Cartels

Enforcement, Appeals and Damages Actions

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Australia

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Overview of the law enforcement regime relating to cartels

Corporate cartel conduct in Australia is regulated by Part IV of the *Competition and Consumer Act 2010* (Cth) ("**CCA**"). A corporate cartel exists when actual or potential competitors agree to a cartel provision.

A cartel provision is defined as a provision of a contract, arrangement or understanding that occurs between two actual or potential corporate competitors. The purpose or effect of the condition must be to fix, control and maintain price or to:

a) prevent, restrict or limit production, capacity or supply;

b) allocate customers; or

c) bid rig.[1]

Australian law provides for both criminal and civil penalties for those found to have contravened the offence provisions. The Australian Competition and Consumer Commission ("**ACCC**") is responsible for investigating cartel matters, while the Commonwealth Director of Public Prosecutions ("**CDPP**") is responsible for prosecuting such cases.

The Federal Court of Australia has jurisdiction for civil matters arising under the Act[2] and exclusive jurisdiction in respect of criminal proceedings. The State and Territory Courts have jurisdiction to deal with certain offences[3] as well as examinations and commitment for trial on indictment.

Overview of investigative powers in Australia and current reforms

The mandate for fairer business practice in the area of competition led to a review by Professor Ian Harper ("**The Harper Review**"), commencing in 2014, to determine whether the legislation was still adequate given the economic changes that have occurred since the 1990s.[4] This was the first Competition Policy Review in Australia in over 20 years. In 2017, two bills were passed to implement long-needed reforms which came into operation on 6 November 2017.

The Harper Review recommended that: the power given to the ACCC under s 155[5] should be 'extended to cover the investigation of alleged contraventions of court-enforceable undertakings';[6] that the amendment to s 155 of the CCA was to include a reasonable search defence to the contravention of 'refusal or failure to comply with a notice' issued by the ACCC;[7] and the fine for non-compliance with a notice was to be increased.

Section 155 CCA changes

The CCA provides that the ACCC may issue a notice to obtain information, documents and evidence if the matter 'constitutes, or may constitute a contravention of any of the terms of

an undertaking under section 87B of this Act or under section 218 of the Australian Consumer law'.[8]

It is a contravention of the CCA to 'refuse or fail to comply with a notice…' given by the ACCC.[9] In order for the defence to be available, the notice must relate to producing documents and the individual must prove that, after a reasonable search, they are not aware of the documents.[10] Additionally, the person must provide a written response to the notice that includes a description of both the scope and limitations of the search.[11] The defendant bears the onus of proof in determining whether a reasonable search has been conducted.[12]

In order to determine what constitutes a 'reasonable search', an additional provision was introduced by the Amendment Act to include, 'the nature and complexity of the matter, the number of documents involved, the relative ease and cost of retrieving a document and any other relevant matter'.[13] Although these factors provide a guide only, what constitutes 'reasonable' has intentionally been given a broad scope.[14]

A person who refuses or fails to comply with a notice from the ACCC 'is guilty of an offence punishable…[by]…a fine not exceeding 100 penalty units' ($21,000.00).[15] If the defendant is a corporation, the fine may be a maximum of $105,000.00.[16]

Given the serious nature of non-compliance with compulsory evidence-gathering notices, the ACCC may also choose to refer the matter to the CDPP.[17] If the CDPP elect to prosecute, a conviction for this offence is punishable by imprisonment for two years.[18] Furthermore, 'if a person refuses or fails to comply with a notice, a Court may, on application by the Commission, make an order directing the person to comply with the notice'.[19]

In conclusion, the implementation of the recommendations of The Harper Review has seen an overall increase in the ACCC powers and the enforcement procedures available for contraventions of the Act.

Overview of cartel enforcement activity during the last 12 months

During 2018 there were a number of significant developments in enforcement activity relating to corporate cartels, demonstrating an increased appetite for enforcement and a trend towards higher monetary penalties being imposed on corporations and individuals in order to deter cartel conduct. This was evident in the cases of Nippon Yusen Kabushiki Kaisha ("**NYK**") and Kawasaki Kisen Kaisha ("**K-Line**").

