COMPETITION AND REGULATION UPDATE

Jurisdictional limits of cartel laws in Australia and the United States

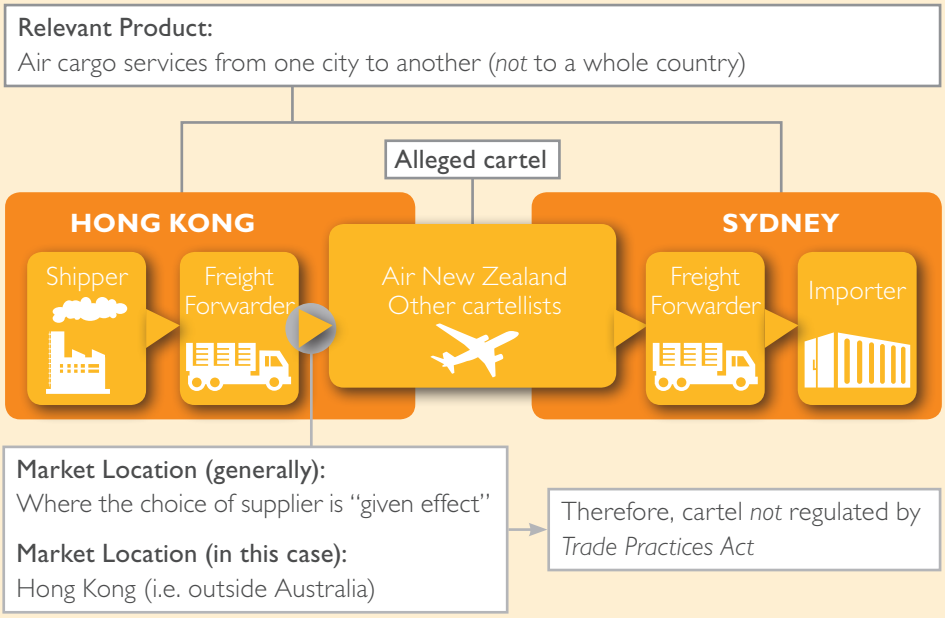
ACCC v Air New Zealand and Motorola Mobility v AU Optronics

Commerce may be increasingly global, but there remain limits on the extraterritorial application of cartel laws in individual countries. In late 2014, Courts in Australia and the United States (US) delivered judgments limiting the extraterritorial application of cartel laws and the remedies available to victims of cartels. Both decisions are subject to appeal.

This publication provides a summary of the existing decisions and identifies the key implications arising from those cases.

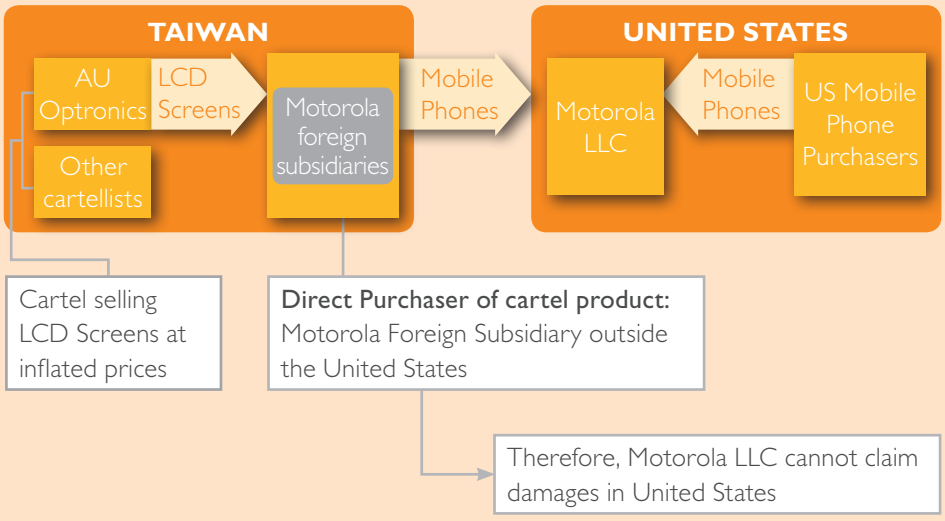
ACCC v Air New Zealand

In Australia, the Federal Court judgment in *ACCC v Air New Zealand* determined that an alleged air cargo cartel in respect of surcharges on flights from Hong Kong to Australia did not occur in a "market in Australia" and was therefore not subject to the *Australian Trade Practices Act 1974* (Cth) (TPA).



Motorola Mobility v AU Optronics

In the US, the 7th Circuit Court of Appeals judgment in Motorola *Mobility v AU Optronics* precluded Motorola Mobility LLC from using US law to seek remedies in respect of alleged foreign cartel inflated LCD screen prices because the direct purchasers of the screens were Motorola's foreign subsidiaries rather than Motorola itself.



