



COMPETITION & REGULATION UPDATE

Consequences for those involved in cartel conduct increasing in Australia and abroad

Companies and individuals who breach prohibitions against cartel conduct face increasing levels of fines and other penalties in Australia and overseas. In this article, we outline expected developments in Australia this year, including the first criminal proceedings for cartel conduct, and we look back over the recent fines, management bans and jail terms imposed for cartel conduct in Australia and overseas.

CRIMINAL CARTEL PROCEEDINGS AND PUSHES FOR HIGHER FINES ON THE CARDS IN AUSTRALIA IN 2016

This year will be an important one for cartel enforcement in Australia. The ACCC has several cartel cases being heard by the courts at first instance, including a case relating to laundry detergent and a penalty hearing relating to wire harnesses for motor vehicles. The ACCC may also launch further actions in 2016, with around 20 cartel investigations currently under way. The ACCC's Chairman recently indicated that he expects the first criminal prosecutions for cartel conduct will be among those proceedings brought this year, as well as several important civil proceedings. The ACCC have not yet taken a case alleging criminal cartel conduct, but last year it established a new dedicated group exclusively responsible for criminal cartel investigations.

The ACCC has also launched several appeals in relation to cartel cases. In March, the ACCC won an appeal in its case against Air New Zealand and PT Garuda Airlines for alleged cartel conduct concerning air cargo charges. A decision on penalties in that case is pending.

The ACCC also has appeals pending following losses in 2015 in its price-fixing case against Flight Centre and a case alleging attempted cartel conduct concerning eggs.

The ACCC is likely to continue seeking higher penalties in cartel cases in 2016. In 2015, the ACCC Chairman of the ACCC warned that the ACCC would seek larger penalties in competition cases in order to ensure that "businesses know the consequences for crossing the line". Sims labelled an \$11 million penalty against Flight Centre for attempted price fixing (which was later overturned on appeal) as "immaterial".

Looking back, the ACCC obtained substantial penalties against two companies found to have engaged in cartel conduct in relation to forklift gas. The Court ordered the companies and their executives to pay \$8.3 million in penalties and a further \$600,000 in contributions to the ACCC's costs. The companies received discounts for cooperating with the ACCC.



MANAGEMENT BANS – THE ACCC'S STRONGER FOCUS ON PENALTIES FOR INDIVIDUALS INVOLVED

Individual accountability is also becoming a stronger focus for the ACCC in terms of the penalties it seeks. The first disqualification order in a competition law matter was made just over 12 months ago, with the court disqualifying the director from managing any corporation for a period of three years as a result of his involvement in cartel conduct. The manager was also ordered to pay a fine of \$250,000, which is the third largest fine for an individual in a cartel matter in Australia to date.

The power to disqualify managers has existed since 2007, but until now has been mostly pursued by the ACCC in consumer law matters. Interestingly, a survey conducted in the United Kingdom a few years ago showed that business respondents ranked director disqualification as the second most effective deterrent for breaching competition law (after criminal penalties). These results may be a factor in the ACCC's recent push to use those powers in competition matters.

FINES FOR INDIVIDUALS ENGAGED IN CRIMINAL CARTEL CONDUCT INCREASES

In July 2015, the maximum pecuniary penalty for individuals involved in criminal cartel offences increased to \$360,000. This maximum fine has increased \$140,000 since 29 December 2012.

TRENDS WORLDWIDE

Globally, competition regulators have become increasingly aggressive in investigating, prosecuting and punishing international and domestic cartels.

In 2015, competition authorities globally obtained over \$US3 billion in fines against companies that breached cartel conduct laws. This amount is largely comprised of the settlements reached by the US Department of Justice with five of the world's largest banks over the rigging of foreign exchange rates. Citigroup paid the highest individual fine for its involvement in the conduct – \$US925 million.

Global cartel fines reached a record high of \$US5.11 billion in 2014. Authorities in the EU, Brazil and Korea were particularly successful. For example, the EC concluded 10 cartel investigations and fined 45 firms a total of nearly €1.7 billion. These cartels were in the automotive parts, electronics, food, energy, financial and industrial sectors. Interestingly, 80% of those prosecutions were initiated by whistleblowers, who sought immunity in exchange for informing the competition authority of the presence of the cartel and assisting them to prosecute.

