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Piercing the privilege veil in criminal cartels in Australia: Practical considerations for immunity (and leniency) applicants in seeking to reconcile their disclosure obligations

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Legal professional privilege (**LPP**) has long been recognised as a powerful, though controversial protection. As the Australian High Court once declared, it is "*a practical guarantee of fundamental constitutional or human rights*".[1]

Yet, despite its well-established jurisprudential position, its utilisation to protect internal cartel investigation records of criminal cartel immunity applicants (**IA**) from being disclosed to the regulator/investigator, the prosecutor and/or the defendants and/or the court in a cartel prosecution in Australia is unclear.

The issue came to light in a recent interlocutory judgment in a prosecution of an alleged criminal cartel arrangement in the financial services industry.[2] The issue at the centre of the dispute, and the focus of this paper, is whether a prospective cartel immunity applicant can reconcile its continuous disclosure obligations (required to maintain its immunity status), with its desire to protect confidential information and documents created as part of (i.e. the external counsel engaged by the IA) providing legal advice and services to the IA.[3]

In this paper, we provide an overview of this issue and consider its practical implications. In particular, we consider practical strategies prospective immunity (and leniency) applicants can take, when undertaking their internal cartel investigations and before they decide to engage with the regulators in respect of their involvement in the alleged cartel conduct (including by comparative reference to UK practices as we understand them). We also consider possible strategies that regulators/prosecutors may be minded to adopt to practically reduce this risk for immunity/leniency applicants.

Ultimately, we consider that while this issue raises fundamental questions regarding the maintenance of LPP claims in the context of an immunity process, it is unlikely to be determinative in the context of a corporation making a decision about whether or not to seek to become an IA, and may instead be a broader policy question for regulators to consider.

Background to the Banking Cartel Case prosecution

The case relates to an alleged criminal cartel arrangement between Deutsche Bank (**Deutsche**), Citigroup, JP Morgan (**JPM**) and the Australian and New Zealand Banking Group (**ANZ**), in respect of an AUD $2.5 billion ANZ share placement in 2015 (hereafter, will be referred to as the **Banking Cartel Case**). JPM, Deutsche and Citigroup were underwriters in the transaction and were alleged to have agreed about the approach that they would take to the sale of an

~AUD $800 million shortfall of ANZ shares, as part of managing risk and arguably in part to maintain (or at the very least, limit) the potential damage to ANZ's share price.

As the case initially stood, six former and current senior executives of Deutsche, Citigroup and ANZ were facing ancillary charges for being 'knowingly concerned' in the cartel conduct, in addition to the primary cartel allegations launched by the Commonwealth Director of Public Prosecutions (**CDPP**) (following a referral from the competition regulator and investigator, the Australian Competition and Consumer Commission (**ACCC**)) against Deutsche, Citigroup and ANZ. JPM (and its employees most closely involved in the cartel conduct) was the IA and the derivative IAs respectively.[4]

A critical issue considered in Justice White's interlocutory judgment in May 2021 was whether the preliminary internal cartel investigation records (including the draft evidence outlines and interview notes) prepared by the IA's lawyers[5] (collectively referred to as the **First Accounts**) were legally privileged, and if so, whether the IA had subsequently engaged in any inconsistent conduct that would amount to a waiver of their LPP. A short chronology of the key events is set out below:

- **August 2015:** The IA's lawyers approached the ACCC on an anonymous basis and attained a 'first in' marker for immunity for its involvement in "*trading in the market for securities in ASX listed companies in respect of securities issued in a capital placement*".***[6]***
- **September – November 2015:** The IA's lawyers interviewed nine IA employees most closely involved in the alleged cartel conduct (totalling 11 interviews), with the IA's in-house counsels participating in all of the interviews. This was part of the IA's internal cartel investigation to gather information about the 2015 ANZ placement so that the IA can receive legal advice as to its legal exposure arising from its involvement in the conduct and how this exposure might be managed and/or
- **November 2015 – June 2016:** The IA's lawyers provided the ACCC with an oral "proffer", which involved a high level overview of the 2015 ANZ placement and possible legal implications, without any personally attributable accounts.[7] The ACCC granted conditional immunity protection for the IA and derivative immunity protection for the nine relevant IA employees;

The ACCC granted conditional immunity to the IA in respect of cartel conduct in which it had engaged in with two competing investment banks for the 2015 ANZ placement, which involved "*entering into contracts, arrangements or understandings containing*

cartel and/or exclusionary provisions, including provisions with the purpose, effect or likely effect of:

