High Court upholds the practice of parties making agreed or other penalty submissions in civil penalty proceedings

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Introduction

1. The High Court of Australia in *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate; Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate* ("**Commonwealth v FWBII**")[1] has unanimously held that *Barbaro v The Queen* ("**Barbaro**")[2] does not apply to civil penalty proceedings and a court is not precluded from receiving and, if appropriate, accepting an agreed or other civil penalty submission.

2. The High Court's decision, which overturns a ruling by the Full Court of the Federal Court of Australia, is an emphatic endorsement of the longstanding practice in civil penalty proceedings of parties making joint submissions to the court as to the terms and quantum of the penalty that should be imposed on the wrongdoer and the court imposing the agreed penalty if it considers it to be appropriate in the circumstances.

3. This paper considers:

   - the main authorities on the practice;
   - criticisms made about the practice;
   - the High Court's decision in *Barbaro*;
   - the approach to agreed penalty submissions following *Barbaro*; and
   - the High Court's decision in *Commonwealth v FWBII.*

Main authorities

4. In *Trade Practices Commission v Allied Mills Industries Pty Ltd (No 4)* ("**Allied Mills**"),[3] the Trade Practices Commission had commenced proceedings against a number of respondents in the Federal Court of Australia for payment of pecuniary penalties under s 76 of the *Trade Practices Act 1974* (Cth) ("**TPA**"), alleging a contravention of a provision of Pt IV of the TPA. Section 76 of the TPA provided that, if the Court was satisfied that a person had contravened or attempted to contravene a provision of Pt IV of the TPA, the Court could order the person to pay to the Commonwealth a pecuniary penalty not exceeding a specified sum as the Court determined to be appropriate having regard to all relevant matters.

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[1] [2015] HCA 46.
[2] [2014] HCA 2; (2014) 253 CLR 58.
[3] [1981] FCA 142; (1981) 37 ALR 256.

5. One of the respondents and the Trade Practices Commission came to an agreement, the terms of which included that the respondent would withdraw its defence and pay to the Commonwealth a penalty in a specified sum. The Court's approval of the agreement was sought.

6. Sheppard J described the course adopted by the parties as "both proper and not uncommon"[4] and made orders in accordance with the parties' agreement. His Honour said that it was in the public interest to bring litigation to a conclusion as soon as possible especially in a case where the potential liability of each party for further costs was substantial.[5]

7. The Full Court of the Federal Court of Australia confirmed the appropriateness of parties making agreed penalty submissions in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* ("**NW Frozen Foods**").[6] That case also involved proceedings under s 76 of the TPA, this time brought by the Australian Competition and Consumer Commission ("**ACCC**"), the regulatory body which had replaced the Trade Practices Commission. The appellant admitted the contravention and reached agreement with the ACCC upon the facts to be put before the Court and the amount of the penalty to be proposed jointly to the Court.

8. The trial judge, however, rejected the proposed penalty and substituted a significantly more severe penalty. On appeal, the Full Federal Court observed that the TPA:

> "*places on the shoulders of the Court the responsibility to determine the 'appropriate' penalty in each particular case, having regard to 'all relevant matters' including the matters specified in the section. But effects upon the functioning of markets, and other economic effects, will generally be among the most significant matters to be considered as relevant, so that the Court is likely to be assisted greatly by views put forward by the Australian Competition and Consumer Commission, or by economists called on behalf of the parties. Since the decision in Trade Practices Commission v Allied Mills Industries Pty Ltd (No 4) … , it has been accepted that both the facts, and also views about their effect, may be presented to the Court in agreed statements, together with joint submissions by both the Commission and a respondent as to the appropriate level of penalty. 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.*"[7]

9. The Full Federal Court went on to explain that there were "important public policy" considerations involved in the Court receiving agreed penalty submissions and, if appropriate, accepting them:

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[4] Above, n 3, at 259.
[5] Above, n 3, at 259.
[6] [1996] FCA 1134; (1996) 71 FCR 285.
[7] Above, n 6, at 290-291 (Burchett and Kiefel JJ); 299 (Carr J).

> "*When corporations acknowledge contraventions, very lengthy and complex litigation is frequently avoided, freeing the courts to deal with other matters, and investigating officers of the Australian Competition and Consumer Commission to turn to other areas of the economy that await their attention. At the same time, a negotiated resolution in the instant case may be expected to include measures designed to promote, for the future, vigorous competition in the particular market concerned. These beneficial consequences would be jeopardized if corporations were to conclude that proper settlements were clouded by unpredictable risks. A proper figure is one within the permissible range in all the circumstances. The Court will not depart from an agreed figure merely because it might otherwise have been disposed to select some other figure, or except in a clear case.*"[8] (Emphasis added)

10. In that case, the Full Federal Court found that the penalty proposed by the parties was appropriate and so allowed the appeal.