NYK

NYK is a Japanese shipping company responsible for supplying ocean shipping services to Australia. It was the first company to be criminally prosecuted in Australia since the criminalisation of cartel conduct. NYK pled 'guilty to a single charge of giving effect to a cartel provision', contrary to s 44XXRG(1)[20] of the CCA.[21] Although it was not possible to determine the total value of benefits it received from its cartel conduct, the profits generated from the anti-competitive conduct were estimated at AUD$15.4 million.

In imposing the sentence, Wigney J made reference to six factors that weighed in favour of a substantial penalty being imposed:

1. According to the legislation, the maximum penalty for the office is the greater of:
   a) AUD$10 million;
   b) three times the benefits attributable to the offence; or
   c) if benefits cannot be attributed, 10% of the corporation's annual turnover in the 12 months preceding the offence.[22]

Given NYK's benefits cannot be accurately determined, the maximum penalty they were to face was AUD$100 million (annual turnover of AUD$1 billion).

2. The seriousness of the offence in the circumstances.
3. The conduct was 'covert, deliberate, systematic and involved planning and deliberation'.[23]
4. Senior managers were involved in the conduct who knew or ought to have known that the conduct 'breached anti-trust or competition laws'.[24]
5. Profits were obtained from the cartel conduct.
6. General deterrence for other corporations that are engaging or considering engaging in similar conduct.

Wigney J considered that the following four factors mitigated the offence and suggested a lesser penalty:

1. NYK pled guilty at a very early stage. The company also provided 'timely, full, frank and…expeditious cooperation'.[25] Furthermore, NYK gave an undertaking to provide assistance in future proceedings against other members of the cartel.
2. Since the offence, NYK has demonstrated excellent prospects of rehabilitation. They have established new systems and structures within the company to ensure similar conduct does not occur in the future.
3. They have no 'prior record of corporate criminal conduct'.[26]
4. NYK has already had administrative and other penalties imposed by foreign jurisdictions in relation to the impact on those particular jurisdictions.

After considering the above factors, Wigney J came to an initial penalty of AUD$50 million. He then applied a 50% discount for the early guilty plea, past and future assistance. Of that 50% discount, 10% specifically relates to the future assistance. NYK was fined a total of AUD$25 million with the possibility of AUD$30 million if they do not comply with their undertaking.

K-Line

K-Line was part of the same cartel as NYK and also pled guilty to the offence on 5 April 2018, some months after the penalty was handed down in NYK. K-Line's cartel conduct concerns the shipping of cars, trucks and buses to Australia. K-Line is a global organisation with offices in Europe, Africa, Northeast and Southeast Asia, America, India and the Middle East and it has an Australian subsidiary with a head office in Tokyo.

K-Line's executives have not been prosecuted, only the corporation. Australia commenced a criminal prosecution against K-Line following the Department of Justice in the US conducting an investigation which saw the corporation pleading guilty and agreeing to pay a criminal penalty of US$67.7 million.

As of the date of the writing of this article, K-Line has yet to be sentenced for the 37 contraventions of Section 44ZZRG(1) of the CCA.

Australia and New Zealand Bank, Deutsche, and Citigroup

The strong focus by the ACCC on the financial sector has seen the ANZ Bank, Deutsche Bank and Citigroup charged by the CDPP with alleged cartel conduct, relating to the CCA 'Share Placement Cartel'. A number of CEOs and senior executives were also criminally charged.[27] It is alleged that conduct involves cartel arrangements relating to trading in ANZ shares following a AUD$2.5 billion institutional share placement in August 2015. ANZ and

each of the individuals are said to be knowingly concerned in some or all of the alleged conduct.[28] The case centres on ANZ's institutional equity placement and the alleged failure to disclose that a significant portion of shares went to two of the three joint lead managers. It is said that the investigation has been conducted for over two years by the regulator. The corporations and individuals are defending the charges.

