

# Before the High Court

*Commonwealth v Director, Fair Work Building Industry Inspectorate*:

The End of Penalty Agreements in Civil Pecuniary Penalty Schemes?

Rebecca Ananian-Welsh\* and Kate Gover†

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## Abstract

In the upcoming case of *Commonwealth v Director, Fair Work Building Industry Inspectorate*, the High Court will determine whether submissions as to agreed penalty should be permitted in the context of civil pecuniary penalty proceedings. In this column, we identify three questions that the High Court will consider. First, does a strict distinction exist between civil and criminal proceedings, or do civil penalty proceedings defy neat classification as one or the other? Second, is a submission on agreed penalty a submission of law, a material fact or an inadmissible and irrelevant expression of opinion? Third, do submissions on agreed penalty undermine the independence and proper role of the court? We argue that, in light of *Barbaro v The Queen*, it is likely that the Court will overturn existing practice by radically restricting the role of agreed penalties in civil penalty proceedings.

## I Introduction

For almost 20 years, parties to proceedings under Australia's various civil pecuniary penalty schemes have enjoyed an unusual degree of certainty as litigants.<sup>1</sup> This certainty stems from the privileged position of penalty agreements, which are applied by the court in the absence of any clear case requiring departure.<sup>2</sup> In the upcoming case of *Commonwealth v Director, Fair Work*

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\* Lecturer, TC Beirne School of Law, University of Queensland, Australia.

† Research Assistant, TC Beirne School of Law, University of Queensland, Australia.

<sup>1</sup> Civil pecuniary penalties are a form of statutory remedy provided for in regulatory legislation, with the aim of ensuring compliance without necessarily engaging the criminal law: Peta Spender, 'Negotiating the Third Way: Developing Effective Process in Civil Penalty Litigation' (2008) 26(4) *Company and Securities Law Journal* 249, 250; Vicky Comino, 'Effective Regulation by the Australian Securities and Investments Commission: The Civil Penalty Problem' (2009) 33(3) *Melbourne University Law Review* 802, 804, 810–11; *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* (2015) 229 FCR 331, 337–41 [10]–[14] ('*FWBC v CFMEU*'). Civil pecuniary penalties are found in a range of statutes and are administered by regulators including the Australian Securities and Investments Commission and the Australian Competition and Consumer Commission. See, eg, *Corporations Act 2001* (Cth) pt 9.4B; *Industrial Relations Act 1999* (Qld) ch 4 pt 4; *Trade Practices Act 1974* (Cth) ss 76–7.

<sup>2</sup> *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285, 291 (Burchett and Kiefel JJ) ('*NW Frozen Foods*'); *Minister for Industry, Tourism &*

*Building Industry Inspectorate* (*Cth v FWBC*),<sup>3</sup> the High Court could put an end to this practice by restricting submissions on agreed penalties in civil pecuniary penalty proceedings. In this column, we argue that this outcome is likely in light of the High Court's February 2014 decision in *Barbaro v The Queen* (*Barbaro*).<sup>4</sup> The resultant impact on civil pecuniary penalty proceedings would be drastic. However — considering that this case has united the Commonwealth, a regulator and two unions to argue for the preservation of the status quo — a decision against these parties may be met with legislative action.

In *Barbaro*, the High Court sent shockwaves through criminal law practice by radically restricting the circumstances in which a sentencing judge may consider, or even hear, counsel's submissions on sentencing range. The practical impact of this decision was that an accused could no longer rely on pre-trial discussions or agreements on sentencing range in considering whether to enter a plea of guilty.

In *Cth v FWBC*, the Commonwealth, the Fair Work Building Industry Inspectorate ('FWBC') the Construction, Forestry, Mining and Energy Union ('CFMEU') and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia ('CEPU') have joined forces to argue that *Barbaro* does not apply to restrict submissions on agreed penalty in civil pecuniary penalty proceedings. Despite this unusual alliance, the Full Federal Court found against these parties at first instance, holding that submissions on agreed penalty amount to an irrelevant and inadmissible expression of opinion and undermine the proper role of the court.<sup>5</sup>

In determining the appeal from the Full Court's decision, the High Court will face three difficult questions, each with the potential for far-reaching impact. First, the Court will identify whether a strict distinction exists between civil and criminal proceedings. Second, it must determine whether a submission on agreed penalty is a submission of law, a material fact or a mere expression of opinion. Third, the Court will consider whether a submission on agreed penalty undermines the independence and proper role of the court. The resolution of these questions will turn on the construction of the *Building and Construction Industry Improvement Act 2005* (Cth) (*BCII Act*), but will have repercussions in the broader civil penalty context.

## II *Barbaro v The Queen*

The outcome of *Cth v FWBC* will rest on the High Court's treatment of its 2014 decision in *Barbaro*. The inconsistent interpretation of that decision by various

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*Resources v Mobil Oil Australia Pty Ltd* (2004) ATPR ¶41-993, 48,626 [51(vi)] (*Mobil*), discussed below.

<sup>3</sup> The Fair Work Building Industry Inspectorate is generally known as Fair Work Building and Construction, hence we have adopted the abbreviation 'FWBC'.

<sup>4</sup> (2014) 253 CLR 58.

<sup>5</sup> *FWBC v CFMEU* (2015) 229 FCR 331, 404–5 [239]–[241].

lower courts has demonstrated the need for clarification around its scope and underlying bases.<sup>6</sup>

*Barbaro* involved an appeal against criminal sentence following two prosecutions that arose from one of the largest drug hauls in Australian history.<sup>7</sup> The judge at first instance had refused to hear the prosecution's submission as to the appropriate sentencing range.<sup>8</sup> The applicants claimed that this amounted to a denial of procedural fairness and a failure on the part of the sentencing judge to take a relevant consideration into account.<sup>9</sup>

In a relatively short judgment, spanning only 16 pages of the Commonwealth Law Reports, the High Court dismissed the appeal. In doing so, the Court expressly overruled the Victorian Court of Appeal decision in *R v MacNeil-Brown* ('*MacNeil-Brown*'),<sup>10</sup> which had identified submissions on sentencing range as 'an aspect of the duty of the prosecutor to assist the court'.<sup>11</sup>

In *Barbaro*, the High Court held that 'the prosecution is not required, and should not be permitted, to make ... a statement of bounds to a sentencing judge'.<sup>12</sup> This decision was grounded in two key findings. First, a majority of the Court held that a statement marking the bounds of a sentencing range is an expression of opinion, not a proposition of law.<sup>13</sup> Gageler J dissented on this point. His Honour reasoned that submissions on sentencing range relate to a point of law, specifically, whether a sentence meets the statutory description of being 'of a severity appropriate in all the circumstances of the offence'.<sup>14</sup>

Second, the High Court in *Barbaro* emphasised the distinct roles played by the prosecution, the accused and the sentencing judge.<sup>15</sup> The Court agreed with the dissenting judgment of Buchanan JA in *MacNeil-Brown*, reasoning that submissions on sentencing range allow the prosecution to step beyond the bounds of its proper role and act as 'a surrogate judge'.<sup>16</sup> The Court noted that sentencing

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<sup>6</sup> See, eg, *Matthews v The Queen* [2014] VSCA 291 (19 November 2014), in which the majority of the Victorian Court of Appeal concluded that 'the receiving of a submission as to sentencing range [does not], of itself, [amount] to appealable error': at [139]. The majority also noted some uncertainty about whether *Barbaro* extended to exclude submissions as to penalty range by defence counsel: at [22]–[25]. See also *Australian Competition and Consumer Commission v Flight Centre Ltd (No 3)* [2014] FCA 292 (28 March 2014) ('*ACCC v Flight Centre (No 3)*'); cf *Australian Competition and Consumer Commission v Energy Australia Pty Ltd* [2014] FCA 336 (4 April 2014) ('*ACCC v Energy Australia*'), discussed below.

