS [31]. If the present proposed penalty has not been reached in a principled and reasoned manner, the Court is entitled to reject it. If it has been reached in such a manner, it will be more amenable to being accepted.

14. It is unsafe to assert that the fact that many agreed penalties are imposed in the amounts sought by the parties indicates that the Court is affected by some fetter or imperfectly performs its role: ACS [23],[25].[6] It would more likely reflect the seriousness with which Commonwealth regulators generally approach the issue of appropriate penalties and the proper scrutiny which courts place on submissions made before them.

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4 By way of example: *ACCC v Tyco Australia Pty Ltd* [2000] ATPR 41-740, (the Court doubled the proposed penalty in respect of one individual respondent, and halved the proposed penalty for another); *ACCC v FFE Building Services Limited* [2003] ATPR 41-969 (in a matter preceding *Mobil Oil*, the parties jointly sought penalties in the range of $1,000,000 to $1,500,000 for the corporate respondent and $5000 to $10,000 for an individual respondent. Wilcox J regarded the proposed amounts as too low to be appropriate, and imposed penalties in the sum of $3,500,000 and $50,000 respectively); *ACCC v Midland Brick Co Pty Ltd* (2004) 207 ALR 329 (Lee J considered a proposed penalty of $50,000 for an individual respondent was too high, and imposed a penalty of $25,000 instead); *ACCC v Australian Safeway Stores Pty Limited (No 4)* (2006) ATPR 42-101 (A penalty of $30,000 jointly proposed in relation to an individual was increased to $50,000); *ACCC v Australian Abalone Pty Ltd* [2007] ATPR 42-199 (proposed penalties in respect of two individual respondents were halved by the Court); *ACCC v Admiral Mechanical Services Pty Ltd* [2007] ATPR 42-174 (involving multiple respondents, the Court accepted various joint submissions of the parties as to penalty, but reduced one jointly proposed penalty amount from $1,750,000 to $1.5 million); *Secretary, Department of Health & Ageing v Pagasa Australia Pty Ltd* [2008] FCA 1545 (the Court indicated, in the course of hearing, reservations as to a proposed penalty of $100,000. Following an adjournment the parties instead proposed a penalty of $130,000, which was accepted by the Court as appropriate); *Minister for Environment Heritage and the Arts v Lamattina* (2009) 258 ALR 107 (the Court, having invited further submissions from the parties, imposed a penalty of $220,000, rather than $110,000 as jointly proposed); *ACMA v Radio 2UE Sydney Pty Ltd* (2009) 178 FCR 199 (penalties of $130,000, jointly proposed by the parties, were rejected by the Court, with the assistance of an intervener, and penalties of $360,000 imposed); *ASIC v GE Capital Finance Australia* [2014] FCA 701 (the Court imposed penalties of $1.5 million rather than $1 million as jointly proposed by the parties); *BHP Billiton Minerals Pty Ltd v Maritime Union of Australia* [2014] FCA 1357 (penalties at the maximum available of $33,000 and $6,600, jointly proposed by the (private) parties were rejected by the Court, and penalties of $25,000 and $5,000 imposed).

5 Developed in *ACCC v Qantas Airways Ltd* (2008) 253 ALR 89 at 107-108 [25]-[27]; *ACCC v PRK Corporation Pty Ltd* [2009] ATPR 42-295 at [20]- [24]); *ACMA v Radio 2UE Sydney Pty Ltd* (2009) 178 FCR 199 at [54].

6 Likewise, the characterization in ACS [25], of what the Commonwealth's evidence "indicates" ought not be accepted.

15. The Commonwealth 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.[7] It must act with complete propriety, fairly and in accordance with the highest professional standards.[8] A regulator has an ongoing responsibility to, and relationship with, the Court. Presenting inadequate material may have consequences beyond the immediate proceedings. The Court has no reason to doubt that Commonwealth regulators do not subordinate their overriding role and duties to the Court to the exigencies of any particular proceeding.[9] Cognate obligations (although not "model") are imposed upon all applicants and respondents making such submissions before a Court: e.g., s 37N(1) and (2) *Federal Court of Australia Act 1976* (Cth); s 56(4)(a) *Civil Procedure Act 2005* (NSW); ss 7-31 *Civil Procedure Act 2010* (Vic).

16. Notably, each of the criticisms of agreements as to penalties made at ACS [29]-[37] can be applied *mutatis mutandis* to agreed facts; the importance of which is recognised at ACS [37]. ACS [32] suggests that, "an agreed penalty may tell the Court very little". By parity of reasoning, an agreed fact may allow the court to rely upon a matter that a party might otherwise have tested and disproved at trial. However, just as with agreed penalty submissions, in respect of agreed facts, the Court is entitled to assume that parties before it – and especially a regulator – are advancing agreed facts on a principled basis. The fact of agreement, in either case, is not of itself a negative.

