IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

NO B 36 OF 2015

On Appeal From
the Federal Court of Australia

BETWEEN: COMMONWEALTH OF AUSTRALIA
First Appellant

AND: DIRECTOR
FAIR WORK BUILDING INDUSTRY
INSPECTORATE
First Respondent

CONSTRUCTION
FORESTRY
MINING AND ENERGY UNION
Second Respondent

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

SUBMISSIONS OF THE AMICI CURIAE

Filed on behalf of the Amici Curiae by:

Australian Government Solicitor
4 National Circuit, Barton, ACT 2600
DX 5678 Canberra

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File ref: 15082660

Telephone: 02 6253 7424
Lawyer's E-mail: Matthew.Blunn@ags.gov.au
Facsimile: 02 6253 7384

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PART I FORM OF SUBMISSIONS

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

PART II ISSUES

2. The issues that arise on the appeal are:

   (a) whether the principles derived from *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**) remain good law, including as a consequence of the decision in *Barbaro v R; Zirilli v R* (2014) 253 CLR 58 (***Barbaro***);

10 (b) the proper role in a civil penalty hearing for submissions as to penalty (including joint submissions as to an agreed penalty), including whether there is a constraint on the making and consideration of submissions as to appropriate penalty amounts (including on an agreed basis), in light of the decision in *Barbaro*.

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

3. The Amici Curiae certify that consideration has been given to whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth), and is of the view that no notice – further to that given by the notice dated 4 June 2015, as filed by the Appellant in the special leave proceedings – is required.

PART IV FACTS

20 4. The Amici Curiae adopt the statement of facts in Part V of the submissions of the Commonwealth.

PART V LEGISLATIVE PROVISIONS

5. The Amici Curiae accept the Commonwealth's statement of applicable legislative provisions.

PART VI ARGUMENT

6. The decision under appeal has a number of distinct aspects. The first concerns whether the decisions in *NW Frozen Foods* and *Mobil Oil* remain good law, including in light of *Barbaro*. The second concerns the relevance and role of an agreement as to penalties in the Court's performance of its duty to fix penalties, including in light of *Barbaro*, and the
30 extent to which the Court would take such an agreement into account. The third concerns whether either party is permitted to make submissions as to the specific amount of any penalty to be imposed. The second and third issues are related, in the sense that if

the parties cannot make any submissions as to the specific amount of any penalty then they may not be able to rely upon an agreed penalty. However, whilst recognising they are associated questions, the Full Court treated them as distinct (as indeed they are): [19] AB 105. In its written submissions, the Commonwealth focuses primarily on the third issue, in considering the application to civil penalty proceedings of what it describes as the "*Barbaro* principle". In adopting that course, the Commonwealth does not focus upon a number of aspects of the reasoning of the Full Court. A similar approach is taken by the Unions.

7. These submissions deal with the issues in the order listed above. We note, however, that observations in each section have relevance for other sections.

The principle in *N W Frozen Foods* and *Mobil Oil*

8. In *NW Frozen Foods*, Burchett and Kiefel JJ (Carr J agreeing) observed (at 290) that the *Trade Practices Act* 1974 places on the shoulders of the Court the responsibility to determine the "appropriate" penalty in each particular case. Their Honours continued by noting the significance of effects upon the functioning of markets, and the assistance that may be provided by "views put forward by the Australian Competition and Consumer Commission". Their Honours then observed (at 290 - 291):

> 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.
>
> There is an important public policy involved. 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 jeopardised 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... [Emphasis added]**

9. In the present case, the Full Court observed (at [22] AB 106) that the reference to the beneficial consequences being jeopardised if corporations were to conclude that proper settlements were clouded by unpredictable risks "implies that such jeopardy would arise if the parties considered that there was any significant possibility that the Court would not adopt the agreed penalty." Although the words "any significant" may slightly overstate the matter, that proposition otherwise follows as a matter of logic.

10. In the subsequent case of *Mobil Oil*, the Full Federal Court was addressing the following question stated for their consideration: "Where the parties propose an agreed amount to be imposed as a penalty... is the Court bound by the decision in *NW Frozen Foods*... to

consider whether the proposed amount is within the permissible range in all of the circumstances and, if so, impose a penalty of that amount?"

11. The Commonwealth in its written submissions relies upon the fact that this question was answered "No".[1] However, it is relevant to observe that the question was only answered "No" because of a minor qualification referred to in *Mobil Oil* at [54] and [80] - [82], namely that the sixth proposition drawn from the reasoning in *NW Frozen Foods* does not mean that the Court must commence its reasoning with the proposed penalty and limit itself to considering whether that penalty is within the permissible range; a Court could do that, but could also commence by "addressing the appropriate range of penalties independently of the parties' proposed figure and then, having made that judgment, determine whether the prepared [sic: proposed] penalty falls within the range" (at [54]). *Mobil Oil* otherwise endorsed *NW Frozen Foods*, including the "sixth proposition" said to emerge from *NW Frozen Foods*. The "sixth proposition" was as follows (*Mobil Oil* at [51(vi)]):

> Where the parties have jointly proposed a penalty, it will not be useful to investigate whether the Court would have arrived at that precise figure in the absence of agreement. The question is whether that figure is, in the Court's view, appropriate in the circumstances of the case. In answering that question, the Court will not reject the agreed figure simply because it would have been disposed to select some other figure. It will be appropriate if within the permissible range.

12. The meaning of "appropriate" penalty in this context thus includes a figure that differs from the one that the Court "would have been disposed to select" in the proper exercise of its discretionary judgment, and is "appropriate" if it is within "the permissible range".

13. The principles in *NW Frozen Foods* and *Mobil Oil* have been adopted in numerous subsequent cases. They include cases in which the Court (properly, in light of *Mobil Oil*) has adopted an agreed penalty figure, notwithstanding that the Court would have been minded to impose a different penalty if it had addressed the question independently.[2]

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[1] Commonwealth Submissions, at [59] and footnote 62.

[2] For example: *Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd* (2002) ATPR 41-880; [2002] FCA 619 at [29]-[33] per Weinberg J (At [29]: "I should make it clear that were it not for the fact that the parties have agreed that pecuniary penalties totalling $500,000 should be imposed, I would probably have fixed upon a higher figure."); *APRA v Derstepanian* (2005) 60 ATR 518; [2005] FCA 1121 at [25] and [44] per Weinberg J (At [44]: "That does not mean that I would have chosen a penalty of $100,000 for the first respondent had the matter been left purely within my discretion. I may well have selected a higher figure. The fact is that the reasoning in *NW Frozen Foods* imposes a significant constraint upon my choice."); *ACCC v Navman* [2007] FCA 2061 at [148], [149] per Hely J (At [148]: "It seems to me that even allowing for a 25% to 30% discount, the penalty is so close to the bottom of the permissible range as to risk falling below it ... Specific deterrence is to be taken into account. Nevertheless, with considerable reservations, I have come to the view that this is not a clear case where the Court should depart from the agreed penalty."); *ACCC v MSY P/L (No 2)* (2011) 279 ALR 609 per Perram J (At [97]: "Whilst I might have imposed a somewhat stiffer penalty myself, that which has been agreed is plainly within the range"); *ACCC v Turi Foods Pty Ltd (No 2)* [2012] FCA 19 per Tracey J (At [41]: "This penalty is, in my view, towards the lower end of the proper range for contraventions of the relevant kind. It is, however, within the permissible range and I would not depart from the proposed amount simply because I might have been minded to impose a higher figure within the range but for the agreement of the parties."). See also *Comcare v Post Logistics Australasia Pty Ltd* [2008] FCA 1987 at [47] per Flick J: "It is considered that it is 'appropriate' to give effect to the agreement between the parties as to penalty. Whether or not the court would have reached the same figure is not to the point; the sum of $165,000, as agreed between the parties, is within the 'permissible range'" and *ACCC v Cabcharge* [2010] FCA 1261 at [59] per Finkelstein J (At [59]: "While I believe that $3 million is at the low end of the

