Competition Law Conference

Sydney, 5 May 2018

Australian Cartel Law: Biopsies

Patients for Testing

- CAU element of “commitment”:
  - exploring underlying model of agreement
- Cartel provision and “purpose”:
  - is end of *News Ltd v South Sydney* in view?
  - persevere with including party rule?
  - counterfactual analysis?
  - algorithmic collusion?
- Exemptions from cartel prohibitions:
  - joint ventures
  - supply/acquisition agreements ↔ competitors
  - class exemptions
- Liability and sanctions:
  - individuals beyond reach
  - limitations of corporate monetary sanctions

CAU and Commitment

Issue/Background

- Symptoms:
  - *Apco Service Stations Pty Ltd v ACCC*
  - *ACCC v Leahy Petroleum Pty Ltd*
  - *ACCC v Olex Australia Pty Ltd*
  - *ACCC v Colgate-Palmolive Pty Ltd (No 4)*
- Studious commitments to non-commitment:
  - Biopsies [7]
  - *ACCC v Colgate-Palmolive Pty Ltd (No 4)* [152], [282], [436], [475]
- Commitment unnecessary for concerted practice under CCA s 45(1)(c) but SLC test is hurdle

CAU and Commitment

Underlying models of agreement

- Promise Model (CAU element of commitment)
- Plus Factors Model (US)
- Concurrence of Wills Model (EU)
- Black's Offer and Acceptance Model (Oliver Black, *Agreements* (2012))
  - "offer" and "acceptance" in broad sense of propose and assent

CAU and Commitment

Remove commitment for CCA civil prohibitions (ss 45AJ, 45AK)?

- Amendment adapting Diplock LJ test in *Re British Slag Agreements*?
  - Plus suggested (b)(iv) to reflect element of acceptance in Black's Offer and Acceptance Model:

    B assents to that invitation or encouragement, whether explicitly or by behaving in such a way as to indicate to A or another party to the alleged arrangement or understanding that he assents to it or intends to act or does act in accordance with it.
- Pro: would make it more difficult for miscreants to evade liability by studious commitment to non-commitment
- Con: new issues of interpretation and application
- Dispense with element of agreement and focus on direct economic analysis of coordinated conduct (eg Louis Kaplow, *Competition Policy and Price Fixing* (2013))?

Cartel Provision and "Purpose"

Issues/background

- Element of "purpose" central to:
  - purpose/effect condition in s 45AD(2)
  - purpose condition in s 45AD(3)
- Case law has not eliminated spikes:
  - *News Ltd v South Sydney* implies that an ultimate legitimate purpose can trump an immediate substantial purpose to fix prices, to limit production, capacity, supply or acquisition, to allocate customers, or to rig bids
  - including party purpose rule is unsatisfactory and reflects questionable statutory design
  - some suggestion that counterfactual analysis is required when applying the purpose/effect or the purpose condition of a cartel provision – could paralyse the per se cartel prohibitions
  - spectre of algorithmic collusion:
    - does a corporate (ie, non-humanoid) purpose fall within the meaning of s 45AD(2) and (3)?

Cartel Provision and "Purpose"

News Ltd v South Sydney

- Consider application of "end in view" reasoning to s 45AD(3)
  - cases (a) to (e) in Biopsies [26]
  - case (d):
    - Two competing energy companies agree to reduce the amount of natural gas they export in order to increase supply on the eastern seaboard where there is an immediate risk that manufacturers will be forced to reduce production unless more gas is available
- Purpose in cases (a) to (e) does not appear to be a s 45AD(3) purpose on "end in view" whitewashing
- Better view is that a substantial immediate purpose should be sufficient under s 45AD(3)
  - should have been treated as sufficient under s 4D in *News Limited v South Sydney*
  - News Limited should have applied for authorisation
  - end in view reasoning in *News Limited v South Sydney* not overturned by *Rural Press v ACCC*
- Amend s 4F to provide that "substantial purpose" includes an immediate substantial purpose?

