FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Davies (No 2) [2015] FCA 1290

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| Citation: | Australian Competition and Consumer Commission v Davies (No 2) [2015] FCA 1290 |
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| Parties: | **AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v ROBERT PAUL DAVIES** |
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| File number: | QUD 530 of 2014 |
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| Judge: | **REEVES J** |
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| Date of judgment: | 20 November 2015 |
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| Catchwords: | **CRIMINAL LAW** – sentencing – breach of s 155 of the *Trade Practices Act 1974* (Cth) – refusing or failing to comply with a notice – aiding, abetting, counselling or procuring the commission of an offence – plea of not guilty – considerations relevant to penalty |
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| Legislation: | *Crimes Act 1914* (Cth)  *Criminal Code Act 1995* (Cth)  *Penalties and Sentences Act 1992* (Qld)  *Trade Practices Act 1974* (Cth) |
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| Cases cited: | *Australian Competition and Consumer Commission v Davies* [2015] FCA 1017  *Australian Competition and Consumer Commission v Boyle* [2015] FCA 1039  *Australian Competition and Consumer Commission v GIA Pty Ltd* [2002] ATPR 41-902; [2002] FCA 1298  *Australian Competition and Consumer Commission v Narnia Investments Pty Ltd* [2009] ATPR 42-279; [2009] FCA 395  *Australian Competition and Consumer Commission v Rana* [2008] ATPR 42-223; [2008] FCA 374  *Barbaro v The Queen* (2014) 253 CLR 58; [2014] HCA 2  *Bui v Director of Public Prosecutions (Cth)* (2012) 244 CLR 638; [2012] HCA 1  *Director of Public Prosecutions (Cth) v Costanzo* (2005) 191 FLR 45; [2005] QSC 79  *Director of Public Prosecutions (Cth) v El Karhani* (1990) 21 NSWLR 370  *Hili v The Queen* (2010) 242 CLR 520; [2010] HCA 45  *R v Pham* [2015] HCA 39  *R v Rivkin* (2004) 59 NSWLR 284; [2004] NSWCCA 7  *R v Williams* (2005) 216 ALR 113; [2005] NSWSC 315 |
|  |  |
| Date of hearing: | 12 November 2015 |
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| Place: |  |
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| Division: | GENERAL DIVISION |
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| Category: | Catchwords |
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| Number of paragraphs: | 23 |
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| Counsel for the Applicant: | Ms AJ Stoker |
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| Solicitor for the Applicant: | Commonwealth Director of Public Prosecutions |
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| Counsel for the Respondent: | The Respondent appeared in person |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 530 of 2014 |

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| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  Applicant |
| AND: | ROBERT PAUL DAVIES  Respondent |

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| JUDGE: | REEVES J |
| DATE OF ORDER: | 20 NOVEMBER 2015 |
| WHERE MADE: | BRISBANE |

THE COURT ORDERS THAT:

1. The respondent is convicted of the offence of aiding, abetting, counselling or procuring Natural Food Vending Pty Ltd in failing to comply with a notice issued to it under s 155(1) of the *Trade Practices Act 1974* (Cth) contrary to s 155(5)(a) of the *Trade Practices Act 1974* (Cth).
2. Pursuant to s 20AB of the *Crimes Act 1914* (Cth), the respondent is ordered to perform 200 hours of community service on the conditions that he:
   1. not commit another offence during the period of the order;
   2. report to an authorised corrective services officer as defined in s 4A of the *Penalties and Sentences Act 1992* (Qld) at the Southport Probation and Parole District Office at 4/83 Scarborough Street, Southport in the State of Queensland by 27 November 2015;
   3. report to and receive visits from such an authorised corrective services officer as directed by that officer;
   4. perform in a satisfactory way community service as directed by such an authorised corrective services officer for 200 hours at the times directed by that officer;
   5. notify such an authorised corrective services officer of every change of his place of residence or employment within two business days after that change occurs;
   6. not leave or stay out of Queensland without the permission of such an authorised corrective services officer; and
   7. comply with every reasonable direction of such an authorised corrective services officer.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 530 of 2014 |

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| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  Applicant |
| AND: | ROBERT PAUL DAVIES  Respondent |