The impact of the decisions is perhaps best discerned from the circumstance that notwithstanding the very large number of cases indeed involving agreed penalties, it is difficult to locate more than a handful of cases in which an agreed penalty has not been accepted. By contrast, if the Court was acting entirely independently in exercising its discretion to impose a penalty, then having regard to the number of possible values that a penalty can take, it would only be a matter of coincidence that the Court would reach the same result as the agreed penalty, and such a case would be likely to be the exception rather than the rule.

14. Notwithstanding their frequent application, as recognised by the Full Court in the present case the principles drawn from *NW Frozen Foods* and *Mobil Oil* are problematic, including in light of the observations of the majority in *Barbaro*.

15. In *Barbaro*, the majority observed (at [25] – [27]) that a judge imposing a sentence exercises a discretionary judgment, and reference to an "available range" of sentences derives from the well-known principles in *House v R*, such that a manifest excess or manifest inadequacy can be said to be outside the available range. At [27] - [28], the majority observed that the essentially negative proposition that a sentence is so wrong that there must have been some misapplication of principle in fixing it cannot safely be transformed into any positive statement of the upper and lower limits within which a sentence could properly have been imposed, and that stating the bounds of an "available range" is apt to mislead in that the conclusion that an error has (or has not) been made neither permits nor requires setting the bounds of the range of sentences within which the sentence should (or could) have fallen. Similar comments are made at [42] – [43], where the majority observed that stating the bounds of the available range of sentences states no proposition of law. The majority also observed (at [34]) that fixing the bounds of a range within which a sentence should fall wrongly suggests that sentencing is a mathematical exercise.

16. Thus, as explained by the High Court in *Barbaro*, the notion of an "available range" only has meaning as a shorthand expression describing a consideration after the event (such as by an appellate court) of an exercise of discretion by a primary decision-maker, and whether the exercise of that discretion was unreasonable or plainly unjust thus involving error. It is not meaningful for a prosecuting party or the Court to identify in advance of the relevant discretionary decision an available range of possible decisions that could be made, and indeed that would wrongly suggest that sentencing is a mathematical exercise. None of these observations is based on any peculiar or distinct feature of the criminal justice system.

17. In the context of the principle from *NW Frozen Foods* and *Mobil Oil*, the notion of a "permissible range" has the same meaning as an "available range" referred to in *Barbaro*. The very word "permissible" indicates that it is something that would be permitted – that is, the Court would not err. For the reasons explained in *Barbaro*, that notion is inapt. The approach in *NW Frozen Foods* and *Mobil* of adopting an agreed penalty unless the Court concludes that it is outside the "permissible range" is to apply notions that are

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acceptable range for this type of conduct, it narrowly falls within the range I would deem permissible, taking into account the total penalties imposed in this case and the fact that this is still the largest predatory pricing penalty ever imposed in Australia.").

only applicable to what is properly viewed as an appellate or review function of determining whether a particular discretionary decision has miscarried and necessarily involves error. However, that is not the task prescribed by the relevant statute (here the *Building and Construction Industry Improvement Act* 2005 (Cth) (**BCII Act**)). The statute does not confer upon the regulator the task of setting the penalty and upon the Court the task of reviewing that stated penalty to consider whether it involves error in the *House v R* sense. That would be to repose in the Court at first instance a quasi-appellate or review function. The Court cannot address the question of whether an agreed penalty is within a "permissible range" or an "appropriate range" without forming at least some view as to the permissible or appropriate range. That is a conceptually distinct process from addressing the question of what is the appropriate penalty in a given case.

18. In *Australian Securities and Investment Commission v Ingleby* (2013) 39 VR 554, the Victorian Court of Appeal concluded that the approach in *NW Frozen Foods* and *Mobil* incorrectly required the Court to address an appellate question – whether the agreed figure falls within the range of penalties reasonably available.[3] As the Full Court in the present case observed (at [114] AB 140), this approach anticipated at least to a certain extent the reasoning of the majority in *Barbaro*.

19. Further, by directing the Court to consider the question of whether the proposed penalty is within the permissible range, the approach in *NW Frozen Foods* and *Mobil Oil* directs the Court to ask the wrong question. The proper question for the Court is: what is the appropriate penalty in the circumstances of the present case, having regard to proper principles and precedents?

20. As discussed in more detail in the third section below, the exercise of a discretionary judgment to fix an appropriate penalty is closely analogous to the sentencing function. In *Barbaro* at [47], the majority observed that to refer to "plea agreements" or "settlements" cannot obscure three fundamental propositions, which are consistent with the earlier statements of this Court in *GAS v R*.[4] The first is that it is for the prosecution alone to decide what charges are to be preferred against an accused person. The second is that it is for the accused person, alone, to decide whether to plead guilty to the charges preferred, which decision "cannot be made with any foreknowledge of what sentence will be imposed". The third is that it for the sentencing judge, alone, to decide what sentence will be imposed. Those observations are consistent with the "sharp distinction" between the role of prosecutor and judge referred to by the majority at [33].

21. In *GAS v R*, the Court stated a fourth proposition as a corollary of the third, which is that any understanding between the prosecution and the defence as to the evidence to be led, the admissions to be made, or the submissions of law to be put, cannot bind the judge in any sense. In *CMB v Attorney-General (NSW)* (2015) 317 ALR 308 at [64], Kiefel, Bell and Keane JJ observed that the determination of the appropriate sentence is one that rests solely with the court, and the public interest in the sentencing of offenders does not permit the parties to bind the court by their agreement.

[3] At [29] per Weinberg JA, at [98] – [99] per Harper JA, at [102] per Hargrave JA.

[4] (2004) 217 CLR 198 at [28] – [30].

22. Although the BCII Act reposes various functions in the regulator, the statute grants the function of setting the penalty to the Court. It is problematic that the Court would adopt a penalty agreed between the parties, even if the Court would have been disposed to select some other figure in the exercise of its discretion in accordance with the function given to it by the statute. As discussed above, the appropriateness of this approach has hitherto rested on a notion of a "permissible range" that is, for reasons explained in *Barbaro*, inapt. The approach results in an otherwise broad discretion being constrained by a limitation that is not found in either the text or structure of the Act. Further, it is a constraint that is inconsistent with the unfettered and independent exercise of the discretion which the statute confers on the Court. It is not a sufficient answer to say that the *Mobil Oil* confirms that the Court must consider the penalty to be "appropriate". As noted above, "appropriate" in this context does not mean the penalty that the Judge himself or herself would fix, but rather whether the proposed penalty is within a permissible range.