11. Subsequently, some Federal Court judges sitting at first instance expressed reservations about the principles set out in *NW Frozen Foods*:

    - In *Australian Competition and Consumer Commission v ABB Transmission and Distribution Limited*,[9] Finkelstein J observed, amongst other things, that:

        - consent could be coerced and could be given to avoid detection of other contraventions and higher penalties, and

        - it was more difficult for the Court to determine whether the agreed penalty was within the range which the Court could fix because the practice of parties reaching agreement on penalties was now so common, Moreover, decisions which sanctioned agreed penalties were not a good yardstick by which to measure whether later agreed penalties were within the range of appropriate penalties.

    - In *Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd*,[10] Weinberg J described the practice as "somewhat undesirable" because the Court might be seen as a "rubber stamp".

12. However, in *Minister for Industry, Tourism & Resources v Mobil Oil Australia Pty Ltd* ("**Mobil Oil**"),[11] the Full Federal Court reviewed the practice in depth and rejected the criticisms made of *NW Frozen Foods*.[12] In particular, the Full Federal Court said that:

    - *NW Frozen Foods* did not suggest that the Court was bound by the figure suggested by the parties or relieved from the necessity of determining that the proposed penalty was appropriate nor that the Court was precluded from

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[8] Above, n 6, at 291 (Burchett and Kiefel JJ); 299 (Carr J).
[9] [2001] FCA 383; (2001) ATPR 41-815 at [5]-[6].
[10] [2002] FCA 619; (2002) ATPR 41-880 at [32]- [34].
[11] [2004] FCAFC 72; (2004) ATPR 41-993.
[12] Above, n 11, at [81].

requesting further information to determine whether the proposed penalty was a proper one in the circumstances.[13]

- The reasoning in *NW Frozen Foods* did not mean that the Court had to commence its reasoning with the proposed penalty and limit itself to a consideration of whether that penalty was within the range of permissible penalties. That was just one approach that could be taken. Another approach was for the Court to independently assess the appropriate range of penalties and then determine whether the proposed penalty was within that range.[14]

- *NW Frozen Foods* was not inconsistent with any of the following propositions:

    - If the Court was not satisfied that the evidence or information provided in support of a proposed penalty was adequate, it could request the parties to provide additional evidence or information or verify the information provided and, if this was not provided, the Court might not accept that the proposed penalty was within the range.

    - If the absence of a contradictor inhibited the Court in the performance of its statutory duties, it could seek the assistance of an *amicus curiae* or of an individual or body prepared to act as an intervenor.

    - If the Court decided not to impose the proposed penalty, it could, depending on the circumstances, give each of the parties the opportunity to withdraw consent to the proposed orders so that the matter would proceed as a contested hearing.[15]

13. Notwithstanding the decision in *Mobil Oil*, Weinberg J continued to strongly criticise the practice. After his Honour became a justice of the Victorian Court of Appeal, his Honour delivered the leading judgment in *Australian Securities and Investments Commission v Ingleby* ("**Ingleby**"),[16] a case in which the Victorian Court of Appeal refused to follow *NW Frozen Foods* and *Mobil Oil*.

14. In *Ingleby*, Weinberg JA described *NW Frozen Foods* and Mobil *Oil* as "bad law"[17] and "wrongly decided"[18] because:

> *"they treat the trial judge, who is to impose the pecuniary penalty, as though he or she is exercising an appellate role. Under the approach adopted in those cases, the judge is not independently arriving at the appropriate penalty, but rather asking an entirely different question – whether the agreed figure falls within the range of penalties reasonably available. That is, in substance, an appellate question, and not a first instance question. If the*

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[13] Above, n 11, at [50].
[14] Above, n 11, at [56].
[15] Above, n 11, at [60].
[16] [2013] VSCA 49; (2013) 39 VR 554.
[17] Above, n 16, at [28].
[18] Above, n 16, at [29].

judge is unable to say that the agreed penalty is 'wholly outside' the range, he or she is bound to impose that penalty irrespective of whether it is considered appropriate. That is, in my view, a fundamental departure from the judicial function in relation to sentencing, and one that simply ought not to be countenanced."[19]