GLOBAL COMPANIES, GLOBAL ANTI-TRUST ISSUES

Can Head Office obtain damages in its home country for a cartel between foreign suppliers?

Is Management at Head Office subject to penalties under the anti-trust laws where its distributors are located?

Do manufacturing staff need training in the anti-trust laws of countries where retail stores are located?

KEY IMPLICATIONS

Global corporations should conduct anti-trust training and risk assessment on a global basis.

Global corporations should consider the anti-trust regimes in all countries where they have operations.

Global corporations cannot always obtain remedies for anti-trust violations in the forum of their choice.

The extraterritorial application of antitrust laws continues to develop as an area of law.

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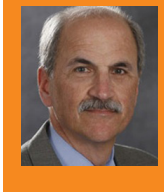

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FURTHER DETAIL REGARDING THE CASES

DECISION IN BRIEF *ACCC v Air New Zealand*	
Summary	The ACCC alleged that Air New Zealand had engaged in cartel conduct in overseas countries (including Hong Kong) in breach of the Australian TPA. The Federal Court ruled against the ACCC because the alleged cartel did not occur in a market in Australia and, therefore, was not subject to the TPA.
Key aspects of judgment	1. The ACCC alleged that international airlines had colluded to fix, among other things, the level of fuel surcharges imposed on air cargo transport services on routes from Hong Kong to cities in Australia. 2. To impose a surcharge on cargo services out of Hong Kong, it was necessary to obtain the approval of the Hong Kong Civil Aviation Department (HK CAD). 3. In Hong Kong, international airlines including Air New Zealand were members of an industry Cargo Sub-Committee (HK BAR CSC). Following meetings of the HK BAR CSC, airlines made joint applications to the HK CAD for approval of surcharges. 4. The TPA prohibited price fixing conduct that has the purpose or effect of substantially lessening competition in a *market in Australia*. 5. Market definition was critical. The Court found that: ▪ a market is an area of close competition between firms or a field of rivalry between them. Market definition involves consideration of substitutes both in demand and supply. The limits of the area or filed are marked by the limits of substitution; ▪ the relevant product markets were for the transport of cargo by air from Hong Kong to particular ports in Australia (e.g. Sydney); ▪ the decision as to which air carrier to use was generally made by freight forwarders but was sometimes made by large importers or exporters, some of whom were located in Australia; ▪ the customers of the airlines were principally freight forwarders but also included some large importers and exporters, some of whom were located in Australia; 6. Geographically, the Court concluded that the relevant markets were not markets in Australia. The Court observed that: ▪ a feature of transport markets is that the place where the customers may *turn to choose* between providers of the service may be different from the place where the sellers *operate* the service; ▪ part of the service was provided in Australia and there was competition between the carriers in respect of that part of the service; ▪ some of the customers were located in Australia, and the airlines tousled for the business of customers located in Australia. Furthermore, the subjective decision of a customer to switch from one airline to another may be made in Australia; ▪ the geographic location of a market is the place where the decision to switch airlines is 'given effect' – that is, the place where possession of the cargo is physically handed to the airline (and therefore the place where each competing airline must have a presence). In this case therefore, the relevant markets in respect of air cargo transport services from Hong Kong were in Hong Kong.

DECISION IN BRIEF (CONTINUED)
ACCC v Air New Zealand

Implications and commentary

In determining the extraterritorial operation of law, there is a difficult balance between:

- sufficiently protecting the interests of local consumers; and
- inappropriately interfering with the sovereign authority of other nations and the conduct of corporations operating in those foreign nations.

That balance remains to be determined in Australia, although the decision in *ACCC v Air New Zealand* provides welcome judicial consideration of the factors that may be relevant. Specifically:

- In 2010, the TPA was replaced by the *Competition and Consumer Act 2010* (Cth) (CCA) which contains broad prohibitions against cartel conduct.
- The extraterritorial application of those provisions remains at large because the provisions are not expressly limited in their application and there is virtually no case law that has considered these provisions. Specifically, the cartel provisions in the CCA do not contain any link to the 'market in Australia' provision used by the Court in ACCC v Air New Zealand.
- Even though the CCA provisions differ from the old TPA, we consider that the cartel provisions should be interpreted as applying only to cartels having a sufficient nexus with Australia.
- In determining what nexus is required, we consider the decision in *ACCC v Air New Zealand* provides a useful starting point.

Although the ACCC v Air New Zealand matter was not concerned with damages, a separate class action based on similar conduct was commenced in 2007. Judgment remains to be issued in that case.

