Cartels

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Australia

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Overview of the law and enforcement regime relating to cartels

In Australia, there are parallel civil and criminal prohibitions against cartel conduct, which are contained in Part IV of the *Competition and Consumer Act 2010* (Cth) (**CCA**). The Australian Federal Government is proposing to amend the prohibitions and has released exposure draft legislation for consultation. A preliminary bill to amend Australia's misuse of market power laws has already been placed before the Australian Parliament. A further bill, which will contain any amendments to Australia's cartel laws, is expected to be placed before the Australian Parliament in the course of 2017.

Division 1A of Part IV of the CCA prohibits the making of, or giving effect to, a contract, arrangement or understanding that contains a cartel provision. A cartel provision is defined as a provision of a contract, arrangement or understanding between actual or potential competitors that has either:

- the purpose or likely effect of fixing, controlling or maintaining a price or component of a price; or
- the purpose of:
  - preventing, restricting or limiting production, capacity or supply;
  - allocating customers, suppliers or territories; or
  - bid rigging.

The prohibition against cartel conduct is a *per se* prohibition, i.e. it is prohibited outright without any competition test having to be satisfied.

The criminal and civil prohibitions are identical except for the standard of proof required. The criminal offence requires both:

- an intention to make or give effect to the contract, arrangement or understanding; and
- the knowledge or belief that the contract, arrangement or understanding contains a cartel provision.

Although a limitation period of six years applies to civil contraventions, there is no limitation period for criminal contraventions.

The CCA also contains:

- a general civil prohibition on contracts, arrangements or understandings that contain provisions with a purpose, effect or likely effect of substantially lessening competition; and
- civil prohibitions against price signalling, which currently only apply to the banking sector (although these prohibitions may be extended to other sectors in the future). These prohibitions provide that:

- a corporation must not make private disclosures to competitors of pricing information if the disclosure is not in the ordinary course of business; and
- a corporation must not make disclosures about prices, capacity or strategy for the purpose of substantially lessening competition.

As part of the exposure draft legislation referred to above, the Australian Federal Government is proposing to repeal the prohibition on price signalling and to enact a new civil prohibition on concerted practices, which will apply to conduct with the purpose, effect or likely effect of substantially lessening competition.

The Australian Competition and Consumer Commission (**ACCC**) is the body responsible for investigating cartel conduct and managing the immunity application process. The ACCC can initiate civil proceedings in the Federal Court of Australia for civil pecuniary penalties and other orders for a breach of the civil prohibitions on cartel conduct.

The ACCC can also refer serious cartel conduct to the Commonwealth Director of Public Prosecutions (**CDPP**) for consideration for criminal prosecution.

The CDPP is responsible for prosecuting criminal cartel offences and can initiate criminal proceedings in the Federal Court for breach of the criminal cartel prohibitions.

Ultimately, it is the Federal Court of Australia that determines whether there has been a breach of the civil or criminal prohibitions on cartel conduct and makes the appropriate penalty orders.

Cartel conduct may also give rise to claims for civil damages. Class actions have featured significantly in the private enforcement of cartel conduct.

Overview of investigative powers in Australia

Australia has an immunity and leniency regime and most cartels are discovered by whistleblowers reporting them to the ACCC (discussed further below). It is very uncommon for the ACCC to investigate a cartel without the benefit of an immunity applicant's cooperation or a report from another national competition authority. Once the ACCC is made aware of a possible cartel, it uses its wide investigative powers to determine whether one actually exists.

Under section 155 of the CCA, the ACCC can require a person to provide information, produce documents or appear before it for examination where there is reason to believe that the person can provide information or documents relating to a possible breach of the CCA. The person can be required to give evidence orally under oath or affirmation when they appear before the ACCC.

A person is not excused from responding to a section 155 notice simply because it would be burdensome or costly for it to do so. The only limitations are that:

- the information, documents or evidence must relate to a "matter that constitutes, or may constitute, a contravention of the Act"; and
- the ACCC must have reasonable grounds for believing the person can provide such information, documents or evidence.

The breadth of the ACCC's powers, and the relatively low threshold for issuing a section 155 notice, means that successful challenges to the validity of a notice have been very rare. The Federal Court has repeatedly stated that, "*[T]he subsection is framed in the widest of terms… [and the] breadth of each of these terms is compounded by their use in combination.*" Courts have concluded that notices issued under the section are not to be narrowly construed.

