Dan Star QC Federal Court Judgments

NOVEMBER

COMPETITION LAW | PRACTICE & PROCEDURE

Competition and Consumer Act 2010 (Cth) – Challenges on appeal to inferences drawn and not drawn by the primary judge

In *Australian Competition and Consumer Commission v Australian Egg Corporation Ltd* [2017] FCAFC 152 (23 September 2017) the Full Federal Court dimissed the ACCC's appeal from the primary judge's dismissal of the proceeding (see [2016] FCA 69).

The ACCC's case was that the respondents attempted to induce egg producers to contravene s 44ZZRJ of the *Competition and Consumer Act 2010* (Cth) by making an arrangement or arriving at an understanding which contained a cartel provision. The ACCC alleged that the respondents engaged in conduct which involved encouraging egg producers to act in a coordinated and consolidated fashion and, thereby, to enter into an arrangement or arrive at an understanding containing a provision to limit the production for supply of eggs in Australia.

There was no challenge to facts found by the trial judge and the appeal largely related to inferences which the trial judge drew or did not draw from those primary facts. The Full Court (Besanko, Foster and Yates JJ) discussed the key authorities on the scope of the Full Court's review in an appeal in such a case (at [126]-[131]).

The Full Court rejected all of the ACCC's arguments on the appeal.

COSTS

Applications for indemnity costs – Where parties failed to notify Court prior to judgment being reserved that alternative costs orders might be sought

In *Thomas v Commissioner of Taxation (No 2)* [2017] FCAFC 144 (18 September 2017) the Court rejected a taxpayer's application to vary costs orders made after the judgment was given in four separate appeals.

The taxpayer was successful in two of the appeals and, when giving judgment, the Court ordered that the Commissioner pay the taxpayer's costs in those appeals. The taxpayer later sought to vary that order with an indemnity costs orders based on previous offers of compromise. At the hearing of the appeals, no separate

debate was flagged by the taxpayers that any further submissions would need to be made about costs.

The Full Court (Dowsett, Perram and Pagone JJ) referred to clear statements and authorities supporting the principle that if a departure from the usual approach to costs is to be urged this should be flagged with the Court before judgment is reserved (at [4]-[5]).

Upon considering the specific basis on which indemnity costs was sought, the Full Court held there was no basis for interfering with the costs order already made (at [26]).

COSTS

Costs under s 570 of the Fair Work Act 2009 (Cth)

In *Australian Building and Construction Commissioner v ADCO Constructions Pty Ltd (No 3)* [2017] FCA 1090 (15 September 2017) the respondent sought a costs order in its favour against the Commissioner.

In an earlier judgment, the Court (Collier J) dismissed the Commissioner's case seeking orders that the respondent contravened s 354(1) of the *Fair Work Act 2009* (Cth) (FW Act) by discriminating against a particular subcontractor, Surf City Cranes Pty Ltd (SCC), because alleged employees of SCC were not covered by an enterprise agreement which also covered the Construction, Forestry, Mining and Energy Union. Relevantly, the Court found that SCC was not the employer of the employees for the purposes of s 354(1) of the FW Act.

Proceedings under the FW Act are generally a 'no costs' jurisdiction. The respondent sought costs under s 570(2)(a) and (b) of the FW Act. Section 570(2)(a) and (b) of the FW Act provides that a party may be ordered to pay costs only if: "(a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or (b) the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs ... "

Collier J referred at [11] to and applied the principles summarised by the *Full Court in Australian Workers' Union v Leighton Contractors Pty Ltd (No 2)* [2013] FCAFC 23; (2013) 232 FCR 428 at [7]-[8]. Justice Collier made no orders for costs on the basis that the respondents had not substantiated its claims for costs under s 570(2)(a) or (b) of the FW Act.

EVIDENCE

Whether privilege against exposure to penalty waived by lawyer acting with ostensible authority

In *Fair Work Ombudsman v Hu* [2017] FCA 1081 (14 September 2017) the Court determined an interlocutory application seeking orders by a natural person respondent and his company (the respondents) vacating orders requiring them to file and serve affidavits and submissions prior to trial and an order excusing them from filing affidavits and any amended defence until the close of the applicant's case.

