

CASE NOTE

A NAIL-BITING FINISH TO A (CIVIL) PENALTY SHOOTOUT: COMMONWEALTH v DIRECTOR, FAIR WORK BUILDING INDUSTRY INSPECTORATE; CFMEU v DIRECTOR, FAIR WORK BUILDING INDUSTRY INSPECTORATE

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*In July 2015, the common occurrence of regulator and litigant making joint submissions regarding an appropriate range of civil penalties was ruled unlawful by the Full Court of the Federal Court. This was on the basis of the High Court's decision in *Barbaro v The Queen*, where submissions regarding an appropriate range of sentences were ruled to be inadmissible opinion. In December 2015, the High Court overturned this decision and restored the status quo. This note considers the decisions of the Full Court and High Court and the two issues in greatest contention: whether principles of criminal law should be analogised to civil penalty proceedings; and whether the practice of joint penalty submissions is preferable as a matter of public policy. In particular, this note is concerned that the High Court failed to adequately address the varied criticisms raised against the practice. It considers the charge that courts merely 'rubber-stamp' the settled positions of the parties and proposes some steps that should be taken to address this issue.*

I INTRODUCTION

A key staple for the police procedural is the plea deal — in return for prosecutors seeking a shorter sentence, the suspect will either confess or offer evidence on his criminal compatriots. The suspect looks out towards the two-way glass of the interrogation room and sees 20 years in prison before them, they crack and they reach out for the deal — the only life raft they can grab.

Reality is a different matter. In Australia, the High Court ruled in *Barbaro v The Queen* that prosecution statements regarding an appropriate sentence length were irrelevant statements of opinion and should not be considered.¹ What may be commonplace for *The Wire* or *Law & Order* is impermissible in the Australian criminal justice system.

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1 (2014) 253 CLR 58, 76 [49] (*Barbaro*).

In May 2015, the Full Court of the Federal Court ruled in *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* that this principle also applied to civil penalty proceedings.² A joint submission by regulator and litigant regarding an appropriate penalty or range of penalties was judged an inadmissible expression of opinion.³ The ramifications were substantial — deals are often struck between the regulator and the litigant for agreed penalties in return for an admission of unlawful behaviour.

However, in December 2015 the pendulum had swung back in defence of the accepted practice of joint penalty submissions. The High Court overruled the Full Court in *Commonwealth v Director, Fair Work Building Industry Inspectorate*, where it was held that *Barbaro* was restricted to the court's criminal jurisdiction and the ability for regulators to make joint penalty submissions was renewed.⁴

This case note unpacks the High Court's decision in two parts. First, what the decision in *Barbaro* stands for and how the courts determined whether it was applicable to civil penalty proceedings. Unlike other aspects of criminal law, which have been translated into civil penalty proceedings, the High Court unanimously rejected incorporating such a standard for receiving submissions regarding penalties; and

Secondly, how the courts evaluated public policy arguments both for and against the continued practice of joint penalty submissions. Although the High Court would back a line of precedent that states that there are good policy reasons for the practice, it would not engage with a vocal line of judicial decisions that view the practice as an exercise in 'rubber-stamping'.

II BACKGROUND AND CASE HISTORY

It is necessary to place the decisions of the Full Federal Court and High Court in the context of civil penalty provisions and the practice of joint penalty submissions, as well as the High Court's decision in *Barbaro*.

A Introduction to Civil Penalties

A civil penalty regime is a statutory enforcement tool available to public authorities. Civil penalties (also known as pecuniary penalties) are the financial sanctions levied against a party for non-compliance. However, the standard of

2 (2015) 229 FCR 331 ('*Fair Work v CFMEU*').

3 Ibid 375 [136].

4 (2015) 90 ALJR 113, 117 [1] ('*Commonwealth v Fair Work*').

proof necessary in civil penalty proceedings is the civil ‘balance of probabilities’ standard rather than the criminal standard of ‘beyond reasonable doubt’.⁵

Civil penalties are perhaps most notable in economic regulation, where regulators such as the Australian Securities and Investments Commission (‘ASIC’) and the Australian Competition and Consumer Commission (‘ACCC’) use them to enforce corporate and competition regulations. However, the ability to levy civil financial sanctions is widespread across Commonwealth and state jurisdictions, in areas such as industrial relations,⁶ the regulation of tax agents,⁷ and environmental protection.⁸ Keep in mind that, whilst they are only a single weapon in a regulator’s arsenal, civil penalties are often a ‘go to’ enforcement tool and complemented by agreements between the parties on future activities or other remedies.

Although this case note is concerned with a discrete aspect of civil penalties, an understanding of the current debates in this area provides extra depth to this dispute.⁹ Kenneth Mann notably used the term ‘middleground’ to describe the ‘jurisprudential arena’ of civil penalties between civil and criminal law;¹⁰ this properly conjures the tension that comes from levying punitive and deterrent sanctions in a civil context. A practical example of that tension is evident in the High Court’s earlier decisions to extend the penalty privilege to civil penalty proceedings.¹¹

Vicky Comino has shown that this tension has not been successfully worked through by the courts. In her review of the regulatory investigation of James Hardie, Comino concluded that courts had come to grips with the ‘middleground jurisprudence’ of civil penalty regimes in haphazard fashion, importing concepts and standards from the criminal law that undermine the regime as an effective *civil* regulatory tool, with courts often ordering penalties that are considered too low.¹²

5 However, the balance of probabilities is balanced by the *Briginshaw* principle, requiring that the seriousness of the allegations and the gravity of the consequences must affect a court’s decision as to whether issues are proven: see *Briginshaw v Briginshaw* (1938) 60 CLR 336. See also *Australian Securities and Investments Commission v Plymin* (2003) 175 FLR 124, 205.

6 See *Fair Work Act 2009* (Cth) s 546.

7 See *Tax Agent Services Act 2009* (Cth) s 50.35.

8 See, eg, *Environment Protection Act 1993* (SA) s 104A. As a point of interest, the South Australian regime explicitly allows the regulator to levy a civil penalty by agreement with the other party, rather than by application to the court.

9 Evidently the High Court disagreed with this sentiment — the Court’s judgment does not engage with the legality of joint penalty provisions within any framework of the broader debates surrounding civil penalties.

10 Kenneth Mann, ‘Punitive Civil Sanctions: The Middleground between Criminal and Civil Law’ (1992) 101 *Yale Law Journal* 1795, 1799.

11 See, eg, *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129.

12 Vicky Comino, ‘James Hardie and the Problems of the Australian Civil Penalties Regime’ (2014) 37 *University of New South Wales Law Journal* 195, 216. This case note is not the place to pull at the broader threads of civil penalty regimes — the matter of joint penalty submissions is quite enough already. The question of how to build a better regulatory system is answered better by others. See, eg, Vicky Comino, ‘Effective Regulation by the Australian Securities and Investments Commission: The Civil Penalty Problem’ (2009) 33 *Melbourne University Law Review* 802; Peta Spender, ‘Negotiating the Third Way: Developing Effective Process in Civil Penalty Litigation’ (2008) 26 *Company and Securities Law Journal* 249.

