NOT ENOUGH DIRTY LAUNDRY: ACCC FAILS AGAINST CUSSONS

INTRODUCTON AND RELEVANCE TO NEW CONCERTED PRACTICES PROHIBITION IN AUSTRALIA

On 22 December 2017, the Federal Court dismissed the proceedings by the Australian Competition & Consumer Commission (**ACCC**) against PZ Cussons Australia Pty Ltd (**Cussons**) for alleged cartel conduct also involving Unilever and Colgate in respect of the supply of laundry detergents. The case demonstrates the difficulties the ACCC faces in proving the existence of a contract, arrangement or understanding amongst competitors based on circumstantial evidence.

This update examines the Court's approach the evidential burden required to establish understandings between competitors and the implications of this case in the context of the recently introduced prohibition against concerted practices. In this regard, ACCC Chairman Rod Sims has commented that "[p]roving the existence of an understanding can be a complex task, which is why the Parliament recently added a new concerted practices prohibition to our competition law."

From a compliance perspective, the judgment provides practical pointers for suppliers and retailers on what they can, and can't, do when meeting and communicating with industry bodies.

On 20 February 2018, the ACCC announced it will appeal the decision to the Full Federal Court on the basis that the ACCC believes there was sufficient uncontested evidence for the Court to infer that Cussons had entered into an understanding.

BACKGROUND

In December 2013 the ACCC commenced proceedings against Colgate, Cussons, Mr Paul Ansell (a former Colgate executive) and Woolworths for alleged cartel conduct in breach of the *Competition and Consumer Act 2010* (Cth) (**CCA**) in respect of the supply of standard and ultra-concentrate laundry detergents. Colgate and Mr Ansell admitted involvement in entering into understandings in breach of the CCA. Colgate paid penalties totalling AU$18 million. Mr Ansell was disqualified from managing corporations for 7 years and ordered to pay a contribution

Key issues

- The case demonstrates the difficulty in cartel cases of proving a contract, arrangement or understanding when there is only circumstantial evidence.
- Evidence of communications between competitors may, in fact, indicate a *lack* of understanding. The Court held that if there were an understanding, competitors would not be seeking information from each other.
- Whilst the conduct considered here may be the type of conduct the new concerted practices prohibition is aimed at, it should be remembered the ACCC also failed to make out any substantial lessening of competition. So, the case would arguably still have failed under the new concerted practices prohibition.
- The case highlights the need for compliance training to address the new concerted practices provisions, particularly in relation to industry association meetings involving discussions between suppliers and retailers.

to the ACCC's costs. Woolworths also settled with the ACCC and was ordered to pay penalties of AU$9 million.

The ACCC case against Cussons proceeded to trial and judgment (*Australian Competition and Consumer Commission v Colgate Palmolive Pty Ltd (No 4)* [2017] FCA 1590).

THE ACCC CASE AGAINST CUSSONS

The ACCC contended that the simultaneous transition by the three suppliers from standard concentrate laundry detergents to ultra concentrate laundry detergents was the result of an anti-competitive arrangement or understanding between those suppliers, aided and abetted by Woolworths and Mr Ansell, who were alleged to have been knowingly concerned in the arrangements. The suppliers were said to benefit generally from the change to higher concentrate product, as it is cheaper to produce, store and transport than standard concentrate detergent. However, the "first to move" risked initially losing sales due to consumer confusion.

The key question in this case, as summarised by Justice Wigney, was essentially whether Cussons transitioning at the same time and in the same manner as Colgate and Unilever was the product of independent strategic and commercial decisions made by it, albeit decisions influenced or conditioned by information and expectations about what its competitors were likely to do and also by the preferences or dictates of its major customers, Woolworths and Coles.

