SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cobb* [2016] QCA 333
PARTIES:	**R** **v** **COBB, Glen Douglas** (applicant)
FILE NO/S:	CA No 207 of 2016 SC No 939 of 2015 SC No 997 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 5 July 2016
DELIVERED ON:	13 December 2016
DELIVERED AT:	Brisbane
HEARING DATE:	29 November 2016
JUDGES:	Holmes CJ and Philip McMurdo JA and Ann Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was charged with one count of attempted murder and, in the alternative, one count of causing grievous bodily harm with intent – where, prior to trial, the Crown rejected the applicant's offer to plead guilty to the alternative charge – where upon arraignment the applicant pleaded not guilty to both offences but offered to plead guilty to causing grievous bodily harm – where the Crown did not accept that plea in discharge of the indictment – where, after trial, a jury convicted the applicant on the alternative charge of causing grievous bodily harm with intent – where the sentencing judge referred to "unguarded admissions" made by the applicant in the form of a Christmas card to the victim apologising for his actions and a letter to the judge – where the applicant was sentenced to eight years' imprisonment with a serious violent offence declaration – where the applicant contends the sentence is manifestly excessive and the sentencing judge did not give sufficient weight to the mitigating factor of the applicant's remorse – whether the sentence is manifestly excessive

Penalties and Sentences Act 1992 (Qld), s 15

Barbaro v The Queen (2014) 253 CLR 58; [2014] HCA 2, applied
R v Amery [2011] QCA 383, considered
R v Clark; ex parte Attorney-General [1999] QCA 438, cited
R v Kilic [2016] HCA 48, cited
R v Laing [2008] QCA 317, considered
R v Lyon [2006] QCA 146, considered
R v Marshall [1995] 1 Qd R 673; [1994] QCA 161, cited
R v McDougall and Collas [2007] 2 Qd R 87; [2006] QCA 365, considered
R v Piper [2015] QCA 129, considered
R v Selby [2013] QCA 261, considered

COUNSEL: S M Ryan QC for the applicant
D R Kinsella for the respondent

SOLICITORS: Mulcahy Ryan Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES CJ:** I agree with the reasons of Philip McMurdo JA and the order he proposes.

[2] **PHILIP McMURDO JA:** In late 2014 the applicant struck his estranged wife in the head with a baseball bat, fracturing her skull and causing life-threatening head and brain injuries. He and the complainant had separated although they were still living in the same house. He was tried on an indictment charging him with attempted murder and an alternative charge of doing grievous bodily harm when intending to do so. He was acquitted of the first charge and convicted of the alternative charge. He was sentenced to a term of eight years' imprisonment with a declaration that he had been convicted of a serious violent offence. A period of 605 days of presentence custody was declared.

[3] He applies for leave to appeal against his sentence on the following grounds:

(a) The making of the declaration had the consequence that the sentence of eight years was manifestly excessive.

(b) The sentencing judge failed to moderate the sentence imposed to reflect the applicant's remorse and cooperation with the administration of justice.

The facts

[4] When the offence was committed, the applicant and the complainant had been separated for about 12 months having been married for about 20 years. They had agreed that the house should be sold. The applicant had learnt that the complainant had formed a relationship with another man. Despite the lengthy separation, the applicant became very angry about this relationship. On the night in question, at a time between finishing work at one place and commencing work at his other workplace, he decided to go home, where he collected a baseball bat from the garage and went to the room where his wife was sleeping.

[5] At that point the applicant experienced what the sentencing judge described as "an internal conflict", in which the applicant thought that he should not do what he had

been about to do with the baseball bat. He left the complainant's room before returning soon afterwards. This time, using both hands, he struck a blow with the baseball bat to his wife's skull as she slept.

[6] The applicant heard the crack of bone and saw blood coming from one of her ears. Believing that she would die, the applicant decided to take his own life. He took a knife from the kitchen and plunged it into his leg. But when he began to realise he was not going to die, he decided to seek assistance for his victim and rang 000. In that conversation he said that he had struck his wife with a baseball bat and asked that an ambulance be sent urgently.

