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Briefing note December 2015

High Court confirms long established practice that Courts can receive submissions on penalties following negotiated settlements in civil penalty proceedings

On 9 December 2015 the High Court of Australia unanimously overturned the Full Federal Court decision in *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCAFC 59[i,ii].

The High Court's decision has restored the long established practice of regulators such as the Fair Work Building Industry Inspectorate, the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission and respondents in negotiated settlements of civil penalty proceedings being permitted to make submissions to the Court as to agreed penalties, nominate specific penalties or identify a range of penalties to be imposed by the Court.

It had been increasingly common for companies and individuals to co-operate with regulators during the course of an investigation and prior to a hearing. Increased co-operation at an early stage means that formal proceedings brought by regulators are resolved between the parties by way of negotiated settlement. The parties then approach the Court with an agreed statement of facts and submissions on agreed penalties. If the Court approves, the agreed penalty will then be imposed by way of final orders.

The Full Federal Court had held that the decision in *Barbaro v The Queen* (2014) 253 CLR 57 (**Barbaro**), which related to the inappropriateness of parties making submissions on sentencing ranges in criminal matters, applied to civil penalty proceedings and precluded a Court from receiving an agreed or other submission as to the amount of a pecuniary penalty to be imposed. However, the Full Court considered that the parties could still make joint submissions as to the facts of the case, identify relevant comparable cases and the proper approach to fixing the penalty.

The High Court decision in *CFMEU* has restored certainty to regulators and companies and individuals who reach negotiated resolutions of civil penalty proceedings that they can again make agreed submissions to the Court as to the amount or range of penalty that should be imposed. This increases the certainty of outcome for regulators and companies or individuals the subject of investigations and will encourage

Key issues

- High Court decision restores long established practice of submissions of agreed penalties in negotiated settlements with regulators.
- Incentive to co-operate with regulators on the basis that Court will have regard to the agreed penalties put forward by the parties.
- Court still needs to be satisfied that agreed penalty is **an** appropriate remedy in the circumstances and having regard to previous decisions.

negotiated resolutions of civil penalty proceedings.

High Court decision

The High Court held that the decision in *Barbaro* does not apply to civil penalty proceedings, and a Court is not precluded from receiving and, if appropriate, accepting an agreed or other civil penalty submission. The principles applicable to agreed penalty submissions in a civil penalty proceeding remain those outlined by the Full Federal Court in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285.

The High Court confirmed the important public policy benefits of predictability in civil penalty proceedings. The High Court held that the practice of receiving and if appropriate accepting agreed penalty submissions from regulators and wrongdoers was consistent with this public policy objective by increasing certainty of outcome. However, the High Court held that a Court must nevertheless satisfy itself that the penalty submitted to it is appropriate in the circumstances. This express recognition of the need for Courts to exercise their independent judgment in respect of penalty submissions recognises concerns regarding perceptions that Courts were acting as "rubber stamps" to agreements of the parties.

Role of the regulator

The High Court agreed with the Full Court's observation that the regulator in a civil penalty proceeding is not disinterested in civil penalty proceedings.

The High Court noted that it is the function of the regulator to regulate their respective industry in order to achieve compliance and it therefore is expected to be able to offer informed submissions in relation to the effects of contravention on the industry and the penalty that is necessary in order to achieve compliance. The regulator should thus take an active role in calculating and achieving an appropriate penalty.

Implications

In the increasingly regulated business environment, early co-operation with regulators has been on the rise for the last few years based on statistics published by the regulators. We referred to evidence led in *CFMEU* on these statistics in our briefing "Negotiated Settlements with Regulators". The Full Federal Court decision in *CFMEU* risked ending that trend. The High Court's decision will encourage companies and individuals who are the subject of investigations and enforcement proceedings by regulators to consider co-operation and negotiated settlements with the regulators.

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. The High Court's decision means that parties can now co-operate with regulators (including pursuant to the ACCC's Immunity and Cooperation Policy for Cartel Conduct) without fear that the Court will not have regard to any agreed penalty that is put forward by the parties. Parties will still have to satisfy the Court that the submitted penalty is appropriate in the circumstances of the matter and having regard to previous decisions.

Parties may again make agreed submissions to the Court as to the agreed set of facts and also the amount or range of penalty that should be imposed. This will encourage early resolution of investigations and proceedings. As a result, lengthy and complex litigation can be avoided.

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[i] 'Negotiated Settlements with Regulators'

[ii] 'Negotiated settlements with regulators: the courts have the final word'

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