- ***preventing, restricting or limiting the supply** by the investment banks of interests or rights in ANZ shares to persons or classes of persons; and/or*
- ***fixing, maintaining or controlling the price** of ANZ shares supplied or likely to be supplied by the investment banks."**[8]***

Critically, both the ACCC and the CDPP's correspondence clearly set out that a key condition upon which the conditional immunity is granted is that the IA (and any derivative IAs) "*must continue to provide full, frank and truthful disclosure and cooperation*", include "*withhold[ing] nothing of relevance*", consistent with the ACCC's "Immunity and Cooperation Policy for Cartel Conduct".[9] As an aside, it is relevant to note that had there been leniency applicants in the Banking Cartel Case (of which there were none), they would have been subjected to the same disclosure obligations.[10]

At various times since March 2016, the ACCC had itself interviewed the IA's employees and had prepared and provided witness statements on the basis of those interviews to the Defendants.

- **2019 – late 2020:** A series of events eventuated, including the Defendants being formally charged in a Local Court committal proceeding.[11] In the course of the committal, the Defendants discovered the existence of the First Accounts and subsequently asked the CDPP to provide them with a full [12]

Notwithstanding the fact that the First Accounts were not shown to, or acknowledged by, the interviewees, the CDPP made it clear that the production of the First Accounts formed an essential part of the IA evidencing its continuous cooperation and compliance with its duty to "*provide full, frank and truthful disclosure*". The CDPP also made it clear that following its review, the CDPP would decide whether the materials be redacted before being disclosed to the Defence.

For reasons that will be elaborated upon in the next section, the Court ultimately upheld LPP claims over the First Accounts, but found the IA had engaged in conduct that gave rise to a waiver of its LPP over the First Accounts, such that the First Accounts should be disclosed to the Defence in their entirety.

Creative attempts to preserve LPP and key arguments

Before we consider the evolution of the LPP claim in this case, we outline below the key principles of LPP in Australia.

Under Australian law, LPP is the claimant's right to resist the compulsory disclosure (as required by third parties) of confidential information contained in a document or communication (written or oral) created for the dominant purpose of:

- obtaining, or giving, legal advice; and/or

- obtaining legal services relating to actual or anticipated legal

The privilege holder has the onus of establishing its LPP claim (as the privilege is that of the client, not of the lawyer).

In order to determine the dominant purpose of a document/communication being brought into existence, regard can be had to the intended use(s) of the document and the purpose of the maker of the communication or document, as assessed at the time of its production (putting to one side copying of documents). It is open to the court to find that only parts of a document were created for the dominant purpose of attracting LPP. It is also relevant to note that communications made or documents prepared for the dominant purpose of obtaining legal advice do not cease to be privileged if the communication or document is not ultimately used for that purpose.

If the privilege holder engages in conduct that is inconsistent with maintenance of the confidentiality of the relevant document/ communications, it can give rise to a waiver imputed by the law, irrespective of the intention of the privilege holder. In making this determination, the court will have regard to perceptions of fairness specifically arising from any inconsistency between these two aforementioned considerations. As LPP is an "*important substantive common right, implied waiver is not lightly imposed*",[13] partial disclosure of a LPP document will not necessarily result in the loss of a LPP claim over the balance of the document if the disclosure is for a limited and specific purpose and on terms that the recipient will treat the information disclosed as confidential.

In seeking to tread the fine tightrope between maintaining LPP over the First Accounts and also complying with its "*full, frank and truthful disclosure*" obligations, the IA's lawyers considered at least two alternatives to achieve these dual objectives, including:

- having the First Accounts subpoenaed (rather than voluntarily produced by the IA)[14];

Ironically, this interlocutory judgment was triggered when the CDPP decided to served subpoenas on the IA to produce the First Accounts (following its consideration of the inadequacies of the strategy outlined in (ii)).

- "*running through slowly*" (and orally) with the CDPP (via a number of in person meetings) the First Accounts without providing an extract of those accounts in In particular, the IA's legal representatives indicated it would seek to "*use the language of the first accounts without reading out the full account*" to rectify any potential inconsistency between its conduct and the maintenance of its LPP claims;[15]

This strategy ended up being executed as an "oral proffer" by the IA's lawyers across two meetings in 2020, which included an oral summary of the factual evidence that the IA expected the relevant JPM interviewees would give at trial based on their First Accounts. The IA's lawyers identified particular extracts from each witness' First Accounts to be read aloud in these meetings, which were transcribed by the CDPP staff and subsequently copies of the transcripts were provided to each Defendant.

