Regulators' submissions on penalties

Vanessa Bosnjak reports on *Commonwealth v Director, Fair Work Industry Inspectorate* [2015] HCA 46.

The practice of the regulator and respondents in civil penalty proceedings making submissions to the court, jointly or otherwise, on the appropriate penalty amount to be imposed in civil penalty proceedings came to an abrupt halt in May 2015.

The Full Federal Court decision and its impact

On 1 May 2015, the Full Federal Court held in *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* (2015) 229 FCR 331 (*Fair Work v CFMEU*) that a court was not to have regard to any submissions on penalties provided by the parties, joint or otherwise.[1] The Full Federal Court applied the decision of the *High Court in Barbaro v The Queen* (2014) 253 CLR 58 (*Barbaro*).

The High Court had held in *Barbaro*, by majority, that the practice of prosecutors in Victoria during criminal sentencing hearings of making submissions on the available sentencing range for an offence was to cease. The High Court held that submissions on the bounds of the available sentencing range was a statement of opinion that advanced no proposition of law or fact that a sentencing judge could properly take into account, and would ultimately not assist the judge in carrying out the sentencing task.[2]

The Full Federal Court in *Fair Work v CFMEU* considered that the court, when determining the appropriate penalty to be imposed in civil penalty proceedings, was required to undertake the same instinctive synthesis that a sentencing court undertook when determining a sentence. The Full Federal Court in *Fair Work v CFMEU* applied *Barbaro* and held that submissions by a regulator on penalty were an impermissible expression of opinion and irrelevant to the role of the court in determining the appropriate penalty.

After the Full Federal Court's decision on 1 May 2015, the regulator and respondents in civil penalty proceedings could lead evidence on matters relevant to determining an appropriate penalty, such as the facts giving rise to the contravening conduct; whether the conduct was deliberate or inadvertent; the seniority of those involved in or having knowledge of the conduct; the culture of compliance; and whether and the extent to which the contravener had assisted the regulator once the contravening conduct had been discovered. However, where previously the regulator and respondents could submit, jointly or otherwise, a proposed penalty or range of penalties having regard to the evidence before the court, no such course was available after 1 May 2015, as no such submissions would be received by the court.

The inability to make submissions affected the ability of the regulators and respondents to agree terms on which civil penalty proceedings could be compromised, as there was no scope for the parties to be heard on an important term of any agreement to compromise civil penalty provision, namely what the parties would seek as the appropriate penalty or range of penalties.

The High Court's decision

On 9 December 2015, the High Court overturned the Full Federal Court's decision in *Fair Work v CFMEU: Commonwealth v Director, Fair Work Industry Inspectorate* [2015] HCA 46. The High Court held that the principles set out in *Barbaro* concerning the sentencing process in criminal proceedings did not apply in civil penalty proceedings. The High Court affirmed the previous practice and approach of the courts when imposing civil penalties established in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 (*NW Frozen*) and *Ministry for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72 (*Mobil Oil*).[3]

NW Frozen was an appeal from a decision to impose a penalty of $1,200,000.[4] At first instance, the parties jointly sought a penalty of $900,000, and it was the first time that a court had rejected a penalty jointly put forward by the parties.[5] On appeal, the court held that while it was the responsibility of the court to determine an appropriate penalty having regard to all of the circumstances, the fixing of a penalty is not an exact science. The question to be determined is whether the amount proposed can be accepted as fixing an appropriate amount, and the court 'will not depart from an agreed figure merely because it might have been disposed to select some other figure, or except in a clear case'.[6]

Mobil Oil affirmed the approach adopted in *NW Frozen*. The court in *Mobil Oil* noted that *NW Frozen* did not require the court to accept the penalty proposed by the parties, nor did it require the court to start with the penalty proposed by the parties and then determine whether the proposed penalty could be said to fix an appropriate penalty. The court could commence with an independent assessment of what is an appropriate penalty and then compare that with the penalty proposed by the parties. It was for the court to scrutinise the submissions and supporting facts to ensure that they were accurate and the contravener's will had not been overborne. A court may seek the assistance of an amicus curiae or intervener where the court formed the view that the absence of a contravener inhibited the court's ability to impose the appropriate penalty. If, when dealing with an application to compromise a civil penalty proceeding, the court is minded to depart from the penalties

or range of penalties proposed by the parties, it could allow the parties to withdraw their consent to compromise on the agreed terms and proceed to a final hearing on the matter.

