mlex
market insight
a LexisNexis® company

INSIGHT | COMMENTARY | ANALYSIS

SPECIAL REPORT
AUGUST 28, 2020

COLLUSION DAMAGE

Australia's struggle to secure its first criminal cartel convictions — and make jail time a deterrent at last

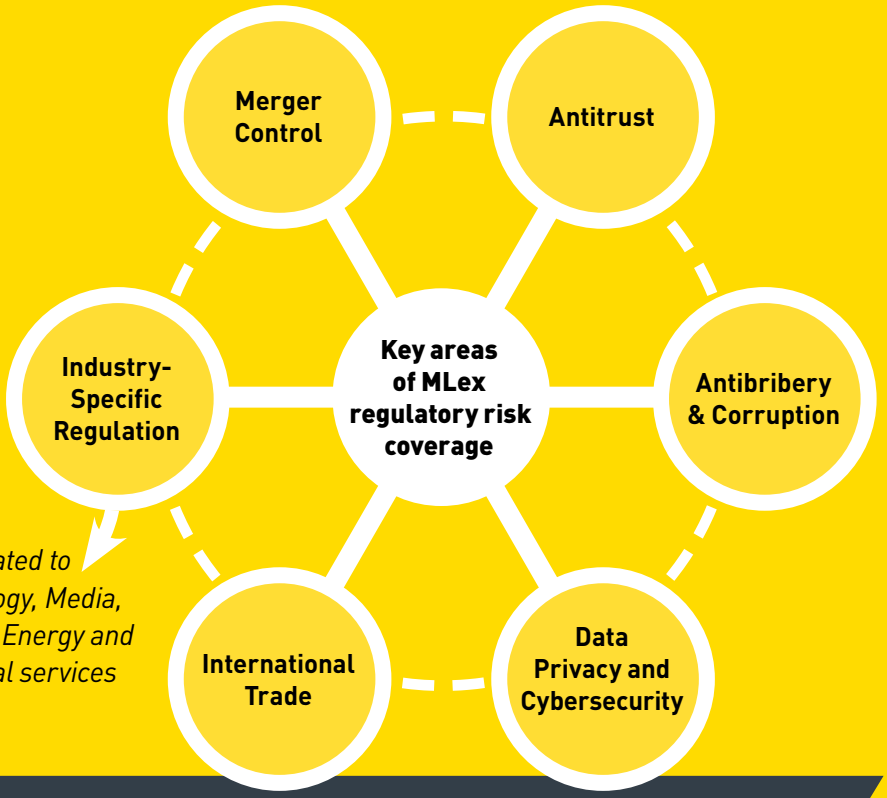
MLex Insight | Commentary | Analysis

Confidently Navigate and Respond to Regulatory Risk

Stay ahead of key regulatory issues with expert insight, commentary and analysis to ensure you are advising your clients on how to best navigate complex, global enforcement environments.

MLex is on the cutting edge of reporting on global regulations, both in effect and proposed.

Our exclusive, real-time coverage of probes, enforcement trends, litigation and regulator commentary help ensure you are informed and able to respond immediately to client risks and opportunities.



The MLex Difference

- ✔ **Singular focus on regulatory risk, providing unrivalled expertise across our team of 80+ journalists reporting from 13 bureaux worldwide.**
- ✔ Through longstanding relationships with regulatory communities we keep you informed of developments ahead of mainstream media.
- ✔ **Highest standards of sourcing and accuracy in our editorial process.**
- ✔ Our unbiased and forensic reporting ensures our clients get the information they need.

UK +44 800 999 3237
US +1 800 356 6547
EU +32 2 300 8250
HK +852 2965 1424
www.mlexmarketinsight.com
customerservices@mlex.com

mlex market insight
a LexisNexis® company

Introduction

David Plott
Managing Editor, Asia

When packaging billionaire Richard Pratt and his Visy group of companies were fined for old-school price-fixing with rival Amcor, the Australian public took notice — briefly. It was 2007, and the Australian Competition & Consumer Commission had successfully argued that the four-year cartel saw Visy's market share balloon and affect 90 percent of Australia's A$1.8 billion cardboard market.

But public interest fizzled as it became clear that those caught up in the cartel had no risk of spending time behind bars and that even the stiffest fine would make little impression. When Pratt died in 2009, he was still among Australia's richest men, and Visy Industries was one of the country's most important players. The A$36 million fine had been paid and forgotten; reputationally, it was as if it had never happened. As for Amcor, it went on to become a global player; having applied for leniency, it wasn't pursued by the ACCC.

Visy's ability to shake off its trouble posed a problem for the antitrust watchdog, long aware of the need to create a deterrent for anticompetitive behavior as it lacked resources to investigate every lead. The fear of getting caught had to be real. But far from a sword of Damocles for Australia's captains of industry, competition law had become a damp squib.

Australia's creation in 2009 of criminal cartel offenses promised to change the game. Suddenly, prison terms of up to 10 years per offense were on the statute books. Added to that was the prospect of a criminal record around an executive's neck — something that could upend cushy retirement plans of directorships and reserved parking at company headquarters. Australia's corporate elites began to take notice.

It was a shot in the arm for the ACCC's enforcement agenda. With one proviso: For the deterrent to work, the regulator needs to secure individual convictions. Until cartelists are led out of court in handcuffs, the laws' potential to put the fear of God into those planning future violations will remain unrealized. It hasn't happened yet. But across five separate cartel prosecutions currently in play, the ACCC and the public prosecutor's office are battling to secure the first convictions.

This is where MLex's reporters in Australia enter the picture. Since the first individual criminal cartel charges were laid early in 2018, MLex has been present at every material court hearing in Canberra, Melbourne and Sydney. We've parsed and analyzed legal tactics; accusations of prosecutorial missteps have been weighed up against their possible impact on the other four cases now unfolding. By chiseling away at the mosaic, we hope we are bringing our subscribers the much bigger picture of spiking regulatory risk.

This in-depth report aims to evaluate the current state of play. We hope you enjoy reading about the thrills and spills of the unfolding regime as much as we relish covering it. ■

mlex
market insight
a LexisNexis® company

Contents

Contributors to this report

James Panichi

Senior Editor, Asia-Pacific

James, an Australian journalist with over 25 years' experience in print and electronic media, is spearheading MLex's coverage of regulatory risk in Australia and New Zealand.
In 2016, James was appointed as MLex's managing editor for continental Europe, overseeing the Brussels bureau's coverage of EU regulatory affairs. Previously he worked for the European Voice newspaper and then at the European operation of US political website Politico as an investigative reporter specializing in governance, transparency and lobbying. In Australia, James spent much of his career at the Australian Broadcasting Corporation. He has degrees in English and Italian literature from the University of Melbourne; a degree in journalism from RMIT University; and an MA in international relations from the ANU.

Laurel Henning

Senior Correspondent, Sydney

Laurel is a senior correspondent covering data privacy and security, antitrust and mergers and acquisitions across Australia and New Zealand. Prior to that, Laurel spent a year spearheading MLex's activist investment coverage, looking at boardroom disputes and shareholder campaigns agitating for changes to company strategy. Laurel joined MLex in 2013 and reported for five years on European energy and climate policies from Brussels. In that time, Laurel covered the regulation of emissions and technological developments pertaining to the energy sector within the EU. A graduate of the University of Liverpool, Laurel studied English and French before beginning a career in journalism with MLex.

Australia's long march to criminal cartel prosecutions faces a tough final leg

Criminal prosecution for cartel behavior remains an elusive goal for Australian antitrust regulators. But that may be about to end. After nearly a century of going back and forth on criminalizing such conduct, things are coming to a head. Five criminal cartel cases are now before Australian courts, based on a law enacted in 2009. Much is at stake for the country's antitrust regulator, businesses and consumers.

By James Panichi & Laurel Henning

In 2009, a senior Australian competition official addressed a conference in Sydney and spoke with the confidence of a cardplayer holding all the aces. The criminal cartel provisions about to be enacted, the official said, would give the country's regulator additional grunt in its fight against price fixing, bid rigging and output restrictions — in fact, it would bolster the enforcer's approach to all illegal arrangements that might tempt captains of industry meeting in smoky backrooms.

Based on recommendations contained in a 1998 report by the Organization for Economic Cooperation and Development, the changes to what was then called the Trade Practices Act were to give the Australian Competition & Consumer Commission the firepower it needed, Marcus Bezzi told the competition law conference.

The head of the ACCC's enforcement team said his agency had been calling for the inclusion of criminal offenses because they would, when seen in combination with existing civil cartel laws, allow for a "proportionate response to cartel conduct." Fines, even large fines, were all good and well, Bezzi said; but any penalty could be rationalized in a large company's balance sheet as a price worth paying for an assertive business strategy. But years in the slammer — well, that was something no board could relegate to an annual-report addendum.

"Whereas pecuniary penalties, no matter how large, may be regarded by some as merely a business cost, the risk of imprisonment alters the equation completely," Bezzi said. "No price can be given to the loss of one's liberty, and a conviction is a permanent stain on anyone's resumé." The stakes were about to go sky-high for cartelists.

The prospect of a 10-year jail sentence, per offense, or penalties ranging from A$10 million ($7 million today) to 10 percent of a company's annual turnover would indeed strike fear into those planning to engage in anticompetitive behavior. Bezzi assured the audience, however, that the tough financial penalties would be a means to an end, not an end in itself. The big stick of jail terms, combined with the smart use of immunity rules by both the ACCC and public prosecutors, would provide a real incentive for cartelists to self-report. This, in turn, would dredge up violations that would have remained hidden under the existing civil-penalty regime.

And if that weren't enough, the additional investigative powers awarded by the criminal cartel legislation would allow the ACCC to launch raids, ask police to tap phones and demand extraditions — in short, the watchdog would have a range of powers hitherto reserved for police and crime prosecutors. Rightly or wrongly, the ACCC saw the new laws, to be implemented in the same year as Bezzi's speech, as the game changer that could see Australia recover from the historic humiliation it had suffered the last time criminal cartel offenses had been on the statute books.

THE LAW

The Competition and Consumer Act 2010 prohibits cartels under civil law and makes it a criminal offense for businesses and individuals to participate in one. Individuals found guilty can face criminal or civil penalties, and corporations could face fines or pecuniary penalties for each criminal cartel offence or civil contravention.

PENALTIES

Maximum sentence of 10 years in jail for an individual convicted of a cartel offense. A fine of up to A$420,000 may also be applied instead or in addition. Companies face a maximum penalty of A$10 million for each criminal cartel offense, or three times the value of the benefits obtained by the violation, or, if the court cannot determine the value of the benefit, 10 percent of global annual turnover in the year of the conduct.

