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Briefing note June 2013

Negotiated settlements with regulators: The courts have the final word

The Australian courts have sent a reminder to parties reaching agreement with a regulator on a recommended penalty that there can be no guarantee that the penalty will ultimately be upheld by the court.

In the recent decision of *ASIC v Ingleby [2013] VSCA 49,* which involved a claim that the former CFO of the Australian Wheat Board (AWB) failed to act with due care and diligence during a period when the AWB was supplying wheat to Iraq in contravention of UN sanctions, the Victorian Court of Appeal made it clear that the court's role is not merely to "rubber stamp" agreed settlements.

Sentencing an offender – including the imposition of a pecuniary penalty is an exercise of judicial power and not a matter for the parties to agree between themselves.

In a departure from views expressed by the Full Federal Court, the Victorian Court of Appeal held that a trial judge dealing with an agreed penalty is not merely to ask whether the agreed penalty falls within the sentencing range but rather what is the appropriate penalty in all the circumstances.

Whilst early co-operation with regulators will no doubt assist persons who are culpable, this will not guarantee that the regulators' views on the seriousnesss of the offence and recommended penalties in subsequent proceedings will be endorsed by the courts especially if the offence is at the serious end of the spectrum.

As has been the case in other jurisdictions, Australian regulators and prosecutors have been increasingly proactive in investigations and enforcement actions.

It is also increasingly common for companies and individuals to co-operate with regulators during the course of an investigation and prior to a hearing. Co-operation may include the provision of information to the regulators to assist their investigation or pleading guilty following charge negotiation to contraventions of the relevant statute at the earliest opportunity.

This increased co-operation at an early stage means that formal proceedings brought by regulators are increasingly resolved between the parties by way of negotiated settlement. If a matter is settled, the parties then approach the court with an agreed statement of facts and what is called an "agreed penalty" seeking the court's approval of the agreed penalty. If the court approves, the agreed penalty will then be imposed by way of final orders.

Co-operation with the Australian Securities and Investment Commission (ASIC)

ASIC's policy is to encourage and fully recognise co-operation. ASIC recently hailed figures showing high levels of co-operation from offenders in enforcement results as evidence that its new strategy of approaching offenders earlier is proving to be a success.

ASIC is empowered to take a range of administrative, civil and criminal actions in relation to alleged misconduct within its jurisdiction. A co-operative approach to dealings

with ASIC may benefit a person or company in many ways. For example:

- early notification of misconduct and/or a co-operative approach during an investigation will often be relevant to ASIC's consideration of which type of action to pursue and what remedy or combination of remedies to seek
- in any proceedings commenced by ASIC it will give due credit for any co-operation it has received from the person or company against whom the proceedings are brought.

Other Australian regulators (such as the Australian Competition and Consumer Commission) have similar policies on co-operation.

Co-operation with the CDPP

Australian regulators also refer the vast majority of criminal matters to the Commonwealth Director of Public Prosecutions (CDPP) and thus these fall outside the realm of civil penalty provisions and negotiated settlements.

While the CDPP also considers the level of co-operation when making its own prosecution decisions in accordance with the Prosecution Policy of the Commonwealth, it is an independent statutory authority and there will be a number of different considerations at play in a criminal matter.

In relation to the CDPP's approach to co-operation, for example:

- an offender's co-operation (both past and future) in an investigation and/or prosecution is a relevant consideration in any charge negotiation with the CDPP which may result in fewer or lesser charges being prosecuted (see *Prosecution Policy of the Commonwealth*).
- in sentencing a person for an offence against Commonwealth law, a court must take into account 'the degree to which the person has cooperated with law enforcement agencies in the investigation of the offence or of other offences' (s16A(2)(h) of the *Crimes Act 1914*);
- in sentencing a person for an offence against Commonwealth law, a court may reduce the sentence because the offender has undertaken to co-operate with law enforcement agencies in proceedings (s21E of the *Crimes Act 1914*); and
- the law relating to sentencing provides for significant 'discounts' in cases where there is an early guilty plea and/or where an offender co-operates with authorities and/or promises future assistance such as giving evidence at the trial of the co-accused (see *Prosecution Policy of the Commonwealth*).

ASIC v Ingleby: Background

Mr Ingleby was the Chief Financial Officer of the Australian Wheat Board (AWB), the sole Australian exporter of wheat, which was involved in the "oil for food" scandal in Iraq from 1998 to 2006.

The Royal Commission set up by the Government of Australia in November 2005 into certain Australian companies in relation to the UN Oil-For-Food Programme found that AWB knowingly made secret payments to the Saddam Hussein regime through middle men in exchange for lucrative wheat contracts. This was in direct contravention of United Nations Sanctions and Australian law.

Despite the findings of the Royal Commission, Australian prosecutors did not charge AWB or any of its officers with any foreign bribery offences under section 70 of the *Criminal Code* (Cth).

However, in 2007 ASIC (assisted by the AFP) commenced proceedings against several former officers of AWB, including Mr Ingleby who was accused of failing in relation to his employers' dealings with Iraq to act with due care and diligence (in contravention of section 180 of the *Corporations Act* 2001) and in good faith (in contravention of section 181 of the *Corporations Act* 2001). ASIC sought an order that Mr Ingleby pay a pecuniary penalty in relation to such contravention and that he be disqualified from managing a corporation for such period as the court thought appropriate.