The proceeding was a penalty proceeding in which the Ombudsman alleged the respondents contravened s 45 of the *Fair Work Act 2009* (Cth) whch provides that a person must not contravene a modern award. The Ombudsman alleged that the respondents were accessories to under-payments of workers who picked mushrooms.

The respondents consented to orders that they file and serve affidavits and submissions by certain dates prior to the commencement of the trial. The interlocutory application sought to vacate these orders based on the 'penalty privilege'. The Ombudsman submitted the natural person had waived that privilege based on certain admissions in a defence that had been filed and the consenting to orders for the filing and service of affidavits prior to trial. The respondents argued that the privilege could not be waived by a solicitor without instructions to do so and no such instructions were given.

The Court (Rangiah J) accepted that penalty privilege, like other forms of privilege such as the legal professional privilege and privilege against self-incrimination, can be waived expressly or impliedly (at [18]). The question before the Court was whether the natural person respondent waived privilege by doing acts inconsistent with the maintenance of the privilege.

Justice Rangiah held at [22] that the individual had waived penalty privilege in respect of the limited admissions and positive assertions of fact made in his filed defence. However, there was no indication of any intention to waive privilege in respect of any other facts or matters. The waiver went no further than the facts and matters admitted and asserted in the defence.

Further, the Court rejected the Ombudsman's submission that the natural person had more generally waived his penalty privilege by consenting, through his solicitor, to

orders that he provide affidavits prior to trial. Privilege may be waived by the actions of a lawyer with the ostensive authority of the person entitled to claim privilege (at [27]). However, here the natural person had not yet filed and served any affidavits. On the face of it, the consent orders were merely an indication of his intention to waive privilege in the future (at [28]).

The Ombudsman contended that the natural person waived privilege by his entry into a binding agreement to provide affidavits prior to the trial, relying upon *Birrell v Australian National Airlines Commission* (1984) 1 FCR 526 at 531-532 per Gray J. Doubt about whether self-incrimination privilege can be waived by contract was expressed by *Finkelstein J in ASIC v Mining Projects Pty Ltd* (2007) 164 FCR 32; [2007] FCA 1620 at [18]-[21]. Distinguishing the position in Birrell, Rangiah J held at [33] that the Ombudsman provided no consideration for the natural person respondent's consent to provide his affidavits prior to trial. Therefore, the agreement to do so was not binding on the natural person respondent and the penalty privilege was not waived by entering into a contract binding him to provide his affidavits prior to trial. The Court made the orders sought by the respondents.

PRACTICE AND PROCEDURE

Application to reopen a case after judgment reserved but not delivered

In *FYD Investments Pty Ltd v Promptair Pty Ltd* [2017] FCA 1097 (15 September 2017) the Court (White J) considered an application to reopen a hearing after judgment had been reserved but before it had been delivered.

The proceeding concerned contractual claims and misleading or deceptive conduct. The trial took placed for five days concluding on 30 March 2017, at which time judgment was reserved. On 27 June 2017, the applicants filed an interlocutory application seeking leave to reopen their case in order to adduce further limited evidence. The need to advance additional evidence and to advance certain claims were attributed to oversights by the applicants' legal reprsentatives at the trial (at [10] and [19]).

Justice White referred to the settled principles on which the Court acts in deciding whether to grant leave to reopen a case (at [30]-[31]). The overriding principle is the interests of the administration of justice having regard to all the circumstances of the case.

Applying those principles, while conscious that the Court ought not readily grant an application to reopen following the reservation of judgment, White J exercised his discretion to permit the applicants to reopen their case (at [45]).

DECEMBER

REGULATORY LAW – CIVIL PENALTIES

Joint and several liability for a penalty – Course of conduct principle – Market harm/financial benefit – Application by the Full Court itself of the principles for the imposition of a penalty

Pecuniary penalties for contraventions of statutory provisions are commonplace in Commonwealth (and state) legislation. Within the Federal Court's jurisdiction there is substantial enforcement litigation resulting in pecuniary penalties under the *Competition and Consumer Act 2010 (Cth) (CCA), the Corporations Act 2001* (Cth), *the Fair Work Act 2009* (Cth) (FWA) and other legislation (such as the Environment Protection and Biodiversity Conservation Act 1999 (Cth)). The applicable principles for the imposition of civil penalties are well-established (in particular, the oft-cited 'French factors' to be applied to determining an appropriate penalty listed by French J as a Federal Court judge in *Trade Practices Commission v CSR Ltd* [1991] ATPR 41-076 at 52,152-52,153). However, the High Court has had some important things to say in recent years in this area of the law, such as about agreed penalties (*Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482) and the importance of deterrence as the purpose of civil penalties (*Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 at [65]-[66]). The High Court is currently reserved on the question of whether the Federal Court has power to order a party not to indemnify another party in respect of a pecuniary penalty order made under s 546 of the FWA (*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union & Anor*, M65/2017, reserved 17/10/2017).

