Australian air cargo cartel class action settles — guidance on risks and costs

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Key points

- The air cargo cartel class action is the fourth of five cartel class actions that has commenced in Australia and the latest to be resolved through a court-approved settlement. The settlement highlights the risk of cartel conduct attracting both regulator and class action lawyers' interest. There is scope for further cartel class actions in Australia as a result of increasing investment in private enforcement of competition laws.
- The Federal Court of Australia's reasons provide guidance on the applicable principles to class action settlement approval. In particular, the in-depth scrutiny of the settlement terms demonstrates the court's concern in protecting the interests of group members that are not before the court but are bound by the settlement.
- This particularly complex and lengthy case illustrates the complexities surrounding class actions, including causation and damages and the significant time and resources that these proceedings utilise.
- The Federal Court of Australia also considers the applicable principles in relation to determination of a lump sum costs order under r 40.02(b) of the Federal Court Rules 2011 (Cth) (the Rules) in favour of a respondent that does not enter into the settlement.

Background

On 8 October 2015, the Federal Court of Australia published reasons for approving the settlement of a cartel class action against major international airlines for alleged contraventions of the price fixing provisions of the Trade Practices Act 1974 (Cth) (now the Competition and Consumer Act 2010 (Cth) (the CCA)).[1]

The class action, brought by De Brett Seafood Pty Ltd (the Applicant) sought damages and other relief on behalf of purchasers of air freight services for losses suffered as a result of the alleged cartel conduct by the airlines between 2001 and 2006 (the Group Members), relating to price fixing of fuel, insurance and security surcharges imposed by the airlines. Commenced in 2007, the respondents in the price fixing class action were comprised of a subset of the international airlines that the Australian Competition and Consumer Commission (ACCC) had investigated, and represented a significant portion of those airlines providing air cargo services into and out of Australia (the Respondents).

The class action was spurred by a series of successful investigations and prosecutions by competition regulators around the world, including the ACCC, in respect of an alleged global air cargo cartel. In 2006, competition authorities simultaneously raided airline offices in the US and Europe. High profile air cargo carriers have faced unprecedented penalties in respect of the alleged price fixing arrangements:

- The ACCC agreed penalties of $98.5 million with 10 airlines, including a $20 million penalty against Qantas Airways Ltd (Qantas) — the highest to be ordered in respect of a single ACCC investigation.[2]
- The US Department of Justice's investigation resulted in 22 airlines and 21 executives being charged. More than US$1.8 billion in criminal fines have been imposed and six executives (including one Qantas executive) have been sentenced to prison time.
- The European Commission fined 11 airlines 799,445,000 euros for colluding in the setting of their fuel and security surcharges which affected cargo services within the European Economic Area.
- Airlines have agreed to pay fines totalling C$24 million and NZ$42.5 million in Canada and New Zealand respectively.
- Airlines have also paid penalties in South Korea and South Africa.

Two airlines defended the ACCC's allegations. Perram J in the Federal Court of Australia found that there

had been collusion between airlines to fix surcharges, but dismissed the proceedings finding that the ACCC had failed to establish the existence of a "market in Australia" as required by the Trade Practices Act at that time.[3] Perram J's decision in relation to market in Australia was overturned in May 2016 by a majority of the Full Federal Court which considered that based on the facts that the requirement of the law that there be a market in Australia even if the market is also in another country, as was the case in the circumstances of the case.

Settlement — application of settlement approval principles

On 6 June 2014, Middleton J approved the air cargo class action settlement deed between the Applicant and seven of the nine Respondents (the Settlement) pursuant to s 33V of the Federal Court of Australia Act 1976 (Cth). The settlement sum was $38 million and distribution was calculated using a formula providing for a reasonable assessment of each Group Member's claim, together with appropriate adjustments. The scheme was similar to those approved in other open class representative proceedings.

His Honour considered the proposed Settlement by reference to the criteria in Practice Note CM 17 — Representative proceedings commenced under Pt IVA of the Federal Court of Australia Act 1976 (Cth) (the Practice Note). Paragraph 11.2 of the Practice Note provides:

> 11.2 When applying for Court approval of a settlement the parties will usually be required to address at least the following factors:
> (a) the complexity and likely duration of the litigation;
> (b) the reaction of the group to the settlement;
> (c) the stage of the proceedings;
> (d) the risks of establishing liability;
> (e) the risks of establishing loss or damage;
> (f) the risks of maintaining a representative proceeding;
> (g) the ability of the respondent to withstand a greater judgment;
> (h) the range and reasonableness of the settlement in light of the best recovery;
> (i) the range and reasonableness of the settlement in light of all the attendant risks of litigation; and
> (j) the terms of any advice received from counsel and/or from any independent expert in relation to the issues which arise in the proceeding.

