MERGER PARTIES BEWARE: ACCC COMMENCES FIRST GUN JUMPING CARTEL PROSECUTION

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IN BRIEF:

- The Australian Competition and Consumer Commission (**ACCC**) has commenced the first prosecution in Australia for alleged "gun jumping" (where parties to a merger commence coordinating prior to merger completion) under the Competition and Consumer Act 2010 (**CCA**).
- The ACCC alleges that Cryosite Limited (**Cryosite**) engaged in cartel conduct by agreeing, as part of a sale agreement, to refer all sale enquiries that it receives before the date of completion to its counterparty. The ACCC alleges that this amounted to a market allocation/cartel agreement.
- The prosecution is a reminder of the risks of entering into agreements/arrangements with a merging party about the conduct of the businesses, prior to the merger completing, where until completion, the parties are competitors.
- Cartel conduct can result in very severe penalties, including fines of up to 10% of annual turnover of a company's business and up to 10 years' jail and fines of AUD500,000 for individuals. In this case the ACCC has decided to prosecute this matter civilly.

BACKGROUND

Cryosite and its counterparty are competitors in the biological storage and management industry. The parties engaged in negotiations in early 2017 coming to the decision that the acquirer was to purchase Cryosite's cord blood and tissue banking business (**Proposed Acquisition**).

In June 2017, the parties entered into a written agreement for the Proposed Acquisition (**Sale Agreement**), the acquirer paying Cryosite a non-refundable AUD500,000 payment. At the same time Cryosite stopped providing cord blood and tissue collection services to new customers.

The parties did not approach the ACCC for clearance of the Proposed Acquisition and while clearance is not mandatory, it is recommended where an acquisition is to take place in a concentrated market. According to the ACCC, the parties were the only private suppliers of cord blood and tissue banking services in Australia.

The ACCC commenced a review of the Proposed Acquisition on 18 September 2017 and after considering the information available to it, decided not to make a decision on whether to grant clearance for the acquisition, discontinuing the public review process on 21 December 2017.

The ACCC, however continued its investigation into the Sale Agreement. ACCC Chairman Rod Sims said, "We

are concerned by the closure of Cryosite's cord blood and tissue marketing, collection and processing operations for new customers, and the failure of the parties to approach the ACCC for clearance."

In January 2018 the parties announced that the transaction would not go ahead and on 12 July 2018 the ACCC instituted proceedings against Cryosite for alleged cartel conduct.

ALLEGED CARTEL CONDUCT

The ACCC alleges that provisions in the Sale Agreement were cartel provisions under the CCA, because the provisions required Cryosite to refer all of its customers to the acquirer after signing the Agreement but before the completion of the acquisition.

Additionally it was alleged, separate to the Sale Agreement, the parties engaged in cartel conduct in that the acquirer agreed not to market to Cryosite's existing customers.

Accordingly, the ACCC has pleaded that Cryosite had engaged in conduct which:

- had the purpose of restricting or limiting Cryosite's supply or likely supply and/or;
- allocating customers between the parties.

This conduct is viewed by the ACCC as gun jumping, which is where parties who are still competitors act in coordination prior to the completion of a transaction. As Mr Sims expressed, "Cryosite effectively jumped the gun by referring its customer enquiries before the deal was completed."

GUN JUMPING IN OTHER JURISDICTIONS

Australia has followed in the footsteps of other jurisdictions where competition law regulators have made strong statements and taken strong action in similar circumstances.

Recently the European Commission imposed a record fine of €124.5 million on a cable and telecoms company in relation to its acquisition of PT Portugal. This conduct is clearly viewed as a serious matter in the EU. Commissioner Margrethe Vestager said:

> "Companies that jump the gun and implement mergers before notification or clearance undermine the effectiveness of our merger control system. This is the system that protects European consumers from any merger that would lead to higher prices or reduced choice. The fine imposed by the Commission … today reflects the seriousness of the infringement and should deter other firms from breaking EU merger control rules".

In the United States penalties can be imposed of up to US$41,484, per day, for each company committing gun jumping offences. The Department of Justice (DOJ) views gun jumping as conduct which prevents the government's ability to prevent anticompetitive mergers and acquisitions.

In 2016 the DOJ handed down a US$11 million dollar penalty for gun jumping to an activist investment firm for non-compliance when it purchased voting shares in an acquisition involving Baker Hughes. Commenting on this matter, Principal Deputy Assistant Attorney General Renata Hesse, head of the DOJ Antitrust Department stated;

> ”Today’s record penalty and important injunctive relief demonstrate our continued commitment to vigorous enforcement of these important notification and waiting period requirements.”

WHAT DOES THIS MEAN FOR BUSINESSES?

These proceedings illustrate the need to act carefully in the period between agreeing to a merger and the transaction completing.

With the risk of civil and potential criminal penalties, businesses need to be aware that they must remain independent before the completion of a transaction as gun jumping effectively removes competition between the parties.

Businesses need to ensure that when entering into an agreement before its completion that they are aware of conduct prohibited under the CCA. This means that they should avoid:

- information sharing without necessary safeguards, particularly relating to pricing, customers and strategy
- agreeing to restrict or limit the supply of goods and services
- the allocation of customers between competitors
- the exchange or transfer of any assets
- restrictions or changes to marketing practices.

They should always obtain adequate advice about each party's obligations under a sale agreement.

Equally importantly, businesses need to make sure that where a transaction has the potential to draw attention from the ACCC, that they seek clearance. A failure to do so impacts upon the competitive process and as Mr Sims states "undermines the effective functioning of the ACCC and the merger process."

For more information about the content of this Insight, please contact a member of the K&L Gates Competition and Consumer Law team.

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