

REGULATORY INTELLIGENCE

ANZ, Citi, Deutsche cartel 'test case' puts global financial sector on notice

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The Australian competition regulator's aggressive criminal cartel case against ANZ Bank, Citi and Deutsche Bank — along with six senior banking figures — could be just the tip of the iceberg, in a case with major global implications. Industry sources have said the conduct is already under investigation in the U.S. and additional senior people could be dragged in as prosecutors build their case. Risk experts have also warned that the case, if prosecuted successfully, could expose a new wave of systemic misconduct across the global financial sector.

The Australian Competition and Consumer Commission (ACCC) filed an unprecedented criminal case on Tuesday against the three banks and six senior executives over an A\$2.5 billion ANZ share placement in 2015.

The case is set to challenge long-standing financial sector practices around the warehousing of unsold stock that underwriters may acquire during under-subscribed share placements. The ACCC is expected to focus on the banks' cooperation following an ill-fated share placement, which saw the underwriters stuck with 25.5 million shares worth A\$789 million. The Commonwealth Director of Public Prosecutions (CDPP) will allege that the parties entered an agreement to "restrict the output" of ANZ's shares to ensure they did not undermine the market price.

The criminal charges against the six individuals have sent shock waves throughout the financial sector. It is understood that Citi's head office did not know about the Australian charges until they were reported in the media.

Sources said there were well-honed investigative techniques for cases such as these, which relied on suspects "flipping" in return for leniency or immunity. They said the prosecutors would be continuing to build their case and were likely to add more names as the case continues.

Neil Jeans, a financial crime consultant at Initialism in Melbourne, said the case was similar to Libor in the sense that it had targeted a practice that is widespread in the industry. Jeans, who is a former stockbroker, said the competition regulator was likely to be using this as a test case to determine what is acceptable market conduct.

"In Libor the defence was that this was 'normal market practice'. That turned out to be a fairly flimsy defence," he said.

"At the end of the day, if it's common market practice that doesn't make it acceptable. Is it widespread? It wouldn't surprise me one bit. The question now is: could this become the next Libor?"

"Flipping" suspects

The Australian investigation is understood to be taking place with cooperation from securities regulators in the United States. The fourth party to the share placement, JPMorgan, has self-reported the alleged breaches and requested immunity from the ACCC.

A risk expert who has worked on major U.S. securities fraud investigations said there were well-established tricks for gathering evidence in cases like these. He said investigators would be using whistleblower immunity provisions to build a case against the other parties and then "flipping" suspects to get higher up the chain of command.

The charges have already reached the highest management levels at Citi and Deutsche in Australia and the ANZ treasurer, Rick Moscati, has also been named as a defendant.

"To pull together cases like this you need insiders. You need cooperating witnesses. It's all about finding the weak point, applying pressure and getting them to flip up the chain," the ex-law-enforcement investigator said.

"We used to use the phrase 'first on the bus'. We made it very clear there were a limited number of seats and the closer you were to the driver the less time you'd serve. So this could be happening now — not only in Australia but in the U.S. as well."

Professor Justin O'Brien, head of financial regulation at Monash Business School, said the presence of a cooperative whistleblower would be critical to the success of the CDPP's case. He said in criminal cartel cases there was a strong incentive to be the first to claim immunity.

"The key issue here is not whether the ACCC or the CDPP thought they had a case. It's that JPMorgan believed they had a case. It's a case of the prisoner's dilemma," he said.



Professor O'Brien said investigators in cartel cases were very adept at putting pressure on individuals to secure evidence. He said the inclusion of the top figures from Deutsche Bank and Citi in Australia indicated that they had already succeeded in getting people lower down the corporate ladder to "flip" in return for immunity from prosecution.

"It's very unlikely that it will stop here, given the inexorable nature of the 'flipping' process in cartel cases," he said.

The ex-securities fraud investigator agreed: "I don't think this is over yet by any stretch. People could be weighing up taking the fall and facing the music or cooperating with the authorities to reduce their exposure to prison or other penalties. This has a long way to run."

Output restrictions

An Australian competition law expert, who did not want to be named, said the ACCC's case was likely to hinge on "highly technical" aspects of the law. The competition regulator is expected to allege that the defendants reached an agreement to "restrict output" in ANZ's shares following the ill-fated institutional placement.