23. As noted above, in *Barbaro* the majority observed at [47] that it is for the accused person, alone, to decide whether to plead guilty to the charges preferred, and that this decision cannot be made with any foreknowledge of what sentence will be imposed. Likewise, it is for a person alleged to have contravened a civil penalty provision to decide whether to admit a contravention, and by parity of reasoning that decision cannot be made with any foreknowledge of what penalty will be imposed. Any foreknowledge would be inconsistent with the clear distinction between the role of the regulator and the role of the Court, and the legislative choice to repose in the Court and the Court alone the task of fixing an appropriate penalty. The concerns expressed by the Commonwealth in the present case as to the impact of the Full Court's decision, and likewise the observation in *NW Frozen Foods* that the beneficial effects of settlements might be jeopardized if corporations perceived that settlements were clouded by unpredictable risks, are inconsistent with the unfettered exercise of discretion by the Court. To put it simply, one cannot have both a proper and independent exercise of discretion by the Court and any degree of certainty for the contravener.

24. The approach endorsed by *NW Frozen Foods* and *Mobil Oil* is in stark contrast to the permissible approach in criminal sentencing, where there has been a rejection of any form of US-style plea bargaining. In the criminal law, the only acceptable form of negotiation is a charge negotiation as to what charges will be pursued as guilty pleas, on a statement of agreed facts to be placed before the sentencing judge. For example, it is not within the capacity of parties to agree that each accused would receive a lesser sentence than a principal.[5] Although it may well be practically expedient for the Court to act on agreed settlements, in the criminal context it has been said that such expediency leads to "clearing the lists at too great a price".[6]

25. The evidence before the Full Court suggested that relevant regulators under various statutory regimes consider it important, in order to induce contraveners to resolve matters, to be able to agree upon a penalty and put forward joint submissions as to that agreed penalty. That could only be on the assumption that the ability to put joint

[5] *GAS v R* (2004) 217 CLR 198 at [35].

[6] *R v Marshall* [1981] VR 725 at 733.

submissions as to an agreed penalty was perceived to be efficacious in achieving that penalty. Having regard to the history of penalty proceedings, and the very small number of proceedings where the Court departs from the agreed penalty, that assumption is certainly warranted. However, as well as containing what the Full Court correctly described (at [186] AB 165) as "some hyperbole" as to the likely consequences on regulatory activities if *Barbaro* was applied, the evidence which puts these matters forward as a virtue in fact reveals them to be a vice. By conferring jurisdiction to impose a civil penalty on the Court rather than the regulator,[7] Parliament clearly intended that it was the Court rather than the regulator who was to set the penalty. However, the evidence adduced by the Commonwealth indicates that a practice has emerged whereby parties desire and expect greater comfort than the simple understanding that the penalty is to be fixed by a Judge having regard to all relevant matters.

26. In the criminal context, pleas of guilty must be made without any certainty as to outcome, as observed by the majority in *Barbaro* at [47]. Indeed, that was said by the majority to be a "fundamental proposition". It is unclear why any different approach should be applicable in the circumstance of a civil penalty. Yet there is a different outcome, because Courts almost universally do not disturb the agreed penalty, applying the principles in *NW Frozen Foods* and *Mobil Oil*. If Courts were instead required to set a penalty on an independent basis then they would most likely require more information, a better understanding of the circumstances of the contravention, and a better understanding of other relevant circumstances pertaining to the culpability of the contravener. As the Full Court suggested (at [237] – [239] AB 184), this would also produce better precedents and thus a better guide to what a Court, in the independent exercise of a sentencing discretion, would do in comparable circumstances.

27. Prior to the decision of the Full Court in the present case, there was a stark contrast (in the case of a person who admitted a crime or a civil penalty contravention) between the approach to criminal sentencing and the approach to imposing a civil penalty. There is no apparent basis for such a stark contrast.

28. The Full Court in the present case considered the matters referred to above in observing that there were difficulties with the approach derived from *NW Frozen Foods* and *Mobil Oil*: for example, at [53] AB 118 and at [133] AB 145. As their Honours observed at [53], in relation to the proposition that it may not be useful for the Court to consider whether it would have imposed the precise agreed penalty, the relevant legislation effectively directs the Court to do so. No error has been demonstrated in the approach of the Full Court on this point. The Full Court correctly concluded that *NW Frozen Foods* and *Mobil Oil* are not good law.

The role of agreed penalties

29. An agreed penalty ordinarily is the product of a bargain between the parties. That bargain might be reached in the course of a formal process (such as a mediation), or an informal negotiation. However, some degree of compromise generally is involved. A regulator, in agreeing to a penalty, may be influenced by various considerations. These

[7] There are of course some statutory regimes which confer on regulators the ability to fine, and the like. We are not here concerned with such provisions.

might include a concern about the risks attendant in pursuing the matter at a contested hearing, the cost and time savings in resolving the matter at an early stage, the effect of an agreed resolution on other related or similar matters (for example, in the case of the ACCC, the potential impact of a settlement with one member of an alleged cartel on the other cartel members), the potential positive impact on the regulator's reputation for successful pursuing contraventions, and many other potential considerations. Likewise, various pragmatic considerations may influence a respondent, such as the desire to avoid the publicity of a full contested hearing.

30. The figure could also be the product of trade-offs as to remedies more generally: for example, a corporate respondent may be prepared to agree to a higher penalty (and possibly higher than the party considers appropriate) if the regulator agrees not to pursue an order for corrective advertising or some other relief. The figure may also be a product of the relative strengths of the parties' bargaining positions, or reflect the determination (and potentially differential determination) of one or more parties to achieve a particular result. For this reason, there can be no confidence that the process of agreeing upon a penalty of itself tends to distil the appropriate, or correct, outcome.

31. That a penalty is often the product of a bargain was demonstrated by the circumstances of the present case. At the hearing, counsel for the Director agreed that there was no explanation in the written submissions as to how the penalty was reached, and said that this was "perhaps a feature of the fact that there was an agreement in respect of the bottom line penalty, as it were, in respect of each of the respondents".[8] Counsel then proceeded to explain how the total amount *might* be justified by reference to considerations as to an appropriate amount per contravention, or the application of the totality principle, but did not suggest that this was how the penalty was in fact reached. This attracted a comment by Wigney J to the effect that this was after-the-event reasoning, which was not disputed.[9] This is not surprising, having regard to the nature of an agreed penalty, and nor is there necessarily anything inappropriate about it, but it underscores the considerable gap between the process of reaching an agreed penalty and the process of assessment by the Court as to an appropriate penalty.

32. As a consequence of these matters, an agreed penalty may tell the Court very little. The fact that an agreed penalty is the product of a compromise alone makes it unlikely that a Court, acting independently in the exercise of its discretion as to penalty, would fix that particular quantum as the penalty to be ordered, representing as it does a range of factors that do not bear upon the judicial determination of the appropriate penalty. The figure is not the product of any instinctive synthesis, and is not the outcome of a judge "balancing many different and conflicting features".[10]

33. In *Barbaro* at [30] – [32], the majority emphasised that a prosecutor might have a view as to sentence which gives undue weight to the value of assistance by the offender, or the benefits of a guilty plea in avoiding a long and costly trial. The majority observed that in each case "the prosecution forms a view which (properly) reflects the interests that the

[8] Transcript 75.13 - .20. The relevant parts of the transcript are attached to these submissions.