Middleton J noted that the criteria are not exhaustive but are a useful guide to applying the general test adopted in *Australian Competition and Consumer Commission (ACCC) v Chats House Investments Pty Ltd*[4] (*Chats House*) that the terms of the settlement need to be fair and reasonable, having regard to the interests of the group members as a whole, and not simply the interests of the Applicant and Respondents.[5]

The Applicant put forward evidence from both solicitors and counsel, and independent advice from relevant experts in favour of approval. His Honour stated that such evidence was often necessary to prove that the Settlement satisfied the *Chats House* test.[6] The court considered the legal and procedural complexities as compelling reasons to settle, as the litigation had already utilised significant resources and was likely to continue at great length. The risks and related costs involved in establishing liability were amplified by the number of respondents, the volume of evidence, and the complex nature of the dispute, including unsettled law and lack of direct evidence.[7] His Honour accepted that these factors weighed in favour of approval of the Settlement.

Providing damages for unlawful cartel activities raises difficult issues of causation and calculation. There are no well-established principles for assessing and quantifying loss or damage in such cases. As such, the cost of establishing loss and a causal link between the impugned agreement and higher price supported the fairness and reasonableness of the Settlement. In addition, Middleton J accepted that the absence of objections by Group Members to the distribution scheme or proposed Settlement supported the conclusion that the Settlement was fair and reasonable and in the interests of Group Members.[8]

Similar class actions were filed simultaneously in a number of foreign jurisdictions. In the US, the class actions were consolidated into one proceeding and settlements have brought total recovery to US$485 million. With collective fines in Australia, the US and Europe already exceeding US$2.5 billion, the risk of further penalties and costs consequences would likely have incentivised the airlines to settle. Litigation is uncertain and a settlement provided both the Group Members and the Respondents with a guaranteed outcome.

Settlement — lump sum costs order

Air New Zealand (Australia) Pty Ltd and Air New Zealand Ltd (the Air New Zealand Parties) were not parties to the Settlement. Although the Air New Zealand Parties had entered into a settlement with the New Zealand Commerce Commission, the unwillingness to settle in the present proceedings may have been prompted by the failed prosecution by the ACCC discussed above. A term of the Settlement involved the Applicant discontinuing the claim against the Air New Zealand Parties, with costs awarded in favour of the Air New Zealand Parties to be paid from the settlement sum.

The court was required to determine the amount that would be payable pursuant to a lump sum costs order pursuant to r 40.02(b) of the Rules. The purpose of a lump sum costs order is to avoid the expense and delay involved in protracted litigation arising out of taxation,

and the nature of the calculation is necessarily more broad brush.[9] However, this does not preclude the operation of the basic principles applicable to taxation of costs — costs must be necessary and proper for the attainment of justice and not overcompensate the party entitled to costs.

The Air New Zealand Parties sent a bill of costs in a non-taxable form for almost $4 million that was not accepted by the Applicant. In arriving at a lump sum costs order, Middleton J was required to determine if the amount of costs sought was reasonable. Both parties put on evidence to support the reasonableness or otherwise of the costs claimed. His Honour was satisfied that there was sufficient evidence in the form of schedules of costs and disbursements to conclude that the costs claimed were necessary and proper for the attainment of justice.[10] However, Middleton J applied reductions for certain periods in which the Air New Zealand parties would have been dedicating resources to other proceedings, and to certain disbursements that lacked detail. The Applicants were ordered to pay $2,883,486.

Ramifications

Impact of investigations by international regulators

It has been estimated that the harm done by international cartels amounts to billions of dollars annually.[11] This mammoth figure has been accelerated by commercial globalisation. As a result, there has been a move globally towards attacking worldwide private international cartels.

Significantly, under the new cartel prohibitions introduced in July 2009,[12] there is no longer an explicit requirement that it be established that the parties are in competition "in a market in Australia". The provisions of the CCA may reach conduct outside of Australia. The Federal Court of Australia's decision in *Norcast S AR L v Bradken Ltd (No 2)*[13] (*Norcast*) demonstrated the extraterritorial application of the CCA. In *Norcast*, the court held that the cartel prohibitions were applicable to conduct relating to the sale of a foreign corporation in a foreign jurisdiction.[14] As a result, we may increasingly see plaintiffs' lawyers commencing class actions in Australia on the back of investigations by foreign regulators, even without an ACCC investigation.[15]

ACCC immunity and cooperation policy for cartel conduct

The ACCC established an immunity policy for corporations and individuals that have been involved in cartel conduct and are the first to report their involvement to the ACCC. The policy provides for immunity from litigation and penalties for those who assist with cartel investigations. Importantly, this immunity does not extend to private proceedings such as class actions. The airline that had gained immunity from ACCC proceedings in relation to the alleged cartel conduct in exchange for its cooperation was not pursued by the ACCC in its proceedings but was a respondent in the class action proceedings.

