

## Case Law update for prosecuting agencies

---

### *Concurrent criminal and civil / regulatory proceedings*

---

September 2016

A recent judgment of the Federal Court of Australia has significance for those involved in government law, particularly regulatory proceedings.

In *CFMEU v ACCC*<sup>1</sup>, the Federal Court examined the position where there are overlapping criminal and civil/regulatory proceedings based on the same facts and circumstances.

In that case the applicant union sought a stay of regulatory (civil) proceedings due to the ongoing existence of related criminal proceedings. A stay was sought by the applicant despite the defendant regulator, the ACCC, providing qualified undertakings to abandon its pursuit of allegations which were also the subject of current criminal charges against two of the applicant union's senior members.<sup>2</sup>

In the course of its judgment, the Court cited the High Court's approach to simultaneous criminal and civil cases in the matter of *Commissioner AFP v Zhao*<sup>3</sup>, namely:

- (i) Where both civil and criminal proceedings are pending, a stay of the civil proceedings will be ordered where *"the interests of justice require such an order"*;
- (ii) A court will not grant a stay of civil proceedings merely because related charges have been brought against an accused and criminal proceedings are pending;
- (iii) To warrant a stay of the civil proceedings, it *"must be apparent"* that the accused *"is at risk of prejudice in the conduct of his or her defence in the criminal trial"*; and
- (iv) The risk of prejudice must be real and, in considering what the interests of justice require, that risk is to be weighed against the prejudice that a stay of the civil proceedings would occasion.

---

<sup>1</sup> [2016] FCAFC 97

<sup>2</sup> Both of whom were also defendants in the civil proceeding.

<sup>3</sup> [2015] 255 CLR 46

The Federal Court held that the CFMEU was not entitled to a stay of the civil proceedings, as there was insufficient evidence to suggest that the accused were likely to give evidence in the civil proceeding (and thereby prejudice their criminal defence), and distinguished the High Court's reasoning in *Zhao* on that basis.

### **Private vs public interests**

The Federal Court also commented upon a submission by the CFMEU that the primary judge had erred in finding that the principles relevant to the exercise of discretion to grant a stay are no different in the case of a proceeding brought by a regulator from those that apply in the case of a proceeding brought by a private plaintiff.

The Court agreed with the primary judge, holding:

*The primary judge took the view that the interests of the persons who would be affected by the failure to grant a stay were to be weighed up in the balancing process against the interests of those affected by the granting of a stay, without specific regard to the identity or character of the holder of the interest as being significant in itself. We can discern no error in that approach. An interest ought not be given less weight merely because it is held or being pursued by a public body in the public interest, rather than in the protection or preservation of the rights of private plaintiffs.*

The Federal Court therefore dismissed the CFMEU's application for leave to appeal in respect of the rejection of its original stay application.

The case is of importance to government lawyers, both as an example of the court's approach to related criminal and disciplinary proceedings, and regarding the equality of public and private interests in the course of regulatory proceedings.

***For further inquiries or assistance, please contact Glen Cranny, Principal, Gilshenan & Luton Legal Practice on 3361 0240 or [gcranny@gnl.com.au](mailto:gcranny@gnl.com.au)***