[7] According to the evidence of a neurosurgeon, the blow to the complainant caused significant and ongoing injuries which, if left untreated, would have probably caused her death. Urgent surgical intervention was required to elevate and wash out a compound contaminated depressed skull fracture and to evacuate an acute subdural haematoma. In the opinion of another medical specialist, the complainant was left with a permanent neurological deficit, a residual facial droop and a reduced range of movements to one side of her face. A further consequence of this offence is that she now suffers post traumatic epilepsy, resulting in seizures which she seeks to suppress with anti-epileptic medication. It is probable that her epilepsy will be permanent. She also has consequential psychological problems which have damaged her relationship with her three children. She is continually tired and fatigued and because of her seizures she is unable to drive. She has lost the ability to work. She has lost the hearing in one ear. She has difficulty in conducting conversations.

[8] The applicant made to police officers what the sentencing judge described as "unguarded admissions". In December 2014 the applicant sent the complainant a Christmas card apologising for what he had done. The sentencing judge remarked that this remorse was also reflected in a letter which the applicant had addressed to his Honour.

[9] Prior to the trial, the applicant had offered to plead guilty to the offence of which he was ultimately convicted. That offer was declined by the prosecution. When he was arraigned, he pleaded guilty to doing grievous bodily harm but not with an intent to do so. That plea was not accepted in discharge of the indictment.

The reasons of the sentencing judge

[10] The sentencing judge noted that the applicant was aged 52 years when he committed the offence and 54 when sentenced. He noted that the applicant had some criminal history but of no significance for this case. He referred to the applicant's personal history, which he described as unremarkable apart from many health problems, which included episodes of cancer and open heart surgery. His Honour noted, however, that none of those health problems would be such as to cause difficulties in the applicant's incarceration.

[11] The sentencing judge discussed the relevance of the applicant's offer, before the trial, to plead guilty to this offence. He referred to *R v Clark; ex parte Attorney-General*,[1] where de Jersey CJ considered the relevance to a sentence for manslaughter of a pretrial offer to plead to that offence, where the offer was not repeated upon arraignment. The Chief Justice there said:

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1 [1999] QCA 438 at [41].

> "As to the offer to plead guilty to manslaughter, it is plain to me that the Crown could not reasonably have accepted it in discharge of the indictment. The public interest strongly warranted the Crown's pursuing this charge of murder. As has been virtually accepted on appeal, and as his Honour found, a conviction for murder was avoided only because of the influence of the respondent's consumption of alcohol. Had the respondent when arraigned pleaded not guilty to murder, but guilty to manslaughter, the position may have been somewhat different. There would then have been some consequent saving of public resources. But the respondent, one infers, preferred to preserve his chance of an outright acquittal. The offer of the plea cannot be regarded as suggestive of remorse. In these circumstances, I cannot see that it should have weighed in any degree in favour of the respondent when the judge came to sentence him."

However the sentencing judge also referred to the observations on this subject in *R v Lyon*.[2] In that case, Jerrard JA (with whom Douglas J agreed) accepted as "both sensible and authoritative" the statement by Fitzgerald P in *R v Marshall*[3] that:

> "… [an offender's] offer to plead guilty to the only offence of which he was [subsequently] convicted was a relevant matter to be brought to account in the exercise of the sentencing discretion. Such a conclusion is clearly consistent with the policy enunciated in s 13 of the *Penalties and Sentences Act* 1992."

As Jerrard JA there noted, this court also agreed with that statement in *R v Wiggins*.[4] On the basis of Lyon, Marshall and Wiggins, the sentencing judge said that the applicant's offer to plead guilty to this offence was a relevant circumstance in that the applicant had thereby "sought to assist the course of justice".

[12] His Honour also referred to the applicant's plea of guilty to an offence of doing grievous bodily harm simpliciter at the commencement of the trial, saying that this was relevant but not something which would significantly reduce the sentence. As his Honour said, there was "overwhelming evidence" that the applicant had caused grievous bodily harm. The sentencing judge noted that "significant admissions" had been made by the applicant's counsel in the course of the trial which ensured that the trial had been conducted "very efficiently". But again, his Honour said that this did not justify a substantial reduction in the sentence.

