

ACCC SUCCEEDS IN FIRST MERGER ‘GUN-JUMPING’ CARTEL PROSECUTION

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Legal Briefings - By **Annalisa Heger**

On 13 February 2019 the Federal Court ordered Cryosite Limited to pay \$1.05 million in penalties for engaging in ‘gun jumping’ cartel conduct in its asset sale agreement with Cell Care Australia. The modest fine reflected the (relatively small) scale of the business concerned and their cooperation with the ACCC’s investigation. The maximum penalty is up to 10% of annual turnover. We would expect very substantial penalties in the event large firms engaged in similar practices.

‘Gun jumping’ occurs when the merger or acquisition parties combine or coordinate their conduct prior to completion of the transaction and in particular prior to obtaining merger control clearance from the relevant competition authorities. Such behaviour may amount to a cartel (or, following its introduction in November 2017, a concerted practice) which is prohibited under the Competition and Consumer Act 2010 (Cth) (**CCA**). The Australian Competition and Consumer Commission (**ACCC**) conducts market monitoring to detect mergers and acquisitions and will take action if it has competition concerns.

CRYOSITE/CELL CARE ASSET SALE AGREEMENT

Cryosite provided long term storage and supply chain logistics services for the private collection, processing, storage and releasing of stem cells contained in cord blood and tissue (**CBT banking**). Private, as distinct from public, CBT banking services, enable a customer to control the release and use of cord blood or tissue that has been stored for that customer. Cryosite and Cell Care Australia were the only two providers of private CBT banking services in Australia.

Cryosite entered into an agreement to sell its CBT banking services assets to Cell Care on 23 June 2017. Cryosite also agreed to refer all CBT banking sales enquiries to Cell Care during the period between execution of the sale agreement and completion. Cryosite gave effect to this restraint by ceasing to supply CBT banking services to any new customers, and establishing and implementing a process to refer and report new customer enquiries to Cell Care. As consideration for entering into the asset sale agreement, Cryosite received a non-refundable upfront payment of \$500,000.

During the relevant period Cryosite had the ability to supply the full range of CBT banking services to pre-existing and new customers and continued to supply such services to existing customers.

The asset sale agreement also provided for Cryosite to resume supply of CBT banking services if the ACCC made inquiries about the proposed sale or announced its intention to do so. Despite this acknowledgement that the proposed asset sale might attract the attention of the ACCC, neither Cryosite nor Cell Care sought any form of merger clearance from the ACCC. Cell Care also communicated to Cryosite the importance of Cryosite first announcing that it had decided to close its CBT banking services to new customers before it announced the proposed sale, as there was perceived to be an otherwise greater risk that the ACCC might prevent the proposed transaction.

Cryosite and Cell Care ceased to give effect to the restraint in August 2017 in response to the ACCC's concerns. Cryosite and Cell Care ultimately did not proceed with the proposed asset sale. Cryosite closed its CBT banking services business to new customers in October 2017.

Cryosite admitted the behaviour contravened the cartel prohibition in that:

- during the period from about June 2017 to August 2017 Cell Care and Cryosite were or would have been in competition with each other for the supply of CBT banking services; and
- the asset sale agreement had the purpose of restricting Cryosite's supply of CBT banking services and allocating customers between Cryosite and Cell Care (to Cell Care).

Cryosite also admitted that it gave effect to the cartel during the period from 23 June 2017 to August 2017.

PENALTIES IMPOSED

Fines of up to 10% of annual turnover or \$10 million (whichever is the greater) may be imposed for each cartel contravention of the CCA. Entry into an agreement containing a cartel provision and giving effect to the cartel provision gives rise to two distinct contraventions of the CCA.

In setting the level of the fine, the Court is primarily concerned with the objective of general and specific deterrence. In particular, Beech J in delivering his judgement noted that premature coordination or integration ahead of the completion of a sale can have the “*commercial but illegitimate attractions of removing price or other competition between the parties, providing access to advantageous commercially sensitive information or generating cost savings by enabling consolidation of customer bases*”. Beech J also noted the particular concern that gun jumping cartel conduct can result in permanent structural change to the market, and circumvent the proper application of the merger control rules in the CCA.

Beech J expressed concern as to whether the quantum of the fine in this case was sufficient for general deterrence, reflecting on the seriousness with which the Court treats cartel conduct. Ultimately however, Beech J was satisfied, acknowledging the limited context in which Cryosite entered into and implemented the cartel.

COMMENTARY

This is the first time the ACCC has taken enforcement action against a company for gun jumping and reflects a willingness to take action against companies which try to circumvent the merger control rules. The judgement sends a strong message that merging parties must continue to operate independently on the market as coordination may amount to a cartel or a concerted practice which is prohibited. It is advisable to always consider whether a proposed transaction raises competition concerns and whether to notify the proposed transaction to the ACCC.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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