Cartel Provision and "Purpose"

Including party purpose rule (*Seven Network Ltd v News Ltd* (2009))

- All of the parties to a CAU will often be aware of the purpose of a particular provision and have the purpose prescribed by a purpose condition in s 45AD but sometimes the parties may have different substantial purposes
- Rule that the purpose of an including party is sufficient to amount to the purpose of a provision can inculpate an innocent party (ie a party whose substantial purpose is not a cartel purpose)
- Obverse rule, that the purpose of a non-including party is insufficient to amount to the purpose of a provision, can exculpate a party with a cartel purpose where the substantial purpose of the including party is not a cartel purpose
- Including party rule works capriciously and lacks any apparent policy justification:
  - see examples in Biopsies [30], [31]
- Excise the concept of "purpose of a provision" and redefine cartel provision in terms of the intention of the particular defendant?

Cartel Provision and "Purpose"

Counterfactual analysis?

- Is a counterfactual analysis required when applying the purpose/effect condition or the purpose condition of a cartel provision under s 45AD?
- Consider first *ACCC v CC (NSW)* (1999) (Lindgren J) [168]:
  - an arrangement or understanding has the effect of 'controlling price' if it restrains a freedom that would otherwise exist as to a price to be charged."
- Contrast *ACCC v Pauls Ltd* (2003) (O'Loughlin J):
  - an agreement does not control a price if the price charged or offered pursuant to the agreement is a market price
- View expressed in Biopsies:
  - the intention of the effect condition in s 45AD(2) is partly to avoid the creation of loopholes and the need for difficult or protracted counterfactual analysis
  - O'Loughlin J's interpretation would:
    - create loopholes and require potentially complex counterfactual assessment
    - be inconsistent with conventional wisdom of *United States v Socony Vacuum Oil Co* (1940) (interference with free play of market forces sufficient for price fixing)
- If non-counterfactual approach is adopted in relation to effect condition in s 45AD(2), would be odd to adopt counterfactual analysis when applying purpose condition in s 45AD(2)
- If counterfactual analysis is unnecessary and inappropriate when applying purpose/effect condition in s 45AD(2), no apparent reason why counterfactual analysis should be necessary or appropriate in relation to purpose condition in s 45AD(3).

Cartel Provision and "Purpose"

Algorithmic collusion

- Conceivable that prices, production, capacity, supply or acquisition, allocation of customers, or bids may be subject to coordination by the use of algorithms:
  - can an algorithmic decision to restrict competition by fixing prices, limiting production, capacity, supply or acquisition, allocating customers or rigging bids manifest the "purpose" of a cartel provision?
  - if so, can that algorithm-generated purpose be attributed to a corporation?
- Algorithm-generated strategy does not seem to be a s 45AD purpose under present law:
  - quaint legal theology that only humans can act intentionally (eg *Universal Music v ACCC*)
  - reference to "state of mind" in CCA s 84(1)
- Amend s 84 to reflect concept of corporate purpose and include algorithmic-generated strategy or objective as such a purpose? See Biopsies [43]–[46]
- Would assist only where there is a CAU (Biopsies [[41], [46])
- Concerted practice prohibition does not require a CAU but:
  - use of autonomous agents may not necessarily entail a concerted practice
  - may be necessary to introduce a prohibition against the unilateral use of market-coordinating autonomous agents

Exemptions

Issues/background

- Given potential breadth of s 45AD, liability for cartel conduct often depends on whether or not an exemption under the CCA applies:
  - often essential to scan for exemptions that will save the day without the need to apply for authorisation
  - authorisation not possible on basis of no-SLC
- Where are things up to after the 2017 amendments?
  - the joint venture exemptions have been improved in some respects by the 2017 amendments but not in others
  - the once-proposed supply/acquisition exemption disappeared from the 2017 amendments
  - class exemptions under s 95AA have important potential but at this stage are of unknown quantity and quality