DECISION IN BRIEF

Motorola Mobility v AU Optronics Corp et al

Summary	Motorola instituted proceedings in the U.S. seeking damages arising from cartel conduct allegedly undertaken by suppliers overseas (including in Taiwan). The Court ruled against Motorola Mobility LLC (Motorola) for two reasons: ■ Factually, it was Motorola's foreign subsidiaries, rather than Motorola itself, who directly purchased the LCD screens from the foreign cartel; and ■ Legally, United States antitrust law should not be interpreted so broadly as to enable corporate groups to temporarily ignore the separate legal status of their foreign subsidiaries in order to take advantage of the more favourable damages laws that exist in the United States.
Background	1. Motorola is incorporated in the United States. It sells mobile phones to customers in the United States and abroad. 2. Motorola has established a number of foreign subsidiaries that construct mobile phones and sell them to Motorola. 3. AU Optronics Corp was the largest producer of liquid crystal displays (LCDs) in Taiwan. It supplied LCD screens to Motorola's foreign subsidiaries. Those screens were used in the construction of mobile phones. 4. On 13 March 2012, it was convicted in a jury trial of participating in a conspiracy to fix the prices of LCD panels in breach of section 1 of the Sherman Act. 5. *Motorola Mobility v AU Optronics*, is an action brought in the United States by Motorola seeking damages in respect of an alleged conspiracy.
Key aspects of judgment	1. Of the panels sold by the defendants to Motorola and its subsidiaries: ■ 99% were bought by foreign subsidiaries abroad who used them to construct mobile phones which were then sold to Motorola. Of these, Motorola sold 42% in the United States and 57% abroad; ■ 1% were not subject to the appeal as they were bought by, and delivered to, Motorola in the United States. 2. The Court found that sections 6a(1)(A) and (2) of the Foreign Trade Antitrust Improvements Act 15 U.S.C. (FTAI Act) set out a dual limb test – the Sherman Act shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless: "… such conduct has a direct, substantial, and reasonably foreseeable effect … on trade or commerce which is not foreign commerce with foreign nations, or on import trade or import commerce with foreign nations" (First Limb); *and* "[the] effect [on import trade or domestic commerce] gives rise to a claim" under federal antitrust law (Second Limb). 3. The Court found that the relevant commerce was foreign commerce and did not satisfy the Second Limb (i.e. the effect of the conduct did not give rise to a claim under federal antitrust law) because: ■ The victims of the cartel were Motorola's foreign subsidiaries, not Motorola itself; and ■ US antitrust laws are not to be used for injury to foreign customers.

DECISION IN BRIEF (CONTINUED)

Motorola Mobility v AU Optronics Corp et al

Reasoning of Court

The Court gave a number of reasons in support of the above conclusion.

1. A corporate group should not be able to pick and choose when the separate legal existence of its subsidiaries is recognised. Specifically:
   - Motorola recognises the separate legal existence of its subsidiaries for taxation purposes. It should not then be permitted to disregard that separate legal existence for the purposes of obtaining damages under antitrust law.
   - The foreign subsidiaries may have available remedies available to them under local antitrust law. If not, that is a consequence that Motorola must accept of having established a subsidiary in that country.
2. Motorola lacks antitrust standing for two reasons:
   - Although Motorola owns its foreign subsidiaries, the harm it suffered is a derivative injury that does not give rise to an anti-trust claim. It is recognised that owners, employees and investors in a company injured by an antitrust violation are not themselves entitled to seek damages under antitrust law.
   - Although Motorola was an indirect purchaser (in that it purchased mobile phones from its foreign subsidiaries at prices which may have been inflated as a result of the cartel), indirect purchasers do not have the ability to seek damages for antitrust violations (Illinois Brick doctrine). The Illinois Brick doctrine prevents any downstream purchaser, other than the direct purchaser, obtaining damages against a cartel participant.
3. Motorola was asking the Court to enormously expand the extraterritorial reach of the Sherman Act. Doing so may create friction with other countries by unreasonably interfering with their sovereign authority.
4. Any actual damages suffered by Motorola were likely to be small since the LCD screens were, on a cost basis, a relatively small component of a mobile phone and Motorola in any case likely passed on any cost increase to its customers and there is no evidence that Motorola suffered a loss in sales.

Implications and commentary

This case highlights the difficulties associated with seeking damages arising from cartel behaviour, even when the regulator has already proved a violation.

In the United States, the indirect purchaser doctrine arising in *Illinois Brick* presents a significant roadblock to anyone other than the direct purchaser seeking a remedy under the federal anti-trust laws. In other countries, the position is different. In Europe for example, the Directive on Antitrust Damages adopted by EU Council of Ministers on 10 November 2014. In Australia, the position is unresolved.

As such, even though the United States may be an attractive jurisdiction for cartel victims to seek remedies because of the potential for the treble damages, corporate groups that have been the victim of a cartel will need to carefully consider whether the United States is the appropriate forum for a damages claim.