

UK Cartel Trial Implosion Causes Shockwaves

The collapse of the British Airways collusion case has implications for Australia
writes Caron Beaton-Wells

Just as the British public were waiting on the results of their cliff-hanger election last Monday, so were dramatic events unfolding in the Southwark Crown Court. Four years ago the Office of Fair Trading, Britain's competition authority, had announced charges against British Airways executives for offences relating to price fixing of airline fuel surcharges. The charges arose out of the same allegations that have been made against airlines and their employees around the world, have seen a Qantas executive jailed in the US and have secured in excess of \$40 million in civil fines for the Australian Competition and Consumer Commission to date. The BA case was to be the first contested trial under the UK cartel offence since it was introduced in 2003. The company had already accepted a GBP121 million fine from the OFT but criminal liability applies only to individuals in the UK and, unlike the position in Australia, requires proof of dishonesty.

In an unexpected turn of events last Monday, the prosecution announced withdrawal of the charges and the BA executives walked free. The OFT's decision followed the discovery mid-trial of a year's worth of email correspondence some of which may have been exculpatory and none of which had been disclosed to the defence, contrary to the prosecutorial obligation of disclosure. Virgin, which had escaped prosecution (having won immunity by being the first to confess), had failed to produce the material until the trial had started.

Cartel offences took effect in Australia from July 2009. Are there lessons in the BA debacle for Australia? There are some basic points reinforced by these events. 1. Criminal investigations require different skills and a different mindset to civil investigations. New senior criminal lawyer and investigator appointments were announced by the OFT within hours of the trial's demise. 2. Case selection is critical. Criminal cases should be selected based on the strength of the evidence and not on the profile of the defendants. There is a view in the UK that the OFT had failed this test. 3. In evaluating the evidence, there are risks in relying on the beneficiary of an immunity deal to make out the prosecution's case. The OFT is now reviewing the role of Virgin in the prosecution's failure, including reconsidering its immunity given the obligation of full disclosure to which it was subject. 4. There are substantial merits in having investigation and prosecution functions vested in separate agencies, particularly when the competition authority is inexperienced in criminal proceedings. Ironically, a bifurcated system of responsibility was considered in the original debate over the UK legislation but was not followed through. 5. In the event of a major prosecutorial failure, public criticism will be scathing and reputational damage to the responsible agency unavoidable. The collapse of the BA trial is seen as a major embarrassment for the OFT. The agency has been accused of serious incompetence and there have been calls for the CEO to resign.

There is every reason to think that Australian authorities are aware of these simple precepts. Not least, significant faith is placed here in the role of the Commonwealth Director of Public Prosecutions. While the ACCC will investigate and refer for prosecution, the DPP will decide if and how to prosecute serious cartel conduct. The DPP is an appropriately conservative institution and one with specialist expertise in white collar criminal prosecutions. It can be expected to adhere to its obligations in the carriage of any future cartel prosecution. This will be an important safeguard for both defendants and the ACCC.

Unfortunately, observers have been robbed by the BA trial's collapse of more significant insights – such as how to meet the challenges of proving the elements of a cartel offence (aside from dishonesty which is not an element of the Australian provisions), charging a jury in a cartel trial and sentencing a guilty cartel defendant. There are also broader questions left hanging as to whether the failure of a criminal cartel regime in the UK (if indeed this is what the BA case represents) will deter other jurisdictions outside of the US from criminalising this type of conduct. Is this just a 'bad by-election result for the UK Criminalisation Party', as one commentator has observed, or are the implications likely to be more far-reaching?

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