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| JUDGE: | REEVES J |
| DATE: | 20 NOVEMBER 2015 |
| PLACE: | BRISBANE |

**REASONS FOR JUDGMENT**

# Introduction

1. On 11 September 2015, I found Mr Davies guilty of an offence under s 155(5) of the *Trade Practices Act 1974* (Cth) (the TPA) of aiding, abetting, counselling or procuring the failure of a company called Natural Food Vending Pty Ltd (NFV) to comply with a notice issued under s 155(1) of the TPA: see *Australian Competition and Consumer Commission v Davies* [2015] FCA 1017 (*Davies*). At the time he committed this offence, Mr Davies was the sole director and shareholder of NFV. These reasons are directed to passing sentence on Mr Davies for that offence.

# The relevant Legislative Provisions

1. The maximum penalty for an offence under s 155(5) of the TPA is a fine not exceeding 20 penalty units, or imprisonment for 12 months: see s 155(6A) of the TPA. At the time of this offence, the monetary value of a penalty unit was fixed at $110 by s 4AA of the *Crimes Act 1914* (Cth) (the Crimes Act). The maximum fine for the offence is therefore $2,200.
2. In addition to these penalties, s 20AB(1) of the Crimes Act provides a range of additional sentencing alternatives. They include: community service orders, work orders, periodic detention sentences, attendance centre orders and weekend detention sentences or attendance orders provided for under the law of a participating State or Territory. The State of Queensland falls within the terms of that expression: see *Director of Public Prosecutions (Cth) v Costanzo* (2005) 191 FLR 45; [2005] QSC 79 at [14]. However, s 20AB(2) contains a requirement that, before passing a sentence or making an order under s 20AB(1), the court must explain to the person sentenced:
3. the purpose and effect of the proposed sentence or order;
4. the consequences that may follow if the person fails, without reasonable cause or excuse, to comply with the sentence; and
5. if the proposed sentence may be revoked or varied under State provisions, that the proposed sentence may be so revoked or varied.
6. Part 1B of the Crimes Act contains various provisions relating to the sentencing, imprisonment and release of persons found guilty of federal offences. The offence under s 155(5) of the TPA is such an offence: see s 16(1) of the Crimes Act. Division 2 of Part 1B describes certain general sentencing principles. It includes s 16A, which sets out a number of matters to which a court must have regard when passing a sentence for a federal offence. For present purposes, those matters relevantly include:
7. the nature and circumstances of the offence (s 16A(2)(a));
8. the degree to which the person has shown contrition for the offence (s 16A(2)(f));
9. whether the person has pleaded guilty to the charge in respect of the offence (s 16A(2)(g));
10. the deterrent effect that any sentence may have on the person (s 16A(2)(j));
11. the character, antecedents, age, means and physical or mental condition of the person (s 16A(2)(m)); and
12. the probable effect that any sentence would have on any of the person’s family or dependants (s 16A(2)(p)).
13. In addition to these matters, s 16C(1) of the Crimes Act requires that, before any fine is imposed on a person, the court must take into account his or her financial circumstances in addition to any matters that are required or permitted to be taken into account. Furthermore, s 17A(1) of that Act provides that a court must not impose a sentence of imprisonment unless, after having considered all other available sentences, it is satisfied that no other sentence is appropriate in all the circumstances of the case.
14. However, the matters set out above are not exhaustive of the matters to be taken into account in this sentencing task. In particular, general deterrence must also be considered, despite there being no specific mention of it in s 16A: see *Australian Competition and Consumer Commission v Neville* [2007] ATPR 42-195; [2007] FCA 1583 (*Neville*) at [18] per Lindgren J. Furthermore, as the High Court observed in *Bui v Director of Public Prosecutions (Cth)* (2012) 244 CLR 638; [2012] HCA 1 (at [18] per French CJ, Gummow, Hayne, Kiefel and Bell JJ, referring to *Director of Public Prosecutions (Cth) v El Karhani* (1990) 21 NSWLR 370 at 378), s 16A also accommodates a number of common law sentencing principles. The Court said:

The section has been held to accommodate principles of general deterrence, proportionality, and totality. It is able to accommodate some judicially-developed sentencing principles where such principles give relevant content to the statutory expression in s 16A(1) “of a severity appropriate in all the circumstances of the offence”, as well as expressions such as “the need to ensure that the person is adequately punished for the offence”, which appears in s 16A(2)(k).