In that context, it is notable that the practice of making joint penalty submissions to the court regarding an appropriate penalty is judicial in development. The practice allows proceedings to be conducted without the same rigour as a criminal trial. Parties are permitted to jointly submit a quantum for a civil penalty and, if the court considers that it falls within the appropriate range, it will accept that amount. This first received the Federal Court's approval in *Trade Practices Commission v Allied Mills Industries Pty Ltd* in 1981,¹³ and was again approved by the Full Federal Court in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission*¹⁴ and *Minister for Industry, Tourism & Resources v Mobil Oil Australia Pty Ltd*.¹⁵ In each of these decisions, the Courts noted the public benefits that flowed from allowing parties to make such submissions, including in particular the way in which it assisted regulators by encouraging litigants into negotiated settlements.

B The Decision of the High Court in Barbaro

Although at first glance unrelated to civil penalties, a development in criminal law would threaten to overturn the lawfulness of joint penalty submissions. In *Barbaro*, the appellants pleaded guilty in the Supreme Court of Victoria to charges relating to drug importation.¹⁶ They had entered pleas of guilty after discussions with the prosecution regarding the available sentencing ranges. Since the 2008 decision of *R v MacNeil-Brown*,¹⁷ it was common in Victoria for the prosecution to make submissions regarding sentencing ranges. However, the Supreme Court had declined to receive such submissions in this case.¹⁸ The two appealed, arguing that their sentencing hearing was rendered unfair by the trial judge's refusal to hear the submissions,¹⁹ and when that appeal failed they obtained special leave to appeal to the High Court.²⁰

The High Court dismissed their appeal and prohibited prosecution submissions on the available range of sentences. The majority's primary reason for the decision was that a statement by the prosecution on the available sentences was a statement of opinion rather than a submission:

Its expression 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

13 (1981) 60 FLR 38 ('*Allied Mills*').

14 (1996) 71 FCR 285 ('*NW Frozen Foods*').

15 [2004] ATPR ¶41-993 ('*Mobil Oil*').

16 *Barbaro* (2014) 253 CLR 58, 65 [1].

17 (2008) 20 VR 677. In that case, the Victorian Court of Appeal had stated that an aspect of the prosecution's duty would be to provide submissions on sentencing range where:

1. The court requests such submissions; or
2. The prosecutor believes there is a substantial risk that without such submissions the court would make an error regarding the appropriate sentencing range.

18 *DPP (Cth) v Barbaro* [2012] VSC 47 (23 February 2012).

19 *Barbaro v The Queen* (2012) 226 A Crim R 354.

20 Transcript of Proceedings, *Zirilli v The Queen* [2013] HCATrans 184 (16 August 2013).

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.²¹

In addition, the majority also determined that the practice was improper because of matters that might affect the administration of justice, namely:

- The prosecution ‘is not, and cannot be, dispassionate’ and its submissions will reflect their interests as prosecutor;²² and
- It may be seen by others that the Court ‘has been swayed’ by the prosecution’s statement of sentences.²³

In his separate judgment, Gageler J disagreed with the majority’s view that statements on sentences were not submissions, stating that it was a submission of law ‘that a sentence within that range would or would not meet a limiting condition of the discretion conferred on the court to sentence for the offence and therefore would or would not fall within the limits of a proper exercise of the sentencing discretion’.²⁴

His Honour held that the Court in *R v MacNeil-Brown* was correct to hold that a prosecutor may assist the court by making submissions on sentencing range in some circumstances, but such a submission ‘has no greater or lesser status than any other submission of law’.²⁵ Consequently the sentencing court is not bound to accept the submission or be guided by it — on these grounds the prisoners’ claim that the prosecution statement on sentencing had to be taken into account was dismissed.

Gageler J also noted that if the reasoning of the majority was followed, submissions regarding sentencing ranges would be proscribed at trial but remain a crucial part of any appeal. In their duty to the court the prosecution must assist in avoiding an appealable error and, so far as prosecution submissions were not given special force, the court could consider them.²⁶ Perhaps because of his Honour’s separate judgment in this case, Gageler J would also pen a separate judgment in *Commonwealth v Fair Work*.²⁷

C Context of the Dispute

The decisions of the Full Court and High Court were of broad application to all civil penalty frameworks. Nonetheless, the specific structure of the relevant civil penalty system in this dispute should be set out.

21 *Barbaro* (2014) 253 CLR 58, 66 [7].

22 *Ibid* 72 [32].

23 *Ibid* 72 [33].

24 *Ibid* 79 [59].

25 *Ibid* 80 [62].

26 *Ibid*.

27 (2015) 90 ALJR 113.

The regime was contained within the *Building and Construction Industry Improvement Act 2005* (Cth) (*BCII Act*).²⁸ Section 38 stated that '[a] person must not engage in unlawful industrial action'. It was annotated to be a 'Grade A civil penalty' provision.

Concerning enforcement, s 49 of the *BCII Act* read:

- (1) An appropriate court, on application by an eligible person, may make one or more of the following orders in relation to a person (the *defendant*) who has contravened a civil penalty provision:
 - (a) an order imposing a pecuniary penalty on the defendant;
 - (b) an order requiring the defendant to pay a specified amount to another person as compensation for damage suffered by the other person as a result of the contravention;
 - (c) any other order that the court considers appropriate.
- ...
- (6) Each of the following is an *eligible person* for the purposes of this section:
 - (a) the ABC [Australian Building and Construction] Commissioner;
 - (b) an ABC [Australian Building and Construction] Inspector;

The framework is elegant: should a person engage in unlawful industrial activity, then the regulator can commence proceedings for a civil penalty against the non-compliant party. In this relatively simple design, the framework is similar to many other civil penalty regimes.

The relevant dispute arose from these provisions. In 2013, the Director of the Fair Work Building Industry Inspectorate (as the Commission had been renamed) commenced civil penalty proceedings in the Federal Court against the Construction, Forestry, Mining and Energy Union and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia for alleged breaches of s 38.²⁹ The parties filed a 'Statement of Agreed Facts' wherein the unions acknowledged contravention of s 38 and the parties jointly agreed on the penalty amount, subject to 'the discretion of the Court to fix an appropriate penalty'.³⁰

At this point, difficulties arose for the parties' negotiated settlement. The trial judge was concerned about the possible application of the High Court's decision in *Barbaro*, so the question of whether *Barbaro* applies to civil penalty proceedings was referred to the Full Court.³¹ The Commonwealth was given leave to intervene

28 Although the proceedings were brought under the *BCII Act*, the regime was in a process of transition. See *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012* (Cth); *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Regulation 2012* (Cth) reg 2.3.