<sup>7</sup> Mark Russell, 'Key Figure Faces Life Over World's Biggest Ecstasy Haul', *The Age* (online), 1 August 2012 <<http://www.theage.com.au/victoria/key-figure-faces-life-over-worlds-biggest-ecstasy-haul-20120801-23en3.html>>.

<sup>8</sup> *Barbaro* (2014) 253 CLR 58, 65 [3], 68 [17]. In the course of the hearing, counsel for Mr Zirilli (the second applicant before the High Court) made submissions regarding the prosecution's comments on sentencing range, although counsel for Mr Barbaro did not. The prosecutor made no submission as to sentencing range.

<sup>9</sup> *Ibid* 65 [1]–[2].

<sup>10</sup> (2008) 20 VR 667.

<sup>11</sup> *Ibid* 678 [2], quoted in *Barbaro* (2014) 253 CLR 58, 69 [21].

<sup>12</sup> *Barbaro* (2014) 253 CLR 58, 66 [7] (French CJ, Hayne, Kiefel and Bell JJ).

<sup>13</sup> *Ibid* 75 [42]–[43].

<sup>14</sup> *Ibid* 78–9 [59], citing s 16A(1) of the *Crimes Act 1914* (Cth).

<sup>15</sup> *Barbaro* (2014) 253 CLR 58, 76 [47].

<sup>16</sup> *MacNeil-Brown* (2008) 20 VR 667, 710 [128], quoted in *Barbaro* (2014) 253 CLR 58, 71 [29].

is not a ‘mathematical exercise’, but involves the consideration and balancing of various factors.<sup>17</sup> Therefore, the prosecution’s conclusions regarding the weight to be attributed to those factors will be implicit in any sentencing range proffered.<sup>18</sup> These submissions are not only inherently value-laden, but unnecessary: if the sentencing judge is properly informed by the parties’ submissions, including the provision of comparable cases to serve as a yardstick, there is no need to intrude upon the proper role of the judge by proposing an appropriate sentencing range.<sup>19</sup>

*Barbaro* has been met with strident criticism<sup>20</sup> and even confusion.<sup>21</sup> Bagaric criticised *Barbaro* as ‘an exemplar of bad principle damaging the legal system’<sup>22</sup> and argued that the case seriously undermines the fairness and effectiveness of the sentencing process by discouraging plea negotiations.<sup>23</sup> Other commentators disagreed, focusing on the restricted scope of the decision and arguing that *Barbaro* leaves counsel’s capacities to assist the court largely intact. Babb advised that ‘[t]he key thing that will need to be avoided [by counsel] is what is, or appears to be, a mere expression of opinion as to what a sentencing outcome should be’.<sup>24</sup> Justice Priest summarised the impact of the decision in similar terms, saying: ‘[w]hat the prosecution must not do ... is offer an opinion as to an appropriate numerical sentencing range. With that caveat, little has changed’.<sup>25</sup> Presumably Justice Priest and Babb placed less weight on the broader impact of the decision on pre-trial negotiations. Or perhaps these commentators believed that counsel may be able to avoid the restrictions arising from *Barbaro* by continuing to make submissions on sentencing range in a manner that clearly connects the submissions to legal principle or comparable cases.

### III *Cth v FWBC: The Case to Date*

Since *Barbaro* was handed down in February 2014, lower courts have grappled with its scope and basis.<sup>26</sup> In a number of these cases, courts have struggled to establish whether or not *Barbaro* applies beyond the criminal sentencing context,<sup>27</sup>

<sup>17</sup> *Barbaro* (2014) 253 CLR 58, 72 [34].

<sup>18</sup> *Ibid* 72–3 [35]–[37].

<sup>19</sup> *Ibid* 73 [38], 74 [40]–[41].

<sup>20</sup> See, eg, Mirko Bagaric, ‘The Need for Legislative Action to Negate the Impact of *Barbaro v The Queen*’ (2014) 38(3) *Criminal Law Journal* 133; Brin Anniwell, ‘Submissions on Sentencing Ranges’ [2014] *Bar News (Winter)* 13, 14.

<sup>21</sup> Mirko Bagaric, ‘Bad Law Inevitably Leading to Confused Jurisprudence — The Inevitable, Regrettable Fallout from *Barbaro v The Queen*’ (2015) 39(1) *Criminal Law Journal* 3; Justice Phillip Priest, ‘Prosecutors’ Duties in the Wake of *Barbaro*’ (2014) 88(6) *Australian Law Journal* 386, 386.

<sup>22</sup> Bagaric, ‘The Need for Legislative Action’, above n 20, 135.

<sup>23</sup> *Ibid* 133.

<sup>24</sup> Lloyd Babb, ‘Prosecutorial Ethics’ (Speech delivered at the Public Defenders’ Criminal Law Conference, Taronga Zoo, Sydney, 23 February 2014) 3.

<sup>25</sup> Priest, above n 21, 388. See also Justice John Basten and Justice Peter Johnson, ‘The Prosecutor’s Role in Sentencing’ (2014) 26(6) *Judicial Officers’ Bulletin* 47, 49.

<sup>26</sup> See, eg, *ACCC v Flight Centre (No 3)* [2014] FCA 292; *ACCC v Energy Australia* [2014] FCA 336; *Grocon v Construction, Forestry, Mining and Energy Union (No 2)* (2014) 241 IR 288 (‘*Grocon v CFMEU (No 2)*’); *Re Vault Market Pty Ltd* [2014] NSWSC 1641 (20 November 2014).

<sup>27</sup> See, eg, *Grocon v CFMEU (No 2)* (2014) 241 IR 288 in which Cavanough J concluded that *Barbaro* applied in the context of determining penalties for contempt of court: at 317 [70].

including to civil pecuniary penalty proceedings.<sup>28</sup> The present case of *Cth v FWBC* is the culmination of these authorities.

*Cth v FWBC* arises from a series of strikes that took place in May 2011 at several construction sites where work was being funded by the Queensland Government, namely: the Queensland Children’s Hospital, the Brisbane Convention and Exhibition Centre, and the Queensland Institute of Medical Research. These strikes were coordinated by the CFMEU and the CEPU following concerns about sham contracting.<sup>29</sup>

Following negotiations, the FWBC, CFMEU and CEPU came to an agreement that the strikes constituted ‘unlawful industrial action’ in contravention of s 38 of the *BCII Act*. Accordingly, the FWBC brought an action under s 49 of the *BCII Act* seeking pecuniary penalties against the two unions. The action was supported by a statement of agreed facts signed on behalf of each party and contained details of ‘agreed declarations and penalties’.<sup>30</sup> This statement concluded by seeking pecuniary penalty orders requiring the payment of \$105 000 by the CFMEU and \$45 000 by the CEPU arising from the admitted contraventions of s 38. Negotiated settlements of this kind are utilised regularly — not only by the FWBC, but by regulators such as the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission, among others.<sup>31</sup>

Law and practice has developed to recognise a clear role for regulators in the context of civil pecuniary penalty proceedings. In the usual course, the negotiation and agreement between the FWBC, CFMEU and CEPU, would have been followed by an uncontested hearing before a single judge of the Federal Court. That judge would have made a determination guided by the authorities of *NW Frozen Foods*<sup>32</sup> and *Mobil*.<sup>33</sup> These cases established the principle that a court will accept and apply an agreed civil pecuniary penalty, provided it is satisfied that the agreed penalty is within the permissible range in all the circumstances.<sup>34</sup>

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<sup>28</sup> See, eg, *ACCC v Flight Centre (No 3)* [2014] FCA 292; cf *ACCC v Energy Australia* [2014] FCA 336; *Australian Competition and Consumer Commission v Mandurvit Pty Ltd* [2014] FCA 464 (12 May 2014) (*‘ACCC v Mandurvit’*). See also the discussion in Samantha Teong, ‘Stamping Out Rubber-stamped Penalties? Determining an Appropriate Judicial Response to Agreed Penalties in Civil Penalty Settlements’ (2015) 43(1) *Australian Business Law Review* 48, 65–6.

