Let judges be judges: The Federal Court asserts its ultimate discretion in determining pecuniary penalties

Date : 13 May 2015

Author/s : Sarah Andrews and Rachel White

The recent landmark decision of the Full Federal Court in *Director, Fair Work Building Inspectorate v CFMEU* [2015] FCAFC 59 (**CFMEU case**) has led a number of commentators to raise concerns that the decision will reduce the certainty of outcomes for respondents and thereby have a chilling effect on their willingness to cooperate with regulators and agree to resolve proceedings.

In our view, however, the decision may have the welcome effect of levelling the playing field between regulators and respondents in settlement negotiations and lead to overall fairer and more consistent outcomes. The effects may be particularly apparent in proceedings brought by the Australian Competition and Consumer Commission (**ACCC**) where a large proportion of proceedings, particularly those under the Australian Consumer Law (**ACL**), involve agreed penalties and where the average size of those penalties has been steadily increasing in recent years.

Background

On 1 May 2015, the Full Federal Court handed down its decision in the CFMEU case. The case concerned the assessment of pecuniary penalties in civil prosecutions. The applicant regulator had commenced proceedings in May 2013 against the respondent unions (CFMEU and CEPU), alleging that they had contravened the *Building Construction Industry Improvement Act 2005* (Cth), and seeking pecuniary penalties. The parties filed a signed statement of agreed facts which contained a section on "agreed declarations and penalties".

The central issue before the Court was whether, and if so to what extent, it should have regard to those agreed figures in fixing the amounts of the penalties to be imposed in light of the High Court's decision in the 2014 case of *Barbaro v R* (**Barbaro case**).[1] In the Barbaro case, the High Court held that in the context of criminal sentencing the prosecution should not be able to make submissions as to an appropriate sentencing range or specific outcome. It reasoned that submissions by parties as to the "appropriate sentence" for an accused, whether proffered unilaterally or in collaboration with one another as part of a plea bargain, amounted to inadmissible "opinion" and were of no relevance to the task of a sentencing judge.

Following the Barbaro case there was significant debate as to whether the same principles should apply in civil penalty proceedings. Given the significance of this issue, the Chief Justice directed that the CFMEU case should be heard by the Full Court of the Federal Court and granted the Commonwealth leave to intervene. Independent counsel were also appointed to contradict the Commonwealth's position.

Ultimately, the Full Federal Court determined that the ruling in the Barbaro case applied equally to civil penalty proceedings and refused to have any regard to the agreement between the parties in determining the level of penalty to impose. In doing so, it aligned the principles to be applied to submissions relating to penalties in civil prosecutions with those in criminal prosecutions. It also largely aligned the Federal Court's approach to negotiated settlements with that taken by the Victorian State Supreme Court in its *Ingleby*[2] decision in 2013, where it was held that an agreed penalty under the *Corporations Act 2001* had no binding effect.

Key Points of the Judgment

The first question you might ask, and which the Commonwealth did ask, is: "why should a High Court decision on sentencing procedure in criminal proceedings guide the exercise of a court's discretion in pecuniary penalty proceedings?"

There is no pure and simple dichotomy between "civil" and "criminal" sentencing procedures

The Court ruled that the application of legal principles is not restricted by the question of whether the relevant proceedings are "civil" or "criminal" – it is enough that such proceedings are "penal in nature". It held that in both civil and criminal proceedings the right to make submissions on a matter in issue does not include the right to offer opinions which are unsupported by recognised expertise or evidence. The Court noted that the issues addressed in the Barbaro case, such as the proper content of submissions (having regard to the nature of the discretion to be exercised), the mechanics by which such

discretion is to be exercised, the public interest and public perceptions, were equally relevant to the present civil proceedings.

For these reasons, the Court deemed it appropriate to follow the decision in the Barbaro case and articulated a number of important principles that were served by this approach.

Justice is a matter of perception, as well as practice

The Court confirmed that it is for the trial judge alone to determine the appropriate penalty in any proceedings, civil or criminal. It reiterated that this must occur not only as a matter of fact but also in the eyes of the public. Importantly, the Court observed, at [133]:

> *It is not clear to us that it is possible to maintain the public perception that the Court imposes the penalty and, at the same time, lead the parties to believe that their agreement will probably be adopted.*

Therefore, whilst the Court recognised that there is a public interest in promoting settlement of litigation, it did not accept this as an adequate basis for presenting to the Court agreements or submissions as to the appropriate penalty or range of penalties to be imposed. Indeed, it held that it would be contradictory to maintain that it is for the Court to make the final decision and yet expect the Court to adopt an outcome earlier agreed by the parties almost as a matter of course.