The ACCC alleged Cussons had entered into two types of agreements with Colgate and Unilever, being:

an agreement to withhold supply of standard concentrates, with the effect of preventing, restricting or limiting the supply of detergent by Colgate, Cussons and Unilever to Woolworths, Coles and Metcash. It was contended by the ACCC that this was an exclusionary provision within the meaning of section 4D of the CCA; and

an agreement to undertake an aligned transition to ultra concentrates, which was alleged to have the effect of the three suppliers:

- ceasing to supply standard concentrates to Woolworths, Coles and Metcash;
- simultaneously moving to supply ultra concentrates to Woolworths, Coles and Metcash; and
- supplying only ultra concentrates that met certain prescribed parameters in relation to concentration level, pack size and information specified on packaging to Woolworths, Coles and Metcash.

The ACCC alleged that the agreement to undertake an aligned transition had the substantial purpose, effect or likely effect of substantially lessening competition in the laundry detergent market, and the purpose of preventing, restricting or limiting the production (or likely production) of laundry detergent. The ACCC's case was that, but for this agreement, the suppliers would have continued to supply ordinary standard concentrate detergent in competition with ultra concentrates, leading to competition between the two products and lower prices for the ultra concentrates.

EVIDENCE

Justice Wigney observed that the ACCC was unable to provide specific evidence establishing when and how the suppliers entered into alleged agreements. Rather, the ACCC's case relied heavily on a series of meetings and communications between the three suppliers, Accord (the national industry association for the Australasian hygiene, cosmetic and speciality products industry) and Woolworths to establish that the alleged agreements constituted an arrangement or understanding between competitors.

Accord industry meetings

The ACCC sought to rely on evidence that Colgate had proposed an industry standard through Accord, which would require all of the suppliers to switch to ultra-concentrate formulas by the end of January 2009. The proposed industry standard was put to the other members (including Cussons and Unilever) at an Accord meeting. It was submitted by the ACCC that from the time the proposal was circulated, the suppliers had evinced a commitment to a joint transition to ultra concentrates. Justice Wigney did not agree, with his Honour finding that whatever Colgate's purpose had been in advancing the proposal, there had been no agreement reached as to any such standard by the suppliers and the proposal by Colgate was essentially unilateral. In addition, it was noted that internal documents demonstrated that Cussons' reaction to the proposal was negative from the outset. The proposal did not amount to any collaborative agreement to coordinate the launch of ultra concentrates.

Internal documents

The ACCC also led evidence of internal documents suggesting that the suppliers considered it to be desirable that they would all switch to ultra concentrates at the same time. The internal documents also demonstrated that each of the suppliers was attempting to guess when their competitors would be changing to ultra concentrates.

Justice Wigney reasoned that, first, whilst there was some evidence that the suppliers considered it to be desirable for all the suppliers to make the change at the same time, this was not the same as evidence that there was actually some arrangement or understanding reached between them to do this. The ACCC's evidence fell short in this respect.

Secondly, had the three competitors been in a cartel arrangement, there would have been no need for constant guesswork about what action each would take. Evidence was led of phone calls between employees of Colgate and Unilever "fishing" for information about the transition to ultra concentrates. Although at first blush evidence that competing companies have been making contact with each other may appear favourable to the ACCC's case, his Honour found that this evidence showed that the suppliers were attempting to extract information from the other suppliers, indicating that they were *not* in an arrangement or understanding.

Other internal documents also indicated that from a very early stage (being well before the industry standard was proposed by Colgate), each of the suppliers had commenced their projects to switch to ultra concentrates around the same time. In addition, from the beginning of

these projects in around late 2007, all the suppliers anticipated the switch to occur in early 2009. This evidence undermined the ACCC's theory that there was some agreement subsequently reached to coordinate the switching date to ultra concentrates (and ceasing to supply standard concentrates).

The examination of the internal contemporaneous documentation highlights that documents evidencing the underlying legitimate commercial purpose of a business decision will hold weight. It also demonstrates that internal company documents led in evidence must be considered and assessed in their commercial context. Justice Wigney undertook a holistic consideration of all the internal documents presented to the Court. Whilst some, standing alone, tended to support the ACCC's case, his Honour's view was that on the whole they indicated that there was no contract, arrangement or understanding between the suppliers.

Hub and spoke arrangements

The ACCC's case sought to make out a "hub and spoke" arrangement, whereby the suppliers were alleged to have arrived at an arrangement or understanding not directly, but through a hub (which was alleged to initially be Accord, and later Woolworths), and that information was shared between the suppliers using the hub as a conduit.