29 The proceedings are summarised by the High Court in *Commonwealth v Fair Work* (2015) 90 ALJR 113, 118 [12].

30 The quote is from paragraph 116 of the parties' 'Statement of Agreed Facts', extracted in *Fair Work v CFMEU* (2015) 229 FCR 331, 335–7.

31 Referred by the Chief Justice under *Federal Court of Australia Act 1976* (Cth) s 20(1A).

and, because all the parties supported making orders consistent with the Statement of Agreed Facts, the Full Court gave leave for separate contradictors to appear.

The trial judge's concern and the Chief Justice's referral related to the uncertainty that had developed regarding whether to apply *Barbaro* to civil penalty hearings. There had already been a variety of responses:

- Applying *Barbaro* and holding that the Court could not take into account penalty ranges submitted by the parties;³²
- Distinguishing criminal proceedings from civil penalty proceedings and restricting the operation of *Barbaro* to the former;³³ and
- Rejecting entirely the notion that *Barbaro* was intended to apply to civil penalty proceedings.³⁴

The Full Federal Court handed down their judgment in May, having taken submissions not only from the original parties but also the contradictors and several Commonwealth statutory regulators.³⁵

The joint judgment of Dowsett, Greenwood and Wigney JJ in *Fair Work v CFMEU* was substantial.³⁶ The Full Court reviewed the decision in *Barbaro* and its treatment by other courts, and had to determine whether the principles in that case had any general application. The Full Court also took into consideration public policy reasons for and against the practice of joint penalties.

The Full Court determined that *Barbaro* prohibited courts, absent statutory authority to do otherwise, from considering joint submissions regarding penalties.³⁷ Further, the Court raised concerns (including those advanced in previous cases) that the practice may damage the public's perception that it is the court that imposes the penalty.³⁸

Given the ramifications of the Full Court's decision, an appeal was quickly made to the High Court by both the Commonwealth and the unions. On 6 August 2015, Kiefel and Nettle JJ granted special leave,³⁹ and the parties were heard on 13 October 2015.⁴⁰ The arguments in the two appeals were not materially different,

32 See *Australian Competition and Consumer Commission v Flight Centre Ltd [No 3]* (2014) 234 FCR 325, 340 [56].

33 See *Australian Competition and Consumer Commission v EnergyAustralia Pty Ltd* (2014) 234 FCR 343, 359–366 [113]–[152] ('*EnergyAustralia*').

34 See *Australian Competition and Consumer Commission v Mandurvit Pty Ltd* [2014] FCA 464 (12 May 2014) [48].

35 These parties included the ACCC, ASIC, Australian Taxation Office and Fair Work Ombudsman.

36 For a case note on the judgment of the Full Federal Court see Peter Renehan and Peta Stevenson, 'Purity but at What Price: The Application of *Barbaro* Principles to Pecuniary Penalty Proceedings' (2015) 23 *Competition and Consumer Law Journal* 1.

37 *Fair Work v CFMEU* (2015) 229 FCR 331, 335 [3].

38 *Ibid* 355 [57]–[58], 375 [133].

39 Transcript of Proceedings, *Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate* [2015] HCATrans 171 (6 August 2015).

40 Transcript of Proceedings, *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate; Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate* [2015] HCATrans 259 (13 October 2015).

although the unions sought declaratory relief from the High Court directly, rather than having the case remitted to the Federal Court.

III APPLYING *BARBARO*: CIVIL vs CRIMINAL PROCEEDINGS

The judgments of the Full Court and High Court show how the civil and criminal jurisdictions of the courts are conceived as a matter of principle and the practical consequences of that division. The High Court's decision in particular can be seen as a counterpoint to the trend identified by Comino, whereby courts incorporate criminal standards into civil penalty proceedings to deal with the punitive nature of the sanctions.⁴¹

A Initial Responses to *Barbaro*

As noted above, prior to the Chief Justice's referral of this dispute to the Full Federal Court, treatment of the decision in *Barbaro* had varied. In *Australian Competition and Consumer Commission v Flight Centre Ltd [No 3]*,⁴² the Court had applied *Barbaro* to penalty submissions. Logan J considered 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. The imposition and assessment of a penalty involves the exercise of a discretion by a judge, not the parties. I have not therefore taken into account the ranges respectively submitted.⁴³

The similarity between imposing a sentence and imposing a civil penalty required *Barbaro* to be applied.

In other cases, the Federal Court refused to apply *Barbaro*, relying instead on the orthodox approach developed from *Allied Mills*, *NW Frozen Foods*, and *Mobil Oil*. In *Australian Competition and Consumer Commission v EnergyAustralia Pty Ltd*,⁴⁴ Middleton J restricted *Barbaro* by distinguishing between criminal and civil penalty proceedings. He considered the point of *Barbaro* to be uniquely related to criminal proceedings, so the Court did not need to depart from the traditional practice of evaluating joint penalty submissions.⁴⁵ In this finding, he considered relevant key differences between the two types of proceedings, including:

- That '[a] principal object of imposing a pecuniary penalty is deterrence. Broader considerations apply in imposing a criminal custodial sentence'.⁴⁶

41 Comino, 'Effective Regulation by the Australian Securities and Investments Commission: The Civil Penalty Problem', above n 12, 814.

42 (2014) 234 FCR 325.

43 Ibid 340 [56].

44 (2014) 234 FCR 343.

45 Ibid 362 [125].

46 Ibid 365 [145].

This is why the Court encourages the submission of agreed penalty amounts.⁴⁷

- The positions of regulator and prosecutor are not analogous. Most notably, regulators are not expected to have the same level of independence as prosecutors are required to have.⁴⁸ Regulators are meant to be biased.

He also considered that accepting joint penalty submissions increased the predictability of outcome for parties, making it ‘more likely that proceedings will be resolved by agreement in an appropriate way and under the supervision of the Court’.⁴⁹ This was a valuable outcome that would improve deterrence and free up resources for regulators.

The Federal Court also chose not to apply *Barbaro* in *Australian Competition and Consumer Commission v Mandurvit Pty Ltd*.⁵⁰ McKerracher J believed that the principles enunciated in *Barbaro* could have a ‘broad application’,⁵¹ but considered that ‘such statements should be applied with the benefit of careful reading of the reasoning relevant to the making of the statement’.⁵² Consequently, having reviewed *Barbaro* and other relevant decisions, he chose not to apply *Barbaro* because, citing the decision in *EnergyAustralia*, he was bound to follow the principles of *NW Frozen Foods* and *Mobil Oil*.⁵³ Further, he considered that a joint penalty submission ‘states the parties’ agreed position as to a quantum of penalty that has an appropriate deterrent effect’,⁵⁴ and in doing so is not analogous to *Barbaro*’s concern for an ‘available range’, connected to appealable concepts of ‘manifest excess or inadequacy’.⁵⁵

It is this uncertainty that the Full Court was expected to resolve in *Fair Work v CFMEU*.