SHERMAN vs. LORDS

The year was 1906 and a newly federated Australia had adopted laws based on the US's 1890 Sherman Act. These included jail time for competition violations — albeit, a relatively light sentence of "any term not exceeding one year." A few years later, a Labor Party government, led by a dour Scotsman named Andrew Fisher, had one shot at prosecuting a ship cartel. The prosecution of Coal Vend went all the way to the Privy Council in London, Australia's highest court of appeal at the time. And that's where it all came unstuck, with the British lords apparently puzzled by the Sherman Act's premise that company bosses shouldn't be allowed to gather over a quiet drink and fix prices. Was that not simply a gentleman's right?

It was an embarrassing defeat for Australian authorities, and subsequent governments turned their backs on criminal cartel offenses. The laws lay fallow for more than half a century, before being scrapped entirely in the drafting of the 1974 Trade Practices Act. Back then, the country's lawmakers didn't see a role for criminal offenses, even as Australia signaled a willingness to renew its commitment to competition policy through the enactment of the new law, which is now the 2010 Competition & Consumer Act. In the 1970s, parliament was ready to accept that consumer law was worthy of criminal liability; breaches of competition rules, however, were to remain a strictly civil affair.

"Australia's approach to cartel laws has been in flux for over 100 years," said Elizabeth Sarofim, a competition lawyer who has undertaken research into the criminalization of cartels at the University of New South Wales, in a recent interview with MLex. "We have gone from criminalization to decriminalization and, since 2009, re-criminalization."

A lot has changed since the Coal Vend case. First, the prosecution of cartelists now has

bipartisan support, with the damages caused to consumers by illegal agreements among competitors cited as a cause for concern by both sides of the political firmament. Second, the investigation of cartels is now run by a dedicated agency, the ACCC, that has the required expertise to bring cartelists to book.

Yet for all the ACCC's cockiness back in 2009, we now know that Australia's antitrust agency hadn't by then grasped the organizational challenges posed by criminal cartel investigations. As the ACCC has admitted in public parliamentary hearings, it took some time to build up its capability to meet the higher standards required for a criminal conviction. It just didn't have the necessary expertise in place to establish criminal liability, which requires the prosecution to prove beyond reasonable doubt that the corporation or individual had the intention or knowledge of wrongdoing when establishing the cartel.

In recent years, the ACCC has taken steps to increase its cartel resources and draw a line under those early days, when it appeared to have been caught flat-footed. Chairman Rod Sims said there had been a 'huge investment' in the cartel unit.

In recent years, the ACCC has taken steps to increase its cartel resources and draw a line under those early days when it appeared to have been caught flat-footed. In 2017, ACCC Chairman Rod Sims said there had been a "huge investment" in the cartel unit, which at last count was made up of 30 dedicated staff. "We now have a strong capacity to conduct careful and thorough criminal investigations," Sims said. "To put all this another way, our criminal cartel machine is now built and running at its appropriate capacity. You will now see its continuing output."

The problem is that all prosecutions now filtering through to the courts are connected to ACCC investigations undertaken before the cartel unit had developed its criminal expertise. Recent revelations in a Sydney courtroom have suggested that, in the early days of the agency's criminal cartel probes, a key ACCC investigation was being run by a one-man team: a former policeman whose record-keeping has been revealed as less than perfect. Mounting speculation about the seriousness of the ACCC's criminal cartel teething problems isn't likely to play well when, Covid-19 restrictions permitting, the first jury ever to consider a competition matter in Australia's history is impaneled in 2021.

Preliminary court exchanges have also highlighted what defense lawyers hope will prove to be a point of considerable weakness: immunity deals. Three of the five criminal cartel prosecutions now under way are the product of immunity bargaining between key players in the alleged cartels and the ACCC; the deals offered by the competition enforcer were passed on to federal prosecutors, who are now saddled with those decisions. In two cases, defense lawyers have already argued that you can't trust an immunized witness as far as you can throw him (or, with one exception, her) because people will say anything to obtain a get-out-of-jail card. The coercive advantages of criminal offenses that Bezzi had welcomed will be thrown back at the ACCC under the eyes of an impressionable jury; the unbecoming horse-trading that takes place before an immunity offer is finalized will be dissected. The public is about to find out just how the sausage gets made.

CRIMINAL vs. CIVIL

The ACCC says it will refer serious cartel conduct for prosecution wherever possible. The regulator is responsible for investigating cartel conduct, managing the immunity process and referral of serious cartel conduct to the Commonwealth Director of Public Prosecutions for consideration for prosecution.

Among factors likely to make the ACCC identify serious cartel conduct are: If the conduct was covert, or caused large-scale economic harm, or was longstanding, or caused significant harm to the public or to customers; if any alleged participant had been involved in previous cartel conduct; if senior company executives authorized the conduct; or if the government, and thus taxpayers, were victims.

LINING UP THE CASES

The Country Care case — which MLex has followed from its very first hearing in the Melbourne Magistrates' Court in 2018 — is likely to raise the question of whether the proposed penalty fits the alleged crime (see page 11). The company and the two individuals charged with price fixing and bid rigging are small-town retailers of medical devices who even went to the trouble of having a local law firm draw up the agreements that have become central to the prosecutors' case. Ignorance of the law may be no defense — that goes without saying. But the first criminal cartel court action since 1910 won't allow state prosecutors to paint a picture of fat cats colluding from their headquarters at the big end of town. Those charged are small-time businessmen with one eye on relatively tight margins — something the jury will understand only too well.

The prosecution of the Australia New Zealand Banking Group, Deutsche Bank and Citigroup Markets Australia, along with six key managers, is another story entirely (see page 15). This is lining up as the criminal cartel showcase trial and, if the ACCC has its way, will see executives in expensive suits on the perp walk. The prosecution will make history because it will delve deep into the dealings between the ANZ and its underwriters in the hours after A$2.5 billion worth of shares were placed on the market. Of more importance, though, the very fact that this prosecution was attempted in the first place has sparked panic in the banking industry, which hadn't previously seen much regulatory interest in such high-level dealings.

Yet it's also the ANZ prosecution, where the stakes are highest, that has raised the prospect of early missteps by the ACCC's one-man investigation team; the granting of immunity to a third underwriter, JPMorgan, and, apparently, four key managers will also be put to the test by defense attorneys. In the course of preliminary hearings in the local court, ACCC officials have found themselves on the stand defending their decisions. By the time the prosecution lands in the Federal Court of Australia to face a jury, the ACCC's evidence will have taken a battering at the hands of some of Australia's top criminal and antitrust lawyers.

Other prosecutions in the pipeline are, arguably, less dramatic than the ANZ case, but will all contribute to fleshing out how the 2009 legislation could and should work.

The criminal prosecution of one of Australia's most militant unions, the Construction Forestry Mining Energy Union, over allegations that a senior official attempted to fix prices among subcontractors, will rely not on an immunity deal — at least, not as far as we know (see page 21). Instead, it will tap into previous investigations carried out by an independent commission of inquiry into the country's construction-industry labor associations. The prosecution will be the first to see cooperation between the ACCC, public prosecutors and the Australian Federal Police, or AFP — an additional element likely to have come about to better manage phone taps and other investigative technologies.

The flurry of enforcement activity in Australia, along with false moves and setbacks that may accompany it, all contribute to a much broader regulatory picture.

Police were also involved in the Vina Money Transfer prosecution, which has alleged collusion among Vietnamese-Australian money transfer companies in the setting of the exchange rate between the Australian dollar and the Vietnamese dong (see page 28). The company and the individuals charged are relatively small fry — this is not comparable to the international forex-cartel prosecutions of players including UBS, Citibank and Barclays. Yet the AFP's court filings do allege that the cartel was masterminded by a significant player: Vietnam's Sacombank. These serious allegations aren't likely to go far: no international charges have been laid and no extradition requests have been issued, according to the court documents filed to date.

By contrast, the August 2019 prosecution of Wallenius Wilhelmsen Ocean, the European shipping line, is set to be over before it has begun, with a settlement already on the table (see page 25). This case, along with the now completed prosecution of Japanese shipping lines Kawasaki Kisen Kaisha, or K Line, and Nippon Yusen Kabushiki Kaisha, or NYK, is likely to reveal little about the inner workings of the 2009 legislation, given that none of

them have gone to trial. What's more, it appears that the ACCC was able to piggyback on the investigative work carried out by enforcement agencies in other jurisdictions — again suggesting that the cases may have been low-hanging fruit rather than a chance to test the limits of the criminal cartel legislation.

CARTEL-BUSTING ISLES

While all of this has been unfolding in Australia, legislators on the other side of the Tasman Sea have watched developments keenly while formulating their own legislative revamp, designed to align New Zealand with other jurisdictions (see page 34). Critics of Wellington's decision to introduce criminal offenses for competition violations argued that it amounted to overkill — that New Zealand's small domestic market offered significant and unrepentant cartelists little chance to hide. Yet the local regulator, the Commerce Commission, was adamant that the new offenses would be a valuable addition to its toolbox. And while the laws have yet to take effect, the watchdog appears determined to avoid missteps as it takes on the challenge of criminal investigations.

Meanwhile, the flurry of enforcement activity in Australia, along with false moves and setbacks that may accompany it, all contribute to a much broader regulatory picture. Australian lawmakers appear determined to clamp down on practices that, previously, may have been tolerated — if not by the legal system or public opinion, at least by parts of the business community. The temptation to roll the dice is higher when the only downside is the prospect of penalties that shareholders will begrudgingly pay. If the ACCC is successful in its many attempts to have the 2009 legislation stand up in court, it may well be able to reverse 100 years of enforcement history. And with the ACCC telling MLex that its expectation that the Commonwealth Director of Public Prosecutions will announce two more cases before the end of the year hasn't been affected by the upheaval caused by Covid-19, the criminal cartel laws now appear likely to gain an even greater prominence.

The take-home for MLex subscribers is this: Hold on to your hats. ■

Country Care case set to forge the future of criminal cartel prosecutions in Australia

Country Care, a retailer of medical aids in a small town almost 700 kilometers from Melbourne, is an unlikely candidate to define the contours of criminal cartel prosecutions in Australia. But as the historic case against it winds its way through the courts in the country's first such prosecution, the outsized implications for antitrust enforcement and the way Australia's cartel law is being applied for the first time are emerging.