<sup>29</sup> Sham contracting is a practice whereby an employer pressures workers to enter agreements as individual contractors in an attempt to circumvent their obligations in an employment relationship, including the payment of employee entitlements such as leave and superannuation: Department of Industry and Science, Australian Government, *Unfair Contracts and Sham Contracts* <<http://www.business.gov.au/business-topics/business-structures-and-types/independent-contractors/Pages/unfair-contracts-and-sham-contracts.aspx>>. Sham contracting is prohibited by div 6 of the *Fair Work Act 2009* (Cth).

<sup>30</sup> *FWBC v CFMEU* (2015) 229 FCR 331, 335–7 [4]–[7]. A copy of the statement of agreed facts was attached to the judgment.

<sup>31</sup> Teong, above n 28, 48.

<sup>32</sup> (1996) 71 FCR 285.

<sup>33</sup> (2004) ATPR ¶41-993.

<sup>34</sup> *NW Frozen Foods* (1996) 71 FCR 285, 291 (Burchett and Kiefel JJ); *Mobil* (2004) ATPR ¶41-993, 48,626 [51(vi)].

This is the case even if the court would have awarded a different penalty on its own assessment.<sup>35</sup>

When the FWBC, CFMEU and CEPU submitted their agreed statement to the Federal Court, *Barbaro* had called this familiar process into question.<sup>36</sup> A number of decisions of the Federal Court had resulted in contrary findings as to whether *Barbaro* applied to restrict submissions as to agreed penalties in civil pecuniary penalty proceedings. Justice Middleton in *ACCC v Energy Australia* had distinguished *Barbaro* and accepted the parties' joint submissions on agreed penalty in accordance with *NW Frozen Foods* and *Mobil*.<sup>37</sup> Justice McKerracher in *ACCC v Mandurvit* had considered the principle in *Barbaro* to be broadly applicable outside the criminal jurisdiction, but had ultimately agreed with Middleton J's approach.<sup>38</sup> Justice White had considered himself bound by *NW Frozen Foods* and *Mobil*, but noted that *Barbaro* 'may require this court to review the approach'.<sup>39</sup> In *ACCC v Flight Centre (No 3)*,<sup>40</sup> Logan J had gone further, refusing to take a suggested penalty range into account on the basis that 'there is a relevant analogy to be drawn from the practice in the criminal jurisdiction in a civil proceeding for the recovery of a pecuniary penalty'.<sup>41</sup>

At pre-trial directions, the issue of *Barbaro* arose and the matter was referred to the original jurisdiction of the Full Federal Court. The Commonwealth was given leave to intervene and the FWBC, CFMEU and CEPU adopted the Commonwealth's submissions against the application of *Barbaro* to civil pecuniary penalty proceedings. Accordingly, the Commonwealth was required to engage counsel to appear as contradictor.<sup>42</sup>

In *FWBC v CFMEU*,<sup>43</sup> Dowsett, Greenwood and Wigney JJ issued a unanimous judgment in favour of the contradictor, finding that the principles in *Barbaro* applied to exclude submissions as to agreed penalties in civil pecuniary penalty proceedings under the *BCII Act*. On 18 June 2015, Kiefel and Keane JJ granted the Commonwealth special leave to appeal this decision to the High Court.<sup>44</sup>

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<sup>35</sup> *Ibid.*

<sup>36</sup> *NW Frozen Foods* and *Mobil* had also been stridently criticised by the Victorian Court of Appeal in *Australian Securities and Investments Commission v Ingleby* (2013) 39 VR 554, 563 [28] (Weinberg JA), 571 [71], 575 [97] (Harper JA) ('*Ingleby*'). However, as Teong observes, '[i]n subsequent [Federal Court of Australia] decisions, judges have expressed the view that there seems to be little difference between the *Ingleby* and *Frozen Foods/Mobil Oil* approaches': above n 28, 53.

<sup>37</sup> *ACCC v Energy Australia* [2014] FCA 336, [115].

<sup>38</sup> *ACCC v Mandurvit* [2014] FCA 464, [44], [79].

<sup>39</sup> *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* (2014) 140 ALD 337, 343 [27]. [2014] FCA 292.

<sup>40</sup> *Ibid* [56].

<sup>41</sup> Senior Counsel for the contradictor in the first instance proceedings now appears as *amici curiae* before the High Court.

<sup>42</sup> (2015) 229 FCR 331.

<sup>43</sup> Transcript of Proceedings, *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCATrans 149 (18 June 2015).

## IV The High Court Appeal

In order to resolve whether *Barbaro* applies to restrict submissions on agreed penalty in the civil pecuniary penalty context, three questions will arise for the High Court's determination. The answers to these questions are necessarily interdependent, not one is clear-cut, and each has the potential for far-reaching impact. Though *Cth v FWBC* provides an opportunity for the High Court to clarify the scope of its determination in *Barbaro*, there is every chance that this decision will give rise to as much debate as its predecessor.

### A *Civil or Criminal?*

*Barbaro* has had a radical effect on the conduct of criminal proceedings in Australia, but ought its impact be confined to the criminal sphere? In its submissions to the High Court in *Cth v FWBC*, the Commonwealth has argued that the proceedings under the *BCII Act* are clearly civil, and that '[a] clear civil/criminal distinction is established and maintained in both s 49 and the Act more generally'.<sup>45</sup> It posits that '[the provision] manifests a Parliamentary choice to engage and apply one of these bodies of law (civil) to the exclusion of the other (criminal)'.<sup>46</sup> Thus, the Commonwealth, the FWBC and the unions are arguing that *Barbaro*, as a case about *criminal* sentencing, ought not apply to *civil* penalty proceedings. In particular, these parties distinguish criminal sentencing from civil penalty proceedings on the bases of: the distinct roles of the prosecutor as compared to the regulator;<sup>47</sup> the different purposes underpinning sentencing and civil penalties;<sup>48</sup> the acceptance of settlement and agreement in the civil context as compared to principles against plea bargaining in criminal trials;<sup>49</sup> and the material relevance of agreements in the resolution of civil pecuniary penalty proceedings as distinct from sentencing hearings.<sup>50</sup>

In *Cth v FWBC*, the High Court will face the question of whether a strict dichotomy exists between civil and criminal proceedings. There are three ways in which the Court may resolve this issue. First, it may impose a strict dichotomy, thereby distinguishing *Barbaro* from the present facts and confining its scope to criminal proceedings. Second, the Court may find that civil pecuniary penalty proceedings defy neat classification as either civil or criminal, and that the application of *Barbaro* must be resolved on other grounds. Finally, the High Court may avoid this question entirely by finding that its decision in *Barbaro* was grounded in factors beyond the civil/criminal distinction.

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<sup>45</sup> Commonwealth, 'Submissions of the Appellant', Submission in *Cth v FWBC*, B36/2015, 22 July 2015, [16].

<sup>46</sup> *Ibid* [17].

<sup>47</sup> *Ibid* [19], [24], [33].

<sup>48</sup> *Ibid* [20], [32], [70.3].

<sup>49</sup> *Ibid* [28]; *Malvaso v The Queen* (1989) 168 CLR 227, 233 (Mason CJ, Brennan and Gaudron JJ); Basten and Johnson, above n 25, 48–9.

<sup>50</sup> Instead, the Commonwealth submits that submissions as to agreed penalty are consistent with the purposes of the *BCII Act*: Commonwealth, 'Submissions of the Appellant', Submission in *Cth v FWBC*, B36/2015, 22 July 2015, [35]–[42].