[13] His Honour described the applicant's act as cowardly and unjustified. He set out the facts of the offence and its consequences as I have summarised them. His Honour accepted that the applicant was remorseful, which he said was indicated by several matters including his offer to plead guilty to this offence.

[14] The applicant's then counsel submitted to the judge that the appropriate sentence would be a term of eight years but without a serious violent offence declaration. Alternatively, he submitted, the sentence could be a term of seven years with such a declaration. The prosecutor submitted that a declaration should be made having regard to features of the case which his Honour summarised as follows:

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2 [2006] QCA 146.
3 [1995] 1 Qd R 673, 673.
4 [2003] QCA 367.

> "There are aggravating features in the offending which take the offending outside the norm of the offence of malicious act with intent. [They] include the degree of premeditation involved, the arming with and use of a weapon, the attack upon a victim in a state of vulnerability within the expected protective environment of her own home and the significant injury occasioned."

His Honour accepted "the force of those submissions" adding:

> "Here, you changed your plans to actually go home, knowing where the baseball bat was in the garage. Your actions of that morning do show a considerable degree of premeditation and it would seem to have been motivated, not primarily, but substantially by the fact that your wife was about to go and meet another man …".

The submissions in this court

[15] For the applicant it is submitted that a body of cases in this court provides a discernible and specific range for this offence of five to eight years' imprisonment, so that the sentence of eight years should not have been accompanied by the serious violent offence declaration if regard was had to the applicant's remorse and cooperation. The appropriate sentence, it was submitted, was one of eight years but without the declaration. It was said that this would recognise the applicant's remorse and cooperation and the fact, as his Honour found, that the applicant did not "constitute an ongoing risk to society".

[16] For the respondent, it was submitted that there was no error in the exercise of the sentencing discretion. The declaration, it was argued, was justified by the circumstances described by the sentencing judge as well as what the argument described as a "breach of trust" on the part of the applicant.

[17] I go then to the cases upon which the applicant's argument relies. The first is *R v Piper*,[5] where the applicant had been sentenced to seven years' imprisonment with a parole eligibility date set at three years. This court varied that sentence by fixing an earlier parole eligibility date, specifically at the one-third mark, for the applicant's cooperation and his plea of guilty. He had been arraigned on one charge of attempted murder and on an alternative charge of doing grievous bodily harm with intent to do so and had originally pleaded not guilty to each count. But before any evidence had been called in his trial, he was re-arraigned and pleaded guilty to that alternative count which was accepted by the prosecution.

[18] That offence occurred when the applicant stabbed a man who was with the applicant's wife at the bar of a hotel. The applicant suspected, contrary to the fact, that they were in a romantic relationship. The victim suffered stab wounds to his neck and face. He lost a large amount of blood and required treatment in an intensive care unit for some days. He was left with ongoing psychological difficulties. The offence was committed when the applicant was subject to a Domestic Violence Protection Order which required the applicant not to be within a certain vicinity of his wife. That order was breached on the occasion of the offence. The applicant's argument here emphasises the statement by Morrison JA that authorities in this court had "established a general range for this type of offence as being between five and eight years."[6]

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5 [2015] QCA 129.

6 [2015] QCA 129 at [9].

[19] In *R v Selby*,[7] this court refused leave to appeal against a sentence of eight years with a serious violent offence declaration for an offence of doing grievous bodily harm with intent to do so. The offender had shot the victim in the back and further assaulted him with the butt of the rifle when he was on the ground. The offender then made a 000 call reporting the event which was found to have demonstrated some remorse, as was his initial cooperation with the police. That offender was aged 29 years and had what was described as a significant criminal history for which he had been imprisoned. Although the sentencing judge accepted that there was some remorse, the offender had argued a defence of self-defence at his trial.

