

The Country Care acquittal: how the landmark criminal cartel prosecution fell flat

MARQUE

Clearly something went a bit wrong for the DPP in the Country Care Group cartel prosecution.

Cartel conduct is the only kind of anticompetitive conduct that can be prosecuted as a criminal offence. The ACCC is meant to refer serious cartel conduct to the DPP for criminal prosecution. 'Serious' can mean covert, large-scale, longstanding or of significant detriment to the public. The implication is that a case will only be referred over to the DPP if it's blatant, with a strong chance of success.

After a 12 week hearing, apparently a jury took just 4 hours to unanimously acquit the Country Care Group and its managing director of all criminal cartel charges. The prosecution alleged price fixing and bid rigging in relation to the supply of assistive technology products used in rehabilitation and aged care.

It was the first prosecution of an Australian business under the criminal offence provisions, and also the first prosecution of individuals. It should have set a new bar and sent a strong warning to all businesses about the danger of cartel conduct. Instead, the focus has naturally shifted to the efficacy of the ACCC in the face of such a big defeat.

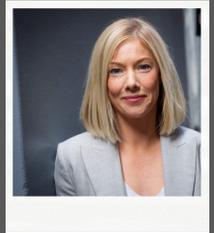
It begs the question; what went wrong? In a cartel case, you generally need a whistleblower or a smoking gun document (preferably both). Unlike other competition cases, you don't get hung up on expert evidence about market impact of the conduct. It's more of a factual analysis; did the parties compete, and did they form a cartel or not. The market effect doesn't matter.

That means that if your whistleblower witness crumbles in the box, so might your case. Reportedly that's what happened here. Country Care claims that the DPP's key witness admitted under cross-examination that he had misled and withheld important information from the ACCC and lied to the jury.

In any prosecution there will be a complex interplay of strategic considerations. How strong is the case? How important is it in the broader context? Who suffered by the conduct? Were they vulnerable? How strong is the evidence? Are there witnesses seeking immunity? How does the case fit into enforcement priorities? Getting the balance of these issues right is critical to the ACCC's success, and therefore the public's confidence in the regulator.

The ACCC has a reputation as one of our stronger, more aggressive regulators. To earn this reputation it has to take on big cases. It can't win them all. But it has to win some. The pressure is definitely on.

Questions? Give us a call.



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