[9] Transcript 75.21 – 76.32. See also T80.16 – 81.9.

[10] *Barbaro* at [34].

prosecution is bound to advance. But that view is not, and cannot be, dispassionate". Those observations identify with considerable force the difficulties inherent in giving effect to the position of a prosecutor or regulator who is inevitably influenced by pragmatic considerations that are not dispassionate, and a fortiori when that position is a result of a negotiation.

34. Further, the process of agreeing upon a penalty means that the penalty may well not even accord with the regulator's best, or most objective, view as to what is an appropriate penalty, and indeed frequently will depart from it. In circumstances where (as discussed in more detail in the next section) the function of a penalty is not just to resolve a particular case and to sanction particular conduct, but also has an important public role in deterring both the individual in question and the broader public from committing a contravention of the relevant Act, acting on the basis of an agreed penalty may not be a sound exercise of the relevant judicial discretion. It is not an answer to say that the Court must ensure that the penalty is "appropriate": the independent exercise of the Court's discretion is one in which an agreed penalty would serve no real role.

35. Moreover, the common (indeed almost universal) acceptance of agreed penalties, i.e. of compromises reached between the regulator and the regulated, is likely to be a questionable basis at best for the setting of an appropriate level of deterrence over time, or for the development of a body of precedent decisions. Principled sentencing and punishment, in either the criminal or civil penalty context – which is sentencing that meaningfully correlates to the particular conduct and circumstances in question – is obscured by the Court's adoption of agreed penalty submissions.

36. The Full Court in the present case considered these matters at [139] AB 145 and [238] AB 184. No error has been demonstrated in this reasoning.

37. The appropriate approach to agreed penalties is to conclude that they have less significance, and less weight, than a conventional submission by a regulator. If they can be taken into account at all (which is discussed in the next section), then they should be given modest weight. Further, it would perhaps be an unusual case in which the Court properly exercising its independent discretion would arrive at the same figure as the agreed penalty. Of far greater significance in the penalty imposition process are the facts on which the Court will act (which need to respond to the relevant considerations for the setting of the penalty), the relevant principles (including submissions as to those principles), and comparable decisions.

Whether the Court can have regard to an agreed penalty

38. In their written submissions, the Commonwealth and the Unions emphasise and list distinctions between civil and criminal proceedings. It may be recognised immediately that there are distinctions. There are also similarities. The issue in the present case will not be resolved by a weighing up of similarities and differences. However, the Commonwealth goes further and submits (at [34]) that the legislative choice to confer power upon the Court to make a pecuniary penalty order without constituting the matter as a criminal trial carries with it that the matter should not be subject to the distinctive requirements and limitations that attend criminal proceedings. That submission goes too

far. As identified below, civil penalty proceedings are already subject to the application of various distinctive principles and limitations drawn from the criminal context. This flows from the particular character of civil penalty proceedings. The Full Court explained that there was no bright line dividing the two, at [11] - [13] AB 97-100.

39. Likewise, the Commonwealth submits that the BCII Act does not reveal a Parliamentary intention that common law limitations on the making and receipt of submissions as to the "available range" of a criminal sentence were intended to be picked up and applied to pecuniary penalties. However, this does not mean that Parliament has revealed the opposite intention: that such limitations not apply.

10 40. The concerns identified by the majority in *Barbaro* are not of their nature confined to criminal proceedings. Nor are they confined to submissions as to an available range. The heightened significance of the independent exercise of the Court's discretion in exercising its power to sanction conduct is equally applicable to the imposition of civil pecuniary penalties. This is evidenced by the application of other criminal sentencing principles in this context.

41. In imposing civil penalties, Australian courts have accepted that a number of criminal sentencing principles are both relevant and instructive in performing that judicial task. It has been observed that "the law of sentencing for criminal offences is an appropriate source of principles applicable by analogy to the determination of the matters which arise
20 in civil penalty proceedings".[11] The rationale, mostly implicit, but sometimes expressly stated, is that both are in essence *sentencing* tasks[12] – the assessment of an appropriate consequence, issued by the State by means of the exercise of judicial power, after a finding of guilt or contravention, to serve both as penalty and deterrence (to the individual and the wider community). Both processes are punitive in nature, making the application of criminal sentencing principles apt: *O'Brien v AISC* (2009) 74 ACSR 324 at [47]. That is, criminal sentencing principles have been developed and refined over time to safeguard the exercise of judicial power in the very particular task of exercise of judicial power by way of punishment and deterrence in the face of a range of contradictory factors and considerations.

30 42. Some of the principles that have been held to apply in the civil penalty context, for example, include:

(a) the instinctive synthesis approach (see, for example, *Australian Competition and Consumer Commission v Singtel Optus Pty Ltd (No 4)* [2011] 282 ALR 246 at [78] per Perram J and *Registrar of Aboriginal and Torres Strait Islander Corporations v Matcham (No 2)* [2014] 97 ACSR 412 at [124]-[128] per Jacobson J);

(b) the course of conduct principle (see, for example, *Secretary, Department of Health and Ageing v Export Corporation (Australia) Pty Ltd* [2012] 288 ALR 702 at [38] per Perram J);

[11] *Vines v ASIC* (2007) 63 ACSR 505 at [19] per Spigelman CJ; Santow JA at [151] and Ipp JA at [220] agreeing; see also *Registrar Aboriginal and Torres Strait Islander Corporations v Matcham (No 2)* (2014) 97 ACSR 412 at [124] per Jacobson J.

[12] *CFMEU v Cahill* (2010) FCAFA 39 at [39].

(c) the totality principle (see, for example, *Tax Practitioners Board v Li* [2015] FCA 233 at [40] and [67] per Edmonds J and *Gillfillan & Ors v Australian Securities & Investments Commission* [2012] 92 ACSR 460 at [185] per Sackville AJA (Beazley JA and Barrett JA agreeing);

(d) the parity principle (see, for example, *Gillfillan & Ors v Australian Securities & Investments Commission* [2012] 92 ACSR 460 at [185] per Sackville AJA (Beazley JA and Barrett JA agreeing) and *In the matter of Idylic Solutions Pty Ltd - Australian Securities and Investments Commission v Hobbs* [2013] 93 ACSR 421 at [113] per Ward JA); and

(e) the relevance of general and specific deterrence (*Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640, at [65] per French CJ, Crennan, Bell and Keane JJ).

In addition, a natural person who is a respondent to civil penalty proceedings has a privilege against self-exposure to a penalty. Although the historical origins of this privilege and the privilege against self-incrimination are distinct,[13] the privilege against self-exposure to the privilege has long been recognized by the common law and is no longer simply a rule of equity relating to discovery, [14] and the operation of the privilege is analogous to that of the privilege against self-incrimination.[15]

43. Although the Commonwealth and the Unions seek to confine the application of *Barbaro* to the particular case of a submission as to applicable range in criminal proceedings, the observations of the majority and the rationale thereby expressed are not so limited. In *Barbaro*, the majority observed (at [30] - [32]) that a submission made or view held by a prosecutor as to the appropriate consequences of assistance to authorities or early pleas of guilty might be unduly influenced by views as to the pragmatic benefits which this produces and may not be dispassionate. The majority observed (at [33]) that a statement by a prosecution of the bounds of an available range of sentences may lead to erroneous views about its importance in the process of sentencing with consequential blurring of what should be a sharp distinction between the role of the judge and the role of the prosecution, and that if a judge sentences within the range the statement of that range may well be seen as suggesting that the sentencing judge has been swayed by the prosecution's view of what punishment should be imposed. This emphasises the importance of both the appearance and the reality of strict separation between the two roles. These propositions do not depend upon any unique aspect of criminal procedure or any recognition of the special role of the prosecutor. They are equally applicable in the case of a submission made by a regulator as to the precise penalty which the Court should impose. Indeed, having regard to the regulator's function in administering the Act, the view of the regulator may well be given inappropriate weight.