B The Full Federal Court Considers *Barbaro*

The Full Court’s treatment of *Barbaro* is linked to a foundational determination that civil penalties are analogical to criminal fines and punishments. This was consistent with earlier jurisprudence which sought to incorporate criminal law protections into quasi-criminal proceedings.

Having compared the concepts of civil penalties and criminal sanctions, the Full Court found that both serve similar purposes, namely:

- General and specific deterrence;

47 Ibid 365 [146].

48 Ibid 364 [140].

49 Ibid 365 [149].

50 [2014] FCA 464 (12 May 2014) (*‘Mandurvit’*).

51 Ibid [44]–[46].

52 Ibid [47].

53 Ibid [77]–[79].

54 Ibid [62].

55 Ibid [64].

- Denunciation and condemnation; and
- Punishment.⁵⁶

Civil penalties were consequently penal in nature.⁵⁷ If the two sanction types are substantially similar — both being an obligation to pay a monetary sanction because of unlawful activity — and serve similar purposes, the Full Court considered that the High Court’s caution in the criminal jurisdiction might be applicable to the peculiar circumstances of civil penalties. *Barbaro* was understood by the Full Court to have this type of general application:

We accept that the duties of the prosecution are not simply to be imposed upon a regulator. However it does not follow that the decision in *Barbaro* has no relevance to the conduct of pecuniary penalty proceedings. That decision concerns the proper content of submissions, having regard to the nature of the discretion to be exercised, the mechanics by which such discretion is to be exercised, the public interest and public perceptions.⁵⁸

The Full Court next distilled its understanding of *Barbaro* to several, more specific, propositions:

- A range of sentences necessarily reflects the biases and internal considerations of the person proposing it;
- Where proposed by a prosecutor, such a range will not be dispassionate and will reflect the inherent biases of that role;
- It is impracticable for those proposing a range of sentences to make clear the inherent biases involved in their determination;
- Therefore, such proposals ‘can never be more than an opinion’; and
- A sentencing judge cannot take opinion into account — instead the court must apply the proper legal tests and determine a comparable sentence based on jurisprudential process rather than ‘numerical equivalence’.⁵⁹

A judge determining a sanction engages in a process in which submissions from the parties cannot be considered; when determining a pecuniary penalty, they would face the same inherent biases from the submissions of a regulator, even if in joint submissions.

Having laid out these propositions, the Full Court turned to *Barbaro*’s subsequent application in the civil penalty context before the Federal Court. Regarding *EnergyAustralia*, the Court concluded that the reasons of Middleton J ‘do not offer a viable basis for limiting the applicability of the decision in *Barbaro* to criminal sentencing’.⁶⁰ The Court considered that Middleton J put regulators in a special

56 *Fair Work v CFMEU* (2015) 229 FCR 331, 341 [14].

57 *Ibid.*

58 *Ibid* 361 [82].

59 *Ibid* 366–67 [98].

60 *Ibid* 375 [134].

or expert position unwarranted by statutory authority,⁶¹ and that his emphasis on the virtue of ‘certainty’ undermined the ideal that the court is the only arbiter of any settlement — ‘[i]t is not clear to us that it is possible to maintain the public perception that the Court imposes the penalty and, at the same time, lead the parties to believe that their agreement will probably be adopted’.⁶²

The Full Court was similarly critical of *Mandurvit*. Despite that decision’s comparison between sentences and penalties, the Full Court still considered that the process of joint submissions ‘invites the Court to start with the agreed penalty, rather than its instinctive synthesis of the relevant circumstances’.⁶³ The Full Court further emphasised their concern that regulators may be neither independent nor ‘dispassionate’ in their prosecution of civil penalty cases, which undermines the value of any joint submission.⁶⁴

Having dismissed those decisions, the Full Court sought strength in logical simplicity: if *Barbaro* stands for the proposition that statements regarding the range of a penalty are impermissible opinion, and criminal sentences and civil penalties are substantially similar in purpose and effect, then *Barbaro* should apply to civil penalty proceedings.⁶⁵ That being the case, the task for the High Court was to re-evaluate the fundamental proposition of what *Barbaro* stood for.

C The High Court Clarifies Barbaro’s Application

In *Commonwealth v Fair Work*,⁶⁶ each of the three judgments drew a clearer dividing line between aspects of the civil and criminal jurisdictions of the court, using those distinctions to restrict *Barbaro* to purely criminal proceedings. In doing so, the High Court established a firm limit on the encroachment of criminal law concepts into civil penalty proceedings — the *civil* nature of the proceedings inherently allows for compromise in the form of joint submissions.

However, the different approaches taken in the separate reasons suggest that the High Court remains unsettled as to the proper meaning of *Barbaro*.

1 Judgment of the Majority

The reasons of the majority (French CJ, Kiefel, Bell, Nettle & Gordon JJ) are succinctly put in their statement that:

contrary to the Full Court’s reasoning, there are basic differences between a criminal prosecution and civil penalty proceedings and it is they that provide

61 Ibid 374 [130].

62 Ibid 375 [133].

63 Ibid 376 [139].

64 Ibid 376–7 [141].

65 Ibid 388 [180].

66 (2015) 90 ALJR 113.

the ‘principled basis’ for excluding the application of *Barbaro* from civil penalty proceedings.⁶⁷

The first steps in their reasoning re-tread the orthodox approach of *Allied Mills*, *NW Frozen Foods* and *Mobil Oil*, before turning to *Barbaro*. The majority summarised the findings of *Barbaro*:

1. It was ‘impossible to define the precise limits of the “available range” of terms of imprisonment that may be imposed on a criminal offender’;
2. Because of this, it is not possible to transform the negative statement in *House v The King*⁶⁸ — ‘that a sentence is so far outside the range that it must be the result of a misapplication of principle’ — into a positive proposition allowing a prosecutor to comment on the upper and lower limits of sentence; and
3. Allowing prosecutors to make such submissions would blur the distinction between judge and prosecutor that criminal jurisdiction must crucially maintain.⁶⁹

In this way, the High Court held that *Barbaro* stood for more specific claims than the Full Court determined, propositions inseparable from the context of the court’s criminal jurisdiction.

Next, the majority drew a distinguishing line between the civil and criminal jurisdictions. They contrasted criminal proceedings, ‘governed by the fundamental principle that the burden lies in all things upon the Crown to establish the guilt of the accused beyond reasonable doubt’,⁷⁰ and civil penalty proceedings which are

an adversarial contest in which the issues and scope of possible relief are largely framed and limited as the parties may choose, the standard of proof is upon the balance of probabilities and the respondent is denied most of the procedural protections of an accused in criminal proceedings.⁷¹

Although both may be issued against a party in response to a breach of the law, the criminal law’s aim at securing a criminal conviction draws a formal dividing line between the two; a quality inherent in criminal conviction sets it apart.

The majority further contrasted the aims of the two jurisdictions: whereas criminal law is focussed on retribution and rehabilitation, civil penalty proceedings are prophylactic in that they ‘promot[e] the public interest in compliance’.⁷² By distinguishing the purposes of each regime, the majority undercut the Full Court’s view that civil penalties are penal in nature.

