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Australia

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Overview of the law and enforcement regime relating to cartels

In Australia, corporate cartel conduct is governed by Part IV of the *Competition and Consumer Act 2010 (Cth)* ("CCA"). Under the legislation, a corporate cartel is determined to exist when actual or potential competitors agree to a cartel provision.

According to s 45AD(2)–(3) of the CCA, a corporation must not make, or give effect to, a contract, arrangement or understanding with another corporation which contains a cartel provision. In order to be considered a cartel conduct, the purpose or effect of the condition must be to:

a) price fix;
b) prevent, restrict or limit production and capacity to supply;
c) allocate customers, suppliers or territories; or
d) bid rig.

In determining whether a corporation has engaged in cartel conduct, it is first necessary to consider s 84 of the CCA. Under this section, it is necessary to establish the state of mind of the body corporate, in relation to the contravention. It must be shown that a director, employee or agent of the body corporate:

a) engaged in the conduct;
b) in engaging in the conduct, they acted within the scope of their actual or apparent authority; and
c) they had that state of mind.

If the above is satisfied, the body corporate is taken to have engaged in a contravention of the CCA.

Similarly, in proceedings against a person other than a body corporate, it is essential to first establish the individual's state of mind. Under s 85 of the CCA, the Courts are given discretion to determine whether the defence of "acting honestly and reasonably in the circumstances" is available.

If a corporation or an individual have contravened a cartel provision, the Australian regime provides for both civil and criminal penalties. Civil matters are investigated by the Australian Competition and Consumer Commission ("ACCC") and are determined "on the balance of probabilities", while criminal matters are prosecuted by the Commonwealth Director of Public Prosecutions ("CDPP") and must be determined "beyond reasonable doubt". The difference in standards reflects the serious nature of the criminal provisions.

Overview of investigative powers in Australia

The ACCC's main investigatory powers are contained under Part XII of the CCA. S 155 of

the CCA enables the ACCC to issue a written notice requiring a person to furnish information, produce documents and appear before the ACCC to give evidence, which "constitutes, or may constitute, a contravention of…" the CCA.

In June 2019, the ACCC produced a set of guidelines for the use of these powers, which confirm the first consideration should be the value of the information requested along with the burden of the notice on the recipient. This power does not override legal professional privilege ("LPP"); however, it does override an individual's privilege against self-incrimination. The information cannot, however, be used in criminal proceedings.

It is a contravention, under s 155 of the CCA, to "refuse or fail to comply with a notice…" issued by the ACCC and is punishable by way of a fine. For an individual, the fine is up to AUD$22,200.00 and for a corporation, up to AUD$111,000.00. Additionally, given the serious nature of non-compliance with compulsory evidence gathering notices, the ACCC can refer matters to the CDPP. If this occurs, a conviction is punishable by two years' imprisonment.

Recently, the defence of "reasonable search" under s 155(5B) was introduced to the regime. In order to be eligible for the defence, the individual must provide a written statement which includes details of the scope and limitations of the search. To determine what constitutes a reasonable search, s 155(6) stipulates the following may be taken into account:

a) the number of documents involved;
b) the nature and complexity of the matter to which the notice relates;
c) the ease and cost of retrieving a document relative to the resources of the person who was given the notice; and
d) any other relevant matter.

Australia's current regime also allows the ACCC to seize information by way of a search. Before the search can be executed, a warrant must be obtained from the Court.

Overview of cartel enforcement activity during the last 12 months

After the introduction of new cartel laws in 2017, Australia's enforcement activity has significantly increased. The ACCC now has a substantial team of specialist criminal cartel investigators which reflects this growth in enforcement activity.

Since the publication of the 2020 Australia chapter in *Global Legal Insights – Cartels*, there have been a number of developments in cartel enforcement activity.

Australia and New Zealand Bank, Deutsche Bank and Citigroup

The financial sector has been a strong focus of the ACCC for some time, which ultimately resulted in cartel charges being brought against Australia and New Zealand Bank ("ANZ"), Deutsche Bank and Citigroup. A number of CEOs and senior executives have also been criminally charged as a result of JPMorgan's immunity deal with the ACCC.