While the key arguments motivating the CDPP to seek the First Accounts material have been canvased above, a brief summary of the arguments proffered by the Defence and the IA is also necessary to form a holistic understanding of the key question considered in this article. Underlying the Defence's desire to get access to the First Accounts were the alleged 'flaws' they exposed within the ACCC's statement taking process (including a lack of note keeping, overwriting drafts and failure to disclose potential exculpatory material). Consequently, the Defence wanted to compare the ACCC's statements with the First Accounts to highlight any inconsistencies (and thus cast further doubt) about the ACCC's case theory and evidence collection processes. While the Defence took issue with whether LPP existed over the First Accounts (though the CDPP did not), in light of Justice White's findings that LPP did exist over the First Accounts, the focus of our article is more appropriately cast on how waiver of LPP over the redacted portions of the First Accounts was found.[16]

In respect of waiver of LPP, the CDPP and the Defence focused on two types of conduct that the IA engaged in which they argued amounted to a waiver of LPP, including:

- inconsistency in seeking and obtaining the conditional immunity; and
- inconsistency in making the partial disclosures of the First Accounts in late

By contrast, the IA focused on two counterarguments, being that consistent with relevant judicial precedent, the disclosure of the unredacted portions of the First Accounts ***did not*** amount to a waiver of LPP over the remainder of the documents as those unredacted portions can be "*read and understood without resort to further material within the same documents.*"[17] That is, the IA's limited disclosures of the First Accounts was for a limited and specific purpose and on terms that the recipient will treat the information disclosed as confidential. Further, the IA highlighted the potential 'chilling' effects from a public policy perspective if the court was to decide otherwise, as it would discourage corporations/individuals from applying for immunity (or seeking legal advice on whether they should do so) if their legal advice may be disclosed "*to the world*".[18]

Piercing the privilege veil – the court's take on inconsistent conduct

As discussed above, there were two types of conduct that the CDPP and the Defence alleged that the IA engaged in that amount to a waiver of its LPP claims over the entirety of the First Accounts.

In respect of the most important question that may bear public policy ramifications regarding whether the IA's disclosure of the First Accounts is a fair return for its continuing to receive conditional immunities and satisfying its disclosure obligations, Justice White refrained from commenting – expressly stating that it would be inappropriate for the court to adjudicate on this issue as it was strictly unnecessary for determining whether a relevant inconsistency has arisen so as to result in a waiver of LPP. It also involves considering the "*metes and bounds of the conditions upon*

which the CDPP granted the immunity" which was a substantive issue that Justice White did not feel comfortable adjudicating on in the absence of full submissions to the court in that regard.[19]

Instead, Justice White focused on whether the IA's conduct through its oral proffers in late 2020 was inconsistent with its LPP claims over the First Accounts. While Justice White considered there were seven compelling reasons justifying the conclusion that the IA had waived its LPP over the totality of the First Accounts as a result of its partial disclosures in 2020, we capture the three key reasons below:

- **The IA made a "*conscious and voluntary*" decision to disclose portions of its confidential documents**, and while it had to choose between maintaining confidentiality and not jeopardising its grant of conditional immunity, it was not 'compelled' to choose the latter over the [20]
- **When the IA made the partial disclosures, it knew that the CDPP's position was that it required the totality of the First Accounts** (and the disclosures were not made on the condition that the CDPP would not disclose the material to other third parties). The IA took the conscious risk that its method of partial disclosure may nonetheless be considered by the CDPP to be
- **Moreover, when the IA made the partial disclosures, it made a judgment call regarding which aspects of the First Accounts relates to the "core conduct" in the 2015 ANZ placement.** While the IA's lawyers acted in good faith in their selection of the relevant content, the assessment of what's "core" and "non-core" is a matter upon which reasonable minds can differ. Moreover, it prevented the opportunity for the CDPP to make its independent assessment and the nature of the redactions indicate that additional contextual material needed to be disclosed in order to form a holistic understanding of the "core" extracts of the First Accounts that was

While the above considerations may paint a somewhat sobering picture for prospective immunity (and leniency) applicants, the Banking Cartel Case provides some useful clarity on the limitations of waiver of LPP.

