

## Case law update for prosecuting agencies

---

### *The High Court's recent decision on CFMEU: submissions on penalty in civil penalty proceedings*

---

16 December 2015

Our recent case law update<sup>1</sup> summarised the implications from *Barbaro v The Queen* (2014) 253 CLR 58 to sentencing practices in criminal, pecuniary penalty and disciplinary matters. The update noted that the High Court had granted special leave for an appeal of the Full Federal Court's decision of *Director, Fair Work Building Industry Inspectorate v CFMEU* (2015) 105 ACSR 403. The Full Federal Court decision had extended the *Barbaro* principle to effectively prohibit the parties from providing joint submissions on penalty in civil penalty proceedings.

In its appeal judgement last week<sup>2</sup> the High Court overturned the Full Federal Court's decision, finding that the reasoning from *Barbaro v The Queen* had no application in civil penalty proceedings. As a result, the principles applicable to agreed penalties in civil penalty matters will revert to those expressed in *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285, that is to allow joint submissions from the parties on penalty, and further, that "the Court will not depart from an agreed figure merely because it might otherwise have been disposed to select some other figure, or except in a clear case" (*NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285, 291).

The decision will be welcomed by all parties involved in civil penalty proceedings, as it will provide for a greater degree of certainty than the recent (pro-*Barbaro*) position has allowed.

**If you have any questions on this topic or about the prosecution of criminal, regulatory or civil penalty cases generally, please contact Glen Cranny, Principal, Gilshenan & Luton Legal Practice on 3361 0240 or [gcranny@gnl.com.au](mailto:gcranny@gnl.com.au).**

---

<sup>1</sup> Sentencing practice: *Barbaro's* impact upon criminal, pecuniary penalty and disciplinary matters – sent via email on 23 October 2015

<sup>2</sup> *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46, 9 December 2015