By James Panichi & Laurel Henning

The only thing the lawyers assembled in the Melbourne Magistrates' Court knew for sure was that the air conditioning wasn't working. "Is it getting warm in here?" magistrate Charlie Rozencwajg asked as the temperature in the snug courtroom continued to rise. "Feel free to take off your jackets." None of the well-dressed lawyers took up the offer — this prosecution would offer them billable hours for years to come and they weren't about to lose their composure at the starting gate.

It was the early days of a court case that's set to revolutionize the way cartels are dealt with in Australia — the first of its kind since the early 1900s. If prosecutors get their way, the Country Care case will culminate in criminal convictions and jail time, something unprecedented for competition law in Australia. The fact that the company targeted by the prosecution is a small-time, privately-owned retailer of medical aids from a country town seven hours' drive from the Melbourne court is irrelevant — this court action is the first, significant test for Australia's 2009 criminal cartel offenses.

Any flaw in the tactics used by the Commonwealth Director of Public Prosecutions and any shortcomings in the evidence lined up for the prosecutors by the Australian Competition and Consumer Commission will cast a shadow over other prosecutions under way — including the high-profile ANZ, Deutsche Bank and Citigroup case that's only now entering its final stages before a Sydney local court, where it has been stuck since 2018.

It's in this stuffy courtroom that Country Care and two individuals found themselves facing up to 28 charges each for capital-C cartel practices that include price fixing and bid rigging at the expense of government departments. Although the list of charges was slashed as the case moved to the Federal Court of Australia, allegations that the company had established a cartel that ran throughout regional areas of eastern Australia remained in place. The stakes for both the company and the men charged are high.

The hearings in the Magistrates' Court only scratched the surface of the allegations, and the initial case-management hearings in the Federal Court have also yielded little about how the prosecution will unfold — assuming the Covid-19 crisis allows for a jury to be impaneled in 2021. But what we already know is that federal prosecutors regard a meeting

If prosecutors get their way, the Country Care case will culminate in criminal convictions and jail time, something unprecedented for competition law in Australia.

held in May 2014 in a Melbourne hotel as the starting point of the alleged cartel. According to the charges, it was at this meeting of retailers from across eastern Australia that Country Care managing director Robert Hogan outlined an arrangement to fix prices on items for the elderly or the injured including beds, mattresses, wheelchairs, walkers, specialized furniture and continence devices.

This, the prosecution has argued, was part of a bid-rigging arrangement in which the Mildura-based company would secure government contracts and bring in other members of the alleged cartel as subcontractors. Hogan is one of the two men facing charges; a former employee named Cameron Harrison is the other.

The CDPP's evidence against Country Care and Hogan includes slides presented at the Novotel meeting, one of which had read: "Low prices on members' websites — never advertise contracted products on websites for less than the contracted prices." It was this message, prosecutors have alleged, that Country Care had been sending members of what is known as the Country Care Group — 43 retailers selling assistive technology across regional centers in eastern Australia.

Why was the advertising of lower prices on members' websites an issue? By keeping their prices offline, the CDPP alleges, members of the Country Care Group had been attempting to prevent government officials from discovering that the bids they were receiving as part of tender processes weren't based on the lowest prices. This is where the alleged price-fixing and bid-rigging allegations meet.

The CDPP has provided the court with a copy of a subcontracting agreement prepared by Country Care almost a year after the Novotel meeting. According to the allegedly anti-competitive agreement, drafted by an unnamed law firm, "the member must ensure that efforts to promote the products under the [Rehabilitation Appliances Program of the Department of Veterans' Affairs, or DVA] contract do not lessen the market value of those items by advertising the products at a price less than the price agreed to by the DVA. This includes all online marketing."

The CDPP might not have the recording of Hogan's comments at the Novotel meeting, but

it has the slides, the subsequent contract and a long list of witnesses who were in the room when the allegedly anti-competitive agreement was described.

Prosecutors also allege that evidence unearthed by the ACCC points to a range of anti-competitive arrangements agreed to between 2014 and 2015 — allegations corroborated in court by two witnesses with knowledge of two separate alleged offences. These key witnesses have one thing in common: they have been granted immunity to testify.

IMMUNITY DEALS UNDER FIRE

The lower court hearings revealed that defense lawyers are likely to challenge the CDPP's interpretation of Hogan's early-morning presentation — they will suggest that the comments impugned by the prosecution were part of a light-hearted, off-the-cuff speech that fell well short of an attempt to establish a cartel. More importantly, though, the lawyers are expected to push back on evidence provided by immunized witnesses — a tactic that will be of intense interest to those working on the defense of ANZ, Citigroup and Deutsche Bank in a separate cartel case. The key question is whether the immunity deals offered to the two men in the Country Care case — deals signed off by the ACCC and embraced by the CDPP — will tarnish the witnesses' credibility. Will the deals underpinning at least three of the five criminal cartel prosecutions in the pipeline stand up in court, or will a judge direct the jury to take the evidence provided by the "immunized" witnesses with a grain of salt?

Rightly or wrongly, those on the receiving end of Australia's first criminal cartel charges will attempt to break the procedural nexus between the investigation and immunity offers.

According to evidence that emerged in the lower court hearings, one of the "immunized" witnesses, Sydney businessman Andrew Cuddihy, appears to have had knowledge of one of the bid-rigging allegations. What we already know is that the defense has documented Cuddihy's often difficult relationship with ACCC investigators and his insistence that his request for immunity be dealt with quickly. Lawyers for the defense want to know how the decision to grant immunity was made. What was the quid pro quo? Can a witness be credible when he or she is bending over backwards to secure an immunity deal?

Rightly or wrongly, those on the receiving end of Australia's first criminal cartel charges will attempt to break the procedural nexus between the investigation and immunity offers. If they are successful, both the public prosecutor and the ACCC may have to return to the drawing board and consider reviewing their reliance on those deals, which underpin three of the five criminal cartel prosecutions now under way. Comments by ACCC official Marcus

Bezzi during a cross-examination in the ANZ criminal cartel prosecution explaining that the regulator had reviewed its immunity procedures since its earliest investigations didn't go unnoticed by lawyers working on all prosecutions.

As for the timing of the trial, that's now in the hands of medical experts in Victoria, as the southern Australian state grapples with the impact of Covid-19. To impanel a jury for a long-running criminal case is fraught at the best of times; to do so in the course of an epidemic brings with it arguably insurmountable obstacles. There is, of course, the social distancing to consider — something that Melbourne's relatively spacious Owen Dixon Federal Court building could easily accommodate. But what happens if a jury member tests positive to the coronavirus midway through a prosecution? Given the circumstances, a mistrial would place a large burden on the resources available to a small country business.

Then there's the additional concern of jury fatigue — the prospect that the 12 citizens will be so overwhelmed by the complexities of the case and the specific evidentiary requirements of the criminal cartel offenses that they won't be able to deliver any kind of verdict. Preliminary hearings in the Federal Court have already raised questions about how the jury should be handled and whether the judge should direct it to reach a unanimous decision on all groups of charges faced by Country Care, Hogan and Harrison. The trial judge, Robert Bromwich, has declined to do so, but the issue of how to present a complex competition issue to a panel of average Australians has been a common thread throughout the early phases of the prosecution. What if it were all simply too much to ask of a jury?

The CDPP is pushing back on those concerns, with the director of the prosecutor's office, Sarah McNaughton, recently reminding observers that juries have been asked to deal with complex areas such as tax, insider trading and drug trafficking. These are all complex legal matters and a cartel prosecution won't be any different, McNaughton has said.

Because the Country Care prosecution is the first of its kind in recent history to percolate through Australian courts, it's likely to answer many outstanding questions being considered by defense lawyers working on criminal cartel cases, along with the ACCC and the federal prosecutors. Immunity deals, the wear and tear on juries and the legal responsibility of the lawyers that drafted Country Care's alleged price-fixing arrangement are all issues expected to come out in the wash. The outcome of this prosecution is likely to set the tone for all other criminal cartel prosecutions to follow. ■

Big banks' blockbuster cartel prosecution highlights antitrust regulator's early shortcomings

In taking on the banking sector in a high-profile criminal cartel case, the stakes for Australia's antitrust regulator are high. Not only is it targeting well-heeled players, it is tangling with some of the best lawyers in the business. So far, proceedings against ANZ, Citigroup, Deutsche Bank and six senior managers have shown that the regulator likely faces an uphill battle.

By Laurel Henning & James Panichi

The prospect of senior banking executives being led out of court in handcuffs would be newsworthy, no matter what. Yet the combination of untested laws and the byzantine dealings surrounding the release of A$2.5 billion worth of shares have transformed the criminal cartel prosecution of Australia and New Zealand Banking Group, Citigroup Global Markets Australia, Deutsche Bank and six senior managers into a veritable showstopper.

The case is now entering its final administrative stages in a local court in Sydney and the spectacle of senior antitrust officials having to explain how they investigated the case and why they decided to offer immunity from prosecution to another international bank, JPMorgan, has entrenched the position of the case as fodder for front pages.

As MLex reported last year during earlier Sydney local-court proceedings in the case, the realization that prosecutors were going after the underwriters of a capital-raising venture sent shivers down the collective spine of one of the country's most close-knit sectors. This wasn't an area that Australian lenders had believed would attract the interest of competition enforcers; what's more, that prosecutors would pursue the matter with the big stick of criminal offenses raised the prospect of relationships in other concentrated industries facing a similar fate. Behind the scenes, the fear is now real.

The drama was underscored by tension over claims that Australia's gargantuan banking sector was uncompetitive and dominated by a cosy relationship among the banks — in particular, the country's four largest lenders, which government policy protects from takeovers. ANZ, Commonwealth Bank of Australia, National Australia Bank and Westpac all feature in the country's top 10 companies in terms of share value, with a combined market share in excess of 70 percent. All four lenders have been accused by both the Australian Competition & Consumer Commission and the Productivity Commission, a top economic adviser, of being lethargic when it comes to competing against one another.

The banks' critics aren't mincing their words. ACCC Chairman Rod Sims has called the industry a "cozy oligopoly" that engaged in "accommodative and synchronized" pricing; a recent Productivity Commission report concluded that the so-called four-pillars rule protecting lenders from acquiring one another, or being acquired by others, was a

"redundant" and "ad hoc" policy that achieved little other than making the incumbents lazy and reducing "the potential for ... new entrants to be a source of competition."

It's against this regulatory backdrop that federal prosecutors brought charges against ANZ two years ago. And, indeed, the prosecution fits the narrative of a banking community more inclined to reach mutually beneficial outcomes over a conference call than allowing market forces to rip.