[20] In *R v Amery*,[8] the applicant had pleaded guilty to one count of a malicious act with intent. He was sentenced to eight years' imprisonment and no parole eligibility date was fixed. In this court his sentence was reduced to seven years seven months and a parole eligibility date was fixed at three years into that term. He had an extensive criminal history which included a number of armed robberies for which he had received lengthy terms of imprisonment. The victim was his de facto partner whom he hit on the head with a sledge hammer while she was lying in bed. He then called 000 and told police he had assaulted her. That victim made a full recovery from her injuries. Mullins J, who gave the principal judgment, said that the term of eight years was not outside the bounds of the sentencing discretion but "the failure to adjust the sentence for the pre-sentence custody of 140 days and the failure to fix a parole eligibility date result[ed] in the sentence being manifestly excessive".[9] Although this offence was in many respects very similar to the present one, in that case a parole eligibility date was fixed largely because of the applicant's plea of guilty.

[21] In *R v Laing*,[10] the applicant was convicted upon the verdict of a jury of one count of burglary with circumstances of aggravation and one count of unlawfully doing grievous bodily harm with an intent to do so. He was sentenced to six and a half years' imprisonment for each offence. The applicant had entered the complainant's house by cutting through a window before attacking the complainant with a hammer as he was asleep in his bed. The applicant was then aged 62 years and had a minor criminal history. The injuries suffered by the complainant were described as very serious and having a continuing adverse effect on the quality of his life. Keane JA (with whom Fraser JA and Jones J agreed) said that the sentence imposed "was within the appropriate range, and was distinctly moderate."[11]

[22] In *R v Lyon*,[12] to which I have already referred, the applicant was convicted after a trial of an offence of entering the dwelling of his former wife with an intent to commit an indictable offence and with aggravating circumstances and a further offence of unlawfully wounding her with an intent to do grievous bodily harm. He was acquitted of a charge of attempting to murder her. The sentencing judge imposed a term of nine years on the count of unlawful wounding and a concurrent term of five years on the burglary offence. The unlawful wounding with intent was declared to be a serious violent offence. A majority of this court substituted a sentence of seven years' imprisonment but still with the serious violent offence declaration. The applicant and complainant had separated some years earlier but there remained bitter disputes between them

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7 [2013] QCA 261.
8 [2011] QCA 383.
9 [2011] QCA 383 at [27].
10 [2008] QCA 317.
11 [2008] QCA 317 at [48].
12 [2006] QCA 146.

which had resulted in the applicant being convicted of breaches of a restraining order issued under the *Domestic and Family Violence Protection Act* 1989 (Qld) just a few days before the subject offences. They occurred after the applicant had sharpened a machete and driven to the complainant's house, which he entered by kicking in the front door. He attacked her with the machete, striking at least one glancing blow to her. She sustained a slash to her face and cuts to her neck and arms. She also experienced severe whiplash and damage to nerves in her cheek and was left with facial scarring. The attack was committed in the presence of their children. There had been a number of written offers to the prosecution that the applicant would plead guilty to the charges of which he was ultimately convicted. Jerrard JA said of these offers:[13]

> "He was entitled to some reduction in his sentence for that reason, a matter which the learned judge … did not take into consideration, not having been told of it."

[23] *R v Daley*[14] involved several offences which relevantly included one of an assault occasioning grievous bodily harm with intent to do so, for which the applicant had been sentenced to eight years' imprisonment with a serious violent offence declaration. He had bashed a woman with a rock, causing severe head injuries including lacerations to the scalp and forehead, lacerations to the face, a broken nose, gross swelling of an eye, a fracture of the eye socket, a fractured jaw and dental injuries. She underwent extensive surgery and retained an absence of feeling on parts of her face and head as well as pain in her fingers and she had permanent prominent scarring to the face and ongoing psychological problems. When apprehended by police, the applicant at first denied involvement in the matter, but one of his companions gave a statement incriminating him. He pleaded guilty to this offence after the prosecution agreed not to proceed on a charge of attempted murder. The sentencing judge accepted that he had been remorseful. This court dismissed the appeal. McPherson JA said that it was "almost impossible to see how the learned Judge could have avoided making a declaration that this was a serious violent offence."

