AUSTRALIAN COMPETITION & CONSUMER COMMISSION

Gun jumping risks for merger transactions

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In Australia, merger parties should be aware that some actions they take in anticipation of their transaction completing can expose them to legal action for gun jumping.

What is gun jumping?

In this context, 'gun jumping' is a term used in Australia when merger parties start coordinating their activities or behaving as one entity instead of as competitors during the period *before* a merger or acquisition is completed (including where the ACCC is still conducting a merger review).

Gun jumping conduct, particularly if it involves market sharing or price fixing, will risk breaching Australian competition laws prohibiting cartel and other anti-competitive conduct.

Gun jumping by parties before completion of a merger or acquisition that may be at risk under Australian competition law includes:

- sharing current and competitively sensitive information beyond what is required for integration planning and to conduct due diligence[1],
- placing unreasonable restrictions on the target's business activities or impeding its ability to compete, for example by restricting its ability to make new business investments, and
- taking steps to integrate the acquirer's and target's businesses or to coordinate their pricing or dealings with customers, such as joint marketing or referring the target's customers to the acquirer.

It is important to note that:

- pre-merger gun jumping may breach Australian competition law regardless of whether or not the merger parties notify the ACCC of a proposed transaction, and
- completing a transaction does not remove the risk of the ACCC taking legal action in respect of any gun jumping conduct that occurred before the transaction was completed.

Potential consequences for gun jumping conduct

The ACCC can become aware of possible gun jumping conduct in a number of ways, including while undertaking a merger review or via information from customer/supplier complaints, competitors or whistleblowers.

1 Usually parties implement information-sharing confidentiality restrictions, such as ensuring a select group of employees responsible for viewing competitively sensitive information necessary for merger planning are not also involved in commercial decisions.

Where the ACCC is concerned that merger parties may have 'jumped the gun', it will investigate whether the conduct in question contravenes the prohibitions on cartel conduct in ss. 45AA to 45AU of the *Competition and Consumer Act 2010* (Cth) (CCA), involves an anti-competitive arrangement in breach of s. 45 of the CCA or constitutes an anti-competitive acquisition in breach of s. 50 of the CCA.

While the ACCC can investigate possible breaches of the CCA, only the Federal Court has the power to determine that there has been a contravention of the CCA and, if so, what penalties and other remedies should be imposed. Significant civil and criminal penalties may apply for breaches of the CCA.

Engaging in gun jumping conduct may also delay the ACCC's consideration of the proposed merger, if the ACCC suspends its assessment of a merger while it investigates the conduct.

Case study: ACCC v Cryosite Limited

In February 2019, following proceedings commenced by the ACCC, the Federal Court ordered Cryosite to pay $1.05 million in penalties for engaging in cartel conduct in relation to its 2017 sale agreement with Cell Care Australia Pty Ltd (Cell Care).

Under the agreement, Cell Care agreed with Cryosite that it would acquire Cryosite's cord blood and tissue banking business. At the time of making the agreement, Cryosite and Cell Care were the only two businesses supplying private cord blood and tissue banking services in Australia.[2]

Upon receiving an anonymous complaint about the proposed merger, in September 2017 the ACCC commenced an informal merger review. During that review, the ACCC became aware of possible gun jumping conduct and began a separate cartel investigation into that conduct. In particular, the ACCC became aware that the agreement between the parties included a clause requiring Cryosite to refer all cord blood and tissue banking sales enquiries to Cell Care, including during the pre-completion period.

In December 2017 the ACCC announced that it would discontinue the merger review and not make a decision on whether to grant informal merger clearance, but would continue its cartel investigation into the circumstances surrounding entry into the sale agreement and the closing of Cryosite's cord blood and tissue collection operations.

The ACCC instituted cartel proceedings against Cryosite in July 2018 on the basis that Cryosite had jumped the gun by effectively ceasing to compete with Cell Care before completion of the sale, in breach of the cartel provisions (s. 44ZZRJ and s. 44ZZRK) of the CCA.

Cryosite ultimately admitted that the relevant clause was designed to restrict or limit the supply of cord blood and tissue banking services by Cryosite, and to allocate potential customers to Cell Care, and that, by including the clause in the sale agreement and giving effect to the clause, it had engaged in cartel conduct in breach of the CCA.

In its judgment, the Court emphasised the seriousness of conduct of this kind, noting at [46] that:

> *Market sharing, including when it is undertaken in the context of a proposed or anticipated sale of business, is cartel conduct. And cartel conduct of its nature causes serious harm to consumers, other businesses and the economy.*

and at [47] that:

> *...cartel conduct involving the coordination or integration of competing businesses prior to the completion of a sale can result in permanent structural change to the market.*

The penalties ordered were based on admissions made by Cryosite and joint submissions on penalty made by Cryosite and the ACCC. While the penalties were at the lower end of the maximum available, the Court noted at [88] "*in light of Cryosite's size and financial position, the proposed penalties could not reasonably be regarded as an acceptable cost of doing business, and could be expected to render any risk/benefit analysis materially less palatable to other potential wrongdoers.*"

The Cryosite decision serves as a reminder to businesses that they must remain independent and continue to act as competitors until a merger is completed, even where they have signed a business or share sale agreement.

If they do not, by engaging in gun jumping conduct they risk contravening the CCA and making themselves liable to criminal or civil sanctions, including significant pecuniary penalties.

2 Stem cells in cord blood and tissue are collected at the birth of a child and can be used in the treatment of blood disorders.

Penalties

Legislative provision		Civil penalties	Criminal penalties
Cartel provisions (ss. 45AA to 45AU)	Prohibits cartel conduct, being when parties make and/or give effect to a contract, arrangement or understanding between themselves, and those parties are in competition with each other. Cartel conduct can relate to price fixing, bid rigging, allocating customers/ suppliers/territories, or restricting outputs.	*For corporations:* the maximum civil pecuniary penalty for each act or omission is the greater of: ▪ AUD$10 million, ▪ three times the value of the benefits obtained from the contravention, or ▪ if the benefit cannot be calculated, 10% of the annual Australian sales turnover of the corporate group in the preceding 12 months. *For individuals:* the maximum penalty for each act or omission is AUD$500 000. Individuals who are knowingly concerned in, or a party to, the conduct may also be banned from managing corporations.	*For corporations:* fines of up to: ▪ AUD$10 million, ▪ three times the total value of the benefits obtained from the contravention, or ▪ if the benefit cannot be calculated, 10% of the annual Australian sales turnover of the corporate group in the preceding 12 months. *For individuals:* up to 10 years in jail and/or fines of up to AUD$420 000 per offence.
Section 45	Prohibits the making of, and giving effect to, contracts, arrangements or understandings or concerted practices that have the purpose, or would have the effect or likely effect, of substantially lessening competition.		N/A
Section 50	Prohibits acquisitions that would have the effect or likely effect of substantially lessening competition.	As well as the above, the Federal Court may order divestiture of the shares or assets acquired or may declare the transaction void.	N/A

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