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# The Legal 500 Country Comparative Guides

## Australia CARTELS

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This country-specific Q&A provides an overview of cartels laws and regulations applicable in Australia.

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# AUSTRALIA

## CARTELS



### 1. What is the relevant legislative framework?

Australia's competition legislation is the *Competition and Consumer Act 2010* (Cth) (**CCA**).

The cartel provisions are contained in Part IV, Division 1 of the CCA. Cartel conduct is prohibited per se, regardless of competitive effects. The CCA establishes corresponding civil liability provisions and criminal offences for making, or giving effect to, a contract, arrangement or understanding (**CAU**) between competitors or potential competitors containing a "cartel provision".

A provision of a CAU will be a "cartel provision" if it is between two or more parties who are actual or potential competitors in relation to the supply, acquisition or production of the relevant goods or services and the provision has either:

- the purpose or effect of fixing, controlling or maintaining the price of goods or services supplied by any or all of the parties; or
- the purpose of:
  - preventing, restricting or limiting the production, capacity, supply or acquisition of goods or services by any or all of the parties;
  - allocating customers or territories supplied by any or all of the parties; or
  - rigging bids.

The criminal cartel offences have an additional "fault element" requiring proof that the accused had the requisite knowledge or belief of the essential elements of the offence. The offence must be established beyond reasonable doubt. By comparison, civil liability requires the elements to be established on the (lower) balance of probabilities.

There are a number of exceptions to cartel conduct, including for or in relation to:

- joint ventures;

- related bodies corporate;
- the acquisition of shares or assets;
- conduct that constitutes exclusive dealing or resale price maintenance;
- collective bargaining conduct notified to the Australian Competition & Consumer Commission (**ACCC**) (not bid-rigging);
- conduct subject to a grant of authorisation; and
- the collective acquisition of goods or services (exception applies to price fixing only).

The CCA also contains other exceptions which apply to but are not specific to cartel conduct, including for acts or things specifically authorised by Commonwealth or State laws, provisions for the conduct of partnerships, certain employment conditions, and provisions relating exclusively to the export of goods or services (but only if full particulars are provided to the ACCC within 14 days of the CAU).

Part X of the CCA enables parties to international liner cargo shipping conference agreements to obtain partial and conditional exemptions from the cartel provisions. To benefit from the exemption, the relevant conference agreements must be registered.

### 2. To establish an infringement, does there need to have been an effect on the market?

No, cartel conduct is prohibited per se, irrespective of competitive effect.

### 3. Does the law apply to conduct that occurs outside the jurisdiction?

Yes, the cartel provisions apply to conduct outside Australia in certain circumstances:

- the cartel conduct must be in "trade or commerce within Australia or between Australia and places outside Australia"; and

- for conduct outside Australia, the cartel provisions apply to:
  - either body corporates incorporated or registered within Australia or “carrying on business” within Australia;
  - Australian citizens; or
  - persons ordinarily resident within Australia or “otherwise connected with” Australia.

#### 4. Which authorities can investigate cartels?

The ACCC is responsible for investigating cartel conduct, managing the immunity/leniency processes and instituting civil cartel proceedings. The Commonwealth Director of Public Prosecutions (**CDPP**) prosecutes criminal cartels. The ACCC refers serious cartel conduct to the CDPP for consideration for criminal prosecution in accordance with a Memorandum of Understanding (**MOU**) between the two agencies. The Australian Federal Police (**AFP**) may also execute search warrants to obtain evidence in criminal cartel investigations.

#### 5. What are the key steps in a cartel investigation?

The conduct of a cartel investigation is a matter for the ACCC as the responsible investigating authority. There are no legislative or other prescribed timeframes for an investigation (other than the six year time limit for the ACCC to commence proceedings to recover a civil penalty). Cartel investigations are typically protracted and often last years.

The ACCC gathers evidence voluntarily or through its compulsory information gathering and search and seizure powers (see Section 6 below).

