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Conduct of Federal OH&S proceedings and issues related to penalty are clearer following recent decision

Following the recent decision of his Honour, Justice Flick of the Federal Court of Australia in *Comcare v Post Logistics Australasia Pty Ltd* [2008] FCA 1987 (**Post decision**), the procedure for civil penalty proceedings in the Federal occupational health and safety (**OH&S**) jurisdiction and the factors that the Court will take in to account when determining whether to impose a civil penalty have become more clear.

Procedural issues

In what is only the third decision for a breach of the obligation under section 16(1) of the Occupational Health and Safety Act 1991 (Cth) (**Act**), namely the obligation for employers or principals to take all reasonable steps to protect the health and safety of its employees and contractors, the following procedural points emerged:

- A respondent will not necessarily be required to file a defence. The parties may ask the Court for directions allowing them to file a statement of agreed facts, in which certain admissions would be made, thereby obviating the necessity to file a defence.
- If agreement is reached with Comcare about the content of a statement of agreed facts, Respondents should be careful to ensure that the statement of claim properly reflects any admissions made. This may require Comcare to file an amended statement of claim.
- The parties may agree to a penalty. The considerations that the Court will take into account when assessing the appropriateness of any agreed penalty are set out below.
- The amount of evidence that it is necessary to lead in a proceeding will be significantly reduced if the parties can reach agreement about a penalty. However, the parties should be prepared to make extensive submissions about why any agreed penalty is appropriate in the circumstances.

- It may assist the Court for the parties to provide to it an agreed form of wording for the declaration that the Court is required to issue under Schedule 2 of the Act where it finds or a party admits to a breach of section 16(1).

Although not expressly dealt with as part of the Post decision, it is also important to take account of the different procedural requirements that exist between proceedings in the Federal Court under the Act and those that arise in State and Territory OH &S proceedings, in respect of which the latter are “criminal” in nature. Under the Act, when proceedings are commenced, Comcare must comply with the Federal Court Act of Australia and the Federal Court Rules, which have a significant impact on the formal nature of pleadings and the manner and method of presenting evidence. In particular, Comcare will be subject to strict obligations to fully plead and particularise the allegations made against the Respondent, much more so than practitioners will be used to in equivalent State and Territory jurisdictions. This process will place a higher burden on Comcare, as opposed to its State counterparts, to precisely plead at the commencement of proceedings the breach and all relevant particulars leading to the alleged breach. This is one area in which a Respondent can place pressure on Comcare to outline its case prior to it having to file its Defence or take any further steps in the proceedings.

This same issue also raises questions over the role of Comcare’s investigator’s report and what status this will have in any proceedings. To date, this has not been an issue that has arisen for determination, including in the context of whether that report can be relied upon for the purposes of providing particulars, that is, whether it is sufficient in the pleading for Comcare to refer back to its investigator’s report. It is suggested that it should not be, but the Court is yet to provide a determination on this point.

Finally, in the context of the above, the Court has not addressed how and the extent to which Comcare will be subject to obligations as a “prosecutor” and what impact any such obligation will have on the process including, in particular, obligations in respect of discovery and the production of documents.

The principles that will be applied where a penalty is to be imposed

Usefully, the Post decision sets out the factors that the Court will take in to account when imposing a penalty. In doing so, his Honour had regard to the principles that guide the issue in a number of other jurisdictions in which civil penalties are available, including the trade practices, therapeutic goods and the New South Wales OH&S jurisdictions. Specifically, his Honour stated that the Court will have regard to factors including the following:

- the nature and extent of the contravening conduct;
- the amount of loss or damage caused;
- the circumstances in which the conduct took place.
- the size of the contravening company;
- the degree of power it has, as evidenced by its market share and ease of entry into the market;

- the deliberateness of the contravention and the period over which it extended;
- whether the contravention arose out of the conduct of senior management or at a lower level;
- whether the company has a corporate culture conducive to compliance with the Act, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention; and
- whether the company has shown a disposition to co-operate with the authorities responsible for the enforcement of the Act in relation to the contravention.

Having said this, his Honour indicated that the overriding duty of the Court is still to consider a penalty in light of the terms of the OH&S Act and that these considerations do not fetter the discretion of the Court.

His Honour also made it clear that the Court should not fix a penalty simply by reference to penalties imposed in other cases. In particular, he held that it would be inappropriate to regard the penalty of \$198,000.00 that was imposed in *Comcare v Commonwealth* [2007] FCA 662, the first decision under section 16(1) of the Act, as setting a benchmark for the imposition of penalties in future Federal OH&S cases. Rather, it is important that each case is considered “*on its own facts*”.

Further, the Post decision confirms that the parties can agree on a penalty but that, even if the penalty is agreed, the Court must first satisfy itself that any figure proposed by agreement between the parties is appropriate in the circumstances of the breach of the Act. In this context, his Honour noted that it is not the Court’s responsibility to decide what figure it would independently propose as being an appropriate civil penalty and assess the agreed sum in this light. Rather, the Court ought to consider whether the agreed sum is within a range of what the Court considers to be appropriate. If the agreed sum falls within that range, it ought not to be disrupted by the Court. The rationale for this being that there is a public interest in promoting settlement of litigation and the length of proceedings can be radically shortened where the parties rely upon a statement of agreed facts and joint submissions as to penalty.

His Honour also stated that, in his view, prior incidents resulting in criminal prosecutions, albeit in a different jurisdiction are relevant considerations to the assessment of an appropriate penalty.

Benefit of agreement on facts and penalty

If an employer elects to admit certain breaches of the Act, there is a clear benefit in reaching agreement with Comcare about not only the content of an agreed statement of facts but also the quantum of the penalty. By reaching such agreement, the legal costs associated with civil penalty OH&S proceedings can be reduced quite substantially. Further, provided that the proposed penalty is within a permissible range, some degree of control over the penalty is retained and there is a prospect that a lesser penalty will be imposed than where it is left entirely to the discretion of the Court.