CORRS IN BRIEF

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CORRS IN BRIEF – WHERE TO NOW FOR LENIENCY/COOPERATION IN AUSTRALIA?

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On 1 May 2015, the Full Court of the Federal Court delivered its decision in *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union*[1] (***CFMEU***). The judgment overturned in excess of twenty years of authorities relating to the ability of parties, such as the ACCC, and those that are the subject of civil prosecutions from making joint submissions to the Court about the appropriate pecuniary penalty or range of penalties.

The Court, following the recent High Court decision in *Pasquale Barbaro v The Queen, Saverio Zirilli v The Queen*[2] (***Barbaro***), which dealt with the position of recommendations of penalties in criminal matters, came to the view that:

- courts should have *"no regard to the agreed figures in fixing the amounts of the penalties to be imposed, other than to the extent that the agreement demonstrates a degree of remorse and/or cooperation on the part of each respondent"*[3]; and
- the parties or the regulator was not permitted or required to provide the Court with their/its view as to the penalty or range of penalties that the Court may impose.

Additionally, the Court rejected submissions from Commonwealth regulators, including the ACCC that the application of *Barbaro* may result in a material reduction in the likelihood of expedient resolutions of civil prosecutions.

In our view, this judgment creates significant uncertainty for both the ACCC and potential respondents alike. It is likely to lead to a significant chilling effect on the preparedness of parties to seek to resolve, rather than to contest, matters. For example, it is likely to create considerable uncertainty about the operation of the leniency/cooperation component of the ACCC's *Immunity and Cooperation Policy for Cartel Conduct* (***Immunity and Cooperation Policy***).[4] The level of comfort or certainty about the likely quantum of penalty in proceedings by the ACCC against a party prepared to cooperate and obtain leniency for cartel conduct[5] or other conduct that may contravene the *Competition and Consumer Act* (Cth) 2010 (**Act**)[6] will, in the foreseeable future, be non-existent.

It is not yet known whether special leave will be sought to appeal this decision to the High Court.

BARBARO

In 2014, in *Barbaro*, a criminal law proceeding, the High Court held that the prosecution is not permitted or required to make submissions on sentencing ranges. It held that it was for the sentencing judge alone to decide what sentence will be imposed.

The High Court's view was that the prosecution's submission as to an available sentencing range is not a submission of law but rather, no more than a statement of opinion. Accordingly, it was not unfair for the sentencing judge to have refused to receive such a submission. It also held that this refusal did not amount to a failure to take into account a relevant consideration in sentencing the defendants.

1 [2015] FCAFC 59 – The CFMEU and another union made admissions that they had contravened the Building and Construction Industry Improvement Act as part of an Agreed Statement of Facts and a Joint Submission with the Director about the quantum of penalty.

2 [2014] HCA 2.

3 [2015] FCAFC 59 at [3].

4 Dated 10 September 2014 can be accessed here: http://www.accc.gov.au/publications/accc-immunity-cooperation-policy-for-cartel-conduct.

5 As opposed to those that are "first in" and hence able to seek immunity under the Immunity and Cooperation Policy in the context of cartel conduct.

6 Including for contraventions of the Australian Consumer Law.

CONSIDERATIONS IN CFMEU

The judgment in CFMEU noted that there existed long-standing authorities, such as *NW Frozen Foods Pty Ltd v ACCC*[7] (***NW Frozen Foods***) and *Minister for Industry, Tourism and Resources v. Mobil Oil Australia Pty Ltd*[8] demonstrating that there has been a practice of government regulators, particularly the ACCC and respondents making joint submissions as to an appropriate penalty and that there is a strong public interest in doing so. Even following Barbaro, this approach had been accepted by the Court in recent decisions that have brought by the ACCC.[9]

The Court granted the Commonwealth leave to intervene in the *CFMEU* proceedings and was heard in relation to whether the position in respect of 'pleas', agreed statements of fact and joint submissions nominating a penalty or range in civil pecuniary cases can be made to the courts as a result of Barbaro. As part of the Commonwealth's intervention, the ACCC, ASIC, ATO and the Fair Work Ombudsman provided evidence.