In particular, Justice White rejected the following submissions:

The IA should be imputed to have waived its LPP claims over the First Accounts by reason of its conduct in interviewing the relevant witnesses and recording what they said in handwritten notes and evidence outlines

Justice White noted that it is illogical to find that the "*conduct bringing the privilege into existence is the same conduct by which that privilege was waived".****[21]*** Further, conducting interviews and recording witness recollections is in the ordinary course of providing legal advice and it is up to the IA (who is the legal privilege holder) to use that advice for their discretionary purposes.

The IA's conduct in seeking and obtaining conditional civil and criminal immunity amounted to a waiver of its LPP claims over the First Accounts

In rejecting this submission, Justice White took particular note of the fact that the First Accounts were not disclosed to, or discussed by, the IA with the ACCC during its

initial oral proffer in 2015. Justice White also helpfully clarified that there was no inconsistency in the IA deciding to undertake an internal cartel investigation to seek legal advice that could allow it to make a decision of whether it wanted to apply for immunity. Justice White found this conclusion to be particularly compelling given that neither the ACCC nor the CDPP's respective immunity or prosecutorial policies required the disclosure of LPP material as a condition of granting immunity.

Practical implications for prospective immunity (and leniency) applicants: A storm in a teacup or a signal for further reforms?

Given the undecided nature of this question in the Banking Cartel Case, there remains a possibility that it may well be a 'storm in a teacup' with altered fact scenarios or changed behavioural patterns from the regulators going forward.

Yet even if we assume this possibility to be true, it nonetheless falls short in offering any immediate comfort, nor provide sufficient clarity, for legal practitioners on how they should guide their clients through the process of undertaking an internal cartel investigation (and if needed, subsequent immunity application), particularly where there is a risk for criminal prosecution.

While the above raise fundamental questions regarding the maintenance of LPP claims in the context of an immunity process, query whether such an issue will be determinative in the context of a corporation making a decision on whether it seeks immunity. Nevertheless, we seek to examine below the potential practical implications and possible approaches to mitigate potential practical disclosure risks by prospective immunity (and leniency) applicants.

In formulating the practical implications below, we have had regard to our foregoing discussion of the Banking Cartel Case, our experience in advising IA and derivative IAs in such scenarios (including in the Banking Cartel Case), as well as our understanding of established processes in the UK (which we consider to be most comparable to Australia) in dealing with material subject of a LPP claim during a criminal cartel investigation.[22] In particular, our thoughts are focused on the key actions at each stage of the criminal cartel investigative process that may be changed to mitigate the risk of the IA engaging in inconsistent conduct regarding its preliminary internal cartel investigation materials that may lead to a waiver of materials subject to a LPP claim.

Undertaking an internal cartel investigation

Prepare 'high level' internal cartel investigation records with an expectation to producing such records to the ACCC/CDPP as needed if the corporation do decide to apply for immunity

The primary rationale of conducting an internal cartel investigation in such circumstances, is to advise a corporation as to its potential liability for cartel conduct, and to decide whether it should apply for immunity. Lawyers undertaking the internal

investigation may consider preparing 'high level' written records (and no more) to facilitate this decision making process. These records could/would be prepared with the expectation that they are to be provided to the ACCC/CDPP if the corporation seeks immunity. In this regard, the ACCC's current immunity policy incorporates a clear expectation that IAs should "cooperate" with the ACCC on a "*proactive basis*", which involves the IA providing "*all relevant information and/or documents…without necessarily being prompted to do so by a request from the ACCC*".[23]

What amounts to a 'high level' record will likely need to be assessed on a case-by-case basis. However, this may include, for example, canvassing the key points and topic areas (that may be considered by the lawyers as 'core' to the alleged cartel conduct) that the interviewees have considered (rather than record verbatim what their views/evidence are).

The advantage of adopting this approach is multi-fold:

- it may facilitate a more expeditious internal cartel investigation (and allow the corporation to understand its cartel conduct risk earlier);
- it provides the regulators additional insights into the circumstances giving rise to the alleged cartel conduct, in addition to the regulators' assessment of the 'primary documents' and any 'oral proffers' provided by the IA to the ACCC, as part of its preparation for interviews the IA's witnesses, thus reducing evidentiary weaknesses associated with prior inconsistent

However, in highly complex, 'borderline' cartel conduct cases, it may be more appropriate for lawyers representing the corporation to consider taking a verbatim record from witnesses as part of their internal cartel investigation (for further details, see next point).