The Full Federal Court of Australia has confirmed the breadth of the ACCC's power to issue section 155 notices in *Obeid v ACCC*. In that case, the Full Court unanimously upheld the validity of a section 155 notice issued in respect of bid rigging conduct. It held that the notice need only specify a "matter" which, after allowing for undiscovered facts, *may* amount to a contravention of the CCA.

The Australian Federal Government is proposing, as part of the exposure draft legislation referred to above, to introduce a "reasonable search" defence in relation to section 155 notices requiring the production of documents. If this is implemented into law, parties would only need to produce documents that they find after undertaking a "reasonable search".

The ACCC has also issued revised non-binding guidelines indicating its preparedness, in certain circumstances, to consult with parties prior to issuing section 155 notices about their document management and digital environment. That consultation may affect the scope of the notice that the ACCC ultimately issues.

Privileges

A person does not have to produce documents that are legally privileged in response to a section 155 notice.

In Australia, communications with in-house legal counsel can attract legal professional privilege. Where such counsel have a dual legal and commercial function, legal professional privilege will only apply to the extent that the in-house counsel was acting in their legal capacity and was sufficiently independent from their employer that they were engaged in the giving of independent legal advice.

A person is not excused from giving answers to questions or providing documents or information to the ACCC during the investigatory process on the basis that doing so will incriminate them and expose them to a penalty. However, any self-incriminating material produced in response to a section 155 notice is not admissible as evidence against them in criminal proceedings.

Sanctions for non-compliance

For non-compliance with a section 155 notice, a person may be liable to pay a fine up to a maximum of AU$3,600 or be imprisoned for up to 12 months, and a corporation may be fined up to $18,000. The same sanctions apply for knowingly providing information or giving evidence that is false or misleading, or obstructing an ACCC officer who is authorised to enter premises to undertake a search. The Australian Federal Government is proposing to increase the maximum penalty to $18,000 for individuals and $90,000 for corporations.

These sanctions have been used in the past in demonstration of the ACCC's consistently strict approach to requiring compliance with section 155 notices. Previous penalties ordered against individuals have included a fine of $3,500 (*ACCC v Boyle*), a fine of $2,160 along with 200 hours of community service (*ACCC v Neville*) and imprisonment for six months (*ACCC v Rana*).

Other enforcement tools

Outside of section 155 notices, the ACCC may:

- apply to a judge of the Federal Court for a warrant authorising it to carry out dawn raids (which involve both search and seizure powers, including the ability to copy physical documents as well as computer hard drives); and/or
- seek access to telephone interception and surveillance material collected by the Australian Federal Police (or other interception agencies) under a warrant issued by the Federal Court (or the Australian Administrative Tribunal) during investigations of cartel offences.

Overview of cartel enforcement activity during the last 12 months

This year (2016) has been an extremely active one for cartel enforcement, with:

- the first prosecution under criminal cartel laws being brought against Nippon Yusen Kabushiki Kaisha (NYK) and Kawasaki Kisen Kaisha (K-Line):
  - NYK has pleaded guilty and will face a sentencing hearing in April 2017;
  - K-Line has not yet entered a plea – the ACCC has been ordered to serve a brief of evidence by 27 December 2016 and the matter is next listed before the Court on 7 February 2017 for reply.
- the Federal Court of Australia handing down a number of significant penalties in respect of cartel conduct. In particular:
  - in May 2016, the Court ordered a number of parties, including Cement Australia Pty Ltd, to pay penalties totalling $18.61m for anti-competitive agreements regarding the acquisition and supply of fly ash;
  - in May 2016, Colgate-Palmolive Pty Ltd agreed to pay a penalty of $18m in respect of cartel conduct in the laundry detergent industry;
  - in June 2016, grocery retailer Woolworths Ltd agreed to pay a penalty of $9m for being "directly or indirectly knowingly concerned" in some of Colgate's conduct; and
  - in December 2016, the Court ordered penalties of $9m and $6m respectively against ANZ Banking Group and Macquarie Bank, by consent, for attempted cartel conduct in relation to the benchmark rate for the Malaysian ringgit;
- the ACCC commencing civil proceedings against a number of parties in respect of alleged cartel conduct in the polycarbonate roofing industry;
- the High Court (Australia's ultimate appellate court) allowing the ACCC's appeal in the *Flight Centre* matter, upholding the ACCC's allegation that travel agent Flight Centre attempted to induce airlines to enter into price fixing agreements;
- the ACCC succeeding in its appeal against the Court's first instance decision to dismiss its proceedings against Air New Zealand and Garuda Indonesia in the well-known air cargo litigation. An application for special leave to appeal to the High Court was heard in October 2016, with a decision (on special leave to appeal) expected in early 2017;
- the Federal Court of Australia finding that Italian cable company Prysmian had engaged in cartel conduct in the high voltage energy cable industry. The Court has yet to make its decision in relation to penalty; and
- the Federal Court of Australia hearing the ACCC's cases against Olex Australia Pty Ltd and others for alleged cartel and exclusionary conduct also in the supply and acquisition of electrical cables. The Court reserved its judgment in March 2016.