Although the above highlights the criminalisation of corporate cartels, there have also been a number of recent civil penalties imposed for similar conduct.

Flight Centre

The ACCC alleged that Flight Centre attempted to induce three airlines to enter a contract, arrangement or understanding to fix, control or maintain prices for air travel in contravention of Section 45 and 45A of the then CCA. Flight Centre denied the claim and argued that there is no lessening of competition where the provider of air travel remains the same whether it is sold directly by the airline or by an agent for the airline. The trial Judge agreed with the ACCC and Flight Centre were ordered to pay AUD$11 million for the contravention. Flight Centre appealed to the Full Federal Court and were successful, the Court finding that there was no separate market for distribution services to customers, and that Flight Centre did not compete in the alleged market. The ACCC were ordered to pay Flight Centre's costs.

The ACCC was granted special leave to appeal to the High Court of Australia in 2016. The majority of the High Court (4-1) considered that there was a market in which the parties competed and as a result the agreements between Flight Centre and the airlines substantially lessened competition. In May 2017, the matter was remitted to the Full Federal Court of Australia on the issue of penalty alone and this resulted in an increased fine of AUD$12.5 million.[29]

Yazaki Corporation

The Federal Court of Australia found that Yazaki Corporation engaged, with a competitor, in collusive conduct when supplying Toyota Australia with wire harnesses. The Corporation was initially fined AUD$9.5 million. In the recent appeal, the Full Federal Court of Australia increased the penalty to AUD$45 million, which currently constitutes the highest penalty imposed under the CCA.[30]

This decision to more than quadruple the penalty brings Australia's cartel penalties more in line with US and European jurisdictions.

Moving forward, it is reasonable to expect that there will be an increase in ACCC Cartel enforcement investigation and activity. The Chairman of the ACCC Rod Sims has highlighted that the regulator has a 'substantial team of specialist criminal cartel investigators'.[31]

Key issues in relation to enforcement policy

The greatest investigative challenge that the ACCC continues to confront is that cartel conduct is usually conducted covertly. Corporations attempt to hide their wrongdoings in order to retain the profits that they have made through their illegal conduct.

Imposing an appropriately deterrent financial penalty also remains an enforcement challenge. The ACCC has indicated that many penalties imposed on corporations fail to consider the size of the corporation.[32] This is supported by independent research conducted by the Organisation for Economic Co-operation and Development ("**OECD**"). Overall, the maximum fines imposed in the Australian jurisdiction are significantly lower in comparable jurisdictions.[33]

An important development in the investigation of criminal cartels that operate in covert ways is detecting digital collusion through algorithms. Digital collusion through mechanisms such as pricing algorithms, as well as advancing technology to prevent and detect digital collusion, are some of the issues faced by regulators. Experts are divided in their views about the degree to which artificial intelligence and algorithms pose threats to competition and whether appropriate legislation can address these risks.[34]

Key issues in relation to investigation and decision-making procedures

While the covert actions of corporate cartels create challenges for investigations and enforcement, this also affects decisions concerning whether to prosecute individuals and corporations. The ACCC is unable to recommend corporations to the CDPP for prosecution unless they have enough evidence to do so.

The ACCC refers any serious breach of CCA legislation for prosecution wherever possible.

On 15 August 2014, the ACCC and CDPP signed a Memorandum of Understanding ("**MOU**") regarding serious cartel conduct and the CDPP is responsible for prosecuting offences against Commonwealth law. The MOU states that conduct is deemed to be "serious" if one or more of the following apply:

- the conduct was covert;
- the conduct caused, or could have caused, large-scale or serious economic harm;
- the conduct was longstanding, or had a significant impact on the mark;
- the conduct caused or could have caused significant detriment to the public;
- one or more of the alleged participants has previously been found by a Court to have participated in cartel conduct either criminal or civil;
- senior representatives within the relevant corporation(s) were involved in authorising or participating in the conduct;
- the government and, thus, taxpayers were victims of the conduct; and/or
- the conduct involved the obstruction of justice or other collateral crimes committed in connection with the cartel.[35]

Leniency/amnesty regime

Both corporations and individuals in Australia can apply for immunity in relation to cartel conduct. The application can be made in relation to civil or criminal proceedings. It is generally referred to as 'first in' immunity as it is only available to the first entity to disclose cartel conduct.[36] It is not necessary to have the required information at the initial stage of the immunity application.