In the alternative, consider having two note takers in internal cartel interviews, one focused on capturing the factual details relating to the conduct, the other focused on capturing communications between the lawyer and the interviewee that relates to potential legal implications of the conduct to more naturally separate factual accounts from documents over which LPP may be claimed

To successfully execute this strategy, the primary interviewer needs to provide significant guidance throughout the interview as to whether the relevant information may be privileged or not. Both note takers will also need to be keen, active listeners to avoid capturing any 'out of scope' information.

Given the extremely 'fine' (and unpredictable) line of whether partial disclosure of documents may result in a complete waiver of privilege over such documents, the safest approach is to have complete separation of materials subject to a LPP claim (against materials that won't be subject to such a claim) in the first instance. While it is not a foolproof strategy (see below), it will help the IA evidence its unequivocal intention to maintain confidentiality over the relevant communications, as well as maximising the likelihood that the content of the respective documents can be understood in its totality (without resorting to information subject to a LPP claim). It

will also assist the IA to satisfy its disclosure obligations by providing the ACCC and CDPP with a copy of materials not subject to a LPP claim to assist the regulator/prosecutor to probe/ask more informed questions in the course of its investigation.

However, we recognise that this strategy may not suit all businesses wishing to undertake an internal cartel investigation (given the significantly more resources/time it demands) and there remains a residual risk that non legally-privileged material may be included in the LPP document. It may also lead to the interviewee being more reluctant to disclose the totality of the facts in the first instance (given they may feel intimidated by the presence of two note takers in addition to the primary interviewer). This downside may be ameliorated by providing proper assurance to the interviewee as to the purpose of the arrangement (i.e. it does not indicate that their involvement was more than any other interviewees) and being prepared to have multiple interviews to seek to elicit the relevant surrounding circumstances leading to the alleged contravening conduct.

Make it very clear for the parts of the preliminary internal cartel investigation records that may be subject to a LPP claim what the dominant purpose of the communication is

While assertions of the dominant purpose for which documents/communications were brought into existence may be at risk of being challenged by third parties (particularly if made retrospectively), a non-ambiguous contemporaneous statement by the privilege holder (or by their lawyers) is nonetheless a useful prima facie indication that LPP did exist over the relevant communication. In the Banking Cartel Case, the assertion of the 'dominant' purpose of the First Accounts occurred a number of years after the conclusion of the investigation. This arguably made it more difficult to substantiate those assertions (than compared to the case if there were contemporaneous records to this effect).

For consistency across the internal cartel investigation, the inclusion of a proforma statement/header across the relevant communications may be useful. For example, a potential header may be "*This document/communication is confidential and is subject to legal professional privilege. It is created for the dominant purpose of assisting [x] to advise on the circumstances leading to the potential cartel conduct and its relevant legal implications for the company".* The IA should also make sure its actions are consistent with its intentions to assert LPP, including ensuring that it only circulates the LPP communication or documents internally on a 'need to know' basis.

Be aware of, and be prepared for, additional complications that may arise when there may be potential for different LPP claims by employees most closely involved in the conduct (as against the corporation)

This issue more commonly arises after a corporation makes an 'oral proffer' to the ACCC (and where it is often only after the completion of a thorough internal cartel

investigation that the alignment, or if any, separation of, interests between the corporation and the individuals can be appropriately differentiated and ascertained). Here, the lawyer for the corporation needs to make clear to the employee that he/she can seek independent legal advice if needed (as the duty towards the corporation by its lawyer will override their duty to any individual employee, in the event that they conflict).

This may create additional complications for the conducting of internal cartel investigation interviews, where there may be materials that are separately subject to different claims of LPP (whether by the lawyer of the corporation or the 'independent' lawyer for the employee). Here, the most practical solution is perhaps the simplest, being to set appropriate 'time outs' to allow the employee to privately converse with their 'independent' lawyer should they need to discuss legally privileged matters. It is also important for the lawyer representing the corporation to limit communications with the independent lawyer for the employee so that the information that is shared can be appropriately characterised as 'subject to common interest privilege', particularly if there is a risk that the employee's interest and the corporation's interest may diverge down the track.

