2017 ICN Cartel Workshop - Mini-Plenary #9:

SANCTIONS FOR COMPETITION LAW INFRINGEMENTS

I. General

1. Can your NCA impose sanctions or does it have to refer the case to a governmental body or to a judicial court?

   The ACCC cannot itself impose sanctions. Rather, it must take proceedings in the Australian Federal Court seeking penalties and other sanctions for contraventions of the Competition Law provisions of the *Competition and Consumer Act (CC Act).* A judge then decides upon whether there has been a contravention and, if so, the sanctions to be imposed.

II. Monetary sanctions on companies:

2. Are monetary sanctions on companies established as a maximum percentage of the company's turnover or as a maximum lump sum?

   Up until December 2006, there was a maximum lump sum penalty of $A10m for each contravention. From 1 January 2007, that maximum penalty was amended to become the greatest of the following:

   (i) $10m;

   (ii) 3 times the value of benefits obtained from the anti-competitive conduct; or

   (iii) **Where the value of benefits cannot be determined, 10% of turnover.**

3. Is there a standard method for calculating sanctions, and if so, is this method public?

   The ACCC does not calculate or impose the sanction, rather it is imposed by a judge. This may be done by way of an agreed submission by the ACCC and the respondent as to the appropriate sanction to be imposed (which the judge is not obliged to follow but generally does) or each party may put opposing submissions to the judge as to what they consider to be the appropriate sanction.

4. What role is attributed in the determination of the amount of the fine to (a) the value of sales of the company in the market to which the infringement relates; (b) total turnover of the company; (c) the fact that the company belongs to a group (parental liability)?

   As noted in answer to question 2 above, the total turnover of the company is one of the factors which go into the determination of the maximum penalty. In determining the actual sanction to be imposed, what is usually of more direct relevance is the value of affected commerce or what you describe as "the value of sales of the company in the market to which the infringement relates". Whether the fact that the company who engaged in the conduct is part of a larger corporate group is relevant to assessing the penalty has not finally been determined by the

courts in Australia. Some cases suggest it is not relevant unless the parent company had some responsibility for the conduct or where it is relevant to the company's capacity to pay any penalty. However, there are other cases where it has been taken into account as a general consideration in assessing the appropriate penalty.

5. What other factors are taken into account when determining the amount of the fine?

The CC Act itself specifies that, in determining the appropriate pecuniary penalty, the court must have regard to all relevant matters, including the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission, the circumstances in which the act or omission took place and whether the person has previously been found by a court to have engaged in any similar conduct.

Other factors identified by judges through decided cases include the size of the contravening company; the degree of power of the contravener, as evidenced by its market share and ease of entry into the market; the deliberateness of the contravention and the period over which it extended; whether the contravention arose out of the conduct of senior management or at a lower level; whether the company has a corporate culture conducive to compliance with the CC Act as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention; and whether the company has shown a disposition to cooperate with the authorities responsible for the enforcement of the CC Act in relation to the contravention.

6. Are leniency and/or settlement reductions foreseen?

Although the ACCC does not set percentage discounts for pleas of guilty, making of admissions or co-operation, companies understand that discounts (up to 50% in total) are available depending upon the circumstances. Ultimately in our system it is the Court which must approve any settlement outcome, including discounts.

7. Does the fact that a company has a compliance program affect the level of the sanction?

As noted in answer to question 5 above, the existence of a compliance program is generally regarded as relevant to the level of sanction imposed by the court. In Australia the courts look at such compliance programs in two respects. First, the court will ask whether there is a substantial compliance program in place which was actively implemented. Second, the court will ask whether the implementation of that program was successful – in part this poses the question of how the breach in question arose and whether it was an isolated incident.

8. Does your NCA explain in detail how the fines have been calculated in each case?

The Court imposes the penalty or fine and the judgment sets out, generally in some detail, how the amount has been assessed. Where there are comparable cases, it is often done by reference to those cases.

III. Other types of sanctions on companies:

9. Independently of whether national law defines it properly as a sanction, is there a provision of debarment of companies from public contracts when they infringe competition law?