But the ACCC's move was also an attack on the operations of underwriters. Australia's stock exchange for the period 2013 through 2018 listed more than 40,000 share placements, with 21 of those valued at more than A$1 billion. The ANZ prosecution amounts to a deep dive into the relationship among underwriters that underpins some of the most lucrative business dealings in the country.

SHARE WITHHOLDING

Here's what we know happened. ANZ's August 2015 share placement saw the lender employ Citigroup, Deutsche Bank and JPMorgan to raise A$2.5 billion by finding institutional investors to buy up the stock. If the banks failed to find buyers, as underwriters they would be left holding the bag. The agreement was standard practice and its terms haven't been impugned by the ACCC or the prosecutors that have laid the criminal charges.

Then, things became contentious. What sparked the competition watchdog's interest was the allegation that the banks had agreed among themselves to withhold shares from the market as a result of lukewarm buyer interest. Put bluntly, the banks are alleged to have agreed not to sell a chunk of shares, thus artificially inflating the shares' market value.

The allegations of a boardroom deal by phone hook-up are pinned to the ACCC's characterization of calls among banking executives in the hours following the weak initial

market interest in the shares and break down into two alleged agreements: first, not to trade shares on Friday Aug. 7, 2015; second, an understanding on trading volumes for the following day. According to suggestions aired in the Sydney local court, there are recordings of at least some of these conversations.

It's becoming clear that the allegations are based on information put forward by JPMorgan, which has applied for immunity from prosecution, as well as the bank's four witnesses: two current and two former executives, who have also been guaranteed conditional immunity.

When he took to the witness box in December, former JPMorgan executive Jeffrey Herbert-Smith described a phone call he'd had with former Deutsche Bank official Michael Ormaechea and former Citigroup manager Stephen Roberts — both of whom are facing individual criminal charges carrying maximum jail sentences of 10 years. Herbert-Smith told the court that the three men took it in turns to speak, each saying that he would do the same thing: stay out of market trading for that day. Herbert-Smith characterized these decisions as matching but — crucially — taken separately from one another.

Put bluntly, the banks are alleged to have agreed not to sell a chunk of shares, thus artificially inflating the shares' market value.

The conclusions of the ACCC's investigations, which were forwarded to the Commonwealth Director of Public Prosecutions, or CDPP, alleged that these conference calls amounted to criminal cartel conduct. Related allegations that the banks failed to inform the markets of their understanding are central to the claim in a separate yet connected civil lawsuit brought against ANZ by the Australian Securities and Investments Commission, or ASIC, in the Federal Court of Australia — although that case has been put on ice until the conclusion of the criminal prosecution, where a trial in the Federal Court of Australia is unlikely to begin until late 2021 at the earliest.

JOINT VENTURES

So far, so good. Assuming the tapes can be used as evidence, their content will either support the defendants' claim that they were merely communicating decisions that they had already made or support the CDPP's charges that the conversations were an act of collusion involving the underwriters and ANZ.

But what if there were a third scenario? Could the phone conversations that took place that August morning be characterized neither as a collusive agreement nor a conversation reflecting three separate decisions but, rather, a joint venture? It's true that the legal

protections offered to joint ventures under Australian competition rules are a fraught, evolving area of competition law; yet the application of these rules look set to play a key role in court proceedings — even before the high-profile case reaches the Federal Court.

The banks' defense that they had been working together as part of a legally enshrined joint venture was raised in the course of the July hearings, which were moved to a local court in western Sydney amid Covid-19 concerns, and which saw some of the country's top lawyers dialing in via Microsoft Teams to argue their case. MLex's early analysis of the prosecution now appears eerily prescient: Defense lawyers indeed appear to be gearing up for a joint-venture defense.

If this came to pass, it would nonetheless be a hard slog for the banks' legal teams. It's true that recent updates to Australia's 2010 Competition and Consumer Act have entrenched definitions of joint ventures, spelling out more clearly that companies may cooperate when acquiring and producing goods in the context of a joint venture; what's more, joint-venture agreements no longer even need to be in written form. But at the time of the cartel arrangements allegedly put in place by ANZ and its international underwriters, there was a harsher regime that governed joint-venture deals. Even so, competition lawyers watching the prosecution from the sidelines have said that the defense should take some comfort in the fact that the definition of joint ventures under Australian law was reasonably broad even before the 2017 changes.

TACTICS SCRUTINIZED

As well as offering an initial airing of the defense tactics the banks are likely to put forward in the Federal Court, the local-court hearings have also had the effect of placing the ACCC methodology in investigating the alleged cartel under intense scrutiny. Questions have been raised about record-keeping practices, interview tactics with witnesses and changes to witness statements. In this context, the evidence of Jeffrey Herbert-Smith was pivotal, not just because of how he characterized the calls that took place in August 2015, but how he depicted the ACCC's operations at the time.

For example, Herbert-Smith, the "immunized" witness who once worked for JPMorgan, told the court that a member of the ACCC's enforcement team, Jane Lin, had "found it difficult to believe that three people could come to a decision like that" — that is, the simultaneous decision not to hold on to shares, rather than place them on the market.

Herbert-Smith added that, perhaps, his disagreement with Lin in his interpretation that the banks reached three separate decisions could have come down to "familiarity with capital markets" — the implication being that the ACCC official may have been out of her depth.

A statement made available to defense lawyers during cross-examination hearings last year suggested that the ACCC had got Herbert-Smith to alter the content of his statement — a revelation that raised questions among lawyers defending the banks. Lin explained the move by saying there had been an inconsistency in Herbert-Smith's evidence that she was right to question "by logic and by reference to what he had said previously."

Lin said that the point of the ACCC guidelines in dealing with these matters was to raise the inconsistency and give the witness an opportunity to reconsider his or her evidence. "He did, and we moved on," she told the Downing Centre Local Court, where the case was being heard before Covid-19 clobbered the court's schedule.

Yet the ACCC guidelines for conducting investigations say that an "investigator should not attempt to influence a statement even if the instigator knows the witness is wrong" — an apparent inconsistency that is likely to be subject to further scrutiny as the prosecution proceeds. Both Lin and star ACCC witness Marcus Bezzi — who has since been promoted to the role of ACCC executive general manager and who sits next to Chairman Rod Sims during parliamentary hearings — have dismissed these concerns in the lower court proceedings. Yet the defense teams appear set to pursue these arguments all the way to the Federal Court.

The ACCC methodology in investigating the alleged cartel has come under intense scrutiny. Questions have been raised about record-keeping practices, interview tactics with witnesses and changes to witness statements.

In fact, defense lawyers also appear likely to continue their criticisms of the ACCC's statement-taking process that, they argue, has left them with an almost non-existent paper trail and potentially inconsistent witness statements. Bezzi defended his team's practices, explaining to the court that until a witness signs a statement, it isn't considered as "final" evidence and is typed over in the ACCC's document-management system. The only way that lawyers have been able to see earlier versions of witness statements is if they've ended up attached to ACCC emails that have been disclosed in the case.

Another chink in the ACCC's and CDPP's armor could be the record-keeping by the key investigator in the early days of the ANZ probe. Michael Taylor, the former federal policeman who led the ACCC's investigation, has been accused of lying over his record-keeping — he had nary a notebook to his name covering his early inquiries into the alleged cartel. Taylor told the court that he had destroyed any notes and that any information worth keeping had been emailed — suggesting that notes of the investigator's communication with the markets' regulator may have been destroyed. This

communication will be important when and if ASIC's civil lawsuit against ANZ proceeds in the Federal Court; it could also point to an improper example of evidence-sharing between the regulators.

DEVELOPING CRIMINAL EXPERTISE

Taylor could be excused for appearing a bit frazzled: He spent five consecutive days in the witness box in February answering pointed questions about events that had taken place years earlier. But the narrative pursued by defense lawyers was clear: The ACCC's approach to cartel investigations before the establishment of its specialized cartel unit wasn't up to scratch. And the explanations offered by the watchdog about its investigative shortcomings were problematic. One of the reasons given for the poor record keeping was that the officials working on the cartel investigation were all in the same, small, pre-Covid-19 room and that their communication was therefore verbal and informal. Why send emails to the person sitting in front of you?

But revelations that Taylor destroyed his notebooks visibly shocked his colleague Leah Won when she took to the witness box this July. The investigator told the court that her own note-taking practices were quite different. Defense lawyers suggested that Won had once asked Taylor whether he had any additional notes, prompted by concerns over the paucity of his record-keeping.

The case being mounted by the defense is that the evidence points to an enforcer that was acquiring the discipline it needed for criminal prosecutions as it went about the task of establishing its cartel team. It was a learn-as-you-go operation, the defense is suggesting in arguments that will inevitably feed into other criminal cartel prosecutions now under way in Australia, as the 2009 legislation percolates through the courts.

Indeed, with other criminal cartel cases now in the pipeline likely to involve ACCC investigations that began before the specialized cartels unit was running at full capacity, the ANZ court action — as it has panned out so far — tells us that the defense will be as much about process as substance.

The CDPP will be using the ACCC's investigation to argue that the banks colluded to withhold shares from the market, while some of the best defense lawyers in Australia will be telling judges and, eventually, a jury that the ACCC probe was an amateur-hour endeavor, contaminated by procedural hiccups and informal office conversations. This prosecution is likely to cast a shadow over criminal cartel cases that are to follow. ■

By taking on a union in a criminal cartel case, the antitrust regulator is opening a can of worms

Unions don't immediately jump to mind when one considers targets for criminal cartel prosecutions. But the Australian antitrust regulator is determined to take on a powerful construction union in a case that is rife with political dimensions that will be hard to ignore as the case makes its way to court.

By James Panichi & Laurel Henning

For employers in Australia, the merits of the independent inquiry into union corruption that kicked off in 2014 were self-evident. The probe laid bare a range of questionable union tactics, prepared witness transcripts and assembled documents — all paving the way for Australian prosecutors and law-enforcement agencies to take further action. But for the many opponents of the Royal Commission into Trade Union Governance and Corruption, the probe was never going to disentangle itself from the divisive political clash that brought it to life.

So it was that when six of the most militant unions in the land found themselves in the conservative government's crosshairs, they were quick to say they would never accept the legitimacy of a probe based on what they considered a flawed premise: the existence of union corruption. The probe was merely a political witch-hunt established by a center-right government determined to clobber organized labor, the union movement claimed.

