

Interview with Gina Cass-Gottlieb, Chair of the Australian Competition and Consumer Commission

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Over the last five to ten years, we have seen a series of quite high profile immunity and leniency matters, which have resulted in significant fines in the United States and European Union. The companies have made admissions and paid substantial fines. Yet, competition law authorities have faced much greater challenges getting convictions in contested matters with individuals. What do you think has been driving this?

Gina Cass-Gottlieb: Readers will be aware that the Australian Competition and Consumer Commission (ACCC or the ‘Commission’) investigates potential matters and refers them to the office of the Commonwealth Directors of Public Prosecutions (CDPP) to consider for prosecution.

The Australian Competition and Consumer Commission recognises the challenges involved in bringing and running contested criminal cartel prosecutions. Nonetheless, the Commission continues to see it important to have criminal prosecution available for the most serious conduct. We are continuing to investigate

and take clear action and will continue to do all possible to detect, deter and dismantle cartels.

The Commission and CDPP have had success in criminal matters where there have been guilty pleas. Most recently, there has been an order of a custodial sentence in *Vina Money*, which involved price fixing of exchange rates and fees relating to international money transfers to Vietnam.¹ We had the earlier convictions and admissions of guilt by *K-Line*, *Nippon Yusen Kabushiki Kaisha (NYK)* and *Wallenius Wilhelmsen Ocean (WVO)* in the shipping cartel.² We currently have a number of prosecutions before the court, including the *Alkaloids Australia* matter in the pharmaceutical sector, where the company and one senior executive have entered pleas of guilty in relation to cartel offences.³

The fact that there continue to be pleas of guilt does indicate that, in certain situations, the provisions identify the elements practitioners understand about this prohibited conduct. However, the cases to date do show that the provisions can be ‘prolix, convoluted and labyrinthine’.⁴

We are seeing some challenges from both the prosecution and our Federal Court judges about the clarity of directions to the jury. We are working together with the CDPP to think about this and the approaches we can take. We are also facing the problem that cartel conduct is generally carried out by perpetrators who structure their conduct to evade detection and investigation. This poses further problems and is one of the reasons that there is an immunity policy in place: to assist the Commission get evidence. I acknowledge, in contested cases, we need to think about how to be as focused as possible in an investigatory and evidentiary setting to be able to provide evidence to assist the judge and the court to put a clearer set of propositions to the jury. We have some work to do here.

1 *Commonwealth Director of Public Prosecutions v Vina Money Transfer* [2022] FCA 665.

2 *Commonwealth Director of Public Prosecutions v Kawasaki Kisen Kaisha Ltd* [2019] FCA 1170; *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876; *Commonwealth Director of Public Prosecutions v Wallenius Wilhelmsen Ocean AS* [2021] FCA 52.

3 Commission, ‘Pharmaceutical ingredient company pleads guilty to criminal cartel charges’ (Commission Media Releases, 16 November 2021) www.accc.gov.au/media-release/pharmaceutical-ingredient-company-pleads-guilty-to-criminal-cartel-charges accessed 22 August 2022; Commission, ‘Former export manager of pharmaceutical ingredient company pleads guilty to criminal cartel charges’ (Commission Media Releases, 26 October 2021) www.accc.gov.au/media-release/former-export-manager-of-pharmaceutical-ingredient-company-pleads-guilty-to-criminal-cartel-charges accessed 23 September 2022.

4 *Commonwealth Director of Public Prosecutions v Citigroup Global Markets Australia Pty Limited (No 5 – Indictment)* [2021] FCA 1345 [246].

There have been many changes to leniency policies across the globe due to fewer people taking advantage of them and a perception that they have become less attractive. In Australia, a party that has successfully received immunity from the Commission still faces uncertainty of criminal prosecution by the CDPP. Do you consider this undermines the effectiveness of the policy?

G C-G: An effective cartel immunity policy is very important to the capability of the Commission, as well as other antitrust regulators globally. The ACCC immunity and cooperation policy for cartel conduct is distinct from the leniency offered for other types of criminal offences in Australia.

The Commission has a Memorandum of Understanding with the CDPP,⁵ which sets out how the two agencies work together. My experience is that the processes of the two agencies have become much closer as a matter of principle. Annexure B of the CDPP's prosecution policy now sets out criteria mirroring the Commission's immunity and cooperation policy.⁶ That has developed over time. In addition, the CDPP has been providing written assurances to individuals regarding immunity at an earlier stage.

