IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B36/2015

BETWEEN: **COMMONWEALTH OF AUSTRALIA**
Appellant

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

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION
Second Respondent

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

SUBMISSIONS OF THE SECOND AND THIRD RESPONDENTS

Annotated

File by the Second and Third Respondents
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PART I: PUBLICATION

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

PART II: ISSUES

2. As the Commonwealth submits (AS [2]), the issue that arises on the appeal is whether the Full Federal Court erred in ruling that the decision in *Barbaro v The Queen* (2014) 253 CLR 58 (***Barbaro***) applies to civil pecuniary penalty proceedings under the *Building and Construction Industry Improvement Act 2004* (Cth) (**BCII Act**) so as to constrain the making and consideration of submissions as to appropriate penalty amounts, including on an agreed basis (including in circumstances where, as here, the Originating Application only sought penalties in a specified sum).

3. The Full Court's approach raises these questions:

   i. Can either party make submissions as to the appropriate pecuniary penalty?

   ii. If so, can the parties make joint submissions on this issue?

   iii. If so, can and should the court adopt the approach approved 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***) where the parties have agreed and jointly seek particular penalties? That approach was as follows: "Because the fixing of the quantum of a penalty cannot be an exact science, the Court, in such a case, does not ask whether it would without the aid of the parties have arrived at the precise figure they have proposed, but rather whether their proposal can be accepted as fixing an appropriate amount" (*Mobil Oil* at 290-1 per Burchett and Kiefel JJ).

4. The Second and Third Respondents (**the Two Unions**) submit that the answer to each of these questions is "yes".

5. The Unions support the orders sought by the Commonwealth in this appeal. The Two Unions are also the appellants in matter No. B23 of 2015 listed to be heard at the same time as this appeal. Separate submissions will be filed in that matter.

PART III: SECTION 78B NOTICE

6. The Two Unions certify that they have considered whether a notice should be given under s.78B of the *Judiciary Act 1903* (Cth) and consider that no notice needs to be given.

PART IV: FACTS

7. The Two Unions adopt the statement of facts in Part V of the submissions of the Commonwealth, and make the following additional point.

8. The Originating Application before the Federal Court (AB 2-4) was for specific relief, namely declarations that each of the Two Unions had breached s.38 of the Act, and for monetary penalties to be imposed on each of them. The Originating Application indicated that the First Respondent (**the Director**) sought specific, identified monetary sums. The Director did not seek monetary penalties generally. Nor did he seek "such further or other order as the Court thinks fit", or such like.

PART V: LEGISLATIVE PROVISIONS

9. The Two Unions accept the Commonwealth's statement of applicable legislative provisions.

PART VI: ARGUMENT

10. The Two Unions refer to and adopt the arguments in Part VI of the Commonwealth's submissions, and make the following additional submissions.

The effect of the Full Court's decision

11. The Full Court's judgment involves the following conclusions:

(a) Agreements and submissions as to penalty or range of penalties are "matters of opinion": [211], AB 174.

(b) Submissions as to "the appropriate outcome or range within which such outcome should fall", by any party, are to be excluded: [115], AB 141.

(c) An agreed penalty is, "at best, a shared opinion as to the effect of previous, more or less comparable penalties, having regard to the circumstances of the case in hand": [139] AB 147, see also [158] AB 154, [231] AB 181. As such, the agreed penalty is irrelevant, and the Court should "have no regard to the agreed figures in fixing

the amounts of the penalties to be imposed, other than to the extent that the agreement demonstrates a degree of remorse and/or cooperation on the part of each respondent": quote from [3] AB 93, see also [115] AB 141, [241] AB 185.

(d) The Court appears to suggest at [193] AB 167 and [231] AB 181 that *neither party* may make submissions as to the appropriate penalty amount, because for either to do so is merely to "advance opinions".

(e) The Court rejected application of the approach approved in *NW Frozen Foods* and *Mobil*: at [242]-[243] AB 185. It is for the court to make that judgment, alone, unaided by submissions, and without regard to the fact of any agreement: [2]-[3] AB 93, [239]-[243] AB 184.

(f) In answer to a submission that imposing civil penalties was equivalent to the awarding of exemplary damages, the Court at [219] AB 178:

i. Indicated that it considered the *Barbaro* principle might also apply to such awards: "Of course, it may be that any such submission is also nothing more than an opinion. It is difficult to see how it could be anything else. Perhaps such a submission should not be made".

ii. In any event, distinguished such awards on the basis that they "are infrequent and are generally adjuncts to compensatory claims".

12. The Full Court's decision was not reached on constitutional grounds as to the nature of the judicial power. Nor did it have any particular foundation in the BCII Act, the *Federal Court of Australia Act 1976*, or the rules of the Court. Rather, it was based upon adoption of this Court's general law reasoning in *Barbaro*, addressed to an argument based upon procedural fairness. The issue is whether that reasoning and conclusion was correctly understood and applied by the Full Court, with the consequences outlined by the Full Court for penalty proceedings under the BCII Act created so as to be brought in an appropriate court (see ss.48(1), 49, 75, 75A and 75B), applying civil procedures.

Parliament's choice of civil practice and procedure

13. In the BCII Act the Parliament has distinguished what norms create offences (eg ss.52(6) and 65) and what create civil penalties. The norm at issue here, s.38, is a civil penalty provision. Section 51 restricts use of evidence given by an individual in civil penalty

proceedings against them in any subsequent criminal proceedings addressed to substantially the same conduct.