In addition, the Full Court of the Federal Court heard the ACCC's appeal of the first instance decision to dismiss its proceedings against the Australian Egg Corporation Limited, some of its directors, and egg producers associated with those directors, for attempting to induce an arrangement or understanding among egg producers to limit egg production. The Full Court is likely to deliver its decision in the coming months. The Federal Court has already ordered one director to pay a penalty of $120,000 pursuant to a settlement he reached with the ACCC.

Penalty decisions are also awaited in respect of the Federal Court's 2015 findings of cartel conduct in the supply of automotive wire harnesses against Yazaki Corporation and an Australian subsidiary.

Key issues in relation to enforcement policy

The ACCC regards cartel conduct as extremely serious and it remains a long-term enforcement priority. ACCC Chairman Rod Sims observed in June 2016 that "Cartel conduct is so detrimental to consumer welfare and the competitive process that it will always be an enforcement priority for the ACCC." This attitude is reflected in the ACCC's extensive cartel enforcement activity in the last year.

The ACCC has made public statements about its enforcement policy which suggest that, as a matter of policy, the enforcement procedures and penalties for cartel conduct will depend on the nature of the conduct in question. If the conduct is considered to be "serious cartel conduct", the ACCC will seek to have the parties prosecuted criminally. Less serious conduct will be pursued under civil penalty provisions. Mr Sims has also emphasised the need for penalties to be "commercially relevant", and "high enough for businesses not to see them as merely an acceptable risk of doing business". Notably, as referred to above, the ACCC has appealed the Federal Court's penalty decision in cartel proceedings regarding the acquisition and supply of fly ash, arguing that the Court's penalty of $18.61m was manifestly inadequate and not of appropriate deterrent value. The ACCC had previously submitted that penalties of over $90m would have been appropriate.

Criminal enforcement

The ACCC also remains committed to pursuing cartel conduct on a criminal basis, with ACCC Chairman Rod Sims stating in August 2016 that the ACCC had 10 to 12 in-depth criminal investigations and was aiming for a steady stream of one to two criminal cases per year. It has established a serious cartel unit dedicated to examining potential "serious cartel conduct". In August 2014, in support of the ACCC's recently revised *Immunity and Cooperation Policy for Cartel Conduct* (**Immunity Policy**, see below), the ACCC and CDPP signed a new MOU regarding serious cartel conduct.

In accordance with the MOU, the ACCC will be more likely to consider cartel conduct to be "serious cartel conduct", and therefore refer it to the CDPP, if the conduct:

- was covert;
- caused, or has the potential to cause, large-scale or serious economic harm;
- was longstanding or had, or could have had, a significant impact on the market in which it occurred;
- caused, or could have caused, significant detriment to the public or a class of the public;
- caused, or could have caused, significant loss or damage to one or more customers of the alleged participants;
- involved senior representatives authorising or participating in the conduct;
- involved alleged participants that have previously been found to have participated in or have admitted to participating in a cartel;
- involved the government (and thus taxpayers) as victims; and/or
- involved the obstruction of justice or other collateral crimes.

Civil enforcement

In accordance with the ACCC's *Compliance and Enforcement Policy* (last updated in February 2016), the ACCC is more likely to commence proceedings if conduct is particularly egregious, where there is reason to be concerned about future behaviour, or where the party involved is unwilling to provide a satisfactory resolution.

Australia has a system of judicial enforcement, and the ACCC is not able to issue administrative fines for cartel conduct. To obtain civil penalties for cartel conduct, the ACCC must institute proceedings in the Federal Court of Australia. Even where an investigation has been settled, and the level of penalty (and other orders) agreed with the persons or corporations who have contravened the Act, the question of an appropriate penalty for a contravention is a matter for, and function of, the Courts in the exercise of judicial power, and an application must be made to the Court.

Parties can negotiate penalties with the ACCC to be jointly submitted to the Court. The Court will generally order the penalty as long as it is appropriate (that is, it falls within the "permissible range"), even if the Court would have otherwise imposed different penalties. In the recent ANZ and Macquarie cases regarding collusion in relation to the benchmark rate for the Malaysian ringgit, the Court noted that it would have imposed higher penalties, possibly significantly higher penalties, if the parties had not agreed on penalties with the ACCC.

