

Australian Competition and Consumer Commission Launches Criminal Cartel Case: More to Come?

IN SHORT

The Background: Earlier in 2018, the Australian Competition and Consumer Commission warned that several domestic companies would face criminal cartel prosecutions in 2018.

The Situation: The ACCC has begun to follow through on that promise by commencing criminal proceedings against Country Care.

Looking Ahead: Cartel prohibitions in the Competition and Consumer Act, and particularly the criminal cartel provisions, should be taken seriously, and businesses should reexamine their conduct to determine if they may be at risk of prosecution.

The Australian Competition and Consumer Commission ("ACCC") has instituted criminal cartel proceedings against the Country Care Group Pty Ltd ("Country Care"), its Managing Director Robert Hogan, and a former employee, Cameron Harrison. This follows a public warning in January 2018 from the ACCC chairman that the ACCC would likely be [pursuing three to four domestic criminal cartel actions](#) in 2018. This is the first criminal proceeding by the ACCC against individuals, although not the first against companies.

Country Care is a family-owned business that sells mobility aids. The alleged cartel conduct relates to products used in rehabilitation and aged care, including beds, mattresses, wheelchairs, and walking frames. The specific nature of the charges have not yet been made public, but the matter will be heard in the Magistrates' Court in March 2018. If the Magistrate determines that there is sufficient evidence for the matter to proceed, then it is likely that the matter will be heard in the Federal Court.

The Prohibition

Cartel conduct is prohibited by the *Competition and Consumer Act 2010* (Cth) ("CCA") which, broadly speaking, defines cartel conduct to include agreements between competitors to:

- Fix, control, or maintain prices;
- Divide up markets;
- Rig bids; and
- Prevent, restrict, or limit outputs.

Corporations found guilty of criminal cartel conduct are liable for a fine to be the greater of \$10 million and three times the total value of the benefits obtained that are reasonably attributable to the offence or, for a contravention where benefits cannot be fully determined, 10 percent of the annual turnover of the company (including related corporate bodies) in the preceding 12 months. Individuals are liable for up to 10 years' imprisonment and/or fines of up to \$420,000 per offence, and a financial penalty of up to \$500,000 per civil breach.

There are both criminal and civil prohibitions against both: (i) making a contract, arrangement, or understanding that contains a cartel prohibition; and (ii) giving effect to a contract, arrangement, or understanding that contains a cartel prohibition.

There is an additional fault element of "knowledge or belief" in respect of the criminal offence. This is the first criminal cartel action against an Australian corporation under the CCA, and the first action against an individual.



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The ACCC has previously successfully prosecuted a Japanese shipping company under the criminal cartel provisions, leading to a fine of \$25 million. This was only the second criminal cartel prosecution in

Australia for cartel conduct (the first occurring in 1908). A second criminal prosecution against a Japanese shipping line is listed for trial later in 2018. Similarly, the ACCC has previously commenced proceedings against individuals and companies for breaches of the civil cartel prohibitions in the CCA.

Although the ACCC has jurisdiction to investigate cartel conduct, manage the immunity process, and commence proceedings in respect of civil prohibitions, the Commonwealth Director of Public Prosecutions ("CDPP") is responsible for commencing criminal cartel actions, by virtue of the *Memorandum of Understanding between the CDPP and the ACCC regarding Serious Cartel Conduct*. Under this arrangement, the ACCC investigates cartel conduct and refers serious conduct to the Commonwealth Department of Public Prosecution for prosecution.

Lessons

The criminal cartel action against Country Care serves to highlight that the ACCC is following through on its warning that there would be several domestic criminal cartel actions pursued in 2018, including against individuals. The [ACCC's 2018 Compliance and Enforcement Priorities](#), released on 20 February 2018, have also indicated the severity with which the ACCC and the courts treat cartel conduct. The same document has also indicated that the ACCC has an additional "five current referrals" with the CDPP, and a portfolio of investigations at an advanced stage."

For those "three to four" companies facing prosecution this year, including Country Care, it may be too late to avoid formal criminal proceedings. However, this case serves as a reminder that the cartel prohibitions in the CCA (in particular the criminal cartel provisions) should not be taken lightly, and businesses should reexamine their conduct to determine if any of their contracts, arrangements, or understandings are at risk.

The ACCC offers leniency programs for companies where contravening conduct has been discovered. Any companies worried about their conduct are strongly advised to come clean early. Ignoring the issue and hoping that it goes away is a risky strategy that is likely to land companies and individuals in hot water.

TWO KEY TAKEAWAYS

1. Under the CCA, there are both civil and criminal prohibitions against cartel conduct. In the past, criminal prosecutions were rare, but the ACCC is now actively pursuing criminal cartel actions.
2. Companies that risk prosecution for violations of the CCA's cartel prohibitions should early consider steps to reduce their legal risk, particularly since companies convicted of criminal violations face high fines.

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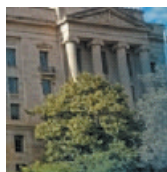
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