In March 2019, the CDPP served the statement of facts on the accused, approximately 10 months after the initial charges were laid. Later, in early November 2019, a Local Court Magistrate ordered that both JPMorgan's current and former executives and several ACCC senior officials be questioned in relation to the immunity deal. The basis for the questioning was in "the interests of justice".

The matter was temporarily suspended in March 2020 due to COVID-19. On 8 December 2020, the six senior banking executives were committed to the Federal Court of Australia for trial before a jury on the criminal cartel charges. The matter will be heard in the Federal Court at a later date.

The Country Care Group Pty Ltd

The Country Care Group Pty Ltd ("Country Care") is an Australian company which supplies aged care goods such as wheelchairs, alarm systems and dementia products. In February 2018, charges were laid against Country Care, its managing director and one employee for breaches of the CCA relating to price-fixing. This represents the first criminal prosecution of an Australian corporation and the first prosecution of individuals for cartel conduct.

While there were initially 140 charges, it is reported that the CDPP reduced this number for the indictment. Dates for this matter have changed on a number of occasions; it is currently listed for hearing on 9 February, or between 1 March–23 April 2021.

J Wisbey & Associates Pty Ltd v UBS AG & Ors

On 27 May 2019, a class action was filed by J Wisbey & Associates against UBS AG, Natwest Parkets PLC, JPMorgan Chase Bank NA, Citibank NA and Barclays Bank PLC for alleged cartel conduct in the foreign exchange market between 1 January 2008 and 15 October 2013. This is known as the Australian Foreign Exchange Cartel Class Action. The charges relate to manipulation of foreign exchange benchmark rates, foreign currency spreads and the triggering of client stop-loss and limit orders.

The matter was listed for hearing on 8–9 October 2020. It is unclear from the available sources whether this took place.

BlueScope Steel Limited ("BlueScope")

In 2019 the ACCC has commenced civil proceedings against BlueScope and its former general manager of sales and marketing, alleging that between September 2013 and June 2014, they attempted to induce steel distributors in Australia and overseas manufacturers to enter agreements containing a price-fixing provision.

On 16 December 2020, the former general manager was sentenced to eight months' imprisonment for inciting the obstruction of the ACCC investigation. In imposing a sentence, the Local Court Magistrate emphasised the seriousness of the conduct, and said: "[I]n all dealings [with the ACCC] a person needs to allow investigations to run properly, without any attempt to hinder investigations by officials."

This was the first time an individual had been charged with, and convicted of, inciting the obstruction of an ACCC investigation.

Key issues in relation to enforcement policy

One of the biggest challenges facing the ACCC is the covert nature of corporate cartels. Both corporations and individuals go to great lengths to hide their wrongdoings in order to retain the maximum financial benefit possible. The fact that the conduct is illegal only adds to its covert nature.

With today's rapid technological advancement, cartels are able to operate digitally and collude through the use of mathematical algorithms. As previously reported, there has been recent development in the detection of such algorithms. Experts, however, are divided as to the degree of assistance artificial intelligence can provide in detecting such convert behaviour.

A further challenge to enforcement is the ability to impose an appropriate financial penalty. Although Australia can and does impose substantial penalties, the most recent report published by the Organisation for Economic Co-operation and Development indicates that the maximum penalties imposed in Australia are significantly lower than those in comparable jurisdictions.

Key issues in relation to investigation and decision-making procedures

While the ACCC has extensive investigative powers under the CCA, there are also some safeguards in place to ensure the rights of those involved are respected. For example, although the ACCC may search premises, perform telephone intercepts and replicate important information, they must first apply for and receive a warrant from the Court. The Court thoroughly reviews any such applications to ensure these individual rights are preserved. In addition, the ACCC does not have the power to override LPP.

The ACCC may only recommend corporations to the CDPP for prosecution if they have gathered enough evidence to do so. On 15 November 2014, the ACCC and the CDPP signed a Memorandum of Understanding ("MOU") which allows the ACCC to refer any serious breach of the CCA for prosecution wherever possible. The MOU states that if one or more of the following apply, the conduct is to be considered "serious":

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

Leniency/amnesty regime

Immunity and leniency are available to both corporations and individuals involved in cartel conduct. Each may apply for a marker, which has the effect of preserving the "first-in" status that is necessary for immunity. These options are available in both civil and criminal proceedings.

