

THE CARTELS AND LENIENCY REVIEW

EIGHTH EDITION

Editors

John Buretta and John Terzaken

THE LAW REVIEWS

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PREFACE

Cartels are a surprisingly persistent feature of economic life. The temptation to rig the game in one's favour is constant, particularly when demand conditions are weak and the product in question is an undifferentiated commodity. Corporate compliance programmes are useful but inherently limited, as managers may come to see their personal interests as divergent from those of the corporation. Detection of cartel arrangements can present a substantial challenge for both internal legal departments and law enforcers. Some notable cartels have managed to remain intact for as long as a decade before being uncovered. Some may never see the light of day. However, for those that are detected, this compendium offers a resource for practitioners around the world.

This book brings together leading competition law experts from 26 jurisdictions to address an issue of growing importance to large corporations, their managers and their lawyers: the potential liability, both civil and criminal, that may arise from unlawful agreements with competitors as to price, markets or output. The broad message of the book is that this risk is growing steadily. Stubborn cultural attitudes regarding cartel activity are gradually shifting. Many jurisdictions have moved to give their competition authorities additional investigative tools, including wiretap authority and broad subpoena powers. There is also a burgeoning movement to criminalise cartel activity in jurisdictions where it has previously been regarded as wholly or principally a civil matter. The growing use of leniency programmes has worked to radically destabilise global cartels, creating powerful incentives to report cartel activity when discovered.

This book serves as a useful resource to the local practitioner, as well as those faced with navigating the global regulatory thicket in international cartel investigations. The proliferation of cartel enforcement and associated leniency programmes continues to increase the number and degree of different procedural, substantive and enforcement practice demands on clients ensnared in investigations of international infringements. Counsel for these clients must manage the various burdens imposed by differing authorities, including by prioritising and sequencing responses to competing requests across jurisdictions, and evaluating which requests can be deferred or negotiated to avoid complicating matters in other jurisdictions. But these logistical challenges are only the beginning, as counsel must also be prepared to wrestle with competing standards among authorities on issues such as employee liability, confidentiality, privilege, privacy, document preservation and many others, as well as consider the collateral implications of the potential involvement of non-antitrust regulators.

The authors are from some of the most widely respected law firms in their jurisdictions. All have substantial experience with cartel investigations and many have served in senior positions in government. They know both what the law says and how it is actually enforced, and we think you will find their guidance regarding the practices of local competition

authorities invaluable. This book seeks to provide both breadth of coverage (with a chapter on each of the 26 jurisdictions) and analytical depth for those practitioners who may find themselves on the front line of a government inquiry or an internal investigation into suspect practices.

Our emphasis is necessarily on established law and policy, but discussion of emerging or unsettled issues has been provided where appropriate.

This is the eighth edition of *The Cartels and Leniency Review*. We hope you will find it a useful resource. The views expressed are those of the authors, not of their firms, the editor or the publisher. Every endeavour has been made to make updates until the last possible date before publication to ensure that what you read is the latest intelligence.

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January 2020

Chapter 2

AUSTRALIA

Prudence J Smith and Lachlan J Green¹

I ENFORCEMENT POLICIES AND GUIDANCE

Statutory framework

Australia's competition law is contained in the Competition and Consumer Act 2010 (Cth) (CCA) and is administered by the Australian Competition and Consumer Commission (ACCC). The ACCC has powers to investigate and bring proceedings against parties that have engaged in cartel conduct, including the power to:

- a compel any person or company to provide information about a suspected breach of the CCA, including by providing documents or oral evidence;²
- b obtain search warrants for company offices and the premises of company officers;³ and
- c facilitate surveillance of individuals, including phone taps, through collaboration with the Australian Federal Police.

In the CCA, there are four categories of cartel conduct that are prohibited by Section 45AD. These provisions prohibit making or giving effect to a contract, arrangement or understanding between competitors that has the purpose of:

- a or is likely to have had the effect of, price-fixing;
- b market sharing;
- c bid rigging; or
- d preventing, restricting or limiting production, capacity or supply.

Cartel conduct constitutes both a civil and a criminal offence under the CCA, which does not differentiate between differing degrees of cartel behaviour. However, under the Criminal Code Act 1995 (Cth), additional requirements must be met in order to prosecute a criminal cartel offence, including the need to establish certain fault elements, prove the offence beyond reasonable doubt and, depending on the circumstances, obtain a unanimous jury verdict. While the ACCC investigates and litigates cartel conduct as a civil offence, it is the Commonwealth Director of Public Prosecutions (CDPP) that prosecutes criminal cartel offences. The ACCC and the CDPP have signed a memorandum of understanding (MOU), which provides that the ACCC will refer cartel conduct that can cause large-scale or serious economic harm to the CDPP for prosecution.

¹ Prudence J Smith is a partner and Lachlan J Green is an associate at Jones Day. The authors wish to thank Nicholas J Taylor, Matthew J Whitaker and Timothy K Atkins for their generous assistance in preparing previous versions of this chapter.

² Section 155 of the CCA.