This division creates different approaches to the sanctions in each regime. Deciding a sentence is the ‘uniquely judicial exercise’ in which there is no scope

67 Ibid 126 [51].

68 (1936) 55 CLR 499.

69 *Commonwealth v Fair Work* (2015) 90 ALJR 113, 123 [35]–[37].

70 Ibid 126 [52].

71 Ibid 126–7 [53].

72 Ibid 127 [54]–[55].

for considering the prosecution's opinion.⁷³ On the other hand, civil proceedings allow greater scope for agreed facts and remedies, if the court is persuaded 'that it is *an appropriate remedy*'.⁷⁴ As the majority stated:

That range [of available sentences] refers to the spread which notionally separates the indeterminate points beyond which a court of criminal appeal is persuaded that a sentence is so manifestly excessive or inadequate as to be affected by error of principle. In contrast, *NW Frozen Foods* and *Mobil Oil* were concerned with the very different conception applicable to civil penalty proceedings that, because fixing the quantum of a civil penalty is not an exact science, there is a permissible range in which 'courts have acknowledged that a particular figure *cannot necessarily be said to be more appropriate than another*'.⁷⁵

This reasoning rests in part on ignoring the substantial analogy between criminal and civil penalties in favour of maintaining the formal divide between the two jurisdictions. Civil penalties, despite fulfilling many of the same policy objectives as criminal penalties, are to be determined according to the intellectual exercise employed in other civil proceedings, where facts and remedies may be agreed.

The majority commented that 'a civil penalty proceeding is precisely calculated to avoid the notion of criminality as such'.⁷⁶ It is a telling comment generally and specifically. Generally, it should remind academics and practitioners to avoid overly materialistic accounts of the law. Viewing a civil penalty and a criminal sentence, it is easy to equate the two based on their substantial similarities. The majority of the High Court however underlined the importance of heeding the formal and even moral divisions in jurisdiction — future analogies between criminal and civil law in judicial reasoning will need to consider whether inherent moral characteristics in criminal jurisdiction, such as the concept of criminality, inhibit drawing too close links between the two. The High Court intended to maintain a bright dividing line between the two, which may prevent future development of the law by analogy between civil and criminal jurisdictions.

In the specific context of civil penalty proceedings, this bright line may signal the end of haphazard borrowing from the criminal law. Naturally it is too soon to tell, however the High Court's decision may be the beginning of a new jurisprudence of civil penalties that seeks to give real substance to their *civil* nature. On the other hand, the relatively restricted nature of this decision and the High Court's own choice not to situate the issue of joint penalty submissions in the broader context may serve to restrict in turn any effort to prune back restrictive procedures in civil penalty proceedings.

73 Ibid 127 [56].

74 Ibid 128 [58] (emphasis in original).

75 Ibid 126 [47] (emphasis in original) quoting *Mobil Oil* [2004] ATPR ¶41-993, 48 626 [51].

76 *Commonwealth v Fair Work* (2015) 90 ALJR 113, 127 [54].

2 Judgment of Gageler J

In his separate judgment, Gageler J applied a narrower interpretation of *Barbaro* to the matter of civil penalties, reflecting his dissatisfaction with the majority's reasoning in that case.

He considered the argument of the amici curiae to be that *Barbaro* (as applied to the circumstances of this case) stands for the proposition that:

an available range can no more inform the making of a discretionary judgment as to the civil penalty that a court 'considers appropriate' within the meaning of s49(1) of the *Building and Construction Industry Improvement Act 2005* (Cth) than it can inform the making of a discretionary judgment as to the sentence 'that is of a severity appropriate in all the circumstances of the offence' within the meaning of s 16A(1) of the *Crimes Act 1914* (Cth). In either case, the court is distracted from its statutory function of exercising its own judgment, arrived at through a process of synthesising potentially competing considerations to produce a single result.⁷⁷

However, Gageler J considered that this position was based on a misunderstanding of *Barbaro*.

Noting subsequent interpretation by the Victorian Court of Appeal,⁷⁸ Gageler J read *Barbaro* as a case regarding the particular role of the prosecutor. *Barbaro* is 'best understood as having gone no further than to recognise a qualification to the common law duty of a prosecutor to assist a criminal court to avoid appealable error'.⁷⁹ Within that reading, *Barbaro* has nothing to say about how parties should behave in a civil penalty proceeding — the regulator occupies a very different position to a prosecutor. The regulator in a civil penalty proceeding is, subject to statute, free 'to advocate for a litigious outcome which the regulator considers to be in the public interest'.⁸⁰

Gageler J concluded that a regulator, whose only real duty in an adversarial proceeding is to conduct litigation fairly, cannot be compared to the duties of a prosecutor.⁸¹ In doing so, his Honour drew a substantial line between the public roles of regulator and prosecutor, in particular giving regulators the flexibility required to tailor enforcement. By narrowing the focus of *Barbaro* to individual roles rather than the inherent character of the jurisdiction, his reasoning provides what looks to be the more elegant solution.

3 Judgment of Keane J

The reasoning of Keane J is an interesting counterpoint to the decisions of the Full Federal Court and the majority of the High Court. Whereas the reasoning of the Full Federal Court leaned towards the substantial similarity between criminal

77 Ibid 130 [72].

78 See *Matthews v The Queen* (2014) 44 VR 280, 290–1 [22]–[25].

79 *Commonwealth v Fair Work* (2015) 90 ALJR 113, 131 [77].

80 Ibid 131 [78].

81 Ibid.

and civil penalty proceedings and the High Court towards the formal differences, Keane J showed that in fact there are sufficient substantial differences between the two types of proceedings to support the restriction of *Barbaro*. As his Honour stated:

The Full Court proceeded on the footing that there is no relevant distinction between proceedings ... for the contravention of a civil penalty provision and proceedings for the imposition of criminal punishment. In doing so the Full Court erred in failing to give effect to the BCII Act.⁸²

Keane J acknowledged that the distinction between civil and criminal proceedings is not always a bright line,⁸³ but the distinctions that are drawn serve a purpose. The most notable of these is the ‘accusatorial nature’ of criminal proceedings, which have no civil analogue.⁸⁴ The development of that concept⁸⁵ historically led to ‘recognition of the special character of criminal proceedings ... and the exclusivity of the role of the judiciary in fixing a just punishment’.⁸⁶ So, whereas the Full Court considered that the ‘instinctive synthesis’ necessary for the task of sentencing was analogical to fixing a civil penalty, Keane J considered that *Barbaro* can only be viewed ‘in the light of the development of criminal practice and procedure, and as appurtenances of the exercise of criminal jurisdiction’.⁸⁷

From the historic development of the sentencing task, Keane J turned to the mechanics of a civil penalty provision. Having considered that ‘[t]he Full Court declined to ascribe any significance to the legislative descriptor “civil” in relation to penalty’,⁸⁸ he pointed out that under the BCII Act, it is the plaintiff’s role to state the scope of its claim against a defendant and to say what remedy they claim. When parties agree to a civil penalty, they assent to a grant of relief of the plaintiff’s rights. There is no statement of an opinion, it is the basis of resolving a legal controversy.⁸⁹

There are numerous technical points that separate the regime in the BCII Act from being simply analogised to criminal proceedings. Any ‘eligible person’ may commence proceedings, in order to obtain a wide range of remedies, and those plaintiffs are not expected to be dispassionate.⁹⁰ On these grounds Keane J restricted the operation of *Barbaro* — on a technical level, many of the Full Court’s analogical similarities fall away.