Corporations in civil proceedings

In order for a corporation to be eligible for conditional immunity, it must satisfy the following criteria:

a) they must be or have been a party to the cartel;

b) they must admit that their conduct may constitute a contravention of the CCA;

c) they are the first of the cartel to apply for immunity;

d) they have not coerced others to participate in the cartel;

e) they have ceased or indicate they will cease involvement in the cartel;

f) the admissions are a truly corporate act;

g) they have provided full, frank and truthful disclosure and have cooperated fully and expeditiously while making the application; and

h) they must also undertake to continue to act in this way.[37]

Additionally, related corporate entities and officers/employees of the corporation may apply for derivative immunity if the corporation qualifies for the above. In conjunction with the above criteria, immunity is only available if the ACCC has not yet received written legal advice that they have reasonable grounds to institute proceedings in relation to that cartel.[38]

Individuals in civil proceedings

Aside from the 'corporate act' criterion above, individuals must meet the same criteria as corporations in order to be eligible for conditional immunity in relation to cartel conduct.

Criminal immunity

The CDPP and the ACCC have agreed to facilitate immunity for criminal proceedings at the same time as immunity for civil proceedings as they recognise the need to maximise certainty within cartel cases.[39] If the ACCC is satisfied that an applicant is eligible for immunity, they can make a recommendation to the CDPP that immunity from prosecution also be granted. Although the CDPP will consider this recommendation, they ultimately make an independent assessment. If they too are satisfied the applicant meets the criteria, they will write a letter of comfort which recognised the 'first-in-status'.[40] In order to maintain this status, applicants must continue to provide full, frank and truthful disclosure whilst also maintaining confidentiality regarding details of the investigation.

Application process

The corporation or individual seeking immunity must first request the placement of a marker. A marker effectively preserves the 'first-in-status' and allows the applicant a limited time (generally 28 days) to gather information and demonstrate they meet the conditional immunity criteria. Once the information has been gathered, the applicant must provide a proffer. This essentially means the applicant is required to give the ACCC the information they have acquired. A proffer can be made orally or in writing.

If the ACCC determines there is sufficient information, the applicant will be requested to sign a waiver in regards to their identity and the information provided for each affected jurisdiction. It is important to note that the ACCC endeavours to protect any confidential information provided along with the applicant's identity; however, sometimes this cannot be achieved. If a criminal prosecution is to proceed, the ACCC will make a recommendation to the CDPP that criminal immunity also be granted to the applicant.

Finally, the ACCC is then at liberty to grant conditional immunity to the applicant. Final immunity is only granted if the applicant maintains eligibility and continues to provide full, frank and truthful disclosure throughout the remainder of the investigation.

Cooperation

In circumstances where an applicant is not eligible for 'first in' immunity, they are still able to cooperate if they desire to. If a party chooses to cooperate, the ACCC can make submissions to the Court regarding the cooperation provided. Generally, the Courts afford more lenient treatment to parties that have provided cooperation in relation to cartel conduct.