17. The larger point underpinning ACS [29]-[37], and much of the present Full Court's judgment, is that submissions on the range or quantum of a pecuniary penalty divert the court from its proper function because they are irrelevant. However, far from fettering or skewing the court's performance of its role, a proposed penalty supported by persuasive reasoning on why such a result would be a correct application of law to fact can assist the court. It is no different from, and no less helpful than, a well-reasoned submission on, say, appropriate exemplary damages in a negligence case, or vindicatory damages in a defamation case.

B THE PROPER CONSTRUCTION OF S 49 OF THE BCII ACT

18. In construing s 49 of the BCII Act, the meaning of a provision cannot vary depending upon the party seeking relief pursuant to the provision.[10] The construction must accommodate the fact that a regulator or private party may seek relief under the provision. Analysis cannot be confined solely to examination of the circumstances of the "regulator" and alleged similarities in role to a prosecutor: cf ACS [17].

19. ACS [39] is a curious submission of statutory construction. It appears to accept the Commonwealth's submission that one cannot find an intention in the BCII Act to pick up from the criminal law a *Barbaro*-type limitation on the parties and the Court. Yet it argues one cannot find the reverse intention. The result seems to be the statute is construed as if it is agnostic and the common law fills the vacuum by prohibiting the

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7 Legal Services Directions 2005 at [4.2], and Appendix B, [2(d) and (e)]

8 *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* (2012) 203 FCR 166 at [42] (North, Logan and Robertson JJ); *ASIC v Hellicar* (2012) 247 CLR 347 at [240] (Heydon J).

9 As the Full Court observed in *Mobil Oil*, at [57]: The Court "is entitled to expect the regulator to explain the basis on which a discount from the otherwise appropriate penalty has been calculated having regard to the contravenor's co-operation and, for that matter, other relevant factors."

10 *ACMA v Today FM (Sydney) Pty Ltd* (2015) 317 ALR 279, at [43] (French CJ, Hayne, Kiefel, Bell, and Keane JJ)

parties and the Court from doing that which would be conventional in every other respect of a civil case.

C THE APPLICATION AND EXTENSION OF *BARBARO*

20. The notion of "permissible range" or "appropriate range" in *NW Frozen Foods*, *Mobil Oil*, and the numerous decisions involving agreed penalties, is not that of "available range" within *Barbaro:* cf ACS [15]-[19], [22].

21. *Barbaro* was concerned with attempting to predict in advance the upper and lower limits of sentencing which would be manifestly excessive or manifestly inadequate, so as to indicate appellable error. The "range" referred to in the civil penalty cases is quite different: recognising that an appropriate penalty is not confined to a single figure, it refers to the range of penalty that the Court itself, in determining penalty, would consider appropriate. The Court must in the end select a single figure, of course, but in the steady realisation it could never be the only figure. In selecting that figure it gives as much weight as is appropriate in the case to the figures (or ranges) offered by the parties – whether jointly or by way of contest. Accordingly, the question for the Court in assessing an agreed penalty is whether the Court considers it to be an appropriate penalty – that is, within the range of penalties the Court would consider to be appropriate in all the circumstances. That responsibility rests with the Court.

22. Contrary to ACS [41], the reference to "criminal sentencing principles" in *O'Brien v ASIC* is to analogous sentencing principles, not processes. And so Tobias JA at [47] said this:

> The gravamen of the judgments in *Rich*, including that of McHugh J, was to establish that civil penalty proceedings are punitive as well as protective. The fact that they are punitive leads to the conclusion that, amongst other factors, sentencing principles are to be taken into account as relevant criteria governing the exercise of the court's powers of disqualification under the Act. However, that is not to equate civil penalty proceedings with criminal proceedings. Such a submission was rejected by this Court in *Adler v ASIC* [2003] NSWCA 131; (2003) 46 ACSR 504 at 647 [678] where Giles JA, with the agreement of Mason P and Beazley JA, made it clear that civil penalty proceedings are not criminal proceedings.

23. The Commonwealth agrees with ACS [54], and submits that [58] of the Unions' submissions ought be rejected. While the application filed in a proceeding may – subject to amendment and where no order is sought for such further orders as the court considers fit – delimit the kinds of relief sought, it does not delimit the content or quantum of that relief. Hence a court confronting certain deficiencies of evidence may be required to do the best it can to assess damages.[11]

Dated: 26 August 2015

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

[11] *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* (2003) 196 ALR 257; *Troulis v Vamvoukakis* [1998] NSWCA 237.