14. A key step in the Full Court's analysis was to reject arguments that the civil character of proceedings for a penalty under the BCII Act distinguished them from criminal proceedings, and in particular distinguished them from the reasoning of this Court in *Barbaro*: see eg at [11]-[14] AB 97. The Full Court said the following at [233] AB 182:

> We do not accept that criminal procedure is, in principle, necessarily different from civil procedure. Both are conducted as adversarial proceedings in the long tradition of the common law. Both are generally conducted by counsel who have, with some qualifications, the same roles in both kinds of proceedings. Both are conducted according to largely similar rules of procedure and evidence. The demise of the jury in most civil cases has led to apparent differences between civil and criminal trials, as has the tradition of oral pleading in criminal cases. This is not the occasion for a detailed examination of the history of civil and criminal proceedings in the Court of Queen's Bench and in Australian courts. For present purposes, we see no basis for treating any identified procedural differences as a basis for declining to apply the reasoning in *Barbaro*. The similarities between the sentencing process and that for imposing a pecuniary penalty are obvious and compelling.

15. The Court overstates the similarities, and does not take sufficient account of the differences.

16. No doubt there may be, in some respects, no bright line between criminal and civil proceedings: *CEO of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 at [114]. That does not mean that no distinction may be drawn between the two types of proceedings. The law draws such distinctions in a range of ways, including the following.

17. First, a fundamental, if not necessarily unique, feature of criminal proceedings is that a determination of guilt may lead to a *conviction*: note discussion in *Labrador Liquor* at [134]-[138]; *Elliott v The Queen* (2007) 234 CLR 38 at [5]. Such a conviction reflects the denunciatory and retributive character of criminal proceedings. A conviction brings with it a range of other legal and social consequences.

18. Secondly, no doubt reflecting that fact, at the federal level trials on indictment are required to proceed by jury: s.80, Constitution.

19. Thirdly, a different standard of proof generally applies.

20. Fourthly, beyond this, different procedures apply: see for example *Lee v The Queen* (2014) 88 ALJR 656 at [32]-[33]; *CFMEU v Boral Resources (Vic) Pty Ltd* (2015) 320 ALR 448 at [42]-[45]. Different rules of evidence may apply: note *ACMA v Today FM (Sydney) Pty*

Ltd (2015) 89 ALJR 382 at [49]. These procedures and rules themselves may reflect substantive principles of law. Thus in civil proceedings, in general, both sides will be required to exchange some formal articulation of their case, and the evidence (or at least an outline of the evidence) on which they tend to rely. No such requirements are applied, in general, to defendants in criminal proceedings.

21. Fifthly, the maintenance of a prosecution against a defendant is in substance an exercise of public power by the state: note *CFMEU v Boral* at [42], [44] and [68]. Typically the prosecuting authorities have the benefit of evidence gathered by compulsory processes of search and seizure: ibid at [44].

22. It is true, of course, that private prosecutions may be brought. But even those prosecutions can be seen as in substance an exercise of public power, insofar as they may be taken over, and potentially ended, by the state. The Attorney General of the Commonwealth may, pursuant to s.71 of the *Judiciary Act,* "decline to proceed further in the prosecution of an indictable offence against the laws of the Commonwealth". Section 71 is a statutory expression of the prerogative power of the Attorney General to decline to proceed further in an indictable prosecution: see *Clyne v Evans* (1984) 2 FCR 515 at 519-524; see also eg *Barton v The Queen* (1980) 147 CLR 75 at 89-94. Similarly, by s.9(5) of the *Director of Public Prosecutions Act 1983* (Cth) the Director is empowered to take over a private prosecution in respect of both indictable and summary offences. There are analogue provisions in State and Territory legislation: *Director of Public Prosecutions Act 1980* (ACT) s.81; *Director of Public Prosecutions Act 1986* (NSW) s.91; *Director of Public Prosecutions Act 1984* (Qld) s.10(1); *Director of Public Prosecutions Act 1973* (Tas) s.12(1); *Public Prosecutions Act 1994* (Vic) s22(1)(b); *Director of Public Prosecutions Act 1991* (WA) s.11(1).

23. This characteristic of prosecutions – that they are an action of, or subject to the control of, the state – is a stark distinguishing feature from proceedings for relief, including for civil penalties, under the BCII Act. Neither the Commonwealth DPP nor the Attorney-General has any particular standing to bring proceedings under the Act. Nor do they have power to take over –and continue or end – such proceedings. They are proceedings which exist independently of the will of the government of the day.

24. Sixthly, particular, demanding standards of conduct apply to prosecutors with respect to their conduct of criminal proceedings, for example in relation to the disclosure and calling

of evidence and the manner in which submissions are made. This demanding of such standards reflects the fact that "[o]ur system of criminal justice reflects a balance struck between the power of the State to prosecute and the position of an individual who stands accused": *Lee v The Queen* (2014) 88 ALJR 656 at [32], see also at [74], and *CFMEU v Boral* at [62]. Whatever standards are required of regulators seeking civil penalties, they are not identical to those of a prosecutor: note *ASIC v Hellicar* (2012) 247 CLR 345 at [230]-[231]; cf [147]-[155]. The Full Court did not suggest otherwise: see at [76] AB 125. It is not the role of a prosecutor to seek some particular outcome in criminal sentencing, as the Full Court seemed to accept at [128] AB 144.

10 25. Proceedings for a pecuniary penalty under the BCII Act are quite different from criminal proceedings:

(a) Section 49 of the BCII Act, provides, inter alia, that an applicant can apply to an appropriate court for "an order imposing a pecuniary penalty on the defendant". In this matter the applicant at first instance (the Director) is a regulator. It need not have been. Any person "affected by the contravention" could have brought such a claim: s.49, BCII Act.

