

Gun-jumping in Australia

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION
V CRYOSITE LIMITED [2019] FCA 116

What is “gun-jumping”?

‘Gun-jumping’ refers to conduct where parties in a merger and acquisition transaction, who are actual or potential competitors, start to integrate or coordinate their conduct before the transaction is actually completed

ACCC v Cryosite: Chronology

23 June 2017	<p>Cryosite and Cell Care Pty Ltd entered into an asset sale agreement (Agreement), by which:</p> <ul style="list-style-type: none">○ Cryosite agreed to sell their Cord Blood and Tissue (CBT) banking business to Cell Care○ Cryosite agreed to approach any Cryosite customer who had cord blood or tissue stored with Cryosite in the five years preceding completion of the proposed sale, with a view to convince that customer to obtain storage from Cell Care (post-completion restraint)○ Cryosite agreed to cease supply of CBT banking services to new customers and to refer all potential customers to Cell Care (pre-completion restraint)
August 2017	ACCC commenced investigation
September 2017	Deed of variation which deleted pre-completion restraint
October 2017	Cryosite closed the part of the business that had previously supplied CBT to new customers
July 2018	ACCC commenced proceedings against Cryosite
11 February 2019	Cryosite admitted to having breached ss 44ZZRJ (45AF) and 44ZZRK (45AG) of the CCA
13 February 2019	FCA ordered Cryosite to pay \$1.05 million in penalties

Relevant Cartel Legislation

Section 44ZZRJ (45AF) of the CCA

“A corporation contravenes this section if:

- (a) the corporation makes a contract or arrangement, or arrives at an understanding; and
- (b) the contract, arrangement or understanding contains a cartel provision.”

Section 44ZZRK (45AG) of the CCA

“A corporation contravenes this section if:

- (a) a contract, arrangement or understanding contains a cartel provision; and
- (b) the corporation gives effect to the cartel provision.”

ACCC v Cryosite: Penalties Imposed

Deterrence

- FCA's primary concern in setting a pecuniary penalty was to deter similar conduct by other businesses [44]
- FCA was satisfied that the proposed sum would be sufficient to deter other companies of the same size and financial position as Cryosite [76-79]

Aggravating factors

- Cryosite did not seek merger clearance from ACCC [82]
- Difficult for third parties to detect the conduct in question [69]
- Cryosite obtained a benefit from the conduct [74]
- Cryosite deprived costumers in Australia of any choice of provider [80]

Mitigating factors

- Conduct occurred for a short period of time: 23 June to August 2017 [12]
- Cryosite acted on legal advice → no reason to believe that Cryosite acted with intention to breach [9 & 73]
- Financial difficulties of Cryosite [77]
- Cryosite co-operated with ACCC prior to and after the commencement of the ACCC's investigation was commenced [83-85]

ACCC v Cryosite: Penalties Imposed (cont.)

Treatment of multiple contraventions

- The statutory maximum applies to each contravention, not to each course of conduct (s 76(1A) of the CCA)
- Cryosite received 12 enquiries from potential customers → 12 separate contraventions
- FCA treated them as comprising a single course of conduct in light of the overlap in time, nature, context and purpose among the acts giving effect to the cartel provision [62]

Penalties absent divestiture orders

- Australian courts do not have power to order divestiture of shares or assets to remedy structural effects resulting from cartel conduct if that conduct does not in fact result in an acquisition of shares or assets
- Penalty for gun jumping needs to be “*sufficiently high to deter businesses who may otherwise be able to circumvent the proper application of s 50 and its associated divestiture remedy or at the least render less effective or nugatory such a remedy*” [49]

Gun-jumping in Other Jurisdictions

United Kingdom

- Part 3 of the *Enterprise Act 2002* (merger control legislation)
- February 2019: the Competition Appeal Tribunal imposed £100k penalty on Electro Rent for the company's failure to comply with an order requiring it to keep its operations separate from those of its target in the context of a merger investigation

United States

- Section 1 of the *Sherman Antitrust Act* (governs collective action in restraint of trade, including standstill obligation)
- Section 7A of the *Clayton Act* (duty to notify and observe waiting period)
- July 2003: the US Federal Trade Commission imposed over \$USD 5.6 million penalty on Gemstar-TV Guide International for entering into an agreement with a merger counterparty to focus on different customer bases, agree on prices and terms to be offered to cable service providers, and to share competitively sensitive information with each other

Gun-jumping in Other Jurisdictions

European Union

- Section 4(1) of *EU Merger Regulation* (EUMR) (duty to notify)
- Article 101(1) of the *Treaty of the Functioning of the European Union* (TFEU) (standstill obligation)
- On two occasions, the EU Commission found that the buyer was in violation of the standstill obligation by increasing its shareholding in the target prior to the completion of the merger (Electrabel 2009; Marine Harvest 2014). In both cases, penalty imposed amounted to €20 million
- In 2016, the French Competition Authority imposed a €80 million penalty on the French telecommunication company, Altice, for intervention in management of their target, SFR, on several occasions and implemented a coordinated strategy for the two groups during the suspensory period
- In 2018, the European Commission imposed another fine on Altice of €124.5million for acquired veto rights over the Portuguese telecoms operator PT Portugal's daily business, which influenced a marketing campaign, and from which they received detailed commercially sensitive information
- Ongoing investigation: against Canon in connection with its acquisition of Toshiba Medical Systems, in which Canon paid the full price for non-voting shares in Toshiba Medical Systems and options for voting shares

Discussion

Was the penalty too high, too low or about right?

- Recent cartel cases in Australia
 - ACCC v Yazaki* - \$46million
 - ACCC v Air NZ* - \$15million
- Recent gun-jumping cases in Europe
 - French Competition Authority v Altice* (2016): €80 million
 - European Commission v Altice* (2018): €124.5million

How responsible were the external lawyers for parties?

Did the new monopolist, Cell Care get a great result?

Did the parties engage in a concerted practice?

Does Australia need a better regulation on premerger coordination?

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