³ CCA, Part XID and Section 135A.

II COOPERATION WITH OTHER JURISDICTIONS

Cooperation between antitrust enforcement agencies of different countries has become increasingly important. Cross-border commerce has increased and led to greater scope for international cartel conduct. For example, two treaties allow for assistance between Australia and the United States to exchange evidence and enforce their respective competition laws: the Australia United States Mutual Antitrust Enforcement Assistance Agreement, and the Agreement between the Commonwealth Government of Australia and the Government of the United States relating to cooperation and antitrust matters. In April 2019, the ACCC also signed a Memorandum of Cooperation with the United States Federal Bureau of Investigation in an attempt to strengthen efforts in combating cartels and other anticompetitive behaviour.

The ACCC has also previously signed agreements and MOUs with numerous other antitrust agencies, including in Canada, China, Taiwan, the European Union, Fiji, India, Japan, New Zealand, Papua New Guinea, the Philippines, the Republic of Korea and the United Kingdom. These agreements aim to assist with cross-border cooperation and joint investigations and assist other countries, particularly in the Asia-Pacific region, in building effective systems and appropriate antitrust regulatory frameworks.

Additionally, the ACCC receives and makes requests outside these formal arrangements. For example, in 2018–2019, the ACCC received and responded to, or made requests to, agencies in Austria, Barbados, Canada, Chile, China, Colombia, Denmark, the European Commission, France, Germany, India, Indonesia, Israel, Italy, Japan, Kenya, Mexico, the Netherlands, New Zealand, Norway, Papua New Guinea, Poland, Russia, Saudi Arabia, Seychelles, Singapore, South Africa, Sweden, Switzerland, Taiwan, the United Kingdom, the United States and Vietnam.⁴

i Information sharing

The ACCC very regularly exchanges information with overseas antitrust agencies, facilitated by agreements and MOUs with these agencies, and bilateral waivers obtained from the affected parties. The ACCC has a standard non-negotiable disclosure consent form to allow confidential information to be disclosed to, among other entities, these foreign agencies and government bodies.

The CCA permits the ACCC to disclose ‘protected information’ to a foreign government body when the chairman of the ACCC is satisfied that disclosure would assist the foreign government body. Protected information is defined in Section 155AAA of the CCA to include information that was given in confidence to the ACCC, including by a foreign government body or obtained by the ACCC under compulsion. The chairman is entitled to impose conditions, in writing, in relation to the disclosure of protected information.

In relation to its treatment of confidential personal information, under the Privacy Act 1988 (Cth), the ACCC is prohibited from disclosing personal information for a purpose other than that for which it was collected, subject to the exceptions provided in the Privacy Principles.

Additionally, under the Cartel Immunity and Cooperation Policy, the ACCC will not share (unless required by law) with other regulators any confidential information provided by an informant, or the identity of the informant, without the informant’s consent. However,

⁴ ACCC, ‘ACCC Annual Report 2018-2019’, October 2019, p. 96.

in international matters, it will seek to obtain the informant's consent as a matter of course and request that the informant provide written consent to disclosure for each jurisdiction in which he or she intends to seek immunity or leniency for prohibited conduct.

ii Extradition requests

Extradition procedures are dictated by the Extradition Act 1988 (Cth). Australia accepts extradition requests from countries that have been declared an extradition country. Regulations also make provisions for extradition procedures with countries that have non-treaty extradition arrangements with Australia, including the United Kingdom and Japan.

For the Australian government to agree to an extradition request, the conduct in question must amount to an offence in both Australia and the foreign country. As cartel conduct constitutes a criminal offence under the CCA, there is scope for Australia to accept extradition requests for contravening conduct from foreign agencies.

iii Extraterritorial discovery

Extraterritorial discovery constitutes the gathering of evidence for foreign proceedings and discovery, which is not permissible.

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

i Extraterritorial application of Australia's competition laws

Section 5(1) of the CCA provides that Australia's competition laws extend to the engaging of conduct outside Australia. The laws extend to companies incorporated or carrying on business in Australia, Australian citizens or persons ordinarily resident in Australia. The laws also extend to suppliers of goods and services in relation to a misuse of market power and exclusive dealing.

ii Extended meaning of party

Section 45AC of the CCA has the effect of deeming related bodies corporate to be parties to cartels in circumstances where any one related body corporate is a party to the cartel conduct. For example, this provision will draw an international parent company into an Australian proceeding against its subsidiary relating to domestic cartel conduct.

iii Joint venture exemption

The CCA provides for exemptions from civil and criminal prohibitions for joint ventures.⁵ Joint ventures contained in an arrangement or understanding (not simply contracts) and for the acquisition of goods or services (not just production or supply) are exempt from civil and criminal prohibition. However, the CCA imposes some additional requirements to qualify for the joint venture exemption.

⁵ CCA, Sections 45AO and 45AP.

For a production, supply or joint acquisition joint venture, the exception from the application of the cartel laws will be available to the extent that the cartel provision is reasonably necessary for undertaking the joint venture, and the joint venture is not carried out for the purpose of substantially lessening competition.