82 Ibid 131 [81].

83 Ibid 133 [89], quoting *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161, 198–99 [114] (Hayne J).

84 *Commonwealth v Fair Work* (2015) 90 ALJR 113, 133 [90], quoting *Lee v The Queen* (2014) 253 CLR 455, 467 [32].

85 *Commonwealth v Fair Work* (2015) 90 ALJR 113, 133–4 [91]–[92].

86 Ibid 134 [93].

87 Ibid 134 [95].

88 Ibid 135 [102].

89 Ibid 136 [103].

90 Ibid [105]–[106].

IV CONSIDERING THE PUBLIC BENEFITS OF JOINT PENALTY SUBMISSIONS

The second issue for consideration by the High Court was whether there are overriding concerns of policy that support or detract from continued judicial support for joint penalty submissions. In considering this issue the High Court entered into a long running judicial debate, though without successful resolution.

A *Judicial Debate of Joint Penalty Submissions before Bararo*

Both the Full Court and High Court traced the practice of joint penalty submissions to Shepard J in *Allied Mills*:

There is from time to time, amongst members of the profession and amongst the public, discussion concerning plea bargaining. Sometimes it is suggested that it involves disreputable conduct. It is my opinion that that is so if it at all implicates the court in private discussions as to what the court's attitude will or would be likely to be if a particular course is taken. In this case nothing of that kind has occurred. The parties have made their own agreement and put it to the court for approval, not knowing what its attitude was likely to be.⁹¹

The policy justification was later refined by the Full Federal Court. In *NW Frozen Foods*,⁹² it considered that a court would be assisted by a regulator's views, given the purposes of the regulatory framework and the economic consequences of contravention. The Court enunciated the following public policy justification:

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 ... 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.⁹³

Consequently, the Full Court considered that by posing the judicial question of whether a penalty was 'one within the permissible range in all the circumstances', it provided regulators and other parties a flexibility that allowed it to best pursue its regulatory goals.⁹⁴

But the practice has received judicial criticism. In *Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd*,⁹⁵ Finkelstein J

91 (1981) 60 FLR 38, 41.

92 (1996) 71 FCR 285.

93 *Ibid* 291.

94 *Ibid*.

95 [2001] ATPR ¶41-815.

raised several concerns that the practice of joint penalty submissions may undermine judicial policy:

- That consent may be coerced by the regulator;
- That an agreed settlement may operate to ‘avoid detection of other contraventions and higher penalties’; and
- That constant acceptance by courts of joint submissions rob judges of ‘a good yardstick against which to measure whether what is agreed in later cases is within the range of appropriate penalties’.⁹⁶

Similarly in *Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd*,⁹⁷ Weinberg J considered that if the court’s practice is to apply the submitted penalty so long as it falls within a permissible range, then the risk exists that the court will look as though it is ‘rubber-stamp[ing]’ the private agreements of the parties.⁹⁸ Weinberg JA (having been appointed to the Victorian Court of Appeal) would again criticise the practice in *Australian Securities and Investments Commission v Ingleby*,⁹⁹ considering that the trial judge is relegated to a role akin to an appeal judge, determining whether the agreed penalty falls within a permissible range. His Honour considered that such activity was an undesirable development in the judicial function.¹⁰⁰

Such considerations (except for the decision in *Ingleby*) were canvassed and dismissed by the Full Federal Court in *Mobil Oil*, which suggested:

- If a respondent is poorly resourced and may be coerced, the court can and should scrutinise the submission and other agreed statements; and
- That a court can (and does) depart from agreed submissions and is still required to form a view as to whether an amount is an appropriate penalty.¹⁰¹

In addition, the Full Court reapproved the public interest rationale in *NW Frozen Foods* and reasserted that the practice does not fetter the judge’s discretion, but allows for cases to be dealt with quickly whilst providing the flexibility where the court considers further review of the question of penalties is necessary.¹⁰²

B Considering Public Benefit in The Full Federal Court

The Full Court considered and adopted the critiques of joint penalty submissions that the vocal minority had been making, assembling a second ground on which to fight the practice of joint penalty submissions.

96 Ibid 42 936 [5]–[6].

97 [2002] ATPR ¶41-880.

98 Ibid 45 064 [32]–[35].

99 (2013) 39 VR 554 (*‘Ingleby’*).

100 Ibid 563 [29].

101 *Mobil Oil* [2004] ATPR ¶41-993 48 628 [58], 48 628–9 [63].

102 Ibid 48 632 [79].

Their major concern was with the argument that the practice allowed regulators to deal with other parties and negotiate settlement with a degree of certainty as to outcome. This argument could lend strength to accusations of ‘rubber-stamping’ parties’ private agreements. They said:

such certainty could only be achieved if there were a very high level of expectation that that the Court would adopt the agreed outcome. Such an expectation would belie the pious assertion, frequently made, that it is for the Court to make the final decision. It is not clear to us that it is possible to maintain the public perception that the Court imposes the penalty and, at the same time, lead the parties to believe that their agreement will probably be adopted.¹⁰³

It was improper, they judged, to recommend the practice on the basis of a virtue that could adversely affect public perceptions of the court. Further, by promoting joint penalty submissions as a method of dispute settlement, the Full Court felt that their independence, perceived or actual, was encroached upon in other ways. Other issues arise due to the consequences of the practice beyond the judicial sphere, which could be seen to empower regulators to make deals cloaked in the legitimacy of the court and allow regulators and litigants to attempt settlements that suit their interests but would not be proper within the legislative framework or the court’s own tests.¹⁰⁴

- Regulators are put into a position of power in civil penalty proceedings, as litigants would view them as holding the keys to quick settlement of the dispute, rather than the court. The practice also improperly favours the regulator.¹⁰⁵
- Regulators had been ceded the effective power to agree a joint penalty and the joint facts submitted to a court to support the penalty. Within the broad scope of the judicial test considered by the court, they have been taken ‘a long way from a process in which the penalty is fixed by the Court’;¹⁰⁶ and
- The responsibility for fixing a penalty is in part removed from the court and put into the hands of the parties: ‘we cannot see that [the court] discharges that responsibility by considering whether an agreed figure falls within an appropriate range’.¹⁰⁷

The policy criticism of the Full Court can be boiled down to an improper transfer of responsibility. By allowing a practice whereby the court only judges if a penalty falls within an appropriate range, the responsibility of the court appears to flow to the parties. Perceived or actual, this transfer leads to the all the policy arguments raised by Finkelstein and Weinberg JJ. As they concluded, ‘[t]he public interest in the imposition of pecuniary penalties also leads to the conclusion that the fixing

103 *Fair Work v CFMEU* (2015) 229 FCR 331, 375 [133].