Australian Competition and Consumer Commission v Cement Australia Pty Ltd [2017] FCAFC 59 (5 October 2017) is a recent Full Court judgment (Middleton, Beach and Moshinsky JJ) that is likely to be often cited on some discrete principles relevant to imposition of pecuniary penalties under s 76 of the CCA. It may also have relevance to other statutes providing for pecuniary penalties (allowing for any bespoke differences in the other legislative regimes compared to the CCA).

The Full Court upheld the ACCC's appeal, and dismissed a cross-appeal, against the penalties that the trial judge imposed on Cement Australia Pty Ltd (Cement Australia) and its related companies for making and giving effect to anti-competitive agreements.

The facts were complex and detailed and, given the focus of this case note is on penalties, it will suffice to give a basic summary. The respondents were related corporate entities involved in the manufacture and distribution of cement and concrete materials in Queensland. The proceedings concerned decisions to enter into or amend contracts with power station operators to acquire their supply of flyash. Flyash, a by-product of the burning of fossil fuels, was produced by the power stations. If it was of sufficient quality, it could be used as a partial substitute for cement in the production of concrete. The trial judge held that the relevant contracts with the power stations contained provisions that had the purpose, or had or were likely to have had the effect, of substantially lessening competition in the relevant markets. It was held that, by making each of those contracts, Pozzolanic Industries Pty Ltd (PIPL), a company related to Cement Australia, had committed separate contraventions of s 45(2)(a)(ii) of the then *Trade Practices Act 1974* (Cth) (TPA) and that, by giving effect to those provisions in certain instances, PIPL and other respondents had contravened s 45(2)(b)(ii) of the TPA. Some respondents were also found to have been knowingly concerned in the contraventions. The trial judge ultimately imposed penalties totalling $17.1m against Cement Australia and companies in its group. Some of the penalties were imposed separately and some were imposed jointly and severally on the companies in the Cement Australia group.

The specific issues in the appeal were at [10]:

A. "whether the primary judge erred in law in assessing and imposing a single joint and several penalty on two respondents;

B. whether the making of and giving effect to the provisions of each of the contravening contracts ought to be separately penalised or treated as a single course of conduct;

C. whether the primary judge erred in his treatment of issues of market harm and financial benefits; and

D. whether the penalties imposed by the primary judge were manifestly inadequate as they were not of appropriate deterrent value."

On the 'joint and several issue', the Full Court held that s 76(1) of the CCA does not allow for the imposition of a single joint and several penalty against multiple respondents (at [376]). This conclusion was reached through "an orthodox application of statutory construction" (at [377]). The Full Court also said at [385] that the general principles governing the assessment and imposition of penalties also supported their interpretation. "The deterrent effect of a penalty at a personal level is potentially lessened if one party is able to avoid paying any portion of that penalty at all. This is not necessarily ameliorated by the respondents' suggestion that deterrence would be sufficiently achieved at the level of the corporate group." Accordingly, the Full Court held that the trial judge erred because he was not empowered under s 76(1) of the CCA to fix a joint and several penalty (at [391]).

The next issue in the appeal concerned the course of conduct principle, which seeks to ensure that an offender or contravenor is not punished or penalised twice for what is essentially the same conduct (at [393]; see also [421]). In the appeal there was not a dispute about the nature of the course of conduct principle. It was a dispute about whether the facts of the case supported the application (or non-application) of the principle in relation to certain contracts. Relevantly, the trial judge regarded the making of and giving effect to one particular contract as one course of conduct, however, he did not treat the making of and giving effect to the other contracts as single courses of conduct. The Full Court at [425]) was "mindful that the application of the course of conduct principle requires an evaluative judgment in respect of the relevant circumstances." (Their Honours held that the trial judge erred where he regared the making of, and giving effect to, a particular contract as constituting a single course of conduct stating at [431]: "We consider that the course of conduct principle must be informed by the particular legislative provisions relevant to these proceedings. In particular, we consider that weight must be given to the fact that the legislature has deliberately and explicitly created separate contraventions for each of the making of, and giving effect to, a contract, arrangement or understanding that restricts dealings or affects competition: ss 45(2)(a) and 45(2)(b)."