Exemptions

Joint ventures

- "Joint venture" retained:
  - less than clear and may be narrower than concept of a collaborative venture
  - why not collaborative venture or collaborative activity as in US, EU, Canada and NZ?
- "For the purposes of a joint venture" remains unclear − see Biopsies [56]
- "Reasonably necessary for undertaking a joint venture":
  - does not necessarily require an efficiency-enhancing integration of business functions
  - ACCC guidelines would assist
  - NZ Commerce Commission *Competitor Collaboration Guidelines* (Jan 2018)
  - no subjective fault element where jv exemption applies to cartel offence:
    - cf Commerce (Criminalisation of Cartels) Amendment Bill 2018 (NZ) proposed s 82C(1)(b)
- "Not carried on for the purpose of substantially lessening competition":
  - does not follow US or NZ law:
    - test whether D's dominant purpose was to lessen competition between any 2 or more parties to the CAU
  - highly questionable:
    - introduces complexity of market definition and SLC test
    - a sham joint venture may be used in order to eliminate competition between two competitors but no further and not to the extent of substantially lessening competition in a market
    - former s 76C was out of whack with per se nature of prohibitions to which it applied

Exemptions

Supply/acquisition agreements between competitors

- Many examples where pro-competitive supply or acquisition agreements between competitors are caught by cartel prohibitions unless authorised − see Biopsies [65]
- Still no specific exemption for supply/acquisition agreement between competitors:
  - cf proposed s 44ZZRS exemption in Exposure Draft Bill (Oct 2016)
  - cf *Commerce Act 1986* (NZ) s 32 (exemption for vertical supply contracts)
- Delay is unfortunate in a number of respects, incl:
  - exemption for exclusive dealing conduct is limited in scope;
    - does not apply in many situations where supply or acquisition agreements between competitors are not anti-competitive
  - uncertainty and overreach occasioned by *ACCC v Flight Centre:*
    - makes introduction of a supply/acquisition exemption from per se cartel liability important, especially in context of dual distribution arrangements
- Proposed s 44ZZRS exemption was imperfect and requires tweaking:
  - changes recommended by LCA to ensure exemption is not subject to restrictions that do not apply to exemption for exclusive dealing
  - safeguard against abuse, eg:
    - no dominant purpose to lessen competition between any 2 or more parties to the CAU as in *Commerce Act 1986* (NZ) s 32

Exemptions

Class exemptions

- Class exemptions under s 95AA potentially important, eg:
  - can carve out conduct that is likely to be pro-competitive or benign yet is caught by broad definition of a “cartel provision” (or, under s 45(1), nebulous SLC test)
- Consider eg major EC block exemptions:
  - Technology Transfer Block Exemption Regulation (TTBER)
  - Vertical Agreements Block Exemption Regulation (VBER
- Who will do all the work necessary to prepare good and useful class exemptions under s 95AA?
  - s 95AA envisages that the ACCC will develop class exemptions, which raises questions of priority, resources and interest
  - private sector may choose to act proactively by developing draft class exemptions as a starting point rather than to leave development solely to the initiative of the ACCC

Liability and Sanctions

Issues/background

- There have been only three cartel offence prosecutions to date and two of those were solely against corporate accused
- Monetary penalties against corporations may be too low to achieve effective deterrence
  - see eg OECD report, *Pecuniary Penalties for Competition Law Infringements in Australia* (2018)
- Focus of Biopsies is limited to:
  - inability to impose individual liability for cartel offences or breaches of civil penalty prohibitions where an individual assisted or encouraged the unlawful conduct from overseas or skipped the jurisdiction after participating in it onshore
  - limitations of monetary sanctions against corporations and whether those limitations can be overcome or reduced

Liability and Sanctions

Individuals beyond reach – two problems

- NYK-Type Jurisdictional Problem:
  - cartel conduct in Australia has been induced or assisted by an individual located overseas where that person is not subject to territorial jurisdiction under CCA s 5(1) (*Poynter* [2010] NZ CA)
  - a significant practical issue given the prevalence of multi-national cartels and the fact that cartels often are run from bases outside Australia
  - in *CDPP v NYK* senior executives were closely implicated in serious cartel conduct yet enjoyed immunity from prosecution in Australia
- Fugitive Problem:
  - an individual has participated in cartel conduct in Australia but leaves the jurisdiction before criminal or civil proceedings have been initiated or completed
  - in relation to cartel offences:
    - extradition is not possible where extradition arrangements are not in place
    - Australia does not have extradition arrangements with many countries (eg there is no extradition treaty with Japan or China)
  - in relation to civil penalty proceedings:
    - a corporation subject to civil penalty proceedings may adopt expedient of transferring executives implicated in contravention to a posting overseas
    - an individual subject or potentially subject to civil enforcement action may decide to move out of sunlight to destination offshore

Liability and Sanctions

Individuals beyond reach – possible cures?