104 These considerations are aptly described by Renehan and Stevenson as being ‘[g]uidance beyond *Barbaro*’: Renehan and Stevenson, above n 36, 12–14.

105 *Fair Work v CFMEU* (2015) 229 FCR 331, 346 [27], 374 [130].

106 *Ibid* 383 [164].

107 *Ibid* 354 [53].

of the amount of such a penalty is a matter for the Court, and that the parties cannot, by agreement, bind it'.¹⁰⁸

The Full Court not only considered this improper, it was dangerous to the judiciary. Taking a rather pessimistic view of their colleagues, they considered that the judicial test as currently formulated posed a temptation to not scrutinise joint penalty submissions as carefully as they should. Where a system transfers the substance of penalty determination from the court, it is not enough to fall back on the 'pious assertion' that all submissions will be suitably scrutinised — the fact is that that may not happen.¹⁰⁹ That is an outcome that could not be tolerated.

C Public Benefit Arguments before the High Court

Although the High Court affirmed the orthodoxy of *Allied Mills* that the practice of joint penalty submissions is in part justified by the public benefit it brings, it did not engage with criticisms raised by the Full Court to the extent that commentators may have hoped. In fact, its relative silence is indicative of the limits of judicial consideration of the practice and its critiques.

The two separate judgments in *Commonwealth v Fair Work* did not consider the arguments of public policy raised by the Full Court in *Fair Work v CFMEU* in depth. Having completed his technical review of the *BCII Act*, Keane J used that same analysis of legislation to justify flexibility for the regulator. The Commissioner is expected to 'weigh broad considerations of cost and benefit in order to maximise the impact ... given the relative scarcity of resources'.¹¹⁰ In order to best further the public interest, the regulator needs to be able to reach settlements in civil penalty proceedings, and the regulator is in the best position to judge how to do that. That said, Keane J does conclude on a note of warning, quoting the Full Federal Court in *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* when it stated that penalties 'must be fixed with a view to ensuring that the penalty is not such as to be regarded by [the] offender or others as an acceptable cost of doing business'.¹¹¹ The courts must still remain vigilant of an overly 'pragmatic' regulator.¹¹²

Gageler J's concluding statement that '[s]ubject to its statutory charter, the regulator is permitted to advocate for a litigious outcome which the regulator considers to be in the public interest'¹¹³ recalls the supposed public benefit in allowing regulators flexibility of action. However, his Honour didn't consider any of the critiques raised and whether there may be reasons for restricting this

108 Ibid 378 [145].

109 Ibid 375 [133].

110 *Commonwealth v Fair Work* (2015) 90 ALJR 113, 137 [108].

111 Ibid 137 [110], quoting *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249, 265 [62]–[63].

112 *Commonwealth v Fair Work* (2015) 90 ALJR 113, 137 [110].

113 Ibid 131 [78].

flexibility. So for both of the separate judgments, giving flexibility to regulators to pursue their goals or use their resources is again a powerful public policy reason for joint penalty submissions.

The majority's reasoning attacks the Full Court's comments that judges may hide behind the 'pious assertion' that the court makes the final decision. They write:

Nor is it 'pious' to suppose that judges will do their duty, as they have sworn to do, and therefore reject any agreed penalty submission if not satisfied that what is proposed is appropriate. It would be a travesty of justice if that were not the case. It may be presumed that a judge will do his or her duty according to the oath of office. The public may have confidence that it will be so.¹¹⁴

However, this is the extent of the majority's original engagement with the issues raised by the Full Court. They were otherwise satisfied to repeat and approve the treatment of the various policy critiques set out in *NW Frozen Foods* and *Mobil Oil*. In doing so, the debate over possible adverse effects of the joint penalty submissions did not receive a proper airing.

Further, by hewing close to the line that civil penalty proceedings are little different from other civil cases, the majority ignored the unique position and public policy context that they exist in. They wrote:

It is true that there is a public interest in the imposition of civil penalties as opposed to the purely private interests which are in issue in many civil proceedings. But civil penalty proceedings are by no means the only civil proceedings in which the public interest is involved. Custody disputes involve the public interest. So do group proceedings and schemes of arrangement. So also do taxation, customs and social security appeals, and detention orders; and examples can be multiplied. Yet in each of those cases, it is wholly unexceptionable for a court to accept an agreed submission as to the nature and quantum of relief, provided the court is persuaded that it is an appropriate remedy.¹¹⁵

The majority is being coy when they analogise the public interest in a civil penalty regulatory framework to a tax or customs dispute. Civil penalty proceedings often serve purposes far beyond that of simply ensuring the integrity of a tax bill or a Centrelink entitlement. They exist to further certain public goals, whether it is the economic regulation of competition, the safe administration of corporations or, in this case, the lawful administration of a specific industry. Parliament has legislated in these areas to enforce certain policy goals. The way that those goals are furthered through enforcement has a higher quality of public interest than other civil proceedings and may demand higher standards as a result.

Much of this question lies outside the judicial sphere — a court cannot do in-depth studies of public perceptions of regulatory practice to inform its considerations of competing arguments that are all, at their core, abstract. However, the author considers that the High Court could have considered two questions that may have developed these issues further:

114 Ibid 126 [49].

115 Ibid 128 [59].

1. Could the judicial test — whether the submitted figure falls within the appropriate range — create a public perception that a court is ‘rubber-stamping’ the submissions of the parties?
2. Does the practice create an unacceptable risk that less well-resourced parties may be coerced into agreed admissions of unlawful action and can that risk be properly mitigated by judicial oversight?

The first question should be considered from the point of view of the reasonable person, evaluating the existence of perceptions that may undermine the judiciary. The second question cannot be answered so easily — but courts must step away from assertions (pious or otherwise) that they naturally carry out their duty; courts need to consider whether the structural features of the practice and judicial test pose risks and whether alternative judicial tests could mitigate them.

V JOINT PENALTY SUBMISSIONS: WHAT IS TO BE DONE?

Although the High Court confirmed the practice of joint penalty submissions, debate regarding the unintended adverse effects will continue. It was already noted above that, whilst it was generally supportive of the public benefit arguments made in *Allied Mills* and supported in *NW Frozen Foods* and *Mobil Oil*, the High Court failed on two grounds:

- To properly recognise and evaluate the unique public role played by the regulator that makes civil penalty proceedings uniquely in the public interest; and
- To properly evaluate the criticisms of the practice that have been made in the past.

The first ground has already been discussed, and on the second the High Court’s silence recognises that it is a question of policy that a court is not best suited to comment on.