The Court rejected this. In particular, it was noted that there was "(t)here was nothing unusual, let alone nefarious or improper"[1] about Cussons engaging in communications or meeting with Woolworths. Woolworths was an important client of Cussons, and the major project of the switch to ultra concentrates necessitated planning by Woolworths and Cussons. Justice Wigney observed that, in that context, it was not surprising that there were regular meetings to discuss the timing, nature and scope of the transition. Justice Wigney declined to make an inference that at these meetings, Cussons representatives had an intention that information shared would be passed on to Colgate or Unilever, and that the parties knowingly and intentionally exchanged information through meetings and communications with Woolworths.

Colgate and Woolworths

Justice Wigney noted that the ACCC, other than referring to the fact in opening submission, provided no evidence concerning the settlement of proceedings against Colgate, Woolworths and Mr Ansell. Nor were representatives of Colgate or Woolworths called by the ACCC as witnesses. Justice Wigney further noted that the circumstances that may have led those parties to settle, and the terms of the settlements, were not matters that could or should be the subject of speculation.

[1] [2017] FCA 1590 at [487].

FEDERAL COURT'S DECISION

There was no "understanding"

The Court found that the ACCC's evidence did not sufficiently establish the existence of an arrangement or understanding between the three suppliers. This conclusion was largely based on the fact that Cussons did not consider itself to be under any duty, or any way obliged or committed, to the other suppliers not to supply ultra concentrates before any particular date, not to supply ultra concentrates that did not meet certain prescribed parameters after that date or not to supply standard concentrates after that date.

It is well established law, under the relevant provision of the CCA, that a mere expectation that a party will act in a certain way is not sufficient to establish cartel conduct, instead there must be a "meeting of the minds". Whilst the internal documents from the suppliers demonstrated there may have been a desire for some kind of industry standard or understanding in relation to the switch to ultra concentrates, the question for the Court was whether the suppliers *in fact* entered into such an agreement or understanding.

In considering the commercial context of the impugned meetings and communications, Justice Wigney noted that as the suppliers are subsidiaries of global companies, and given the global trend to move towards ultra concentrates, it was an inevitability that this would occur in the Australian market and the only question was the timing of the move. In addition, the timing was largely dictated by Woolworths and Coles' annual product review process.

Circumstantial evidence

The ACCC argued that the agreements between the suppliers should be "wholly or partially implied from the facts, matters and circumstances"[2] relating to the specifically pleaded meetings and communications. Justice Wigney's decision highlights that the difficulties of inferring an understanding from circumstantial evidence where there is another credible business rationale, based on contemporaneous documents, for a company's actions.

Substantial lessening of competition

It was unnecessary for his Honour to make any finding on whether the understanding had an anti-competitive effect, given it was found that no understanding existed. Notwithstanding this, Justice Wigney did make some comments on this issue. Justice Wigney noted that there were a number of significant problems with the ACCC's case on this point. For example, the ACCC did not bring any persuasive evidence in support of its contention that one or more of the three suppliers would have offered ultra concentrates at a materially lower price than standard concentrates had the alleged understanding not existed.

The ACCC has announced that it will appeal the decision, focusing largely on the issue of whether the Court should have inferred the existence of an understanding. However, when that appeal is heard, it is likely to be equally (if not more) difficult to address the issues raised by Justice

[2] [2017] FCA 1590 at [29].

Wigney in relation to anti-competitive purpose as the Full Federal Court will not have had the benefit of hearing the evidence and the extensive cross examination of witnesses that the trial judge had.

RELEVANCE OF DECISION TO NEW PROHIBITION AGAINST CONCERTED PRACTICES

On 6 November 2017 a number of significant changes to the CCA commenced, including the introduction of a prohibition against concerted practices that have the purpose or effect of substantially lessening competition (see our briefing). The Explanatory Memorandum for the legislation introducing these changes provides that "a concerted practice is any form of cooperation between two or more firms (or people) or conduct that would be likely to establish such cooperation, where this conduct substitutes, or would be likely to substitute, cooperation in place of the uncertainty of competition".