In affirming the approach adopted in *NW Frozen* and *Mobil Oil*, the High Court noted that a court determining an appropriate penalty was not bound to accept the penalty proposed by the parties. Rather, it was for the court to determine whether the proposed penalty could be accepted as fixing an appropriate amount.[7] The High Court considered that, subject to the court being sufficiently persuaded of the accuracy of the facts and consequences put forward by the parties, and that the penalty proposed by the parties is an appropriate remedy in the circumstances, it was consistent with principle and highly desirable in practice for the court to impose the proposed penalty.[8]

The High Court recognised that there were relevant distinctions between criminal prosecutions and civil penalty provisions, and that *Barbaro* did not apply to civil penalty proceedings in the circumstances.[9] Those distinctions included that, unlike criminal proceedings, civil penalty proceedings are adversarial and the issues raised and the relief sought are largely determined by the parties.[10] Further, civil penalty proceedings do not involve notions of criminality and are primarily if not wholly protective in promoting the public interest in compliance.[11]

The High Court acknowledged that there is a public interest in imposing civil penalties. However it considered that that public interest was such as to distinguish it from other civil proceedings in which there is a public interest, for example custody disputes, schemes of arrangements, taxation matters. In those types of matters courts may accept agreed submissions on the nature of relief, provided the court is ultimately persuaded that the settlement proposed by the parties is appropriate. The same applies to civil penalty proceedings.[12]

The High Court made observations about the role of the regulator in enforcing regulatory regimes, including that:

- unlike a criminal prosecutor, the regulator is not dispassionate. The regulator may advocate for a particular outcome considered to be in the public interest and within the objects of the relevant regulatory regime;[13]
- it is for the regulator to choose the enforcement mechanism considered to be most conducive to securing compliance. In making that choice, a regulator balances the competing considerations of compensation, prevention and deterrence;[14]
- where a discount on the penalty is sought, the regulator should explain to the court the regulator's reasoning that justifies the discount.[15] Discounts may be sought in circumstances where, for example, the contravener has assisted the regulator following discovery of the contravening conduct; and
- having regard to its functions as a regulator of a relevant industry or activity, there is an expectation that the regulator will be able to provide informed submissions as to the effects of the contraventions on the relevant industry and the level of penalty necessary to achieve compliance.[16]

Civil penalty provisions are found in various areas of law, including industrial, taxation, corporations, and competition and consumer protection. Those responsible for enforcing civil penalty provisions under those various laws have specified powers and may deal with different industries and activities. While the High Court's decision concerned the *Building and Construction Industry Improvements Act 2005* (Cth) (BCII Act), there can be no doubt that it has broader implications for regulatory regimes more generally. However, it is clear that the High Court's decision was based on the relevant regulatory regime under the BCII Act. As noted by French CJ, Kiefel, Bell, Nettle and Gordon JJ, there was nothing in the purpose or text of the BCII Act that indicated the court should be less willing to receive submissions on the appropriate penalty to be imposed.[17] Justice Keane, who agreed with the reasons of the joint judgment, detailed why the Full Federal Court's decision in *Fair Work v CFMEU* had failed to give effect to the BCII Act.[18] Regard must always be had to the purpose and text of the particular legislative regime.

Endnotes

1. *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* (2015) 229 FCR 331 at [192].
2. *Barbaro* at [7], [38], [42].
3. French CJ, Kiefel, Bell, Nettle and Gordon JJ at [31], [32], [46] – [48]; Gageler J at [68]; Keane J [79].
4. *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 at 287.
5. *Australian Competition and Consumer Commission v NW Frozen Foods Pty Ltd* [1996] FCA 1680.
6. *NW Frozen v ACCC* at 290–291.
7. At [47], [48].
8. At [56].
9. At [50]–[58].
10. At [52]–[53], [57].
11. At [54]–[55].
12. At [59].
13. Gageler J at [78]; Keane J at [105].
14. French CJ, Kiefel, Bell, Nettle and Gordon JJ at [24]; Keane J at [108].
15. At [32].
16. At [60].
17. At [61].
18. At [101]–[108].