



Cracking Cartels International and Australian Developments

**24th November 2004
Graeme Samuel, Chairman**

Cartels are a cancer on our economy.

Their price fixing, bid rigging and market sharing are a silent extortion that in many instances do far more damage to our economy, to business, and to consumers, than many of the worst consumer scams

They steal billions of dollars both here and abroad from business, from taxpayers and ultimately from you and me as consumers in higher prices.

But the damage can extend far beyond higher prices. By controlling markets and restricting goods and services cartels can put honest and well run companies out of business while protecting their own inefficient members and stifling innovation.

Just look at the damage done right here in Australia from these three cartels before they were detected and busted by the ACCC.

- From the 1970s until the early 1990s, three express freight companies, which controlled 90 per cent of the Australian market worth between \$1 billion and \$2 billion per year, fixed prices and divided up the market to protect themselves from competition. If a customer switched companies, on occasions they even went so far as to deliberately lose or damage freight to encourage their return to the original carrier.
- From 1989 to 1994 a Queensland pre-mixed concrete cartel divided up between them the sale of \$1.1 billion worth of concrete. Over the course of more than 50 meetings the cartel participants fixed prices and agreed not to compete on specified major projects. They even engaged an accountant to monitor market shares to ensure no-one 'cheated' on the illegal fix.
- The Queensland fire protection cartel, which ran for 10 years until 1997, rigged contracts worth more than half a billion dollars across almost the entire fire alarm and fire sprinkler installation industry in Brisbane. The participants referred to the regular meetings they held to fix tender prices as the 'Coffee Club'.

But cartels don't just affect multi-million dollar contracts. Our Sydney office last year investigated concerns about tenders for a government contract for fishing rights in lakes in Western NSW.

All the tenderers offered very similar prices and even gave the same fax number as the contact point. It turned out that a bunch of professional

fishermen who belonged to the same association had all agreed to use the same lawyer to prepare the tenders, and had agreed on the price.

So cartels can range from very small scale local arrangements to huge multi-national operations seeking to control markets across the globe.

Regardless of their size, the Australian Competition and Consumer Commission regards fighting this insidious and damaging behaviour as a major priority of our enforcement programme here within Australia and as part of a global network of competition agencies in detecting and breaking up international cartels.

That's one of the principal reasons why we organised this conference - Cracking Cartels – so we could bring together some of the world's leading competition practitioners and regulators.

This conference provides an opportunity to hear first hand the latest developments in anti-cartel enforcement from around the globe from the world's leading cartel investigators. The conference also provides a unique opportunity to learn more about the International Competition Network's efforts towards detecting and stopping cartel conduct. Many of the conference speakers and panellists are in Sydney to participate in the ICN Cartels and Leniency Workshops which were hosted by the ACCC over the past four days.

Today I am announcing three important developments to further the fight against cartels right here in Australia:

- A formal review of one of the principal tools in the ACCC's armoury for fighting cartels – our leniency policy
- The establishment of a dedicated cartels team within the ACCC
- A new campaign to assist government agencies to detect and report cartel behaviour in government contracts.

Role of the ACCC

Enforcement of Australia's cartel law falls to the Australian Competition and Consumer Commission.

Cartels are outlawed under subsection 45(2) of the *Trade Practices Act* ("TPA") which prohibits contracts, arrangements or understandings which:

- have the purpose, effect or likely effect of substantially lessening competition; or
- contain an exclusionary provision.

The Commission has currently identified 40 suspected cartels, with 21 under intensive investigation, a further 5 cases in litigation and others recently concluded.

Unlike some other jurisdictions, the ACCC has no power to issue on the spot fines or penalty notices if it believes a breach of the law has occurred.

Rather, we become the applicant in civil proceedings in the Federal Court of Australia.

Like any other litigant, we must prove our case to the Court. Because of the seriousness of the allegations, the standard of proof required is higher than the traditional civil “balance of probabilities” standard – but lower than the usual criminal “beyond reasonable doubt” standard.

In enforcement proceedings, the ACCC can seek a range of remedies for breaches including:

- declarations that the conduct was unlawful;
- penalties (in the case of cartel conduct, a maximum of \$10 million per breach for corporations and \$500,000 per breach for individuals);
- injunctions banning repeat conduct and/or requiring those involved to undertake compliance training or put in place trade practices compliance systems; and
- damages for those who have suffered loss by reason of the unlawful conduct.