Justice is not a matter of mathematics and vested interests

The Court ruled that a trial judge cannot discharge his or her responsibilities simply by considering whether the amount of the penalty nominated by the parties falls within an "appropriate" range. This is because, in determining the appropriate sentence, a judge should not undertake a "mathematical exercise" but rather an instinctive synthesis of all the relevant circumstances, without constraint by an arbitrary limit set by the parties. As the Court noted, at [139]:

> *The agreed figure may simply reflect the point at which each party considers that it is in its best interests to agree.*

Furthermore, the Court noted that a regulator may have vested interests in nominating a specific penalty and, hence, that the Court's involvement may ultimately lead to a more impartial outcome. It stated, at [205]:

> *The regulator's responsibilities and functions may well magnify the risk … that it will not be dispassionate in any view which it expresses as to penalty…. The Court's involvement reduces the risk that undue regard is given to matters which are important to the regulator.*

Administrative convenience should not influence the exercise of judicial power

The Court noted the Commonwealth's submissions that it was common practice for regulators, particularly the ACCC, to enter into agreements on penalties with respondents and that this practice leads to the efficient disposition of cases. It rejected, however, any suggestion that the fact that this practice was in place, and that it may make negotiation easier for regulators, meant that the Court was obliged to recognise and give effect to this practice as a matter of law.

Joint submissions and admissions of liability are still relevant and to be encouraged

Finally, the Court rejected the Commonwealth's submissions that the inability to make joint submissions on penalty would have a negative effect on parties' willingness to settle litigation or would necessarily discourage joint submissions as to the facts of the case, identification of any relevant comparable cases and the proper approach to fixing the penalty.

It noted that there was no suggestion that the Barbaro case had led to a reduction in guilty pleas and found that there were many "good reasons for resolving litigation" even without the benefit of certainty as to outcome.

The Court also confirmed that the fact that a respondent has admitted liability and is willing to submit to a substantial penalty is a relevant consideration in the assessment of the appropriate penalty and should be taken into account to the extent that it demonstrates a degree of remorse and / or cooperation. There was no reason, it found, that contrition and cooperation could not be communicated to it through means other than an agreed penalty.

What does this mean for you?

Whilst the Court in the CFMEU case limited its decision to the specific context before it, the implications are far more widespread given the prevalence in the use of agreed penalties by regulators.

The decision has led to much commentary lamenting the lack of certainty that this will lead to for parties and the disadvantages of not knowing how a particular judge might exercise his or her discretion in determining penalties. As far as respondents are concerned, however, we are not convinced that the decision is really all doom and gloom.

In fact, we believe that this decision may work in favour of respondents in many cases by levelling the playing field in settlement negotiations. Under the approach to date, regulators have had considerably stronger bargaining power in settlement negotiations knowing that courts are likely to approve any penalty they can agree with the respondent(s). There may be a various strategic reasons, not least considerations of time and cost, for respondents to choose to succumb to pressure from the regulator and agree to a particular penalty even where they believe it may be higher than what a court would impose. Indeed the Court alluded to this possibility when commenting on the high level of agreed penalty cases brought by the ACCC under the ACL, noting, at [154], that "at least under this regime, the average size of the penalty is quite high". As noted above, the Court also expressed the view that

regulators may not be impartial or "dispassionate" on the question of penalty.

With submissions (joint or unilateral) on the appropriate penalty or range of penalty now prohibited, respondents may still choose to resolve proceedings, and obtain the consequent benefits, without having to accept the penalty insisted upon by the regulator as part of the settlement package. Respondents' cooperation can still be recognised in the Court's own assessment of mitigating factors.

We note, however, that this may not be the end of the story. There is a distinct possibility that the Commonwealth will seek, and be granted, special leave to appeal to the High Court. Alternatively, the legislature may see fit to clarify the scope of regulators' powers following on from the decision. Until that happens, however, we consider that this decision marks the start of a new, more positive era in the regulatory landscape: where judges can be judges; and regulators can be regulators.

Sarah Andrews, Special Counsel
Telephone +61 2 8915 1o61
Email sarah.andrews@addisonslawyers.com.au

Rachel White, Solicitor
Telephone +61 2 8915 1o24
Email rachel.white@addisonslawyers.com.au

1
2