

Foreign cartel cases are providing ammunition for use in local actions

THOSE in the Australian air cargo industry will already be aware that they are subject to an extensive regulatory regime. That regime encompasses compliance with obligations imposed by a number of Government departments, including the Australian Customs and Border Protection Service, the Australian Quarantine and Inspection Service, the office of Transport Security and the Department of Defence. However, of recent time, competition authorities, both here and overseas have focused close attention on alleged cartel activity by those in industry. Parallel to such action by the competition authorities, there have been class actions by customers of the industry who believe they have suffered damage and loss by paying unduly high prices resulting from such cartel activity.

The actions in Australia include proceedings by the Australian Competition and Consumer Commission ("ACCC") against a number of air cargo operators alleging price fixing, which proceedings have expanded on a regular basis to include new operators. At the same time, the Federal Court has recently reinstated a class action being brought against those operators seeking damages for losses from such alleged cartel activities.

The actions in Australia are no great surprise given that proceedings overseas are generally more advanced and have thrown up evidence applicable to the Australian market.

Threat

While action in Australia has, to date, focused on air cargo operators, there has always been the view that such actions would "drill down" to those arranging air cargo such as freight forwarders, whether they be international or local freight forwarders. The European Commission has instituted such action against a number of international freight forwarders already in the European Union. The threat of such actions in Australia has grown larger with the recent announcement that the New Zealand Commerce Commission has instituted proceedings against six (6) international freight forwarding companies implicated in an alleged price-fixing cartel.

The investigations relating to the New Zealand action allegedly commenced in 2007 following a reported confidential application for leniency by one company involved in the alleged cartels.

The immediate proximity of the New Zealand proceedings may give cause to those in the Australian air cargo industry to consider their position in relation to these issues, especially when some benefits do accrue to those who are first to voluntarily disclose the alleged offending conduct and who agree to assist with further inquiries. Even putting to one side past conduct, those in industry should, at the very least, be paying specific attention to ensuring that they do not enter into any arrangement or understanding that could be construed as cartel behaviour in whatever form, whether that relates to understandings as to fixing prices, fixing capacity or arrangements as to the way in which tenders for services are lodged or competition undertaken in the market place.

Penalties

Such attention to future conduct is especially important given that recent amendments to the Trade Practices Act 1974 ("TPA") now provide for significantly increased penalties for cartel behaviour and jail terms for individuals involved in such actions (consistent with jail terms having been imposed on



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executives overseas). These new provisions have been matched with new powers to conduct investigations and secure evidence.

There have also been other recent amendments to the TPA in relation to unit pricing and unfair contracts which warrant close attention if they have not had close attention already.

My view has always been that avoidance is better than cure - regulators look more kindly upon those companies who have demonstrated an intention and effort to comply with regulatory requirements and who put into place practices and directives to ensure that compliance is observed. At the same time, if something does go wrong, my view is also to volunteer those errors at the earliest opportunity and take steps to mitigate adverse consequences, as well as accepting liability and working to avoid future reoccurrences.

If those in industry do not already have a "trade practices" or "competition" compliance program already in place, then they should do so as a matter of urgency.