Following an investigation, the ACCC may:

- refer serious cartel conduct to the CDPP. It is a matter for the CDPP to determine whether to commence a criminal prosecution;
- initiate civil proceedings in the Federal Court seeking penalties and other orders;
- resolve less serious conduct by accepting court enforceable undertakings or through engagement and negotiation where the party may commit to do various things to address the conduct and ensure it does not recur; or
- take no further action (such as for technical contraventions).

#### 6. What are the key investigative powers that are available to the relevant authorities?

The CCA invests the ACCC with significant investigatory powers.

Under s 155 of the CCA, the ACCC may issue a notice to a person if they have “reason to believe” that the person is capable of providing information, documents or evidence relating to a matter that constitutes, or may constitute, a contravention of the CCA.

Specifically, the ACCC can issue three types of s 155 notices:

- to furnish information;
- to produce documents, or
- require a person to appear before the ACCC to give evidence, orally or in writing.

It is an offence to fail to comply with a s 155 notice or knowingly provide false or misleading information in response to a s 155 notice. In *ACCC v Rana* [2008] FCA 374, the defendant was sentenced to gaol for refusing to comply, and aiding and abetting the failure of a company he controlled to comply, with a s 155 notice. In *ACCC v Davies (No 2)* [2015] FCA 1290, the respondent was ordered to perform 200 hours of community service for aiding and abetting a company’s failure to comply with a s 155 notice. The Court has also imposed fines for providing false or misleading information in response to a s155 notice (e.g., *ACCC v Narnia Investments Pty Ltd* [2009] FCA 395 and *ACCC v Boyle* [2015] FCA 1039, the latter involving the giving of false or misleading answers in a s 155 examination).

Since 1 January 2007, the ACCC has had the power to obtain a search warrant authorising it to enter specified premises and seize documents and things, including electronic equipment and data storage devices, in relation to alleged contraventions of the CCA.

An executing officer may make copies of evidential material and/or seize things. They may also require a person to answer questions or produce evidential material. A failure to comply with any such requirement is a criminal offence.

If a warrant is valid, an occupier must provide reasonable facilities and assistance. An occupier is entitled to observe the search being conducted, receive a receipt of each document or thing seized and request a copy of the material seized.

In criminal investigations, the AFP may also obtain a warrant under the *Crimes Act 1914* (Cth) (**Crimes Act**).

The ACCC (together with the AFP) can also obtain a warrant allowing the interception of telephone communications or the installation of listening/surveillance devices.

## 7. On what grounds can legal privilege be invoked to withhold the production of certain documents in the context of a request by the relevant authorities?

Information or documents subject to legal professional privilege (**LPP**) do not need to be disclosed to the ACCC under a s 155 notice or search warrant. Broadly, in Australia, LPP applies to:

- confidential communications between a client and a lawyer (generally including in-house counsel and lawyers qualified outside the jurisdiction), and in some circumstances, a client or its lawyer and a third party; and
- confidential documents,

where the communication is made or the document was prepared for the dominant purpose of the client being provided with or obtaining legal advice, or for use in existing or anticipated litigation.

## 8. What are the conditions for a granting of full immunity? What evidence does the applicant need to provide? Is a formal admission required?

### **Civil immunity**

The ACCC's *Immunity and Cooperation Policy for Cartel Conduct* sets out when an immunity applicant (corporation or individual) will be eligible for and granted conditional civil immunity. The policy was updated on 1 October 2019 (**Updated Policy**) with changes that included four new or strengthened conditions for immunity. Currently, an applicant will be eligible for immunity if it:

- is the first party to seek immunity for the cartel;
- is or was a party to a cartel;
- admits it has engaged or is engaging in cartel conduct and the conduct may constitute a contravention of the CCA, and for corporations only, the admissions are a truly corporate act;
- has not coerced others to participate in the cartel;
- has ceased or undertakes it will cease its involvement in the cartel;

- has at all times provided full, frank and truthful disclosure, and cooperated fully and expeditiously when making the application, including taking all reasonable steps to procure the assistance and cooperation of witnesses (for corporations) and to provide sufficient evidence to substantiate its admissions, and agrees to continue to do so on a proactive basis throughout the ACCC's investigation and any ensuing court proceedings;
- has entered into a cooperation agreement with the ACCC; and
- has agreed to maintain confidentiality regarding its status as an immunity applicant and the details of the investigation and any ensuing proceedings (unless otherwise required by law or with written consent).