The imposition of a strict dichotomy between civil and criminal proceedings would not accord with previous decisions of the Court. In *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* ('*Labrador Liquor*'),<sup>51</sup> the High Court determined that although civil procedure expressly applied under the relevant statute, the standard of proof was the criminal standard of beyond reasonable doubt.<sup>52</sup> The Court declined to characterise the proceedings as either civil or criminal,<sup>53</sup> Kirby J observing that '[a] strict dichotomy between "criminal" and "civil" proceedings is not always observed in Australian legislation'.<sup>54</sup> Similarly, Hayne J said: 'I do not consider it useful or relevant to attempt any classification of proceedings of the present kind as civil or criminal and then argue from that classification to a conclusion about standard of proof'.<sup>55</sup>

In *Naismith v McGovern*,<sup>56</sup> the High Court considered briefly whether civil pecuniary penalty proceedings were civil or criminal in nature in determining a procedural issue under the *Income Tax and Social Services Contribution Assessment Act 1936-1951* (Cth). The Court determined that civil procedure was clearly intended to apply under the statute. Regarding the nature of the proceedings, however, the Court stated that '[t]he most that can be said is that the proceedings being for the recovery of penalties are of a penal nature'.<sup>57</sup> In *FWBC v CFMEU*, the Full Federal Court followed *Naismith v McGovern*, concluding that 'seeking to resolve the present dispute by reference to any such taxonomic exercise' was of no assistance.<sup>58</sup>

Against this backdrop, the High Court is likely to reject a bright-line distinction between civil and criminal proceedings that would confine the impact of *Barbaro* to the latter. Rather, authorities indicate that the Court may find that civil pecuniary penalty schemes straddle the civil and criminal spheres. This conclusion more accurately reflects the role of pecuniary penalties in Australia. Civil pecuniary penalty schemes have evinced both civil and criminal characteristics since their inception.<sup>59</sup> They have been described variously as 'a hybrid between the civil and the criminal law',<sup>60</sup> as 'punitive civil sanctions'<sup>61</sup> and

<sup>51</sup> (2003) 216 CLR 161.

<sup>52</sup> *Ibid* 208–9 [145]–[148] (Hayne J).

<sup>53</sup> *Ibid* 209 [146]–[147] (Hayne J).

<sup>54</sup> *Ibid* 177 [52] (Kirby J). See also *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129, 172 [108] (Kirby J), quoted in Comino, 'Effective Regulation by ASIC', above n 1, 811.

<sup>55</sup> *Labrador Liquor* (2003) 216 CLR 161, 204 [131].

<sup>56</sup> (1953) 90 CLR 336.

<sup>57</sup> *Ibid* 341.

<sup>58</sup> (2015) 229 FCR 331, 341 [14]. For further discussion comparing civil penalty and criminal regimes, see Teong, above n 28, 59–62, in which the author draws on qualitative research to conclude that 'civil penalty and criminal systems are similar in respect of the *substantial* effects of contraventions, and differ in *form*': at 62 (emphasis in original).

<sup>59</sup> For example, s 247 of the *Customs Act 1901* (Cth) as made and s 136 of the *Excise Act 1901* (Cth) as made, which provided that all Customs or Excise prosecutions were to be conducted according to civil procedure, although the available penalties included recording a conviction against the defendant. See discussion in *Labrador Liquor* (2003) 216 CLR 161, 195–7 [108]–[111] (Hayne J).

<sup>60</sup> John Farrer, *Corporate Governance: Theories, Principles and Practice* (Oxford University Press, 3<sup>rd</sup> ed, 2008) 245, as quoted in Comino, 'Effective Regulation by ASIC', above n 1, 811. See also Vicky Comino, 'James Hardie and the Problems of the Australian Civil Penalties Regime' (2014) 37(1) *University of New South Wales Law Journal* 195, 215.



as ‘an example of the new statutory remedies developed by regulatory law that fit uneasily within the traditional civil–criminal procedural divide’.<sup>62</sup> Recognising this, Peta Spender has argued that civil pecuniary penalties call for ‘a paradigm shift ... which reconsiders the bifurcation of civil and criminal procedure to effectively accommodate regulatory law and statutory remedies’.<sup>63</sup>

If the High Court follows this approach, then the applicability of *Barbaro* would need to be determined on other grounds. However, in avoiding any bright-line characterisation of civil pecuniary penalty schemes as civil or criminal, the Court could go further — openly acknowledging that there is a grey area or third category of proceedings in Australian law.<sup>64</sup> It is difficult to fully appreciate the potential impact of that approach. For scholars such as Comino, Spender, Rosen-Zvi and Fisher, this recognition would support the development of a new model of proceedings, uniquely adapted to the pecuniary penalty context.<sup>65</sup> More broadly, the adoption of this approach by the High Court may herald the erosion of similar distinctions in other areas of the law — for instance, in drawing a strict delineation between punitive and non-punitive administrative detention.<sup>66</sup>

## **B A Submission of Law, a Material Fact or an Irrelevant Opinion?**

Courts resolve disputes by applying the relevant law to material facts. In fulfilling this role within the adversarial system, a court relies on the parties to make submissions of law and fact. The crux of *Barbaro* is that a submission on penalty must connect unequivocally to a relevant sentencing principle, otherwise it will be construed as an expression of counsel’s irrelevant and inadmissible opinion. If *Barbaro* is not constrained to the criminal sentencing context, the primary question for the High Court in *Cth v FWBC* becomes whether the parties’ joint submission of an agreed penalty figure is an admissible submission of law, a material fact, or an inadmissible expression of mere opinion.

<sup>61</sup> Kenneth Mann, ‘Punitive Civil Sanctions: The Middleground between Criminal and Civil Law’ (1992) 101(8) *Yale Law Journal* 1795.

<sup>62</sup> Comino, ‘Effective Regulation by ASIC’, above n 1, 830.

<sup>63</sup> Spender, above n 1, 258. See generally Comino, ‘Effective Regulation by ASIC’, above n 1; Comino, ‘James Hardie’, above n 60.

<sup>64</sup> Cf New Zealand, where a strict delineation is required: New Zealand Law Commission, *Pecuniary Penalties: Guidance for Legislative Design*, Report No 133 (2014) 36 [4.14], quoted in *FWBC v CFMEU* (2015) 229 FCR 331, 338–9 [11].

<sup>65</sup> Comino, ‘Effective Regulation by ASIC’, above n 1, 829–30; Spender, above n 1, 256–8; Issachar Rosen-Zvi and Talia Fisher, ‘Overcoming Procedural Boundaries’ (2008) 94(1) *Virginia Law Review* 79, 84, 133–55.

<sup>66</sup> This distinction is crucial in applying the principle arising from *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (‘*Chu Kheng Lim*). That is, in determining whether the exercise of a power to order detention falls within the exclusively judicial power of the Commonwealth, or may be exercised by the executive government. See *Chu Kheng Lim* (1992) 176 CLR 1, 71 (McHugh J); *Fardon v A-G (Qld)* (2004) 223 CLR 575, 612 [78] (Gummow J); James Renwick, ‘The Constitutional Validity of Prevention Detention’ in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 127, 133; Rebecca Ananian-Welsh, ‘Preventative Detention Orders and the Separation of Judicial Power’ (2015) 38(2) *University of New South Wales Law Journal* 756, 769–70; Jeffrey Steven Gordon, ‘Imprisonment and the Separation of Judicial Power: A Defence of a Categorical Immunity from Non-Criminal Detention’ (2012) 36(1) *Melbourne University Law Review* 41.