Competition agencies worldwide have also focussed increasingly on penalising executives involved in cartel conduct. In 2015, the US' Department of Justice indicted and convicted over 60 individuals involved in cartel conduct. The DOJ's recent record shows that it is imprisoning approximately double the number of defendants it did in the 1990s and defendants are serving much longer prison terms. The average prison sentence in the US is now two years. Competition regulators in UK, South Korea, Japan and Brazil have also been particularly active in seeking and obtaining prison terms against executives. In December 2015, a former UBS and Citi trader was sentenced in the UK to 11 years in prison for his involvement in the LIBOR rate-rigging scandal. In delivering its reasons, the court warned that cartel conduct will incur severe sentences, including prison terms longer than 11 years.

WHAT THIS MEANS FOR YOUR BUSINESS

Ensure that your company has appropriate compliance measures in place to:

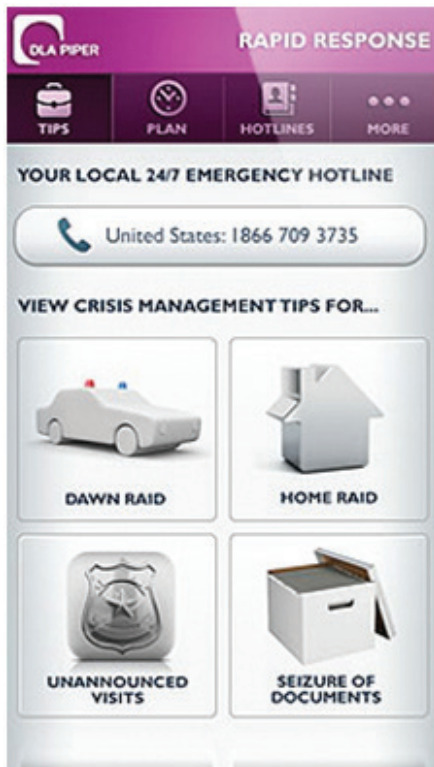
- Avoid cartel conduct before it arises by ensuring staff are aware of the prohibitions against cartel conduct and advice is sought on how to structure agreements or whether to seek authorisation for proposed conduct.
- Detect cartel conduct early and seek immediate advice on options – remember that immunity is available only to the first successful applicant, so time is of the essence.
- Handle any ACCC investigation into the company and its staff efficiently and effectively.



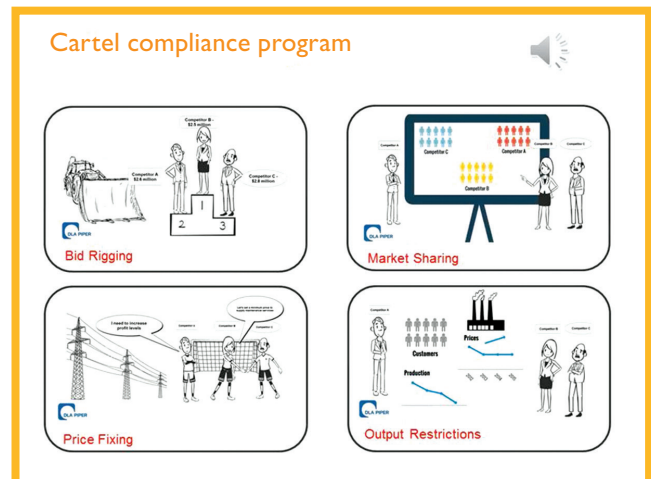
FURTHER INFORMATION

For further information, please refer to:

- DLA Piper’s Rapid Response website and app (pictured)



- Our series of articles on what to do if the ACCC comes knocking – see [here](#), [here](#) and [here](#)
- Our four short cartoons designed to assist businesses with compliance training. These cartoons describe the different types of cartel conduct and illustrate the conduct with examples. Please contact us if you would like to receive a copy of these cartoons.



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