[24] The last in this group of cases is *R v McDougall and Collas*.[15] Those two applicants had each pleaded guilty to manslaughter and other offences. Collas had pleaded guilty also to an offence of an assault occasioning bodily harm. They were each sentenced to eight years' imprisonment for the offence of manslaughter with a declaration of a serious violent offence and concurrent but lesser terms for the other offences. They were each aged 23 at the time of the manslaughter offence. Each had prior convictions although McDougall had substantially more. The judgment of the Court set out a number of discretionary considerations which can be relevant in deciding whether to declare an offence to be a serious violent offence.[16] Most relevantly here, they included the following propositions:

- the discretion granted by s 161B(3) and (4) of the *Penalties and Sentences Act* requires the existence of factors which warrant its exercise, but the overall amount of imprisonment to be imposed should be arrived at having regard to the making of any declaration, or not doing so;
- the considerations which may be taken into account in the exercise of the discretion are the same as those which may be taken into account in relation to other aspects of sentencing;

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13 [2006] QCA 146 at [28].
14 [1999] QCA 332.
15 [2007] 2 Qd R 87; [2006] QCA 365.
16 [2007] 2 Qd R 87, 96 [19].

- for the sentencing reasons to show that a declaration is fully warranted in the circumstances it will usually be necessary that declarations be reserved for more serious offences that, by their nature, warrant them;

- where a discretionary declaration is made, the critical question will be whether the sentence with that declaration is manifestly excessive in the circumstances.

The Court concluded that McDougall's offence of manslaughter was serious enough to warrant the declaration made in his case but the offence by Collas was relatively less serious, at least because he had not attempted to use a weapon on anyone and was not shown to have the opportunity of realising how seriously hurt the victim was.[17] Accordingly the Court varied the sentence imposed upon Collas by deleting the declaration. The case is relevant here not so much as a comparable offence but for its statements of principle for the making of a serious violent offence declaration.

Consideration of the applicant's argument

[25] The applicant's argument emphasises the mitigating factor of his offer before the trial to plead guilty to the offence of which he was convicted. But as I have discussed, the sentencing judge did refer to that factor and accepted that it evidenced, as did other circumstances, the applicant's remorse. The effect of the argument is that although his Honour said that he had taken the applicant's remorse and cooperation into account, the sentence which was imposed showed otherwise. The argument is that his Honour could not have taken those factors into account because the term of eight years was at the top of the sentencing range and a serious violent offence declaration was made.

[26] The premise of that argument, namely that a term of eight years was at the top of the sentencing range, is said to be established by the authorities which I have discussed. That premise cannot be accepted.

[27] The applicant especially relied upon *Piper*, submitting that the outcome there could not be reconciled with that in the present case. But in *Piper*, the applicant when re-arraigned did plead guilty, a course which was said to have saved the community the cost of a trial and saved the witnesses the trauma of giving evidence, that being a significant matter for the victim who had sustained psychological injuries in consequence of the offence.[18] Similarly in *Amery* a parole eligibility date was fixed largely because of the applicant's plea of guilty and the term of eight years in that case was reduced only to give the applicant the benefit of some presentence custody.

[28] In *Selby*, an identical sentence to that of the present case was not disturbed. That case was in some respects more serious than the present one, because of the absence of an offer to plead guilty. But *Selby* is not an authority for a proposition that such a sentence cannot be imposed where there are the circumstances of remorse and cooperation which exist in the present case. Like *Selby*, the decision in *Daley* does not indicate that the present sentence was excessive. The court there did not say that the sentence of eight years' imprisonment with a serious violent offence declaration represented the upper limit of a relevant range absent circumstances of remorse and cooperation.

[29] *Laing* involved a sentence which was described as "distinctly moderate" and does not indicate that the higher sentence in this case was excessive. In *Lyon*, the applicant

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17 [2007] 2 Qd R 87, 97 [23].
18 [2015] QCA 129 at [45].

had to be resentenced because the relevant circumstance of the existence of prior written offers to plead guilty had not been put before the sentencing judge. And although the victim's injuries in that case were significant, they were not as severe as those suffered in the present case.

