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High Court finds that Barbaro does not apply to civil penalty proceedings

This morning the High Court handed down a landmark decision in *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46, finding that the principles in *Barbaro v The Queen* (2014) 253 CLR 58 do not apply to civil penalty proceedings and affirming the approach previously adopted by regulators and the courts in relation to agreed penalties.

Summary

In allowing the Commonwealth's appeal from the decision of the Full Court of the Federal Court in *Director, Fair Work Building Industry Inspectorate v CFMEU* (2015) 229 FCR 331, the High Court has unequivocally confirmed that the principles in *Barbaro* do not apply to civil penalty proceedings, and made a number of important observations concerning the role of regulators and the courts in such proceedings.

In short, the effect of this decision is that:

- The High Court has affirmed the appropriateness and, in the case of regulators, the desirability of parties to civil penalty proceedings making submissions, on an agreed or separate basis, to a court as to the appropriate pecuniary penalty amount to be imposed in a given case.
- The approach to agreed penalties established by *NW Frozen Foods v ACCC* (1996) 71 FCR 285 and *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* (2004) ATPR 41-993 has been affirmed without alteration.

French CJ and Kiefel, Bell, Nettle and Gordon JJ handed down a joint judgment, with Gageler and Keane JJ writing separate judgments, endorsing the joint judgment and allowing the appeal. The judgments of Gageler and Keane JJ outlined additional reasons as to why *Barbaro* did not apply to civil penalty proceedings, focusing, in Gageler J's case, on his Honour's interpretation of the scope of *Barbaro* and, in Keane J's case, on the nature of criminal proceedings and the *Building and Construction Industry Improvement Act 2005* (Cth).

Some key aspects of the decision are set out below.

Barbaro *does not apply to civil penalty proceedings*

In its decision, the Court was unequivocal that *Barbaro* did not apply to civil penalty proceedings.

At [51], the plurality stated: 'Contrary to the Full Court's reasoning, there are basic differences between a criminal prosecution and civil penalty proceedings and it is they that provide the "principled basis" for excluding the application of *Barbaro* from civil penalty proceedings.'

Similarly, Keane J observed at [102]: 'The legislative choice to designate proceedings for recovery of a civil penalty may not be ignored by a court.'

Agreed penalties, NW Frozen Foods *and* Mobil Oil

The Court also affirmed the approach to agreed penalties as set out in *NW Frozen Foods* and *Mobil Oil*, with the plurality stating at [50]: '… nothing in *Barbaro* is antithetical to continuing the practice of agreed penalty submissions in civil penalty proceedings.'

In this regard, the Court also made a number of observations about the benefits of agreed penalties and the role of the courts and regulators in approaching them, including that:

- There is an important public policy involved in promoting predictability of outcome in civil penalty proceedings through receiving and, if appropriate, accepting agreed penalty submissions, as such predictability encourages corporations to acknowledge contraventions and, in turn, avoid lengthy and complex litigation, 'and thus tends to free the courts to deal with other matters and to free investigating officers to turn to other areas of investigation that await their attention' (at [46], by the plurality).
- *Mobil Oil* makes clear that the court is not bound by figures suggested by the parties, and *NW Frozen Foods* and *Mobil Oil* do not suggest that the task of a judge faced with an agreed penalty is to simply consider whether it is 'wholly outside' the range of penalties reasonably available or to impose the penalty irrespective of whether it is considered appropriate (at [48], by the plurality).
- If a court is disposed not to impose an agreed penalty, it may be appropriate to give the parties an opportunity to withdraw their consent or otherwise be heard (at [65], by the plurality).
- The regulator's stance in litigation may be expected to reflect a pragmatic assessment that the public interest is best served by bringing the proceedings to a conclusion on agreed terms as to penalty, and that course may be informed by a perceived need to conserve resources for the pursuit of other wrong-doing and to avoid the risks and uncertainties usually associated with litigation (at [109], by Keane J).

Specifically, in rejecting criticism made by the Full Court of submissions made by the Commonwealth below, the Court stated at [49]:

> Nor is it "pious" to suppose that judges will do their duty, as they have sworn to do, and therefore reject any agreed penalty submission if not satisfied that what is proposed is appropriate. It would be a travesty of justice if that were not the case. It may be presumed that a judge will do his or her duty according to the oath of office. The public may have confidence that it will be so.

Specialist role of the regulator

The Court also made a number of observations confirming the specialist role of regulators within civil penalty regimes.

At [24], the plurality adopted the Commonwealth's description of the distinct nature of civil penalty regimes and the role of regulators within them, stating:

> In essence, civil penalty provisions are included as part of a statutory regime involving a specialist industry or activity regulator… with the statutory function of securing compliance with provisions of the regime that have the statutory purpose of protecting or advancing particular aspects of the public interest. Typically, the legislation provides for a range of enforcement mechanisms, including injunctions, compensation orders, disqualification orders and civil penalties, with or, as in the BCII Act, without criminal offences. That necessitates the regulator choosing the enforcement mechanism or mechanisms which the regulator considers to be most conducive to securing compliance with the regulatory regime. In turn, that requires the regulator to balance the competing considerations of compensation, prevention and deterrence. And, finally, it requires the regulator, having made those choices, to pursue the chosen option or options as a civil litigant in civil proceedings.

Keane J made comments to the same effect at [109].

While the plurality at [60] accepted the Full Court's observation that a regulator in a civil penalty proceeding is not disinterested, the Court recognised the importance of that interest in affirming the desirability of regulators making submissions as to penalty. The Court noted it is the function of the relevant regulator to regulate the industry in order to achieve compliance and that it is to be expected that the regulator will be in a position to offer informed submissions (which will be considered on the merits) as to the effects of contravention on the industry and the level of penalty necessary to achieve compliance.

Gageler J additionally observed at [78], on the role of regulators as a party to proceedings, that:

> The regulator is not bound by the nature of the proceeding to be dispassionate in the relevant sense. Subject to its statutory charter, the regulator is permitted to advocate for a litigious outcome which the regulator considers to be in the public interest.

Primacy of deterrence

In discussing the differences between criminal and civil penalty proceedings, the High Court reiterated the importance of deterrence as the primary factor in imposing civil penalties, stating at [55]: '… whereas criminal penalties import notions of retribution and rehabilitation, the purpose of a civil penalty, as French J explained in *Trade Practices Commission v CSR Ltd*, is primarily if not wholly protective in promoting the public interest in compliance.' See also [59].

Significance of the decision

The effect of today's High Court decision is unequivocally to:

- reject the application of the principles established by *Barbaro* to civil penalty proceedings
- affirm both *NW Frozen Foods* and *Mobil* as good law
- affirm the primacy of deterrence in imposing civil penalties.

AGS acted for the Commonwealth in both the High Court and Full Federal Court.

AGS will provide further guidance on the implications for regulators arising from this landmark decision.

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