Leniency/amnesty regime

"First-in" immunity

An individual or corporation can seek civil immunity from ACCC-initiated proceedings for cartel conduct, and criminal immunity from criminal proceedings under the ACCC's Immunity Policy. The Immunity Policy was updated in September 2014 following a targeted consultation in 2013–2014.

To qualify for *conditional immunity*, the ACCC must not, at the time of the application for immunity, have enough evidence to start proceedings in respect of the cartel, and an applicant must:

- be or have been a party to a cartel (as a corporation or individual), or a director, officer or employee of a corporation that is or was a party to a cartel;
- admit that its conduct may contravene the CCA (and any admission by a corporation must be a truly corporate act);
- be the first party to apply for immunity in respect of the cartel;
- not have coerced others to participate in the cartel;
- have ceased its involvement in the cartel, or indicate that it will cease its involvement; and
- provide full, frank and truthful disclosure, and cooperate fully and expeditiously when making the application, and undertake to continue to do so throughout the investigation and any court proceedings.

Application process

To facilitate and encourage applications for immunity, the ACCC has developed a near-paperless process under its Immunity Policy.

An initial approach can be made orally to the ACCC, on a no-names or hypothetical basis, to determine whether immunity is available and request the placement of a marker. The marker allows an applicant to hold its place in the "immunity queue" for a limited period of

time (usually 28 days) in order to allow it to collect the necessary information and complete initial internal investigations before seeking to "perfect" its marker. A marker must include a description of the cartel conduct in sufficient detail to allow the ACCC to confirm that no other person has applied for immunity or obtained a marker in respect of the cartel.

After obtaining a marker, a party needs to perfect its marker by demonstrating that they satisfy the requirements for conditional immunity. This includes the provision of a detailed description of the cartel conduct (often referred to as a "proffer"), which can also be made orally or in writing, as well as the production of contemporaneous documents evidencing the cartel conduct.

On the basis of the information provided in the proffer, the ACCC will determine whether the marker holder satisfies the criteria for a grant of conditional immunity. The ACCC will advise an applicant in writing once it is satisfied that a party is eligible for conditional immunity. Ordinarily, the letter will describe the conduct for which the applicant has been granted conditional immunity, and the terms and conditions of the grant of conditional immunity.

Once a corporation obtains conditional immunity it can also seek derivative immunity, available for related entities and/or its current and former directors, officers or employees who were involved in the cartel conduct.

The requirement of full cooperation places a heavy burden on immunity applicants and their employees. However, the consequence is full immunity from ACCC-initiated civil proceedings and criminal proceedings undertaken by the CDPP.

To receive final immunity, the applicant must:

- remain eligible for conditional immunity;
- provide full and frank disclosure; and
- keep confidential its immunity applicant status, and details of the investigation and any ensuing proceedings.

If a party is eligible, conditional civil immunity will become final immunity once any ensuing civil proceedings brought by the ACCC against other cartel members conclude.

While all applications for both civil and criminal immunity must be made to the ACCC, as described above there is a division of responsibility in relation to granting immunity:

- The ACCC will grant immunity from civil proceedings in accordance with its Immunity Policy. However, if the ACCC determines that the conduct in question amounts to serious cartel conduct (see above) and refers the matter to the DPP, it will also make a recommendation to the CDPP in relation to immunity from criminal proceedings.
- In accordance with the Prosecution Policy of the Commonwealth, the CDPP will take the ACCC's recommendation into account but possesses independent discretion on whether to grant immunity from criminal prosecution. Under its new Prosecution Policy, the CDPP will inform the parties of the conditions of immunity in writing by way of a letter of comfort, and then provide an undertaking. This is intended to create greater certainty for companies as to their criminal liability.

One of the limitations of the immunity regime is that it does not limit the rights of injured third parties to launch proceedings to recover damages. The status of private actions for damages is explored below.

Amnesty-plus

The ACCC's Immunity Policy also includes an amnesty-plus regime for cartelists who are not eligible for immunity in a cartel already being investigated by the ACCC but who provide

the ACCC with evidence of a second cartel of which the ACCC was not previously aware.

If they satisfy the ACCC's amnesty-plus policy, they gain immunity from prosecution for the second cartel and a recommendation from the ACCC to the Court for a further reduction in the civil penalty in relation to the first cartel. If the first cartel is being pursued as a criminal matter, the DPP will advise the Court of the full extent of the cooperation provided.

