

Cartels update - A review of Australia's criminal cartel regime in light of the Federal Court's first criminal cartel jail sentence in Vina Money

The recent judgment by Justice Abraham of the Federal Court of Australia in Vina Money, is the first imposition of jail terms in a criminal cartel case in Australia. This Briefing provides some background on the Vina Money case, and long term trends in Australian criminal cartel proceedings.

Background

Laws prohibiting criminal cartel conduct were first introduced in Canada in 1889, the United States followed suit in 1890 by enacting the Sherman Act. More than one hundred years later, in 2009, Australia followed suit and made long awaited changes to criminalise cartel conduct. It has taken a further 13 years for such charges to be successfully brought against individuals.

Criminal cartel charges were laid against a money transfer business (**Vina Money**) and five individuals in April 2019. The case concerned what were essentially small businesses offering customers the service of transferring money from Australia to Vietnam. However, the period of time involved in the cartel meant that it affected quite a significant amount of foreign exchange.

On 9 June 2022, Justice Abraham delivered judgment sentencing four of the five individuals to imprisonment and imposing a fine to Vina Money in the sum of \$1m. The four accused were sentenced to terms of imprisonment varying from 9 months to 2.5 months, although all were immediately released on recognizance orders due to their previous good character and low risks of re-offending.

The fifth individual has pleaded not guilty to the offences and the matter is listed for trial before Justice Abraham on 30 August 2022. The judgment (available [here](#)) is the first time the Federal Court of Australia has ordered imprisonment for individuals who contravened the cartel provisions within the Competition and Consumer Act 2010 (Cth) (**CCA**).

While the judgment was a first, the four individuals and Vina Money had pleaded guilty to the offences and no contested hearing was required. While the case was not contested, it was still a much-needed win for the Australian Competition and Consumer Commission (**ACCC**) and Commonwealth Director of Public Prosecutions (**CDPP**) (the independent prosecutorial agency for federal crimes), which discontinued its major criminal cartel case against banking executives earlier this year.

Key issues

- Australia legislated to criminalize antitrust cartels under the CCA in 2009.
- The ACCC conducts cartel investigations and provides briefs of evidence to the CDPP to determine whether to bring criminal charges.
- Two of the most high-profile criminal cartel matters, ANZ Bank and the CFMMEU, had all charges withdrawn by the CDPP in the last twelve months.
- There are currently only four matters that have resulted in convictions in respect of criminal cartels in Australia, the accused in those matters all plead guilty to the offence.
- Since criminalisation in 2009, only the second contested criminal cartel case is listed to be heard in September 2022.

Relevant Conduct

The factual circumstances underpinning the proceeding were discovered by chance. In 2014, the Australian Criminal Intelligence Commission (formerly the Australian Crime Commission), lawfully intercepted telecommunications between two of the accused in respect of an unrelated investigation. The Australian Crime Commission referred the matter to the Australian Federal Police (**AFP**) and ACCC for investigation. With the assistance of immunity applicants, the AFP and ACCC conducted a joint investigation which led to charges being laid in April 2019.

The accused operated separate money remittance businesses that offered the service of transferring money from Australia to Vietnam. The businesses operated multiple branches, often within close proximity to one another. The accused pleaded guilty to giving effect to a contract arrangement or understanding (**CAU**) that contains a cartel provision / being knowingly concerned in a contravention of a cartel provision. The accused provided a statement of facts as agreed (or in respect of some of the accused, not disputed) which contained details around the cartel CAU. In short, the accused agreed to fix their foreign exchange rates, rather than openly compete on price. The accused acted in accordance with the cartel CAU for an extended period, between 1 December 2011 and 31 October 2016. During this time, the cartel CAU accounted for approximately 65% of the market in terms of transactions remitting money from Australia to Vietnam, approximately AUD2.5billion worth of transactions.

Cartel proceedings trends in Australia

Since cartel offences were criminalized in 2009, the CDPP have brought eight criminal actions. Three of those actions only involved corporations and not individuals.¹ The remaining five were brought against both corporations and individuals.² The table below summarises the current state of criminal cartel cases in Australia.