(b) The applicant may seek an order that the pecuniary penalty be payable to someone other than the Commonwealth, such as themselves: s.49(5).

(c) The applicant may choose to seek compensatory, injunctive or other relief rather
20 than pecuniary penalties: s.49(1) and (3).

(d) The claim, whether brought by a regulator or not, is not liable to being taken over by the Attorney General or the DPP.

(e) No conviction is recorded in conjunction with a penalty being imposed.

(f) There is no committal process, nor indictment. The civil standard of proof applies. The laws and rules applicable to civil proceedings are applied, including in a case brought in the Federal Court (as here), the *Federal Court Rules 2011*. Those Rules include, relevantly, Rules 8.01 and 8.03, which impose an obligation on an applicant to state the relief claimed in the originating application.

(g) As the Full Court appeared to accept at [128]-[130] AB 144 and [141] AB 148, the regulator is not constrained in the way a prosecutor is in seeking a particular outcome.

26. The Commonwealth has made submissions at AS [57]-[59] and [63]-[66] as to why the decision in *Barbaro* was not correctly understood by the Full Court, and is directed to issues particular to the criminal process. The Two Unions add the following points.

27. The Full Court accepted at [206] AB 173 a submission by the Contradictor that the imposition of a pecuniary penalty is "primarily to sanction contravention of a statutory norm, and to deter others from similar misconduct", and that such imposition "involves an exercise of the coercive power of the State to punish or sanction wrongdoing". It accepted that "[t]he exercise of that power by the Court should be unfettered and entirely independent". Any exercise of judicial power may involve a coercive exercise of the state, insofar as the courts are a branch of the state. That the particular exercise of power may involve elements of sanctioning wrongdoing and deterrence, is similar to, say, the award of exemplary damages (see further below). And whether at federal or State level, courts exercising judicial power are, and are required to be, independent. But receiving submissions as to the appropriate judgment does not compromise this independence. Indeed, it is commonplace and required by natural justice (see below). These points raised by the Full Court do not require that parties be excluded from making submissions as to appropriate penalties.

28. The point that seems to have most influenced the Full Court's conclusions was that it considered the setting of an appropriate civil penalty involved much the same instinctive synthesis as is involved in criminal sentencing: [3] AB 93, [192] AB 167, [214] AB 176, [239] AB 184. No doubt in deciding upon appropriate civil penalties there is no one right answer (see Full Court at [193] AB 167), just as the same is true for imposing criminal sentences. But that is a defining characteristic of discretions and subjective evaluations; it is not a distinguishing feature from any number of other judicial discretions. Whether or not an "instinctive synthesis" approach is applicable to ascertaining an appropriate penalty, there is no doubt that the decision is to be made by taking account of a range of relevant considerations and legal principle, guiding the judge in settling upon an appropriate figure. Again, that is a feature common to the exercise of judicial discretions and evaluations.

29. The Full Court sought to answer such an argument at [221] AB 179 by stating that whilst many other discretions involve the weighing up of numerous factors:

> very few, if any involve the extent of the discretion involved in sentencing and, perhaps to a lesser degree, in fixing a pecuniary penalty. Most other discretionary decisions depend upon evidence as to the question of actual loss, or evidence as to likely future conduct which may cause harm to others. The factual considerations are limited, both in nature and scope. In fixing a penalty, the Court is concerned with a much wider range of considerations.

30. That points to a difference, at most, of degree. The Court accepts that the degree of difference is lesser than involved in criminal sentencing. Such a difference in degree is not a sound foundation for imposing such a significant limitation on civil procedure as to prevent submissions on the issue. Further, if anything the complexity of the task only reinforces the importance of according a hearing to the parties with respect to how the court should approach the assessment, and with what suggested result.

31. At [153] AB 153, [218] AB 178 and [228] AB 181 the Full Court accepted a distinction mooted by the Contradictor "between pecuniary penalties and compensatory, remedial and protective remedies". The basis for that distinction is not apparent. It may be in the point made at [221] AB 179, just quoted and addressed. Insofar as the distinction is based upon arguments as to penal consequences, it is insecure: *CEO of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 at [139]; *Rich v ASIC* (2004) 220 CLR 129 at [32]-[35].

32. The Full Court accepted at [231] AB 181 that the parties could agree facts in a pecuniary penalty proceedings. Such agreements may constrain the parties from seeking to adduce inconsistent evidence, subject to the leave of the court: s.191, *Evidence Act 1995* (Cth). Presumably the parties could agree all the relevant facts. Yet in choosing what evidence to present (and not present) to the court – and whether by agreement or not – the parties are necessarily affecting the exercise of the assessment in setting the penalty. That effect is necessarily significant; it may well be more significant than the content of any submissions. It is inherent in an adversarial system. It does not undermine the judicial role in setting a penalty. Nor does the making of submissions.

33. The Full Court at [193] AB 167 appeared concerned that if parties were able to suggest a specific figure for the penalties, then, if they offered different figures, the court would find itself faced with a range. That is no different to what is commonplace in civil claims for money.