In *Barbaro*, the majority justices held that:

The prosecution's statement of what are the bounds of the available range of sentences ... advances no proposition of law or fact which a sentencing judge may properly take into account in finding the relevant facts, deciding the applicable principles of law or applying those principles to the facts to yield the sentence to be imposed. That being so, the prosecution is not required, and should not be permitted, to make such a statement of bounds to a sentencing judge.<sup>67</sup>

Their Honours went on to distinguish expressions of opinion on sentencing range from the prosecution and defence counsels' *duty* to assist the court in appraising itself of the relevant sentencing principles and comparable cases.<sup>68</sup> Such submissions are of direct relevance to the grounds on which the court will exercise its discretion in determining an appropriate sentence. Importantly, the High Court was willing to overturn previous authorities and depart from existing practice in order to maintain strict limits on the appropriate scope of counsel's submissions on sentence.

In *FWBC v CFMEU*, the submission made by the FWBC and the unions to the Full Federal Court set out the agreed penalties and asserted that: 'The parties have agreed that, subject to the discretion of the Court to fix an appropriate penalty: (a) The penalty amounts set out above, are satisfactory, appropriate and within the permissible range in all the circumstances'.<sup>69</sup> The question for the High Court is whether this submission connects to a relevant principle that will guide the court's discretion in making a pecuniary penalty order.

The High Court may find that this statement is a submission of law. After all, it is phrased in a manner that connects it to a legal standard to be applied by the court. In particular, it asserts that the penalty figure is within the 'permissible range' — which is the relevant inquiry set down in *NW Frozen Foods* and *Mobil*. However, this conclusion seems unlikely in light of the Court's approach in *Barbaro*. Like submissions as to sentencing range, the agreed penalty would presumably be based on a wide variety of factors, none of which are identified or explained in the submission. This arguably renders the submission of little assistance to the court in exercising its discretion or in determining the bounds of the 'permissible range'.<sup>70</sup> As Wigney J expressed at the first instance hearing:

You [the FWBC] 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 ... You have to explain how you got to this figure in some principled way.<sup>71</sup>

<sup>67</sup> (2014) 253 CLR 58, 66 [7].

<sup>68</sup> *Ibid* 74 [39].

<sup>69</sup> (2015) 229 FCR 331, 336–7 [6].

<sup>70</sup> The Full Federal Court noted that these submissions are at best a shared opinion based on a variety of (not dispassionate) factors: *ibid* 376 [139], 397 [211]. The factors and process of arriving at the penalty are not explained, which demonstrates the same difficulties identified in *Barbaro*: at 407 [251]. This opacity poses as great a risk of damaging public perceptions of the court's independence in the pecuniary penalty context, as it does in criminal sentencing: at 404 [239].

<sup>71</sup> Transcript of Proceedings, *FWBC v CFMEU* (Federal Court of Australia, QUD257/2013, Dowsett, Greenwood and Wigney JJ, 11 August 2014) 76 (Wigney J), attached to the submissions to the

His Honour went on to say:

[O]ne 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 ... it certainly looks that way from the written submissions.<sup>72</sup>

There is logical force to these statements. Indeed, they echo the majority justices' conclusion in *Barbaro* that:

[A] bare statement of a range tells a sentencing judge nothing of the conclusions or assumptions upon which the range depends. And if, as will often be the case, counsel who appears for the prosecution on a sentencing hearing was not responsible for deciding what range would be proffered, the judge will have little or no assistance towards understanding why the range was fixed as it was.<sup>73</sup>

If *Barbaro* stands for the principle that submissions on penalty must be clearly connected to legal principle, and that the connection must be apparent on the face of the submission, then a vaguely worded claim that a penalty is appropriate and permissible in all the circumstances falls well short of this standard. This form of submission arguably falls within the scope of Babb and Justice Priest's warnings that, following *Barbaro*, counsel must avoid submissions that appear to be mere expressions of opinion on the appropriate numerical penalty.<sup>74</sup>

The Commonwealth, the FWBC and the unions further argue that an agreement between the parties as to the appropriate penalty is by its nature a materially relevant fact — provided that one looks to the context and purpose of the *BCII Act*.<sup>75</sup> The relevant contexts identified are that of civil litigation and the frameworks established by the numerous Commonwealth regulatory regimes.<sup>76</sup> The rules and procedures of civil litigation are characterised by a focus on the just and expeditious resolution of disputes, the facilitation of agreements between parties (subject to ultimate judicial oversight) and the avoidance of drawn-out proceedings where possible.<sup>77</sup> In light of these factors and the broader system of regulation, the role of the regulator is argued to include the negotiation of penalty

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High Court of the amici curiae in *Cth v FWBC*: Moore, 'Submissions of the Amici Curiae', Submission in *Cth v FWBC*, B36/2015, 12 August 2015, 20. It may be acknowledged that Gageler J's dissenting approach in *Barbaro* would appear to support a finding that a submission phrased in this broad manner would qualify as a submission of law, assisting the court in determining an appropriate penalty.

<sup>72</sup> Ibid 77 (Wigney J).

<sup>73</sup> (2014) 253 CLR 58, 73 [37].

<sup>74</sup> Babb, above n 24, 3; Priest, above n 21, 388. See also Basten and Johnson, above n 25, 50:

[T]he primary consequence of *Barbaro* is to emphasise the importance of the prosecutor's role in providing real assistance to the sentencing judge, which should demonstrate an available range for sentencing, rather than simply stating the range without identifying the underlying assumptions and supporting material.

<sup>75</sup> Commonwealth, 'Submissions of the Appellant', Submission in *Cth v FWBC*, B36/2015, 22 July 2015, [10.3], [23]–[28], [35]–[42].

<sup>76</sup> Ibid [23]–[28], [35]–[37].

<sup>77</sup> Teong, above n 28, 64; *Federal Court of Australia Act 1976* (Cth) ss 37M–37P (the overarching purpose of civil practice and procedure provisions), 33V (a proceeding may not be settled or discontinued without the approval of the Court); Bernard Cairns, *Australian Civil Procedure* (Thomson Reuters, 10<sup>th</sup> ed, 2013) 49–53.

agreements, thereby expediting proceedings while achieving the Act's aims of punishment and deterrence.<sup>78</sup>

These arguments depend upon a highly contextual reading of the *BCII Act*. *Barbaro* suggests that the Court is more likely to adopt a narrower view of the statute that places less weight on broad public policy concerns. In *Barbaro*, the High Court barely mentioned the role that sentencing submissions can play in pre-trial negotiations, despite being alive to this issue and the impact that the decision would have on guilty pleas.<sup>79</sup> Moreover, in *Barbaro* the Court identified countervailing policy concerns that are of equal relevance to pecuniary penalty proceedings.<sup>80</sup> Efficient regulation and the expeditious resolution of disputes may be weighed against concerns of legality, relevance and the maintenance of the proper role of the court and parties (we turn to this final factor below).<sup>81</sup> The certainty that is undoubtedly gained for the parties from the court hearing and accepting submissions on agreed penalty may be weighed against the certainty that would arise from the development of a more detailed body of precedent if courts no longer accepted such submissions.<sup>82</sup>

If *Barbaro* is a guide, the Court does not appear willing to blur the distinction between relevant and irrelevant submissions in order to serve even clear

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<sup>78</sup> Commonwealth, 'Submissions of the Appellant', Submission in *Cth v FWBC*, B36/2015, 22 July 2015, [42]–[43]. There is some disagreement with respect to the purpose of the *BCII Act* and civil pecuniary penalty schemes in general. Section 3 of the Act provides broad aims for the statute, including respect, accountability and high employment. At first instance, the Commonwealth argued that deterrence was the only purpose of the *BCII Act* and other civil pecuniary penalty schemes: *FWBC v CFMEU* (2015) 229 FCR 331, 357 [64], 359–60 [75]. The Full Federal Court disagreed, pointing to a number of goals under s 3 including 'promoting respect for the rule of law, ensuring respect for the rights of building industry participants and ensuring accountability for unlawful conduct', which indicate that the purposes of the *BCII Act* include 'education and rehabilitation': at 357–8 [67], 360 [75]. Teong has identified that punishment is of 'unsettled importance' in this context: above n 28, 59. Comino goes further, arguing that the punitive nature of civil penalties 'cannot be denied': 'Effective Regulation by ASIC', above n 1, 813; see also Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Federal Jurisdiction*, Discussion Paper No 65 (2002) 573 [17.68]. On this note, in *Australian Securities and Investments Commission v Vizard* (2005) 145 FCR 57 Finkelstein J's 'real concerns [were] with punishment for retributive purposes and general deterrence, but principally the latter': at 68 [47], quoted in Comino, 'Effective Regulation by ASIC', above n 1, 813–14.

