

Blake Dawson

Cartels: Early Court Resolution in Australia The Experience – The Challenge

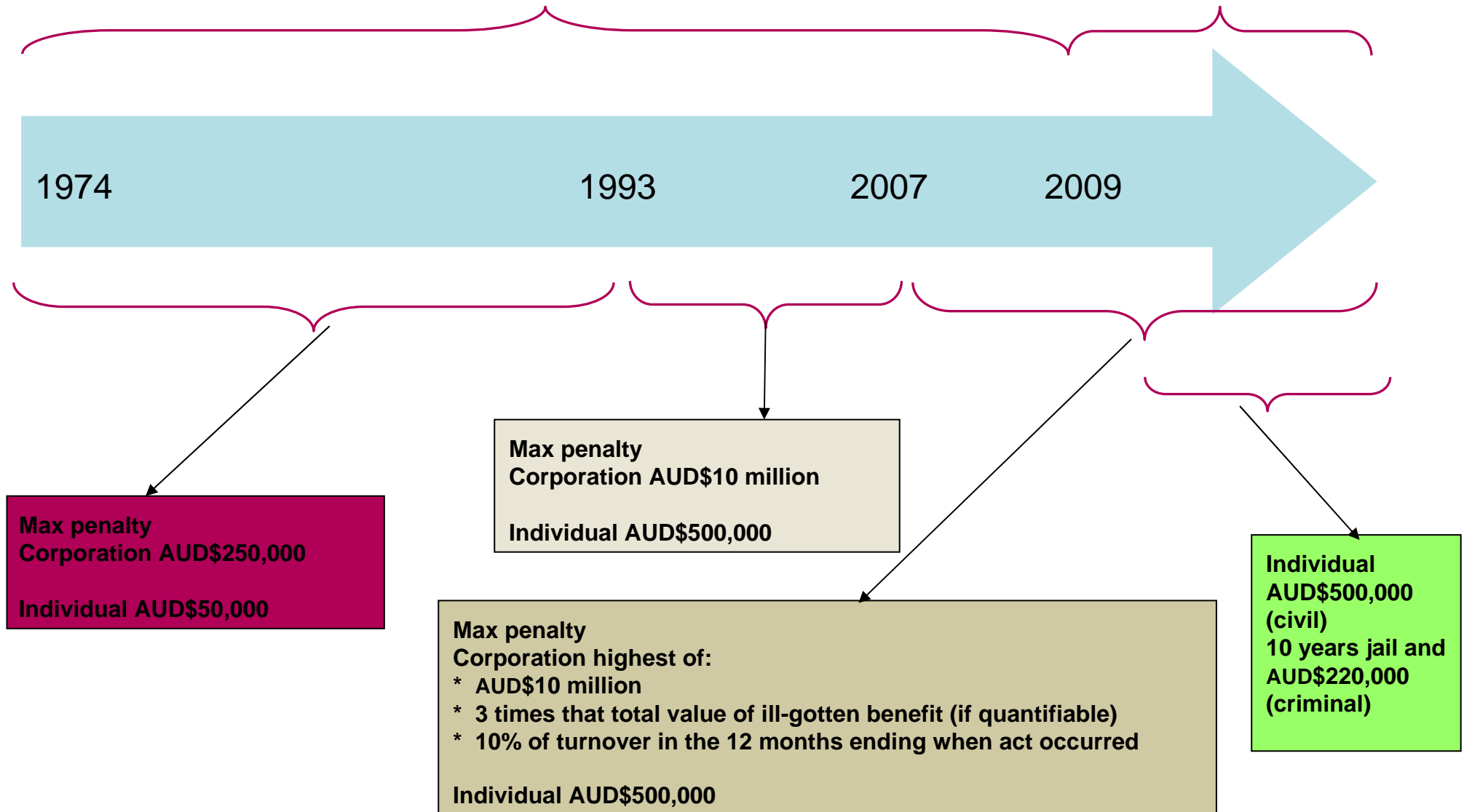
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Civil Pecuniary Penalties for
Cartel Conduct

Dual Criminal & Civil Regime



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

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