In 2010, Mr Ingleby reached agreement with ASIC regarding resolution of the proceedings subject to the court's approval. Mr Ingleby admitted that he was guilty of a contravention of section 180(1) of the Corporations Act (failure to exercise due care and diligence). The "agreed penalty" put forward in the agreed statement of facts by ASIC and Mr Ingleby was a pecuniary penalty of A$40,000 and a period of disqualification as a director for 15 months.

The parties then approached the Supreme Court of Victoria for approval of that compromise and tendered a statement of agreed facts. The trial judge, in reliance on the agreed statement of facts, considered that the agreed penalty was too harsh and reduced the pecuniary penalty to

A$10,000 and the period of disqualification to approximately four and half months.

ASIC appealed the reduction in penalty and sought to reinstate the original "agreed penalty". Mr Ingleby did not participate in the appeal.

Court's approach to agreed penalties

The Court of Appeal of the Supreme Court of Victoria (Weinberg and Harper JJA and Hargrave AJA) allowed the appeal and reinstated the "agreed penalty" against Mr Ingleby. The Court of Appeal made it clear, however, that had it had the option to impose a more severe penalty, it probably would have done so as it considered that Mr Ingleby had a central role in the AWB and his involvement was not accurately reflected in the statement of agreed facts. As Mr Ingleby was not involved in the appeal and did not have the opportunity to be heard in the matter, the Court of Appeal considered that it could do no more than uphold the original agreed penalty.

The court raised concerns with the negotiated settlement process in the context of proceedings brought by regulators and the perception that courts do no more than "rubber stamp" an agreed penalty in those circumstances.

In particular the court disagreed with the approach taken by the Full Federal Court in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission (1996)* 71 FCR 285 where it was held that the benefits of negotiated settlements would be compromised if parties could not rely on obtaining court approval of those settlements as they would be clouded by unpredictable risks.

The Full Federal Court expressed the view that provided an agreed penalty was within the permissible range in all the circumstances, the court should not depart from an agreed figure "*merely because it might otherwise have been disposed to select some other figure*". The Court in Ingleby expressed the view that such an approach represented "*bad law*".

The court in *Ingleby* noted that whilst a trial judge should give due weight to an agreed penalty it should be regarded as "*nothing more than a submission*". Even if an agreed penalty happens to fall within the sentencing range the court's view was that "*it should have no binding force of any kind*".

It remains to be seen whether the Federal Court will adopt the approach in *Ingleby* or whether it will continue to apply the *NW Frozen Foods* approach.

Agreed statements of facts

The court in Ingleby was highly critical of the agreed statement of facts that was put before the trial judge on the basis that it did not provide an accurate picture of the offending conduct.

The agreed statement of facts presented a highly watered-down version of Mr Ingleby's culpability in the affair and was inconsistent with the documentary material before the Court.

While the Court of Appeal acknowledged that courts will be greatly assisted by statements of agreed facts, those facts must be sufficient to "*form a sound – which must include fully informed – basis for such assessment [of penalties]*".

Serious offences and the responsibilities of senior officers and managers

The imposition of a pecuniary penalty for contravention of a statute generally follows from conduct that is at the serious end of the spectrum (rather than minor infringements of the law). In such cases, while co-operation with the authorities at an early stage is beneficial, offenders cannot assume that the court will follow the regulator's recommendation in any leniency shown for such co-operation.

Importantly, the *Ingleby* decision should serve as a warning to the senior executives and managers of Australian companies who face the scrutiny of regulators for serious contraventions of the law.

The court was not sympathetic to a submission that Mr Ingleby's failure to see what he ought to have seen was a consequence of the demands placed on him by his job. Hargrave JA stated "*it is essential that those who accept the rewards of important offices also accept the responsibilities which go with them. Proper corporate and professional behavior depends upon that acceptance, and must be supplemented by the knowledge that the courts will play their part in the maintenance of appropriate standards".*

The standard of care and diligence required of those who occupy senior positions in companies is high. Regardless of how co-operative officers and managers of companies may be with any investigating or prosecuting authorities, the courts will be concerned that they are held accountable for their failure to comply with their responsibilities and that penalties imposed reflect the true level of their culpability.

Benefits of negotiated settlements in civil penalty proceedings

There are obvious benefits to companies and individuals in acknowledging contraventions of statutes alleged by regulators and resolving proceedings brought by them by way of negotiated settlement at an early stage. They avoid, amongst other things, further damage to their reputation which would arise from defending protracted proceedings. Early co-operation may result in a discounted sentence.

Conclusion

In the increasingly regulated business environment, early cooperation with regulators is on the rise based on statistics published by the regulators. In any negotiations with regulators, it remains important to consider whether criminal action is a possibility and be mindful that while the CDPP may take the level of co-operation into consideration in any charge negotiation or prosecution, as an independent statutory authority there are other factors at play.

The possibility of CDPP involvement at a later stage may influence the response to a regulatory investigation in the first instance.

In proceedings brought by regulators, the level of assistance provided to the regulator will be one of the key mitigating factors to be considered in any penalty ultimately imposed by the court.

While the court will have regard to the regulator's recommendation in relation to any penalty to be imposed, it will not simply ratify such a recommendation. The courts will be vigilant in ensuring that the penalty imposed properly reflects the level of culpability of the individual.

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