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FIVE MINUTES ON…
The Future of Penalties in Regulatory Prosecutions in Australia

In a world of increasing regulation in all spheres of business, the risk of breaching regulations and being subject to regulatory enforcement action is increasing.

When a business is faced with a prosecution for breaching regulatory rules there are many issues that arise. This article focuses on just one of these issues – if found guilty how will the court determine what penalty to impose?

In many cases enforcement actions are by way of *criminal* prosecution rather than proceedings for a civil penalty. In the United Kingdom section 85 of *The Legal Aid, Sentencing and Punishment of Offenders Act 2012* came into force in March 2015, removing the limits on fines that Magistrates' Courts can impose for serious regulatory offences including, amongst other things, environmental, food, health and safety, and licensing offences. This article explores how this differs from the current position in Australia, current trends in sentencing in Australia, and whether the UK position might be an indicator of things to come.

If a company or person is found by a court to be guilty of a regulatory offence, the court will impose a sentence, most commonly a fine. Currently, when imposing the fine the court is confined by:

- maximum penalties (and in some cases minimum penalties) set out in the relevant legislation (for example the *Mines Safety and Inspection Act 1994* (WA) with fines ranging up to AU$500,000 for a first time offence committed by a corporation and the *Environmental Protection Act 1986* (WA) with fines ranging up to AU$1million for a body corporate); and
- general principles of sentencing (discussed further below).

Maximum penalties are traditionally specified by reference to "penalty units" or fixed monetary amounts. However, this is not always the case. In some instances the *Competition and Consumer Act 2010* (**CCA**) sets maximums by reference to the *greater* of either fixed amounts, multiples of the value of the benefits obtained or percentages of annual turnover. Further, in some cases where the contravention occurs over an extended period of time, the imposition of "daily" penalties or penalties per contravention can effectively remove a meaningful cap.

In recent years that have been some emerging trends in penalties for regulatory prosecutions.

Higher Maximum Penalties

There are signs that there is a trend in Australia towards the legislature specifying harsher penalties in regulatory prosecutions.

In 2014 in NSW some of the maximum penalties under the *Protection of the Environment Operations Act 1997* (NSW) were increased tenfold.

Some offences carry a maximum penalty of AU$2 million for a corporation where the offence has been committed negligently, which increases to AU$5 million if the offence is committed intentionally. These are significant fines even for large corporations.

Another example of increasing penalties is the CCA which came into effect on 1 January 2011 (replacing the *Trade Practices Act 1974*). It came with a significant increase in maximum penalties along with a range of new remedies and enforcement actions. The ACCC Chairman Rod Sims announced in February of this year that the ACCC would continue to advocate for harsher financial penalties, to act as a real deterrent to companies.

The ACCC as a regulator has sought, and the court has imposed, significant penalties. In April 2015 Coles Supermarket was fined AU$2.5 million in the Federal Court and ordered to pay costs after breaching the CCA by falsely advertising bread products as "freshly baked" and "baked today". The ACCC had pushed for a penalty of AU$5 million in what the ACCC Chairman described as a wish to "really get a deterrence message out." He went on to state that concerns around weak penalties were valid and would be discussed in the upcoming review of the Australian Consumer Law.

As one of the rationales behind the amendment in the UK was a similar concern to allow the imposition of "more proportionate" (i.e. higher) fines on wealthy and corporate offenders, this may be a mechanism considered by Australian parliament in the future to enable harsher sentences.

Move Away from Agreed Penalties

A further development by the courts in Australia is the abandonment of the practice of the court endorsing "agreed penalties" negotiated between the regulator and offender.

The trend away was made clear in *ASIC v Ingleby* [2013] VSCA 49. In that case ASIC and Mr Ingleby "agreed" to civil penalties of AU$40,000 and orders disqualifying him from managing a company for 15 months. However the trial judge imposed a lesser penalty and, on appeal from ASIC, the Court of Appeal criticised the practice and stated that the court should not "rubber stamp" such agreements. The court emphasised that a penalty regime is an exercise of judicial power by the court.

This trend was cemented by the High Court decision in *Barbaro v R* (2014) 305 ALR 323, where the High Court went even further and held that the common practice of the prosecution even making submissions to the court on the sentencing range should not be permitted. Recently in *FWBC v CFMEU* (2015) FCAFC 59 the Full Court of the Federal Court of Australia applied *Barbaro* and held that this principle also applies in civil penalty proceedings (it remains to be seen if this will be appealed).

The Future – Consequences if Maximum Penalties are Removed?

If Australia went further and, like the UK, removed the limit on penalties, what would govern the scope of penalties?

The answer is the range would be limited only by any legislative guidance and the application of general sentencing principles which the courts apply every day. In Western Australia, the *Sentencing Act 2005* (WA) provides some guidance and potential limits on the amount of the fine to be imposed. Section 53 provides that in deciding the amount of the fine the court must, as far as is practicable, take into account the means of the offender and the extent to which payment of the fine will burden them.

Currently the courts also apply sentencing principles to determine the appropriate penalty relatively to the maximum. Some of the relevant principles are:

- the sentence must be commensurate with the offence, taking into account the seriousness of the offence itself, the severity of the breach, the circumstances and any aggravating or mitigating factors, whether the event demonstrates a course of conduct or whether it is a single event, the nature of the risk and the serious harm that might flow from the breach, and whether measures have taken to prevent a recurrence;
- there must be an appropriate level of consistency with other fines;
- a need for general deterrence and/or personal deterrence;
- reductions if there was an early plea of guilty;
- prior record; and
- "good character" sometimes demonstrated by its actions as a corporate citizen.

An example of the application of such sentencing guidelines is *BHP Billiton Iron Ore Pty Ltd v Capon* [2014] WASC 267 (S). This is a case that involved a prosecution under section 9A(3) of the *Mines Safety and Inspection Act 1994* (WA) for an incident that occurred on 29 June 2008 at the Nelson Point Rail Operation Locomotive Overhaul Workshop, in Port Hedland. A person was fatally injured whilst attempting to repair a non-mobile scissor lift hoist alone, when the platform dropped causing fatal crush injuries. The maximum penalty was AU$400,000. The Supreme Court of Western Australia imposed a fine of AU$60,000. The fine was reduced after the court concluded that BHP Billiton had taken "exemplary steps" since the incident regarding safety, and that it had demonstrated its behaviour as a "good corporate citizen", both of which are mitigating factors under the sentencing guidelines.

The real difference if there was no maximum sentence is that if the court considered it appropriate to do so based on the sentencing principles above, it could impose much higher fines. Further, unless additional guidelines were developed, the court would lack an easily identifiable starting point for determining penalties, which would seem to increase the difficulty of the sentencing task. It is notable that in the UK new guidelines for sentencing health and safety, corporate manslaughter and food safety offences are being developed (with final guidelines to be published later this year). The draft guidelines provide information on how a court should come up with a starting point and, in many instances, provide numerical starting figures based on the size of the organisation, the assessment of culpability and the level of harm. The development of such guidelines would be essential to enable courts to apply an appropriate level of consistency in sentencing and to enable corporations to properly understand risks and likely ranges of liabilities.

Conclusion

With the apparent perception amongst some regulators and the public that the penalties for some regulatory offences are inadequate to provide sufficient deterrence for the wealthy, Australian parliaments are likely to look for new ways to provide the courts with flexibility to impose harsher penalties. One mechanism which has already been implemented in Australia is the linking of maximum fines to corporate turnover. It will be interesting to see whether in light of the change of approach in the UK, the Australian parliament will begin to consider the removal of maximum penalties altogether.

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