(Footnotes omitted)

# The relevant sentencing considerations

1. Taking into account these statutory provisions and observations, I have set out below the matters that I consider are particularly important in fixing the sentence to be imposed on Mr Davies.

## General deterrence

1. In offences of this kind, general deterrence is a particularly important factor. Thus, in *Neville*, Lindgren J observed (at [43]) that s 155 of the TPA “serves the public interest that the [Commission] be enabled to carry out its investigations efficiently and effectively”. His Honour added that:

… not only does [a contravention of the section] have the immediate effect of obstructing and delaying the particular investigation: it also has the potential to direct the [Commission] away from other sources of information and to draw human and financial resources away from its other work. The general public should know that conduct of that kind will be treated seriously by the Court.

1. To similar effect, in *Australian Competition and Consumer Commission v Rana* [2008] ATPR 42-223; [2008] FCA 374 (*Rana*) (at [69]), North J noted that “[t]he sentence must communicate to the community that the Court views compliance with s 155 of the [TPA] as a serious obligation and that it regards [it] as a most important tool for the protection of the public” against contraventions of Australia’s competition and consumer laws. These observations reinforce the need to include general deterrence when imposing a sentence for an offence under s 155(5) of the TPA, or similar statutory provisions.

## The nature and circumstances of the offence: section 16A(2)(a)

1. In *Davies*, I made a number of factual findings about the nature and circumstances of Mr Davies’ offending, which are relevant to the sentence that should be imposed on him. Those findings included that:
2. Mr Davies was the sole director and “high managerial agent” of NFV, and therefore “expressly, tacitly or impliedly” permitted NFV to commit the offences under s 155(5)(a) of the TPA: see *Davies* at [41];
3. Mr Davies took no action to cause NFV to comply with the notice, for example he did not disclose to Mr Ngan the location of the documentation sought by the Commission, nor did he provide him with any of the information requested in the notice: see *Davies* at [47];
4. to the contrary, rather than taking steps to ensure NFV complied with the notice, on his own evidence, Mr Davies sought to avoid compliance with it by agreeing to pay a not insignificant sum to Mr Ngan to make the problem “go away”: see *Davies* at [47]; and
5. in this way, Mr Davies intentionally brought about the result, or made it more likely, that NFV would fail to comply with the notice: see *Davies* at [47]–[48].
6. It is also to be noted that one of the effects of Mr Davies’ conduct was to undermine the Commission’s investigation of a number of serious allegations against NFV. In doing so, he stymied the public interest in the efficient investigation of those allegations and, in the process, caused public resources to be wasted.

## Contrition and cooperation: section 16A(2)(f) and (g)

1. As I noted at [9] of *Davies*, Mr Davies did not enter a plea of guilty to the Commission’s charge and the matter therefore proceeded to trial. Nonetheless, I take account of the fact that he made a number of admissions which likely reduced the length of the trial significantly. Those admissions are set out in *Davies* at [10]. On the other hand, I did not detect any element of contrition in Mr Davies’ behaviour. Indeed, his conduct during the trial and the subsequent sentencing hearing demonstrated an unwillingness on his part to take responsibility for his actions. For example, during both stages, he sought to blame Mr Ngan and the Commission for not advising him that he had to comply with the notice. He claimed that if he had been so advised, he would have complied. I find these claims to be quite disingenuous.