The main issue is the one touched on by the Full Court when they decried the ‘pious assertion’ that judges will always do their duty in assessing penalties, a charge that the High Court incompletely answered. That issue is whether the practice of joint penalty submissions damages the standing of the court, either on its own feet or because of the perception created by it.

In an article noted by the Full Court in its decision,¹¹⁶ Samantha Teong contends that ‘[a]rguably, under the *Frozen Foods/Mobil Oil* approach, the [Federal Court] has mollified the judicial task of penalty setting as demanded by the rule of law, in order to ... encourage settlements in the public interests of efficacy’.¹¹⁷ The charge

116 *Fair Work v CFMEU* (2015) 229 FCR 331, 355 [58], citing Samantha Teong ‘Stamping Out Rubber-Stamp Penalties? Determining an Appropriate Response to Agreed Penalties in Civil Penalty Settlements’ (2015) 43 *Australian Business Law Review* 48.

117 Teong, above n 116, 55.

is supported by the evidence of ‘a judge experienced in the field of negotiated civil penalty settlements’ (who chose to remain anonymous) who said that in around 90 per cent of cases, the agreed figure would be the penalty imposed by the court.¹¹⁸

The High Court confronted the abstract argument of rubber-stamping by noting that courts will depart from agreed penalties where considered inappropriate.¹¹⁹ However, this anecdotal evidence demands that the argument be further studied. If the rate of even 75 per cent of submitted penalties were to be accepted, policymakers and judicial decision makers alike should reconsider the practice of joint penalty submissions. They must question whether the judicial test is too broad and whether it has turned decision making into a form of rubber-stamping.

More than considering whether the judicial practice has substantively become one of rubber-stamping, it is a matter of policy to determine whether the practice, legitimate or not, is publicly viewed as such. As is tritely stated, justice must not only be done, it must be seen to be done. Public support is necessary not only for the judiciary but also for the continued work of the regulator. If the perception exists that regulator and business negotiate an outcome that is merely accepted by the court, then the work of that regulator is undermined.

Solutions lie beyond judicial consideration. First, the extent of any public perception needs to be investigated with greater objectivity. These kinds of studies could be conducted by the Australian Law Reform Commission, investigating public perceptions of joint penalty submissions as an abstract concept and with the use of practical examples.¹²⁰ This is necessary to determine whether the mere concept of the practice damages public perceptions of the judicial practice or whether only certain examples create certain perceptions. These studies would also give some idea of whether the issue is one that can be solved by greater public education or whether there is an inherent problem with the practice.

A study by the ALRC could also investigate two potential solutions which may address some of the policy and judicial critiques of joint penalty submissions. First, regulators could discuss and develop more detailed policies explaining the practice of joint penalty submissions and the types of cooperation that will assist parties. Greater public awareness that genuine cooperation by a litigant, as well as acknowledgement of breach and intention to repent, will combat any perceptions that regulators treat big business easily or that businesses can use joint penalty submissions to turn civil penalties into another cost of doing business.

118 Ibid 49, 57.

119 *Commonwealth v Fair Work* (2015) 90 ALJR 113 122 [31], citing *Australian Competition and Consumer Commission v FFE Building Services Ltd* [2003] FCA 1542 (19 December 2003).

120 The Australian Law Reform Commission (‘ALRC’) has previously conducted a study of the role of regulators in negotiating settlement in civil penalty proceedings: ALRC, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, Discussion Paper No 65 (2002), cited in Teong, above n 116, 49. Weinberg JA in *Ingleby* referred to the ALRC study, noting that ‘the view had been expressed that the lack of transparency of negotiated settlements may reinforce the perception that negotiated penalties are not “adequately grounded in fact and legal principle”’: *Ingleby* (2013) 39 VR 554, 557 [11], quoting ALRC, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, Discussion Paper No 65 (2002) [7.158].

Second, having conducted objective studies of the issue and determined whether there are unattractive perceptions of rubber-stamping and/or an actual problem with judges failing to appropriately scrutinise settlements, stakeholders need to gather and consider what options are available. A few examples of possible pathways to improve the practice, if problems are found at all, include:

- Active consideration by legislatures of how civil penalties should be levied against wrongdoers. Legislative approval and oversight of a practice can go some way to improving its public perception and its operation. An intrusive method would be drafting mandatory guidelines on the practice, tailored to the situation of each regulator. A less intrusive one would be to include principles of practice within the jurisdiction's model litigant rules, which bind regulators to act to a higher standard than other civil litigants.¹²¹
- Regulators themselves could take up the task of drawing up more substantial guidelines on how they will act when settling civil penalty proceedings. Such guidelines would provide litigants with greater certainty of how a regulator will act, without presuming whether a court will 'rubber-stamp' an agreement. For example, the ACCC's policy on settlement dates back to 2002 and is only four pages long.¹²² There is room for improvement.
- Courts themselves can adopt procedures to address concerns. This could be accomplished by preparing new rules and practice notes for settlements during civil penalty proceedings. While still being based on the question of whether the settlement is within an 'appropriate' range, new guidance could bring in other matters that the court considers when evaluating that question, specifically matters of public interest. Such a framework already exists in the Federal Court when considering settlement in class actions.¹²³
- Additionally, in cases where the court considers that a special point of public interest is at stake, or that a litigant is at risk of being coerced because it is poorly resourced, they may consider appointment of a contradictor, to add balance to proceedings and ensure that all sides are canvassed on the question of penalty.

These suggestions do not pretend at being answers. Instead, they hope to place some empirical meat on the doctrinal bones that courts have heretofore been content to theorise about. The decision of the High Court only answered a legal principle; debate over the policy aspects of the practice should continue, supported by genuine evidence and open to all stakeholders.

121 The Commonwealth's model litigant rules and rules for handling monetary claims for example are legislative instruments under the *Judiciary Act 1903* (Cth): see *Legal Services Directions 2005* (Cth) apps B–C.

122 ACCC, 'ACCC Cooperation Policy for Enforcement Matters' (July 2002) <<https://www.accc.gov.au/publications/accc-cooperation-policy-for-enforcement-matters>>.

123 See Federal Court of Australia, *Practice Note No CM 17 — Representative Proceedings Commenced under Part IVA of the Federal Court of Australia Act 1976* (Cth), 9 October 2013, cls 11.1–11.4. That note was revoked on 25 October 2016, but the relevant principles appear in its successor: see Federal Court of Australia, *Practice Note No GPN-CA — Class Actions*, 25 October 2016, cls 14.1–14.5.

VI CONCLUSION

This note hopes to have shown that, although courts continue to permit joint penalty submissions, there remain policy issues that need to be considered. The place for those considerations is not within the judicial system, though they would be an important stakeholder.

The way forward for any serious consideration of reform is through empirical investigation of the practice and the actual perceptions that exist. Taking such an approach will advance the issue beyond the scholastic debate of court judgments that deal with theoretical and hypothetical perceptions, towards a more productive end.