The ACCC's new immunity and cooperation policy commenced in October 2019, replacing the September 2014 policy. The new policy contains an updated criteria and comments on the need for a cooperation agreement to be in place prior to immunity being granted.

Civil immunity

Before a corporation can be eligible for immunity, they must satisfy the following criteria:

a) they must admit to engaging in cartel conduct as either a principal or in an ancillary capacity, and that the conduct may contravene the CCA;
b) they must be the first party to apply within the cartel;
c) they must not have coerced others to participate in the cartel;
d) they must have ceased or undertake to cease involvement in the cartel;
e) the admissions must be a truly corporate act;
f) they have provided full, frank and truthful disclosure and have cooperated fully and expeditiously during the process, including taking all reasonable steps to procure the assistance and cooperation of witnesses and to provide sufficient evidence to substantiate its admissions, and agrees to continue to do so;
g) they have entered into a cooperation agreement; and
h) they have maintained and agree to maintain confidentiality regarding the status of their immunity and the details of the investigation.

Provided the ACCC is satisfied the above criteria are met, conditional immunity will be granted. In order to gain final immunity, a corporation must maintain eligibility and continue to provide full and frank disclosure. Conditional immunity becomes final immunity at the conclusion of any ensuing proceedings.

If a corporation is eligible for conditional immunity, they may apply for derivative immunity for related corporate entities and/or current and former directors, officers and employees that were involved in the conduct. During the application process, the corporation must provide a list of all those seeking derivative immunity and must be able to demonstrate the necessary relationship at all relevant times.

Furthermore, the ACCC will generally not grant immunity if they are already in possession of enough evidence that is likely to establish at least one contravention of the CCA. They also have the ability to revoke immunity at any time if, on reasonable grounds, they are satisfied the applicant has failed to meet the necessary conditions.

Criminal immunity

The ACCC must first be satisfied the corporation or derivative entity meets the criteria for civil immunity. If so, they are able to make a recommendation to the CDPP for immunity from prosecution. Once a recommendation has been made, the CDPP must then exercise independent discretion and consider whether immunity is appropriate in the circumstances. Provided they are so satisfied, the CDPP will provide a letter of comfort to the corporation. This letter recognises the "first-in" status and outlines the CDPP's intention to provide immunity so long as they maintain eligibility and enter into a cooperation agreement. Before criminal proceedings commence, the CDPP will then issue a written undertaking which grants the immunity.

Similar to the ACCC, the CDPP may revoke immunity based on recommendation or on their own belief that the corporation has not fulfilled the necessary requirements.

Cooperation policy

Given the extensive criteria, the reality is that not all parties are eligible for immunity. In these situations, cooperation is still encouraged by the ACCC and the courts afford more lenient treatment to persons who cooperate.

Civil cooperation policy

During the course of proceedings, the ACCC will make submissions to the Court that outline any cooperation received, specifying the extent and value of it. In some circumstances, the ACCC can invite parties to write their own submissions and provide evidence in support. To determine the extent and value of the cooperation, the ACCC will consider whether:

a) the ACCC was approached in a timely manner seeking to cooperate;
b) the party provided significant evidence which was previously unknown;
c) the party provided full, frank and truthful disclosure and continued to cooperate;
d) the party ceased or indicated they would cease involvement in the cartel;
e) the party coerced others to participate in the cartel; and
f) the party acted in good faith when dealing with the ACCC.

In exceptional circumstances, the ACCC can use its discretion to grant full immunity to a cooperating party who otherwise would not be eligible.

Criminal cooperate policy

After the ACCC considers the above, they then have the ability to provide a recommendation to the CDPP. The CDPP can present the recommendation to the Court; however, it is ultimately for the Court to weigh these factors with general sentencing considerations to determine an appropriate outcome.

Amnesty Plus

Amnesty Plus is available to those parties who discover the existence of a second, unrelated cartel while cooperating in relation to the first. Generally, conditional immunity will be granted in relation to the second cartel, while "Amnesty Plus" is available in relation to the first.

