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Submissions on penalty ranges – High Court's view and implications for civil regulators

In *Barbaro v The Queen; Zirilli v The Queen* [2014] HCA 2; (2014) 305 ALR 323 (*Barbaro*) (12 February 2014) the High Court held that criminal prosecutors should not make submissions to the sentencing judge on the outer bounds of the available sentencing range. Does this restrict regulators from making submissions to a court about the appropriate level of pecuniary penalties?

Summary

The High Court has now held by a majority that prosecutors should not make submissions to a sentencing judge on the so-called 'available range' (namely, the upper and lower limits within which a sentence could properly be imposed).

Does this mean that regulators in civil penalty cases can no longer make submissions on appropriate penalty? The better view is that it does not. A submission on an 'appropriate penalty' is different from a submission on the 'available range'. Further, civil penalty proceedings are different in important respects from criminal sentencing proceedings, with the regulator performing a different function from that of a prosecutor.

The issues before the High Court

Mr Barbaro and Mr Zirilli appealed to the High Court from a criminal sentencing hearing. The applicants alleged that their sentencing hearings were procedurally unfair and that the sentencing judge failed to take into account a relevant consideration. The essence of the complaint was that the sentencing judge had refused to accept any submission from the prosecutor about the available range of sentences she could impose on each applicant.

Each of the applicants had pleaded guilty to serious drug trafficking charges. Before deciding to make their pleas they had had discussions with prosecutors, who had told the applicants' lawyers what they considered to be the limits of the sentencing range. The prosecutors' advice was based on the principles set out in *R v MacNeil-Brown* (2008) 20 VR 677, a Victorian Court of Appeal decision that held that a prosecutor's duty to assist the court included making submissions on the bounds of the available range of sentences.

However, at the sentencing hearing, Justice King of the Victorian Supreme Court made it clear that she did not intend to ask any party for such submissions and the prosecution did not subsequently inform the court of the range that it had previously told the applicants' lawyers.

The sentences ultimately imposed were higher than the 'available range' that the prosecutor had identified in the discussions with the applicants. The applicants conceded before the High Court that the sentences were not manifestly excessive and that the sentencing judge had not made any legal or factual error. Their sole complaint was that the absence of a submission from the Crown on the available range denied them procedural fairness.

The High Court's decision

The majority (French CJ, Hayne, Kiefel and Bell JJ) found that the trial judge's refusal to accept submissions on the upper and lower bounds of available sentences did not deny the applicants procedural fairness. Their Honours held that such a statement by a prosecutor was no more than a statement of opinion; therefore, in refusing to entertain a submission on the available range, the trial judge had not failed to take into account a relevant consideration.

In dismissing the appeal, the joint judgment discussed the role of the prosecutor in the sentencing process. Key parts of that discussion include the following:

- Identifying the 'available range' involves trying to state in advance the bounds beyond which a sentence will be manifestly inadequate or manifestly excessive (ie the range beyond which appellable error could be found under the principles in *House v The King*). However, the attempt to identify such a range before a sentence has been passed fundamentally misunderstands the kind of appellable error available under those principles – it can only be assessed *after* a given sentence has been imposed.
- In putting forward views on the available range, a prosecutor necessarily makes assumptions about the facts that the sentencing judge will find and the weight that could properly be given to them. These are matters for the sentencing judge, not the prosecutor. Accordingly, a statement by the prosecution of the bounds of an available range of sentences may lead to a blurring of the sharp distinction between the role of the judge and the role of the prosecution in the sentencing process.
- A prosecutor's statement describing the bounds of the available range is a statement of opinion. Its expression advances no proposition of law or fact that a sentencing judge may properly take into account in finding the relevant facts, deciding the applicable principles of law or applying those principles to the facts to yield the sentence to be imposed. Therefore, the prosecution is not required, and should not be permitted, to make a statement of bounds to a sentencing judge.
- The part of *R v MacNeil-Brown* that required prosecutors to make submissions about the bounds of the available range of sentences should be overruled and the practice should cease.

Gageler J also dismissed the appeal but for different reasons. His Honour found that a submission on the bounds of the available sentencing range was a submission of law, not opinion. However, his Honour considered that no unfairness had arisen from the trial judge's refusal to receive the submission.

Recent discussion of the decision

The possibility that the principles set out by the High Court in *Barbaro* may apply equally to the imposition of civil penalties has already been considered. In *Commissioner for Consumer Protection v Susilo* [2014] WASC 50 (*Susilo*) (27 February 2014) Beech J noted, but did not need to rule upon, submissions that *Barbaro* did not apply to a statement by a civil regulator on an appropriate civil penalty. However, his Honour observed that 'what was decided in *Barbaro*, including in particular whether the reasoning and result in that case applies to the process of fixing a pecuniary penalty in civil enforcement proceedings, have potentially far reaching consequences'.