Amnesty plus

While cooperating with the ACCC, a party may discover the existence of a second cartel that is unrelated to the first. In these circumstances, the party can apply for conditional

immunity for the second cartel and 'amnesty plus' for the original. Essentially, 'amnesty plus' is a recommendation to the Court by the ACCC for a further reduction in penalty in relation to the first cartel. Parties who wish to seek 'amnesty plus' should initially apply for a marker in relation to the second cartel.[41]

Civil penalties and sanctions

Australian legislation stipulates there are two types of contravention in relation to cartel conduct. The first is the making of a contract, arrangement or understanding that contains a cartel provision.[42] The second is giving effect to such provision.[43] As penalties are determined for each contravention, significant fines can be imposed if the cartel conduct occurred over a long period of time. The CCA specifies the maximum pecuniary penalty that can be incurred per offence is the greater of the following:

a) AUD$10 million;

b) three times the benefits attributable to the offence; or

c) if the benefits cannot be attributed, 10% of the corporation's annual turnover in the 12 months preceding the offence.[44]

Additionally, individuals who knowingly participate in cartel conduct are liable for pecuniary penalties of up to AUD$500,000. Aside from pecuniary penalties, the Court can also impose injunctions, probation orders, community service orders, adverse publicity orders and orders that exclude individual eligibility for company management.

While there are no official sentencing guidelines for cartel conduct, the Court is likely to consider similar factors addressed by Wigney J in the case of NYK.

Right of appeal against civil liability and penalties

As with most single judge decisions, individuals and corporations are afforded the right of Appeal. *Flight Centre* was seen to utilise this right a number of times, appealing to the High Court of Australia.[45] Cartel-related matters are heard by a single judge from the Federal Court of Australia. If an Appeal is lodged, the case will be re-heard in front of the Full Court of the Federal Court of Australia. The Full Federal Court has three or more sitting judges at any time. As seen in *Flight Centre*, further Appeals can only occur when the High Court of Australia grants leave.[46] Further to an Appeal on liability, defendant's also have a right to Appeal against the penalty imposed. Once again, *Flight Centre* utilised this process.[47]

Criminal sanctions

Under s 79 of the CCA, individuals who attempt to contravene, aid contravention, conspire to contravene or knowingly contravene cartel offence provisions may face up to 10 years' imprisonment, a fine of 2,000 penalty units (currently AUD$420,000) or both. Corporations currently face the same criminal penalties as they do under civil proceedings; however, directors, officers and employees involved in the cartel conduct are punished according to the above.

Although the newest amendments to the CCA have toughened Australia's stance on corporate cartels, there has been some reprieve through the expansion of the 'joint ventures' defence. Previously, this defence was only available if the cartel provision was explicitly stated in the contract of the joint venture. Since the amendments have come into effect, the defence is now available if the cartel provision is contained within the parties 'contract, arrangement or understanding'.[48] In addition, the legitimate purposes for a joint venture have also been

expanded. The amended provision now allows joint ventures for the 'acquisition of goods and services'.[49] Initially, the joint venture defence was only available for the 'production of goods' and the 'supply of goods and services'.[50]

While the amendments have expanded the available defence, they have also increased the number of elements that must be met in order for business dealings to qualify as a joint venture. For criminal prosecution, the cartel provision must be 'for the purposes of a joint venture' and must be 'reasonably necessary for undertaking the joint venture'.[51] Additionally, the defendant bears the burden of proof in such matters.[52] When civil penalties are involved, the joint venture must 'not be carried on for the purpose of substantially lessening competition'.[53]

Through the expansion of the joint ventures defence, corporations with less formal business connections will now have the opportunity to defend themselves against prosecution in relation to corporate cartel allegations. The new provisions also permit a wider range of business dealing to fall within the exception. Whilst this may be seen as a softening of the law, the latest amendments to the CCA have also included additional requirements that corporations must meet in order to qualify for the defence. This is in an attempt to ensure the legislation strikes a balance between the criminalisation of corporate cartels and allowing the necessary business dealings of corporations to continue.

Cross-border issues

Given the global nature of cartel conduct and the focus by regulators on multinationals, it is important to consider any cross-border issues that may arise when attempting to enforce Australian law. Currently, s 5 of the CCA limits extraterritorial enforcement to conduct engaged in outside Australia by:

'a) Bodies corporate incorporated or carrying on business within Australia; or
b) Australian citizens; or
c) Persons ordinarily resident within Australia."[54]

The Panel in the Harper Review recommended this section be extended to include conduct that related to trade or commerce within Australia or between Australia and places outside Australia.