The CDPP will present evidence, including call recordings, that allegedly show the parties reaching an agreement on the sale of 25.5 million ANZ shares on the secondary market. Prosecutors will argue that this represented cartel activity as it was designed to ensure that the brokers did not tank the ANZ share price by dumping their stock simultaneously.

The ACCC says that output restrictions occur when competitors agree to "prevent, restrict or limit the volume or type of particular goods or services."

"Any business may independently decide to reduce output to respond to market demand, but it is against the law to make an agreement with competitors to coordinate restricting an output," the ACCC's website states.

Professor O'Brien said the CDPP would be likely to present evidence from recorded calls, a webcast and witness statements, among other things.

"ANZ's share price had already gone down on the day of the announcement of the placement. If the truth about the failure to get the placement away had been public, the prosecution will try to argue that it would have been trading even lower," he said.

"The prosecution is likely to argue that ANZ had a vested interest in ensuring that any shortfall, which was held by the underwriters, was released into the market in a staged way that would not precipitate a further decline in ANZ's share price. This all comes down to a governance question."

Regional shocks

The ACCC's criminal case has sent shockwaves throughout the Asia-Pacific region. Financial sector sources said Singapore and Hong Kong were watching closely as Australia pushed ahead with a number of landmark cases, including the Royal Commission; the ACCC case; and AUSTRAC's \$700 million anti-money laundering settlement with the country's largest bank.

The impact is heightened as the ACCC's case targets multinational banks and high-profile individuals who are well known across the region. These include John McLean, Itay Tuchman and Stephen Roberts, formerly of Citigroup; Michael Ormaechea and Michael Richardson, formerly of Deutsche Bank; and Rick Moscati, treasurer of ANZ.

Ben Quinlan, chief executive at strategic consultancy Quinlan & Associates, said the ACCC was leading the charge against individuals in a new era of personal accountability. He said regulators across the Asia-Pacific region had warned market participants they would start taking this approach.

Quinlan said the ACCC case was also sending a clear signal to senior managers that prosecutors would no longer settle for easy targets.

"I think it's part of the ACCC's modus operandi to challenge this view that it's okay to have willful ignorance among senior management. I think their view is that it's very easy to cast blame on lower-level individuals," he said.

Quinlan & Associates has been warning financial services firms that regulators have ushered in new frameworks for accountability, such as Hong Kong's Manager-In-Charge (MIC) regime and the Australian Banking Executive Accountability Regime (BEAR).

Financial services firms and their staff ignore this regional trend at their peril, Quinlan said.

"I think with these criminal charges dropping it's really going to give the industry a prod around their behavior. Those in high-risk functions, or those that expose the bank to degrees of risk, will think twice about taking some of the more suspect actions," he said.

Globally coordinated action

There is growing concern in the industry that the ACCC action against global banks, with JPMorgan as the key Crown witness, has been coordinated at an international level. If that is the case, there is a greater possibility that this case could trigger a spate of voluntary disclosures from international banks. That would provide competition and securities regulators with ample evidence to pursue more claims.

When JPMorgan applied for immunity in Australia it was required under U.S. securities laws to disclose this to the "home state" regulators.



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Jeans said it was likely that anti-trust regulators had been working collaboratively with the Australian and U.S. securities regulators on the case. This type of global cooperation is commonplace in major enforcement cases involving a cross-border element, foreign currencies or multinational banks.

It is especially common in markets that have mutual interests and harmonised laws, such as the U.S., Australia and the UK.

"In terms of understanding the ACCC's motivations, you've got to factor in the US element," Jeans said. "For the ACCC, there was a risk that the US would take action and Australia would be seen to have been asleep at the wheel."

Tackling tone, from the top

Regardless of the outcome in the ACCC case, the message that will reverberate around the world will be in relation to senior management accountability.

Governments and regulators have had enough of financial services firms that are still talking about improving culture and conduct. A decade on from the financial crisis, which brought the global economy to its knees, they now want to see a healthy dose of fear and respect in the market.

"Regulators are now at the point where they're saying, 'It's impossible for things of this magnitude to happen without the people right at the top knowing what was going on'," Quinlan said.

"They don't want to see any more scapegoating, or banks putting the blame on people at the coalface," he said.

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