<sup>79</sup> (2014) 253 CLR 58, 60, 62–3, 66 [5], 71–2 [31]. For a scathing critique of the case drawing on pragmatic concerns about efficiency, see Bagaric, 'The Need for Legislative Action', above n 20, 135.

<sup>80</sup> These include avoiding 'inevitable' appeals and a public perception that the sentencing judge has been inappropriately 'swayed by the prosecution's view': (2014) 253 CLR 58, 72 [33].

<sup>81</sup> *Ibid* 75 [42], 76 [47]; *Australian Securities and Investments Commission v Chemeq Ltd* (2006) 234 ALR 511, 534–5 [100] (French J).

<sup>82</sup> See the views expressed by Dowsett J during argument at first instance: Transcript of Proceedings, *FWBC v CFMEU* (Federal Court of Australia, QUD257/2013, Dowsett, Greenwood and Wigney JJ, 11 August 2014) 78, attached to the submissions to the High Court of the amici curiae in *Cth v FWBC*: Moore, 'Submissions of the Amici Curiae', Submission in *Cth v FWBC*, B36/2015, 12 August 2015, 22. See also the concerns of the Full Federal Court: *FWBC v CFMEU* (2015) 229 FCR 331, 404 [238]. The development of precedent in this area would, however, not create the same degree of certainty for defendants as present practice around agreed penalties: Teong, above n 28, 67.

public policy objectives like the expeditious resolution of disputes.<sup>83</sup> Moreover, any argument based on the role of the regulator misconstrues the reasoning in *Barbaro*, which focuses on impermissible intrusion into the role of the judge, rather than the role and duties of the prosecutor.<sup>84</sup> The role of the judge in the context of uncontested civil pecuniary penalties is identical to that in criminal sentencing: to determine the appropriate penalty in the circumstances.

In a sense, the Commonwealth, the FWBC and the unions face an uphill battle against the text of the *BCII Act*. There is nothing in the Act that would exclude agreed penalties as a relevant factor to the court's determination, but equally there is nothing to suggest they have legal significance.

For the Full Federal Court, the parties' submission on agreed penalty was at best an expression of a 'shared opinion'.<sup>85</sup> That this opinion was grounded in a myriad of unidentified factors seriously undermines arguments that assert its relevance to legal principles or to the exercise of the court's discretion.<sup>86</sup>

The outcome of *Cth v FWBC* will turn on the degree to which the High Court is willing to adopt a contextual and purposive reading of the Act. The Court did not take this approach in *Barbaro*, but it may be persuaded to do so in the context of civil pecuniary penalty schemes. However, if the High Court finds that the submission on agreed penalty is a submission of opinion, which the legislation (properly construed in its full context) does not make material, there is a real possibility that the Court will extend the application of the *Barbaro* principle to all civil penalty proceedings.<sup>87</sup> If the Court takes that approach, legal practitioners would be advised to ensure that all submissions as to penalty range or figure are accompanied by a detailed explanation and, crucially, that such submissions are carefully phrased so as to connect unequivocally to a principle that is relevant to the court's determination. The relevance of a submission on penalty would no longer be readily accepted by virtue of its agreed status.

### **C Public Confidence and the Proper Role of the Court**

In *Barbaro*, the High Court held that submissions as to sentencing range impermissibly cloud the roles of the accused, the prosecutor and the court.<sup>88</sup> Relevantly, the Court observed that it was for the accused to decide how to plead,

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<sup>83</sup> *Barbaro* (2014) 253 CLR 58, 71 [30], 72 [33]. See also the consideration of these public policy concerns by the Full Federal Court: *FWBC v CFMEU* (2015) 229 FCR 331, 356 [62], 383 [164]–[165], 404 [239], 405 [242].

<sup>84</sup> *Barbaro* (2014) 253 CLR 58, 71 [29].

<sup>85</sup> *FWBC v CFMEU* (2015) 229 FCR 331, 376 [139]. A submission as to an agreed penalty range is an opinion — moreover, it is an irrelevant opinion: at 373 [127].

<sup>86</sup> Due to this irrelevance, even if the agreed penalty was submitted as evidence (perhaps as expert evidence on the part of the regulator, or as evidence by consent) it would be inadmissible. The Full Federal Court noted that although opinions may be admitted as evidence by consent, they must also be relevant, and concluded that the particular interest of the regulator does not increase the weight or relevance of its opinions: *ibid* 373 [127], 374 [130], 392–3 [195]. The Full Federal Court also concluded that if expertise is the basis for the opinion, then it may be adduced and tested as expert evidence: at 373 [127], 374 [130].

<sup>87</sup> *Ibid* 388 [180], 391 [191].

<sup>88</sup> *Barbaro* (2014) 253 CLR 58, 71 [29], 72 [33].

for the prosecutor to determine the charge and for the court alone to fix the sentence.<sup>89</sup> For the High Court, submissions in the form of a numerical sentencing range incorrectly suggest that sentencing is merely a mathematical exercise.<sup>90</sup> Moreover, the efficacy of such submissions depends upon the prosecutor acting as a dispassionate ‘surrogate judge’,<sup>91</sup> and may involve the parties pre-empting certain findings of fact.<sup>92</sup> Each of these factors indicates that submissions on sentencing range pose a risk to public confidence in the impartiality of the sentencing court:

If a judge sentences within the range which has been suggested by the prosecution, 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. By contrast, if the sentencing judge fixes a sentence outside the suggested range, appeal against sentence seems well-nigh inevitable.<sup>93</sup>

The High Court’s basic reasoning in *Barbaro* seems applicable to submissions on agreed pecuniary penalties. The submission of a single penalty figure, not supported by clear explanation of how that figure relates to relevant principles, risks giving an impression that a mere ‘mathematical exercise’ has been undertaken.<sup>94</sup> Likewise, in negotiating and agreeing upon the figure, the parties are acting as surrogate judges at best, making the necessary (implicit) assertions of fact and principle.<sup>95</sup> At worst, the parties are basing their agreement upon other, similarly unidentified motives, unrelated to the aims or objectives of the *BCII Act*.<sup>96</sup> Following *Barbaro*, it is therefore likely that the High Court will view submissions on agreed penalty as capable of undermining public confidence in the impartiality of the court.

It is arguable that a court’s perceived independence and proper role is compromised to an even greater degree by submissions on agreed penalty in civil penalty proceedings, than by submissions on sentencing range in criminal sentencing hearings. While *MacNeil-Brown* imposed a duty on prosecutors to make submissions on sentencing range, it did not go so far as to require the court to comply with that range. *NW Frozen Foods* and *Mobil*, however, held that a court should place its own assessment of an appropriate penalty to one side and should accept and apply an agreed penalty provided that it is ‘within the permissible range’ — regardless of whether the court would have arrived at a different figure on its own assessment.<sup>97</sup> This principle places a significant constraint on the exercise of the judge’s discretion in determining an appropriate penalty. As Weinberg J observed in *Australian Prudential Regulation Authority v Derstepanian*, ‘I may well have selected a higher [penalty] figure. The fact is that

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<sup>89</sup> Ibid 76 [47].

