AUSTRALIAN FIRST: CRIMINAL CHARGES LAID AGAINST INDIVIDUALS FOR ALLEGED CARTEL CONDUCT

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Australia Antitrust, Competition and Regulatory Alert

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IN BRIEF

- On 15 February 2018, the Australian Competition and Consumer Commission (ACCC) announced that criminal charges had been laid against The Country Care Group Pty Ltd (Country Care), its Manager Director, Robert Hogan and a former employee, Cameron Harrison.
- This is the first time that criminal charges have been laid against individuals under Australian cartel laws which became criminal provisions in 2009.
- It is also the first time that an Australian company has been charged under the country's criminal cartel laws. Australia's first criminal cartel charges were laid in 2016 against Japanese shipping companies.
- Imposing criminal charges against individuals is in line with global trends in cartel prosecution and is likely to signal a new way forward for cartel enforcement actions in Australia.
- The maximum criminal penalties for individuals for breaches of the criminal cartel provisions in Australia is up to 10 years in jail and fines of up to AUD420,000 per contravention.

IN DETAIL

Criminal charges for alleged cartel conduct have been laid against Country Care and two individuals – the company's Managing Director, Robert Hogan and former employee, Cameron Harrison.

After being pre-empted by ACCC Chairman Rod Sims earlier this year, these charges are Australia's first instance of criminal charges being laid against individuals for alleged breaches of cartel laws.

Australia's first criminal cartel charges were laid in 2016 against Japanese shipping companies including Kawasaki Kisen Kaisha (K-Line) with both companies alleged to be in the same cartel involving the international shipping of cars, trucks and buses. However, the charges against Country Care represent the first instance of an Australian company being charged under the country's criminal cartel laws which became criminal provisions in 2009.

Based in Mildura, Victoria, Country Care sells assistive technology products used in rehabilitation and aged care such as wheelchairs, walking frames, beds, chairs and mattresses.

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Given the criminal jurisdiction of the charges, they will first be heard by the Magistrates' Court of Victoria in Mildura on 14 March 2018. If the Magistrate determines that there is sufficient evidence for the matter to proceed, then it is likely that the matter will be heard in the Federal Court.

WHAT DO THESE CHARGES MEAN FOR BUSINESSES AND INDIVIDUALS?

With criminal charges against individuals now an actuality rather than a theoretical possibly, all businesses and their employees should be aware that coordinating with competitors can lead to extremely serious consequences for both businesses and individuals that are knowingly concerned in the conduct.

The maximum penalties for breach of the criminal cartel provisions are the greater of:

- AUD10 million;
- 3 times the value obtained from the offence; or
- 10% of annual turnover of the company.

Individuals face criminal penalties of up-to 10 years in jail and fines of up to AUD420,000 per contravention.

Businesses should redouble their efforts to ensure that they have compliance programs in place to limit the risk of breaches of competition laws, including cartel conduct. In particular, businesses should ensure that employees whose roles include interactions with competitors and whose tasks include pricing or other strategic decisions about market, product or customer segmentation are trained and have a sound understanding of competition laws.

Additionally, businesses should ensure that effective incident reporting and whistleblower policies and procedures are in place to encourage early detection of potential breaches.

During his annual speech at the Committee for Economic Development of Australia (CEDA) on 20 February 2018, Rod Sims indicated that the ACCC currently has five referrals of cartel matters with the Commonwealth Director of Public Prosecutions (CDPP) with announcements about the outcomes of cartel investigations to be made progressively throughout the year.

GLOBAL TRENDS IN CARTEL PROSECUTION

Australia's first criminal charges against individuals are in line with global trends in cartel prosecution and are likely to signal a new way forward for cartel enforcement actions in Australia.

In the United States which similarly poses a maximum sentence of 10 years imprisonment for cartel offences, the Antitrust Division of the Department of Justice (DOJ) prosecuted 453 individuals and 220 corporations in the years 2000 to 2009, indicating that individual prosecutions more than doubled that of corporate prosecutions. [1] In recent years, the DOJ has further strengthened its focus on individual culpability with the Antitrust Division prosecuting nearly three times as many individuals as corporations in the period from 2010 to 2017. [2]

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While the United States has a long history of prosecting individuals, these efforts were formalised as department policy when U.S. Deputy Attorney General Sally Yates issued a directive in 2015 stating that the DOJ must focus on individual wrongdoers from the outset of investigations. [3]

Outside of the United States, the level of criminal prosecutions against individuals is much lower but the growing trend towards criminalisation of cartel offences reflects the deterrent value placed on the threat of criminal conviction. In Europe, a number of countries have criminalised cartel offences including the United Kingdom which first secured criminal convictions in 2008, Denmark, France and Ireland while many countries such as Germany and Italy have criminalised only certain forms of cartel conduct such as bid rigging.

In light of global trends in cartel actions that focus on criminal prosecutions and the accountability of individuals, we expect that the ACCC will continue its focus on prosecuting individuals to capitalise on its message of deterrence.

Notes:

1. https://www.justice.gov/atr/division-operations/division-update-spring-2017/individual-accountability-financial-services-industry
2. https://www.justice.gov/atr/division-operations/division-update-spring-2017/individual-accountability-financial-services-industry
3. https://www.justice.gov/archives/dag/file/769036/download

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