Seeking immunity/leniency and interaction with the ACCC/CDPP

If disclosure of material subject to a LPP claim to the ACCC and CDPP cannot be avoided, such material may be compelled by the ACCC (instead of voluntary production)

The Banking Cartel Case suggests there is an extremely high threshold that an immunity/leniency applicants needs to meet before they will be considered as being 'compelled' to undertake a course of action. In the Banking Cartel Case, the IA had to choose between protecting confidentiality over its First Accounts as against risking the loss of its immunity status (which at that point, it had invested at least 6 years of time and resources to maintain). Justice White specifically made reference to the established judicial proposition that "*persons cannot be compelled to produce on subpoena documents which are subject to legal professional privilege, even though those documents may establish the innocence of persons charged with criminal offences or materially assist their defence*".[24]

While the specific factual circumstances in the Banking Cartel Case was such that the issue of LPP over the First Accounts did not arose at all during the investigation process (and only arose through a pre-trial process) (hence necessitating consideration of using subpoena as a way to solicit compulsory production of information from the IA). Arguably, following the Banking Cartel Case, it is highly likely that any LPP disputes would occur prior to the proceeding and possibly in the initial stages of the investigation process. In this context, it would be easier for the IA to ask the ACCC to issue a s155 notice (a compulsory statutory notice the ACCC can issue for the production of documents). The IA would still be able to refuse the production of any documents that may be the subject of a LPP claim (without engaging in conduct that would give rise to an imputed waiver).[25]

Potential changes in the ACCC/CDPP's investigative processes for criminal cartels going forward

It is possible that the ACCC/CDPP will alter its statement taking practices going forward and request internal cartel investigation materials not subject to a LPP claim upfront

It is possible that the ACCC/CDPP will seek internal cartel investigation materials from the IA that are not subject to a LPP claim upfront (including as discussed above, compelling the IA to produce these documents through issuing a s155 notice). This enables the ACCC (and ultimately the CDPP) to verify the veracity of such materials as part of its investigations, or alternatively use such materials as a basis to assist with its own investigations, including the taking of statements from the relevant individuals/potential witnesses.

In parallel with this, one possible change to the ACCC's statement taking practices may involve recording their interviews with the relevant individuals, instead of rely on imperfect verbatim notes. If there is a dispute regarding exactly what a witness has said (or whether the totality of their evidence is captured in their statement), the recording/transcript could be admissible in court under certain circumstances as an unambiguous and complete record of what transpired in the interviews. This would be particularly valuable given the trial often occurs several years after the investigation, in which case the witnesses' recollections are often less complete than whatever accounts they gave contemporaneous to the alleged contravening cartel conduct.[26]

It is possible that the ACCC/CDPP may amend their prosecutorial/immunity guidelines to incorporate more explicit guidance on the status of legally privileged materials in criminal cartel investigation

Currently, neither the ACCC's "Immunity and Cooperation Policy for Cartel Conduct" (October 2019), nor the CDPP's "Prosecution Policy of the Commonwealth" make reference to how information subject to a LPP claim provided by an IA or leniency applicant will be treated. Rather, as discussed above, the ACCC policy states that it expects the IA to provide it all relevant information and documents. The only reference to privilege is in the ACCC's "Immunity and cooperation policy: frequently asked questions" guide which considered whether the information provided by the IA will be disclosed to the public, in which the ACCC states that it "*may be able to claim privilege*" to protect "*confidential information from disclosure*".[27] Arguably, this does not provide prospective IAs or leniency applicants sufficient clarity as to the ACCC/CDPP's potential treatment of relevant documents/materials that may be subject of a LPP claim.

However, it is possible in future revisions to the ACCC/CDPP's policies as referenced above, the regulator/prosecutor may clarify the treatment of LPP materials, similar to what has been the longstanding practice of the Competition Markets Authority (**CMA**) (and its relevant predecessor for this issue, Office of Fair Trading, which ceased operations in 2014) for almost the last decade.

Under CMA's "Applications for leniency and no-action in cartel cases" guide, which has been operative since July 2013 (last updated in September 2020), considerations of potential LPP disputes are well embedded into the CMA's processes, which the ACCC/CDPP may well draw upon.[28] These elements include:[29]

- The CMA makes it clear that it will not, as a condition of leniency, require waiver of LPP over any relevant information.
- If necessary, the CMA will appoint (and fund) an independent counsel to assess the legitimacy of LPP claims made by the leniency applicant.[30] During this process, the information subject to the LPP claims will only be provided to the independent counsel, who will make their observations on whether the LPP claim should be upheld (although the CMA also has the discretion to make its own observations after reviewing the independent counsel's conclusions). A copy of these observations will be provided to the leniency In the case where a LPP claim is upheld, the applicant is expected to provide a redacted copy of the materials (where possible) and an independent counsel may be asked to confirm that the correct redactions have been made.
- Importantly, the CMA's policy makes it explicitly clear that the independent counsel review process "*does not absolve the leniency applicant from their duty of complete and continuous cooperation*".***[31]*** In considering whether the leniency applicant has met this disclosure obligation, the CMA will consider case-specific factors including whether any LPP claims made by the applicant were *"manifestly baseless"* or without "*sufficient specificity*", and whether the applicant may be abusing this process to delay or prejudice the CMA's
- It is relevant to note that the CMA is cognisant that there may be scenarios where LPP claims are likely to be contentious. While the independent counsel's view is intended to be determinative as between the leniency applicant and the CMA, there remains scope for the LPP dispute to be brought in front of a court to be further considered and 'conclusively determined'.