I acknowledge and can see, from both my experience before coming to the Commission and now, that there does need to be some stepping through, at the point in which the decision is being made, as to whether the conduct is eligible for immunity. I think that practitioners are experienced in how to manage that initial stage. Our processes are now much closer to the CDPP's following that stage, to give confidence and comfort to parties and individuals in relation to their immunity.

You have spoken previously about the close working relationship between various competition authorities in international merger matters. Could you explain how that works, what that means in terms of assisting your inquiries and the overall problems the regulators face?

G C-G: International cooperation enables a more efficient process for both streamlining reviews and the consideration of remedies.

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- 5 CDPP, 'Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission regarding Serious Cartel Conduct' (CDPP Memoranda of Understanding, 15 August 2014) www.cdpp.gov.au/sites/default/files/MR-20140910-MOU-Serious-Cartel-Conduct.pdf accessed 23 September 2022.
- 6 CDPP, 'Prosecution policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process' (CDPP Prosecution Process, 24 February 2021) www.cdpp.gov.au/sites/default/files/Prosecution%20Policy%20of%20the%20Commonwealth%20as%20updated%2019%20July%202021.pdf accessed 23 September 2022; Commission, 'Commission immunity and cooperation policy for cartel conduct' (Commission Publications, October 2019) www.accc.gov.au/system/files/1579_Commission%20immunity%20%26%20cooperation%20policy%20for%20cartel%20conduct%20-%20October%202019_FA.pdf accessed 23 September 2022.

Collaborating with overseas agencies on global merger reviews brings important benefits in terms of process and timing, which are important for both the competition authorities and merger parties. It reduces duplicative efforts and results in more efficient investigations, as where the same information is relevant, it can be produced to multiple authorities in similar scope.

Every competition authority must make its own separate decision and satisfy itself that it has all relevant evidence that pertains to an assessment of the potential competitive impacts in its jurisdiction. However, cooperation provides a more efficient investigation. In some instances, it also provides greater certainty to merger parties as they navigate the intersection of various jurisdictional regulatory hurdles, particularly in relation to review timelines. One example is the Google Fitbit merger. While jurisdictions reached different views at various points of the decision-making, the capacity to understand timelines between each jurisdiction in relation to the various phases that are followed under each jurisdiction's processes and the information that had been received certainly assisted the Commission.

In transactions where the Commission has formed a view that competition concerns are raised and the parties have offered a remedy, in some cases, the remedies are specific solely to our jurisdiction. However, in other cases, they are offered across multiple jurisdictions and we can sometimes rely on the intersection with other jurisdictions. Similarly, if there is a question of licensing of intellectual property, this will often have global elements. These are examples of where cooperation and understanding between competition authorities is of assistance.

Many global companies find managing multiple competition law regimes to be quite challenging. Is there an opportunity for regulators to use global organisations such as the International Competition Network (ICN) or Organisation for Economic Co-operation and Development (OECD) to make the process of merger & acquisition (M&A) approval more efficient?

G C-G: The ICN has a very well-established working group looking at merger processes. There is an increasing focus on sharing lessons among members to allow for more streamlined reviews.

There is a consensus about the need to achieve both more effective and efficient processes from an agency point of view, but also, to the extent possible, achieve greater predictability or certainty for merger parties and their advisers in global transactions, in terms of the likely approaches in different jurisdictions and how they could align processes and timelines.

Do you see a merger reform review programme coming up in the next few years? And, if so, do you anticipate there will be further public consultation on these issues?

G C-G: The Commission continues to face some material disadvantages in not having a mandatory suspensory notification regime, which we particularly observe in global mergers. Australia is frequently approached comparatively late because jurisdictions with mandatory notification are given pre-eminence, given the legal consequences of non-compliance. This is in contrast with proposals that must get approval from the Foreign Investment Review Board (FIRB), where as a general rule, the Commission tends to hear from the merger parties in these matters earlier.

We can see the difference between mandatory notification and voluntary notification in Australia. We are continuing to consider whether our merger regime functions in the best manner it can to inform the Commission's decision-making. We are considering the proposals that were identified as part of a debate about the need for reform last year. We have received feedback from the Law Council of Australia and other stakeholders, and we are considering that feedback. Ultimately, it will be a matter for the government to decide whether to progress any reforms. But we are keeping this topic alive.

