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WHITE PAPER

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ACCC on a Criminal Cartel Warpath: ANZ, Deutsche Bank, Citigroup, and Individuals Charged

Although Australia's *Competition and Consumer Act 2010* (Cth) has contained criminal cartel prohibitions since 2009, the Australian Competition and Consumer Commission has now made criminal cartel enforcement one of its top priorities. The ACCC laid its first criminal cartel charges in 2017, and since that time, it has laid charges against big business, small business and individuals.

Companies of all sizes and their executives need to ensure that their conduct does not fall foul of the cartel prohibitions.

This Jones Day *White Paper* reviews the ACCC's recent prosecution efforts, the increasingly high penalties for those who breach cartel laws, and the defences available to companies and executives seeking leniency for cartel conduct.

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The Australian Competition Regulator ("ACCC"), in June 2018, laid charges against Australia and New Zealand Banking Group Ltd ("ANZ"), Citigroup Global Markets Australia Pty Limited ("Citigroup"), Deutsche Bank Aktiengesellschaft ("Deutsche Bank") and several executives over alleged criminal cartel conduct in breach of the *Competition and Consumer Act 2010* (Cth) ("CCA") ("Share Placement Cartel").

The executives charged include Citi Australia's head of capital markets origination, the former head of markets for Citi Australia, the former CEO of Citi Australia, the former CEO of Deutsche Bank, the former head of equity capital markets for Deutsche Bank Australia and ANZ's Bank Treasurer.

The alleged cartel behaviour relates to the $2.5 billion sale in Australia of 80.8 million discounted shares to institutional investors in 2015. The proceeds of the institutional equity placement were intended to increase ANZ's capital buffer to meet requirements demanded by the Australian Prudential Regulatory Authority. The ACCC investigation has been running for over two years, and the matter is listed before the Federal Court of Australia on 3 July 2018. The parties charged have all made it clear they will vigorously defend the allegations.

Furthermore, a Citigroup spokesperson commented, "The allegations involve an area of financial markets activity that has not been considered by any Australian court or addressed in any regulatory guidance notes previously published by the ACCC or ASIC … This is a highly technical area and if the ACCC believes there are matters to address, these should be clarified by law or regulation or consultation." Citi has also said that underwriting syndicates exist to provide the capacity to assume risk and underwrite large capital raisings, and have operated successfully in Australia in this manner for decades.[1] In bringing these proceedings, it appears that the ACCC is unpersuaded that these apparently longstanding business practices are permitted by law.

The action is the fourth criminal action for cartel conduct in the past two years, and only the second instance in which individuals have been criminally charged.

A few months earlier, on 15 February 2018, the Commonwealth Department of Public Prosecutions ("CDPP") commenced proceedings against Country Care Group Pty Ltd ("Country Care"), its managing director and the former business development manager. This marked the first time individuals have been charged under Australia's criminal cartel prohibitions. It was alleged that Country Care, a Mildura-based company, engaged in cartel conduct involving assistive technology products used in rehabilitation and aged care, including beds and mattresses, wheelchairs and walking frames.

These two actions are consistent with the upward Australian and global trend of criminal cartel enforcement over the past two years, and are in line with the ACCC's many warnings to companies that conduct that falls within the prohibitions will be enforced to the fullest extent possible. Now that the ACCC has made good on its warnings, cartel participants should stand up and take note of the ACCC's new direction.

The Organisation for Economic Co-Operation and Development ("OECD") has labelled cartel behaviour as among "the most egregious violations of competition law".[2] From the OECD's perspective, cartels lead to a reduction in output and an increase in the price above a market equilibrium level, causing customers to purchase less of the product, and to pay more for what they do purchase. This results in a misallocation of resources and reduction in efficiency, thereby harming the economy in all respects. [3]

The OECD estimates that on average cartels produce overcharging amounting to 10 percent in the relevant market, and cause overall harm to the economy of 20 percent.

A DECADE OF PROGRESSION: ENFORCEMENT ACTIVITY FROM 2009–2018

The CCA (at that time, the *Trade Practices Act 1974* (Cth)) was amended to criminalise cartel conduct in 2009, surrounded by much fanfare.[4]

Cartel activity has become more global in nature since 2009, with competitors from various countries and regions coordinating on prices they charge on a regional or even global basis. The increasingly multijurisdictional and complex nature of cartel conduct has made cross-border cooperation crucial. In reaction, there is a growing trend among global competition regulators to coordinate efforts to expose violations, which increasingly results in investigations in one country leading to similar moves in others. Cooperation between regulators highlights the need

for companies to take a global approach to competition law compliance, and cooperate with investigations undertaken by both domestic and foreign competition regulators.