While the meaning of the term ‘reasonably necessary’ is as yet unclear in the context of the joint venture exception, the term imports a consideration of the purposes of the joint venture and whether the provision in question is reasonably necessary to attain the joint venture’s purposes. If this could be achieved through less restrictive means, then the provision is unlikely to be considered reasonably necessary.⁶

iv Anti-overlap provisions

The CCA provides exceptions to the cartel prohibitions in relation to provisions in contracts, arrangements or understandings that would otherwise also contravene:

- a Section 47, which prohibits exclusive dealing that has the purpose, effect or likely effect of causing a substantial lessening of competition;⁷
- b Section 48, which provides for a *per se* prohibition on resale price maintenance;⁸ or
- c Section 50, which prohibits the acquisition of shares in a body corporate, or the acquisition of assets in a person, where the purpose, effect or likely effect of the acquisition is a substantial lessening of competition.⁹

This means that if there is a provision in the agreement that amounts to both cartel conduct and a breach of either Section 47, 48 or 50, the conduct will be tested under those provisions alone. This is particularly important in relation to share and asset acquisitions and conduct that also amounts to exclusive dealing as the anti-overlap provisions may enable potential cartel conduct to escape *per se* liability and be tested, instead, in accordance with the substantial lessening of competition test.

v Additional exemptions

The CCA also provides exemptions where:

- a the parties to the conduct are related bodies corporate;
- b the relevant provision of the contract, arrangement or understanding relates to the price for goods or services to be collectively acquired, or for the provision of joint advertising of the price for resupply of goods and services so acquired;¹⁰
- c the conduct has been authorised by the ACCC;¹¹ or
- d the conduct is the subject of a collective bargaining notice.¹²

⁶ See the courts’ view on the term ‘reasonably necessary’ in *Thomas v. Mowbray* (2007) 233 CLR 307 at 332 and *Brown v. Tasmania* (2017) 261 CLR 328, at 336. Also see a similar position taken in many United States cases on the definition of ‘reasonably necessary’: *Capital Imaging Assoc, PC v. Mohawk Valley Med Assoc, Inc.*, 996 F2d 537, 542-43 (2nd Circuit 1993); *State Oil Co v. Kahn*, 522 US 3, 10 (1997); and *Timken Roller Bearing Co v. US*, 341 US 593, 598 (1951).

⁷ CCA, Section 45AR.

⁸ CCA, Section 45AQ.

⁹ CCA, Section 45AT.

¹⁰ CCA, Section 45AU.

¹¹ CCA, Section 90.

¹² CCA, Section 93AB.

vi Immunities

The ACCC has an Immunity and Cooperation Policy (Leniency Policy) that grants full immunity from any civil enforcement action brought by the ACCC to the first individual or corporation that meets the criteria under the policy.¹³ Those criteria include continuing cooperation and full disclosure of information relating to the alleged cartel.

The ACCC also accepts applications for criminal immunity and makes recommendations to the CDPP that an applicant be granted immunity pursuant to the Prosecution Policy of the Commonwealth.¹⁴ Such a recommendation will be made only where the individual or corporation first satisfies the criteria for a conditional immunity application under the ACCC's Leniency Policy.

IV LENIENCY PROGRAMMES

i Overview

The ACCC first introduced a leniency programme in July 2003. The current policy, referred to in Section III.vi as the 'Leniency Policy', was published in September 2019 and sets out the ACCC's approach to cooperation by cartel participants. The Leniency Policy came into effect on 1 October 2019 and now requires immunity applicants to enter a cooperation agreement that clearly sets out the steps required for conditional civil and criminal immunity under the policy. At the time of publication of the Leniency Policy, the ACCC chairman emphasised the policy's utility in detecting and prosecuting cartels:

The immunity policy is one of our key strategies for detecting and dismantling cartels. We have been able to undertake numerous in-depth cartel investigations as a result of immunity applications under our policy. This policy, pro-active ACCC intelligence gathering and whistleblower reports, have resulted in multimillion dollar penalties against cartel members.¹⁵

In 2018–2019, the ACCC was approached by 12 cartel participants, granting six of them civil conditional immunity, with one participant also receiving criminal conditional immunity by the CDPP.¹⁶ In September 2019, the ACCC also launched an additional, completely anonymous method for persons to report cartel conduct. Whistle-blowers are able to contact the ACCC via an anonymous online portal, which encrypts the information so that their identity is anonymous to the ACCC.¹⁷

13 ACCC, 'ACCC Immunity and Cooperation Policy for cartel conduct', 10 September 2019.

14 Commonwealth Director of Public Prosecutions, 'Prosecution Policy of the Commonwealth, Annexure B: Immunity from Prosecution in Serious Cartel Offences', September 2014.

15 ACCC, 'Cartel immunity policy strengthened, whistleblowing tool launched' (media release 165/19, 6 September 2019), www.accc.gov.au/media-release/cartel-immunity-policy-strengthened-whistleblowing-tool-launched.