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[13] *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2015) 320 ALR 448 at [55].

[14] *Daniels Corporation International Pty Ltd v* ACCC (2002) 213 CLR 543 at [13]; *Rich v* ASIC (2004) 220 CLR 129 at [23] – [24].

[15] *Trade Practices Commission v Abbco Iceworks Pty Ltd* (1994) 52 FCR 96 at 111.

44. In *Barbaro*, the majority also emphasised the proper approach to sentencing submissions by observing (at [38]) that if a sentencing judge is properly informed about the parties' submissions about what facts should be found, the relevant sentencing principles and comparable sentences, the judge will have all the information which is necessary to decide what sentence should be passed without any need for the prosecution to proffer its view about available range. The majority also observed (at [40]) that the proscribed submission must be distinguished from the proper and ordinary use of sentencing statistics and other material indicating what sentences have been imposed in other (more or less) comparable cases. Again, there is no reason why these observations would not apply to a civil penalty proceeding, in light of the appropriate application of sentencing principles to the civil penalty context.

45. The majority confirmed (at [39]) that these observations were not merely applicable to an "available range" submission, by observing that "[i]t is neither the role nor the duty of the prosecution to proffer some statement of the specific result which counsel then appearing for the prosecution... considers should be reached or a statement of the bounds within which that result should fall."

46. These observations by the majority in the main consist of an application of conventional principles from the criminal sentencing context. The Full Court was correct to conclude that they were equally applicable in relation to the analogous process of imposing civil penalties. So understood, the correct approach is inconsistent with the principles drawn from *NW Frozen Foods* and *Mobil Oil* and inconsistent with the submission of an agreed penalty, which amounts to a submission by the regulator as to the precise penalty which the Court should impose.

47. Although the Commonwealth and the Unions emphasise certain unique features of the criminal sentencing context, those submissions do not address why the observations of the majority in *Barbaro* are apt in that context but not otherwise. That is, there is no link drawn between the context and the limitation. The contention, for example, does not grapple with the instances in which the principles to be applied in criminal sentencing have been held also to apply to the determination of civil penalties. In these circumstances, the distinction drawn between civil and criminal proceedings is a false dichotomy.

48. The Commonwealth gives emphasis (at [19]) to the fact that the regulator must select, from a range of possible remedies, the remedies that are pursued in the action and specify the relief sought. In a conventional civil penalty case, the application would simply seek an order for a penalty (i.e. with the amount to be fixed by the Court). This does not mean that the making and receipt of submissions as to the particular relief sought "is the logical and conventional endpoint of the application for civil relief", as the Commonwealth contends. In a criminal case, the State must select the charge and the indictment and the accused must be able to ascertain it with precision. This does not mean that a submission as to the appropriate sentence is the "logical and conventional endpoint" to the selection of the particular charge.

49. The Commonwealth (at [18]) and the Unions (at [35] and [41]) advance a form of floodgates argument – that the principle would be applicable to a potentially broad class

of claims. However, such arguments are no substitute for a consideration, on a principled basis, of whether a particular rule or principle applies in a given content. The Courts frequently have to consider the scope of application of a particular principle without the benefit of simple boundaries. For example, in *Rich v ASIC* (2004) 220 CLR 129, this Court was concerned with the question of whether the privilege against self-exposure to penalties applied to proceedings that were not traditional civil penalty proceedings. The majority observed (at [31] - [33]) that attempts to resolve such questions by dividing proceedings into categories such as "civil" and "criminal" or "punitive" and "protective" were problematic and unhelpful. Rather, the question was resolved by considering the nature of the potential consequences for the individual concerned, and whether they were in the nature of penalties. The majority observed (at [35]) that to begin the inquiry from an a priori classification of proceedings as either protective or penal invites error because it "assumes mutual exclusivity of the categories chosen when they are not, and because the classification is itself unstable". Likewise, in *Chief Executive Officer of Customer v Labrador*,[16] Hayne J (Gleeson CJ and McHugh J agreeing) observed that arguments founded on classification of proceedings as "civil" or "criminal" as determinative of the standard of proof must fail, because such arguments seek to divide "the litigious world into only two parts when, in truth, that world is more complex and varied than such a classification acknowledges. There are proceedings with both civil and criminal characteristics: for example, proceedings for a civil penalty under companies and trade practices legislation. The purposes of those proceedings include purposes of deterrence, and the consequences can be large and punishing".

50. The submissions of the Unions (at [39] - [49]) emphasise the need for the parties to a penalty proceedings to be able to make submissions. However, this contention attacks a straw case and proceeds on the footing that the Full Court has somehow prevented the reception of any submissions. (See also [11(e)] of the Unions' submissions, where it is suggested that the Full Court has held that it should make a judgment "unaided by submissions"). This mischaracterises the Full Court's decision and the implications of *Barbaro*. In *Barbaro*, the majority did not suggest that a prosecutor was unable to make submissions. On the contrary, the majority gave close attention (at [38] - [40]) to the type of submission which could legitimately be made. The submissions by the Unions do not explain why the permissible form of submissions is unsufficient. Any such explanation would have to grapple with why a submission in that form is adequate for the purposes of a prosecution but not otherwise.

51. The Commonwealth submits (at [21] and [22]) that by virtue of the provisions in section 49 of the BCII Act that application may be made by any "eligible person" and any penalty may be paid to the Commonwealth "or some other person", the Parliament is indicating that it does not expect the principles to be applied by the Court in adjudicating applications by the Commissioner to differ from those brought by private litigants, tending against the application of the *Barbaro* principle. This submission should not be accepted. The provisions in question are consistent with the historical practice of penalties being payable to common informers: *Community and Public Sector Union v Telstra Corporation Limited* [2001] FCA 1364, (2001) 108 IR 228 at [22] - [28] per Finkelstein J. We are not here concerned with conventional litigation between private litigants.

[16] (2003) 216 CLR 161 at [114].

52. As discussed by the Full Court at [10] AB 97, the imposition of pecuniary penalties as an instrument of law enforcement emerged at times when there was limited governmental capacity to provide such enforcement. The right to seek penalties was given to private citizens as an adjunct to law enforcement. The question of whether a penalty should be payable to a third party, even if to do so would confer a windfall on that party, has been the subject of conflicting decisions in this Court: see the discussion of the authorities in *Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union* (2008) 171 FCR 357 at [63] - [70] per Branson and Lander JJ; and in the context of s 49(5) of the BCII Act: *Woodside Burrup Pty Ltd v Construction, Forestry, Mining and Energy Union* (2011) 220 FCR 551 at [106] - [136] per Gilmour J. However, as these cases make clear, the identity of the recipient of the payment does not alter the nature of the penalty, the nature of the breach as a "transgression of a public obligation", the principles for determining whether a penalty is payable, or the quantum of that penalty. The existence of these provisions, rather than supporting the Commonwealth's appeal, highlights the use of civil penalties as an alternative form of law enforcement, in parallel with the criminal law. They certainly do not tend against the application of the principles in *Barbaro*.