The ACCC regularly engages and exchanges information with regulators in other jurisdictions on a range of matters. The ACCC, for example, stated that its marine hoses cartel investigation was "greatly assisted" by both the United States Department of Justice and the United Kingdom Competition and Markets Authority.

From 2009 to 2014, the ACCC successfully brought civil proceedings against a good number of lower profile cartels. These included cartels in relation to the refrigerant gas, blenders, laundry detergent and cable supplies industries, among others.

In *ACCC v Air New Zealand* ("Air Cargo Cartel"), the ACCC commenced proceedings against 15 international airlines, settling with 13 airlines for A$98.5 million. On 27 June 2018, the Full Federal Court of Australia imposed a $15 million penalty on the 14th airline, Air New Zealand. The ACCC proceedings against the 15th airline, PT Garuda Indonesia Ltd, is being assessed for penalties at the time of writing (July 2018). The cartel resulted in a follow-on class action, which settled for A$38 million. [5]

The ACCC brought action against three parties in 2009 for engaging in cartel conduct in the markets for high voltage land and submarine cables. In July 2017, the Federal Court of Australia imposed A$3.5 million penalties against one of the cartel participants, Italian cablemaker Prysmian Cavi e Sistemi.[6]

By 2016, despite having a robust competition framework, the ACCC was yet to assert itself as tough on cartels. In 2016, the United States imposed cartel fines totalling A$386m, Brazil's Administrative Council for Economic Defense levied A$230.71m, the South Africa Competition Commission levied A$110.7m, and South Korea's Fair Trade Commission imposed A$764.81m. In the same period, the ACCC imposed A$39m worth of fines.

2017 marked a change in direction, as the ACCC began stamping its authority with significant sanctions against criminal cartels.

Australia's first ever criminal cartel proceedings were brought against a Japanese shipping company in early 2017.[7] In this case, the company pleaded guilty to criminal cartel conduct for its role in the alleged cartel concerning the international shipping of trucks, cars and buses to Australia between July 2009 and September 2012. The company was fined $25 million. Later in the year, criminal charges were laid against Japanese-based company Kawasaki Kisen Kaisha ("K-Line") in relation to the same cartel, and on 5 April 2018 K-Line entered a guilty plea. Sentencing will be heard in November 2018.

The CDPP set its sights within Australia's borders with the Country Care proceedings on 15 February 2018.

Five days later, the ACCC chair launched the ACCC's *2018 Compliance and Enforcement Policy*, which outlines the ACCC priorities for 2018.[8] Mr Sims emphasised that the ACCC was investing in its capacity to investigate criminal cartel behaviour, noting "we have five current referrals with the CDPP and a portfolio of investigations at an advanced stage." The five referrals the business community was warned about have now come to light.

As of June 2018, the ACCC has taken on banks and individuals. In the past two years, the ACCC's investigations have resulted in criminal proceedings against big business, small business, individuals and foreign companies. The promise of five criminal charges foreshadowed by Mr Sims in February 2018 has been delivered, and all indicators suggest the ACCC will not ease up in relation to cartels. In fact, the ACCC is likely to learn from these early actions, ensuring that criminal cartel prosecution are a justice on the ACCC report card.

PENALTIES ON THE INCREASE

Addressing the Committee for Economic Development of Australia in February 2018, ACCC Chair Rod Sims outlined the ACCC's priority of bringing pecuniary penalties in line with other jurisdictions. In March 2018, an OECD report reaffirmed the basis for Mr Sims's concerns, concluding that the average and maximum penalties imposed by the Australian Courts for breaches of cartel laws are significantly lower than in other OECD jurisdictions.[9]

In May 2018, the Full Court of the Federal Court ordered Japanese company Yazaki Corporation to pay a A$46 million penalty for cartel conduct in relation to motor vehicle wire harnesses, the highest penalty ever handed down under the CCA.[10] The ACCC had appealed the original penalties of A$9.5

million handed down in the Federal Court, emphasising its new hard-line stance against cartels.

In June 2018, Air New Zealand was ordered by the Federal Court of Australia to pay $15m in fines for its role in the Air Cargo cartel, the second biggest penalty imposed out of the 15 airlines charged.

Expect to see more cartels uncovered in 2018 and 2019, with harsher penalties imposed. The ACCC's cartel enforcement activity will eventually trend toward the standard set by the United States and the European Commission.