34. The Full Court also appeared to consider it relevant to applying the *Barbaro* principle that pecuniary penalty proceedings involved an element of punishment: at [64]-[75] AB 121, [204]-[206] AB 171, [212] AB 175, [216]-[218] AB 177. Yet, as the Commonwealth pointed out below, exemplary damages are imposed in significant part to punish a defendant: *Lamb v Cotogno* (1987) 164 CLR 1 at 8-10; *Gray v Motor Accident Commission* (1998) 196 CLR 1 at [8]-[19]. The Full Court responded to the argument by suggesting that the *Barbaro* principle could apply even to submissions relating to the extent of exemplary damages that should be awarded, but in any event finding the analogy not useful: at [219] AB 178.

10 35. In the Two Unions' submission, the suggestion that the principle might apply even with respect to exemplary damages illustrates the error of the Full Court's analysis. There are a range of curial orders which may contain some punitive element (eg victim compensation orders; aggravated damages; triple damages; banning orders). Yet it could not be the case that parties are not entitled to be heard in relation to whether such orders should be made and, if so, to what extent.

36. Aggravated damages must be sought at trial; they cannot simply be sought on appeal: see *Lamb v Cotogno* at 8.6 and 13.7; *Gray v Motor Accident Commission* at [7] and [102]. No doubt the same is true for exemplary damages, as a matter of basic fairness and principle. Thus it is within the remit of a claimant to seek this type of relief. Ordinarily the claimant
20 would identify to the court what amount they sought. There could be no good reason why they should not be able to do so. Indeed, procedural fairness would require that a defendant be given notice of the size of the claim, and the matters said to be relevant to justifying a claim of that size. For example, if it was to be suggested that account should be taken of the defendant's wealth as a matter going to the quantum of damages (see eg *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 472), then that would have to be articulated in advance such that the defendant could address the point by way of evidence and submissions. The same would apply if a claimant suggested that account should be taken of profits made by the defendant as a result of the tortious conduct.

37. The reason why a claimant would suggest that account should be taken of wealth or profits
30 in this way would be to increase the amount of damages ordered. In substance, plainly, such submissions go to the size of the award of damages sought. It is difficult to identify any rational reason why, in that context, it is impermissible for the claimant to put a figure on its claim, or to make submissions in support of the remedy sought. That would seem to

elevate form over substance. Conversely, procedural fairness requires that a defendant be put on notice of whether exemplary damages are claimed and the justifications for that claim, and be given a chance to respond by way of evidence and submissions.

38. The same principles apply with respect to pecuniary penalties. This leads to a broader issue relating to natural justice.

Judicial discretions/evaluations and natural justice

39. The relief claimed by the Director in the originating application (see AB 2-4) in this matter consisted (only) of:

(a) declarations that each of the Two Unions breached s.38 of the BCII Act;

10 (b) civil penalties imposed on each of them under s.49 of the Act in specified amounts.

40. The seeking of that relief represented the Director's choice. It is neither novel nor surprising that in the context of such a statutory scheme the claimant should be able to specify whether he/she/it seeks a penalty (amongst other possible relief), in what amount, and payable to whom. If such can be specified, then it must be capable of being the subject of submissions by the party seeking the orders and by the party potentially subject to them. There is also nothing novel about respondents consenting to the making of specified orders against them.

41. Courts are routinely called upon to make discretionary or evaluative judgments, for example in relation to:

20 (a) the grant of equitable relief;

(b) the grant of administrative law relief;

(c) the awarding of compensation pursuant to provisions such as s.87 of the *Competition and Consumer Act 2011*;

(d) the awarding of aggravated or exemplary damages;

(e) whether or not to award costs and, if so, whether in part or in full, and on a party-party or indemnity basis;

(f) procedural decisions, such as applications for amendments or adjournments.

42. Parties are entitled lead evidence relevant to such decisions. They are also entitled to make submissions, having regard to the facts and the law, going to the exercise of discretion or evaluation. To deny them the opportunity to lead such evidence and make such submissions would be to deny them natural justice. Needless to say, there is nothing in the BCII Act which contains any suggestion – let alone to the requisite degree of clarity – reducing the scope of the principles of natural justice and procedural fairness to be applied by courts in matters arising under the BCII Act (even assuming such could validly be done – a topic it is not necessary to address).

43. The hearing rule requires the following (see *Commissioner for ACT Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591-592, quoted eg in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [29]):

> Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker *in support of an outcome that supports his or her interests*. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. [emphasis added]

44. These statements were made with respect to administrative decision-makers. The principles of natural justice are no less demanding with respect to courts: cf *Cameron v. Cole* (1944) 68 CLR 571; *Commissioner of Police v Tanos* (1958) 98 CLR 383; *Taylor v Taylor* (1979) 143 CLR 1; *International Finance Trust Company Limited v NSW Crime Commission* (2009) 240 CLR 319 at [54].

45. Such principles require that both the party seeking particular relief, and the party potentially subject to it, are entitled to be heard with respect to that relief. And that must extend to the quantum of the relief. The size of any pecuniary penalty may, self-evidently, affect adversely the interests of a respondent who is subject to that order. Such a respondent has a strong and legitimate interest in being heard on the question of whether such relief should be ordered at all in the court's discretion and, if awarded, in what amount. An applicant who is seeking payment of the penalty to themselves has a converse legitimate interest in being heard as to these questions.

46. The fact that the amount ordered may go not to the applicant but to the Commonwealth does not alter the fact that if an applicant has sufficient interest to commence and pursue the proceedings, then they necessarily have an interest in the result, whatever their motivations for seeking the penalty. That a prosecutor in a criminal matter has no role in

actively seeking some particular result is not a restriction which applies in civil penalty proceedings, as the Full Court appeared to acknowledge at [128]-[130] AB 144: "[w]e accept that a regulator may have, and pursue a particular view as to the appropriate outcome of the proceedings" ([130] AB 145). If that is so, why can the regulator not make submissions in support of what it seeks?