The amendment requiring an admission to cartel conduct by an immunity applicant is particularly significant as previously, it was only necessary for an immunity applicant to admit that the conduct may have constituted cartel conduct. Further, at the time of the application, the ACCC will generally not grant immunity if the ACCC is already in possession of evidence that is likely to establish at least one contravention of the CCA. In the past, the ACCC would not grant immunity if it had received written legal advice that it has reasonable grounds to institute proceedings in relation to the cartel.

If a corporation qualifies for conditional civil immunity, it may also seek derivative immunity for related corporate entities and/or for its current or former directors, officers and employees who were involved in the cartel conduct. The conditions attaching to derivative immunity are the same as those for immunity.

### **Criminal immunity**

If it considers the conditions for immunity are satisfied, the ACCC will recommend to the CDPP that it grant criminal immunity. The CDPP will make its own decision on such recommendation. If the CDPP considers the criteria for immunity are met, it will provide a "letter of comfort" to the applicant that it intends to grant criminal immunity. Before commencing any prosecution, the CDPP will then provide the applicant with a written undertaking granting criminal immunity.

## 9. What level of leniency, if any, is available to subsequent applicants and what are the eligibility conditions?

Parties not eligible for "first in" immunity may seek to

cooperate with the ACCC, but there is no immunity from prosecution and there are no pre-determined discount levels or ranges that apply. It is a matter for the Courts to determine the appropriate penalty or fine, having regard to the extent of any discount for cooperation. The ACCC or CDPP will set out in submissions to the Court any cooperation provided by a party and their assessment of the extent and value of the cooperation. In relation to individuals, in practice, the ACCC or the CDPP may provide “assurances” in return for them providing a witness statement to the effect that the person’s statement will not be used as evidence against the individual in civil or criminal proceedings (other than in any proceedings concerning the witness knowingly providing false or misleading evidence).

The Immunity Policy sets out the factors the ACCC/CDPP will consider in assessing the cooperation of a party, such as whether the party:

- approached the ACCC in a timely manner;
- has provided significant evidence of cartel conduct; and
- has pleaded guilty (criminal).

The ACCC or CDPP may also require the cooperating party to make admissions, agree to a statement of facts, and/or provide evidence in proceedings. The Updated Policy makes clear that in assessing whether a cooperating party has provided significant evidence of cartel conduct, the ACCC will consider the extent to which the evidence was previously unknown to the ACCC or materially advanced the ACCC’s case.

## 10. Are markers available and, if so, in what circumstances?

Yes, to obtain a marker, the applicant must describe the cartel conduct in sufficient detail to enable the ACCC to confirm no other corporation or individual has obtained a marker or applied for immunity in respect of the cartel. Subject to this requirement, a marker can be requested on a hypothetical, anonymous basis.

If a marker is placed, it preserves the recipient’s “first in” status for a defined period. The Updated Policy (see Section 8 above) states that a marker will lapse if sufficient information is not provided to the ACCC within the “marker phase” or may be cancelled if the ACCC forms the view the applicant will not be able to satisfy the requirements (for e.g., where the conduct does not disclose cartel conduct).

## 11. What is required of immunity/leniency

## applicants in terms of ongoing cooperation with the relevant authorities?

To maintain civil or criminal immunity, a corporation or individual must provide full, frank and truthful disclosure and cooperate fully and expeditiously on a continuing basis throughout the ACCC’s investigation and any ensuing court proceedings. As part of the changes to the Updated Policy (see Section 8 above), this requirement was strengthened to be on a “proactive basis” and extends to corporations taking all reasonable steps to procure the assistance and cooperation of witnesses and for all applicants to provide sufficient evidence to substantiate admissions of cartel conduct.