The question of market harm and the expected and actual benefits said to be causally connected to the contravening conduct was the next issue considered by the Full Court (at [443]-[565]). The ACCC's grounds of appeal on these issues were fully rejected.

The final issue in the appeal was the quantum of penalties to be imposed (in light of the ACCC's success on certain grounds) and whether the penalties imposed by the trial judge were manifestly inadequate. At trial and on appeal, there was a 'canyon' between the parties. At trial the ACCC contended for total penalties of $97m while the respondents submitted appropriate penalties were in the order of $4m (at [316]). This gulf between the parties hardly narrowed in the appeal (at [575]-[577]). The Full

Court decided for itself the penalties to be imposed and ordered total penalties of $20.6m (that is, an increase compared to the trial judge's total penalties of $17.1m).

JANUARY/FEBRUARY

CONSTITUTIONAL LAW/DEFAMATION PRACTICE AND PROCEDURE

Trial by jury in the Federal Court?

Section 39 of the *Federal Court of Australia Act 1976* (Cth) (Federal Court Act) provides that civil trials are to be without a jury "unless the Court or a judge otherwise orders." Section 40 of the Federal Court Act is a broad discretionary power of the Court in civil proceedings to direct trial of issues with a jury.

In *Wing v Fairfax Media Publications Pty Ltd* [2017] FCAFC 191 (27 Novembr 2017), the Full Court determined an interlocutory application seeking an order pursuant to s 40 of the *Federal Court Act* that, to the extent permitted by law, the proceeding be heard by a jury. This was in relation to the applicant's claim for damages for defamation under the *Defamation Act 2005* (NSW) (the NSW Defamation Act). The Court had jurisdiction because the applicant alleges that the matter complained of was published in (among other places) the *Australian Capital Territory: Crosby and Another v Kelly* (2012) 203 FCR 451.

There was a constitutional law issue before the Full Court by reason of an alleged inconsistency between ss 21 and 22 of the the *NSW Defamation Act* and ss 39 and 40 of the *Federal Court Act* for the purposes of s 109 of the Constitution (Cth). The parties agreed (as did the Court) that ss 21 and 22 of the *NSW Defamation Act* were inconsistent with ss 39 and 40 of the *Federal Court Act* within s 109 of the Constitution (at [21] and [23], Allsop CJ and Besanko J). The point on which the parties disagreed was whether the Court in exercising the discretion under s 40 of the *Federal Court Act* may have regard to ss 21 and 22 of the NSW Defamation Act. The Full Court held ss 21 and 22 of the NSW *Defamation Act* did not apply to the proceeding and the sections were not relevant to the exercise of the discretion in s 40 of the *Federal Court Act* (at [30]-[34], Allsop CJ and Besanko J, and [49], Rares J).

The Full Court also dismissed the respondents' interlocutory application under s 40 of the *Federal Court Act* seeking an order that the proceeding be heard by a jury (at [46], Allsop CJ and Besanko J, and [66], Rares J). In doing so, the Full Court considered the authorities and principles relevant to exercising the discretion to order a trial by jury in the Federal Court (at [36]-[44], Allsop CJ and Besanko J, and [51]-[60], Rares J).

Justice Rares noted at [59] that "in the forty years of the existence of ss 39 and 40 in the *Federal Court Act*, Ra 183 FCR 148 is the only occasion on which a judge has ordered a jury trial" :.. *Ra v Nationwide News Pty Ltd* (2009) 182 FCR 148 was in fact a decision of Rares J. In Wing, Rares J agreed Allsop CJ and Besanko J with that his view of the certain factors in *Ra* was erroneous (at [40]-[42], Allsop CJ and Besanko J, and [49]-[50] Rares J).