47. The Full Court repeatedly stated that any such submissions were merely matters of opinion: eg [47] AB 115, [139] AB 147, [158] AB 154, [180] AB 162. It said at [241] AB 185 that any agreement as to appropriate outcome "is no more than an expression of a shared opinion, and therefore inadmissible". That is a mischaracterisation. Submissions as to these matters may not be facts. But they are *submissions*, that is, they represent an articulated argument as to why, in light of the relevant facts and law, the court's discretion should or should not be exercised in a particular way to produce a particular outcome. There is nothing exceptional about that.

48. To receive and take account of submissions put by a regulator as to what penalty should be awarded does nothing to "prevent the Court from performing its duty", nor to "adversely affect public perceptions of the judicial process": cf judgment [171] AB 159. It simply constitutes a routine instance of the court according a hearing to parties entitled to seek particular outcomes, where the ultimate resolution of the claim lies in the power and discretion of the court.

49. The Court suggested (by implication) at [183] AB 164 that joint submissions as to penalty "may tend to limit the discretion conferred upon the judge as explained in *Barbaro*". Such submissions no more limit the court than they would if made by the respondent alone, nor any more than do submissions as to such matters as to the appropriate extent of exemplary damages or the appropriate term of an injunction.

The approach approved of in *NW Frozen Foods* and *Mobil Oil*

50. The Full Court accepted that the practice approved of in *NW Frozen Foods* and in *Mobil Oil* was long established, but considered that the decision in *Barbaro* required departure from it: at [243] AB 186. For the reasons articulated above, it erred in concluding that the *Barbaro* principle applied with respect to pecuniary penalties under the BCII Act. In consequence it erred in considering that departure from the well-established practice was required.

51. The practice considered in *NW Frozen Foods* and in *Mobil Oil* is not novel. It represents a court giving effect to orders sought by consent. It is incumbent on any court asked to make consent orders to check that it has jurisdiction and power to make such orders, and that the making of such orders would be an appropriate exercise of the power. If those requirements are met, then if the consent orders serve to resolve the controversy without requiring substantial expenditure of resources of the parties and the court, there is nothing objectionable about that; on the contrary: note *NW Frozen Foods* at 298-299.

The significance of the specific relief sought in this case

52. The Court in *Barbaro* had to decide whether the defendants had been denied procedural fairness by reason of the trial judge declining to receive submissions from the prosecutor as to the appropriate sentence range, which would delimit the bounds of appellable error. The delimitation of the bounds of appellable error in a predictive sense was held by the Court to be impermissible opinion. That type of submission was not before the Court in this matter. The parties jointly sought figures set out in the Director's originating application.

53. In civil proceedings the Court deals with, and determines, the dispute brought before it: note s.19, *Federal Court of Australia Act 1976*, and s.48 of the BCII Act. The Federal Court is empowered by s.22 of its Act to grant all remedies to which the parties appear to be entitled in respect of a legal or equitable claim properly brought forward so that the "matters in controversy between the parties" are finally determined. The issues in the proceeding – the matter in controversy; the subject matter for determination – are those chosen and identified by the parties. Parties "have choices as to what claims are to be made and how they are to be framed": *AON Risk Services (Aust) Ltd v ANU* (2009) 239 CLR 175 at [112], see also [71].

54. The matters in controversy in these proceedings are crystallised in the relief sought by the Director. Section 49 of the BCII Act empowered him (as an "eligible person") to apply for orders imposing pecuniary penalties on the respondents to the proceedings. He did so and sought penalties in specific sums. As applicant in the proceedings, he was able to choose the form and content of the relief. He was not obliged to choose the content (the penalty amounts) but, in accordance with the usual provisions as to civil proceedings, was able to do so. Having done so, the real issues revealed on the pleadings are confined, relevantly, to penalties in those specified sums.

55. Courts have power to amend applications before them on their own motion only in circumstances where it is necessary to determine the real question in controversy: *AON v ANU* at [14]-[17] per French CJ, see also Gummow, Hayne, Crennan, Keifel and Bell JJ at [116]. There is no suggestion in this matter that the Federal Court needed to amend the application before it in order to avoid a multiplicity of actions or proceedings. To the contrary, the Full Court accepted that *if* it determined that the relief was "inappropriate" then that "*may* lead to the regulator to seek different orders from those initially claimed" (at [170] AB 158, emphasis added). The conclusions of the Federal Court that submissions as to quantum of penalty should not be received has the effect that the parties in this proceeding have been precluded from making submissions on the matter in controversy before the Court.

56. The Full Court said at [53] AB 118, in the 5th dot point, that a court "does not generally accept that the parties may, by their agreement, limit the exercise of its discretion". The point is overstated. No doubt if a discretion is available to a court, then it is available regardless of the parties' agreement as to some particular outcome. But whether and to what extent it is available may depend upon the parties' actions and choices, including as to the formulation of the matter. A court does not have discretion to award what relief it thinks fit, regardless of whether or not sought. And if the relief sought is bounded, then that sets the bounds on what the court may award.

57. The Full Court stated at [170] AB 158 that:

> If [a regulator] were to choose to limit the amount of the penalty sought, it may be arguable that the rules of procedural fairness would limit the order which the Court could make, in which case the penalty imposed might not be that fixed by the Court as the appropriate penalty. We understand it to be accepted that the regulator cannot limit the amount to be awarded by the Court. Hence it would probably be inappropriate for the regulator to seek, in its application, to limit the amount of the penalty sought.

