

**COMMONWEALTH OF AUSTRALIA v DIRECTOR,  
FAIR WORK BUILDING INSPECTORATE & ORS  
(B36/2015)**

**CONSTRUCTION, FORESTRY, MINING AND ENERGY  
UNION & ANOR v DIRECTOR, FAIR WORK BUILDING  
INSPECTORATE & ANOR (B45/2015)**

Court appealed from: Full Court of the Federal Court of Australia  
[2015] FCAFC 59

Date of judgment: 1 May 2015

Special leave granted: 18 June 2015 and 6 August 2015

In civil proceedings before the Federal Court (where that Court's original jurisdiction was exercised by a Full Court), the Director, Fair Work Building Industry Inspectorate ("the Director") alleged that the Construction, Forestry, Mining and Energy Union, along with the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia ("the Unions") contravened the *Building and Construction Industry Improvement Act 2005* (Cth) ("the BCII Act"). The Director then sought pecuniary penalties and associated declaratory relief against the Unions. The Commonwealth of Australia ("the Commonwealth") intervened in those proceedings and was heard in relation to an issue arising from the decision of this Court in *Barbaro v The Queen* [2014] HCA 2 ("Barbaro"). The Director and the Unions both supported the Commonwealth's submissions. Counsel however was briefed (by the Commonwealth) to appear before the Full Federal Court as a contradictor.

The primary issue before the Full Federal Court was a practice which has become commonplace in proceedings for the imposition of *civil* pecuniary penalties. In such cases, submissions are frequently made by the parties, often jointly, nominating the actual figure to be adopted, or the range within which it should fall. In *Barbaro* however the majority of this Court (French CJ, Hayne, Kiefel and Bell JJ) held, that in *criminal* sentencing proceedings, the prosecution should not nominate the specific sentencing result, or the range within which it should fall.

Before the Full Federal Court in this case, the parties agreed upon the penalties which they considered to be appropriate. On 1 May 2015 however their Honours (Dowsett, Greenwood and Wigney JJ) unanimously concluded that the reasoning in *Barbaro* should also apply to this, a civil case. They held therefore that they should have no regard to the parties' agreed figures (concerning penalties), other than to the extent that that agreement demonstrates a degree of remorse and/or cooperation on the part of each of the Unions.

In matter number B36/2015 (the Commonwealth's appeal) the Chief Justice has granted Mr Cameron Moore SC and Ms Danielle Tucker leave to appear as *amicus curiae* at the hearing of the appeal.

In matter number B36/2015 (the Commonwealth's appeal) the grounds of appeal include:

- The Full Federal Court erred in ruling that the decision in *Barbaro* applies to civil pecuniary penalty proceedings under the BCII Act, so as to constrain the making and consideration of submissions as to appropriate penalty amounts, including on an agreed basis.

In matter number B45/2015 (the Unions' appeal) the grounds of appeal are:

- The Full Federal Court erred in:
  - a) Holding that evidence and submissions by the parties to the proceedings as to the agreed penalty, and as to the appropriate penalty, were inadmissible and the Court should have no regard to them, save to the extent that the agreement demonstrated a degree of remorse and/or cooperation by each of the Unions.
  - b) Declining to grant the orders jointly sought by the parties to the proceedings.