That price is a steel!

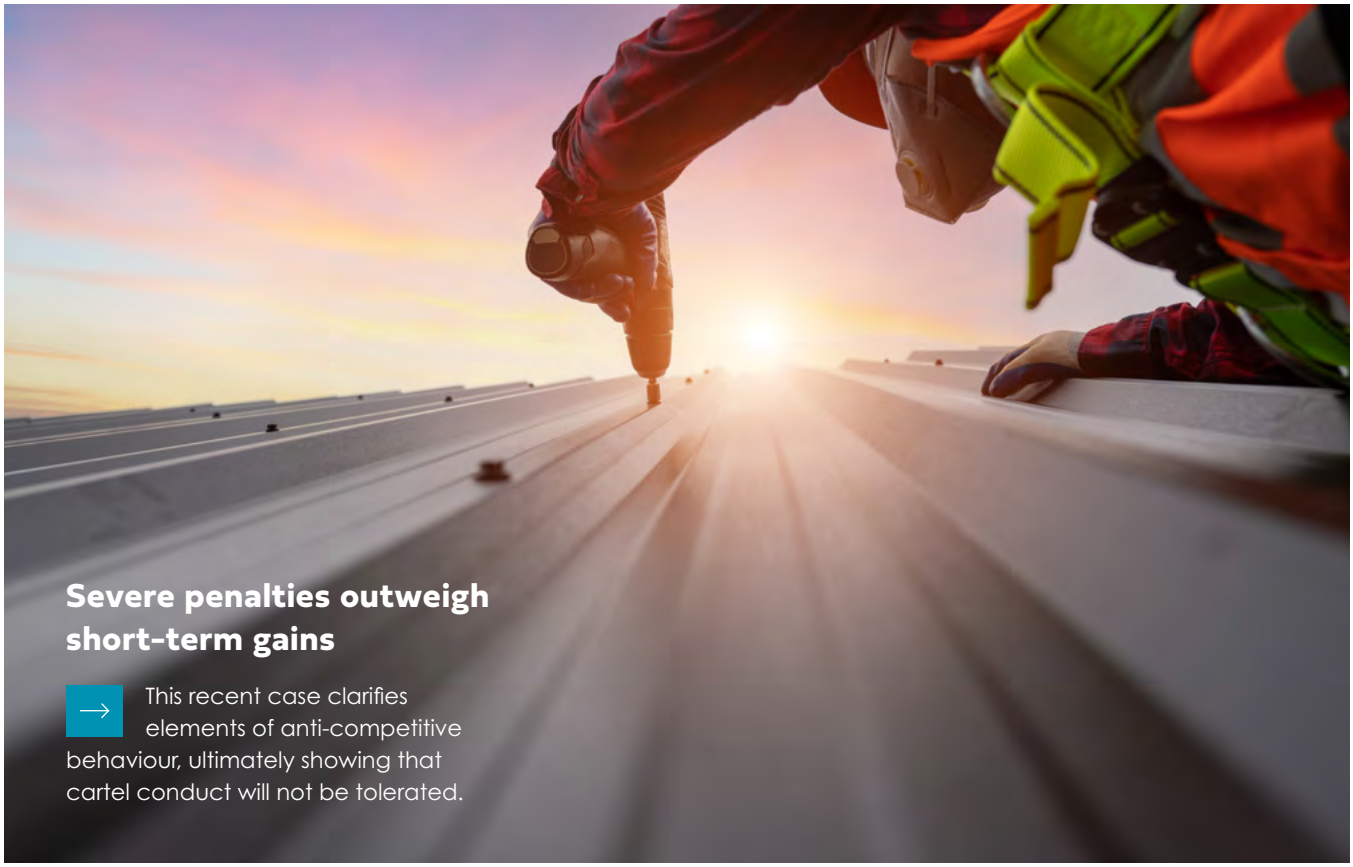
Federal Court of Australia irons out the downsides of joining a cartel

WRITTEN BY ALEXANDER LYALL

The Federal Court of Australia (the **Court**) has issued its deliberation on a long-running attempt by a manufacturing and distribution company to engage in cartel conduct. *Australian Competition and Consumer Commission v BlueScope Steel Limited* (No 5) [2022] FCA 1475 is a sharp reminder that consumer protection agencies, both in Australia and New Zealand, will not let crime pay.

Background

BlueScope is a leading manufacturer of flat steel products in Australia, a component vital to the construction industry. Following the global financial crisis in 2008, an over-supply of these products led to lower-than-average prices. It was in this market context that BlueScope began having conversations about pricing with competitors and this was picked up on by the



Severe penalties outweigh short-term gains

→ This recent case clarifies elements of anti-competitive behaviour, ultimately showing that cartel conduct will not be tolerated.

Australian Competition and Consumer Commission (the **ACCC**). The ACCC consequently began proceedings against BlueScope for this alleged anti-competitive behaviour.

Anti-competitive behaviour and cartels

A cartel is created when parties in the same market, or who may likely be in the same market, agree to set aside their relationship as competitors for the purpose of maximising profits. Conduct can cover price fixing, sharing markets, rigging bids, and controlling the amount of goods or services produced. Cartel conduct has now been criminalised in both Australia and New Zealand, irrespective of whether the outcome actually impacts competition, due to the negative impact it has for consumers.

ACCC alleges cartel conduct

The ACCC alleged that around September 2013, BlueScope's manager had developed a strategy to enhance the profit of sales of flat steel products. The strategy consisted of three approaches. It would:

a. provide competing distributors with a recommended resale price for flat steel products higher than the market price – this included distributors who did not distribute BlueScope's product;
b. persuade distributors to use the recommended resale price to adjust the price at which those distributors would sell flat steel products to steel users; and
c. cause its own distributors, BlueScope Distribution and New Zealand Steel, to set their prices for flat steel products in accordance with the suggested or recommended resale price.