As an aside, we consider that the explicit adoption of the above guidance similar to the CMA processes in the ACCC/CDPP's policies is likely to assist prospective applicants to seek immunity or leniency as they would have a clear understanding of the status of LPP materials (and the process through which such claims can be disputed and settled).

Concluding Thoughts

Undoubtedly, criminal cartel investigations are one of the most high stakes environments imaginable in competition law regulatory actions. Despite Australia still being in relative nascence in its criminal cartel experience (with cartels only criminalised in the last decade), such investigations nonetheless involve significant inherent complexity because of the higher burden of proof, the prosecutor's disclosure obligations, the very substantial obligations to ensure fairness to the accused and the dire personal consequences (including imprisonment terms) that are on the line.

It is for this reason that the unresolved question at the centre of this article, being

whether an immunity (or leniency) applicant can ever reconcile their "*full, frank, truthful*" disclosure obligations as a part of the grant of their immunities on the one hand, while preserving LPP claims over relevant internal cartel investigation records on the other, is unsatisfactory.

Having "said that", we consider that the resolution of this question may have more significant implications for the ACCC and the CDPP (from an immunity and prosecutorial policy design perspective) and the likelihood of securing more successful criminal cartel prosecutions in 'clear cut' cases (i.e. with the assistance of non-privileged preliminary internal cartel investigation materials). For prospective immunity and leniency applicants, the significant pecuniary penalties (as well as the risk of follow on class action), the dire personal consequences (reputational and financial), will likely continue to be critical factors to their decision on whether they wish to engage with the ACCC and the CDPP on the criminal cartel immunity or leniency process. It is highly unlikely, as a practical matter, that the potential risk of disclosure of LPP materials is going to be determinative of an IA/leniency applicant's decision to engage with the ACCC/CDPP as it would not affect the evidence that the immunity and leniency applicants will provide (assuming they have been frank and truthful throughout the whole process). This is particularly so as it seems clear that records of legal advice provided to the IA is very unlikely to ever be disclosed.

We have attempted to distil practical guidance for legal practitioners in assisting their client in engaging with the regulators in Australia in these high stakes scenarios. Only time will tell whether this is a storm in a teacup (due to potential changes in ACCC/CDPP behaviour and immunity/leniency applicants' approaches to internal cartel investigations), or whether this remains an overriding unresolved public policy issue in criminal cartel contexts.

The authors also acknowledge the assistance of Jessica Mandla for her perspectives. All views expressed in this article are the author's own and are not representative of K&L Gates LLP's views.

[1] *Carter v Managing Partner, Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 161.

[2] For more, read Justice White's judgment in *Commonwealth Director of Public Prosecutions v Citigroup Global Markets Australia Pty Ltd* [2021] FCA 511.

[3] Under Australian competition law, if convicted of criminal cartel conduct, the potential liabilities for the corporations and individuals involved are significant. Individuals can face up to 10 years imprisonment and/or fines of up to AUD $420,000 per criminal offence, and corporations are liable for up to 10% of their annual turnover (including related corporate bodies) in the preceding 12 months to the contravening conduct.

[4] We acted for individuals who were derivative IAs in the Banking Cartel Case.

[5] References to the IA's lawyers in this article refer to both IA's in house counsel and external lawyers. While there are some variances in approach in other jurisdictions such as the EU regarding whether LPP extends to in-house counsel, it is outside the scope of the paper to engage in a comprehensive or comparative debate on this issue.

[6] See footnote 3, [35].

[7] That is, there was no content in the First Accounts that was disclosed to the ACCC as part of the IA's oral proffer.

[8] See footnote, 3, [47].

[9] This disclosure obligation was reflected in the ACCC's immunity and cooperation policy for cartel conduct (September 2014) which was the applicable version for the alleged cartel conduct considered in the Banking Cartel Case, see section C 'Civil Immunity', and also reflected in Annexure B of the Prosecution Policy of the Commonwealth.