58. The Full Court was correct to recognise that procedural fairness is a relevant limit in such a situation, but it is not the only limit. If the applicant had not sought a pecuniary penalty, then it would not be open to the court to award a pecuniary penalty. The Full Court appears to accept this at [189]-[190] AB 166. It would not be directed to resolving the controversy between the parties. There is no difference in principle if a pecuniary penalty of a certain amount is sought. If the originating application limits the relief sought in that way then, unless and until that claim is amended – and in the absence of a claim for such further or other order as the court thinks fit, which claim might perhaps encompass a greater penalty

claim – then that claim represents the bounds of the controversy before the court for determination. It would be open to the court to award a lesser amount, but that is because a claim for the greater includes the lesser.

Conclusion

59. Having regard to the text of the BCII Act, within its statutory and general law context, the principles identified in *Barbaro* do not apply to a claim for pecuniary penalties under the BCII Act so as to:

(a) prevent a respondent to such proceedings from leading evidence or making submissions with respect to the appropriate size of the penalty;

(b) prevent an applicant from doing the same;

(c) prevent the parties from agreeing facts;

(d) prevent a respondent from agreeing with submissions made by an applicant, or vice-versa, including with respect to appropriate penalties;

(e) prevent the parties from making joint submissions, including with respect to appropriate penalties;

(f) prevent the Court from having regard to all such evidence and submissions;

(g) require departure from the practice described in the decisions of the Full Court of the Federal Court in *NW Frozen Foods* and *Mobil*.

PART VII: ARGUMENT ON NOTICE OF CONTENTION

60. The Two Unions have not filed a notice of contention. They are Appellants in matter No. B23 of 2015, an appeal from the same judgment. Separate submissions will be filed in that matter.

PART VIII ORAL ARGUMENT

61. The Two Unions estimate they will take about 1 hour in oral argument.

10 August 2015

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Judiciary Act 1903

No. 6, 1903

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Prepared by the Office of Parliamentary Counsel, Canberra

70 Offences committed in several States

(1) When an offence against the laws of the Commonwealth is begun in one State or part of the Commonwealth and completed in another, the offender may be dealt with tried and punished in either State or part in the same manner as if the offence had been actually and wholly committed therein.

(2) This section has effect subject to section 68C.

70A Indictable offence not committed in a State

(1) The trial on indictment of an offence against a law of the Commonwealth not committed within any State and not being an offence to which section 70 applies may be held in any State or Territory.

(2) This section has effect subject to section 68C.

71 Discharge of persons committed for trial

(1) When any person is under commitment upon a charge of an indictable offence against the laws of the Commonwealth, the Attorney-General or such other person as the Governor-General appoints in that behalf may decline to proceed further in the prosecution, and may, if the person is in custody, by warrant under his or her hand direct the discharge of the person from custody, and he or she shall be discharged accordingly.

(2) Nothing in subsection (1):
   (a) affects the power under subsection 9(4) of the *Director of Public Prosecutions Act 1983* of the Director of Public Prosecutions; or
   (b) affects, or shall be taken to have affected, the power under subsection 8(2) of the *Special Prosecutors Act 1982* of a Special Prosecutor.

Federal Court of Australia Act 1976

No. 156, 1976

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Part III—Jurisdiction of the Court

Division 1—Original jurisdiction (general)

19 Original jurisdiction

(1) The Court has such original jurisdiction as is vested in it by laws made by the Parliament.

(2) The original jurisdiction of the Court includes any jurisdiction vested in it to hear and determine appeals from decisions of persons, authorities or tribunals other than courts.

20 Exercise of original jurisdiction

(1) Except as otherwise provided by this Act or any other Act, the original jurisdiction of the Court shall be exercised by a single Judge.

(1A) If the Chief Justice considers that a matter coming before the Court in the original jurisdiction of the Court is of sufficient importance to justify the giving of a direction under this subsection, the Chief Justice may direct that the jurisdiction of the Court in that matter, or a specified part of that matter, shall be exercised by a Full Court.

(1B) Subsection (1A) does not apply in relation to indictable primary proceedings.

(2) The jurisdiction of the Court in a matter coming before the Court from a tribunal or authority (other than a court) while constituted by, or by members who include, a person who is a Judge of the Court or of another court created by the Parliament shall be exercised by a Full Court.

(2A) Subsections (1A) and (2) have effect subject to subsections (3) and (5).

(ii) the legal arguments in relation to the matter can be dealt with adequately by written submissions.

(3) This section does not limit subsections 20(4) and (6).

21 Declarations of right

(1) The Court may, in civil proceedings in relation to a matter in which it has original jurisdiction, make binding declarations of right, whether or not any consequential relief is or could be claimed.

(2) A suit is not open to objection on the ground that a declaratory order only is sought.

22 Determination of matter completely and finally

The Court shall, in every matter before the Court, grant, either absolutely or on such terms and conditions as the Court thinks just, all remedies to which any of the parties appears to be entitled in respect of a legal or equitable claim properly brought forward by him or her in the matter, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of proceedings concerning any of those matters avoided.

23 Making of orders and issue of writs

The Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate.

Evidence Act 1995

No. 2, 1995

Compilation No. 26

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(b) the court is satisfied that the defendant understands the consequences of giving the consent.

(3) In a civil proceeding, the court may order that any one or more of the provisions mentioned in subsection (1) do not apply in relation to evidence if:

(a) the matter to which the evidence relates is not genuinely in dispute; or

(b) the application of those provisions would cause or involve unnecessary expense or delay.

