Australian Government Solicitor the leading lawyers to government

AGS

Express law
fast track information for clients

27 March 2013

Victorian Court of Appeal changes approach to civil penalties sought by consent

The Court of Appeal of the Supreme Court of Victoria recently rejected as bad law decisions by the Full Court of the Federal Court of Australia on the issue of pecuniary penalties sought by consent.

The Full Court has previously endorsed the approach whereby courts will approve a penalty jointly proposed by the parties, in circumstances where the penalty figure proposed is within the permissible range in all the circumstances.

The Court of Appeal in *Australian Securities and Investments Commission v Paul John Ingleby* [2013] VSCA 49 (*Ingleby*) viewed a penalty figure sought by consent as being nothing more than a submission, it being a matter for the judge to determine what appropriate penalty figure should be ordered in all the circumstances.

This replaces the previous approach in Victoria whereby a judge should only reject a civil penalty sought by consent if it were outside the appropriate range.

The test now to be applied in proceedings in the courts of Victoria is for a judge to consider the totality of the material, including joint or contested submissions on penalty, and determine the appropriate penalty.

While the decision is not binding on courts in other jurisdictions, including the Federal Court, the principles in *Ingleby* will undoubtedly be considered at some stage by other courts. To that extent, the question of whether the Full Court of the Federal Court will revisit its approach remains open.

It also reinforces the need for regulators to ensure that there is sufficient material before a court in a statement of agreed facts or evidence to support the contraventions and penalties sought rather than only relying on admissions.

Background

Regulators commonly negotiate, with a party with which it has commenced enforcement litigation, a penalty to be sought by consent based on a statement of agreed facts or joint admissions. In those cases where agreement has been reached, the statement of agreed facts and agreed pecuniary penalty (often in the form of draft consent orders) will normally be submitted by the parties for approval by the court.

Ingleby relates to the Australian Securities and Investments Commission's investigation of the former Chief Financial Officer of AWB Limited, Mr Paul Ingleby, and the enforcement action it took against Mr Ingleby for his contravention of s 180 of the *Corporations Act 2001*.

ASIC and Mr Ingleby negotiated 'agreed facts' relating to his conduct and jointly submitted an appropriate penalty which involved a pecuniary penalty of $40,000 and a period of disqualification as a director for 15 months.

At first instance in the Supreme Court of Victoria, the trial judge rejected the penalty that had been sought by consent and instead imposed a lower pecuniary penalty of $10,000 and ordered that Mr Ingleby be disqualified from managing corporations for approximately 4½ months.

The trial judge relied upon the statement of agreed facts in coming to conclusions about penalty. Given the conduct that was admitted in the statement of agreed facts, the trial judge considered that the 'penalty' sought by the parties was too severe and fell outside the permissible range that was appropriate in all the circumstances.

Importantly, the trial judge found that, but for the admission of Mr Ingleby that the contravention was serious, he may have found otherwise. This suggests that the trial judge was not satisfied that the statement of agreed facts contained sufficient information to support the orders sought by consent – one criterion for a pecuniary penalty to be ordered under s 1317G of the *Corporations Act 2001* is for the contravention in question to be serious.

ASIC appealed the decision to the Court of Appeal, seeking a pecuniary penalty of $40,000 and disqualification for 15 months, consistent with what had been submitted jointly.

The Court of Appeal, in considering what an appropriate penalty was, focused on the correct approach to penalties sought by consent and the accuracy and sufficiency of statements of agreed facts.

NW Frozen Foods and Mobil Oil

The Court of Appeal in *Ingleby* considered whether the approach that had been endorsed by the Full Court of the Federal Court in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 (*NW Frozen Foods*) was correct. Weinberg JA, one of the 3 members of the unanimous Court in *Ingleby*, had previously been critical of the Full Court in *NW Frozen Foods* in some of his decisions delivered while a Federal Court judge.

The Full Court in *NW Frozen Foods* endorsed the approach whereby courts will approve a penalty jointly proposed by the parties in circumstances where the penalty figure proposed is within the permissible range in all the circumstances. The Full Court held that:

> Because the fixing of the quantum of a penalty cannot be an exact science, the Court, in such a case, does not ask whether it would without the aid of the parties have arrived at the precise figure they have proposed, but rather whether their proposal can be accepted as fixing an appropriate amount.

The Full Court in *NW Frozen Foods* recognised that there were significant public policy reasons in support of this approach. In particular, very lengthy and complex litigation is frequently avoided, freeing the court to deal with other proceedings and allowing regulators

to turn their attention to other areas in which they are required. If the certainty of negotiated settlements were removed, these valuable consequences would be jeopardised.

The Full Court of the Federal Court in *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72 (*Mobil*) endorsed the approach in *NW Frozen Foods*, holding that there was no error of principle in its reasoning. The Full Court in *Mobil* noted that, where the court is not satisfied that it has sufficient information to support the orders sought and make the proposed penalty order, the court can ask the parties to provide additional evidence or information. The joint judgment in *Mobil* also rejected the proposition that parties should be limited to a joint submission on a range of pecuniary penalties, as distinct from a precise figure. The requirement that a range of pecuniary penalties be provided by the parties, rather than a precise figure, was something that Weinberg J (as he then was) previously commended in *Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd* [2002] FCA 619.

