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CIVIL PENALTIES – EVERYTHING OLD IS NEW AGAIN

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Introduction

On 9 December 2015, the High Court of Australia delivered judgment in *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46 (**Fair Work**), unanimously allowing an appeal from the Full Federal Court judgment in *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* (2015) 229 FCR 331 (**CFMEU**) delivered on 1 May 2015.

CFMEU had, albeit temporarily, revolutionised the landscape for civil penalty proceedings.

In CFMEU the Full Court of the Federal Court of Australia concluded that the sentencing principles articulated in *Barbaro v R* (2014) 253 CLR 58 (**Barbaro**) also applied in civil penalty proceedings. This meant that it was not open to regulators to make submissions as to the quantum of a penalty to be imposed, and that the well-established practice of submitting agreed penalties for approval by the Court was impermissible.

Background

In CFMEU, the Director of the *Fair Work Building Industry Inspectorate* alleged that the CFMEU along with the *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (together the **Unions**) contravened the *Building and Construction Industry Improvement Act 2005* (Cth) and sought penalties and associated declaratory relief against the Unions.

The principal issue before the Full Court of the Federal Court of Australia exercising its original jurisdiction was whether the sentencing principles articulated in *Barbaro v R* (2014) 253 CLR 58 (**Barbaro**) also applied in civil penalty proceedings. In *Barbaro,* the plurality of the High Court (French CJ, Hayne, Kiefel and Bell JJ) held that in criminal sentencing proceedings, the prosecution should not make submissions relating to sentence or the range within which a sentence should fall. Therefore, if *Barbaro* applied to civil penalty proceedings, a practice which had become commonplace in such proceedings to make submissions as separate parties, or jointly, nominating the actual figure to be adopted for such penalties, or the range within which any penalties should fall was to be disregarded by a court.

The Full Court of the Federal Court (Dowsett, Greenwood and Wigney JJ) unanimously

concluded that *Barbaro* applied to cases involving the imposition of a civil penalty and that the Court should accordingly have no regard to the parties' agreed figures regarding penalties, other than to the extent that that agreement demonstrated a degree of remorse and/or cooperation on the part of each of the Unions.

Grounds of Appeal

The issues before the High Court on the appeal were whether the Full Court of the Federal Court of Australia erred in:

(a) holding that evidence and submissions by the parties to the proceedings as to the agreed penalty, and as to the appropriate penalty, were inadmissible and the Court should have no regard to them, save to the extent that the agreement demonstrated a degree of remorse and/or cooperation by each of the Unions; and

(b) declining to grant the orders jointly sought by the parties to the proceedings.

The High Court's Decision

The reasoning in CFMEU was rejected by the High Court.

In particular, the High Court held that the differences between a criminal prosecution and civil penalty proceedings provide a principled basis for excluding the application of *Barbaro* in civil penalty proceedings. Those differences include the following:

a. civil penalty proceedings are adversarial, and the issues and the scope of the relief are limited by the parties whereas criminal proceedings are accusatorial and the burden lies in all things upon the Crown to establish the guilt of the accused;

b. the standard of proof;

c. civil penalties are principally, if not wholly, directed towards general and specific deterrence (*TPC v CSR Limited* [1991] ATPR 41-076) whereas criminal penalties are also directed towards retribution and rehabilitation; and

d. in criminal proceedings the imposition of penalty is a uniquely judicial exercise whereas there is considerable scope in civil penalty proceedings for parties to agree on the facts and upon consequences.

The Court said (at [46]) that "…*there is an important public policy involved in promoting predictability of outcome in civil penalty proceedings and that the practice of receiving and, if appropriate, accepting agreed penalty submissions increases the predictability of outcome for regulators and wrongdoers. As was recognised in Allied Mills and authoritatively determined in NW Frozen*

Foods, such predictability of outcome encourages corporations to acknowledge contraventions, which, in turn, assists in avoiding lengthy and complex litigation and thus tends to free the courts to deal with other matters and to free investigating officers to turn to other areas of investigation that await their attention."

It follows from the decision of the High Court in Fair Work that:

a. a Court may accept a penalty jointly proposed by the parties, subject to the Court being persuaded of the accuracy of the parties' agreement as to the facts and consequences, and of the appropriateness of the penalty; and

b. in a contested civil penalty hearing, the Court may receive submissions from both parties in relation to the quantum of an appropriate penalty.

Fair Work does not otherwise effect any significant change in the principles regarding the imposition of civil penalties. Those principles are well established: see, for example, *Trade Practices Commission v CSR Limited* [1991] ATPR 41-076; *ACCC v NW Frozen Foods* (1996) ATPR 41-515; *NW Frozen Foods v ACCC* (1996) 71 FCR 285; *J McPhee & Son v ACCC* (2000) 172 ALR 532.

Conclusion – the current position

Agreed penalties

Prior to CFMEU, a practice had developed over a period of around 20 years whereby parties sought to reach agreement regarding the quantum of a civil penalty, and if such agreement were reached, then a penalty would be proposed with the consent of the parties, often supported by joint submissions and an agreed statement of facts.

In deciding whether to impose the penalty proposed by the parties, the Court had to be satisfied that it had the power to make the orders, and that the proposed orders were appropriate: see, for example, *ACCC v Virgin Mobile Australia (No 2)* [2002] FCA 1548 at [1]; *ACCC v Fisher & Paykel* [2014] FCA 1393 at [49].

Although the Court had a duty to scrutinise the appropriateness of the proposed orders, once the Court was satisfied that they were appropriate, it was generally accepted that it would be slow to impede final settlement of the matter based upon the agreed orders and submissions, especially where the consenting parties were legally represented: see, for example, *ACCC v Target Australia* (2001) ATPR 41-840 at [24]; *ACCC v REIWA* (1999) 161 ALR 79 at [20]-[21]; *ACCC v Econovite* (2003) ATPR 41-959 at [11]; *ACCC v Woolworths (South Australia)* (2003) 198 ALR 417 at [21].

The Courts had in the great majority of cases decided that the agreed penalty was appropriate. In a small number of cases, however, the Court decided that a different penalty should be imposed: see, for example, *ACCC v NW Frozen Foods* (1996) ATPR 41-515 (reversed on appeal in *NW Frozen Foods v ACCC* (1996) 71 FCR 285); *ACCC v FFE Building Services* [2003] FCA 1542; *ACCC v Midland Brick Co* (2004) 207 ALR 329; [2004] FCA 693; *ACCC v Australian Safeway Stores (No 4)* [2006] FCA 21.

The effect of Fair Work is that the practice of submitting agreed penalties and the principles relating to their approval have been reinstated.

Submissions as to penalty in a contested penalty hearing

Following the decision in *Fair Work*, it is now clear that parties can make separate submissions in relation to the quantum of an appropriate penalty.

Insofar as submissions by the regulator are concerned, the plurality in *Fair Work* observed that, although a regulator is not disinterested in the outcome of the proceedings, it is to be expected that the regulator will be in a position to offer informed submissions as to the effects of contraventions on the industry and the level of penalty necessary to achieve compliance given its statutory function. However:

a. the regulator's submissions are not to be afforded greater weight than submissions by a respondent and are to be treated on their merits; and

b. a regulator's submissions on penalty will be considered "*subject to being supported by findings of fact based upon evidence, agreement or concession*".

Accordingly, it appears that a mere expression of opinion by a regulator (which is not properly supported) as to the quantum of an appropriate penalty may be impermissible.

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