Opinion

The ACCC has failed on consultation, say ANZ cartel case lawyers

The competition regulator's case against ANZ and its underwriting banks was disproportionate, over the top in its pursuit of criminal charges against individuals, and came without warning of a new approach.

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There are no surprises in the vow of outgoing Australian Competition and Consumer Commission Chair Rod Sims not to ease up on "the banks" following the prosecution's comprehensive surrender in the ANZ cartel case.

The case involved allegations of cartel conduct following an ANZ capital raising in 2015.

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From the very beginning of this sad chapter, the ACCC has failed to display an important regulatory principle: consultation.

Companies benefit from engaging multiple banks to pull together large and complex capital raisings. Once mandated, it is expected that the banks act cohesively and with a single combined purpose.

Those banks need to be true to the investors who participate. This includes ensuring that the aftermarket is unaffected by their conduct (like gun-jumping each other to sell-down residual shares not taken up by investors who participate in the raising).

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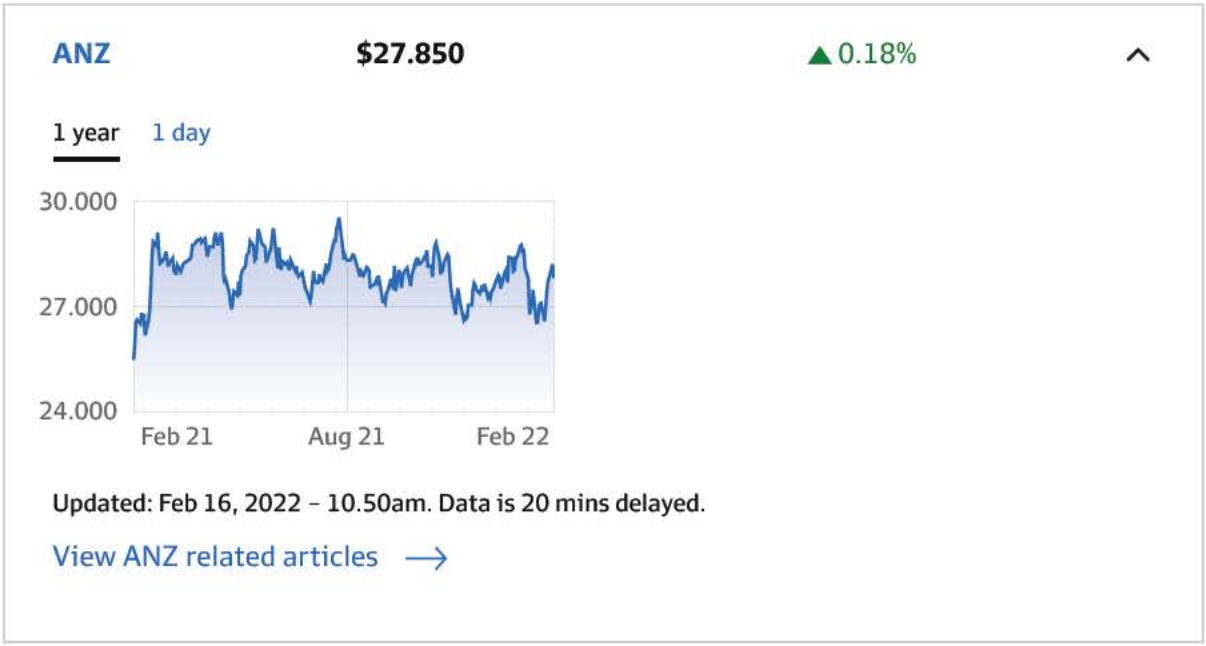

In this circumstance the banks are not competing in building a book of demand for equity, so why would it make sense that they should be constrained in dealing with any residual shares in an orderly way?

Even if anyone could find a sensible answer to that question, the ANZ case went down the wrong path in two ways.

First, it would seem that given the heart of the matter is capital raising execution practices, it feels like something that ASIC should take the lead on.

Second, and more importantly, the ACCC pursued a criminal case against individuals that should, at best, have been pursued as a civil (non-criminal) action

against the companies. As barristers for the accused pointed out last week, the human toll of defending proceedings cannot be measured.

The ACCC had long advocated for cartel conduct to be a criminal offence. What it failed to appreciate is that with greater power comes greater responsibility – a responsibility not to test novel and finely balanced legal arguments when an individual's liberty is at stake.

Stepping back, a regulator ought to have the wisdom to raise a globally novel area in a discussion paper or draft guidance note. It should socialise its concerns and seek comment from market participants and others to engage in a sensible debate on the pros and cons of new angles of regulatory scrutiny.

Even that step alone is likely to create an environment of caution while consultation evolves and the issues under consideration are aired. This, combined with a public education campaign, is a tried and tested way to affect market conduct in a measured but effective way.

The ACCC did not do this with the cartel case. The launch of this case, at a time when ASIC was under fire in the royal commission into banking, was a step that surprised a sophisticated market – one that invests significant effort in compliance. Instead, it extracted headlines at huge personal cost to individuals unlucky enough to be caught up in the whole catastrophe.

The fact that the case was a "shemozzle" from start to its abrupt finish – especially the way witnesses were handled – was more of the same.

We should be very clear. Regulators need to be given the freedom to launch (and sometimes lose) litigation because there are times when only a court can clarify or delineate ambiguous laws or regulations. This situation did not fall into that category.

In fact, it arose from a bigger mischief. As we have argued elsewhere in *The Australian Financial Review*, the urging from the royal commission – "Why not litigate?" – was an unprincipled quip with unintended and unacceptable results.

Other regulators are resetting their approach to litigation and have declared a more nuanced assessment to the "Why not litigate?" question. In that context, why double-down with media releases? If anything, it is deserving of some contrition and reflection, particularly given the human cost.

When you think of all the good things the ACCC has done over its history, and the high quality of regulators in Australia by reference to global standards, this episode

requires serious reflection. It does not need a vow to keep at what should never have been done to begin with.

Our regulators, including the ACCC, are usually better than that.

The authors are partners of King & Wood Mallesons, which acted for one of the bank defendants in the case.