Despite this opposition, the former High Court of Australia judge who led what would become an almost two-year inquiry, Dyson Heydon, was able to produce well-documented allegations concerning the unions targeted by the probe's terms of reference. Whatever the political machinations that led to the probe's establishment, those allegations were always going to pique the interest of law-enforcement agencies, public prosecutors and regulators.

Topping the list of concerns relating to the country's leading construction industry — known at the time of the investigation as the Construction, Forestry, Mining and Energy Union, or CFMEU — was the allegation that its chapter in the national capital Canberra may have violated competition laws. "There was evidence ... of cartel conduct and of attempts by the CFMEU to induce it," Heydon's final report alleged.

As an example of this conduct, Heydon showcased the plight of an independent bricklayer, referred to simply as "Charlie," who had been charging a builder A$4 a block — below the rate charged by union-affiliated bricklayers. When a union official caught wind of this, Heydon alleged, he proceeded to put pressure on Charlie — as well as the company employing him — to fall in line with the union-negotiated price of over A$6. And the inquiry claimed to have the telephone recordings to prove what had occurred.

Charlie the bricklayer was used as a showcase for what was alleged to be cartel behavior — something that went beyond the mere strong-arming of a non-union member not to undercut rates.

Although bricklayers are alleged to have been caught up in the attempt to fix prices, Heydon's report also referred to steel-fixing and scaffolding and listed concerns with concreters and crane operators. But Heydon used Charlie's example as a showcase for what he alleged was cartel behavior — something that went beyond the mere strong-arming of a non-union member not to undercut rates.

In an account of one meeting, the Royal Commission's final report alleged that a union official had said he was "trying to get [all contractors] more money on the jobs by getting all the companies to agree on a minimum price for jobs." One of the witnesses told Heydon that a scaffolding company had been warned that any contractor undercutting the agreed rate would be "hammered and run out of town." Another building-company manager stormed out of a meeting, allegedly saying that it was an attempt at price fixing.

The only reason why the allegations of competition-law violations weren't included in the inquiry's final list of recommendations was that, by then, the Australian Competition & Consumer Commission had used the information gathered by Heydon to launch its own investigation and the watchdog appeared willing and able to take the matter further. The ACCC entered into a "joint agency agreement" with the Royal Commission itself and key evidence was relegated to Volume 6 of the probe's final report — the contents of which haven't been made public, so as not to prejudice a prosecution.

Yet the view of Heydon, which provided a backdrop to the ACCC's investigation, was clear: The allegations against the CFMEU pointed to price fixing. "To assemble competitors in a room, to stimulate a discussion about prices and costs, and to engage in a process of advising the competitors to charge a particular price is a very hazardous activity," according to the final report of the Royal Commission (the adjective "royal" merely indicates that the probe is at arm's length from the government).

Heydon went on to say that even when the conduct itself isn't unlawful, the behavior nonetheless "establishes a perfect background for unlawful conduct." The take-home for the retired judge was that individual traders "ought to be left to negotiate as they wish with unions. They should not reach agreements among themselves."

By the time Heydon's inquiry wrapped up, the ACCC had indicated it would take the matter further. But what only became clear in August 2018, when federal prosecutors filed charges against both the construction union and Canberra-based union official Jason O'Mara, was that the competition watchdog had opted to invoke the 2009 criminal cartel offenses contained in the legislation — it was using the biggest stick it had.

It was a bold move. The regulator had turned to untested legislation to tackle agreements negotiated in the context of organized labor — not familiar territory for a regulator specialized in pursuing deals done in company backrooms. The ACCC also recommended criminal charges against the individual that the Royal Commission claimed had been at the center of the alleged price-fixing attempt — again, the criminal prosecution of an individual over allegations of competition-law violations amounted to a move into uncharted waters, even though criminal cartel charges had already been laid against individuals in both the Country Care and ANZ prosecutions.

The prosecution will now need to disentangle itself from a local court in the Australian Capital Territory and make its way to the Federal Court of Australia — MLex's most recent reporting from the Canberra Magistrates' Court has revealed that the case is bogged down in a dispute over legal privilege. If and when the case is heard in the Federal Court, a jury will be asked to decide whether getting building contractors and those employing them to fix a price for their services — as is being alleged by the Commonwealth Director of Public Prosecutions — amounts to a criminal cartel or was simply an assertive approach to the union's core business of looking out for its members.

The additional complication in the case is that the Australian Federal Police was involved in the investigation. Its role remains unclear, and the lack of information available at this early stage means it's likely to stay shrouded in mystery for some time — although public statements by the ACCC in the past suggested that police involvement would likely be sparked by the need for phone intercepts, which are outside the competition regulator's area of expertise.

The involvement of police in a criminal cartel investigation marks another first in Australia, with the Vina Money Transfer prosecution, announced subsequently, only the second time police have been required to investigate cartels. This too has seen the ACCC breaking new ground.

MLex has attended every hearing of the prosecution against the CFMMEU (the additional "M" now in the acronym stands for "maritime"). We can confirm that, so far, prosecutors haven't made much headway against a union affiliated with Australia's largest opposition formation, the Australian Labor Party, or against O'Mara, who is listed as the union's branch secretary in the Australian Capital Territory. For their part, the union and O'Mara are being

represented by organized labor's go-to law firms — Gordon Legal and Slater & Gordon, respectively — and appear set to offer a vigorous defense to the charges.

Following the usual progression for criminal cartel prosecutions, the ACCC carried out its own investigation and passed its research on to the CDPP, which then laid charges. The prosecution must now find its feet in a lower court before the case can graduate to the Federal Court.

Legal-privilege disputes may well continue all the way to the Federal Court, where it will become clear whether the ACCC's foray into union practices is likely to backfire or will secure what could be headline-grabbing cartel convictions that could set new standards in the building industry.

When announcing the court action, the ACCC said that prosecutors had charged the CFMMEU with attempting to enter into illegal construction-industry agreements between 2012 and 2013 and that the alleged illegal agreements targeted suppliers of steel fixing and scaffolding. Steel-fixing services refer to the installation and fixing of reinforcement steel on building sites, including concrete slabs; scaffolding services include the erection and dismantling of scaffolding on building sites.

Hearings had been set to resume this year, following an interruption caused by Covid-19. But lawyers vacated a July hearing date in a bid to allow for more time to prepare arguments in the ongoing legal-privilege disputes hampering the case. Even so, we know that last year's court hearings focused on the CFMMEU's intention to cross-examine prosecution witnesses in the case, with 22 witnesses expected to be asked to take the stand. Those disagreements have dominated hearings so far and may well continue all the way to the Federal Court, where it will become clear whether the ACCC's foray into union practices is likely to backfire, or will secure what could be headline-grabbing cartel convictions that could set new standards in the building industry.

And if the political context in which this prosecution is unfolding wasn't complex enough, earlier this year an independent inquiry by the High Court found Heydon, the former judge and Rhodes Scholar who led the Royal Commission, had sexually harassed six female associates, in a high-profile case that has sparked a debate about the treatment of women in Australia's top legal circles. The political, economic and social context of this prosecution will ensure that the case will always be about more than just antitrust enforcement. ■

Pursuit of shipping line WWO offered an easy early win, even if details remain unresolved

The decision by shipping line Wallenius Wilhelmsen Ocean to plead guilty in June to criminal cartel charges gave regulators and prosecutors in Australia an easy victory. That was due, in part, to the fact that WWO had been a party to cartel findings in other jurisdictions before a case was brought against it in Australia. Still, the case helped ease the Australian antitrust regulator into the world of criminal cartel investigations, where it is now engaged in a growing number of cases.

By Laurel Henning & James Panichi

The clash between global shipping line Wallenius Wilhelmsen Ocean and Australia's competition watchdog has largely been a clear-cut affair. The WWO court action was one of a cluster of three criminal prosecutions involving an international shipping cartel that the Australian Competition & Consumer Commission, or ACCC, was able to use as a low-stakes dress rehearsal for its untested 2009 criminal cartel offenses.

The regulator worked its way through the three by availing itself of disclosures made in other jurisdictions while steering clear of the additional responsibility of laying individual charges. The companies' early guilty pleas offered the ACCC low-hanging fruit at a time when the competition agency had yet to nail down its approach to criminal cartel enforcement.

Of the five criminal cartel investigations the ACCC had before the courts at the start of this year, the WWO prosecution is the only case that doesn't involve an Australian company or individual charges.

By the time the ACCC started legal action against WWO last year, the regulator already had under its belt two successful prosecutions of fellow cartel members: Kawasaki Kisen Kaisha, or K Line, and Nippon Yusen Kabushiki Kaisha, or NYK. It was therefore with some confidence that, in August 2019, the Commonwealth Director of Public Prosecutions, on the ACCC's advice, decided to lay charges against WWO. That confidence was vindicated by WWO's guilty plea in June this year, which was submitted by lawyers for the shipping line alongside a proposed penalty of A$20 million.

By the time the CDPP kick-started the WWO prosecution, the ACCC had been piggybacking on three years' worth of investigations into this global cartel and two Federal Court of Australia rulings that saw the usually cautious and, by international standards, lenient local judges impose fines with some heft: in 2011, K Line received a record A$34.5 million penalty for its role in the international vehicle-shipping cartel; NYK was fined A$25 million in 2017.

At the heart of the international cartel are allegations of price coordination, bid rigging, customer allocation and capacity restrictions revolving around three Japanese shipping lines: K-Line, NYK and rival Mitsui OSK Lines. The CDPP leaned on files containing

information gleaned from investigations abroad — namely, in China, the EU and the US — as well as its two successful prosecutions of K-Line and NYK. It now appeared merely to be a question of how much WWO would be fined when, as suggested in the first case-management hearing, the Oslo-headquartered company pleaded guilty.

Any cartel inflating the price of imported cars has real implications for a country that depends on overseas products.

AN EASY START

The international shipping cartel of which WWO was a member offered the ACCC a chance to ease into the challenges posed by the new criminal cartel offenses — for several reasons. First, a case is inevitably more straightforward when only corporate defendants are involved — unlike, say, the ANZ and Country Care prosecutions, which involve charges against individuals and, therefore, could culminate in jail sentences. Second, by 2013 the cartel had been thoroughly investigated and enforced by several overseas regulators, providing a wealth of information for the ACCC to tap into.

That's not to say that it wasn't a significant moment in Australia's judicial history when the prosecutions landed on the desk of Federal Court Judge Andrew Wigney, who has dealt with all three shipping cartel prosecutions. As an island continent in which car manufacturing has gradually shrunk to the point of collapse — General Motors shuttered its local Holden factory in 2017 — Australia is now entirely reliant on imports. Any cartel inflating the price of imported cars has real implications for a country that depends on overseas products.