53. Likewise, the Commonwealth's submission that the ability of private litigants to seek pecuniary penalty orders under s 49 does not involve the imposition of punishment by the State, does not properly recognise the nature of these provisions as common informer provisions.

54. The submissions of the Unions at paragraph [58] go even further than the Commonwealth and suggest that the discretion of the Court in fixing an appropriate penalty (for example, so as to act as an appropriate deterrent, or to give effect to considerations of parity) is limited by the specification of an amount in the prayer for relief in the Originating Application. Such an approach would be inconsistent with the terms of the statute in the present case and the terms of analogous sections in analogous penalty cases, which confer upon the Court the discretion to fix an appropriate penalty. Section 49 of the BCII Act does no more than enable an "eligible person" to apply for an order "imposing a pecuniary penalty" (s 49(1)(a)), to be distinguished from an order for compensation, which may be sought in a "specified amount" (s 49(1)(b)). There is no authority cited for the proposition stated in the submissions of the Unions at paragraph [58] that the specific relief sought confines the upper range of any pecuniary penalty and the proposition is wrong in principle. The Court is not so constrained. If a prayer for relief would operate to constrain the Court in this way, that would suggest that prayer for relief is invalid and unavailable under the statutory scheme.

55. For these reasons, the Full Court was correct to conclude that the principles in *Barbaro* apply by analogy to the civil penalty context, and no error has been demonstrated in that conclusion.

PART VII ESTIMATED HOURS

56. It is estimated that 2 hours will be required for the presentation of the oral argument of the Amici Curiae.

Dated: 12 August 2015

Cameron Moore
Telephone: 02 8239 0222
Facsimile: 02 9210 0639
Email: cameron.moore@banco.net.au

10

Danielle Tucker
Telephone: 02 9376 0674
Facsimile: 02 9376 0699
Email: danielle.tucker@banco.net.au

Counsel for the Amicus Curiae

AUSCRIPT AUSTRALASIA PTY LIMITED
ABN 72 110 028 825

Level 22, 179 Turbot Street, Brisbane QLD 4000
PO Box 13038 George St Post Shop, Brisbane QLD 4003
T: 1800 AUSCRIPT (1800 287 274) F: 1300 739 037
E: clientservices@auscript.com.au W: www.auscript.com.au

TRANSCRIPT OF PROCEEDINGS

O/N H-428573

FEDERAL COURT OF AUSTRALIA

QUEENSLAND REGISTRY

DOWSETT J
GREENWOOD J
WIGNEY J

No. QUD 257 of 2013

DIRECTOR, FAIR WORK BUILDING INDUSTRY INSPECTORATE

and

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION and ANOTHER

BRISBANE

10.17 AM, MONDAY, 11 AUGUST 2014

MR C.J. MURDOCH appears for the applicant
MR E. WHITE appears for the respondents
MR J. GLEESON SC appears with MR T. BEGBIE for the Commonwealth
MR C. MOORE SC appears with MS D. FORRESTER as amici curiae

WIGNEY J: Which paragraph?

MR MURDOCH: Page 13 is the beginning of the pleading in respect of that project, and then the actual facts begin from paragraph 50 on page 14, and then if your Honours go to - - -

WIGNEY J: I must have a different - - -

DOWSETT J: Are you using the tab numbers, are you?

MR MURDOCH: I beg your pardon, your Honour.

DOWSETT J: I have just got the printed statement of claim loose on the page.

MR MURDOCH: I'm sorry, your Honour. I'm using the tab numbers.

DOWSETT J: Anyway, just give me the paragraph numbers. That's all right. 50, you said, did you?

MR MURDOCH: Paragraph 50. Yes.

DOWSETT J: Yes. I have got it.

MR MURDOCH: That sets out the factual matters relied upon and then the pleading in respect of contravention, paragraph 76, is in respect of Mr Close, and paragraph 77 is in respect of Mr McQueen, Bland and Griffin. 78 is in respect of the events of 26 May.

WIGNEY J: But that seems to suggest that three separate acts, one on each day, constituted a contravention.

MR MURDOCH: That is – but then if your Honour goes to paragraph 79 - - -

WIGNEY J: I see. So a single contravention by the CFMEU consisting of the three acts of – three separate acts on three separate days.

MR MURDOCH: That is so, and then paragraph 80.

DOWSETT J: I think it's pretty arbitrary.

MR MURDOCH: In my submission, it is – it might appear to be that way, but when one looks – when one considers, rather, the actual facts that pertained in a practical way over each of the respective sites, it was, in effect, per site one stoppage, and, in my submission, that is consistent with the approach taken by Tracey J in the case that I have referred your Honour to.

DOWSETT J: But this is a question of, whether or not it is one in the course of conduct, ... factual question, isn't it?

MR MURDOCH: I accept that. Can I then move to deal with the application of the totality principle to the matter? Now, the way in which the parties approached the matter, of course, as is now notorious, is that there was an agreement made in respect of a sole penalty for each of the respondents. In my submission, the effect of that is that the – the effect is not that the totality principle doesn't apply or shouldn't be applied, but the effect is that the agreement that the parties have reached in respect of penalty reflects the end result of the application of the totality principle as opposed to an avoidance of the totality principle.

WIGNEY J: But you don't explain how you got there, though.

MR MURDOCH: Well, that is so, and again, that is perhaps a feature of the fact that there was an agreement in respect of the bottom line penalty, as it were, in respect of each of the respondents. But notwithstanding that, in my submission, an application of the totality principle to the relevant contraventions in this case still results in the respective penalties as being appropriate.

WIGNEY J: But it's not an application of the totality principle, because if it was an application of the totality principle, you would have to have said in relation to each of the separate contraventions, you know, I could impose this penalty and then take a step back after you've done that and perhaps adjust it in some way. But as Justice Dowsett indicated earlier today, that could be done in different ways. It could be three sets of $35,000 penalties, or it could be imposing a particularly large penalty for the first transgression and smaller ones for the second two. There's all sorts of different ways. But in the absence of any explanation in the submissions as to how you got there, what are we to make of it?

MR MURDOCH: Well, in my submission, your Honour, can I deal with that in a number of ways. And I apologise; I'm working – it might appear that I'm working backwards, but I don't mean to not answer your Honour's question. The amounts put forward are the end result. In any sentencing process that applied the totality principle, there would still be an end result. I accept that in the submissions that are being made, what hasn't been explained is the application of the totality principle.

What I would submit is this, that if one takes the position that in respect of the CFMEU there are three contraventions, and if one takes the position that there are two in respect of the CEPU, on the facts of this case it might be considered that the contraventions are at a medium level of severity. And once that is accepted, one would then need to take into account early agreement, cooperation by way of agreed statement of facts, etcetera. One would need to discount the median penalty back to an appropriate figure. In my submission, a case such as this – if that exercise were to be undertaken in respect of the CFMEU, bearing in mind that the maximum is $110,000, it's not inappropriate, taking into account the medium range of severity

discount, that in respect of the three CFMEU contraventions, figures of $45,000 for each contravention might be considered appropriate.