The Updated Policy also includes new requirements that applicants enter into a cooperation agreement with the ACCC (and continue to comply with it) as well as maintain confidentiality as to their status as an immunity applicant and the details of the investigation and any subsequent proceedings. The ACCC’s template cooperation agreement includes a schedule for detailing the specific initial actions an immunity applicant must comply with to obtain conditional immunity. According to the template agreement, an applicant is also required to comply with additional requirements of cooperation set out in writing by the ACCC from time to time to obtain and maintain immunity. Conditional immunity will only become final after the resolution of any ensuing proceedings against cartel participants who do not have conditional immunity.

## 12. Does the grant of immunity/leniency extend to immunity from criminal prosecution (if any) for current/former employees and directors?

If a corporation qualifies for civil/criminal immunity, it may also seek derivative immunity for current and former directors, officers and employees who were involved in the cartel conduct. As a result of the Updated Policy, derivative immunity has been extended to related entities that share a common parent company with the corporate applicant (previously this category of related entities was not covered), as well as current and former directors, officers and employees of any eligible related entities. The application must specify the relevant individuals for whom derivative immunity is sought. An individual may also apply for civil or criminal immunity if he or she was a director, officer or employee of a corporation that is or was a party to a cartel.

## 13. Is there an ‘amnesty plus’ programme?

Where a party is cooperating with the ACCC in respect of one cartel (for which it is not eligible for conditional immunity) and discovers a second, unrelated cartel, the party may apply for conditional immunity in respect of the second cartel and seek “amnesty plus” for the first cartel.

Under “amnesty plus”, either the ACCC will recommend to the Court a further reduction in the civil penalty for the first cartel or the CDPP will inform the Court of the full extent of the party’s cooperation so as to be taken into account in sentencing.

Eligibility for “amnesty plus” requires the party to be cooperating with the ACCC for the first cartel and have conditional immunity for the second.

#### **14. Does the investigating authority have the ability to enter into a settlement agreement or plea bargain and, if so, what is the process for doing so?**

In civil cases, parties may agree in principle on the appropriate penalty to be imposed and make submissions to the Court accordingly.

The Court is not a “rubber stamp” but will usually give deference to the parties’ agreement. However, in a civil case instituted by the ACCC against Volkswagen under Australia’s consumer (rather than antitrust) laws in relation to the emissions scandal, the Federal Court rejected an agreed penalty of A\$75million, and later imposed a penalty of A\$125m. This is the second highest penalty ever imposed for a contravention of Australia’s consumer laws and was upheld on appeal by the Full Federal Court. The High Court (Australia’s highest court) refused Volkswagen’s application for special leave to appeal the Full Federal Court’s decision.

In criminal sentencing, a prosecutor cannot agree on or make submissions as to the appropriate penalty or range, although it can indicate if the Court would fall into appellable error were it to impose a sentence within a penalty range submitted by the accused. In both cases, ultimately it is for the Court to determine the appropriate penalty/fine.

Civil proceedings can be settled at any time prior to judgment. The parties will usually file with the Court an agreed statement of facts and may also file joint submissions on penalty. In criminal proceedings, a settlement will usually involve agreement as to the charges to which the defendant will plead guilty, agreeing the parameters for settlement where permissible, and filing an agreed statement of facts.

In both civil and criminal matters, hybrid settlements, where some but not all aspects are agreed or settled, are possible.

#### **15. What are the key pros and cons for a party that is considering entering into settlement?**

Possible advantages of settlement include:

- a reduction in the penalty/fine;
- potentially significant saving of costs, time and resources;
- greater scope to shape and limit the facts and evidence forming part of the settlement; and
- greater (but not absolute) certainty as to penalty and to a lesser extent, the fine.

