



HIGH COURT OF AUSTRALIA

9 December 2015

COMMONWEALTH OF AUSTRALIA v DIRECTOR, FAIR WORK BUILDING INDUSTRY
INSPECTORATE & ORS
CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION & ANOR v
DIRECTOR, FAIR WORK BUILDING INDUSTRY INSPECTORATE & ANOR

[2015] HCA 46

Today the High Court unanimously held that, in civil penalty proceedings, courts are not precluded from considering and, if appropriate, imposing penalties that are agreed between the parties. The Court therefore allowed two appeals from a decision of the Full Court of the Federal Court of Australia ("the Full Court").

The Director of the Fair Work Building Industry Inspectorate ("the Director") commenced a proceeding in the Federal Court of Australia against the Construction, Forestry, Mining and Energy Union ("the CFMEU") and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia ("the CEPU") (together, "the Unions"). The Director alleged that the Unions had contravened s 38 of the *Building and Construction Industry Improvement Act 2005* (Cth), a civil penalty provision which prohibited unlawful industrial action. The Unions admitted the contraventions and, in accordance with longstanding practice in civil penalty proceedings, agreed with the Director to seek from the Court declarations as to the contraventions and pecuniary penalties of \$105,000 against the CFMEU and \$45,000 against the CEPU.

At a pre-trial directions hearing, the primary judge raised a concern about whether the decision of the High Court in *Barbaro v The Queen* (2014) 253 CLR 58 applied to the proceedings. In *Barbaro*, a plurality of the High Court held that criminal prosecutors are not permitted to make a submission to a sentencing judge nominating a quantified range of sentences that the prosecution considers to be open. The proceeding was referred to the Full Court. The Commonwealth was granted leave to intervene.

The Full Court held that the principle in *Barbaro* applies to civil penalty proceedings, with the result that it was impermissible for parties to make joint submissions to a court seeking the imposition of an agreed penalty. The Full Court adjourned the proceeding for further hearing.

By grants of special leave, the Commonwealth and the Unions each appealed to the High Court. The Court unanimously held that the principle in *Barbaro* does not apply to civil penalty proceedings. The task of a court is to determine whether, in all the circumstances, the agreed penalty is an appropriate penalty. The court is not bound to accept the agreed penalty if it does not consider it appropriate. The High Court set aside the Full Court's adjournment order and remitted the proceedings to the Federal Court.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*