Cartels: Early Court Resolution in Australia
The Experience – The Challenge
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Civil Pecuniary Penalties for Cartel Conduct

1974
Max penalty Corporation AUD$250,000
Individual AUD$50,000

1993
Max penalty Corporation AUD$10 million
Individual AUD$500,000

2007
Max penalty Corporation highest of:
* AUD$10 million
* 3 times that total value of ill-gotten benefit (if quantifiable)
* 10% of turnover in the 12 months ending when act occurred
Individual AUD$500,000

2009
Dual Criminal & Civil Regime
Individual AUD$500,000 (civil)
10 years jail and AUD$220,000 (criminal)
Approach to penalties and early case resolution settled

**Primary object of penalties:** Deterrence – of the particular offender & others who may engage in similar conduct

**Factors relevant to size of penalty settled by a combination of legislation and court decisions:**

- Nature and extent of the conduct
- Amount of loss and damage caused
- Similar conduct in the past
- Size/financial strength/market power of the contravening company
- Deliberateness of the conduct and the period over which it extended
- Senior management or lower level conduct
- Corporate culture/culture of compliance
- Company's disposition to cooperate
- Deterrent effect
Approach to penalties and early case resolution

Majority of cases resolved by early resolution of proceedings:

- ACCC commences proceedings
- ACCC and parties agree about relevant facts
- ACCC and parties agree about quantum of civil penalty
- Joint submission to the Court

Generally court decision does not depart from the position jointly reached by the parties – "a court should not depart lightly from a settled position"
Approach to Penalties and early case resolution

Majority of cases resolved by early resolution of proceedings:

- The statistics:
  - Approx 67% of cases (since 1997) resolved by way of cases resolved by way of agreed submissions on facts and penalties (approx 40/60 proceedings)
  - Significantly higher in the last 5 years - approx 75%

- Assisted by:
  - ACCC readiness to accept the approach
  - ACCC Cooperation Policy for enforcement matters
  - ACCC Immunity Policy for Cartel Conduct (discount for co-operation)
  - Court's ongoing confirmation of its position about early resolution
Early Resolution of proceedings : A success?

- Differing views about the success of the approach

- Problem : Empirically measuring success/extent of deterrence?

- ACCC views the approach a success (in combination with immunity/cooperation processes)
  - has resulted in efficient case management
  - has reduced time in Court/costs
  - scarce resources focused on 'next' cartel investigation
  - has resulted a body of 'precedent' on quantum of penalties (and a trend of increasing penalties for companies)

- Court views approach a success
  - Despite misgivings by some judges, on the whole enthusiastically adopted
Early Resolution of Proceedings: A success?

There have also been criticisms:

- the level of penalties are very low by world standards, (particularly for individuals) – arguably have not have a sufficient deterrent effect

- principal argument: the ACCC submits that there needs to be higher maximum penalties/jail terms, yet rarely seeks penalties approaching the maxima

Balancing the cost/benefit (expected fine v expected gain) of higher penalties with:

- need for constant reinforcement/publicity about judgments

- reinforcement of stigma associated with convictions
Early Resolution of Proceedings: the Challenge

ACCC responding to will of legislature:

• Cartel is a crime/should be subject to significantly higher penalties for Corporations/jail time for individuals

• 26 Feb 2010 and subsequent public pronouncements:
  • "Make no mistake, the ACCC will be seeking higher penalties"
  • "The ACCC will be pressing for any penalty to be calibrated against whatever might be the maximum ...."

• Charge Negotiation – no negotiation with ACCC

The Challenge:

• Previous judgments likely to have little precedent value – but will be clear in the minds of litigants

• Is there likely to be a period of protracted litigation until a recalibration of penalties/assessment of consequences takes place
Blake Dawson

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