16 ACCC, 'ACCC Annual Report 2018-2019', October 2019, p. 41.

17 The online portal is accessible via: <https://accc-cartels.whispli.com/cartels>. The ACCC also provides a separate online portal for construction industry cartel cases, accessible via: <https://app.whispli.com/accc-anonymously-report-a-construction-issue>.

The Leniency Policy offers two forms of leniency for cartel participants who are willing to assist the ACCC in its investigation.

- a Immunity: the first cartel participant to approach the ACCC may be granted conditional immunity from civil enforcement actions, and potentially from criminal action by the CDPP if it meets the necessary criteria.
- b Cooperation: if a cartel participant fails to meet the criteria for conditional immunity, it may still receive leniency from the ACCC, or the court if it cooperates in the ACCC's investigation.

A corporation that is or was party to a cartel (in a primary or ancillary capacity) will be eligible for conditional civil immunity if it meets the following eight conditions.

- a It admits that its conduct may contravene the CCA.
- b It is the first party to apply for immunity in respect of the cartel.
- c It has not coerced others to participate in the cartel.
- d It has ceased its involvement in the cartel, or undertaken to the ACCC that it will cease its involvement.
- e Its admissions are a true corporate act, rather than isolated confessions of individual representatives.
- f It has provided full, frank and truthful disclosure, and has cooperated fully and expeditiously while making the application, and undertakes to continue to do so throughout the investigation and any subsequent court proceedings.
- g It has entered into a cooperation agreement.
- h The ACCC has not received written legal advice that it has reasonable grounds to institute proceedings in respect of the cartel.

An individual who was a director, officer or employee of a corporation that is or was party to a cartel may also apply for conditional immunity, subject to the same criteria (except for the requirement that the admissions are a true corporate act).

When determining whether to grant conditional immunity, the ACCC will interpret the Leniency Policy in favour of the applicant in the case of any ambiguity. Further, in rare and exceptional circumstances, the ACCC may grant immunity to an applicant that fails to meet the criteria (including second or subsequent applicants) under its cooperation policy by not commencing civil proceedings against the applicant. The ACCC has not issued any guidance as to what constitutes 'rare and exceptional circumstances'.

Under an agreement between the ACCC and the CDPP, if the ACCC considers that an applicant meets the criteria for conditional immunity, it may recommend to the CDPP that the applicant be granted immunity from criminal prosecution. The CDPP will then exercise independent discretion to assess whether the applicant meets the criteria under the Leniency Policy.

ii ‘Amnesty plus’ regime

A cartel participant who does not qualify for conditional immunity but who cooperates with the ACCC in relation to a cartel may discover a second, unrelated cartel. In such a case, that party may apply for conditional immunity for the second cartel as well as a recommendation by the ACCC to the court for a further reduction in penalty in relation to the original cartel.

iii Obtaining a marker

Corporations or individuals who intend to apply for immunity can request a marker from the ACCC. The marker will have the effect of preserving the applicant's status as the first immunity applicant in respect of a cartel, giving it a limited period of time to gather the required information to satisfy the criteria for conditional immunity. To obtain a marker, the applicant must provide a description of the cartel conduct that allows the ACCC to confirm that no other party has applied for immunity or obtained a marker in respect of that cartel. If this standard is met, the request may be made anonymously.

If the applicant wishes to proceed with the immunity application after obtaining a marker, it must make a 'proffer' by providing the ACCC with a detailed description of the cartel conduct. The proffer may be made orally or in writing. Early in the proffer stage, the applicant will be required to enter a cooperation agreement that outlines the initial cooperative steps the applicant agrees to undertake pursuant to its application. If the ACCC is satisfied that the applicant has met the criteria for immunity, it will grant conditional immunity.

iv Duties of cooperation required for a grant of leniency

Once conditional immunity is granted, the applicant has an obligation to provide full, frank and truthful disclosure and to cooperate fully and expeditiously with the ACCC throughout its investigation and any subsequent court proceedings. The applicant must also keep confidential its status as an immunity applicant and the details of any investigation or court proceedings, unless otherwise required by law or with the ACCC's written consent.

If the applicant complies with these obligations, conditional immunity will become final immunity upon the resolution of any proceedings against other cartel participants.

v Reductions in liability

The first applicant to meet the criteria in the Leniency Policy is completely immune to civil action by the ACCC, and potential criminal prosecution by the CDPP, as discussed in Sections IV.i and IV.iii. It should be noted, however, that immunity under the Leniency Policy is not a bar to private enforcement actions. The applicant may still be liable to compensate parties that suffered damage as a result of the cartel conduct.

A further benefit of conditional immunity for a corporation is that it may also seek derivative immunity for related corporate entities or current and former directors, officers and employees. A related corporate entity will be eligible for derivative immunity if, for all or part of the period of the cartel conduct, the corporation with conditional immunity held a controlling interest in the related corporate entity, or the related corporate entity held a controlling interest in the corporation, and the related corporate entity meets the conditions set out in Section IV.i. Individual directors, officers or employees will similarly qualify for derivative immunity if they meet the conditions for individual conditional immunity.