There will be public consultation in relation to these reforms at the appropriate time. The Commission first needs to continue its internal deliberations before identifying areas the government may wish to consider for reform. There are a number of steps that would be required, and public consultation will definitely be part of it, if it proceeds.

The Commission appears to have had a real focus on digital platforms for several years. Do you consider that there has been a sufficient level of concrete recommendations for specific reform in the reports it has published? And how much will the Commission's future recommendations be informed by the approaches taken in the EU/US/United Kingdom and jurisdictions closer to Australia?

G C-G: For context, the Commission has a standing direction from the government to do six-monthly reports. Those reports have addressed different platforms and services. We published a consultation paper in February and have since received approximately 100 submissions. We have also conducted stakeholder roundtables, focusing upon measures which are appropriate for consumer protection and relevant to promoting competition.

The report that the Commission is working on currently, and will provide to the government by the end of September, will address whether there is a need in Australia for specific regulation additional to the Commission's general investigative and prosecutorial powers for antitrust and anti-competitive conduct. We are using the previous reports' work to help inform this consideration. We are also conscious

that the services offered by platforms, app developers and their suppliers and competitors are changing quickly. In this context we are trying to ensure that we take into account the changes to the market, new entrants and the growth of entrants. The fast-moving dynamic nature of digital platform services is part of the challenge to traditional competition and consumer protection law enforcement. This capacity to be flexible will be an important factor for the regulatory design.

We consider that the September report, which will consider potential specific proposals, is a timely response having regard to how other countries are handling the same issues. We note that there is certainly clear development overseas, particularly in Germany, the EU and the UK. Closer to home, Japan and South Korea have also taken a number of steps in the area. However, while the Competition and Markets Authority in the UK has done very substantial work, it is still not clear when its recommended new regulatory framework will become legislated. We also understand that, in the US, it is still unclear which of the particular possible legislative proposals will, or may, be adopted.

We are looking closely at the different structural approaches taken overseas and how explicitly they target individual digital platforms. The UK model, for example, seeks to use codes to be targeted but also flexible over time. We are conscious, to the extent we decide any reform is necessary, that global harmonisation will be of benefit to the platforms.

As we have a continuing direction to look at this, we will continue to produce the six-monthly reports. These reports will inform the government of regulatory gaps and areas that need to be addressed. They will also assist the Commission's understanding of what is occurring and inform the enforcement investigations currently underway. We have taken, and been successful, in relation to a number of consumer protection cases involving digital platforms. We are continuing to consider various anti-competitive conduct cases as well.

Do you consider that competition law reform is always the most appropriate pathway for the regulation of digital platforms?

G C-G: The Commission's reports have prompted that question in a number of respects. We have also recently had two very interesting sessions on this topic at the ACCC and Australian Energy Regulator's 2022 regulatory conference.

At the conference, Professor Carl Shapiro and Professor Catherine Tucker spoke about the borders of antitrust analysis and antitrust problems, as compared to, say, misinformation. These are matters that have been raised in multiple jurisdictions with a particular focus in the US at the moment. Shapiro proposed that data regulation should be resolved through legislation that makes it a right of each user, taking a property rights approach.

In relation to the safeguarding of revenue for investigative journalism, some jurisdictions have been looking at this through a neighbouring rights lens, such as the EU's directive on copyright and related rights in the Digital Single Market.⁷ Other jurisdictions, like Canada, have been looking at a similar approach that the Australian Government adopted.⁸

It is important to note, however, that the Commission is an agency with a broad scope across the economy for consumer protection with a mandate and statutory obligations to promote and protect. It is also the regulator of a series of essential services, such as infrastructure. We consider that we have a broader scope than just regulating anti-competitive behaviour. That is relevant as we think about those questions. But it is a very important set of questions for us. When we consider what the right regulatory framework and scope is, we are looking at the different types of harm and the different ways in which those harms can be best understood and addressed. This helps inform which agency is most appropriate.

Ultimately, this is an important question for the government to determine. For instance, the government decided that the regulation of how data is used, gathered and stored would be taken forward by reform of privacy law and largely regulated by our privacy Commission: the Office of the Australian Information Commissioner.

7 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC OJ [2019] L130/92.

8 Online News HC Bill (2021–present) (Canada).