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Cartel allegations in capital raising underwrites – what can we learn from the ACCC's recent charges?

Presented by:
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Introduction

- ACCC charges in relation to August 2015 ANZ share placement
- Coordination on sell-down by underwriters – output restriction
- Orderly sell-down of shortfall shares reflects understood market practice

Capital raising

ANZ Banking Group $3b capital raise

- $2.5b institutional placement
- Followed by $500m Share Purchase Plan to ANZ retail shareholders

Institutional placement fully underwritten

- Citigroup, Deutsche Bank, J.P. Morgan
- Floor price of $30.95 (underwritten floor price)

Shortfall and underwrite

Book-build under-subscribed

- Shortfall of 25.5 million shares (31.5% of offer)
- Underwrite called on

ANZ completes $2.5 billion Institutional Equity Placement

ANZ today announced it had raised $2.5 billion in new equity capital through the placement of approximately 80.8 million ANZ ordinary shares at the price of $30.95 per share.

ANZ announcement

- Institutional placement completed
- No reference to shortfall or call on underwrite
  - Note NZX Listing Rule 7.14.1

Post-offer

Alleged to have been an agreement between ANZ and underwriters

- Orderly sell down
- Agreement on one or more of price, timing and volume of sell down?

"The allegations involve an area of financial markets activity that has not been considered by any Australian court or addressed in any regulatory guidance notes previously published by the ACCC or the Australian Securities and Investments Commission (ASIC). This is a highly technical area and if the ACCC believes there are matters to address, these should be clarified by law or regulation or consultation."

"As required by the Market Integrity Rules, Citi also effectively participated in orderly capital markets to ensure that the required outcomes for ANZ and its shareholders were achieved."

ACCC allegations

"An arrangement or understanding"

- Australian Director of Public Prosecutions laid criminal charges for cartel conduct against ANZ, a local unit of Citigroup, and Deutsche Bank
- Also laid criminal charges against several senior individuals at each company

Output Restriction

- "Controlling the output or limiting the amount of goods and services" available to buyers

The newly-defined 'cartel provision'

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- Price fixing: agreeing with a competitor to fix, maintain or control prices:
  - *"price includes not only headline prices, but credits, discounts, rebates and potentially any significant component of cost".*
- Restricting output: agreeing with a competitor to restrict, prevent or limit output.
- Market allocation: agreeing with a competitor to allocate customers, suppliers or territories.
- Applies to both procurement (inputs) and sales (outputs).
- Applies to parties "in competition"
  - This necessarily implies competition in a relevant antitrust "market"

"renovation rather than revolution" – NZCC

The Court may see that differently.

Cartel criminalisation is back in NZ

National had removed proposed 7 year max jail sentences for cartel conduct

- risks of chilling procompetitive conduct > benefits of deterrence

Labour reintroduced Bill in February (currently before Commerce Select Committee)

The new NZ cartel exemption

- The collaborative activities exemption will apply where:
  - Competitors are combining their businesses, assets or activities in some way in a commercial activity.
    - May be "one off" collaboration, so long as there is sufficient integration of activities
  - The parties' prevailing purpose must be "benign" or "pro-competitive", eg:
    - To combine their different capabilities;
    - To attain economies of scope; or
    - To achieve some environmental or health & safety purpose;
  - The cartel provision is objectively "reasonably necessary" at the time it is entered into, which requires that it significantly:
    - Reduces the parties' risk;
    - Reduces the cost of achieving the purpose;
    - Shortens the timeframe to achieve the purpose;
    - Aligns the parties' incentives.

Broader climate

- ACCC charges should be viewed in the context of the broader regulatory climate:
  - Post-GFC regulatory action worldwide in respect of banks and investment banks
  - Australian Royal Commission
  - ASIC's focus on conduct in capital raisings

Lessons for the industry

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- Book managers
- Underwriters
- Bidders into a bookbuild/syndicate

Questions?

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