"Amnesty Plus" is essentially a recommendation to the Court, from the ACCC, for a reduction in penalty for the corporation's participation in the first cartel. To increase the chances of receiving Amnesty Plus, parties should initially apply for a marker in relation to the second cartel.

Administrative settlement of cases

In the ACCC's October 2019 immunity and cooperation policy, they addressed the possibility of administrative settlement. When determining whether to reach an agreement on civil penalties or other relief and the terms of such agreements, the ACCC is to consider the following factors:

a) the extent and value of the cooperation;
b) whether the contravention arose out of senior management conduct or at a lower level;
c) whether there is a corporate culture of compliance;
d) the nature and extent of the contravening conduct;
e) whether conduct has ceased;
f) the amount of loss/damage caused;
g) the circumstances in which the conduct took place;
h) the size and power of the corporation; and
i) whether the contravention was deliberate and the period over which it extended.

After considering the above, the ACCC will then determine whether it is appropriate to settle the matter.

Third-party complaints

Any person, or corporation who suspects a breach of the cartel provisions, may make a complaint to the ACCC and apply for immunity from prosecution. Under the current regime, the ACCC is not obligated to investigate based on such complaints.

If the ACCC does investigate a matter and subsequently decides not to bring an action, the third party may bring a private action as discussed below.

Civil penalties and sanctions

There are currently two civil prohibitions in the CCA against cartel conduct. S 45AJ, prohibits making a contract, arrangement or understanding that contains a cartel provision. It is also prohibited under s 45AK to give effect to such a provision. The current regime stipulates the penalties for each contravention are the same. Under the CCA, the maximum pecuniary penalty that can be incurred by a body corporate, per civil contravention, is the greater of the following:

a) AUD$10 million;
b) three times the benefit of the profits attributable to the offence; or
c) if the benefit cannot be determined, 10% of the corporation's annual turnover for the 12 months prior to the offending.

An individual found in contravention of the above can be liable for a pecuniary penalty of up to AUD$500,000.00. The Court may also exclude individual eligibility for company management.

Right of appeal against civil liability and penalties

Initial proceedings are held before a single Judge in the Federal Court of Australia. If a matter is to be appealed, it is brought before the Full Federal Court and is heard before at least three Judges. Flight Centre utilised this right a number of times.

Flight Centre was initially ordered to pay a fine of AUD$11 million for contravening the cartel provisions in the ACCC. They appealed the decision to the Full Federal Court which determined they had not participated in cartel conduct and ordered the ACCC to pay Flight Centre's costs. Following this appeal, the ACCC were granted special leave to appeal to the High Court of Australia. In a majority Judgment (4-1), the High Court ultimately determined that Flight Centre had, in fact, lessened competition in the market and was in contravention of the CCA. The matter was sent back to the Full Federal Court for sentencing and Flight Centre was ordered to pay a fine of AUD$12.5 million.

Criminal sanctions

There are two criminal offences in the CCA that involve cartel conduct. Under s 45AF, it is an offence to make a contract, arrangement or understanding that contains a cartel provision. It is also an offence, under s 45AG, to give effect to such a provision. The current regime stipulates the penalties for each contravention are the same. Corporations that are prosecuted face the same penalties as in the civil jurisdiction.

Pursuant to s 79 of the CCA, individuals who:

a) attempt to contravene;
b) aid a contravention; induced or attempts to induce a person to contravene; or
c) conspires with others to contravene,

cartel provisions are punishable by a term of imprisonment not exceeding 10 years and/or a fine of AUD$444,000.00.

The Federal Court also has the power to impose probation orders, injunctions, adverse publicity orders and community service orders.

Since the reform proposals came into effect in November 2017, the defence of "joint ventures" is available when facing prosecution. Under s 45AO of the CCA, the contraventions do not apply if the defendant proves that:

a) the cartel provision is:
    i) for the purposes of a joint venture;
    ii) reasonably necessary for undertaking the joint venture; and
b) the joint venture is for any one or more of the following:
    i) production of goods;
    ii) supply of goods or services;
    iii) acquisition of goods or services; and
c) is not carried out for the purpose of substantially lessening competition.