The ACCC's case was also bolstered by the 2018 dismissal of an application by K Line in a Sydney local court to undertake preliminary cross examinations of immunity witnesses — a decision that ended up fast-tracking the related WWO case, given that the K Line witnesses had been referring to the same cartel. Any attack on the credibility of immunity witnesses — a defense tactic that has emerged in both the Country Care and the ANZ prosecutions — was simply not on the table for WWO.

Yet despite the head-start enjoyed by prosecutors in the WWO case, the action in the Federal Court of Australia has floundered since its first hearing a year ago, when a penalty agreement appeared imminent. At an initial hearing in August, the parties said WWO planned to enter

a guilty plea before the court, with lawyers expected to work to an October deadline to work out a "statement of facts" ahead of a December sentencing hearing. Ironing out the statement of facts has caused delays in the case since that first hearing.

While it's unclear exactly why the statement of facts has caused such a significant delay in what had appeared a straightforward case, the fact that WWO isn't one of the three key companies at the heart of the cartel may go some way to explaining the prosecution's extended timeline.

The three Japanese carriers at the heart of the cartel are NYK Group Europe and rivals Mitsui OSK Lines and K Line, known as the "three J" group. Mitsui OSK was the immunity applicant. As well as WWO, Chilean carrier CSAV and Norwegian-Swedish line WWL-EUKOR were also involved in the cartel, although neither CSAV nor WWL-EUKOR have faced charges in Australia. WWO is a European carrier with primary conduct in shipping routes between North America and Australia. The slight difference in routes and origin could explain a delay, as different facts in the case are indeed probably required.

NO GLOBAL LENIENCY

Both K Line and NYK had sought leniency in their penalties from Judge Wigney when he ruled on their roles in the international shipping cartel. The companies argued they had already been penalized for their conduct in other jurisdictions. WWO isn't part of the crucial "three J" group, but the company is nonetheless facing ongoing legal action for its role in the cartel elsewhere, including damages sought in the UK by companies such as Jaguar Land Rover and Volvo as recently as June this year.

And while there may be some sympathy in legal circles for companies facing litigation in multiple jurisdictions, Wigney has indicated in previous judgments that if a company breaches Australia law, it will face Australian fines — regardless of fines imposed elsewhere.

Calculations to decide fines for criminal cartel conduct are set out under Australia's competition law. There are three ways to calculate penalties: a flat A$10 million per offense; three times the gain of the conduct, if knowable; or 10 percent of corporate turnover. Once calculated, whichever fine is the highest is the one demanded by prosecutors. For an international cartel, A$10 million is almost always considered too low, but calculating gains obtained as a result of the conduct has so far proved too much of a challenge. That leaves judges to work out sentences that fit within the "10 percent of turnover" figure. Once this methodology has been employed, it doesn't matter whether a company has already been fined overseas over the same conduct — the calculation applies regardless. ■

Vietnamese money changers prove small game — but still big enough for prosecution

If hunters should be judged by their game, the case against a small group of money changers with origins in Vietnam by Australia's antitrust regulator and prosecutors hardly made for an epic tale of pursuit in the field. Nevertheless, the criminal cartel case that emerged helped hone some of the skills the regulator will need in future prosecutions, most notably cooperation with the Australian Federal Police.

By James Panichi & Laurel Henning

Those with even a passing interest in competition law would probably be able to namecheck a few of the global banks that have been caught up in the foreign-exchange cartel that's reverberating around the world: Bank of America, Barclays, Citigroup, JPMorgan Chase, Royal Bank of Scotland and UBS.

But in an April 2019 court hearing in Melbourne, forex cartel allegations steered clear of the big end of town; indeed, the top law firms that sprang into action on behalf of defendants in, say, the ANZ criminal cartel prosecution in Sydney were nowhere to be seen. Instead, five businesspeople — four men and a woman — patiently waited alongside lawyers from suburban firms for their turn as a magistrates' court judge sifted through preliminary hearings for a range of criminal matters, including offenses of violence and breaking and entering.

Finally, the five were asked to rise — in fact, counting an interpreter, there were six people before the judge, with three having traveled to Melbourne with their lawyer for this appearance. Federal prosecutors had charged a Sydney money-exchange company used by the local Vietnamese community, Vina Money Transfer, with fixing the exchange rate between the Australian dollar and the Vietnamese dong, and agreeing on the fees the company charged customers. The five individuals charged were all linked to either Vina or another company listed in the charge sheet, Hong Vina, which isn't facing charges.

A third company mentioned in the court filings, Eastern & Allied, also escaped the Commonwealth Director of Public Prosecution's charges, as did the directors of the company, which trades as Hai Ha Money Transfer. Following a pattern familiar to both the Country Care and ANZ prosecutions, documents revealed that Hai Ha had signed an immunity deal with the Australian Competition & Consumer Commission, which investigated the alleged cartel; the Commonwealth Director of Public Prosecutions embraced that deal and accepted the ACCC's recommendations for prosecution.

The charge sheet obtained by MLex at the time alleged that Vina Money Transfer and the individuals had set in place "a provision that had the purpose or was likely to have the effect of directly or indirectly fixing, controlling, maintaining or providing for" the fixing of prices

for remittances-services provided. The five accused are all Vietnamese-Australians. Three of those facing charges belong to the Sydney-based Le family, which owns Vina Money Transfer: Van Ngoc Le, Jamie Le and Tony Le; the two Melbourne-based accused are Thi Huang Nguyen and Khai Van Tran, respectively a former shareholder and a former secretary of Hong Vina. The offenses allegedly took place between 2011 and 2016.

The CDPP's court filings painted a picture of a small-time cartel involving a close-knit ring of rival money-exchange companies in two Australian cities, Sydney and Melbourne. All three companies served Australia's Vietnamese community, which is largely made up of refugees who arrived in the 1970s and their descendants. Vietnam-born Australian residents numbered 185,000 in the most recent census, with many community members maintaining close ties with their country of birth — making it hardly noteworthy that they would turn to community-based businesses to send money to family members in their country of origin.

the Australian Federal Police documents pointed to an unexpected international dimension — unexpected for a cartel alleged to have unfolded entirely within Australia among three small-time businesses.

So far, no surprises. But the involvement of the Australian Federal Police and documents filed by the top law-enforcement agency added an unexpected dimension to the story. First, the fact that the AFP had been involved in a cartel investigation — just as it had been for the CFMMEU prosecution — raised the prospect that policing work, including phone taps, had been required. More important, though, the AFP documents pointed to an unexpected international dimension — unexpected for a cartel alleged to have unfolded entirely within Australia among three small-time businesses.

According to the AFP documents lodged with the court and obtained by MLex, the puppet master of the alleged forex cartel was none other than Vietnamese lender Sacombank. The publicly listed commercial bank, based in Ho Chi Minh City, allegedly contacted the Australian money-transfer companies by e-mail in March 2011, encouraging them to agree to matching exchange rates and indicating that there was already some preparedness on the part of at least one of the companies. By December 2012, Vina was communicating with rivals Hai Ha and Hong Vina in an attempt to fix a common exchange rate between the Australian dollar and the dong, according to the AFP's statement of facts.

The allegations that Sacombank engineered the agreement were startling, particularly given that the Vietnamese bank hasn't itself been targeted by the prosecution and no extradition requests have been signed — at least, not from what the AFP partially redacted documents

tell us. Yet the police filings do suggest that all three companies caught up in the alleged cartel had a relationship with Sacombank. The police document also suggests that the accused individuals were offered the opportunity to record an interview with investigators but declined to do so.

The AFP is new to investigations involving the 2009 criminal cartel legislation. Yet the federal force appears to have taken its role seriously, with AFP Detective Sergeant Jarrod Ragg saying that what has been codenamed Operation Euporie was a significant moment of cooperation between police and the competition watchdog. "The alleged criminal conduct occurred over an extensive period of time and involves allegations of significant anticompetitive cartel conduct," Ragg said. "This has been a long-term, joint investigation that has successfully resolved through the laying of complex charges that will be heard in the Federal Court."

For now, the case still has some way to run in the Magistrates' Court of Victoria, a lower court in the southeastern state of which Melbourne is the capital. For the magistrate to hand it over to the Federal Court, he or she will have to tease the case out further — just as a Melbourne magistrate had done in the Country Care case. This may well reveal further evidence of Sacombank's involvement in the case, as well as the role of the Sydney-based Hai Ha, whose managers have sidestepped charges altogether. The defense may want to probe what Hai Ha offered the ACCC in return for its immunity deal and the degree to which it may have cooperated with the police investigation. For now, all that has been alleged is that Hai Ha was somehow involved with the cartel, but neither the company nor its secretary, named as Dianne Phuong Nguyen, have been charged.

Once the Covid-19 upheaval has subsided sufficiently for the Vina prosecution to resume, it may not be lost on the five people facing charges and the small law firms managing their legal representation that, in the Federal Court building just a few hundred meters up Melbourne's William Street, another lawsuit is playing out. UBS, Barclays, Citibank, JPMorgan and NatWest Markets, formerly known as Royal Bank of Scotland, have lined up some of the best barristers in the land to fend off a class-action lawsuit focusing on the banks' participation in a global foreign-exchange cartel that operated between 2008 and 2013. This is the arrangement by which executives working for some of the largest banks in the world chatting with one another using monikers such as "The Cartel," "The Mafia" and "The Three Musketeers." It will be a tale of two worlds at the opposite end of the foreign-exchange spectrum. ■

BlueScope Steel escapes criminal charges but remains wrapped in related prosecution

BlueScope, Australia's largest steel producer, may have escaped criminal cartel charges, but it remains a target. The company and a former manager, Jason Ellis, are facing concurrent legal battles, including civil litigation by the antitrust regulator and criminal charges by prosecutors alleging that Ellis obstructed the initial probe. The case has also seen the competition regulator leverage its international contacts to pursue the alleged cartel.

By Laurel Henning & James Panichi

BlueScope Steel is the criminal cartel prosecution that got away. The Australian antitrust regulator was clear that its long-running probe into an alleged attempt to create a price-fixing cartel would have culminated in the laying of criminal charges had things gone to plan. But the ticking clock got the better of antitrust officials.

The disputed conduct on the part of Australia's largest steel producer and its then-senior manager, Jason Ellis, is alleged to have occurred between September 2013 and June 2014; But by August 2019, federal prosecutors had yet to take the plunge and the five-year statutory limitation period was about to expire. The Australian Competition & Consumer Commission realized it couldn't wait any longer.