EQUITY/NATIVE TITLE

Fiduciary duties of persons constituting an applicant for bringing a native title determination application

In *Gebadi v Woosup* (No 2) [2017] FCA 1467 (7 December 2017) the Court considered fiduciary obligations that arise in equity in the context of statutory arrangements under the *Native Title Act 1993* (Cth) (the Act).

The applicants were persons who brought proceedings in a representative capacity on behalf of the Ankamuthi People. The respondents (Mr Woosup and Ms Tamwoy) were formerly two of thirteen persons authorised by the Ankamuthi native title claim group to prosecute the native title determination application under s 61 of the Act.

The main issues in the case were summarised by Greenwood J at [52]: " ... the central contention in these proceedings is that Mr Woosup and Ms Tamwoy owed fiduciary obligations to the Ankamuthi native title claim group when acting as applicant and that they failed to discharge those obligations. In the case of Mr Woosup, it is said that he has taken for his own benefit, benefits payable under the Gulf agreement for and on behalf of the *Ankamuthi* native title claim group. The first question is whether Mr Woosup and/or Ms Tamwoy owe fiduciary obligations to the *Ankamuthi* native title claim group, that is to say, are they in a fiduciary relationship with that group? The second question is, if fiduciary obligations are owed by either of them to the claim group, what are the obligations so owed? The third question is, have either of them failed to discharge those obligations? ... "

As to whether and how fiduciary obligations arose, Greenwood J held at [96] that the applicable principles " ... are the essential principles which determine whether a person has accepted or assumed fiduciary obligations to another. The context in the case of Mr Woosup and Ms Tamwoy, in accepting and undertaking to act as persons constituting *the applicant*, is the *relevant context* but the *principles* to be applied in determining whether they owed fiduciary obligations to the native title claim group are the same principles determined in our jurisprudence for deciding whether a person has, in all the circumstances, assumed particular fiduciary obligations to another." At

[97]-[98], Greenwood J relied on the extensive discussion of principles on whether particular parties owed fiduciary obligations to another from his judgment in the Full Court (with whom White J agreed) in *Oliver Hume South East Queensland Pty Ltd v Investa Residential Group Pty Ltd* [2017] FCAFC 141 at [236]-[269].

The Court held that Mr Woosup and Ms Tamwoy owed fiduciary obligations to members of the *Ankamuthi* native title claim group (at [101]-[104]) and that they had breached those obligations (at [154]). The Court granted declaratory relief and also made orders for the respondents to pay monies into court of the financial benefits they derived in breach of their fiduciary obligations (at [163]-[169]).

INDUSTRIAL LAW

Freedom of association – Contraventions of ss 346, 348 and 349 of the Fair Work Act 2009 (Cth)

In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Quest Apartments Case)* [2017] FCA 1398 (30 Novembr 2017) the Court found contraventions of ss 349, 346 and 348 of the *Fair Work Act 2009* (Cth) (FW Act) by the respondent union and Mr Farrugia, the union's representative and a shop steward. The contraventions arose from threats made and action taken by Mr Farrugia to prevent a worker from working on a construction site because he did not pay membership fees to the CFMEU.

Following a contested trial, the Court found that the contraventions on 17 March 2014 by the shop steward were:

A. a contravention of s 349 of the FW Act by knowingly making a false representation to two workers that each was obliged to engage in industrial activity by paying fees to the CFMEU in order to work on the site (at [53] and [58])

B. a contravention of s 348 of the FW Act by threatening to take action against a worker, by threatening to prevent him from working on the site if he did not pay fees to the CFMEU, with intent to coerce him to engage in industrial activity by paying the fees to the CFMEU (at [72])

C. a contravention of s 346(b) of the FW Act by taking adverse action against a worker, that is, prejudicing him in his employment or in relation to his performance of a contract or services, by threatening to prevent him from working on the site, because he had engaged in industrial activity by not paying the fees to the CFMEU (at [87] and [89]-[90]).

There were also contraventions of s 348 (at [74]-[75]) and s 346(b) (at [87]-[90]) of the FW Act by the shop steward on 31 March 2014. The contravening conduct on 31 March 2014 was constituted by the shop steward taking action against the worker. The union was found to be liable for each of the contraventions by the shop steward pursuant to ss 363 and 793 of the FW Act (at [92]-[93]). The Court will have a further hearing on 5 February 2018 on final relief (specifically declarations and penalties).

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