15. Subsequently, Federal Court judges sitting at first instance noted the criticisms made in *Ingleby* but continued to follow the decisions of the Full Federal Court in *NW Frozen Foods* and *Mobil Oil* which were binding on them.[20] In *Australian Competition and Consumer Commission v AGL Sales Pty Ltd*,[21] Middleton J rejected the criticisms made in *Ingleby* but said that the comments by the Victorian Court of Appeal were a useful reminder of the onerous responsibility placed upon a Court in determining the appropriate penalties and that the Court would necessarily rely heavily upon the parties to appropriately inform it of all relevant matters for deliberation and be alert to the situation where the agreed facts and admissions did not truly characterise the nature or extent of the contravention.

High Court decision in *Barbaro*

16. In February 2014, the High Court of Australia delivered its judgment in *Barbaro*, a case dealing with the exercise of the sentencing discretion in criminal proceedings. A plurality of the High Court held that the practice of the prosecution making submissions as to the "available range" of sentences for an offender was wrong in principle and should no longer be followed.[22] The High Court's reasoning was, in substance, as follows:

    - A statement as to the bounds of an available range of sentences purported to identify the points at which conclusions of manifest excess and manifest inadequacy of sentence became open. However, it was impossible to state such bounds because sentencing was not a mathematical exercise and reasonable minds could differ as to the available range of sentences. It was only on appeal that a sentence could be identified as manifestly excessive or manifestly inadequate. Therefore, a statement of bounds would be an attempt to predict appealable error using a numerical approach which was not permitted.

    - The prosecution's statement of bounds would be a statement of opinion which a sentencing judge could not take into account.

    - The prosecution's statement of bounds could lead to erroneous views about its importance in the sentencing process, with consequential blurring of what

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[19] Above, n 16, at [29] (footnote omitted). See also Harper JA at [99] and Hargrave AJA at [102].
[20] See, for example, *Australian Competition and Consumer Commission v Hewlett-Packard Australia Pty Ltd* [2013] FCA 653 and *Tax Practitioners Board v Shanahan* [2013] FCA 764.
[21] [2013] FCA 1030 at [43]-[44].
[22] Above, n 2, at [23].

should be a sharp distinction between the role of the judge and the role of the prosecution in the sentencing process.

- The prosecution's view of the available range was not, and could not be, dispassionate. [23]

Approach to agreed penalty submissions following *Barbaro*

17. Following *Barbaro*, differing views were expressed as to whether the decision applied to civil penalty proceedings. For example, in *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union*,[24] White J considered that the reasons in *Barbaro* could have relevance to the imposition of civil penalties and so might require a review of the approach set out in *NW Frozen Foods* and *Mobil Oil.* However, his Honour found that such a review was neither necessary nor appropriate in the case before him.

18. On the other hand, in *Australian Competition and Consumer Commission v EnergyAustralia Pty Ltd*,[25] Middleton J considered the issue in some depth and found that there were important differences between the criminal sentencing context and the civil penalty context and the position of crown prosecutors and regulators. Accordingly, his Honour concluded that the High Court in *Barbaro* did not intend to exclude, in a civil context, the making of submissions (joint or otherwise) by the parties as to the appropriate orders to make and did not implicitly overrule *NW Frozen Foods* and *Mobil Oil.*

19. Similarly, in *Australian Competition and Consumer Commission v Mandurvit Pty Ltd*,[26] McKerracher J considered that the complete reasoning expressed in the plurality judgment in *Barbaro* did not indicate that the High Court intended what was said to apply to civil pecuniary penalty cases and agreed with the views expressed by Middleton J in *Australian Competition and Consumer Commission v EnergyAustralia Pty Ltd.*

20. In addition, in *Matthews v The Queen*,[27] a majority of the Victorian Court of Appeal concluded that the reasoning in *Barbaro* was concerned only with the role of the Crown in the sentencing process and, hence, had no application to civil proceedings.

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[23] Above, n 2, at [24]-[43]; see also *Commonwealth v FWBII*, above, n 1, at [35]-[37].
[24] [2014] FCA 160 at [27]-[28].
[25] [2014] FCA 336; (2014) ATPR 42-469 at [137]-[150],
[26] [2014] FCA 464; (2014) ATPR 42-471 at [48]; [79].
[27] [2014] VSCA 291 at [29].