Proof of damages in private competition law actions

There are many uncertainties in the calculation of loss and damage in proceedings such as the present. For example, the loss and damage claimed in cartel class actions result from, among other things, higher prices paid and decreased demand as a result of higher prices. Some jurisdictions calculate loss on an overcharge basis, which often results in a greater measure of loss, while others use a lost profits basis that requires the court to analyse the impact of all factors that affect profits. The latter tends to give a better estimation of loss, however further complexity is introduced when deciding whether calculation should be on an *ex ante* or ex post basis. The principles for calculation are not settled in Australia.

Further, as a result of the lack of cartel class actions in Australia, issues such as the pass-through defence,[16] where the respondents seek to restrict the quantum of damages to the extent that the applicants have passed on increased prices to their customers, are yet to be litigated and may add to the complexity and cost of future cartel class actions.

Establishing that the impugned agreement caused loss will always be a complex and expensive task, especially where calculation is over a considerable period of time. However, the ability of class actions to aggregate customers' alleged losses to create a large claim for damages and the availability of litigation funding ensures that cartel class actions in Australia will continue. Further, the complexity and often substantial costs of litigating the causation issue can promote settlement.

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Footnotes

1. *De Brett Seafood Pty Ltd v Qantas Airways Ltd (No 7)* [2015] FCA 979; BC201510071.
2. See for example, *Australian Competition and Consumer Commission (ACCC) v Qantas Airways Ltd* (2008) 253 ALR 89; [2008] FCA 1976; BC200811642; *Australian Competition and Consumer Commission (ACCC) v British Airways PLC* [2008] FCA 1977; BC200811643; and *Australian Competition and Consumer Commission (ACCC) v Singapore Airlines Cargo Pty Ltd* [2012] FCA 1395; BC201209570.
3. *Australian Competition and Consumer Commission (ACCC) v Air New Zealand Ltd; ACCC v PT Garuda Indonesia Ltd* (2014) 319 ALR 388; [2014] FCA 1157; BC201411318. The relevant provision, s 45A, has been replaced by the cartel prohibitions in the Competition and Consumer Act 2010 (Cth) (CCA). These prohibitions require only that parties "be in competition with one another". The requirement for applicants to address market in Australia may therefore be less than was the case in the air cargo class action.
4. *Australian Competition and Consumer Commission (ACCC) v Chats House Investments Pty Ltd* (1996) 71 FCR 250; (1996) 142 ALR 177; (1996) 22 ACSR 539; BC9606509.
5. Above n 1, at [10].
6. Above n 1, at [15].
7. Above n 1, at [23] and [26].
8. Above n 1, at [18].
9. Above n 1, at [53].
10. Above n 1, at [69].
11. B Sweeney "The role of damages in regulating horizontal price-fixing: comparing the situation in the United States, Europe and Australia" (2006) 30 *Melbourne University Law Review* 837 at 839.
12. CCA, above n 3, Pt IV, Div 1.
13. *Norcast S AR L v Bradken Ltd (No 2)* (2013) 219 FCR 14; (2013) 302 ALR 486; [2013] FCA 235; BC201301413.
14. See Competition Policy Review *Final Report* (31 March 2015) http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report_online.pdf. The Competition Policy Review (the Harper Review) Final Report contains a recommendation that the cartel provisions should only apply to cartel conduct affecting goods or services supplied or acquired in "Australian markets".
15. For example, in *Wright Rubber Products Pty Ltd v Bayer AG (No 3)* [2011] FCA 1172; BC201108170, the Federal Court of Australia approved a settlement of class action proceedings against Bayer AG and Chemtura Corp for alleged global rubber cartel arrangements. The Australian rubber cartel class action was commenced after investigations and fines imposed on Bayer AG (among others) by the European Commission. Relevantly, the ACCC had not commenced proceedings in respect of the alleged rubber cartel.
16. In the US, the pass-through defence is known as the "Illinios Brick doctrine". However, its application is not uniform with many state antitrust laws rejecting the doctrine.