BACKGROUND

The 1998 OECD *Recommendation of the Council Concerning Effective Action Against Hard-Core Cartels* addressed four types of anticompetitive behaviour, broadly categorised as involving price fixing, output restriction, market allocation and bid rigging.[11]

The CCA contains both criminal and civil prohibitions against making or giving effect to a contract, arrangement or understanding which contains a cartel provision, which reflects the 1998 OECD *Recommendation*.[12]

In recognition of the seriousness of the cartel offences, the CCA imposes strict, or "per se" liability.

The criminal offence contains the additional fault element of "knowledge or belief" as defined in the *Criminal Code Act 1995* (Cth). A person has "knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events." The term "belief" remains undefined in the *Criminal Code* and the CCA, although case law suggests that in relation to criminal offences, it refers to a degree of awareness falling short of actual knowledge.[13]

The definition of "cartel provision", as applicable to both the criminal and civil prohibitions, is contained in s 45AD of the CCA. A cartel provision is one relating to price fixing, restricting outputs in the production or supply chain, allocating customers, suppliers or territories, or bid rigging, by parties that are, or otherwise would be, in competition with one another.

Collaboration of competitors is the oldest and most notorious way to create or consolidate economic power. When all significant competitors join together to eliminate their natural rivalry on price or other important terms of trade, they form the most offensive of all devices to trump the market—the cartel. Price fixing deadens the central nervous system of competition. It creates inefficiencies. It is illegal per se.[14]

DEFENCES

In rare circumstances, named parties can obtain statutory immunity from the ACCC for cartel conduct.[15] Additionally, the CCA provides an exemption for collective acquaintances or joint ventures.[16]

IMMUNITY AND THIRD PARTY ACTIONS

An integral part of the ACCC's strategy to combat cartels is its immunity and cooperation policy, which outlines the process for obtaining civil immunity from the ACCC, and potentially criminal immunity from the CDPP.[17] This policy also outlines how parties who participate with the ACCC, but are not the first to come forward, can seek lenient treatment in ACCC proceedings.

Australia is one of a number of countries with active leniency programs. These programs have played an important role in detecting cartel activity on a global level, as regulators can often gain access to evidence of global cartel conduct that may reside outside the jurisdictional reach of the country conducting the cartel investigation.

As cartel participants react to the sanctions, we expect an increase in immunity and leniency applications.

Despite the protections afforded to successful immunity applicants, parties should also be very aware of the prominence of private and class action proceedings in Australia. Immunity granted by the CDPP or the ACCC will in no way protect an offending cartel participant against third party actions including class actions. The opposite in fact is almost true; 'piggyback' third party actions often follow ACCC cartel proceedings. For example, the 'Concrete Cartel', the 'Vitamin Cartel', the 'Box Cartel', the 'Rubber Chemicals Cartel' and the 'Air Cargo Cartel'.[18]

INDEMNIFICATION OF OFFICERS: YOU ARE ON YOUR OWN, AND DEFENCE IS FUTILE

Any executives in danger of an ACCC action should note that the CCA prohibits companies from indemnifying their officers in respect of any civil liabilities incurred in their capacity as an officer of a corporation, and the legal costs incurred in defending an action where a director is found to be liable (s 77 CCA).[19] The CCA prohibition against indemnification makes no distinction between claims for which no liability is found and claims for which liability is found in the same proceedings—meaning it is theoretically sufficient for the director to be found liable on one claim in a proceeding to trigger the prohibition on indemnification in respect of all legal costs—even those incurred in respect of claims for which no liability was found.

The complex and costly nature of litigation involving alleged contraventions of the cartel prohibitions serves to operate harshly or unfairly against officers involved. As a consequence, there is a risk that an officer may elect to settle with the ACCC, or give concessions, rather than fight any allegations for fear that they will personally be exposed to all costs in a civil hearing.

As a closing point, 'officer' has the meaning given to it under s 9 of the *Corporations Act 2001* (Cth), meaning employees and middle-managers may not fall within the ambit of s 77A of the CCA. Therefore, it appears that employees that do not fall within the 'officer' definition can be indemnified by the company in relation to civil liabilities and legal costs.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com/contactus/.

Prudence Smith
Sydney
+61.2.8272.0593
prudencesmith@jonesday.com

John Emmerig
Sydney
+61.2.8272.0506
jemmerig@jonesday.com

Tim K. Atkins, a law clerk in the Sydney Office, assisted in the preparation of this White Paper.

ENDNOTES

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