- NYK-Type Jurisdictional Problem:
  - bring s 5(1) into line with territorial jurisdiction under Commonwealth Criminal Code:
    - s 5(1) not revised when cartel prohibitions were introduced and not fixed despite *Poynter* warning
    - s 8(1)(d) Competition Policy Reform Acts?
      - as in *CDPP v NYK*, is a foreign executive whose only connection with Australia is assisting or encouraging a cartel offence in Australia a person "otherwise connected with the jurisdiction"?
    - key question should be whether D's *conduct* affects or relates to economic activity in Australia, not whether D is Australian citizen, resident or a person "otherwise connected with" jurisdiction
  - take inability to prosecute individuals into account as an aggravating factor in sentencing and determination of penalty:
    - offset a deterrence deficit that arises from inability to prosecute individual persons by an increase in the punishment or penalty imposed on the corporation
- Fugitive Problem:
  - could be reduced to some extent in context of cartel offences by further extradition treaties with countries that also have cartel offences (slow process; gaps inevitable)
  - in criminal and civil proceedings, impose an internal discipline order on the corporate accused or defendant (D):
    - such an order would require D to take internal disciplinary action against individuals, including fugitives within corporate grasp, and report back to the court on the action taken
    - where D unable or unwilling to take internal discipline action, that should be taken into account when determining sentence or penalty against D

Liability and Sanctions

Limitations of monetary sanctions against corporations

- Three well-known main limitations:
  - monetary sanctions are an indirect method of achieving sanctioning impacts on managers and other personnel in a position to control corporate behaviour and may have little impact on them:
    - they may inflict substantial loss on shareholders and may have adverse spillover effects on employees, consumers, and other innocent bystanders
    - worst case scenario for spillover effects on consumers is where all members of an oligopoly are fined for their participation in a cartel, have sufficient market power to be able to pass the fines on to their customers and are able to rely on some form of tacit collusion to coordinate future prices
  - monetary sanctions, no matter how large, do not ensure that corporate offenders will respond by taking internal disciplinary action against those implicated in the offending conduct:
    - cheapest and least embarrassing response may be simply to write a cheque in payment of the fine and continue with business as usual
  - monetary sanctions, no matter how large, do not ensure that corporate offenders will respond by revising their internal operating procedures in such a way as to guard adequately against re-offending:
    - response may be to treat the offence or contravention as an isolated incident and simply to write a cheque in payment of the fine, hoping or expecting that the incident will not be repeated

Liability and Sanctions

Limitations of monetary sanctions against corporations – possible cures?

- Unless and until the limitations of monetary sanctions are recognised they are most unlikely to be addressed (they are not recognised or addressed in the OECD Report)
- The Incentive Theory of monetary penalties against corporations has much to commend it but does not address known limitations of monetary sanctions
- The Deterrent Impacts Theory addresses known limitations of monetary sanctions:
  - the main intended deterrent impacts of monetary penalties are specified:
    a) a monetary penalty on a corporation is to be felt by management with limited pass-through to shareholders or consumers;
    b) to the extent possible, those implicated in a contravention are to be held accountable; and
    c) internal operating procedures (including compliance programs) are to be reviewed and revised to guard against similar contravention in future.
  - the Deterrent Impacts Theory requires that:
    d) monetary penalties be used in ways calculated to reinforce and achieve the intended impacts specified above; and
    e) intervention in the internal affairs of corporations be avoided except to the extent of enforced self-regulation
- Enforced self-regulation could be used to induce a corporate defendant to:
  - come up with ways of making management feel the impact of a monetary penalty and limiting the pass-through of monetary penalties to shareholders or consumers
  - prepare a self-investigative report detailing the internal disciplinary steps taken to impose individual accountability on those concerned in the contravention or in a position to help prevent it
  - report on steps taken to strengthen internal controls including compliance programs, whistleblowing procedures, and incident reporting procedures