[30] The applicant's argument seeks to use these cases to establish with numerical precision an upper limit which would govern the sentencing for any offence of the present kind. For two reasons, such an analysis would be contrary to principle. The first is that comparable sentences do not define the numerical limits of a sentence which can be imposed in another case. As the plurality (French CJ, Hayne, Kiefel and Bell JJ) said in *Barbaro v The Queen*:[19]

> "[I]n seeking consistency sentencing judges must have regard to what has been done in other cases. Those other cases may well establish a range of sentences which have been imposed. But that history does not establish that the sentences which have been imposed mark the outer bounds of the permissible discretion. The history stands as a yardstick against which to examine a proposed sentence."

The cases cited in the applicant's argument are clearly comparable to the present case and must be considered. But they are indicative and not determinative.

[31] The second reason is that a decision of an appellate court does not establish even the range of sentences for the particular case which it is deciding. The appellate court must consider whether the sentence is within a range within which the discretionary judgment of the sentencing judge could be properly exercised. Still, that is not a range for which upper and lower limits are to be quantified by the appellate court. In *Barbaro*, the plurality said:[20]

> "[27] The conclusion that a sentence passed at first instance should be set aside as manifestly excessive or manifestly inadequate says no more or less than that some 'substantial wrong has in fact occurred' in fixing that sentence. For the reasons which follow, the essentially *negative* proposition that a sentence is so wrong that there must have been some misapplication of principle in fixing it cannot safely be transformed into any *positive* statement of the upper and lower limits within which a sentence could properly have been imposed.
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> [28] Despite the frequency with which reference is made in reasons for judgment disposing of sentencing appeals to an 'available range' of sentences, stating the bounds of an 'available range' of sentences is apt to mislead. The conclusion that an error has (or has not) been made neither permits nor requires setting the bounds of the range of sentences within which the sentence should (or could) have fallen. If a sentence passed at first instance is set aside as manifestly excessive or manifestly inadequate, the sentencing discretion must be re-exercised and a different sentence fixed. Fixing that different sentence neither permits nor requires the re-sentencing court to determine the bounds of the range within which the sentence should fall."

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19 (2014) 253 CLR 58, 74 [41]; [2014] HCA 2; see also *R v Kilic* [2016] HCA 48 at [21]-[24].

20 (2014) 253 CLR 58, 70-71.

The authority of *Barbaro* in these respects is unaffected by the recent amendment to s 15 of the *Penalties and Sentences Act* 1992 (Qld), which permits a sentencing court to receive submissions which state the sentence, or range of sentences, the party considers appropriate for the court to impose. This provision removes the impediment, according to *Barbaro*, of the proffering of an opinion of the prosecution as to the appropriate outcome.[21] It does not affect the authority of *Barbaro* upon the proper use to be made by courts of comparable sentences.

[32] Because the essential premise of the applicant's argument cannot be accepted, it cannot be concluded that the sentencing judge failed to take into account the applicant's remorse and cooperation. Consequently there was no distinctly discernible error by the sentencing judge.

[33] The question then is whether it can be said that the judge must have erred in some way because the sentence is manifestly excessive. The reasons of the sentencing judge well explained the aggravating and mitigating circumstances. The offence was particularly serious for the factors which his Honour identified as relevant to the making of the declaration. In my opinion, a lesser sentence, such as that suggested by the applicant's argument, might well have been imposed. But this sentence was not "unreasonable or plainly unjust" such that it should be inferred that there has been an error in the exercise of the sentencing discretion.[22] This sentence is not manifestly excessive.

Conclusion and order

[34] I would order that the application for leave to appeal against sentence be refused.

[35] **ANN LYONS J:** I agree with the reasons of Philip McMurdo JA and the order proposed by his Honour.

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

22 *House v The King* (1936) 55 CLR 499, 505, cited in *Barbaro* (2014) 253 CLR 58, 70 [26].