## Mr Davies’ personal circumstances and personal deterrence: sections 16A(2)(j), (m) and (p)

1. During submissions on penalty, Mr Davies told me he is 43 years old and he lives with his family at Parkwood on the Gold Coast, Queensland. He said he is married and has two young daughters. Although he does not appear to have taken responsibility for his conduct, I accept that he is acutely aware of the effect that this sentence may have on his family. He told me he considers himself “an entrepreneur”. He claimed he conducted a health care business which helped people and was “for the greater good”. He also claimed that the charge against him and the related investigation had caused a “massive hit” to his finances. He said he is currently unemployed and is living off his savings. On this aspect, I do, however, note the Commission’s submission that Mr Davies remains a director of six corporations and appears to remain active in the business community. This is a pertinent factor in considering the need for personal deterrence.
2. While the Commission informed me that Mr Davies has a criminal history, it did not submit that history was relevant to the present offence. Aside from this, there is no evidence before me to suggest that Mr Davies is not otherwise of good character. Nonetheless, in this regard, I accept the Commission’s submission that prior good character is of lesser weight in cases involving, what is referred to as, “white-collar crime”. As the New South Wales Court of Criminal Appeal observed in *R v Rivkin* (2004) 59 NSWLR 284; [2004] NSWCCA 7 (at [410]), the “relevance of good character is of lesser significance for white-collar crimes, since it is that factor which normally places the offender in a position whereby he or she is able to commit the offence”. To similar effect, in *R v Williams* (2005) 216 ALR 113; [2005] NSWSC 315 (at [47]), Wood CJ at CL noted that “the general deterrence factor is important in this area of criminality, and may require a custodial sentence, even though the offender has an unblemished prior record”.

# COMPARABLE sentencing decisions

1. Although Part 1B of the Crimes Act does not specifically provide for sentencing judges to take current sentencing practices into account, the High Court has recently stated that, with federal offences, it is implicit in that Part that a sentencing judge “must have regard to current sentencing practices throughout the Commonwealth”: see *R v Pham* [2015] HCA 39 (*Pham*) at [23] per French CJ, Keane and Nettle JJ. Their Honours explained the justification for this approach in the following terms (at [24]):

As Kirby J observed in *Putland v The Queen*, a federal offence is, in effect, an offence against the whole Australian community and so the offence is the same for every offender throughout the Commonwealth. Hence, in the absence of a clear statutory indication of a different purpose or other justification, **the approach to the sentencing of offenders convicted of such a crime needs to be largely the same throughout the Commonwealth**. Further, as Gleeson CJ stated in *Wong*, the administration of criminal justice functions as a system which is intended to be fair, and systematic fairness necessitates reasonable consistency. And, as was observed by the plurality in *Hili*, **the search for consistency requires that sentencing judges have regard to what has been done in comparable cases throughout the Commonwealth**.

(Emphasis added and footnotes excluded)