If an applicant fails to meet these conditions, it may still receive leniency from the ACCC or the court if it cooperates in the ACCC's investigation. There is no sliding scale for discounts awarded for cooperation but, in civil proceedings, the ACCC will identify to the court any cooperation provided by a party and take this cooperation into account when making a recommendation as to a penalty or sanction. When assessing the extent and value of the cooperation, the ACCC will consider:

- a* the timeliness of the cooperation;
- b* the significance of the evidence provided;

- c whether the party provided full, frank and truthful disclosure and continued to cooperate fully and expeditiously;
- d whether the party ceased its involvement in the cartel or indicated that it will cease its involvement;
- e whether the party coerced any other party to participate in the cartel;
- f whether the party acted in good faith in dealings with the ACCC; and
- g in the case of individuals, whether the party agreed not to use the same legal representation as the corporation by which they are or were employed.

Ultimately, the penalty or sanction imposed on cartel participants will be determined by the court.

In criminal proceedings, when determining the appropriate sentence, the court will take into account the extent to which the defendant cooperated with law enforcement agencies.

vi Discovery of surrendered materials by private litigants

As discussed in Section IV.v, immunity under the Leniency Policy does not protect the applicant from private enforcement actions. There is a risk that information disclosed to the ACCC in support of an application for leniency may be discovered by parties to private litigation.

While the ACCC undertakes to ‘use its best endeavours to protect any confidential information provided by an immunity applicant’, this is subject to the protected cartel information provisions of the CCA. In particular, Section 157C provides that the ACCC is not required to make discovery of documents containing protected cartel information (defined as information relating to a cartel offence and given to the ACCC in confidence) to a party to actual or prospective court proceedings. However, the ACCC may disclose such information after considering such matters as the fact that the information was provided in confidence, the safety of the informant, the fact that the disclosure may discourage future informants, and the interests of the administration of justice.

V PENALTIES

i Statutory basis for and types of liability

Individuals and corporations face both civil and criminal liability under the CCA for their involvement in cartel conduct. The criminal and civil prohibitions are the same, except for an additional fault element of ‘knowledge or belief’ in relation to the criminal offence. The civil penalties for making or giving effect to a cartel provision are the same as those currently available for other contraventions of Part IV – Restrictive trade practices.

It is the CDPP that has the power to bring criminal indictments under the CCA. The ACCC will refer serious cartel matters to the CDPP.

ii Potential and typical remedies for cartel violations

Individuals

Individuals face pecuniary penalties of up to A\$500,000 per breach of the cartel prohibitions contained in Part IV, Division 1 of the CCA.¹⁸

18 CCA, Section 76(1B)(b).

In addition, individuals found to have committed a cartel offence may face criminal penalties of up to A\$220,000 (per breach) or up to 10 years' imprisonment.¹⁹ It is illegal for a corporation to indemnify its officers against legal costs and any financial penalty.²⁰

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.

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

Penalties for corporations

The maximum fine or pecuniary penalty for a corporation (per criminal cartel offence or civil contravention, whichever applies) will be the greater of the following amounts:

- a A\$10 million;
- b three times the commercial gain derived from the anticompetitive activity; or
- c where the amount of gain cannot be fully determined, 10 per cent of the group turnover in Australia.²¹

Other remedies

On application, the Federal Court may impose other penalties for cartel civil contraventions or criminal offences, including:

- a injunctions;²²
- b damages (to compensate persons who suffer loss and damage as a result) (six-year limitation period);²³
- c orders disqualifying a person from managing corporations;²⁴
- d non-punitive orders, such as community service orders, probation orders, orders for disclosure of information or orders requiring the offender to publish an advertisement on the terms specified in the order;²⁵

19 CCA, Section 79.

20 CCA, Section 77A.

21 CCA, Section 76(1A)(aa).

22 CCA, Section 80.

23 CCA, Section 82.

24 CCA, Section 86E.

25 CCA, Section 86C.

- e punitive orders, such as adverse publicity orders for breach of Section 45AF or 45AG;²⁶ and
- f the Court may make ‘such orders as it thinks appropriate’. These orders may include voiding a contract or certain provisions of a contract, varying a contract or refusing to enforce all or any of the provisions of a contract.²⁷

Typical penalty

It is only the court that can impose penalties and determine their value. The ACCC is able to, and does, agree with parties the amount of penalties that will be sought from the court. In 2015, the Full Federal Court ruled that joint submissions on penalties was not permitted, which put into doubt the ACCC’s ability to make joint submissions in relation to pecuniary penalties. This doubt arose as a result of the High Court decision in *Barbaro*,²⁸ in which the court held that the prosecution should not nominate a sentence range in criminal sentence proceedings.

The question of whether the reasoning in *Barbaro* applies to civil pecuniary penalties was appealed to the High Court,²⁹ as was the question of whether parties could make joint submissions with regulators in relation to an agreed penalty or penalty range. The High Court unanimously held that *Barbaro* did not apply to civil pecuniary penalties and, accordingly, parties to civil proceedings are able to submit agreed penalties to the court. Whether the court accepts them is, of course, a different matter.

