Kluwer Competition Law Blog

Corrs in Brief: Where to now for agreed penalty outcomes with the ACCC in Australia?

Ayman Guirguis (K&L Gates) · Monday, June 22nd, 2015

The Full Court of the Federal Court has just handed down a very important decision in the Fair Work Inspectorate v CFMEU.

The decision has very wide ramification across all industries. The Court held that in civil prosecutions, the regulator and respondent are not permitted to make joint submissions to the Court about the appropriate level of penalties that the Court may order. The Court held that this is only the remit of the judge. The decision follows a decision by the High Court in Barbaro v The Queen where the High Court came to the same view in the context of criminal cases.

The Court's decision overturns more than twenty years of precedent and practice where regulators and respondents agreed to resolve prosecutions, including the penalties to be imposed, and made joint submissions to the Courts – which Courts had generally so ordered. This has been the practice adopted by many regulators including the ACCC, ASIC and in this case the Fair Work and Building Inspectorate. In fact in the case of the ACCC, it has published it Immunity and Cooperation Policy for Cartel (and other) Conduct to reflect its practices.

The Commonwealth intervened in this case, with the ACCC, ASIC, ATO and the Fair Work Ombudsman giving evidence/making submissions that their capacity to make joint submissions as to penalty is critical to their capacity to conduct effective negotiations and efficiently resolving proceedings and that a majority of respondents would not agree to resolve matters without being in a position to agree penalties and make joint submissions to the Court.

The Court's rejection of these submissions means that the level of comfort or certainty about the likely quantum of penalty in proceedings by regulators such as the ACCC against a party prepared to cooperate and obtain leniency as part of resolving the proceedings will, in the foreseeable future, be non-existent.

Our colleagues in the Competition Group and Litigation Group have prepared a Corrs in Brief article about the implications of the judgment. Please click attached below for more information.

Corrs In Brief – The CFMEU Case – May 2015

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