

A two-year probe by Australia's consumer watchdog has resulted in [criminal charges](#) against ANZ, Citigroup and Deutsche Bank, as well as six of their senior executives, over alleged "cartel-like" behaviour.

The case, brought by the Commonwealth Director of Public Prosecutions (CDPP) after an investigation by the Australian Competition and Consumer Commission (ACCC), is the second prosecution of its kind to be brought in Australia since competition laws were tightened almost a decade ago.

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The banks and six investment bankers are charged with cartel conduct related to the sale of A\$2.5 billion worth of unsold ANZ shares to investors in August 2015. The ACCC [alleges](#) that senior executives from the three banks colluded in the way they dealt with these shares.

The exact details of the alleged criminal conduct will only become clear at a Sydney court hearing on July 3, 2018.

### What is cartel behaviour?

Cartels are forms of anti-competitive conduct where cartel participants decide to stop competing and start colluding. Australian civil law has banned cartels for decades. But the practice only became a [criminal offence in 2010](#). Only its serious forms are subject to criminal law; civil law still governs the rest.

Cartels can take different forms. In the most common instance, participants collude by setting their prices. Other forms include: output restrictions; dividing markets among cartel participants on mutually agreed terms; and bid-rigging, in which a commercial contract is decided in

advance but other operators put in sham bids to give the appearance of competition.

There is one primary reason why businesses or executives would stop competing and start colluding: profit. In short, cartel participants cheat to get more money, creating higher prices and lower output in the process. This disadvantages consumers, the economy and society at large.

But proving criminal collusion in a court is harder than it might seem.

### **Beyond reasonable doubt**

Although we need to wait for the case to unfold to find out more, what we can tell at this stage is that the ACCC and the CDPP perceive the alleged conduct as serious enough for it to constitute a criminal case. Criminal cases are harder to prove than civil cases. Cartel collusion must be proved beyond reasonable doubt, and the evidence has to show that the individuals involved knew (or believed) that they were colluding.

What these charges also show is that the ACCC and the CDPP are prepared to go after the most powerful corporations and their executives for alleged cartel-like conduct. This is an enormously important step for deterrence, because criminal charges are naturally more attention-grabbing than civil lawsuits.

Charging high-ranking bank executives will potentially make the deterrent more effective still, because high-ranking executives set the cultural tone for their organisations.

Research has shown that significant prison time – or the threat of it – for individuals is a more effective deterrent than civil penalties; especially if the penalties are not high enough, as was argued in the [recent OECD report on corporate penalties for cartels in Australia](#). The report showed that the penalties applied in Australia were low in comparison with competition law regimes in the European Union and the United States.

### **Just the beginning?**

This is the second Australian criminal case of cartel conduct – the first involved a [Japanese](#)

### [company shipping cars to Australia](#)

. We can reasonably expect more of these kinds of charges in the future, given that the laws are only eight years old and investigations of this type typically take years to reach fruition. (The alleged cartel conduct in the latest case took place in August 2015, almost three years ago.)

There are differences in investigation procedures between criminal and civil cases, to ensure that collected pieces of evidence are admissible in a criminal proceeding. It is ultimately the CDPP's (and not the ACCC's) decision whether or not to prosecute.

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The final step is for criminal proceedings to be prosecuted. The first cartel criminal case, which concerned the shipping industry, can be perceived as successful, with two global shipping companies pleading guilty.

It is still early days for Australia in terms of tracking down and punishing examples of cartel behaviour via criminal prosecutions. But the latest developments suggest that Australia is prepared to follow the example of the world leader in successful cartel-related criminal prosecutions: the United States.

The US criminal regime is one of the oldest in the world, having existed since 1890. The US boom of cartel-related criminal cases began in the late 1990s with the lysine cartel and the vitamin cartel and with the first foreign national being sentenced to imprisonment in July 1999. One of the first criminal cartel investigations inspired the production of the 2009 movie [The Informant!](#)

The numbers further illustrate the success of the US criminal prosecutions. For instance, [27 corporations and 82 individuals were charged in the fiscal year 2011](#)

## Criminal charges against banking 'cartels' show Australia is getting tough on competition law

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. Australia has a long way to go before it can match those numbers.

*Barbora Jedlickova has received two Ian Potter Foundation grants which are unrelated to this article.*

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