Leniency

For those corporations and individuals who fail to 'get in first' and secure immunity, the ACCC's Immunity Policy also provides a mechanism through which a cooperative party can receive more lenient treatment than would otherwise be the case.

At the end of an investigation, the ACCC will assess the extent and value of a party's cooperation and make submissions to the Court identifying the corporation and recommending appropriate penalty discounts and other sanctions. The Court will ultimately determine the penalties or other sanctions to be imposed.

The relevant factors the ACCC will consider in assessing the extent and value of a party's cooperation include:

- the timeliness of the party's approach to the ACCC;
- the significance of evidence provided;
- the party's willingness to provide full, frank and truthful disclosure and full and expeditious cooperation;
- whether the party coerced others to participate in the cartel;
- whether the party has ceased involvement in the cartel; and
- whether the party has acted in good faith in dealings with the ACCC.

In deciding whether to resolve an investigation by agreement, including agreed civil penalties or other relief, the ACCC will consider:

- the extent and value of a party's cooperation; and
- for corporations, whether the contravention occurred at senior management level, and whether the corporate culture is conducive to compliance.

In "rare and exceptional" circumstances, the ACCC has discretion to grant full immunity from civil proceedings to a leniency applicant.

The immunity regime has undoubtedly increased the effectiveness of ACCC investigations. Since 2009 (when the previous Immunity Policy was implemented), the ACCC has received over 150 approaches seeking immunity. A significant proportion of cartel investigations and proceedings have involved immunity applicants.

Protection of information provided by an immunity applicant

While the ACCC will create its own records in respect of all marker requests, applications for immunity and proffers received orally, the ACCC has an interest in maintaining the integrity of its immunity policy and the benefits it delivers in terms of enforcement outcomes. To this end, the ACCC will seek to protect the confidentiality of all materials supplied by an immunity applicant, and:

- will use its best endeavours to protect any confidential information provided by an immunity applicant except as required by law or otherwise permitted by the CCA. The CCA includes statutory protections against disclosure of information given to the ACCC in confidence except in limited circumstances. Notably, one of those circumstances is the disclosure of protected information to other competition authorities (section 155AAA);

- may refuse to produce "protected cartel information" when sought by a fellow cartel member in their defence of civil penalty proceedings, after having regard to specific factors (section 157). Protected cartel information (**PCI**) is defined as information given to the ACCC in confidence that relates to a breach or possible breach of the cartel prohibitions;
- is protected from being required to produce PCI in court proceedings without the leave of the Court, having regard to an exhaustive list of factors (section 157B);
- is protected against being required to make discovery or to produce PCI in third party proceedings for damages or other orders (section 157C); and
- may claim privilege and/or public interest immunity to protect confidential information from disclosure where appropriate (Immunity Policy).

Administrative settlement of cases

As noted above, the Federal Court of Australia ultimately determines and imposes penalties and sanctions for parties that have contravened the CCA, even if the ACCC agrees on civil penalties or penalty discounts with the parties.

As a result of a controversial Full Federal Court decision, for much of 2015 the ACCC and respondents to cartel enforcement proceedings were prevented from engaging in what had become a well-established practice of making submissions to the Court (either jointly by agreement or independently) as to the appropriate penalty following settlement. However, in December 2015, the High Court overturned the decision and confirmed that the ACCC may agree a civil penalty with the party that has contravened the Act and make submissions to the Court in respect of the appropriate penalty (and the ACCC and parties may make independent submissions as to the appropriate level of penalty), although the Court must ultimately determine that the penalty is appropriate.

If an individual or corporation has cooperated with the ACCC in its investigation, in accordance with its Immunity Policy (described above), the ACCC will make submissions to the Court identifying the cooperation provided and may recommend an appropriate penalty discount. The ACCC may require the cooperating party to agree to a statement of facts or make admissions. Upon agreeing suggested penalties, the ACCC and cooperating party will file a statement of agreed facts and joint submissions to assist the Court in determining the appropriate penalty.

As an example, in October 2014, the Federal Court ordered penalties of $8.3m in a forklift gas cartel case following agreement between the ACCC and respondents as to appropriate penalties and other orders.

Third party complaints

Any person can bring a complaint, on a confidential basis, to the ACCC regarding a potential breach of the cartel laws. The ACCC may then initiate an investigation if appropriate, but is under no obligation to do so.

This is an easy way for individuals or companies to report parties whom they believe are engaging in cartel conduct which is detrimental to their businesses, and to have that behaviour investigated and prosecuted without having to go to court themselves.