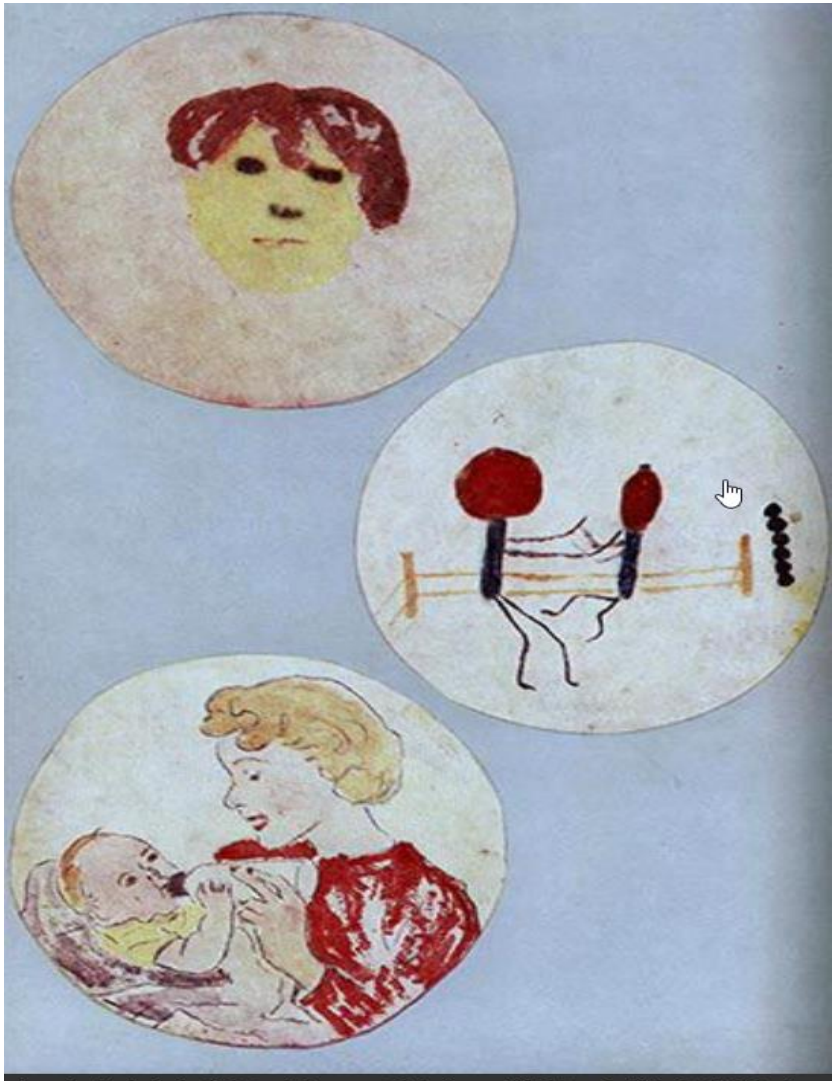
Liability and Sanctions

Limitations of monetary sanctions against corporations – possible cures?

- More could be done to impose individual liability:
  - balance to be struck between individual and corporate liability is fundamental to social control but is not addressed adequately under current law and practice
- Section 86C of CCA now has a number of limitations that could readily be addressed:
  - sanctions under s 86C should be available as punitive or non-punitive sanctions
  - s 86C should provide expressly for internal discipline orders and redress facilitation orders
  - court should be free to impose an order under s 86C whether or not ACCC or CDPP has applied for it
  - provision should be made for pre-order reports and post-order reports

Conclusion

- Is Australian cartel law in robust good health?
- Some cures from Harper Review but not others
- Biopsies suggest more to be done
- Biopsies are tests, not treatment plans:
  - detailed treatment plans may be called for



Alexander Fleming's microbial art paintings were technically very difficult to make. He had to find microbes with different pigments and then time his inoculation such that the different species all matured at the same time. (Alexander Fleming Laboratory Museum (Imperial College Healthcare NHs Trust))