<sup>90</sup> Ibid 72–3 [34], [35].

<sup>91</sup> Ibid 71 [29].

<sup>92</sup> Ibid 73 [36], 74 [39].

<sup>93</sup> Ibid 72 [33].

<sup>94</sup> Ibid 72 [34].

<sup>95</sup> Ibid 71–2 [29]–[33], 72–3 [35]–[36]. See also *FWBC v CFMEU* (2015) 229 FCR 331, 367 [98].

<sup>96</sup> *FWBC v CFMEU* (2015) 229 FCR 331, 376 [139], 376–7 [141].

<sup>97</sup> *NW Frozen Foods* (1996) 71 FCR 285, 291 (Burchett and Kiefel JJ); *Mobil* (2004) ATPR ¶41-993, 48,626 [51(vi)].

the reasoning in *NW Frozen Foods* imposes a significant constraint upon my choice'.<sup>98</sup> This constraint on judicial discretion exceeds that imposed by *MacNeil-Brown* prior to *Barbaro* and therefore poses a greater risk to public confidence in the court's impartiality.

It must be acknowledged that the requirement of judicial independence arising from ch III of the *Australian Constitution* is preserved under the *BCII Act*. Specifically, the court retains its capacities to demand further information, scrutinise the material presented, and exercise an ultimate discretion to depart from the penalty agreement.<sup>99</sup> These factors are crucially important.<sup>100</sup> As Teong has observed: '[a]gainst these opportunities to exercise judicial discretion, the *Frozen Foods/Mobil* approach arguably does not "blinker" courts by approaching the determination by reference to an agreed penalty'.<sup>101</sup>

Nonetheless, following *Barbaro* it appears likely that the High Court will view the principles and practice arising from *NW Frozen Foods* and *Mobil* as standing at odds with the court's statutory jurisdiction to independently determine the appropriate penalty. The High Court's observation in *Barbaro* seems particularly apt in this context: either the judge complies with the agreed penalty and gives an impression that he or she has been swayed by the submission, or the judge fixes a different penalty — in which case, appeal 'seems well-nigh inevitable'.<sup>102</sup> Likewise, Teong concludes that the practice arising from *NW Frozen Foods* and *Mobil* has meant that:

[T]he theoretical attempts of the *Frozen Foods/Mobil Oil* approach at preserving judicial independence are lost, on the whole, to the 'somewhat undesirable practice' of courts simply 'rubber-stamping' agreed penalties. In this regard, the approach ultimately falls foul of the judicial duty to impose penalties.<sup>103</sup>

<sup>98</sup> (2005) 60 ATR 518, 528 [44] (*'Derstepanian'*). See also *Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 2)* [2012] FCA 19, [41] (Tracey J) (*'ACCC v Turi Foods (No 2)'*); *Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd* (2002) ATPR ¶41-880, 45,063-4 [29]-[33] (Weinberg J) (*'ACCC v Colgate-Palmolive'*); *Australian Competition and Consumer Commission v Navman Australia Pty Ltd* (2007) ATPR ¶42-208, 48,444 [148] (Jacobson J) (*'ACCC v Navman'*).

<sup>99</sup> *Mobil* (2004) ATPR ¶41-993, 48,626 [51(i)], 48,628 [58(i)]; Teong, above n 28, 56. See, eg, *Australian Competition and Consumer Commission v Roche Vitamins Australia Pty Ltd* (2001) ATPR ¶41-809, 42,813 [35] (Lindgren J); *NW Frozen Foods* (1996) 71 FCR 285, 291, 298 (Burchett and Kiefel JJ); *Australian Competition and Consumer Commission v FFE Building Services Ltd* (2004) Aust Contract R ¶90-179, 92530 [36] (Wilcox J).

<sup>100</sup> On the importance of judicial discretion in maintaining constitutional validity, see Rebecca Welsh, 'A Path to Purposive Formalism: Interpreting Chapter III for Judicial Independence and Impartiality' (2013) 39(1) *Monash University Law Review* 66, 89; Ananian-Welsh, above n 66, 765-6. See also the following cases in which the High Court relied upon a similar set of factors to support a finding of constitutional validity (in proceedings involving secret evidence): *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 102 [167] (Hayne, Crennan, Kiefel and Bell JJ), 115 [212] (Gageler J) (*'Pompano'*); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 531-2 [94]-[99] (French CJ), 542-3 [144]-[149] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ), 576-80 [257] (Kirby J).

<sup>101</sup> Teong, above n 28, 56, citing *Australian Competition and Consumer Commission v AGL Sales Pty Ltd* [2013] FCA 1030, [42] (Middleton J).

<sup>102</sup> *Barbaro* (2014) 253 CLR 58, 72 [33].

<sup>103</sup> Teong, above n 28, 57, citing *Derstepanian* (2005) 60 ATR 518, 525 [25] (Weinberg J).

Thus, the principle and practice arising from *NW Frozen Foods* and *Mobil* have a negative impact on public confidence in the impartiality of the court and its role as an independent arbiter of disputes according to law. As in *Barbaro*, concerns regarding public confidence weigh heavily against allowing submissions on agreed penalty in civil pecuniary penalty proceedings. These concerns also present a strong argument against the *NW Frozen Foods/Mobil* principle that a court ought to apply an agreed penalty in the absence of a clear case requiring departure.<sup>104</sup>

The Commonwealth, the FWBC and the unions argue that *Barbaro* is limited to the criminal sentencing context, in which there are uniquely and strictly defined roles for each party, and attendant well-developed criminal sentencing principles.<sup>105</sup> In civil proceedings, on the other hand, submissions as to appropriate relief are conventional, provided that the court maintains an ultimate discretion as to the final order.<sup>106</sup> Moreover, the Commonwealth, the FWBC and the unions argue that the regulatory framework established by the *BCII Act* envisages a strong role for the regulator in assisting the court in the just and expeditious resolution of the dispute by negotiating and submitting agreed penalties, and that the acceptance of these submissions aligns with the court's role under the Act.<sup>107</sup> It is apparent that the success of these arguments depends on how the High Court approaches the first two questions identified in this column, that is, whether the High Court accepts that there is a clear distinction between sentencing hearings and civil pecuniary penalty proceedings, and whether it considers submissions on agreed penalty to be legally or factually relevant under the *BCII Act*.

## D Three Connected Questions

At this point our analysis begins to come full circle. We have addressed the three key questions before the High Court in turn, but it must be acknowledged that these questions are intrinsically related — that is, the resolution of each is likely to impact the others. If the High Court reasons that *Barbaro* is constrained to the criminal sentencing context, and identifies civil pecuniary penalties as distinctly *civil*, then it may follow that accepting and applying an agreed penalty aligns with the court's proper role within that scheme. Similarly, if the High Court adopts a highly contextual reading of the *BCII Act*, interpreting its provisions in light of the broader framework of civil procedure and envisaging a strong role for the regulator, then it may follow that submissions on agreed penalty reflect the statutory role of the regulator and provide relevant guidance to the court in properly fulfilling its role under the Act.

<sup>104</sup> We note that in *Ingleby* (2013) 39 VR 554, the Victorian Court of Appeal raised many of these concerns. Citing the need for a greater judicial role to fulfil the court's proper responsibilities, Weinberg JA criticised the principle arising from *NW Frozen Foods* and *Mobil* as 'bad law' and labelled the approach a 'fundamental departure from the judicial function': 563 [28]–[30]. However, as Teong has observed, subsequent Federal Court decisions have downplayed any inconsistency between *Ingleby* and the earlier authorities, and *NW Frozen Foods* and *Mobil* have continued to be adhered to: above n 28, 53.

<sup>105</sup> Commonwealth, 'Submissions of the Appellant', Submission in *Cth v FWBC*, B36/2015, 22 July 2015, [30], [32]–[33].

