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AUSTRALIAN COURTS SPLIT ON APPROACH TO APPROVAL OF CIVIL PENALTY SETTLEMENTS

The Victorian Court of Appeal in *Australian Securities and Investments Commission (ASIC) v Ingleby* [2013] VSCA 49 raised concerns that the current approach to court approval of civil penalty settlements, as set out in two Full Federal Court of Australia decisions, fettered the court's discretion, reduced the court to a "rubber stamp", and compromised the separation of powers.

Civil penalty proceedings brought by various Australian regulators are commonly resolved by way of negotiated settlement. However, such settlements must be approved by the court. For example, in the corporate and securities law sphere, a breach of directors duties (as was the case in *Ingleby*), insolvent trading, continuous disclosure, or insider trading provisions that ASIC pursues through civil penalties are subject to court approval by section 1317G of the Corporations Act 2001 (Cth). Similarly, in the competition law area, the Australian Competition and Consumer Commission ("ACCC") must get court approval pursuant to section 76 of the Competition and Consumer Act 2011 (Cth) for civil penalty settlements involving misconduct such as cartels, misuse of market power and resale price maintenance.

The usual practice is that the regulator and defendant reach a settlement and then approach the court with an agreed statement of facts and an agreed penalty. The court is then asked to approve the settlement and, in particular, the agreed penalty by way of formal orders.

The Federal Court position on the court's role is set out in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285, 141 ALR 640 and *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72. In NW Frozen Foods, the Full Federal Court endorsed the approach of an agreed statement of facts and joint submissions as to the appropriate level of penalty. More controversially, in the eyes of the Victorian Court of Appeal, *NW Frozen Foods* also states:[1]

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> A proper figure is one within the permissible range in all the circumstances. The Court will not depart from an agreed figure merely because it might otherwise have been disposed to select some other figure, or except in a clear case.

In *Mobil Oil*, the Full Federal Court found no error of principle in the approach set out in *NW Frozen Foods*. It endorsed the need for the court to exercise its own judgment. However, a suggestion that a range of penalties be put forward instead of a precise figure was dismissed as less helpful.[2]

The Victorian Court of Appeal criticized the approach in *Mobil Oil* and *NW Frozen Foods*. Justice Weinberg explained that under that approach:[3]

> the judge is not independently arriving at the appropriate penalty, but rather asking an entirely different question—whether the agreed figure falls within the range of penalties reasonably available…. If the judge is unable to say that the agreed penalty is 'wholly outside' the range, he or she is bound to impose that penalty irrespective of whether it is considered appropriate.

Acting Justice of Appeal Hargrave added that the "court's discretion in such cases should not, however, be fettered by a principle requiring imposition of the agreed penalty if it is within 'the permissible range' in all the circumstances".[4]

Justice Harper explained that to ensure that the separation of powers operates properly, it is the court that exercises the power of punishment for breach of the law and regulators like ASIC that exercise investigative and prosecutorial functions. Courts need to ensure that agreed statements of facts and agreed penalties do not transfer the power to impose penalties to the regulator.[5]

More generally, too ready an acceptance of a settlement because of the efficiencies and savings associated with settlement ignores the important role that courts must play in ensuring that serious contraventions of regulatory statutes are adequately denounced—and punished.[6]

The different approach to approval of civil penalty settlements between the Federal Court of Australia and Supreme Court of Victoria means that the issue is ripe for determination by the High Court of Australia, but a suitable matter needs to progress through the regulatory system and the court hierarchy for that to occur. This will probably take some time.

In the foreseeable future, it is likely that two different approaches will be taken in the two jurisdictions. In other jurisdictions, one would expect the Federal Court approach to prevail, at least until a Court of Appeal in the jurisdiction has been asked to consider the question. Indeed, in the state of New South Wales, the Federal Court approach was adopted by the NSW Court of Appeal in the James Hardie appeal on penalties.[7]

Despite the uncertainty, the Victorian Court of Appeal decision provides significant guidance on a number of issues. It is clear that a court needs sufficient reliable information to be able to determine the appropriate amount for a civil penalty. Consequently, the adequacy and accuracy of the material contained in an agreed statement of facts is of great importance. The agreed statement of facts in *Ingleby* were said to be "impossible to reconcile with what the documentary material plainly showed",[8] "less than a desirably sound basis upon which to reach important decisions about appropriate penalties"[9] and "plainly inadequate".[10] If insufficient information is provided, the court can request additional information from the parties or from an amicus curiae or intervenor. There will be additional costs that the parties must bear. If the needed information is not forthcoming, the court may need to impose a penalty bearing the lack of information in mind.[11]

In terms of the amount of the penalty, the Victorian courts would now seem to prefer that the parties provide a range of penalties with an explanation for the choice of the range, compared to the Federal Court, where a specific agreed figure is provided.

The increasing range of contraventions that may be dealt with by a regulator through civil penalty proceedings means that certainty in this area of the law is highly desirable.

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ENDNOTES

1 *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 141 ALR 640 at 644.

2 *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72 at [77]-[79].

3 *ASIC v Ingleby* [2013] VSCA 49 at [29]. Harper JA agreed at [99] and Hargrave AJA agreed at [102].

4 *ASIC v Ingleby* [2013] VSCA 49 at [102].

5 *ASIC v Ingleby* [2013] VSCA 49 at [70]-[72].

6 *ASIC v Ingleby* [2013] VSCA 49 at [12].

7 *Gillfillan v ASIC* [2012] NSWCA 370 at [339].

8 *ASIC v Ingleby* [2013] VSCA 49 at [33].

9 *ASIC v Ingleby* [2013] VSCA 49 at [73]. *See also* [75] "the statement of agreed facts does not place the Court in a position from which it can properly discharge its constitutional responsibilities".

10 *ASIC v Ingleby* [2013] VSCA 49 at [101].

11 *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72 at [71] and [76].

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