WIGNEY J: But this is the difficulty that I have. You provide detailed and helpful submissions in relation to the relevant considerations that have been looked at in various cases, but then you just say, "And here's a figure." And you don't explain in the submissions in any way how you got to that figure, how the principles have been applied to the facts, how one approaches it given that there's three separate contraventions which, on one view, each of which could be fairly serious contraventions. You don't say anything along the lines of what you've just put orally; that is, "Well, you have to discount it for cooperation," or by how much. You just simply say, "Here is what the cases say are the relevant considerations, and here's a figure." And that seems to me to be problematic in respect of what the implications of Barbaro are, because it's really – it's not enough just to say what are the relevant considerations and say something about them. You have to explain how you got to this figure in some principled way.

MR MURDOCH: Well, your Honour, what I'm seeking to do, with respect, is to explain why, in my submission, the court could apply the totality principle and arrive at the figures that have been agreed.

WIGNEY J: I know, but none of this is in your written submissions, and you seem to be – and you're not actually committing yourself to – you're just saying, "Well, it might have been done this way," is the way I understand your submission. "You might be able to view them each as a midrange-type contravention, and therefore they might each be $45,000, and if you add all of that up, it actually gets to more than $105,000, but then you have to discount a little bit because of cooperation." There's just none of that principled reasoning in the written submissions.

MR MURDOCH: Well, your Honour, the submission I make is that the approach that I've just outlined is one that can be applied, and if it is to be applied, then the end result of 105 is appropriate.

DOWSETT J: But quiet apart from anything else, doesn't this depend – I mean, I may misunderstand you, but as I understand what you're saying, you're saying that you've calculated an entirely artificial maximum penalty by choosing the number of – choosing to describe a number of events as being a course of conduct. If you hadn't done that, the maximum would be higher, wouldn't it?

MR MURDOCH: Well, the maximum – yes, the maximum would be higher.

DOWSETT J: Well, then how – by treating it as a course of conduct, you've chosen to treat a number of offences as being less serious than they would otherwise be.

MR MURDOCH: Well, no, with respect, your Honour. It's submitted that it's appropriate that they be regarded as a course of conduct.

DOWSETT J: Well, why?

MR MURDOCH: Well, for the reasons that I've advanced.

DOWSETT J: I see. All right. Well, I must say, I don't find them very convincing. Once you get down to the stage that Justice Wigney has just taken you to of trying to identify appropriate defences – appropriate levels for each individual offence, you have to ask how do you deal with the offence at the Children's Hospital that only involved one course of conduct, apparently, whereas the other one involved two. How do you take account of that? Two different actions – sets of actions which led to stoppages. You just treat them all the same.

MR MURDOCH: I treat them the same because I submit that each separate site should be regarded as one course of conduct in itself.

WIGNEY J: Yes, but see – this is just picking up on the point that Justice Dowsett has just raised. I mean, some of the offence on the QCH site, if one has regard to what you set out as being the relevant considerations, one of the relevant considerations is the nature of importance of the projects, each of which was a public project. And yet you see the QCH is a project valued at approximately 800 million, as compared to 120 million for DCEC project.

Now, on one view that's one factor, and there may be others, including the separate acts that occurred on that site as compared to the BCEC site that would suggest that perhaps the contravening conduct in relation to the QCH site would be more serious, in which case, if one applied all of the relevant principles and went through each of the considerations in relation to each of these sites, you wouldn't get the same penalty for each site; you would actually get different penalties for each site, which you may have to adjust by reference to the totality principle. I don't know. But I have to say, one gets the distinct impression from the submissions that what has happened here is that there's a global amount being agreed at, and you're trying to work backwards from there, and that's not in accordance with principle.

MR MURDOCH: Your Honour - - -

WIGNEY J: Now, you can try and persuade me that that's not what has been done, but it certainly looks that way from the written submissions.

MR MURDOCH: Your Honour, what I'm trying to persuade you of is that, notwithstanding that there is a sole figure that has been applied in respect of each of the contravening entities, that if one were to work forwards as opposed to backwards – and by "working forwards", I'm saying applying the totality principle and looking at individual amounts for each of the contraventions, the final figures that have been put forward are still appropriate. That's all I'm seeking to do, your Honour. And in my submission, a similar approach could be taken in respect of the conduct of the CEPU. And that was all I wished to say in respect of the totality principle and,

indeed, all I wish to say in respect of the situation if Barbaro applies – I beg your pardon – if Barbaro doesn't apply to the exercise before the court.

In the event that your Honours were to hold that Barbaro does apply and that it's not permissible for a penalty amount to be put forward, my client is then in the territory, as it were, of needing to deal with what I think was set out in paragraph 38 of Barbaro, that being that submissions can be made in respect of what facts should be found, the relevant sentencing principles and comparable sentences. Well, I have said what I wish to say in respect of what facts should be found and the relevant sentencing principles and otherwise rely on the written submissions, but in respect of comparable sentences, there's a practical difficulty in this area of consideration, and that is that there aren't – it's difficult to find truly comparable sentences.

DOWSETT J: That's because there has been no practice of judges making the orders of their own volution. Well, we've had these – in general, there's the acceptance of agreements.

MR MURDOCH: But it - - -

DOWSETT J: We seem to have abandoned the obligation to develop jurisprudence in the area absolutely.

MR MURDOCH: Well, your Honour, in any event, there's still – whether one considers past contraventions and penalties have been imposed in terms of situations where there have been agreed penalties that have been accepted by the court, or in situations where there have been either a trial or agreed facts, but still there would be a need for a penalty to be imposed. It's still – I beg your pardon, your Honour.

DOWSETT J: I'm sorry, no. I think you will find that the sort of reasons you will get when a judge has to fix a penalty for him or herself, without the benefit of these agreed things, will look rather different from the reasons you get when there's an agreed penalty. And I am the first to admit that I am probably just as guilty of that as anybody else. The reasons almost invariably focus upon the agreement, which is not the way ordinary sentencing remarks look at all.

MR MURDOCH: In any event, your Honour – and I don't want to be controversial in going to why it is that there's a - - -

DOWSETT J: Well, go on. Be controversial.

MR MURDOCH: I've already said, your Honour, that I adopt the submissions of the Commonwealth, so I don't want to be unnecessary controversial, but - - -

GREENWOOD J: Mr Gleeson was the person who started it off by identifying the gap in this whole thing.

MR MURDOCH: Yes. I will thank him for that – I will thank him for that later, your Honour, yes.

GREENWOOD J: Yes, I'm sure you will. I'm sure you will.

MR MURDOCH: But in any event, we are where we are, and there are a dearth of – there are very few – well, in fact, in my submission, there aren't really any true comparators. Every case turns on its own idiosyncratic facts in terms of - - -

WIGNEY J: But that happens in just about every criminal defence, is they are always – I mean, you have comparable cases put up, and you always – they are always going to have different objective circumstances, different subjective circumstances. You take that all into account, but at least you have – I mean, when you look through the schedule that you provided, there are other cases involving unlawful industrial action.

MR MURDOCH: Yes.

WIGNEY J: And of course, they involve different sites and there's probably different conduct involved, but one would have thought that some analysis of those cases might be able to come up with something that's comparable. I think I – I must say, when I first picked up your submissions, I had assumed that this table would be a table of comparable cases, or at least an attempt at providing the court with some assistance in relation to comparable cases. But as I understand the submissions, it's not; it's simply put forward as being previous contraventions by the CFMEU, which perhaps, if anything, reveals that the penalties that have applied in the past haven't really had the desired effect of specific deterrence.