There are no specific provisions in the CC Act regarding debarment of companies from bidding for Government contracts for breaches of competition law. However, there has recently been introduced into Australia law a new Building Code (administered by Australia's building and construction regulator) which contains a number of provisions that overlap with the ACCC's jurisdiction under the CC Act. In particular, it provides that building contractors or building industry participants must comply with the CC Act to the extent that it relates to tendering or building work and they must not engage in a number of identified collusive tendering practices. The sanctions available under the Code are a formal warning or an exclusion sanction of up to one year, during which time the entity is not permitted to tender for, or be awarded, Government funded building work.

10. In case it does exist, is debarment applicable when the company incurs in any competition law infringement or only in particularly grave infringements (*e.g.* cartels or bid rigging cases)?

Debarment under the new Building Code only applies to collusive tendering practices, identified as follows:

(a) any agreement between tenderers as to who should be the successful tenderer;

(b) any meetings of tenderers to discuss tenders before the submission of tenders if the client is not present;

(c) any exchange of information between tenderers for the payment of money or the securing of reward or benefit for unsuccessful tenderers by the successful tenderers;

(d) any agreements between tenderers to fix prices or conditions of contract;

(e) any assistance to any tenderer to submit a cover tender; and

(f) any agreement between tenderers before submission of tenders to fix the rate of payment of building association fees, where the payment of such fees is conditional on the tenderer being awarded the contract.

11. Are there criminal sanctions applicable to companies for competition law infringements (*i.e.* do legal entities have criminal liability)?

Since July 2009 in Australia, cartel conduct engaged in by companies may be dealt with either by way of criminal charges or by way of civil penalty proceedings. Other competition law infringements by companies may be dealt with only by way of civil penalty proceedings.

The first cartel criminal charges have recently been filed by our Federal prosecutor, the Commonwealth Director of Public Prosecutions (CDPP). Those charges were laid against 2 Japanese companies (NYK and K-Line) in respect of the same cartel which involved price fixing and market sharing conduct over many years relating to shipping cars and other vehicles around the world. Following lengthy negotiations a plea deal was reached with NYK and recently our Federal Court imposed the first ever criminal fine of $A25million upon that company. K-Line is continuing to defend the charges.

12. Are leniency and/or settlement reductions —in case they exist— also applicable to debarment and/or criminal sanctions?

Leniency and settlement reductions are applicable to criminal sanctions. In the only case decided thus far in Australia under the CC Act criminal cartel provisions (referred to above), NYK was fined $A25m by the Federal Court and the judge stated that this fine incorporated a 50% reduction to reflect the plea of guilty and cooperation by the company (both already provided and promised in the future).

Given the fact that the Building Code has only just commenced, it is too early to say whether leniency and settlement reductions could be applied to the debarment sanction – but there is no reason to think that it would not.

IV. Sanctions on individuals:

13. Can employees/managers be sanctioned for competition law infringements committed by their company?

Under the CC Act, directors/employees/managers can be sanctioned for competition law contraventions committed by their company but only if it can be established that they were involved (or to use the relevant Australian legal expression "knowingly concerned") in some way in the contravention. What must be shown is that the person knew the essential facts constituting the contravention and engaged in conduct which implicated him/her in the contravention – in other words he/she was an intentional participant in the conduct which constituted the contravention.

14. Are sanctions on individuals limited to monetary sanctions or is disqualification foreseen as well (as either an administrative or criminal sanction)? Can individuals be criminally indicted for competition law infringements?

The maximum monetary sanctions (fines for cartel offences and pecuniary penalties for other competition law infringements) which can be imposed upon individuals under the CC Act is $A500,000. However, sanctions on individuals are not limited to monetary sanctions and the court may also order:

(i) Terms of imprisonment for up to 10 years (for criminal cartel offences);
(ii) Injunctions;
(iii) Publication orders;
(iv) Compliance programs;
(v) Disqualification orders (for directors of companies).

15. In case they are foreseen, are sanctions on individuals limited to certain types of employees/managers?

    Sanctions on individuals are not limited to any particular type of employee or manager and the only limit is being able to establish that the individual was "knowingly concerned" in the contravention in the manner explained in answer to question 13 above.

16. Do certain additional requirements have to be met to impose a sanction on an individual (*e.g.* a particular involvement in the infringement) or is the infringement by the company sufficient for the individual to be sanctioned for it?