<sup>106</sup> *Ibid* [25], [28].

<sup>107</sup> *Ibid* [24], [36].



On the other hand, if the High Court acknowledges that civil pecuniary penalties are not strictly civil in nature, then it will be less likely to draw on the contextual features of civil litigation in interpreting the *BCII Act* and the role of the court. A narrower reading of the Act may also result in greater emphasis being placed on the requirement that submissions are tightly constrained to relevant points of law and fact, and the need to preserve public perceptions that the court alone is responsible for determining the appropriate penalty. We have argued that this latter interpretive approach is more persuasive, and more likely in light of the High Court's decision in *Barbaro*.

In this way it becomes apparent that '[t]he uncertain role of the court in [civil pecuniary penalty] proceedings derives from a reluctance in the literature and case law to qualitatively define the hybrid nature of civil penalties'.<sup>108</sup> In resolving the classification of civil pecuniary penalties as civil, criminal or belonging to some third category of proceeding, the High Court may go some way toward resolving the related questions regarding the proper content of submissions and the role of the court.

## V Conclusion

In *Cth v FWBC*, the High Court could turn existing practice in civil pecuniary penalty proceedings on its head by finding that *Barbaro* applies to restrict submissions as to agreed penalty. We have argued that this outcome is likely, in light of the High Court's approach and findings in *Barbaro*.

First, the Court is unlikely to confine *Barbaro* to the criminal sentencing context by drawing a strict distinction between criminal and civil proceedings. Second, penalty agreements do not tend to explain how the agreed penalty was calculated or what considerations underpinned that calculation. As such, *Barbaro* would suggest that the High Court is likely to exclude submissions as to agreed penalty on the basis that they are not a submission of law or a material fact, but instead amount to an irrelevant and inadmissible expression of opinion. Third, submissions on agreed penalty undermine the proper role of the court as the sole arbiter of the appropriate penalty, in the same fashion as submissions on sentencing range were held to undermine the proper role of the sentencing court in *Barbaro*. In fact, due to the principle in *NW Frozen Foods* and *Mobil*, the court's actual and perceived independence is threatened to a greater extent in the civil pecuniary penalty context. The risk to public confidence in the court's impartiality will weigh heavily against the maintenance of existing practice. These arguments are by no means foregone conclusions. Each question we have identified is complex and multifaceted. Much will depend upon the High Court's approach to characterising civil pecuniary penalty schemes as civil proceedings (or otherwise) and the extent to which the Court adopts a contextual and purposive reading of the *BCII Act*.

If the High Court finds against the Commonwealth, the FWBC and the unions, and applies *Barbaro* to civil pecuniary penalty proceedings, the impact would be considerable. Parties to proceedings under Australia's various civil

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<sup>108</sup> Teong, above n 28, 58.

pecuniary penalty schemes would no longer enjoy a high degree of certainty as litigants. This would likely lead to fewer agreements and an increase in the number of contested hearings, incurring significant expense for respondents and for the regulators who rely on the public purse. Moreover, an increase in contested hearings would place a drain on court resources. The exclusion of submissions on agreed penalties may also result in harsher penalties for contravening respondents, as settled agreements tend to impose less severe penalties.<sup>109</sup>

On the other hand, the extension of *Barbaro* to civil pecuniary penalty proceedings may have a positive impact. Increased judicial involvement in the setting of pecuniary penalties would facilitate the development of jurisprudence in this area.<sup>110</sup> It may also facilitate the evolution of clearer procedures more appropriate to the ‘hybrid’ nature of civil penalty schemes.<sup>111</sup> Greater judicial involvement would also increase the openness and transparency of civil pecuniary penalty proceedings. If in depth judicial consideration of the relevant facts resulted in harsher penalties, this may also assist in achieving a core aim of civil penalty schemes, namely, deterrence of future contraventions.

It could be that any impact of the High Court’s decision would be constrained through adaptable practices or legislative amendment. *Barbaro* was met with initial concern, however commentators have subsequently downplayed its impact.<sup>112</sup> There is every chance that a similar outcome in *Cth v FWBC* likewise could be contained. The exclusion of agreed penalties would be limited to those submissions expressed as mere opinion. It would remain open to the parties to assist the court through submitting a statement (agreed or otherwise) explaining how the relevant principles apply to the facts at hand, and drawing attention to comparable cases.

Finally, the status quo could be maintained via legislative amendment to the existing regulatory frameworks. Parliament may provide that submissions as to agreed penalties are relevant to the court’s determination of proceedings, or even enshrine the principle in *NW Frozen Foods* and *Mobil*. This response would facilitate those policy considerations identified above: encouraging agreements, avoiding contested proceedings, and greatly enhancing certainty for regulators and respondents. However, it would not address concerns regarding existing practice, namely: risks to the independent role of the court; the openness and transparency of civil penalty proceedings; the deterrent impact of harsher penalties; and the effective development of jurisprudence in this area. Moreover, if the High Court held that a court was acting as a mere ‘rubber stamp’ by hearing and applying submissions on agreed penalty, any legislative amendment to maintain this

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<sup>109</sup> Ibid 64. See also *Derstepanian* (2005) 60 ATR 518, 528 [44] (Weinberg J); *ACCC v Turi Foods (No 2)* [2012] FCA 19 (23 January 2012), [41] (Tracey J); *ACCC v Colgate-Palmolive* (2002) ATPR ¶41-880, 45,063–4 [29]–[33] (Weinberg J); *ACCC v Navman* (2007) ATPR ¶42-208, 48,444 [148] (Jacobson J).

<sup>110</sup> Moore, ‘Submissions of the Amici Curiae’, Submission in *Cth v FWBC*, B36/2015, 12 August 2015, 22; Teong, above n 28, 63–4.

<sup>111</sup> Comino, ‘James Hardie’, above n 60, 201, 215.

<sup>112</sup> Babb, above n 24, 1–4; cf Priest, above n 21; Basten and Johnson, above n 25, 50.

approach might fall foul of the constitutional separation of powers.<sup>113</sup> As argued above, the preservation of the court's fundamental control of proceedings and discretion as to the orders imposed may preserve constitutional validity.<sup>114</sup> However, the application of the separation of powers doctrine is notoriously flexible.<sup>115</sup> Legislation that preserved a significant role for the parties in determining a civil pecuniary penalty figure may well be the subject of a constitutional challenge.

*Cth v FWBC* presents an opportunity for the High Court to clarify the scope of its decision in *Barbaro*, and to shed light on the complex area of civil pecuniary penalties. However, there is every chance that this decision will give rise to considerable debate, calling into question the nature, aims and processes of civil pecuniary penalty schemes. It remains to be seen whether this case will lead to increased judicial involvement in these schemes, or to a strengthening of the regulators' control of proceedings for the sake of efficiency and certainty. Whatever the outcome, *Cth v FWBC* will be an important decision that will guide future developments in regulatory practice and procedure.

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<sup>113</sup> Specifically, it may be argued that the legislation would require federal courts to exercise powers other than the judicial power of the Commonwealth (as defined in, eg, *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ); *R v Trade Practices Tribunal*; *Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374–5 (Kitto J)), thereby violating the strict separation of judicial power under ch III of the *Australian Constitution*: *R v Kirby*; *Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 276–8 (Dixon CJ, McTiernan, Fullagar, Kitto JJ). It may also be argued that the role conferred on courts undermines judicial independence or institutional integrity, which have been identified as essential and defining features of courts: *Pompano* (2013) 252 CLR 38, 72 [68] (French CJ); *Wainohu v New South Wales* (2011) 243 CLR 181, 208–9 [44] (French CJ and Kiefel J).

<sup>114</sup> See text and references above at n 101.

<sup>115</sup> For a critique of both the *Boilermakers'* and institutional integrity doctrines, see Welsh, above n 100.