Possible disadvantages of settlement include:

- making admissions;
- reputational damage;
- greater risk of new third-party actions for damages or impacting existing actions;
- limited or no scope to appeal; and
- disclosure of certain settlement material such as an agreed statement of facts.

#### **16. What is the nature and extent of any cooperation with other investigating authorities, including from other jurisdictions?**

The ACCC is authorised to provide information obtained under a s 155 notice to an Australian and/or foreign government body (the latter includes an agency of a foreign government) if the Chairperson is satisfied the information will assist that body to perform or exercise any of its functions or powers.

The ACCC has also a number of arrangements with overseas competition agencies in relation to competition law enforcement activities. For example, in 2020, the ACCC entered into a MOU with the competition authorities in the US, UK, New Zealand and Canada (known as the “Five Eyes”) to establish a multilateral framework for coordination and cooperation between the countries. It also has numerous specific cooperation agreements with these and other countries. For example, the Governments of Australia and the United States have an agreement under which the parties assist one another and cooperate on a reciprocal basis in providing or obtaining antitrust evidence.

In response to the disruptions caused by the COVID-19



pandemic to global supply chains, the “Five Eyes” competition authorities recently formed a new working group focused on preventing anti-competitive conduct in the supply and distribution of goods.

In the context of an immunity application, unless required by law, the ACCC will not share confidential information provided by an immunity applicant with other regulators without consent but will as a matter of course request confidentiality waivers for each jurisdiction in which the applicant has or intends to seek immunity or leniency. The ACCC typically adopts the same approach for cooperating parties. The ACCC may regard a failure to provide waivers as a failure to provide full cooperation.

There are also limited circumstances in which information (even protected information) can be disclosed, including, for example, where the Chairperson of the ACCC is satisfied that the disclosure can assist other government agencies/bodies.

### 17. What are the potential civil and criminal sanctions if cartel activity is established?

For corporations, the maximum civil penalty or criminal fine per contravention/offence is the greater of:

- A\$10 million;
- three times the total value of the benefits that have been obtained by one or more persons that are “reasonably attributable” to the conduct; or
- if the court cannot determine the total value of those benefits, 10% of the annual turnover of the corporate group during the 12 months preceding the conduct.

For individuals, maximum criminal sanctions are A\$444,000 fine, 10 years’ imprisonment, or both. The maximum criminal fine is based on the value of penalty units, which was automatically indexed on 1 July 2020 and is indexed every three years. The increased penalty unit value only applies to offences committed on or after 1 July 2020.

The maximum civil penalty is \$500,000 per contravention.

The CCA prohibits corporations indemnifying officers for pecuniary penalties and legal costs incurred in defending proceedings, in which the officer is found to be liable for a penalty.

The ACCC can also seek a range of other orders against

corporations and individuals including injunctions and disqualifying/banning individuals from managing corporations.

### 18. What factors are taken into account when the fine is set? In practice, what is the maximum level of fines that has been imposed in the case of recent domestic and international cartels?

The relevant factors the Court must have regard to in determining the appropriate civil penalty include:

- the nature and extent of the conduct;
- any loss or damage suffered;
- the circumstances in which the conduct took place;
- any previous findings regarding the same or similar conduct;
- the size and degree of market power of the company;
- the deliberateness of the conduct;
- whether the conduct was at the direction of senior management;
- the company’s culture of CCA compliance;
- the extent of cooperation; and
- specific and general deterrence.

In criminal matters, an offender is to be sentenced in accordance with the Crimes Act (Part IB). In particular, the sentence imposed must be of a “severity appropriate in all the circumstances of the offence”, and the Court must take into account the matters in s16A(2) (among others).

In *CDPP v NYK* [2017] FCA 876, the Court found the factors identified in civil penalty cases bear also upon criminal sentencing and most are, in any event, replicated in some way in the relevant considerations set out in the Crimes Act. Some of the specific factors in s16A(2) include:

- the degree to which the person has shown contrition;
- if the person has pleaded guilty to the charge;
- the degree of cooperation with law enforcement agencies in the investigation of the offence or other offences;
- the need for adequate punishment; and
- the offender’s prospects of rehabilitation.