    Yes - the additional requirements are those set out in answer to question 13 above

17. Are leniency and/or settlement reductions on sanctions on individuals —in case they exist— also applicable to debarment and/or criminal sanctions?

    Yes – see answer to question 12 above – the same principles set out there in respect of companies also apply to individuals.

V. Judicial review:

18. Can the sanctions imposed by the NCA be reviewed by judicial courts?

    Not applicable to Australia as sanctions can only be imposed by the court.

19. Is the role of the courts limited to reviewing the decision of the NCA or do courts have full jurisdiction, and therefore they can decide the opportune sanction in each case, and even increase the sanction imposed by the NCA.

    The Courts in Australia must determine the appropriate sanction to apply.

20. In practice, how often do courts review the level of the sanction imposed by the NCA.

    Not applicable to Australia as sanctions can only be imposed by the court.

VI. Damages

21. Are follow-on claims for damages usual in your jurisdiction?

    Up until recently (last 5 to 10 years) such claims have not been usual but they are now becoming more frequent. There is now a significant prospect that any major ACCC cartel case will lead to some form of follow on claim (whether by way of individual private damages action or class action). Such follow on claims are not restricted to cartel cases – a recent abuse of market power/exclusive dealing case taken by the ACCC against Visa Inc (and related entities) has been followed up by a private action by one of the alleged victims of Visa's conduct.

22. If so, does the NCA (a) take into account the potential claims when setting the level of the sanctions? (b) intervene in the process of awarding damages?

As to (a), in Australia it is the Court which sets the level of the sanctions, including penalty or fine. The CC Act requires the Court to give preference to compensation orders for victims of conduct that contravenes the CC Act over penalties or fines. However, that section only applies if the defendant does not have sufficient financial resources to pay both the penalty or fine and the compensation. It is also important to note that it applies only where compensation is sought in the same proceedings as the fine/penalty. In other words the Court is not required when setting the fine/penalty to take into account potential future third party damages actions which may or may not eventuate or succeed.

As to (b), the ACCC does not intervene or play a direct role in any follow on proceedings. However, s83 of the CC Act is designed to assist individual applicants to prove their case against a defendant against whom the ACCC has successfully brought proceedings. It does this by providing that findings of fact made against a defendant in earlier (ACCC) proceedings will be prima facie evidence of those facts in later proceedings brought by any affected persons for damages or compensation orders. Another way in which the ACCC often becomes indirectly involved in the later proceedings is by way of the private plaintiffs subpoenaing material from the ACCC proceedings for use in the later proceedings.

VII. Final

23. Briefly describe any specificity and/or recent development regarding sanctions in your jurisdiction that you consider particularly relevant.

The ACCC has recently made public reference to its desire to increase penalty levels within Australia to better achieve sufficient deterrence. This ACCC project to increase penalties has been referenced as a general priority area of the ACCC in 2017. A significant aspect of this project encapsulates cross-jurisdictional analysis with similar jurisdictions to determine how Australia's current approach to penalties compares.

The ACCC is very concerned that penalties imposed by Australian Courts in competition cases historically have not been sufficiently high to deter contraventions, particularly in cases involving larger businesses. The penalties now *available* in Australia are broadly in line with international trends. However, penalties *actually imposed* here in Australia are much lower than those in other comparable jurisdictions.

There are likely a number of reasons for those historically lower penalties. One reason is timing - Australian competition law maximum penalties were only brought into line with those overseas in 2007. From that date Australian courts have had access to penalties up to 10% of turnover where, as is usual, the benefits from the illegal activity cannot be calculated. However, given the fact that penalties in Australia can only be imposed by a Court, and the time taken for cases to be filed and dealt with, the courts are only now regularly encountering cases where the higher maximum penalties apply.

Another reason for comparatively lower penalties in competition cases in Australia may be because the majority of such cases have to date been resolved by way of agreed penalties jointly recommended to the Court by the ACCC and the defendant company. As noted already, judges are not obliged to follow such recommended penalties but generally do so. Many consider that process has led to penalties generally being imposed at a lower level than if judges independently arrived at the penalty figure following submissions from both parties.