The decision

Harper JA and Hargrave AJA both agreed with Weinberg JA that *NW Frozen Foods* and *Mobil* should be rejected as bad law. Weinberg JA in his written judgment was critical of the approach endorsed by those decisions for reasons that included the following:

- There was an apparent lack of transparency with many of the negotiated outcomes. There have been concerns expressed that negotiated penalties are not adequately grounded in fact or legal principle and some reservations have been expressed as to the accuracy, and sufficiency, of statements of agreed facts which have been presented to courts.
- The imposition of a pecuniary penalty is quintessentially an exercise of judicial power. The danger is that courts, if presented with both statements of agreed facts and agreed penalties that are routinely approved, will be seen as nothing more than 'rubber stamps'.
- The imposition of a civil penalty for a statutory contravention is intended to achieve many of the same objectives – such as deterrence, denunciation and punishment – as the fixing of a fine for a criminal offence.
- *NW Frozen Foods* and *Mobil* treat the trial judge who is to impose the pecuniary penalty as though he or she is exercising an appellate role. Under the approach adopted in those cases, the judge is not arriving independently at the appropriate penalty but rather is asking whether the agreed figure falls within the range of penalties reasonably available. That is, in substance, an appellate question.
- Any agreed figure put forward by the parties should be regarded as nothing more than a submission. It should have no binding force of any kind, even if it happens to 'fall within the range'. Hargrave AJA also considered that the court's discretion should not be fettered by a principle requiring imposition of an agreed penalty if it is within the permissible range in all circumstances.

The Court of Appeal was critical of the statement of agreed facts presented, with Harper JA commenting that the statement was 'less than a desirably sound basis upon which to reach important decisions about appropriate penalties'. Harper JA also noted that courts, when assessing what is an appropriate penalty, are greatly assisted by statements of agreed facts that are sufficient to form a sound basis for such assessment.

All members of the Court found that the statement of agreed facts was inadequate. Weinberg JA and Hargrave AJA held that, in these circumstances, the trial judge should have availed himself of the process referred to in *Mobil*, which held that:

> If not satisfied that it has sufficient information to support the 'agreed' approach, the Court can request the parties to provide additional evidence or information. If that information or evidence is not provided, the Court might well decide that it should impose a different sentence or penalty from that proposed by the prosecution or regulator (as the case may be).

What are the implications of this decision?

The Court of Appeal in *Ingleby* viewed a penalty figure sought by consent as being nothing more than a submission; it is a matter for the Court to determine what is the appropriate penalty in all the circumstances. Courts should not be viewed as simply being a 'rubber stamp' for negotiated settlements between regulators and contravening parties.

The Court of Appeal also considered that, in cases where the statement of agreed facts is either inadequate or inaccurate, the Court should require the parties to provide additional evidence and information to assist the Court in determining the case.

It is difficult to reconcile the Court of Appeal's rejection of *NW Frozen Foods* and *Mobil* as bad law, given the endorsement of the process outlined in each of those decisions that a judge should adopt, and which the trial judge should have adopted, when confronted with statements of agreed facts that are inadequate to support the admissions made.

Regardless, it serves as an important reminder for regulators not to acquiesce in removing facts necessary to support the elements of a contravention when negotiating statements of agreed facts. The danger (for both the regulator and the contravenor) is that, if relevant facts are omitted, reliance solely on admissions may prove insufficient.

The decision is also another example of where concepts of criminal sentencing have been imported into the setting of civil penalties without considered analysis of the difference between the functions the 2 processes serve:

- As endorsed by the Full Court in *NW Frozen Foods,* the principal, and probably the only, object of the civil penalties is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene.
- In criminal sentencing, deterrence, general and specific, is one of the competing factors, but not the primary, nor the only, object to be served.

The decision in *Ingleby* is not, in our view, binding in other jurisdictions. As Weinberg JA notes in *Ingleby*, this case does not concern the interpretation of any statute, nor does it concern any question of common law. The principles set out in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 in relation to whether a decision of one intermediate appellate court should be binding on another do not seem to apply to this case. However, as noted by Weinberg JA, judicial comity is an important factor to consider when dealing with the application of national legislation. As such, the principles in *Ingleby* will undoubtedly be considered at some stage by other courts, including the Federal Court. To that extent, the question of whether the Full Court of the Federal Court will revisit its approach remains open.

AGS acted for the ACCC in *NW Frozen Foods* and the Minister for Industry, Tourism and Resources in *Mobil*.

For further information, please contact:

Matthew Blunn
Senior Executive Lawyer
T 02 6253 7048
matthew.blunn@ags.gov.au

Katrina Close
Senior Executive Lawyer
T 07 3360 5784
katrina.close@ags.gov.au

Matthew Garey
Senior Executive Lawyer
T 02 9581 7625
matthew.garey@ags.gov.au

David Ablett
Senior Executive Lawyer
T 03 9242 1247
david.ablett@ags.gov.au

Andrew Haslock
Senior Lawyer
T 03 9242 1477
andrew.haslock@ags.gov.au