In practice, the highest penalty awarded in Australia to date is A\$46m imposed on Yazaki Corporation in May 2018 for civil cartel conduct involving the coordination of quotes with a competitor for the supply of wire

harnesses used in the manufacture of certain Toyota vehicles supplied in Australia. The only criminal fines imposed in Australia to date are A\$25m against Nippon Yusen Kabushiki Kaisha, A\$34.5m against Kawasaki Kisen Kaisha, Ltd. and A\$24m against Wallenius Wilhelmsen Ocean AS, all shipping companies, for cartel conduct in relation to the supply of shipping services to Australia.

### **19. Are parent companies presumed to be jointly and severally liable with an infringing subsidiary?**

There is no presumption of parental joint and several liability. However, if a corporation is a party to a CAU, related bodies corporate are taken (that is, legally deemed) to be a party to that CAU.

### **20. Are private actions and/or class actions available for infringement of the cartel rules?**

Yes, private or class actions are available against cartel participants for damages as well as other relief. The ACCC may also make an application on behalf of other persons who have suffered loss or damage as a result of cartel conduct.

### **21. What type of damages can be recovered by claimants and how are they quantified?**

The CCA does not provide any guidance as to how damages are to be quantified. While the cases state the measure of damages is similar to those recoverable under the common law in tort (that is, to put the person in the position they would have been in had the cartel conduct not occurred), damages are not confined to those recoverable in tort.

### **22. On what grounds can a decision of the relevant authority be appealed?**

First instance decisions of the Federal Court (single judge) can be appealed to the full Federal Court (usually three judges) on errors of law such as where the Court has applied an incorrect legal principle or findings of fact could not be supported by the evidence. Full Federal Court decisions can be appealed to the High Court, with leave. The High Court will only hear cases of significant importance, such as on new points of law, to resolve questions of law decided inconsistently by lower courts,

or on matters of public importance. In criminal cases, except in very limited circumstances, appeals must only involve questions of law, unless leave is granted.

### **23. What is the process for filing an appeal?**

An appeal can be initiated by either party within 28 days of the decision by filing a notice outlining the grounds of appeal.

### **24. What are some recent notable cartel cases (limited to one or two key examples, with a very short summary of the facts, decision and sanctions/level of fine)?**

In December 2017, the Federal Court dismissed the ACCC's civil case against PZ Cussons Australia alleging Cussons had arrived at an understanding with two other laundry detergent manufacturers (Colgate-Palmolive and Unilever, the latter an immunity applicant) to cease supplying standard concentrate laundry detergents in early 2009, and thereafter only supply ultra concentrates. Supermarket retailer Woolworths and a former Colgate executive were also alleged to have been knowingly concerned in the conduct. In 2016, Colgate and later Woolworths admitted to the conduct, with the Court imposing penalties of \$18m and \$9m respectively. The ACCC's case against Cussons was circumstantial.

The ACCC relied on a pattern of behaviour (meetings) and parallel conduct to draw inferences of an understanding. However, the Court found that most meetings did not involve direct communications between suppliers, and further, the communications tended to evidence no agreement was reached. The Court also found the communications were entirely explicable on economic grounds and would have likely occurred in the absence of any CAU. The ACCC appealed to the Full Federal Court, which unanimously dismissed the appeal, and in doing so affirmed that parallel conduct, by itself, is insufficient evidence to establish the existence of a CAU.

To date, in criminal prosecutions where liability has been contested, the CDPP has either not secured a conviction or has withdrawn all charges.

In June 2021, a jury in the Federal Court acquitted the Country Care Group and two individuals accused of alleged attempted price fixing and bid rigging, which prosecuted by the CDPP on a criminal basis. This case involved the first criminal charges laid against an Australian company as well as individuals since the



criminalisation of cartel conduct in July 2009. It was also the first cartel case that proceeded to a contested jury trial on liability, as previous cases involved the corporate accused pleading guilty.