What had been envisaged as a criminal cartel prosecution was repurposed as a civil lawsuit, with the ACCC taking the case directly to the Federal Court of Australia. In announcing the legal action, ACCC Chairman Rod Sims said the matter involved "allegations of serious cartel conduct" and that his agency would seek declarations, pecuniary penalties and costs against BlueScope and Ellis, as well as an order disqualifying Ellis from managing corporations.

The filings don't put forward evidence that the alleged cartel ever came into effect but nonetheless suggest that the arrangement provided "a very strong incentive" for price rises. "By communicating its pricing strategy ... BlueScope ... gained substantial benefit from the increased prospect that the price rises it initiated would be adopted, whether or not the competitors expressly agreed to do so," the ACCC submission alleges.

The Commonwealth Director of Public Prosecutions' inability to lay charges may yet point to a missed opportunity and even a lack of coordination with the ACCC. That said, the lawsuit is already yielding important information on how the regulator went about investigating the alleged attempted price-fixing agreement and has revealed that the regulator was at least putting its international travel budget to good use before Covid-19 restrictions hit, as it leans on the assistance of antitrust enforcers in other jurisdictions.

The Australian watchdog is alleging that BlueScope and Ellis had attempted to rope steel producers in both Taiwan and India into what was to become an Australia-wide price-fixing

arrangement, in an attempt to ramp up profits in steel sales worth up to A$2.8 billion. Among the 11 steel distributors and manufacturers listed by the ACCC as having been contacted by BlueScope and Ellis are Taiwan-based China Steel and Yieh Phui Enterprise, as well as India's JSW Steel.

So far, little is known about how the ACCC gathered information to corroborate its allegations that the Asian steel producers had been contacted as part of the plan. When MLex put the question to ACCC Chairman Rod Sims earlier this year, the top official simply said that his agency had "great links with competition regulators" and that it was "heavily involved" with efforts by the Organization for Economic Cooperation and Development and the International Competition Network. "Yes, we're right at the heart of that — we've got great links," Sims said.

If the Australian watchdog is guarded about revealing how it investigated the case it may be because the lawsuit has taken on an extra level of complexity. Just a month after the ACCC had announced its civil action against both the company and Ellis, the CDPP announced

So far, little is known about how the ACCC gathered information to corroborate its allegations that the Asian steel producers had been contacted as part of the plan.

it had laid criminal charges against Ellis over allegations he had obstructed the BlueScope investigation. That legal action is now playing out in a lower court of the eastern state of New South Wales and may yet reveal details about why the CDPP chose not to lay criminal charges against BlueScope. It's also the first time that a criminal-obstruction case has been associated with an antitrust lawsuit in Australia, which explains why MLex has been covering it so closely.

Yet the parallel unfolding of a civil lawsuit in the Federal Court and a criminal prosecution in a state-based court has led to concerns that evidence in one may contaminate the other — particularly given the possibility that a jury could be impaneled to hear the criminal charges.

It's not the first crossover of criminal and civil in the antitrust area: as mentioned above, the cartel allegations against the ANZ bank preceded by three months civil action from Australia's financial regulator against the bank over allegations that it failed to inform the market of decisions that lie at the heart of the criminal prosecution. Yet in that case, the Federal Court simply ruled that it would put its case on ice until the criminal matter had run its course. That may not be an option in the BlueScope case, with obstruction charges against Ellis likely to be relevant to the ACCC's civil lawsuit. So much so that lawyers for BlueScope in the Federal Court civil case suggested they might seek to shelve the antitrust lawsuit to allow for the criminal case to play out first — something that hasn't occurred so far, as the criminal-obstruction case heads into its final stages.

The problematic connections between the two cases have been playing out in preliminary hearings in both the Federal Court and the Sydney Downing Centre Local Court and have had implications for MLex's ability to cover the story. The ACCC had initially asked the judge presiding over the civil lawsuit to suppress documents, amid fears they might affect an as yet unnamed criminal investigation — this was before the charges against Ellis had been laid. An ACCC lawyer even requested that an MLex reporter step out, preemptively, from the court, to avoid overhearing confidential exchanges — a request politely declined.

Both the ACCC and BlueScope believed the media interest in the case and the "relatively new phenomenon" of criminal cartel prosecutions meant that "members of the public will retain any information that is reported," making it hard to find unbiased jurors. But Federal Court Judge Michael O'Bryan rejected the suppression request that had specifically targeted Nine Entertainment, a media company, concluding that "juries should not be considered as fragile or prone to prejudice."

In his ruling, O'Bryan said that "the risk of prejudice to a fair trial in any future criminal prosecutions is, in my view, remote." The judge went on to argue that "any such risk of a juror learning of prejudicial [information] by ultimately irrelevant allegations or information can be adequately mitigated by the usual jury directions."

This means the two cases will, for now, play out alongside one another — albeit separated by the 878 kilometers between Sydney and Melbourne, where the civil proceeding is unfolding. And while the central cartel allegations don't involve criminal charges, the ACCC's admission in court that it had been running a criminal investigation may help shed light on whether — and how — the regulator's cartel unit has tweaked its approach to antitrust probes more generally, in light of the 2009 legislation. ■

Meanwhile, New Zealand takes a prudent approach to establishing its own criminal cartel regime

New Zealand's new criminal cartel regime isn't likely to suffer from any rash missteps as the new law enters into effect in April next year. That's because lawmakers and regulators are determined to learn from other jurisdictions and properly prepare the country's businesses for what to expect. In return, the country will earn a place at the table with regulators in other jurisdictions in investigations of international cartels.

By Laurel Henning & James Panichi

When New Zealand's criminal cartel legislation comes into effect in April 2021, almost four years will have passed since the idea of a revamped Commerce Act was first put forward as a campaign commitment by then opposition politician Jacinda Ardern. It's proof that law takes time — even in a country with a unicameral parliament and a government with a relatively comfortable majority.

As for whether a country with a population of around 5 million needs stiff penalties and jail sentences to defend itself from anticompetitive behavior — well, that point will still be debated even as the new legislation comes into effect.

But for both the coalition government, led by the New Zealand Labour Party, and the country's competition watchdog, getting criminal cartel offenses onto the statute books was a no-brainer. Their reasoning was clear: the value of having criminal legislation in place would come more from its effect as a deterrent than as a regulatory enforcement tool. In addition, New Zealand needed to align itself with other jurisdictions, in particular Australia, if it was serious about playing its part in bringing down international cartels.

As MLex has reported in recent years, the business community in New Zealand has been far more cautious throughout the development of the legislation. The fear of some captains of industry and the lawyers they work with is that the new rules would have a chilling effect on business — that managers of companies that would have once considered legitimate joint ventures will now be so afraid of finding themselves on the wrong side of a cell door that they could be deterred from considering legitimate and economically crucial deals.

Those fears may be real enough, but the experts who have spoken to MLex's reporters reckon that anyone expecting a swathe of legal action after April needs to take a reality check. Just look across the Tasman Sea at Australia's introduction of criminal cartel provisions in 2009, they say.

It wasn't until 2017 that Australian prosecutors landed a first blow: the A$25 million fine against Japanese shipping line Nippon Yusen Kabushiki Kaisha. And even that was the result of the low-hanging fruit represented by an early guilty plea and swathes of existing

international enforcement files. More than 10 years have passed since Australia's laws were introduced, and they have yet to yield a conviction of an Australian company, let alone the sentencing of an Australian manager. These offenses amount to a slow burn.

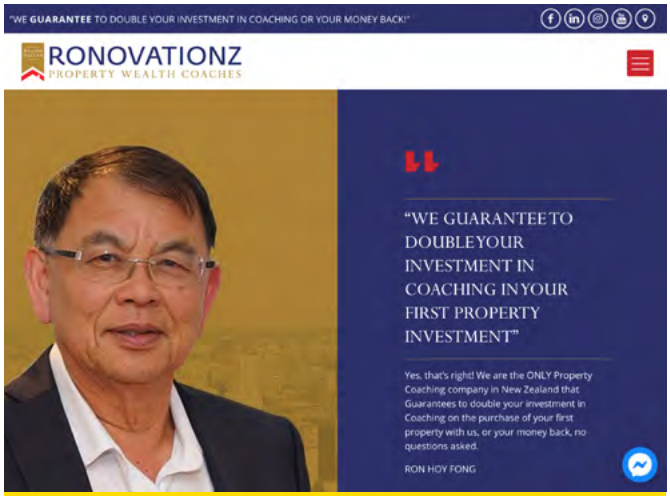
First up, any conduct considered under the new measures needs to have taken place after April 8, 2021. The field could be narrowed even further, if the New Zealand Commerce Commission were to embrace the Australian Competition & Consumer Commission's approach and avoid criminal investigations relating to conduct that occurred both before and after the introduction of new offenses. Add to that the time it takes to conduct a thorough investigation that could lead to the laying of criminal charges and the time-consuming process of dealing with whistleblowers, and it becomes clear that years are likely to go by before the first prosecutions start to filter through. There are even those who say we're unlikely to see any criminal cartel action in New Zealand courtrooms before 2030.

Yet the supporters of the new measures argue the international benefits will be significant. New Zealand officials will be able to cooperate with overseas counterparts on investigations into international cartels — something that can bolster a regulator's bundle of evidence in its probes — and global players won't be tempted to choose New Zealand as their preferred jurisdiction for cartel activities in the hope of sidestepping tougher regimes. The New Zealand Commerce Commission will find it easier to play its part in keeping international corporate giants in line.

But there's a downside to laws that could lead to executives being led from court in handcuffs and companies facing penalties of up to NZ$10 million ($6.6 million) per offense, critics argue. It may sound counterintuitive, but in a small country such as New Zealand, which has a strong culture of compliance, criminal cartel offenses pose a risk to those who stumble into cartel behavior. As competition officials and businesses alike prepare for the new laws, the largest regulatory risk for national companies could come from mistakes, rather than criminal intent. Over recent years there have been a number of civil cases resulting from regulatory ignorance in New Zealand; this raises the prospect that the first antitrust jail sentences will be handed down to mom-and-pop business owners who lacked the legal advice to stay out of trouble.

BLUNDERING CARTELISTS

Take two recent antitrust enforcement cases as examples of lawsuits resulting from corporate blunders. The first competition lawsuit targeted real-estate investment advice company Ronovation, which trades as Ronovationz, over buyer-side anticompetitive agreements; the second was a price-fixing case involving a pharmacy in the town of Nelson, on the northern tip of New Zealand's South Island.