High Court decision in Commonwealth v FWBII

Background

21. Civil penalty proceedings were brought in the Federal Court by the Director of the Fair Work Building Industry Inspectorate ("**Director**") against two unions under Pt 1 of Ch 7 of the *Building and Construction Industry Improvement Act 2005* (Cth) ("**BCII Act**")[28] for contraventions of s 38 of the BCII Act. Section 38 prohibited a person from engaging in unlawful industrial action and was stipulated to be a civil penalty provision.

22. The Director sought pecuniary penalties and declarations under s 49 of the BCII Act. Section 49 provided that, on application by an eligible person, an appropriate court could make one or more of a number of orders in relation to a person who had contravened a civil penalty provision including an order imposing a pecuniary penalty on that person and any other order that the court considered appropriate. The section specified maximum pecuniary penalties for contravention of a civil penalty provision.

23. The Director and unions subsequently filed an agreed statement of facts and submissions in which it was agreed that:

    - the unions had each contravened s 38 of the BCII Act;
    - the parties would seek from the Court declarations as to the contraventions and pecuniary penalties in specified amounts against the unions; and
    - "subject to the discretion of the Court to fix an appropriate penalty", the penalty amounts were "satisfactory, appropriate and within the permissible range in all the circumstances".

24. The issue came to be dealt with by the Full Federal Court[29] which held that *Barbaro* applied to civil penalty proceedings and, accordingly, the parties' agreed penalty submissions could not be received. The Full Federal Court considered that there was a similarity between the "instinctive synthesis" involved in the sentencing task and the Court's task of fixing an appropriate civil penalty and that the parties' submissions were an impermissible expression of opinion and irrelevant and contrary to the process of instinctive synthesis. The Full Court adjourned further hearing of the matter to allow the parties to reconsider their positions.

Appeal to the High Court

25. By grants of special leave, the Commonwealth and the unions each appealed to the High Court of Australia. The High Court (French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon, JJ) unanimously allowed the appeals and set aside the

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[28] The name of the BCII Act has since been changed to the *Fair Work (Building Industry) Act 2012* (Cth) and Pt 1 of Ch 7 of the BCII Act has been replaced by Ch 7, Pt 1 of the *Fair Work (Building Industry) Act 2012*.

[29] The issue was directed to be dealt with by the Full Federal Court under s 20(1A) of the *Federal Court of Australia Act 1976* (Cth) after the primary judge had expressed concern at a pre-trial directions hearing that *Barbaro* might apply to the proceedings.

adjournment order made by the Full Federal Court and remitted the proceedings to the Federal Court for determination according to law.

26. French CJ, Kiefel, Bell, Nettle and Gordon JJ delivered a joint judgment ("**Joint Judgment**") while Gageler and Keane JJ each delivered separate reasons for judgment.

Joint Judgment

The nature of civil penalty regimes

27. The Joint Judgment referred to Pt 1 of Ch 7 of the BCII Act as "typical of civil penalty provisions enacted by the Commonwealth to facilitate the enforcement of various statutory civil regulatory regimes"[30] and observed that some of these civil penalty provisions were contained in legislation which provided for both civil penalties and criminal penalties while others were contained in legislation, of which the BCII Act was an instance, which provided only for civil penalties.[31]

28. However, the Joint Judgment said that in each case the form of the civil penalty provisions was "essentially similar",[32] namely:

> "*In essence, civil penalty provisions are included as part of a statutory regime involving a specialist industry or activity regulator or a department or Minister of State of the Commonwealth ("the regulator") with the statutory function of securing compliance with provisions of the regime that have the statutory purpose of protecting or advancing particular aspects of the public interest. Typically, the legislation provides for a range of enforcement mechanisms, including injunctions, compensation orders, disqualification orders and civil penalties, with or, as in the BCII Act, without criminal offences. That necessitates the regulator choosing the enforcement mechanism or mechanisms which the regulator considers to be most conducive to securing compliance with the regulatory regime. In turn, that requires the regulator to balance the competing considerations of compensation, prevention and deterrence. And, finally, it requires the regulator, having made those choices, to pursue the chosen option or options as a civil litigant in civil proceedings.*"[33]

Civil penalty practice

29. The Joint Judgment observed that until the Full Federal Court's decision in the matter before it, the practice followed in relation to civil penalty proceedings had generally

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[30] Above, n 1, at [16].
[31] Above, n 1, at [23].
[32] Above, n 1, at [23].
[33] Above, n 1, at [24].

accorded with the decisions in *NW Frozen Foods* and *Mobil Oil.*[34] After reviewing those cases, the decisions in *Ingleby* and *Barbaro*, the differing judicial views expressed as to whether *Barbaro* applied to civil penalty proceedings and the Full Federal Court's decision, the Joint Judgment concluded that the Full Federal Court's reasoning in the matter should be rejected.[35]