In relation to the CDPP criminal prosecution against Citigroup, Deutsche Bank and ANZ, and numerous bank executives (on referral from the ACCC) (**Bank cartel case**), the CDPP withdrew remaining criminal charges against the accused in February 2022. This followed a lengthy pre-trial committal process, commenced almost 4 years prior. See also section 25 below. This followed the CDPP earlier withdrawing all charges against the Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**) and a union official for allegedly attempting to induce suppliers of scaffolding services to enter into cartel arrangements regarding prices for scaffolding services provided to builders in the Australian Capital Territory in 2012 to 2013. The CDPP withdrew the charges in August 2021, citing the extended period of time which had elapsed since the alleged conduct occurred, and the difficulties that posed for witnesses' recollections of relevant matters.

## **25. What are the key recent trends (e.g. in terms of fines, sectors under investigation, applications for leniency, approach to settlement, number of appeals, impact of COVID-19 in enforcement practice etc.)?**

Cartels including criminal cartels remain a key ACCC enforcement priority in 2022, as does the prosecution of individuals and seeking jail sentences for cartel conduct.

When the COVID-19 pandemic began, the ACCC refocused its efforts on the immediate priorities raised by the pandemic and established an internal COVID-19 Taskforce to address the immediate harm to consumers and small businesses. As the pandemic has continued and government restrictions have eased throughout Australia, the ACCC has reverted back to its more usual priorities while continuing to actively monitor any consumer and competition issues that may arise from the pandemic.

Following investigations and referral by the ACCC, the CDPP currently has two criminal cartel matters before the courts at various stages, in addition to four civil cases instituted by the ACCC, the most recent being commenced in October 2021. The ACCC has a number of other investigations on foot which may lead to further criminal or civil proceedings being brought, subject to the CDPP's decision.

One of the criminal cases commenced involves Alkaloids

of Australia and its former export manager, concerning the production and supply of the pharmaceutical ingredient SNBB (hyoscine butylbromide) used in antispasmodic medications to relieve stomach pain and bowel cramps. The ACCC alleged Alkaloids and other overseas suppliers made and gave effect to arrangements to fix prices, restrict supply, allocate customers and/or geographical markets, and/or to rig bids for the supply of SNBB to international manufacturers of generic antispasmodic medication. The company and the export manager both pleaded guilty in late 2021 and have been committed for sentencing, which is expected this year (2022).

The other case concerns Vina Money Transfers, a money transfer business, and five individuals, regarding allegations of fixing the Australian Dollar/Vietnamese dong exchange rate and fees they charged to customers between 2011 and 2016. The Company and three of the five individuals have pleaded guilty, while the remaining two individuals are contesting the charges. The Company and the three individuals who pleaded guilty are awaiting sentencing following a sentencing hearing in early February 2022.

The guilty pleas in the above cases follow the acquittal of all accused in the first contested criminal prosecution before a jury in the Country Care case for alleged attempted price-fixing and bid-rigging (see Section 24), as well as the CDPP withdrawing all charges in two other matters, including all remaining charges against Citibank, Deutsche Bank AG and four senior banking executives in the high-profile Bank cartel case.

In the Country Care case, the CDPP alleged that Country Care, its managing director and a former employee engaged in pricing fixing and bid rigging conduct. Country Care supplies rehabilitative and assistive technology products under several government and other contracts, and direct to the general public. After a lengthy 12-week hearing, the jury unanimously acquitted all accused after four hours of deliberations.

The Bank cartel case concerned allegations arising out of an ANZ capital raising in August 2015 which resulted in a significant shortfall. Following investigation by the ACCC, the CDPP laid charges in 2018 and the matter spent close to two and half years at the committal stage in the New South Wales Local Court before the accused were committed to stand trial in the Federal Court. The complete withdrawal of the case in early 2022 followed the CDPP earlier withdrawing all charges against ANZ and two of its executives. The CDPP dropped the charges in accordance with the Prosecution Policy of the Commonwealth, stating that there were no longer reasonable prospects of convicting the accused.