The ACCC's evidence was that:[10]

- *"....the capacity for joint submissions as to penalty is, "critical to its capacity to conduct effective negotiations with the parties and to efficiently resolve enforcement proceedings".... ".*
- *".....a majority of respondents, "would not agree to resolve matters if the ACCC was not in a position to agree to put joint submissions to the Court on the recommended appropriate quantum of penalty"..... the ability to do so is "essential" to ACCC's capacity to reach agreement in relation to the disposition of proceedings without the cost of a contested hearing..... ".*
- *".... without such ability "the majority of matters would be likely to proceed to a contested hearing, at least in relation to penalty, and in many cases, flowing over to a contest in relation to liability (in full or in part) and other relief". This would result in increased cost to both ACCC and the respondents.....that such increased cost would result in its having to reduce the number of matters which it investigates and takes to litigation. Such reduction in enforcement proceedings would be likely to lead to a reduction in specific and general deterrence. "*

The ACCC also stated that when it made submissions to the Court about an appropriate penalty range, it only sought to indicate penalty amounts that the Court might consider to be appropriate. It did not seek to indicate the outer bounds of the available range in the sense that higher or lower penalty amounts would involve appellable error.[11]

The Court acknowledged the concerns of the regulators as to the importance of negotiations and agreements in the enforcement of various statutes pursuant to which pecuniary penalties may be imposed. However, it reiterated that many authorities establish that it is for the Court to fix the penalty.

The Court also expressed that *"the public interest in the imposition of pecuniary penalties also leads to the conclusion that the fixing of the amount of such a penalty is a matter for the Court, and that the parties cannot, by agreement, bind it".*[12]

It stated that once that proposition is accepted, the only remaining question is as to the relevance, to the Court's consideration of submissions as to the ultimate penalty, or range of penalties, or the fact of agreement as to penalty. It found that given the High Court held in Barbaro that statements as to the ultimate outcome or range were merely expressions of opinion and therefore could not properly be advanced in submissions in the context of criminal sentences, there can be no justification for taking a different view in pecuniary penalty proceedings (given that such proceedings were penal in nature).

However, the Court clarified that there was *"no reason to conclude that the exclusion of submissions as to range, agreed penalty or a specific outcome would necessarily*

7 (1996) 71 FCR 285.

8 [2004] FCAFC 72.

9 For example, Middleton J in ACCC v Energy Australia Pty Ltd [2014] FCA 336, where his Honour did not consider that Barbaro went so far as to prohibit the Court from taking into account the submissions of the parties as to the 'agreed' penalty amount in civil penalty proceedings, or that the High Court's decision implicitly overruled NW Frozen Foods.

10 [2015] FCAFC 59 at [159].

11 [2015] FCAFC 59 at [154].

12 [2015] FCAFC 59 at [145].

discourage joint submissions as to the facts of the case and that the identification of relevant comparable cases and the proper approach to fixing the penalty", such submissions being supported by carefully prepared evidence.[13] The Court also clarified that although submissions as to a proposed penalty should only be regarded as mere expressions of opinion, *"a relevant expert opinion may be received into evidence, by consent or otherwise"*.[14] In light of these statements from the Court, going forward, regulators are more likely to consider adducing expert evidence to strengthen their submissions in pecuniary penalty proceedings.

Interestingly, the Court appeared to discount the weight that may be given to earlier decisions where matters were resolved by consent – the vast majority of penalty decisions under the Act (and its predecessor the *Trade Practices Act*) have been by consent. It also concluded that it expects *"that regulators and offenders will continue to seek to reach agreement as to factual matters and as to the application of the law. As to uncertainty of outcome, we consider it to be the inevitable consequence of entrusting the pecuniary penalty process to the judiciary."* [15]

In support of its findings, the Court also provided the following guidance and commentary:

- that admissions of liability coupled with a willingness to submit to the imposition of a substantial penalty, thus evidencing contrition, are a relevant consideration in sentencing or imposing a pecuniary penalty;[16]
- that while it recognised the important role of regulators in the enforcement of relevant legislation, it did not agree that regulators have particular expertise such that they should be placed in a 'special position' when making submissions in the absence of some statutory authority to that effect;[17]
- that while there may be short term inconvenience and perhaps expense for regulators and respondents in cases where agreed penalties or ranges have already been identified, it rejected the 'dire consequences' of forbidding submissions as to penalties or range of penalties that was the evidence of regulators;[18]
- interestingly, the Court rejected the submission by the Commonwealth that the purpose to be served by the imposition of a pecuniary penalty is general and specific deterrence, instead stating that the purpose served by a particular pecuniary penalty regime must be derived from the wording of the relevant statute.[19] This position will require parties to consider carefully their submissions about penalties and the objects of the relevant legislation; and
- in assessing the prevalence of the assessment of a "single course of conduct" in recent decisions,[20] the Court doubted *"whether it would be in accordance with principle to start at a single global figure (the agreed figure) and then work backwards to arrive at appropriate penalties for each contravention. Such an approach would appear to be contrary to the proper approach.... in relation to totality"*.[21] If this approach to totality is adopted going forward, together with an uncertainty about whether the Courts will give much weight to earlier consent decisions, this may result in changes in the levels of penalties that are handed down by the Court. In competition law proceedings such as cartel conduct where a price uplift may be more readily calculated and its likely effect modelled, there is the scope for a material increase in the amount of the penalties awarded. However, in consumer law proceedings where there has been a significant increase in the size of penalties in 2010, even where evidence was adduced about relatively little consumer detriment[22], it may be result in a tempering of penalties.

13 [2015] FCAFC 59 at [237].
14 [2015] FCAFC 59 at [136].
15 [2015] FCAFC 59 at [242].
16 [2015] FCAFC 59 at [211].
17 [2015] FCAFC 59 at [126].
18 [2015] FCAFC 59 at [239].
19 [2015] FCAFC 59 at [64].
20 For example, in the recent decision of ACCC v Origin Energy Electricity Ltd [2015] FCA 278, a penalty of $2 million was imposed on Origin Energy, despite there being at least ten instances of unlawful conduct claimed.
21 [2015] FCAFC 59 at [45].
22 For example, in ACCC v Apple Pty Ltd [2012] FCA 646 and ACCC v TPG Internet Pty Ltd (2013) 250 CLR 640.

WHERE TO NOW?

Clearly, *CFMEU* will result in a very significant rethink about the approach that regulators such as the ACCC will have in their interactions with parties that are alleged to have contravened relevant legislation as well as the Court – it is already having an effect on matters that are presently before the Court or are in the midst of negotiations for discounts on penalties due to cooperation/leniency.

The judgment focuses on submissions as to penalty/range of penalties (ie matters of a penal nature). It still allows the regulator to arrive with parties at agreements as to the facts that are relevant to the matter as well as joint submissions concerning factors relevant to penalty, comparable cases (without being able to submit on the penalty itself) and even orders for declarations, injunctions, even arguably disqualification orders and obviously non punitive orders including orders for compliance.

However, as parties tend to consider the outcome of a prosecution holistically and given that 'certainty' about the likely monetary penalties is often a very significant part of parties' analysis of its position and incentive to seek to negotiate a resolution with a regulator time will tell whether the view of the regulators about the chilling effect on the efficient resolution of litigious matter or the Full Court's view that its judgment will only cause short term inconvenience. Interestingly, it is that 'certainty' to which the Court objected stating *"It became obvious in the course of oral submissions before us that the perceived importance of "certainty" lay at the heart of the concern being expressed by the Director and the respondents as to the possible application of Barbaro to this case. However the obvious response to such concern, is that such certainty could only be achieved if there were a very high level of expectation that the Court would adopt the agreed outcome"*[23]

The other fallout may be the reduced efficacy of investigations by regulators such as the ACCC in the context of cartel conduct investigations. It is one thing to investigate conduct that is relatively transparent such as misleading conduct or a 'refusal to deal'. It is inherently much more difficult to investigate conduct that is more clandestine, which is often the position in cartel cases. The ACCC has pointed in a number of instances to the efficacy of its investigations being assisted not only by the immunity applicant but also those that are "second in" seeking to cooperate with the ACCC. In circumstances where the incentives to such cooperation may be materially impacted, the ACCC's task in seeking to investigate and succeed in prosecutions of cartel may be all the more difficult.

It may also have an interesting impact on the immunity process in Australia. The judgment means that there is an even greater imperative to be 'first in' and achieve the certainty of having immunity. However the difficulties referred to above may mean that the ACCC has even greater reliance on the evidence of the immunity applicant, arguably making the obligation of ongoing cooperation being even more onerous than at present. Query the longer term impact that that may have on the immunity process.

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23 [2015] FCAFC 59 at [133].