Case	Accused	Plea ³	Status
<i>CDPP v Nippon Yusen Kabushiki Kaisha</i> [2017] FCA 876	Corporation	Guilty	Judgment handed down in August 2017
<i>CDPP v Kawasaki Kisen Kaisha Ltd</i> [2019] FCA 1170	Corporation	Guilty	Judgment handed down in August 2019
<i>CDPP v Wallenius Wilhelmsen Ocean AS</i> [2021] ALR 98	Corporation	Guilty	Judgment handed down in February 2021
<i>CDPP v Country Care Group Pty Ltd</i> [2021] FCA 841	Corporation Individual	Not Guilty	Acquitted – No judgment as a jury trial.

¹ *CDPP v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876; *CDPP v Kawasaki Kisen Kaisha Ltd* [2019] FCA 1170; *CDPP v Wallenius Wilhelmsen Ocean AS* [2021] ALR 98; *CDPP v CFMMEU*

² *CDPP v Country Care Group Pty Ltd* [2021] FCA 841; *CDPP v Citigroup Global Markets Australia Pty Ltd & Ors* [2021] FCA 511; *CDPP v Alkaloids of Australia Pty Ltd* NSD1196/2021; *CDPP v Christopher Kenneth Joyce* NSD1149/2021; *CDPP v Vina Money Transfer Pty Ltd* [2022] FCA 665.

³ Plea as at the time of this publication. Noting that accused may elect to change their plea prior to hearing.

Case	Accused	Plea ³	Status
<i>CDPP v Citigroup Global Markets Australia Pty Ltd & Ors</i> [2021] FCA 511	Corporation Individual	Not Guilty	Charges withdrawn in February 2022
CDPP v CFMMEU	Corporation Individual	N/A	Charges withdrawn in August 2021.
CDPP v Alkaloids of Australia Pty Ltd NSD1196/2021; CDPP v Christopher Kenneth Joyce NSD1149/2021	Corporation Individual	Guilty	Sentencing Hearing listed for September 2022
<i>CDPP v Vina Money Transfer Pty Ltd</i> [2022] FCA 665	Corporation Individual	Guilty	Judgment handed down in June 2022
	Individual	Not Guilty	Hearing listed for September 2022

As the above Table indicates:

- the Country Care Group is the only matter that has proceeded to a contested trial. While the trial was lengthy, taking in excess of twelve weeks, the jury deliberated for only four hours before acquitting the Country Care Group and its managing director and former employee of all charges.
- Only four of the eight actions have resulted in convictions (noting another three are still ongoing). Three of those matters involved shipping companies involved in global cartel contraventions (the other being Vina Money) and the accused in all four matters pleaded guilty to the offences.

It appears the next opportunity the CDPP has to contest an individual was knowingly concerned with a cartel provision will be in respect of the Vina Money proceeding against the fifth accused. If the accused maintains their plea of not guilty, the contested trial is set for August 2022. This will be only the second time since the criminalization of the cartel provisions in 2009 that such provisions will be contested. In light of the short deliberation in the Country Care matter, and the withdrawal of the banking cartel proceedings earlier this year, the CDPP (and ACCC) will want to ensure they are well prepared for a contested hearing in Vina Money.

If the contested hearing in Vina Money goes ahead, it will likely involve the CDPP relying on evidence from an immunity applicant to establish, beyond a reasonable doubt, that the accused was knowingly concerned with a cartel provision. Following the extensive criticisms, the ACCC received over its gathering and handling of evidence in the banking cartel proceedings, it will be interesting to see whether similar issues are raised in this matter and whether the ACCC immunity application process needs a refresh.

Continued focus by ACCC on cartel conduct

As noted in the ACCC's March 2022-23 Compliance and Enforcement Priorities statement, the ACCC will always prioritise cartel conduct causing detriment in Australia. In relation to international cartels, the ACCC's focus is on pursuing cartels that have a connection to, or cause detriment in Australia; specifically, cartels that involve Australians, Australian businesses or entities carrying on business in Australia. The judgment in the Vina Money case is the first imposition of jail terms in a criminal cartel case in Australia and underscores that the cost of infringing competition law in Australia has never been higher.

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