The ACCC has subsequently instigated an internal review of the Bank Cartel case. While the failure of the case may not dampen the ACCC's resolve to investigate and refer serious cartel conduct to the CDPP, it is expected that the ACCC will review and modify its approach in conducting criminal investigations to reflect learnings from the case.

The ACCC's civil case against BlueScope Steel Limited and a former employee for alleged attempts to induce certain participants in the steel industry to enter into price-fixing arrangements has been heard and is awaiting judgment. As the proceedings were commenced on a civil basis, the ACCC will only need to prove the allegations on the balance of probabilities. The matter will have important implications on the law of "attempt" and in particular, what conduct amounts to an 'attempt to induce' a cartel arrangement.

The ACCC continues to seek, and the Courts are increasingly willing, to impose higher penalties for anticompetitive conduct including cartels. Current ACCC Chair Rod Sims has repeatedly stated that penalties should be much higher and above \$A100m in appropriate cases.

## **26. What are the key expected developments over the next 12 months (e.g. imminent statutory changes, procedural changes, upcoming decisions, etc.)?**

At the time of writing, there are no proposed reforms which will impact on cartel laws in the next 12 months. However, the judge who presided over the now withdrawn Bank Cartel case has referred to the existing cartel provisions as "akin to producing a cryptic crossword". Such comments could potentially ignite calls for future law reform in this area.

### **Civil cases**

In addition to the ACCC proceedings against BlueScope for which judgment on liability is expected in 2022 (see Section 25), there are several civil cases currently before the Court.

In October 2020, the ACCC commenced proceedings against overhead crane company NQCranes Pty Ltd, alleging it engaged in cartel conduct by entering into a signed agreement with a competitor that contained a provision to not target each other's customers for

overhead crane parts and servicing in Brisbane and Newcastle. This matter is listed for a further case management hearing in June 2022.

In May 2021, the ACCC instituted proceedings against Delta Building Automation Pty Ltd and its sole director for involvement in an alleged attempt to rig a bid in connection with a tender conducted by the National Gallery of Australia in Canberra in late 2019. The tender relates to the replacement and ongoing maintenance of a building management system at the gallery. The ACCC alleges that the sole director, on behalf of the company, attempted to make, or attempted to induce the making of, an arrangement or understanding with a competitor to fix the price of bids to ensure a successful tender during a meeting in December 2019. Notably, the competitor rejected the approach, and the National Gallery did not suffer any loss as a result. This matter is listed for trial on liability in early April 2022.

In October 2021, the ACCC commenced proceedings against two Sydney roof tiling businesses, First Class Slate Roofing and RAD Roofing Specialists (**RAD**) and their sole directors for alleged cartel conduct. The ACCC alleges that First Class, RAD and their respective sole directors colluded to rig bids for tenders in exchange for cash payments at two construction projects. This matter is listed for a case management hearing in April 2022.

### **Criminal prosecutions**

There are currently two criminal cartel cases before the Federal Court, both of which involve the accused entering guilty pleas. The first is the Alkaloids matter, where all accused have pleaded guilty and have been committed for sentencing, with sentencing expected in 2022 (see Section 25). The second is the Vina Money matter (see Section 25), where the company and three individuals pleaded guilty and are awaiting the sentencing decision, while the remaining two individuals are contesting the charges. Both cases involve individuals and as such, it will be the first time an Australian Court sentences an individual for cartel conduct, with the prospect of criminal fines or possibly a custodial sentence.

### **Other**

In December 2021, the Federal Government announced Gina Cass-Gottlieb as the next ACCC Chair, to replace outgoing Chair Mr Rod Sims. Ms Cass-Gottlieb is one of Australia's pre-eminent competition lawyers having been a senior partner in the competition and regulation practice at Gilbert + Tobin for 27 years. Ms Cass-Gottlieb commenced as Chair on 21 March 2022.

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