If the ACCC investigates and chooses not to bring an action or chooses not to investigate, the third party may still bring a private action against the company for breach of the civil cartel provisions for loss or damage as a result of the suspected cartel conduct.

In 2012, the first private action in Australia against a company for breach of the civil cartel provisions was brought and won (*Norcast v Bradken*).

Civil penalties and sanctions

Any particular instance of cartel conduct may give rise to two types of contravention: the first for the making of the contract, arrangement or understanding containing the cartel provision; and the second for each instance in which it is given effect. As penalties are a calculation for each contravention, the total quantum of penalty can increase quickly if the cartel conduct continues over a period.

The Federal Court can impose civil pecuniary penalties on a corporation for each breach of the civil prohibitions of up to the greater of:

- $10m;
- three times the value of the benefit attributable to the conduct (if it can be ascertained); and
- if the benefit cannot be ascertained, then 10% of the corporate group's annual turnover attributable to Australia.

To date, reliance has been placed largely on the $10m maximum, given the difficulties in isolating and determining the value of any benefit gained from a particular contravention.

Individuals knowingly involved in a breach of the civil prohibitions on cartel conduct can be liable for civil pecuniary penalties of up to $500,000 per contravention. Declarations, injunctions, adverse publicity orders, probation orders, community service orders, or orders excluding them from company management, can also be imposed on individuals. These sanctions may be sought concurrently. In its recent enforcement action relating to an egg producers' cartel, for example, the ACCC is currently seeking declarations, injunctions, financial penalties, imposition of consumer and competition law compliance programs, publicity orders and disqualification orders against the directors of the company.

No formal cartel sentencing or penalty guidelines exist for breaches of the CCA, and the Court has a broad discretion to determine the extent of the pecuniary penalty to be imposed. The Court acknowledges that the "fixing of a penalty is not an exact science", and so determines whether the amount is appropriate, taking into account the circumstances of the conduct. The following factors have been considered broadly relevant in deciding the amount of the penalty to be imposed for the breach of competition provisions:

- the nature and extent of the contravening conduct;
- the amount of loss or damage caused;
- the circumstances in which the conduct took place;
- the size of the contravening company;
- the degree of power it has, as evidenced by its market share and ease of entry into the market;
- the deliberateness of the contravention and the period over which it extended;
- whether the contravention arose out of the conduct of senior management or at a lower level;
- whether the company has a corporate culture conducive to compliance with the Act, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention;

- whether the company has shown a disposition to bid rigging with the authorities responsible for the enforcement of the Act in relation to the contravention;
- whether there has been similar conduct by the company in the past;
- the effect of the conduct on the functioning of the market and other economic effects of the conduct;
- the financial position of the contravening company; and
- whether the conduct was systematic, deliberate or covert.

Companies are specifically prohibited from indemnifying individuals against their legal costs or any financial penalty imposed for their contravention of the civil prohibitions.

Right of appeal against civil liability and penalties

The decision of a single judge of the Federal Court determining liability and ordering relief can be appealed to a court of three or more judges sitting as the Full Court of the Federal Court of Australia by way of a re-hearing.

Any further appeals are, by leave only, to the High Court of Australia.

As the hearing to determine liability is often conducted separately to the hearing to determine the penalty, an appeal on liability may be made before the final penalty hearing. In practice, this means that penalties may not be determined until all appeals on liability have been exhausted by an unsuccessful party. In a number of recent cases, however, hearings on penalty have proceeded concurrently with the preparation of appeals on liability; most notably, the Flight Centre and ANZ mortgage broker matters. The filing of an appeal will not ordinarily stay the requirement to pay any penalty that has already been imposed by the Court.

The appeal process does not allow for cross-examination of witnesses, which would have occurred in the first instance proceedings.

As a significant proportion of cartel proceedings are resolved by settlement, there have been relatively few appeals in cartel cases.

Criminal sanctions

Criminal sanctions are available in Australia for serious cartel conduct.

Individuals knowingly involved in a criminal breach of the cartel prohibitions can face a maximum of 10 years' imprisonment, a criminal record and/or fines of $360,000 for each contravention.

Similarly to civil sanctions, a corporation found in criminal breach of the cartel prohibitions can face a fine of up to the greater of $10m, three times the value of the illegal benefit from the conduct or, where the benefit cannot be calculated, 10% of the corporate group's annual turnover attributable to their Australian business.