In March 2018, the Organisation for Economic Co-operation and Development released a report comparing the penalties for competition law infringements between Australia, the United Kingdom, Germany, Korea and the United States. The report found that Australian penalties were comparatively lower, both in terms of average and maximum penalty. In response, the ACCC released an annual report in October 2018 stating the ACCC will ‘rethink its approach to assessing the penalties that it puts to the court for breaches of competition law’.³⁰ This sentiment was carried through into the 2019 Annual Report, which stated, ‘given the importance of significant penalties to deter unlawful conduct, the ACCC will continue to prioritise seeking higher penalties’.³¹ This new approach is evident in the higher penalties sought in cases heard in 2018 and 2019.

The following recent penalties imposed for cartel conduct should provide an indication of a ‘typical penalty’ for a breach:

- a in 2016, a fine of A\$18 million was imposed on Colgate-Palmolive. A fine of A\$9 million was imposed on Woolworths in the same matter;
- b in December 2016, the Federal Court ordered ANZ Bank to pay penalties of A\$9 million, and Macquarie Bank was ordered to pay penalties of A\$6 million, for attempted cartel conduct in 2011 in relation to the benchmark rate for the Malaysian ringgit;
- c in August 2017, the Federal Court imposed a penalty of A\$25 million on NYK after it pleaded guilty to its involvement in a criminal cartel;

26 CCA, Section 86D.

27 CCA, Section 87.

28 *Barbaro v. The Queen; Zirilli v. The Queen* [2014] HCA 2, 12 February 2014.

29 *Construction, Forestry, Mining and Energy Union v. Director, Fair Work Building Industry Inspectorate & Anor* [2015] HCA 46 (2015) ALR476, 9 December 2015.

30 ACCC, ‘ACCC Annual Report 2017-2018’, October 2018, p. 61.

31 ACCC, ‘ACCC Annual Report 2018-2019’, October 2019, p. 39.

- d* in October 2017, the Full Federal Court upheld an ACCC appeal, imposing a A\$20.6 million penalty against Cement Australia and its related companies for giving effect to anticompetitive agreements;
- e* in April 2018, Flight Centre was ordered to pay A\$12.5 million in penalties for attempting to induce three international airlines to enter into price-fixing arrangements between 2005 and 2009;
- f* in May 2018, the Full Federal Court ordered Japanese company Yazaki Corporation to pay A\$46 million for cartel conduct, following an appeal by the ACCC. This is the highest penalty ever handed down under the CCA;
- g* in May 2019, PT Garuda Indonesia Ltd was ordered to pay penalties of A\$19 million for colluding on fees and surcharges for air freight services; and
- h* in August 2019, Kawasaki Kisen Kaisha Ltd was convicted of criminal cartel conduct for its part in a global shipping cartel, and ordered to pay a fine of A\$34.5 million.

VI INVESTIGATIVE POWERS

The CCA contains several far-reaching powers that the ACCC can use for investigating and gathering evidence for investigations. The ACCC will always assess cartels as a priority.

Section 155 of the CCA is the ACCC's most widely used mandatory information and evidence-gathering power. For example, in 2018–2019, the ACCC issued 269 Section 155 notices during its investigations of potentially infringing conduct.³² Section 155 gives the ACCC the power to require a person to provide information or documents, or to give evidence relating to a possible contravention, if the ACCC has reason to believe that a person is capable of doing so. Failure to comply with a notice is a criminal offence punishable by a fine or imprisonment,³³ and there is no privilege against self-incrimination. Legal professional privilege in respect of documents is preserved.

The ACCC also has the option of seeking a warrant to conduct search and seizure operations (i.e., dawn raids).³⁴ The ACCC does not generally comment on its use of search warrants, but they are most commonly used in cartel investigations. The ACCC is able to make copies of items, and can seize items where it has reasonable grounds to believe they contain or constitute evidence. Further, the following factors indicate a likely increase in the occurrence of search warrants:

- a* the focus of ACCC enforcement activities on detecting and prosecuting cartels;
- b* the criminalisation of cartels in Australia; and
- c* the increasing use of search warrants by regulators internationally.

VII PRIVATE ENFORCEMENT

i Private right of action

The CCA permits a private enforcement action in respect of a breach of the cartel provisions contained in Part IV, Division 1 of the CCA. Section 82 provides that any person who suffers loss or damage from a breach of the cartel provisions can bring a private claim for damages

³² *ibid*, p. 277.

³³ CCA, Section 155(7).