30. The Joint Judgment's reasons for this conclusion were as follows:[36]

- There was an important public policy involved in promoting predictability of outcome in civil penalty proceedings and the practice of receiving and, if appropriate, accepting agreed penalty submissions increased the predictability of outcome for regulators and wrongdoers. Such predictability of outcome encouraged corporations to acknowledge contraventions, which, in turn, assisted in avoiding lengthy and complex litigation and thus tended to free the Courts to deal with other matters and to free investigating officers to turn to other areas of investigation that awaited their attention.[37]

- *Barbaro* was concerned with submissions as to the available range of sentences in criminal proceedings, that is, the spread which notionally separated the indeterminate points beyond which a Court of criminal appeal was persuaded that a sentence was so manifestly excessive or inadequate as to be affected by error of principle. In contrast, *NW Frozen Foods* and *Mobil Oil* were concerned with the very different conception applicable to civil penalty proceedings that, because fixing the amount of a civil penalty was not an exact science, there was a permissible range in which Courts had acknowledged that a particular figure could not necessarily be said to be more appropriate than another figure. It was only in that latter sense, and only to that extent, that the Court would not depart from the figure proposed by the parties merely because it might otherwise have preferred to choose some other figure.[38]

- *NW Frozen Foods* and *Mobil Oil* made it plain that the Court was not bound by the figure proposed by the parties but had to satisfy itself that the proposed penalty was appropriate and it could be presumed that a judge would do his or her duty according to the oath of office and reject any agreed penalty submission if not satisfied that what was proposed was appropriate.[39]

- What was said in *Barbaro* applied only to criminal proceedings and, consequently, nothing said in *Barbaro* was antithetical to continuing the practice of agreed penalty submissions in civil penalty proceedings.[40]

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[34] Above, n 1, at [25].
[35] Above, n 1, at [46].
[36] References to cases have been omitted.
[37] Above, n 1, at [46].
[38] Above, n 1, at [47].
[39] Above, n 1, at [48]-[49].
[40] Above, n 1, at [50].

31. The Joint Judgment went on to say that there were basic differences between a criminal prosecution and civil penalty proceedings which provided the "principled basis" for excluding the application of *Barbaro* from civil penalty proceedings,[41] those differences being as follows:

    - A criminal prosecution was an accusatorial proceeding where the burden lay upon the Crown to establish the guilt of the accused beyond reasonable doubt and the accused could not be required to assist in proof of the offence charged. In contrast, civil penalty proceedings were civil proceedings in which:
        - there was an adversarial contest in which the issues and scope of possible relief were largely framed and limited as the parties might choose;
        - the standard of proof was upon the balance of probabilities; and
        - the respondent was denied most of the procedural protections of an accused in criminal proceedings.[42]

    - A criminal prosecution was aimed at securing, and could result in, a criminal conviction. In contrast, a civil penalty proceeding was precisely calculated to avoid the notion of criminality.[43]

    - Criminal penalties imported notions of retribution and rehabilitation. In contrast, the purpose of a civil penalty was primarily, if not wholly, protective in promoting the public interest in compliance.[44]

    - In criminal proceedings the imposition of punishment was a uniquely judicial exercise of intuitive or instinctive synthesis of the sentencing facts as found by the judge and the judge's relative weighting and application of relevant sentencing considerations in accordance with established sentencing principle. This exercise involved the judge considering what was to be the appropriate sentence and left no room for the judge to take account of, or be persuaded by, the Crown's opinion as to an appropriate length of sentence or range of available sentences open to be imposed. In contrast, in civil proceedings there was generally very considerable scope for the parties to agree on the facts and upon the appropriate remedy and for the Court to be persuaded that what was proposed was an appropriate remedy.[45]

32. Accordingly, the Joint Judgment said that, subject to the Court being sufficiently persuaded of the accuracy of the parties' agreement as to facts and consequences, and that the penalty proposed by the parties was an appropriate remedy, it was consistent with principle and, for the reasons *Allied Mills*[46] had identified, highly desirable in practice, for the Court to accept the parties' submissions and impose the

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[41] Above, n 1, at [51].
[42] Above, n 1, at [52]-[53].
[43] Above, n 1, at [54].
[44] Above, n 1, at [55].
[45] Above, n 1, at [56]-[57].
[46] Above, n 3.