In *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2014] FCA 160 (*Construction, Forestry, Mining and Energy Union*) White J, again without needing to decide, noted that *Barbaro* may require the Federal Court to review the approach taken in civil penalty cases. However, his Honour considered that earlier Full Court decisions supporting the practice of providing submissions on penalty were of considerable persuasive value and should continue to be followed in that case.

Implications for civil regulators

There is obvious scope to argue that the High Court's decision in *Barbaro* should apply equally to prevent a regulator from providing submissions on the quantum or range of a civil penalty of appropriate deterrent value. In particular, it may be argued that such a submission 'advances no proposition of law or fact which a sentencing judge may properly take into account in finding the relevant facts, deciding the applicable principles of law or applying those principles to the facts to yield the sentence to be imposed'.

Applying *Barbaro* in this way would require major changes to the way in which regulators make civil penalty submissions. Present practice and authority recognises a clear role for regulators to assist the court through submissions on the appropriate penalty:

- Since *Trade Practices Commission v CSR Ltd* (1991) ATPR 41-076 it has been recognised across most civil penalty regimes that the principal purpose of setting a penalty is to ensure specific and general deterrence and that the court's function is to set a penalty of 'appropriate deterrent value'. As a matter of course, regulators will make submissions about what penalty amount would have appropriate deterrent value.
- The Full Court has said that it will be assisted by the 'views of the specialist body set up to protect the public interest' on whether 'a proposed penalty will be sufficient to deter' particular conduct; such views are 'likely to be persuasive': see *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285 (*NW Frozen Foods*), reinforced in *Minister for Industry, Tourism and Resources v Mobil Oil Australia Ltd* (2004) ATPR 41-993 (*Mobil Oil*).
- The same line of authority recognises a strong public interest in a regulator and a respondent resolving civil penalty cases through agreement on the submissions to be put to a court about the appropriate penalty. The Federal Court encourages this practice by generally imposing the agreed penalty amount, provided always that it is satisfied that the amount is appropriate. Regulators commonly rely on this longstanding practice as a means of obtaining an effective regulatory result in an efficient way. However, respondents are less likely to agree to penalties if these joint submissions can no longer be made.

How should regulators approach Barbaro?

There are good reasons for regulators to continue to make submissions on the appropriate civil penalty, notwithstanding the decision in *Barbaro*:

- The High Court has not overturned *NW Frozen Foods* and *Mobil Oil*: the principles in those cases, which involve regulators making submissions on the appropriate civil penalty, continue to be applicable in the Federal Court.
- The practice with which the High Court was concerned was one involving submissions on the 'available range', or the 'outer bounds' of a permissible sentence. A submission on whether a particular civil penalty amount would have 'appropriate deterrent value' is a submission of a different kind. It involves the specialist regulator explaining why a proposed penalty amount would have the necessary deterrent effect within the relevant industry. It does not involve the regulator stepping into the shoes of the judge to identify the outer limits of a permissible penalty.
- The principles governing the imposition of civil penalties differ in many important respects from those involved in sentencing an offender. Likewise, the role of a civil regulator is quite different from the role of a prosecutor. Accordingly, it should not be assumed that the role and duties of the prosecutor must be applied in the same way to regulators. Rather, it is necessary to consider the particular statutory functions and powers of those regulators and the rules and practices that they are obliged to follow in pursuing civil enforcement action.

However, as the decisions in *Susilo* and *Construction, Forestry, Mining and Energy Union* show, there is likely to be ongoing discussion of these issues until they have been properly resolved by the courts. In the meantime, regulators can properly proceed on the basis that *Barbaro* does not preclude them from making submissions on what penalty would have appropriate deterrent value in a given case.

A note on the proper use of earlier cases

The majority in *Barbaro* also touched upon the question of consistency in sentencing. As there can be confusion about the proper use of earlier decisions, it is worth briefly noting the key principles to be applied.

The majority followed the earlier High Court decision of *Hili v The* Queen (2010) 242 CLR 520 in observing that, while consistency of sentencing is important, the consistency that is sought is 'consistency in the application of relevant legal principles, not numerical equivalence'. It is therefore wrong to determine a sentence by simply comparing the facts of the present case with the facts in earlier cases and making additions or subtractions from the sentences imposed in those earlier cases as though they set the available range.

The same principle applies in the civil penalty context; many Full Court decisions emphasise that penalties in earlier cases cannot dictate the penalty in a later case: see for example *NW Frozen Foods* at 295-6; *Singtel Optus v ACCC* (2012) 287 ALR 249 at [60]; *McDonald v Australian Building and Construction Commissioner* (2011) 202 IR 467 at [23]-[30]; *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 at [12]-[14], [56]-[57] and [87] and *Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union* (2008) 171 FCR 357 at [36] and [60].

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