³⁴ CCA, Part XID.

in the Federal Court against a party that engaged in, or was involved in, the contravening conduct.³⁵ Furthermore, under Section 80, a private litigant may seek an injunction restraining a party from engaging in conduct that constitutes an actual or attempted breach of the cartel provisions, or an attempt to aid, abet or induce a person to contravene the cartel provisions.³⁶

Notwithstanding these statutory provisions, the number of private enforcement actions in Australia continues to lag behind other major jurisdictions.

ii Class actions

Australia has a well-developed class action regime that operates under Part VI of the Federal Court of Australia Act 1976 (Cth) (FCA). Under the FCA regime, four cartel class actions have been commenced, all of which have settled. The most recent action, which settled for A\$38 million, was brought against a number of airlines alleging the existence of a cartel to fix the price of air cargo services.³⁷

The FCA regime provides that a class action may be commenced only if:

- a seven or more persons have claims against the same person;
- b the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
- c all the claims give rise to a substantial common issue of law or fact.³⁸

In relation to the requirements for standing, under the FCA regime, a person who has a sufficient interest to commence a proceeding on his or her own behalf against another person will also have a sufficient interest to commence a class action proceeding.³⁹

The FCA regime operates an ‘opt-out’ system, whereby all persons who satisfy the definition of the ‘class’ will be represented by the lead plaintiff in the proceedings, unless they opt out. However, in some cases the class has been defined as those potential claimants who have arrangements with a certain litigation fund or have engaged a particular law firm. In such instances, the definition of the class becomes sufficiently narrow so that, in effect, potential claimants are required to opt in to the proceedings.

iii Calculation of damages

Damages under the CCA for a breach of the cartel provisions are compensatory in nature and, accordingly, a plaintiff may only recover actual loss or damage suffered.⁴⁰ Punitive or exemplary damages are not available. Further, there is a causal requirement that the loss or damage was sustained by the other party’s contravention. Where a court determines that loss or damage has been incurred, the court will be required to quantify the loss, including, where necessary, by approximation or degree.

In Australia, as no action for damages arising from a breach of the cartel provisions has proceeded to judgment, the precise methodologies by which the courts will calculate damages remain unclear. One key issue that is yet to be addressed in the cartel context is the potential

35 CCA, Section 82(1).

36 CCA, Section 80.

37 *De Brett Seafood Pty Ltd v. Qantas Airways Ltd* (No. 7) [2015] FCA 979.

38 FCA, Section 33C.

39 FCA, Section 33D.

40 CCA, Section 82(1).

availability of a pass-on defence, namely a defence to a claim for loss or damage on the basis that the plaintiff passed through any increased costs associated with the cartel conduct to its own customers.⁴¹

iv Limitation periods

An action for damages in respect of a breach of the cartel provisions must be initiated within six years of the date on which the cause of action accrued. There is no settled position in the Australian courts as to when the cause of action will accrue in cartel cases. One argument is that the cause of action will only accrue when the plaintiff becomes aware that it has suffered loss or damage as a result of the cartel conduct.⁴² However, on the other hand, it is argued that the cause of action accrues at the time the plaintiff suffers the loss, which is usually when the plaintiff purchases the goods or services.⁴³

v Interaction between government investigations and private enforcement

The interaction between the public and private enforcement regimes can both facilitate and frustrate private actions. A private party is not precluded from commencing a private enforcement action when the ACCC or CDPP has commenced or completed its own investigations. In fact, it is increasingly common for private enforcement actions to be triggered by high-profile ACCC proceedings.

Section 83 of the CCA provides that findings of fact made against the respondent in prior proceedings can be used as *prima facie* evidence of those facts in subsequent proceedings.⁴⁴ Accordingly, rather than having to adduce its own evidence, a private litigant may rely on findings of fact made in a successful ACCC proceeding. However, the function of this provision may be undermined by the ACCC Immunity and Cooperation Policy, which encourages the ACCC and the respondent to settle proceedings by way of an agreed statement of facts and consent orders.⁴⁵ It is unclear whether a private litigant can rely on Section 83 in relation to findings based on admissions in settled proceedings, as distinct from findings based on evidence. In addition, under Section 87B of the CCA, when a party has engaged in an alleged contravention of the CCA (including the cartel provisions), the ACCC may accept a formal undertaking by the party. However, an undertaking does not require an admission that the party contravened the CCA, and accordingly cannot be relied upon under Section 83 by a private litigant.

Obtaining evidence is a significant challenge for private litigants. While the ACCC has wide-ranging investigative powers to gather evidence, it has adopted a highly restrictive stance on the disclosure of such information to private litigants. Under the CCA, where evidence is deemed to be ‘protected cartel information’, the ACCC has broad power to refuse to comply with a private litigant’s request for information.

41 Caron Beaton-Wells, ‘Private Enforcement of Competition Law in Australia – Inchings Forwards?’ (2016), *Melbourne University Law Review* Vol. 39, pp. 681, 726.

42 *id.*, p. 693.