proposed penalty. To do so, the Joint Judgment further said, was no different in principle or practice from approving an infant's compromise, a custody or property compromise, a group proceeding settlement or a scheme of arrangement.[47]

33. The Joint Judgment acknowledged that there was a public interest in the imposition of civil penalties but observed that there were other civil proceedings in which the public interest was involved, for example, custody disputes, group proceedings and schemes of arrangement, and that it was not unusual for a Court to accept an agreed submission as to the form and quantum of relief, if this was an appropriate remedy, in those kinds of cases.[48] Accordingly, the Joint Judgment said:

> "*Once it is understood that civil penalties are not retributive, but like most other civil remedies essentially deterrent or compensatory and therefore protective, there is nothing odd or exceptionable about a court approving an agreed settlement of a civil proceeding which involves the public interest; provided of course that the court is persuaded that the settlement is appropriate.*[49]

34. The Joint Judgment also acknowledged that the regulator in a civil penalty proceeding was not disinterested but said that it was the function of the relevant regulator to regulate the industry in order to achieve compliance and that, therefore, the regulator would be able to offer informed submissions as to the effects of contravention on the industry and the level of penalty necessary to achieve compliance. However, the Joint Judgment emphasised that a regulator's submissions would be considered on their merits in the same way as a respondent's submissions and subject to being supported by findings of fact based upon evidence, agreement or concession. [50]

35. The Joint Judgment found that there was nothing in the purpose or text of the BCII Act which indicated that the Court should be less willing to receive submissions as to the form and quantum of a penalty in civil penalty proceedings than to receive submissions as to the form and quantum of relief in any other kind of civil proceedings.[51] The following points were made in this regard:

    - The BCII Act expressly provided that the Director's functions included intervening in proceedings and making submissions in accordance with the BCII Act and did not impose any express restriction or limitation on the evidence or submissions which could be received from the Director. By providing for civil penalty proceedings, it implicitly assumed the application of the general practice and procedure regarding civil proceedings.[52]

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[47] Above, n 1, at [58].
[48] Above, n 1, at [59].
[49] Above, n 1, at [59].
[50] Above, n 1, at [60]-[61].
[51] Above, n 1, at [61].
[52] Above, n 1, at [62].

- Section 49 of the BCII Act provided for civil penalty proceedings to be instituted by a range of eligible persons including "a person affected by the contravention" who clearly would be entitled to make submissions to the Court as to the form and quantum of the relief sought. It made no distinction between the procedure applicable to a proceeding brought by a person affected by the contravention and the procedure which was to apply to a proceeding brought by the Director. Therefore, it appeared to contemplate that whoever was the eligible person would identify the relief sought both in the originating process and in the final address.[53]

- The fact that the BCII Act did not expressly provide for the Director to make submissions as to penalty was unremarkable. Nothing in the BCII Act necessarily implied the exclusion of this entitlement and the phenomenon of a regulator making such submissions did not lead to and was not likely to lead to erroneous views about the importance of the regulator's opinion in the setting of appropriate penalties.[54]

Conclusion

36. The Joint Judgment then concluded:

> "*In contradistinction to the role of the Crown in criminal proceedings, it is consistent with the purposes of civil penalty regimes of which Pt 1 of Ch 7 of the BCII Act is typical, and therefore with the public interest, that the regulator take an active role in attempting to achieve the penalty which the regulator considers to be appropriate and thus that the regulator's submissions as to the terms and quantum of a civil penalty be treated as a relevant consideration.*"[55]

Other judges

37. In separate reasons for judgment, Gageler J observed that the Joint Judgment had concluded that *Barbaro* had no application to civil penalty proceedings and that the principles applicable to agreed penalty submissions in civil penalty proceedings remained those set out in *NW Frozen Foods* and *Mobil Oil*. His Honour agreed with that conclusion.[56]

38. Also in separate reasons for judgment, Keane J agreed that the appeals should be allowed for the reasons given in the Joint Judgment.[57] His Honour made additional observations that the view taken in *Barbaro* was grounded in the special nature of criminal proceedings as they had developed historically but that, in contrast, it was well settled that proceedings for the recovery of a civil penalty were civil proceedings.

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[53] Above, n 1, at [63].
[54] Above, n 1, at [64].
[55] Above, n 1, at [64] (footnote omitted).
[56] Above, n 1, at [68].
[57] Above, n 1, at [79].

His Honour then said that the legislative choice to designate such proceedings as civil proceedings could not be ignored by a Court.[58]

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[58] Above, n 1, at [100]; [102].