Scope of the concerted practices prohibition

Whilst the Australian courts have yet to consider the meaning of a concerted practice, the ACCC argues that the new prohibition is capable of capturing anti-competitive agreements that fall short of satisfying the legal test for a contract, arrangement or understanding between competitors, and in particular a "meeting of the minds" which remains the primary threshold for the cartel provisions.

The ACCC has issued Interim Guidelines as to its views of the new concerted practices prohibition. The Interim Guidelines describe a concerted practice as involving "communication or cooperative behaviour that sits between a contract, arrangement or understanding and a person independently responding to market conditions".

The Interim Guidelines also state that a "concerted practice may be thought of as any form of cooperation between two or more persons, or conduct that would be likely to establish such cooperation", and that "[n]or is it necessary for a person to alter their behaviour in response to a communication in order to demonstrate that they are engaging in a concerted practice". This may be a somewhat questionable proposition and will depend naturally on the particular facts and circumstances under consideration.

How would Cussons be assessed?

In *Cussons*, the Court noted that "[t]here could be little doubt that Cussons' transition to the supply of ultra-concentrated laundry powders to its major customers occurred largely in parallel with similar transitions by Colgate and Unilever,[3] and that the commercial decision to do so was "influenced or conditioned by information and expectations about what its competitors were likely to do, and by the preferences or dictates of its major customers, Woolworths and Coles.[4] Although the conduct in this case was determined to fall short of an "understanding" for the purposes of the cartel provisions, it nevertheless appears on its face to be of a kind of conduct that the recently introduced concerted practices prohibition may be intended to cover.

[3] [2017] FCA 1590 at [5].
[4] [2017] FCA 1590 at [5].

It would be expected, particularly given recent statements by the ACCC Chairman and the fact that the ACCC has included enforcement of this new prohibition in its recently released 2018 Enforcement and Compliance Priorities, that the ACCC will test the full scope of the prohibition in the courts in the short term. However, the ACCC may be disappointed as to the scope of the new law, when it is ultimately considered by the courts. The concerted practices regime has been taken from similar regimes applying in jurisdictions which tend not to otherwise regulate "understandings". In such jurisdictions, the scope of the concerted practices prohibition tends to be limited to conduct that would be caught by the "understandings" test under the CCA (see our briefing).

PRACTICAL LESSONS FROM THE EVIDENCE FOR COMPLIANCE PROGRAMS

The following practical points can be taken from the Court's assessment of the evidence in *Cussons*:

- Always seek legal advice in respect of any proposed industry standard or agreement.
- If attending an industry meeting where proposals will be discussed, obtain advice and agree a protocol with your lawyers before attending the meeting. Make detailed notes of the meeting and record them afterwards. If you do not agree with any part of the minutes of any such meeting, be sure to have them corrected.
- Be very mindful of making direct contact with competitors, even in relation to "non-price" issues such as timing of a product release or change. The optics of such contacts are looked upon suspiciously by the ACCC and can be problematic in circumstances where there is subsequent alignment of actions between competitors.
- In the case where communications with competitors cannot be avoided, take clear minutes of meetings and file notes of any calls or conversations.
- Do not seek information about your competitors through indirect means, such as from a mutual customer.
- Wholesalers and retailers should be mindful to ensure that they are not inadvertently aiding or abetting a cartel amongst their suppliers. Do not pass any information between parties who may be competitors.
- Businesses should ensure that they are making independent decisions which are not tainted by information disseminated by their competitors. Make clear records of rationales for business decisions.

Clifford Chance's antitrust team is well placed to assist you on compliance matters.

FUTURE DEVELOPMENTS

It is likely that going forward, cases such as these will see the ACCC plead contraventions of both the cartel conduct and concerted practices prohibitions of the CCA, particularly where the ACCC does not have clear evidence of an agreement between the parties.

We are expecting to see more ACCC activity in the cartel space. The ACCC Chairman Rod Sims has recently warned that the ACCC are set to launch a series of 3 to 4 criminal cartel cases in 2018.

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