However, apart from issues related to timing and agreed penalties, the ACCC considers there are also more fundamental aspects of the process of assessment of penalties in the Australian context which require examination. In particular, as part of the penalties project, the ACCC has had regard to the way in which other countries quantify their penalties in order to achieve deterrence. In December 2016, for example, Australia participated in a Global Forum on competition hosted by the OECD. A key issue discussed was sanctions in competition cases. The research revealed that most other OECD jurisdictions, including the United States, Europe and the UK, have very transparent methodologies for determining penalties.

In those jurisdictions the sanctioning methodology includes the calculation of a 'base fine'. This is usually done by reference to a set percentage (between 10% and 30%) of the relevant turnover of the business being penalised. That turnover figure is often the turnover of the firm in the jurisdiction concerned but sometimes it is the relevant global turnover of the firm. Commonly once the base fine is found, it is increased having regard to duration of the conduct and numbers of contraventions, and other aggravating factors. Mitigating factors are then applied which reduce the fine before a final figure is determined.

An important difference between the approach in Australia and that of other overseas jurisdictions is that our Courts do not start the fining exercise by calculating a base fine calculated by reference to turnover of the firm. The ACCC believes that base fines calculated in this way is far more likely to lead to the fixing of a penalty which achieves effective specific deterrence in respect of that firm. It would avoid the imposition of fines at a level that might be considered an "acceptable cost of doing business" by large firms, or a price they might otherwise be strategically willing to risk having to pay, in order to gain the benefits associated with offending. If the base fine approach was applied in Australia, firms with smaller turnover might end up with similar fines to those currently imposed, but importantly larger turnover firms would generally end up with much higher penalties.

As an example, an Australian academic has used the USA methodology to calculate that in our most high profile cartel case (the Visy paper case), instead of the agreed penalty of $35m which was imposed by the court, the starting point fine based upon Visy's turnover would have been $212 million, with potential to increase above that level. Under the EC's 2006 Guidelines Visy's base fine would have been even higher.

The Australian courts more recently also seem to be increasingly focusing on the level of penalty required to achieve both specific and general deterrence, in respect of breaches of both consumer law and competition law. This has been highlighted in three recent ACCC cases.

The first was against one of Australia's largest supermakets (Coles) where, in December 2014, the Federal Court of Australia by consent made declarations that Coles had engaged in unconscionable conduct in breach of the ACL and ordered it to pay penalties totalling $10 million. The Court found that Coles had acted unconscionably by threatening its suppliers in a manner not consistent with acceptable business and social standards.

In relation to deterrence, the Judge said:

> ***"while it is a matter for the Parliament to review whether the maximum available penalty of $1.1 million for each contravention by a body corporate is sufficient when a corporation with annual revenue in excess of $22 billion acts unconscionably… the current maximums are arguably inadequate for a corporation the size of Coles."***

The second, again a consumer case, was against Reckitt Benckiser, the maker of the pain relief drug, Nurofen. The Judge at first instance found that the company had engaged in seriously misleading advertising of the product and imposed a penalty of $1.75 million. On an appeal by the ACCC, the Full Federal Court increased the penalty to $6 million, finding that the original penalty was "manifestly inadequate", and that a penalty at that level:

> ***"would reinforce a view that the price to be paid for the contraventions was an acceptable business strategy, and was no more than a cost of doing business."***

As a final example, in cartel proceedings recently taken by the ACCC against two of Australia's largest banks, the sentencing judge expressed reservations about the amount of the agreed penalty that was jointly submitted to the court. He said that the agreed penalties were "*at the very bottom of the range of agreed penalties*" and that he would have ordered a much higher penalty had there been no agreed penalty. He also said:

> ***"A very sizable penalty is plainly required to deter a financial institution of the size of ANZ from engaging in such conduct again. Equally, a very sizeable penalty is required to deter institutions in positions similar to ANZ who might be tempted to engage in similar contravening conduct".***

These are encouraging signs from our Courts. In the ACCC's view penalties imposed in Australia likely need to be many times higher than they are now for larger firms. The ACCC must work with the courts to bring about Parliament's clear intention of a step change in penalties for competition law breaches, particularly in respect of larger companies.