The same defence also applies in the civil jurisdiction. In both jurisdictions, the defendant bears the onus of proof.

Cooperation with other antitrust agencies

Australia is currently one of 64 countries that are part of the Cartel Working Group ("CWG"). The CWG's members represent all six continents and the group itself forms part of the International Competition Network ("ICN"). The ICN attempts to address a number of issues

relating to enforcement such as the prevention, detection, investigation and punishment of cartel conduct. These "agencies" serve as an information sharing platform which facilitates international cooperation and assistance.

The ICN released its priorities for 2019–2022. They are:

a) to promote familiarity with, and use of, existing work product and projects;
b) to expand existing work products;
c) to develop new practical guidance and avenues for exchanging effective enforcement practices;
d) to organise annual cartel workshops;
e) to strengthen CWG working procedures; and
f) to contribute to the broader work of the ICN.

In addition to these collaborations, Australia and the People's Republic of China ("China") have signed a MOU to assist one another in relation to cartel conduct. The agreement allows each country to share relevant information and evidence.

Cross-border issues

Given the global nature of corporate cartels, aside from the above, Australia's legal regime captures conduct that occurs outside its typical jurisdiction. S 5 of the CCA extends the jurisdiction to conduct outside Australia by:

a) bodies corporate incorporated or carrying out business within Australia;
b) Australian citizens;
c) persons ordinarily resident within Australia;
d) New Zealand and New Zealand Crown corporations;
e) bodies corporate carrying on business within New Zealand;
f) persons ordinarily resident within New Zealand; or
g) conduct outside Australia by any person in relation to the supply by those persons of goods or services to persons within Australia.

In addition to the above, the conduct must be done by a person or corporation "in trade or commerce". Trade or commerce is defined as trade or commerce "within Australia or between Australia and places outside Australia"; limiting cartel laws to conduct affecting competition in Australia.

By transcending geographical borders, Australia attempts to combat cross-border issues such as the international nature of corporate cartels.

Developments in private enforcement of antitrust laws

Any corporation or person who has suffered loss or damage as a result of cartel conduct has standing to bring a private claim in the Federal Court of Australia. Under s 82 of the CCA, the limitation period to bring such a claim is six years after the day on which the contravention occurred.

There are obvious disadvantages to bringing a private claim or "stand-alone" action; for example, the lack of resources to investigate the matter fully. The current regime recognises this issue and has attempted to provide some reprieve. S 83 of the CCA operates to assist parties who seek to bring a "follow on" action. The legislation stipulates that a finding of any fact made by a court, or an admission of any fact made by the person in proceedings where they have been found to contravene Part IV of the CCA, is *prima facie* evidence of that fact. In the "follow on" proceedings, Court documents can be produced to prove such a fact.

In addition, in the correct circumstances, private parties have the benefit of class actions under the *Federal Court of Australia Act 1976 (Cth)* ("FCAA"). Under s 33C of the FCAA, the following requirements must be met before a class action can be brought:

a) seven or more persons have claims against the person(s);
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.

In Australia, there is currently an "opt out" regime. Those who meet the description of the "group" are automatically included and it requires positive steps to be removed. If damages are to be awarded, they are calculated based on the group as a whole. Although not private, under s 87(1B) of the CCA, the ACCC may bring representative proceedings on behalf of persons who have suffered or are likely to suffer as a result of cartel contraventions.

The Australian Foreign Exchange Cartel Class Action is an example of these provisions at work.

Reform proposals

In 2014, the mandate for fairer competition business practice led to an extensive review of legislation lead by Professor Ian Harper ("The Harper Review"). The Harper Review examined the legislative regime to determine whether it was still adequate given a number of economic changes that had occurred in the previous 20 years – the time since the last review. As a result of the review, the *Competition and Consumer Amendment (Competition Policy Review) Act 2017 (Cth)* was introduced.

In short, the amendment extended the investigative powers given to the ACCC under s 155 of the CCA, increased fines for non-compliance, introduced the "reasonable search defence", updated the "joint venture" defence and introduced the "in trade or commerce" requirement. Since there has been such recent reform in the area, there are currently no further reforms proposed.

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