(4) Without limiting the matters that the court may take into account in deciding whether to exercise the power conferred by subsection (3), it is to take into account:

(a) the importance of the evidence in the proceeding; and

(b) the nature of the cause of action or defence and the nature of the subject matter of the proceeding; and

(c) the probative value of the evidence; and

(d) the powers of the court (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence.

191 Agreements as to facts

(1) In this section:

agreed fact means a fact that the parties to a proceeding have agreed is not, for the purposes of the proceeding, to be disputed.

(2) In a proceeding:

(a) evidence is not required to prove the existence of an agreed fact; and

(b) evidence may not be adduced to contradict or qualify an agreed fact;

unless the court gives leave.

(3) Subsection (2) does not apply unless the agreed fact:

(a) is stated in an agreement in writing signed by the parties or by Australian legal practitioners, legal counsel or prosecutors

representing the parties and adduced in evidence in the proceeding; or

(b) with the leave of the court, is stated by a party before the court with the agreement of all other parties.

192 Leave, permission or direction may be given on terms

(1) If, because of this Act, a court may give any leave, permission or direction, the leave, permission or direction may be given on such terms as the court thinks fit.

(2) Without limiting the matters that the court may take into account in deciding whether to give the leave, permission or direction, it is to take into account:

(a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing; and

(b) the extent to which to do so would be unfair to a party or to a witness; and

(c) the importance of the evidence in relation to which the leave, permission or direction is sought; and

(d) the nature of the proceeding; and

(e) the power (if any) of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence.

192A Advance rulings and findings

Where a question arises in any proceedings, being a question about:

(a) the admissibility or use of evidence proposed to be adduced; or

(b) the operation of a provision of this Act or another law in relation to evidence proposed to be adduced; or

(c) the giving of leave, permission or direction under section 192;

the court may, if it considers it to be appropriate to do so, give a ruling or make a finding in relation to the question before the evidence is adduced in the proceedings.

Federal Court Rules 2011

Select Legislative Instrument No. 134, 2011 as amended

made under the

Federal Court of Australia Act 1976

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Part 8—Starting proceedings

Division 8.1—Originating applications

8.01 Starting proceeding—application

(1) A person who wants to start a proceeding in the Court's original jurisdiction must file an originating application, in accordance with Form 15.

(2) An originating application must include:
  (a) the applicant's name and address; and
  (b) the applicant's address for service; and
  (c) if an applicant sues in a representative capacity—a statement of that fact.

Note: The originating application must have the applicant's address for service—see rule 11.01.

(3) If an originating application states that the applicant is represented by a lawyer:
  (a) the lawyer must, if requested in writing by a respondent, declare in writing whether the lawyer filed the originating application; and
  (b) if the lawyer declares in writing that the lawyer did not file the originating application, the respondent may apply to the Court to stay the proceeding.

Note: ***File*** is defined in the Dictionary as meaning file and serve.

8.02 Applicant's genuine steps statement

(1) If Part 2 of the Civil Dispute Resolution Act applies to a proceeding, the applicant must, when filing the applicant's originating application, file the applicant's genuine steps statement, in accordance with Form 16.

(2) The applicant's genuine steps statement must comply with section 6 of the Civil Dispute Resolution Act.

(3) The applicant's genuine steps statement must be no more than 2 pages.

Note 1: ***Civil Dispute Resolution Act*** is defined in the Dictionary.

Note 2: A party who wants to start a proceeding must have regard to the Civil Dispute Resolution Act before starting that proceeding to determine whether the Civil Dispute Resolution Act applies to the proceeding that the party wants to start.

Note 3: A lawyer must comply with section 9 of the Civil Dispute Resolution Act, if that Act applies to the proceeding.

8.03 Application to state relief claimed

(1) An originating application must state:

(a) the relief claimed; and

(b) if the relief is claimed under a provision of an Act—the Act and the provision under which the relief is claimed.

(2) An originating application claiming relief of the kind mentioned in column 2 of following table must state the details mentioned in column 3 of the table.

Item	Relief sought	Details
1	Interlocutory relief	The interlocutory order sought
2	An injunction	The order sought
3	A declaration	The declaration sought
4	Exemplary damages	The claim for exemplary damages

(3) The originating application need not include a claim for costs.

8.04 Application starting migration litigation to include certificate

(1) For section 486I of the *Migration Act 1958*, a lawyer may file an originating application starting migration litigation only if the application includes a certificate in accordance with the certificate contained in Form 15, signed by the lawyer.

Note 1: See section 486I of the *Migration Act 1958*.

Note 2: The Court will refuse to accept an originating application unless a certificate is provided in accordance with this subrule.

Competition and Consumer Act 2010

No. 51, 1974

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This compilation is in 3 volumes

Volume 1:	**sections 1–119**
Volume 2:	sections 10.01–179
Volume 3:	Schedules
	Endnotes

Each volume has its own contents

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(b) to produce a document or any other thing; or

(c) to do any other act;

on the ground that the answer or information, production of the document or other thing, or doing that other act, as the case may be, might tend to expose the person to a penalty by way of an order under section 86E.

Definition

(4) In this section:

penalty includes forfeiture.

