

FIRST CUSTODIAL SENTENCES FOR CARTEL CONDUCT IN AUSTRALIA

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Legal Briefings - By **Patrick Clark, Christine Wong, Philip Aitken, Tomas Kemmery and Emily Ainsworth**

Last week, the first custodial sentences were handed down in relation to contraventions of Australia's criminal cartel laws, with custodial sentences ranging from nine months to two years and six months.

BACKGROUND

In April 2019 criminal cartel charges were brought against Vina Money Transfer Pty Ltd (Vina Money) for allegedly fixing the Australian dollar / Vietnamese dong exchange rate and fees they charged their customers. Charges were also brought against five individuals for being knowingly concerned in those alleged offences.

On 3 February 2022, the company, Vina Money, and three individuals pleaded guilty to these offences. A fourth individual pleaded guilty on 17 May 2022. The fifth accused has not pleaded guilty, and his trial is set to commence in September this year.

Those parties that pleaded guilty were recently sentenced. This is the first criminal cartel case in Australia in which individuals have been sentenced. It is only the second criminal cartel in which sentencing has occurred (the first sentences were imposed on three multi-national shipping companies).

Whilst recognizance release orders mean the guilty parties will not serve any prison time, the fact the Court readily accepted a custodial sentence was appropriate in the context of relatively unsophisticated defendants and accepted low level to medium levels of criminality is noteworthy.

The charges followed a joint ACCC and Australian Federal Police investigation. It was alleged that, between 2011 and 2016, a number of independent money transfer businesses operating in Sydney and Melbourne entered into an agreement fixing the price for the exchange rate for Australian dollars to Vietnamese Dong, as well as agreeing to apply or ceasing certain fee discounts on money remittances to Vietnam.

In respect of the fifth accused, if the trial proceeds, it would be the second trial in respect of criminal cartel offences, following the not guilty verdict delivered in the Country Care prosecution last year.

SENTENCING DECISION

[At the sentencing](#), all four individuals were given custodial sentences ranging from nine months to two years and six months. This was after discounts to account for guilty pleas and orders that some sentences be served concurrently. Each of the individuals were given recognizance release orders (effectively, suspended sentences which are available for sentences of less than 3 years, meaning they will not serve any prison time unless the orders are breached). The Court also fined the business \$1 million.

Submissions were made to the effect that these were independent, local businesses, the directors and employees unsophisticated and therefore the conduct did not warrant custodial sentences. The Court nevertheless found that custodial sentences were appropriate for the following reasons.

THE IMPORTANCE OF, AND NEED FOR, GENERAL DETERRENCE

The Court emphasises that the nature of criminal cartel conduct is such that general deterrence is particularly important and ordinarily the primary sentencing consideration. Cartel conduct is difficult to detect, investigate and prosecute. It is an economic crime wherein offenders weigh up the profit against penalisation. The Court concluded that penalties need to be of sufficient significance to deter future possible offenders. This need for general deterrence means factors personal to the offender are necessarily afforded less weight than they otherwise might be.

CRIMINAL CARTEL CONDUCT, EVEN IF LOW TO MODERATE CRIMINALITY, IS OF A VERY SERIOUS NATURE AND CAN CAUSE COMPETITIVE AND CONSUMER HARM

Though the Court accepted the criminality in this case to be low to moderate, it was still a serious offence requiring the imposition of custodial sentences. The businesses may have been independent and local, but they had around two-thirds of the market for money remittance by volume. The Court also found that the conduct was deliberate, involved repeated actions, continued for some time and there was at least a degree of sophistication, planning and cooperation. The conduct was also engaged in for a financial motive. As such, while the businesses were different to, for example, multinational shipping companies (which have previously been sentenced following guilty pleas for criminal cartel conduct), the Court noted that “the nature of the evil is the same” – the conduct was anti-competitive and caused consumer harm.

IGNORANCE OF THE LAW AND OTHER PERSONAL FACTORS ARE NO EXCUSE (AND MAY UNDERMINE A GUILTY PLEA)

Throughout the judgment, the Court was critical of the individuals' explanations for their conduct, including a lack of training in competition law, that they were pressured by their partner bank in Vietnam, that the conduct was not "designed to rip off customers" and that those customers were still better off compared to if they went to banks or multinationals.

For the Court, this led to the impression that some individuals were trying to minimise or justify the conduct and that these offenders failed to grasp the seriousness of their conduct.



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