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Briefing note June 2015

Negotiated Settlements with Regulators

Departing from long established practice, Australian Courts have now made it clear that as the Court has the final word on the penalty to be imposed on an offender in civil penalty proceedings, it is not appropriate for parties to make submissions to the Court on penalties even where there has been a negotiated agreement between the offender and the regulator.

In *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCAFC 59, the Full Federal Court has determined that parties, including the regulator, should not make submissions in civil penalty proceedings as to agreed penalties, nominate specific penalties or identify a range of penalties. In reaching this conclusion, the Court considered that the reasoning of the High Court in *Barbaro v the Queen* (2014) 305 ALR 323 that the prosecution should not nominate the sentencing result or range in criminal sentencing proceedings was also applicable to civil penalty proceedings

The decision in *CFMEU* may impact any concluded settlements with regulators which have not yet been the subject of Court orders and can be expected to have a significant impact on negotiations and settlements with regulators in relation to civil penalty contraventions. As such, the decision will have significant implications for companies and their officers and employees who face scrutiny from regulators for serious contraventions of the law.

Use of agreed penalties

As the Court noted in *CFMEU*, it has become common practice in civil penalty proceedings for the regulator and the respondent to make agreed submissions, often pursuant to a settlement, as to the amount or range of penalty that should be imposed.

The practice had been accepted by the Court on that basis that responsibility for determining the appropriate penalty always remained with the Court.

We have previously noted in *'Negotiated settlements with regulators: the courts have the final word'* that it has become increasingly common for companies and individuals to cooperate with the increasingly proactive regulators during the course of an investigation and prior to a hearing. Increased cooperation with regulators means that formal proceedings brought by regulators are frequently resolved between the parties by way of negotiated settlement in which parties approach the Court with statements of agreed facts and agreed penalties.

In *CFMEU*, evidence was led to the effect that:

- approximately 70% of civil penalty proceedings commenced by the Australian Competition and Consumer Commission (**ACCC**) involve agreed penalties;

- approximately 20% of civil penalty proceedings commenced by the Australian Securities & Investments Commission (**ASIC**) involve agreed penalties;
- approximately 25% of civil penalty proceedings commenced by the Australian Taxation Office (**ATO**) involve agreed penalties; and
- at least 75% of the civil penalty proceedings commenced by the Fair Work Ombudsman (**FWO**) proceeded on agreed basis by the filing of an agreed statement of facts and the FWO commonly sought agreement as to penalty.

ACCC's *Immunity and cooperation for cartel conduct* policy refers to the ACCC recommending penalty discounts to the Court in civil proceedings where there is cooperation.

ASIC's *Cooperating with ASIC* information sheet states that in the event of a settlement the Court can be provided with an agreed set of orders, including orders relating to pecuniary penalty.

Barbaro v the Queen

In *Barbaro*, the appellants pleaded guilty to serious drug related offences after discussions between the prosecution and the lawyers for the appellants. During those discussions, the prosecution informed the lawyers for the appellants of sentencing ranges that would apply to certain charges.

At the commencement of the sentencing proceedings, the sentencing judge said that she would not request the parties to offer their views as to sentencing ranges. The prosecution did not make any submissions concerning the range of sentences.

The sentencing judge imposed sentences, in respect of each appellant, which were above the sentencing range that had been indicated by the prosecution during discussions.

In the High Court, the appellants submitted that the sentencing hearing was unfair because the sentencing judge had refused to receive submissions from the prosecution as to the range of sentences.

The majority of the High Court concluded that the prosecution was not permitted or required to make submissions to the sentencing judge as to the amount or the range of sentences to be imposed.

CFMEU

Background

CFMEU concerned conduct in breach of the *Building and Construction Industry Improvement Act 2005* by officers of the CFMEU and another union which occurred in May 2011.

When the Director of the Fair Work Building Industry Inspectorate filed an application seeking civil penalties in May 2013 there was an agreed position in respect of facts and as to penalties. The application sought penalties in the agreed amounts.

The Regulators

The Commonwealth intervened in the proceedings and made submissions in relation to the position of regulators, particularly the ACCC, ASIC, the ATO and the FWO.

The Commonwealth led evidence on behalf of each of the regulators to the effect that they considered that the ability to make joint submissions to the Court as to penalty was critical to their capacity to conduct effective negotiations with parties and to resolve efficiently enforcement proceedings.

For example, the ACCC submitted that 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 recommended appropriate quantum of penalty'.

Each of the regulators also stated that, if they were prevented from putting submissions to the Court as to amount of penalty, there would be a higher proportion of contested liability hearings resulting in additional costs in time and in money.

Reasoning

The Full Court had difficulty accepting at face value the evidence on behalf of the regulators as to the apparently dire consequences if they were not able to make submissions as to the amount or range of penalty.

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 Full Court applied the reasoning of the High Court in *Barbaro* that statements as to ultimate outcome or range of penalty are expressions of opinion and therefore could not properly be advanced as submissions in civil penalty proceedings.

Permissible evidence and submissions

Despite their views in relation to submissions as to agreed penalties or a range of penalties, the Full Court did not discount the importance of negotiations between regulators and respondents.

The decision provides some guidance in relation to the evidence and

submissions that can be put before the Court where a settlement is reached, including that:

- It will be relevant to the process of fixing a penalty that the respondent has agreed that it has contravened the law and is willing to submit to the imposition of a substantial penalty;
- The Court can receive a statement of agreed facts to provide the factual matrix upon which the quantification by the Court of the relevant civil penalty should be based;
- If staff of a regulator have expertise which will be of assistance to the Court then such evidence may be provided as expert evidence; and
- There should be a consistent approach to the fixing of penalties by reference to prior decisions and parties are entitled to make submissions relating to comparative case law (without making submissions as to what discounts or amounts should apply).

Implications

Unless the reasoning in *CFMEU* is revisited by the High Court or by legislative reform, companies and individuals who are the subject of investigations and enforcement proceedings by regulators will need to assess the relative benefit of settlement in circumstances where they have no real certainty as to the likely penalty that may be imposed by the Court.

In particular, regardless of how cooperative companies and their officers and employees 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.

Regulators will have to reconsider their approach to negotiations and the resolution of enforcement proceedings given that it has been predicated on their ability to make submissions to the Court as to the amount of penalties in return for cooperation. Regulators will also have to amend their cooperation policies to reflect that no submissions can be made as to the amount of penalty to be imposed.

There still remains significant scope for regulators to agree to take steps which may reduce the amount of the penalty which the Court considers appropriate. This may include limiting the contraventions alleged in any proceedings and agreeing facts in relation to the contrition and cooperation of the respondents.

Any such evidence or submissions will need to be prepared carefully so as to contain relevant (and admissible) material in light of the observations of the Full Court in *CFMEU*.

Since this note was first published applications for special leave to appeal to the High Court have been filed by the Commonwealth and by the CFMEU.

Contacts

Diana Chang

Partner
T: +61 28922 8003
E: diana.chang@cliffordchance.com

Kate Godhard
Counsel
T: +61 2 8922 8021
E: kate.godhard@cliffordchance.com

Daniel Moloney
Senior Associate
T: +61 2 8922 8006
E: daniel.moloney@cliffordchance.com

Timothy Grave

Partner
T: +61 2 8922 8028
E: timothy.grave@cliffordchance.com

Dave Poddar
Partner
T: +61 2 8922 8033
E: dave.poddar@cliffordchance.com

Clifford Chance, Level 16
No. 1 O'Connell Street
Sydney NSW 2000

www.cliffordchance.com