87 Other orders

(1) Without limiting the generality of section 80, where, in a proceeding instituted under this Part, or for an offence against section 44ZZRF or 44ZZRG, the Court finds that a person who is a party to the proceeding has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in (whether before or after the commencement of this subsection) in contravention of a provision of Part IV or Division 2 of Part IVB, or of section 60C or 60K, the Court may, whether or not it grants an injunction under section 80 or makes an order under section 82, 86C, 86D or 86E, make such order or orders as it thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (2) of this section) if the Court considers that the order or orders concerned will compensate the first-mentioned person in whole or in part for the loss or damage or will prevent or reduce the loss or damage.

(1A) Without limiting the generality of sections 51ADB and 80, the Court may:

(a) on the application of a person who has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of Division 2 of Part IVB or section 60C or 60K; or

(b) on the application of the Commission in accordance with subsection (1B) on behalf of one or more persons who have suffered, or who are likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of Part IV (other than section 45D or 45E), Division 2 of Part IVB or section 60C or 60K; or

(ba) on the application of the Director of Public Prosecutions in accordance with subsection (1BA) on behalf of one or more persons who have suffered, or who are likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of section 44ZZRF or 44ZZRG;

make such order or orders as the Court thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (2)) if the Court considers that the order or orders concerned will:

(c) compensate the person who made the application, or the person or any of the persons on whose behalf the application was made, in whole or in part for the loss or damage; or

(d) prevent or reduce the loss or damage suffered, or likely to be suffered, by such a person.

(1B) The Commission may make an application under paragraph (1A)(b) on behalf of one or more persons identified in the application who:

(a) have suffered, or are likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of Part IV (other than section 45D or 45E), Division 2 of Part IVB or section 60C or 60K; and

(b) have, before the application is made, consented in writing to the making of the application.

(1BA) The Director of Public Prosecutions may make an application under paragraph (1A)(ba) on behalf of one or more persons identified in the application who:

(a) have suffered, or are likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of section 44ZZRF or 44ZZRG; and

(b) have, before the application is made, consented in writing to the making of the application.

(1C) An application may be made under subsection (1A) in relation to a contravention of Part IV, Division 2 of Part IVB or section 60C or 60K even if a proceeding has not been instituted under another provision in relation to that contravention.

(1CA) An application under subsection (1A) may be made at any time within 6 years after the day on which the cause of action that relates to the conduct accrued.

(2) The orders referred to in subsection (1) and (1A) are:

(a) an order declaring the whole or any part of a contract made between the person who suffered, or is likely to suffer, the loss or damage and the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, or of a collateral arrangement relating to such a contract, to be void and, if the Court thinks fit, to have been void *ab initio* or at all times on and after such date before the date on which the order is made as is specified in the order;

(b) an order varying such a contract or arrangement in such manner as is specified in the order and, if the Court thinks fit, declaring the contract or arrangement to have had effect as so varied on and after such date before the date on which the order is made as is so specified;

(ba) an order refusing to enforce any or all of the provisions of such a contract;

(c) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to refund money or return property to the person who suffered the loss or damage;

(d) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to pay to the person who suffered the loss or damage the amount of the loss or damage;

(e) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted

by the conduct, at his or her own expense, to repair, or provide parts for, goods that had been supplied by the person who engaged in the conduct to the person who suffered, or is likely to suffer, the loss or damage;

(f) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, at his or her own expense, to supply specified services to the person who suffered, or is likely to suffer, the loss or damage; and

(g) an order, in relation to an instrument creating or transferring an interest in land, directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to execute an instrument that:

(i) varies, or has the effect of varying, the first-mentioned instrument; or

(ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the first-mentioned instrument.

(3) Where:

(a) a provision of a contract made, or a covenant given, whether before or after the commencement of the *Trade Practices Amendment Act 1977*:

(i) in the case of a provision of a contract, is unenforceable by reason of section 45 in so far as it confers rights or benefits or imposes duties or obligations on a corporation; or

(ii) in the case of a covenant, is unenforceable by reason of section 45B in so far as it confers rights or benefits or imposes duties or obligations on a corporation or on a person associated with a corporation; or

(b) the engaging in conduct by a corporation in pursuance of or in accordance with a contract made before the commencement of the *Trade Practices Amendment Act 1977* would constitute a contravention of section 47;

the Court may, on the application of a party to the contract or of a person who would, but for subsection 45B(1), be bound by, or

entitled to the benefit of, the covenant, as the case may be, make an order:

(c) varying the contract or covenant, or a collateral arrangement relating to the contract or covenant, in such manner as the Court considers just and equitable; or

(d) directing another party to the contract, or another person who would, but for subsection 45B(1), be bound by, or entitled to the benefit of, the covenant, to do any act in relation to the first-mentioned party or person that the Court considers just and equitable.

(4) The orders that may be made under subsection (3) include an order directing the termination of a lease or the increase or reduction of any rent or premium payable under a lease.

(5) The powers conferred on the Court under this section in relation to a contract or covenant do not affect any powers that any other court may have in relation to the contract or covenant in proceedings instituted in that other court in respect of the contract or covenant.

(6) In subsection (2), ***interest***, in relation to land, means:

(a) a legal or equitable estate or interest in the land; or

(b) a right of occupancy of the land, or of a building or part of a building erected on the land, arising by virtue of the holding of shares, or by virtue of a contract to purchase shares, in an incorporated company that owns the land or building; or

(c) a right, power or privilege over, or in connection with, the land.

87AA Special provision relating to Court's exercise of powers under this Part in relation to boycott conduct

(1) In exercising its powers in proceedings under this Part in relation to boycott conduct, the Court is to have regard to any action the applicant in the proceedings has taken, or could take, before an industrial authority in relation to the boycott conduct. In particular, the Court is to have regard to any application for conciliation that the applicant has made or could make.