43 *ibid.*

44 CCA, Section 83.

45 ACCC, ‘ACCC Immunity and Cooperation Policy for Cartel Conduct’ (Policy Document, September 2014) (under review).

VIII CURRENT DEVELOPMENTS

i Criminal cartel actions

After years of civil prosecutions for cartel conduct, the CDPP has a criminal conviction for a cartel and has commenced criminal proceedings against a number of corporates and executives.⁴⁶ In early 2019, the ACCC indicated that cartel conduct would continue to be a priority, with a goal of ‘two to three’ investigations concluding and prosecutions commenced each year.⁴⁷

Notably, the ACCC’s new focus on targeting individuals represents a significant change in policy – in 2017, the ACCC chair Rod Sims stated: ‘Unfortunately, I fear that only jail sentences for individuals in prominent companies will help send the appropriate deterrence messages that cartels seriously damage competition and the enemy as a whole.’ The ACCC will continue to focus on criminal cartel prosecutions during the next five years, and is likely to seek greater penalties than those handed down previously.

In June 2018, the ACCC laid charges against four major Australian banks and several executives regarding alleged criminal cartel conduct in breach of the CCA (the *share placement* cartel). The alleged cartel behaviour relates to the A\$2.5 billion sale in Australia of 80.8 million discounted shares to institutional investors in 2015. The parties have asserted that the use of underwriting syndicates has operated successfully without prosecution for decades. Accordingly, the case will have ramifications on market practice in the area of institutional placements and capital raisings. The case is still making its way through the lower courts in Sydney and is yet to have been committed to trial.

Since June 2018, the CDPP has also laid criminal cartel charges against an additional six individuals and three companies.⁴⁸ In March 2019, the Country Care Group Pty Ltd, its managing director and a former employee were committed to stand trial in the Federal Court of Australia following criminal cartel charges laid against them in 2018.⁴⁹

ii Repeal of Section 51(3)

On 13 September 2019, the Treasury Laws Amendment (2018 Measures No. 5) Bill 2018 came into force, removing Section 51(3) of the CCA, which had provided exemptions for intellectual property owners against the anticompetitive conduct prohibitions in Part IVA of the CCA. The ACCC has released guidelines on its approach to enforcement of, *inter alia*,

46 ACCC, ‘NYK convicted of criminal cartel conduct and fined \$25 million’ (media release 126/17, 3 August 2017), www.accc.gov.au/media-release/nyk-convicted-of-criminal-cartel-conduct-and-fined-25-million.

47 Rod Sims, ‘2019 Compliance and Enforcement Policy’ (speech at the Committee for Economic Development Australia Conference, 26 February 2019) transcript available at: www.accc.gov.au/speech/2019-compliance-and-enforcement-policy.

48 ACCC, ‘Criminal cartel charges laid against CFMMEU and its ACT branch secretary’ (media release 156/18, 16 August 2018), www.accc.gov.au/media-release/criminal-cartel-charges-laid-against-cfmmeu-and-its-act-branch-secretary; ‘Charges laid against alleged forex price fixing cartel’ (media release 48/19, 11 April 2019), www.accc.gov.au/media-release/charges-laid-against-alleged-forex-price-fixing-cartel; ‘Global shipping company Wallenius Wilhelmsen charged with criminal cartel conduct’ (media release 154/19, 23 August 2019), www.accc.gov.au/media-release/global-shipping-company-wallenius-wilhelmsen-charged-with-criminal-cartel-conduct.

49 ACCC, ‘Country Care cartel case committed for trial in Federal Court’ (media release 31/19, 13 March 2019), www.accc.gov.au/media-release/country-care-cartel-case-committed-for-trial-in-federal-court.

the cartel provisions following repeal of the subsection.⁵⁰ Notably, the repeal has retrospective effect, meaning that even existing arrangements may fall for consideration under the Part IVA prohibitions.

iii Enforcement of gun jumping

On 13 February 2019, the ACCC succeeded in its first *gun-jumping* cartel case, with the Federal Court ordering Cryosite Limited to pay A\$1.05 million in penalties. Gun jumping occurs when merger parties start coordinating their activities or behaving as one entity instead of competing during the period prior to completion of a merger. Unlike other jurisdictions, there is no separate provision under the CCA regulating gun jumping. The case has confirmed that gun jumping by merger parties that are also competitors will contravene the cartel provisions of the CCA.

iv Criminal obstruction charges

In October 2019, the CDPP laid charges against a former general manager of sales and marketing at BlueScope Steel Limited for inciting the obstruction of a Commonwealth official in the performance of their functions. The charges relate to actions allegedly taken by the former general manager during an ACCC investigation into alleged cartel conduct against BlueScope Steel. The case represents the first time that charges have been laid against an individual in relation to obstruction of an ACCC investigation.

50 ACCC, ‘Guidelines on the repeal of subsection 51(3) of the Competition and Consumer Act 2010 (Cth)’ (publication, 30 August 2019), www.accc.gov.au/publications/guidelines-on-the-repeal-of-subsection-513-of-the-competition-and-consumer-act-2010-cth.

Appendix 1

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Prudence Smith is a partner in Jones Day's Sydney office. Prudence is a highly experienced competition law practitioner who advises clients on a full range of competition regulatory law issues. Prudence's background includes more than 14 years at the Australian competition regulator (ACCC), much of the time as a senior ACCC internal lawyer. She has extensive experience in merger clearance, cartel and anticompetitive conduct investigations and litigation, ACCC immunities, authorisations and notifications of contracts affecting competition.

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