Upon the recommendation of the ACCC, the CDPP determines which matters are to be prosecuted. To date, only two criminal prosecutions have been brought in respect of cartel conduct. In July 2016, global shipping company NYK pleaded guilty to criminal cartel conduct in connection with the transportation of vehicles to Australia. NYK is yet to be sentenced. Notably, although imprisonment was one of the key deterrents highlighted in the push for the introduction of criminal sanctions for cartel conduct, no NYK executives will be imprisoned as part of this prosecution. A second entity, K-Line, has since been prosecuted for the same alleged cartel but is yet to enter a plea.

Given that there have been only two criminal cartel prosecutions to date, and neither company has yet been sentenced, there is minimal guidance on how the Courts will approach the enforcement of these sanctions. Unlike civil prohibitions, however, criminal cartel prohibitions can be heard in front of a jury or before a judge.

Cross-border issues

The CCA has considerable extra-territorial application, and the ACCC cooperates regularly with competition and other regulatory authorities in a number of jurisdictions.

Application to global conduct

Under section 5 of the CCA, the CCA's jurisdiction extends to any conduct undertaken outside Australia where: the persons or corporations involved are incorporated in Australia or carrying on business in Australia; are Australian citizens; or ordinarily reside within Australia.

Two recent cases have shed contrasting light upon the extraterritorial application of the old and new cartel provisions.

- Under the current cartel prohibitions, there is no explicit requirement that the cartelists must compete in (or have an effect on) markets located within Australia. In a recent private damages action, the Court found that bid rigging conduct contravened the CCA despite the conduct relating to the sale of a foreign corporation taking place wholly overseas. The fact that the corporation involved was carrying on business in Australia was the only territorial nexus required.
- Under the previous regime, there was an explicit requirement that the "competition" between the cartelists take place in a market in Australia. In *ACCC v Air New Zealand*, the Court concluded that cartel conduct that diminished competition between airlines, where such competition occurred wholly outside Australia, was not caught by the CCA. As a result, and despite finding that the elements of the contravention were otherwise established, no finding of contravention was made out. On appeal, the Full Court of the Federal Court of Australia found that the conduct did occur in a market in Australia and, accordingly, the airlines had contravened the CCA. As noted above, this judgment is being appealed.

The exposure draft legislation referred to above would, if implemented, result in a number of amendments to Australia's cartel laws. Most significantly, the legislation would confine Australia's cartel laws to cartel conduct occurring in trade or commerce within Australia, or between Australia and places outside Australia.

International cooperation

The ACCC is an active member of the International Competition Network and has several bilateral co-operation agreements or MOUs with many regulators, including with the: United States Federal Trade Commission; New Zealand Commerce Commission; Commissioner of Competition, Competition Bureau (Canada); UK Office of Fair Trading; European Commission; Fair Trade Commission of Japan; Korea Fair Trade Commission; National Development and Reform Commission and Ministry of Commerce (China); Taiwan Fair Trade Commission; Competition Commission of India; Commerce Commission of the Fiji Islands; and Consumer Affairs Council of Papua New Guinea.

The agreements provide for reciprocal notification of enforcement activities, co-operation of enforcement activities, avoidance of conflicts, exchange of certain information, and periodic meeting.

Australia has also signed a bilateral treaty on mutual antitrust enforcement with the United States, and provisions of the Australia-United States Free Trade Agreement require cooperation on investigation and enforcement matters. This enables the two countries to reciprocally exchange evidence for use in competition law enforcement.

In the air cargo investigation, each regulatory authority investigating the cartel around the world had weekly conference calls to discuss their strategy in investigating and prosecuting the cartel. On 14 February 2006, each authority co-ordinated worldwide dawn raids on each airline implicated in the cartel.

The obligations set out in these treaties are supported by a number of pieces of domestic legislation, particularly the *Mutual Assistance in Business Regulation Act 1992* (Cth) and the *Mutual Assistance in Criminal Matters Act 1987* (Cth).

Under section 155AAA of the CCA, the ACCC is empowered to exchange information with foreign antitrust authorities which would enable or assist that regulatory body to perform or exercise its functions. As noted above, however, it is the ACCC's policy to refrain from sharing information provided by cartel immunity applicants with regulators in other jurisdictions without the consent of the applicant for immunity, unless required to do so by law. It is the ACCC's general practice to seek waivers from its immunity applicants prior to sharing information with other agencies.

Developments in private enforcement of antitrust laws

Any person who suffers loss or damage from cartel conduct can bring a private claim for damages in the Federal Court against a party that engaged in, or any other person involved in, the contravening conduct. In Australia, damages are assessed on a compensatory basis. A claimant can only recover the amount of loss or damage suffered by them by reason of the cartel conduct, and punitive or exemplary damages are not available.