As the cartel conduct is generally international in nature, a significant number of countries have come together to form the Cartel Working Group ("**CWG**"). The 64 member countries are from all six inhabited continents.[55] The CWG, which forms part of the International Competition Network ("**ICN**"), attempts to 'address the challenges of anti-cartel enforcement, including the prevention, detection, investigation and punishment of cartel conduct'.[56] Essentially, the CWG achieves its mandate by facilitating international assistance in relation to enforcement for cartel matters. The CWG also serves as an information sharing platform. While there is still an official process for giving and receiving information, this facilitation provides a fast and effective method.

The CWG has indicated its priorities for 2018–2021. They are as follows:

1. 'improve the effectiveness of anti-cartel enforcement through education, examining legal challenges and identifying investigative techniques';
2. 'promote familiarity with, and use of, existing work product and projects';
3. 'expand existing work products';
4. 'develop new practical guidance and avenues for exchanging effective enforcement practices';

5. 'organise annual Cartel Workshops';
6. 'strengthen CWG working procedures'; and
7. 'contribute to the broader work of the ICN'.[57]

Further to facilitating assistance between countries, the ICN also provides a significant amount of information in relation to anti-cartel enforcement. A number of manuals have been drafted and are available on the ICN website.

Although Australia has internally limited cross-border enforcement, in recent years it has joined together with other nations in order to investigate corporate cartels. In 2015, Australia and The People's Republic of China signed a memorandum of understanding. The agreement essentially allows both countries to share information and evidence in relation to anti-competitive conduct. The People's Republic of China currently has antitrust cooperation agreements with other countries such as Korea, Japan and America.

Developments in private enforcement of antitrust laws

Any person who suffers loss or damage by way of cartel conduct is able to bring a private claim in the Federal Court of Australia. Although there are some issues with private enforcement and there is need for further development, the current legislative regime allows for class actions under the *Federal Court of Australia Act* 1976 (Cth) ("**FCAA**"). Under the FCAA, the following requirements must be met before a class action can be brought:

'a) 7 or more persons have claims against the same person; and
b) The claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
c) The claims of all those persons give rise to a substantial common issue of law or fact."[58]

Given the potential reach of cartel conduct, the availability of class actions ensures private enforcement can occur on a grand scale. In Australia, all those who meet the description of the 'group' are automatically included in the action. In order to opt out of the class action, they must take positive steps to do so. As with a normal cartel case, damages are awarded on a compensatory basis, based on the class as a whole. While class actions seem to be an appropriate way to satisfy private enforcement, the reality is that only a very small number of class actions relate to cartels. A recent study indicated that only 1.5% of all class actions between 1992 and 2014 were brought in relation to cartel conduct.[59]

Enforcement and compliance priorities for 2018

The ACCC has recently released a statement indicating their enforcement and compliance priorities for 2018. Not surprisingly, cartel prosecution continues to be an area of focus. Particular areas of interest in 2018/2019 are construction, agriculture, financial services and energy sectors. Arguably the most important, however, is the ACCC's priority on consumer protection. Throughout a number of industries, the ACCC has been investigating potential false and misleading conduct as well as potential cartel conduct that is ultimately affecting consumers.

Increased penalties remain a priority regarding the imposition of sanctions for infringements of competition law in order to deter anticompetitive conduct. On 26 March 2018, an OECD report found that average Australian penalties are significantly lower than those imposed in other comparable OECD jurisdictions. This report has forced regulators and prosecutors to consider the current 'instinctive synthesis' approach taken by the Federal Court in its

consideration of various factors, in contrast to OECD countries which use a set methodology including sales of the infringing countries products. As the OECD report found that differences in penalties can have an impact on deterrence, it can be safely predicted that regulators will continue to push for higher penalties. This in turn is likely to lead to corporations increasingly utilising the leniency and amnesty regimes made available by the ACCC and CDPP.

* * *

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