[10] In Australia, the IA (including derivative IAs) (i.e. the 'first-in' applicant to the ACCC to provide information about its participation in cartel conduct) can be provided with conditional immunity by the ACCC and CDPP, giving it full protection from civil and/or criminal prosecution for its involvement in the alleged cartel conduct provided the IA fulfils its conditional immunity obligations (albeit this protection does not extend to any 'follow on' civil class actions by third parties). In contrast, leniency applicants are cartel participants who are not eligible for 'first-in' immunity but nonetheless have provided valuable cooperation with the ACCC/CDPP with their investigation/prosecution. The ACCC/CDPP will exercise their prosecutorial discretion in determining whether they prosecute leniency applicants. If they do, there are no pre-established discount levels for any penalties for 'second-in' /leniency applicants. Any such penalties are determined by a Court on a case- by-case basis.

[11] This is a procedural peculiarity in Australia's criminal cartel cases, such that while such matters are formally heard in the Federal Court (the CDPP can decide to commence the case in the most inferior Court, a Local Court) before undertaking a series of procedures to commit the case to be heard in the Federal Court.

[12] For completeness, the interlocutory judgment dealt with LPP claims for four categories of documents issued by the subpoena to the IA, including First Accounts (Type A) documents which are the focus of this article. The other three categories, being Type B, C and D relates to legal advice that the IA obtained prior, at the time and following the 2015 ANZ placement. The court held that the IA's LPP claims were sustained in respect of documents in Types B, C and D.

[13] Refer to *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 487 (Mason and Brennan JJ).

[14] In the interlocutory judgment, there were some suggestion of discussions between the IA's lawyers and the CDPP regarding the potential implication of pursuing this path and the extent to which the IA's LPP claims could be protected.

[15] See footnote 3, [62].

[16] It is relevant to note that the IA accepted that it had expressly waived its LPP claims in the parts of the First Accounts that was disclosed in its two meetings with the CDPP in late 2020.

[17] See footnote 3, [149].

[18] Ibid.

[19] See footnote 3, [178].

[20] See footnote 3, [155].

[21] See footnote 3, [188].

[22] It is relevant to note that the steps set out in this paper are not intended to be purely chronological. For example, it is not uncommon for lawyers to approach the ACCC on an anonymous basis seeking a 'marker for immunity without first disclosing the identity of their client for a period of time (usually 1-2 months), during which they can undertake an internal cartel investigation to gather further facts relating to the conduct and decide whether they wish to proceed with the immunity application or not.

[23] For example see Q52 in the "ACCC immunity and cooperation policy: frequently asked questions" (October 2019). See also paragraphs 23(f) and 25 of the "ACCC immunity and cooperation policy for cartel conduct" (October 2019) relating on obligations on IAs to cooperate "*fully and expeditiously on a continuing basis*" and on a "*proactive basis throughout the ACCC's investigation and any ensuing court proceedings*".

[24] See footnote 3, [92].

[25] See s155 (7B) of the *Competition and Consumer Act 2010* (Cth). Please note that the ACCC may seek particulars of the ground on which a LPP claim is made if it is used to resist production of documents in response to a s155 notice: see page 11 of the "ACCC guidelines – Use of section 155 powers" (June 2020).

[26] However, broader considerations as to what the effects of a witness being aware that their evidence is being 'recorded' as against a witness providing their evidence in an 'unrecorded' environment may be relevant to ensure that the potential benefits outweighs downsides (i.e. if it makes witnesses more nervous and less likely to provide complete accounts).

[27] See Q40 of the "ACCC immunity and cooperation policy: frequently asked questions" (October 2019).

[28] While the CMA's policy appears to cover LPP claims in both the civil and criminal context, our focus in this article is strictly on the criminal cartel context.

[29] Refer to, in particular, 3.15-3.23 of the CMA's "Application for leniency and no-

action in cartel case" policy (July 2013).

[30] The CMA's use of 'leniency' applicant in its policy covers both immunity applicants and leniency applicants as is known under Australian law, despite the broad use of the terminology. For ease of reference, where we refer to 'leniency applicants' under the CMA's policy, it is intended to cover both cohorts of applicants under Australian law.

[31] Refer to clause 3.22 of the CMA's "Applications for leniency and no-action in cartel cases" (July 2013, last updated in September 2020) guide.

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