It may sound counterintuitive, but in a small country such as New Zealand, which has a strong culture of compliance, criminal cartel offenses pose a risk to those who stumble into cartel behavior.

In her ruling on the Ronovation case, High Court Judge Sarah Katz summed up the blunder theory nicely. Referring to cartel members and Ronovation's owner, Ron Hoy Fong, Katz said there was no evidence that they "realized that this type of anticompetitive conduct breached New Zealand's competition laws." The judge went on to say that the conduct "involved an unwitting breach of the act." Ronovation's rules that prevented members bidding against each other for investment properties were indeed "deliberately anticompetitive" in their design, but those writing the rules didn't know that they were breaching the law. It was the regulator's first win against a buyer-side cartel: an arrangement among buyers, rather than sellers. With the NZ$400,000 penalty, the Commerce Commission could send a warning to other buyer groups planning similar behavior, without crippling the small business.

As for the pharmacy price-fixing in Nelson, the anticompetitive conduct was more of a bungled political protest than textbook antitrust activity. In June, High Court Judge Robert Dobson imposed a fine of NZ$344,000 on Prices Pharmacy 2011, Nelson's largest pharmacy, after accepting that the price-fixing arrangement was mitigated by its overtly political intent. The court accepted that Prices' manager, Richard Hebberd, had placed pressure on other pharmacies to follow his lead and impose a surcharge; however, Dobson also accepted that Hebber's actions weren't serious enough to warrant a fine ranging between NZ$500,000 and NZ$650,00, as the Commerce Commission had demanded.

This kind of blundering will be the backdrop against which the new legislation will come into play. It's true that the Commerce Commission will still have the full suite of civil offenses at its disposal and will be under no obligation to unleash a criminal prosecution for trivial matters. Yet ensuring that well-meaning, small businesses — those that aren't large enough to have in-house counsel or even to employ a law firm to review their decisions — don't get caught up with criminal offenses designed to ensnare larger, possibly global players, will remain a challenge for the agency.

Responding to questions from MLex for this report, the Commerce Commission said

that as well as working on "internal processes and training to conduct criminal cartel investigations," it was also set to undertake "public awareness work to educate traders about cartel conduct and the risk of criminal prosecution." The timing of that campaign has, however, been disrupted by the Covid-19 pandemic.

Further evidence that the Commerce Commission is aware of the risk of small businesses sleepwalking into criminal offenses is provided by the decision to grant lawyers and their clients a two-year grace period between the legislation passing through parliament and its entering into force. The delay was designed to give businesses time to understand the impact of the new measures on their operations.

The regulator is also directing its education effort internally. Commerce Commission Chair Anna Rawlings has said that the watchdog was on a drive to connect with regulators around the world in a bid to increase its "understanding and effectiveness as a regulator and as one small part of a wider New Zealand and global regulatory system." By investing time and effort before the laws come into effect, the Commerce Commission may be able to safeguard its prosecutions from the types of challenges faced in Australian courts by the ACCC, which has seen the professionalism of its early investigations impugned by defense lawyers.

Years are likely to go by before the first prosecutions start to filter through. There are even those who say we're unlikely to see any criminal cartel action in New Zealand courtrooms before 2030.

HITTING THE GROUND RUNNING

As the criminal legislation was making its way through parliament, the bill's supporters were vocal in pointing to the benefit of having legislation that aligned with the rules under which many international counterparts in Europe, the UK and the US were already operating. This alignment would help New Zealand play its part in the investigation of international cartels and was, in the eyes of the Commerce Commission, a major selling point for the criminalization of cartel offenses.

In this, the New Zealand watchdog was in lockstep with the ACCC, with which it consults regularly on key merger and acquisition decisions and antitrust investigations. The criminalization of cartel conduct would allow the Commerce Commission to work closely with counterparts in its major trading partners, the ACCC said in a submission to New Zealand's parliament. Criminal offenses would allow mutual assistance requests and extraditions of suspects and boost the two countries' ability to cooperate in fighting trans-Tasman bid rigging, the Australian enforcer said.

For its part, the Commerce Commission says it hasn't wasted any time in preparing itself for the international enforcement challenges that lie ahead. In a written response to MLex's questions, a spokesperson said the agency has received training from "six of our counterpart agencies: the US Department of Justice, the US Federal Bureau of Investigations, the UK Competition and Markets Authority, the Irish Competition and Consumer Protection Commission, the Canadian Competition Bureau and the ACCC." The watchdog said that it would "continue to draw on both domestic and international expertise in our ongoing preparation."

The Commerce Commission will need to ensure that its investigations are strong enough to handle the rigorous scrutiny associated with criminal charges and is likely to be observing the way in which defense lawyers in both the ANZ and Country Care cases are attempting to pick apart the ACCC's groundwork. Unlike the ACCC, the Commerce Commission will be able to take its investigations to court directly, without handing the file over to public prosecutors; however, it will be required to ascertain how its planned prosecution measures up with the Solicitor General's Prosecution Guidelines, which demand "evidential sufficiency" and proof that the prosecution is in the public interest.

The regulator has argued that the threat of jail time for cartelists, coupled with its leniency policy for whistleblowers, will boost the likelihood of detection and subsequent prosecution of criminal cartels. The leniency policy includes provisions for the granting of conditional immunity — that is, immunity that hinges on the ongoing cooperation of the witness — alongside the ability to offer others lighter enforcement action, or possibly no action at all, in exchange for particularly useful information.

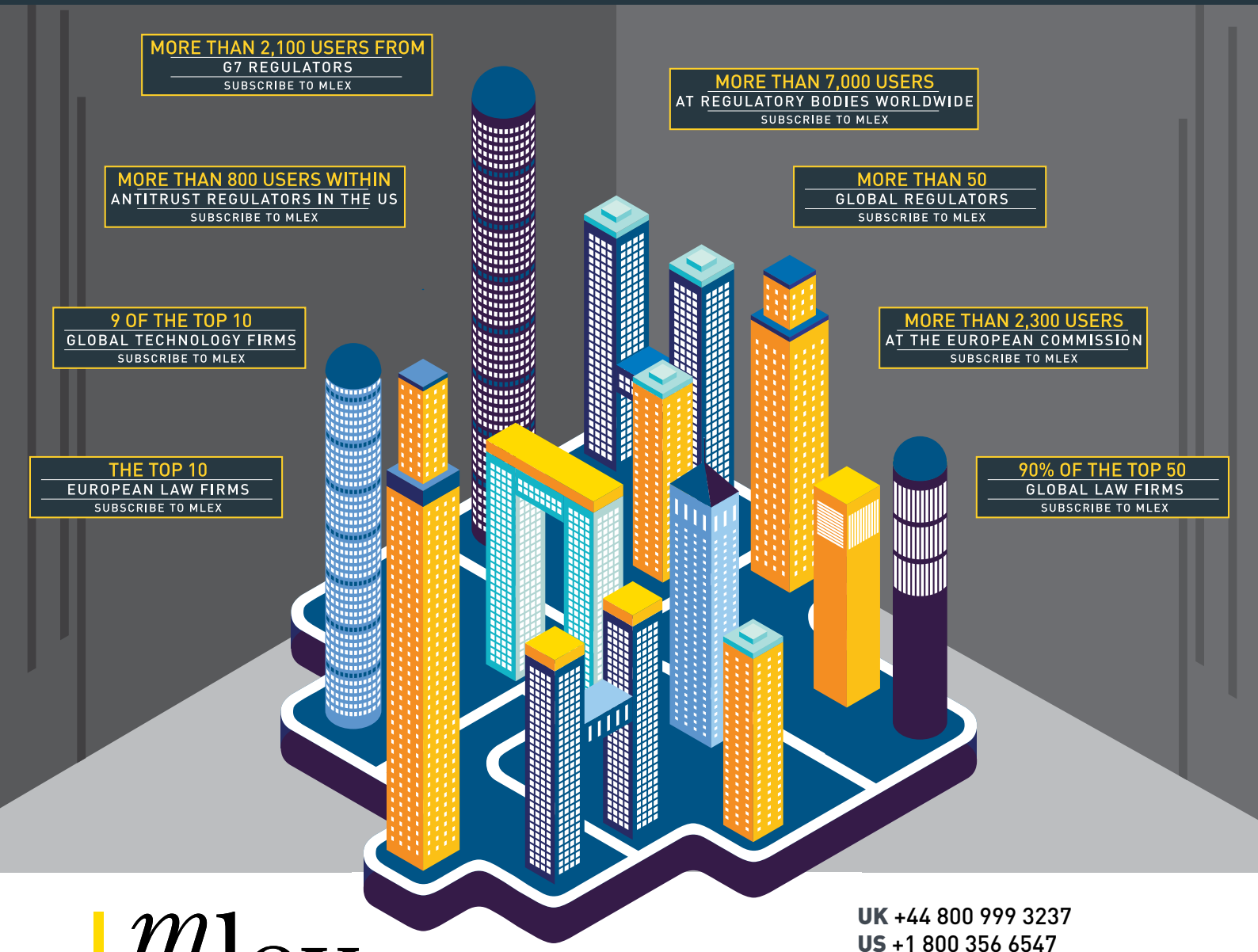
This all suggests that the implementation of criminal cartel law in New Zealand will be a balancing act, the results of which may not filter through until the end of this decade. Enforcement officials will need to avoid penalizing local, well-meaning businesses; they will also have to reassure those seeking to sign legal joint ventures. All the while, the Commerce Commission will need to look at events unfolding in Australia in the hope that its cartel investigators can avoid some of the initial problems encountered by their Australian counterparts — something that, at present, is unfolding as a cautionary tale about the importance of high-standard record keeping.

"We are confident we will be ready come April 2021," the spokesperson said. "The Commission has experience investigating and prosecuting criminal offences ... for breaches of consumer protection laws, as well as [offenses] under the New Zealand Crimes Act 1961. We are building on this experience and developing new capabilities to ensure that we have the expertise to undertake criminal cartel investigations." ■

MLex | Built on Trust

MLex's unique insight, analysis and commentary delivers investigative and forensic coverage of cases working their way through decision-making bodies and regulatory agencies around the world.

Regulatory change is coming. Be ready. Be the first to understand how regulatory change impacts your clients.
Request a free trial.



mlex
market insight
a LexisNexis® company

UK +44 800 999 3237
US +1 800 356 6547
EU +32 2 300 8250
HK +852 2965 1424
www.mlexmarketinsight.com
customerservices@mlex.com