According to the ACCC, Bluescope's manager also developed a separate strategy to limit competition from overseas steel manufacturers. One of the pillars of this strategy was the threat to bring anti-dumping applications in the courts of the countries in which competitors were based, unless the price of the product in Australia was increased.

Unfortunately for BlueScope, it had inadvertently provided a document evidencing the alleged conduct to ACCC when it sought a merger clearance back in 2013. The document detailed a price list and a strategy to ensure it was followed by its distributors.[1]

BlueScope's defence

BlueScope relied on the fact that recommending a resale price is not

1 The admissibility of the document was discussed and approved by the Federal Court in 2021, see *Australian Competition and Consumer Commission v BlueScope Steel Limited (No 3)* [2021] FCA 1147.

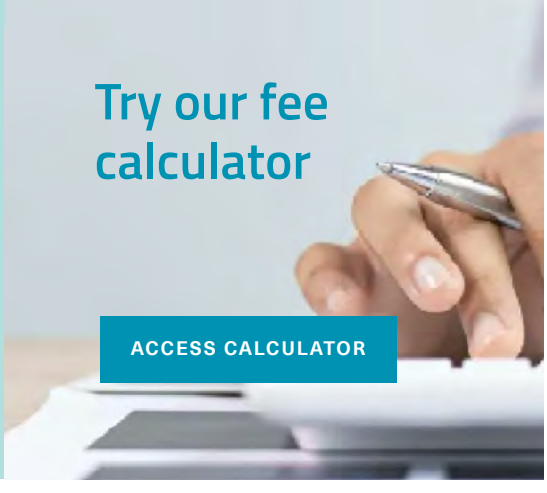
in itself illegal; cartel conduct would only occur when there is an attempt to induce such conduct. BlueScope did not deny that conversations had occurred regarding the retail price. However, according to BlueScope, these conversations had not been done to encourage competitors to increase their prices. BlueScope highlighted three elements about its manner which showed that there had been no attempt to engage in cartel conduct:

- a commitment had not been sought by BlueScope that the counterparties charge certain prices;
- regardless of whether BlueScope sought such a commitment, none was given; and
- nothing was offered in return by BlueScope for such a theoretical commitment.

Decision

With the evidence considered, Justice O'Bryan found it clear that BlueScope and its manager *intended to induce a consensus or meeting of the minds*; which is prohibited conduct under the Competition and Consumer Act 2010. The case treats each different meeting separately, looking at whether there has been an inducement in each of the purported arrangements.

Analaysing each element of the cartel test, point by point, Justice O'Bryan reached the conclusion that BlueScope and its manager had



in fact engaged in cartel conduct. The specific arguments of BlueScope were rejected on the basis that *an attempt to induce a price fixing understanding does not require assent to be achieved*. Furthermore, it is unnecessary for the conduct to *have reached an advanced stage or that the precise terms of the proposed understanding have been formulated*. The Court expanded upon this point by clarifying that engaging in cartel conduct does not require the following factors:

- for the inducement offered to include a specific commercial advantage (the inducement of an *opportunity* was sufficient); or
- for one party to explicitly ask another party for assurance; or
- mutual commitment to be achieved by the parties; or
- for the terms of the proposed understanding to be at an advanced stage.

Engaging in an assessment of the commercial objective of the strategy, the Court found it certain that the purpose was to enable the distributors to increase their profits. The level of involvement by the manager showed the clear intention of creating favourable market conditions for the product. Actions like threatening to allege breach of anti-dumping provisions, for example, were directly tied to attempts to have international competitors increase their prices.

Although the manager had been the instigator of the cartel conduct, the Court held that BlueScope was equally as responsible. A company will be held responsible for the actions of its directors, employees and agents if their conduct was within the scope of their position within the company. The Judge found that to be the case here.

On 3 April this year, a hearing on penalties will occur.

Cartel conduct in New Zealand

Cartel conduct has recently become a criminal offence in New Zealand. Previously, the Commerce Commission could only bring civil proceedings against a person or business who engaged in cartel conduct. Penalties were accordingly limited to fines and orders such as banning orders against directors and managers. However, since April 2021 it has been a criminal offense under section 30 of the Commerce Act 1986 to enter into such an arrangement. Under section 82B, guilty parties can receive a sentence of up to seven years' imprisonment. Alternatively, a fine of up to $500,000 could be imposed.

For companies, the sanctions are also severe. Whichever is the highest of the following may apply:

- a fine of up to $10 million;
- the tripling in size of the commercial gain resulting from the breach; or
- 10% of a company's annual turnover during the accounting period in which any cartel provision was operating.

As in Australia, New Zealand's Commerce Act acknowledges that there are circumstances where intra-competition collaboration is necessary. Sections 31 to 33 of the Act allow for collaborative activities, vertical supply contracts and promotion agreements. The Commerce Commission has produced a guide sheet on cartel conduct to help identity the type of activities contemplated by the Commerce Act.

Conclusion

The Court's decision should be seen as welcome news by the construction industry. If the conduct were not discovered, and then confirmed as illegal by the Court, then the price of flat steel would have undoubtedly gone up. This would inevitably have been passed onto the consumer. The decision also demonstrates the robustness of the ACCC's investigation process. Cartel conduct can and will be caught. As the case reminds us, any short-term gains made by such conduct will very likely be completely, and dramatically, undone by the severe penalties incurred.

About the author

Alexander Lyall is a Research Clerk in The ADR Centre's Knowledge Management team working with BDT. He gained his LLB from the University of Canterbury, and he also holds a BA in political science, media studies, and Te Reo Māori. His writing has previously been published by Radio New Zealand, The Spinoff and The Press.