Under section 83 of the CCA, a finding of any fact by a Court made in previous proceedings in which the contravention was established can be used as *prima facie* evidence of that fact for the purposes of civil damages claims. Such a finding may be proved by production of a document under the seal of the Court from which the finding appears. The exposure draft legislation referred to above, if passed, would resolve the current uncertainty about whether section 83 extends to admissions of fact by explicitly covering both findings and admissions of fact.

Actions for damages for cartel conduct must be initiated within six years after the day on which the cause of action accrues. While the law is far from settled on this issue, arguably a cause of action will only accrue (and the loss or damage is only suffered) when the claimant becomes aware of the cartel and the fact it has been overcharged.

Levels of private enforcement in Australia remain at approximately 30% of all competition proceedings filed in the Federal Court, which stands in stark comparison to the United States, where 90% of claims concerned with competition law breaches are brought by private litigants.[1] As such, jurisprudence on the calculation of damages in Australia remains sparse. In March 2013, however, the Federal Court awarded damages of US$22.4m for a private action brought against a company for bid rigging. While the judgment was appealed both on liability and quantification grounds, the parties reached a confidential settlement prior to the appellate hearing before the Full Federal Court.

Australia has a well-developed class action regime that operates by virtue of Part IVA of the *Federal Court of Australia Act 1976 (Cth)*. The legislation details the requirements for the commencement and conduct of class action claims:

- At least seven persons must have claims against the same person or persons.
- The claims must arise out of the same, similar or related circumstances.
- The claims of all of those persons must give rise to at least one common issue of law or fact.

Australia's class action regime operates as an "opt-out" system, in which all persons who meet the description of the "group" will be represented by the lead claimant in the proceeding unless they take a positive step to exclude themselves from the proceeding. There is a presumption that litigation will continue on a representative basis unless the respondent establishes that it would be inappropriate for claims to be pursued in this way, with no certification or competency hearing as a matter of course.

As for unitary proceedings, a class action may only recover the amount of loss or damage suffered by the claimants due to the cartel conduct. Four cartel class actions have been commenced in Australia and all have settled, the most recent of which alleged a cartel between airlines to fix the price of cargo services and settled for AU$38m.[2]

Reform proposals

As referred to above, the Federal Government has released exposure draft legislation which would result in a number of amendments to Australia's competition laws (including cartel laws). These amendments arose from a review of competition law and policy in Australia which was undertaken in 2014 and 2015, and is known by reference to its Chair as the "Harper Review". In March 2015, the Harper Panel issued its Final Report, recommending an overall simplification of Australia's cartel laws, as well as a number of specific amendments.

While the Government indicated in November 2015 that it accepted the Harper Panel's recommendations in relation to Australia's cartel laws, its exposure draft legislation would not result in the sort of wholesale redrafting and simplification that was envisaged by the Harper Panel. The exposure draft legislation does, however, reflect a number of the specific recommendations of the Harper Panel.

Key amendments to Australia's cartel laws that will result if the exposure draft legislation is passed are set out below:

- The cartel laws would be confined to conduct in trade or commerce within Australia, or between Australia and places outside Australia. The intended effect of this amendment is to confine cartel laws so that they only cover conduct affecting competition in Australia.
- A pre-condition to the application of the cartel provisions is that parties need to be actual or likely competitors. The CCA currently specifies that "likely" includes a mere "possibility that is not remote" that the parties are in competition. The exposure draft legislation removes the cartel-specific definition, leaving the general law interpretation of "likely" (which appears in other provisions of the CCA) to apply.
- The joint venture exceptions to the cartel provisions would be broadened so that they would apply to:
    - contracts, arrangements and understandings (as opposed to just contracts);
    - joint ventures for the acquisition of goods (as opposed to just production and supply); and
    - cartel provisions that are for the purposes of a joint venture, or reasonably necessary for undertaking a joint venture (as opposed to only cartel provisions that are for the purposes of a joint venture).

- The existing exception to the cartel provisions in respect of exclusive dealing (which is separately prohibited under section 47 where it has the purpose or likely effect of substantially lessening competition) would be replaced by an exception that explicitly sets out and broadens the types of vertical trading restraints to be excluded from the operation of the cartel provisions.

* * *

Endnotes

1. Caron Beaton-Wells and Kathryn Tomasic, "Private enforcement of competition law: time for an Australian debate", (2012) 35(3) *UNSW Law Journal* 648.
2. A fifth proceeding, in relation to the supply of concrete, was not permitted to continue as a class action.

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