MR MURDOCH: The table is put forward, your Honour, to provide an indication of prior contraventions, yes. In respect of – in respect – having said that it's difficult to find cases that are on all fours, I have, though, endeavoured to identify some cases that might be of assistance in the written submissions. Can I ask your Honour to – well, your Honours, rather – to turn to the written submissions at paragraph 60. And can I say at the outset – this was perhaps, with respect, anticipating what your Honour Justice Dowsett raised with me a moment ago – the cases that I've identified in paragraph 60 are cases in which there was no agreed penalty. They're cases in which the judge considered the relevant factors and came to a penalty without any submission as to agreement. And, in my submission, each of those cases with all of the qualifications one makes about not being on all fours are cases that may genuinely be of assistance in respect of a case such as this.

DOWSETT J: But that's a problem that is emerging now quite late in the day. But if we have no idea as to the way in which the – well, if we first accept that the general principles of sentencing are, by analogy, appropriate to this exercise and we know – we have no knowledge as to the way in which those principles were fed into the decision because we don't know how you weighted the matters, then doesn't that highlight the dangers of relying upon what the Regulator agrees? I mean, have we

got any reason to believe that the Regulator understands the way in which the principles of sentencing operate, or do we know that he has – that it has been done on proper legal advice as to the level of penalty, or – how do we know? We just don't know, do we?

MR MURDOCH: Well - - -

DOWSETT J: This is not – the way this case was initially put, as I understood it, it was more that it was a matter that was at large, and it was for the Regulator to decide how the discretion should – at least to advise what it thought – the way in which it thought the discretion should be exercised. But when we look at the cases we see that there is broad acceptance that the general principles of criminal sentencing apply. And so we now look around to see whether or not that has been observed in the way in which this agreement is reached, and, as Justice Wigney has pointed out, there doesn't seem to be any basis for assuming that.

WIGNEY J: And just to add to that, I mean, for example, everyone seems to accept that the most significant consideration in arriving at a penalty amount is considerations of specific and general deterrence, right. So let's just focus on specific deterrence for a moment and look at this as analogous to imposing a criminal sentence. If someone was being sentenced for a run of the mill criminal offence of assault, for example – three assaults. And the prosecution turned up with a schedule setting out 54 – 55, I'm sorry – previous assaults that had been committed by this offender, you would say, "Well, obviously whatever penalty that we've imposed on you in the past has had absolutely no deterrent effect so I'm going to impose the maximum penalty."

That is, has your client taken – really taken into account what on any view is a pretty poor record of compliance with the Act by the CFMEU. Because that – that's one of the first things that a sentencing judge looks at in a criminal sentencing case: what is their relevant prior offending conduct of the sort that I'm about to sentence this person for. And here we have 55 previous incidents. And yet I don't see anything in the written submissions beyond paying, with respect, lip service to the notions of deterrence that that has actually been taken into account in arriving at the agreed penalty.

MR MURDOCH: Well, your Honour, those prior contraventions – all of them – I beg your pardon – the majority of them if not all of them are cases that involved my client as – as the applicant.

WIGNEY J: Yes.

MR MURDOCH: So one would expect that that was taken into account in the agreement.

WIGNEY J: But this is the difficulty. I don't see any evidence in your submissions to substantiate that. Just nothing. There's a reflection of the fact that that's a

significant consideration for the court in terms of arriving at an appropriate penalty, but it just doesn't seem that that has actually been – beyond paying lip service to it – has actually been applied in arriving at this agreed penalty. You can persuade us otherwise. Perhaps you should.

MR MURDOCH: Your Honour, all I can say – what I can say in response to that is that those factors would, of course, be relevant to the court determining where on the spectrum of seriousness, as it were.

WIGNEY J: Well, exactly. And earlier you said, when you were saying, "Well, perhaps one way we could look at this is that they're each of about medium range offending conduct so therefore something around 40,000" – well, how can we form the view that these are medium range contraventions in the context of 55 previous offences, some of which may be in relevantly similar circumstances.

MR MURDOCH: Well, your Honour, in that respect I would submit that accepting that the – that the range has to take into account the worst imaginable or worst possible type of – type of contravention, there are a number of features of this case that would tend to indicate that it's – on its own facts – at the medium level of – medium level of the spectrum.

DOWSETT J: What, three major government projects being delayed for three days at the same time.

MR MURDOCH: Regrettably, your Honour, in this – in this area of contravention, there are circumstances in respect of which the circumstances of contravention are – have been and are more serious, for example, whilst I accept that there was stoppage of three days, it's not a case in respect of which it's being – on the facts it's suggested that the stoppage involved any circumstances of personally offensive behaviour or violent abuse or physical confrontation, etcetera, which often is the case in respect of cases which – which can be the case ..... case of this nature.

DOWSETT J: But you don't have to – I mean, it's clear now that you don't have to be able to imagine the worst possible case in order to justify the maximum penalty.

MR MURDOCH: No, no. I'm not saying – I'm not saying that, your Honour. All I'm saying is there are - - -

DOWSETT J: It's serious.

MR MURDOCH: There are a range of factors that are often seen in these sorts of cases which don't make this case as serious as others. That's what I'm saying.

DOWSETT J: Well, yes, I mean, that's undoubtedly true. Over the recent years we've seen a lot of them here, but I don't really see that it can be said that conduct – sustained conduct of that kind at three places over the same three days should be treated as a medium grade level of infringement.

MR MURDOCH: Well, one also has to witness – take into account the fact in this case there has been the cooperation of agreed upon facts, etcetera, etcetera. Yes.

GREENWOOD J: Mr Murdoch, in putting on those 54 or whatever it is examples.

MR MURDOCH: Yes, your Honour.

GREENWOOD J: You obviously put them on, on the footing that you want us to take them into consideration.

MR MURDOCH: Yes.

GREENWOOD J: And how do you want us to take them into consideration? What do you want us to do with them?

MR MURDOCH: Well, take them into consideration in, your Honour, assessing where – when I say on the range, I'm not getting involved in good or bad range. I'm just saying where on the range of sentencing discretion the contraventions in this case - - -

GREENWOOD J: Did you put them on because you put them on to support the suggested beginning penalty or because you want us to take them into account when we exercise the discretion ourselves?

MR MURDOCH: Both.

GREENWOOD J: Fully.

MR MURDOCH: Both.

GREENWOOD J: Well, then, how do the – how do the submissions deal with how we should weigh them in the balance?

MR MURDOCH: Well, they should be weighed in the balance in that those matters, when considered, demonstrate that there have been prior contraventions and the court, in considering the extent to which deterrence in particular specific deterrence should be taken into account, those matters are relevant.

WIGNEY J: And – sorry, just on similar – but this is a point really picking up from something that Justice Greenwood said earlier. In your list of relevant considerations at paragraph 40 of your submissions, you have as the fourth consideration paragraph ..... the nature and extent of any loss or damage sustained as a result of the breaches, which would seem self-evidently a relevant consideration. But why – why is there nothing in the agreed statement of facts as to the nature and extent of the loss or damage sustained as a result of the breaches?

MR MURDOCH: Well - - -