1. To assist in achieving the consistency mentioned immediately above, the Commission has provided me with a schedule of comparable sentencing decisions. In considering that schedule, I have borne in mind the observations in *Pham* that there is a twofold purpose to be served. The first is that such decisions may “provide guidance as to the identification and application of relevant sentencing principles”. The second is that the exercise may enable me to determine whether comparable decisions yield “discernible sentencing patterns and possibly a range of sentences against which to examine a proposed or impugned sentence”: see *Pham* at [26]. However, I also heed the Court’s warning that the range of sentences so disclosed is not necessarily the correct range, or otherwise determinative of the upper and lower limits of sentencing discretion. Rather, the sentencing task is “inherently and inevitably more complex than that”: see *Pham* at [27], referring to *Hili v The Queen* (2010) 242 CLR 520; [2010] HCA 45 at [54] and [60]; and *Barbaro v The Queen* (2014) 253 CLR 58; [2014] HCA 2 at [24]–[28] per French CJ, Hayne, Kiefel and Bell JJ.
2. Bearing these observations in mind, I have set out below the salient features of the comparable decisions in the Commission’s schedule.
3. In *Australian Competition and Consumer Commission v GIA Pty Ltd* [2002] ATPR 41-902; [2002] FCA 1298, the Commission brought charges against GIA Pty Ltd and Mr Eric Thompson, the managing director of the company, alleging contraventions of s 155(5)(b) of the TPA. Section 155(1) notices had been issued to the defendants requiring them to furnish information about the importation, alteration and re-sale of polo shirts from China, which were advertised as fine hand-made Tasmanian knitwear. Mr Thompson responded to that notice on behalf of GIA and provided false information to the Commission. All of the defendants pleaded guilty to charges that they had contravened s 155(5)(b) of the TPA. GIA was fined $5,000 and Mr Thompson was fined $1,000. In passing sentence, Heerey J noted that the conduct of the defendants was a “serious offence” that “hinder[ed] and obstruct[ed] … the protection of consumers” (at [19]).
4. In *Neville*, the respondent, Mr Neville, pleaded guilty to two charges of contravening s 155(5)(b) of the TPA. Mr Neville was a real estate agent who gave false and misleading evidence to the Commission about his involvement in a scheme to prevent a competing realtor advertising an offer of a “flat fee” commission. Mr Neville was fined $2,160 and ordered to perform 200 hours of community service. Material factors influencing this penalty included that Mr Neville was a 63 year old man with no prior convictions, that he was unlikely to re-offend and that he appreciated the seriousness of his offence.
5. In *Australian Competition and Consumer Commission v Narnia Investments Pty Ltd* [2009] ATPR 42-279; [2009] FCA 395, Mr Simon Clarke was the sole director of Narnia Investments Pty Ltd (Narnia). Narnia was served with a s 155(1) notice requiring it to furnish information concerning its sale of a hair replacement solution to a person on a disability pension for $15,500. In response, Mr Clarke furnished false information to the Commission. Narnia was subsequently charged with an offence under s 155(5)(b) of the TPA and Mr Clarke was charged with aiding and abetting that offence under s 11.2 of the *Criminal Code Act 1995* (Cth). They both pleaded guilty. Mr Clarke was fined $1,400 and Narnia was fined $5,600.
6. In *Australian Competition and Consumer Commission v Boyle* [2015] FCA 1039, Mr Boyle was served with two s 155(1) notices to give evidence and attend an examination about an oral spray product called SensaSlim, which purported to effect weight loss. In response, he provided false information. In particular, he denied any knowledge of a Mr Foster who was involved with the sale of the SensaSlim product. Mr Boyle claimed that he had provided this false information because threats had been made against him. The Court accepted that a psychiatric condition from which he was suffering had affected his perception of the seriousness of the threats concerned. He pleaded guilty to two charges under s 155(5)(b) and was fined $3,500; in default, two months’ imprisonment.
7. All of the above decisions involved charges of providing false information or evidence to the Commission in response to a notice served under s 155(1) of the TPA rather than, as in this case, a charge of failing to comply with such a notice. However, in *Rana*, North J was required to deal with the latter situation. Significantly, his Honour rejected a submission made on behalf of the defendant that “there is less culpability in a failure to respond to a s 155 notice at all than by providing a misleading or false response”: see *Rana* at [64]. I respectfully agree with that approach. In *Rana*, Mr Paul Rana was the director of three entities, collectively referred to as the NuEra companies. His son, Mr Micheal Rana, was the sole director of a separate company, although it was accepted he was under the influence of his father. Mr Paul Rana, Mr Micheal Rana and the NuEra companies were each served with s 155(1) notices requiring them to furnish information and documents concerning representations the NuEra companies had made to the effect that a particular system promoted by them was suitable for treating terminal illness. Mr Paul Rana pleaded guilty to refusing or failing to comply with the s 155 notice issued to him personally and he also pleaded guilty to aiding, abetting, counselling or procuring one of the NuEra companies in failing to comply with the notice issued to it. In separate proceedings, he was found guilty (after two pleas of not guilty) of the same offence in respect of two other NuEra companies. His son, Micheal Rana, pleaded guilty to one such offence. Mr Paul Rana was sentenced to six months’ imprisonment. Mr Micheal Rana was sentenced to two months’ imprisonment, but released on a recognisance of $1,000, to be of good behaviour for 18 months.

# The appropriate penalty

1. In all the circumstances of this case outlined above, I do not consider a term of imprisonment is warranted. Furthermore, given Mr Davies’ present financial circumstances, I do not consider a fine is the most appropriate penalty. If he accurately described his financial circumstances to me, they are likely to result in him defaulting in the payment of any fine I impose. Accordingly, imposing a fine would be tantamount to imposing a term of imprisonment which, as I have already observed, is not warranted in this case. Instead, I consider the most appropriate penalty in all the circumstances is an order under s 20AB(1) of the Crimes Act that Mr Davies serve 200 hours of community service. This penalty will serve to reflect the Court’s condemnation of Mr Davies’ conduct and serve as a general deterrence for any other members of the public who may consider taking the same approach as Mr Davies when served with a notice under s 155(1) of the TPA, or any similar legislative provisions.

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| I certify that the preceding twenty-three (23) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Reeves. |

Associate:

Dated: 20 November 2015