Some recent examples of cartels against which the ACCC has successfully taken action include:

- George Weston Foods – where a former divisional chief executive telephoned a competitor seeking to fix the wholesale price of flour. Even though the competitor did not agree to the scheme, the intent alone was enough to earn George Weston a \$1.5 million fine. We were alerted to this failed scheme via an anonymous tip-off.
- The power transformer cartel - in which, for several years, companies fixed the tender price of power transformers through secret meetings that took place in hotel rooms, airport lounges and private homes across Australia. Ultimately, record penalties totalling \$35 million were awarded against the companies and senior officers involved. Again, this cartel was exposed through an anonymous email tip-off.
- Metro Bricks, which agreed in phone calls and meetings with its rival Midland Bricks simultaneously to lift the price of bricks by three per cent, and set a floor price for tender pricing for major builders (in Western Australia). Metro bricks was penalised \$1 million.

Leniency Policy

The brick fix was exposed when Boral, the parent company of Midland, voluntarily came to the ACCC to take advantage of our leniency policy. In so doing, Midland escaped financial penalty while its co-conspirator copped a \$1 million fine.

Our leniency policy goes back to 1998 when the ACCC published a guideline dealing with cooperation which offered partial or complete immunity from ACCC action in return for cooperation from offenders.

The cooperation policy was complemented with a formal leniency policy initiated in 2003. This policy contains a firm offer of immunity for companies and individuals but is available for *cartel conduct only*.

The decision to go down this route was an explicit acknowledgment that the secretive nature of cartels meant that they would often only be exposed by whistleblowers – by those persuaded to break the code of silence.

Under the leniency policy, the ACCC offers:

- immunity from ACCC initiated proceedings, where the leniency applicant is the first to disclose the existence of a cartel of which we were previously unaware; or
- immunity from pecuniary penalty, where the leniency applicant is the first to make an application for leniency in relation to a cartel of which the ACCC was aware, but for which we had insufficient evidence to commence court proceedings.

But the leniency policy comes on conditions – it is only available if those seeking leniency:

- give full and frank disclosure, co-operating fully, expeditiously and continuously with the ACCC,
- cease involvement in the cartel;
- were not the instigators of the cartel, nor have coerced others into participating in it; and, importantly,
- were first through the door.

I want to emphasise the requirement of full cooperation. This is not just paying lip service to the notion, or even providing all available information relating to the cartel activity. It also involves full cooperation with the investigation processes of the Commission, including for example maintaining confidentiality of investigations to avoid tipping off co-conspirators.

If a corporation qualifies for leniency, all directors, officers and employees of the corporation who admit their involvement will also receive leniency. However, there are specific provisions and conditions dealing with individual leniency applicants.

So, the policy makes cartel lawbreakers and their executives an offer to cease the unlawful conduct and report it to the Commission. In return they receive a clear and certain offer of leniency. Their evidence then exposes others involved who will be investigated and, if the evidence permits, brought before the courts.

But only if they were the first to expose the cartel, or the first to come forward once the ACCC began its investigations.

While those companies that are penalised may regard this as unfair, any plea for parity of treatment is unlikely to carry much weight with the courts.

In the December 2003 *Tyco* case¹, Justice Wilcox noted:

“It is sufficient to say that, because of the existence of the leniency agreement, there can be no valid argument for parity in outcome as between Tyco and FFE. If this approach leads to a perception amongst colluders that it may be wise to engage in a race to the ACCC’s confessional, that may not be a bad thing.”

Earlier this year we witnessed a pretty good example of that race to the confessional from companies in one alleged cartel we had under investigation.

As the solicitor acting for one of a number of (too late) leniency applicants wryly observed: “What you’re telling me is that the leniency carrot has already been eaten.”

And that carrot could soon be about to get a lot sweeter.

Currently, Australia’s cartel enforcement regime is a civil one. That means no-one goes to jail for participating in a cartel. However, the Dawson Committee recommended that (subject to further work on the detail) criminal penalties be introduced for hard-core cartels.

The ACCC has been a strong advocate of introducing criminal penalties and was represented on a working party that reported to the Treasurer on how criminal penalties can be introduced following the Dawson Committee recommendations.

Cartel behaviour is, in reality, a form of theft and little different from classes of corporate crime that already attract criminal sentences. However, it is not always perceived this way.

In his judgment in the *Transformers* matter², Justice Finkelstein articulated this point well, saying:

“Generally the corporate agent is a top executive, who has an unblemished reputation, and in all other respects is a pillar of the community. These people often do not see antitrust violations as law breaking...”

“... there is a great danger of allowing too great an emphasis to be placed on the “respectability” of the offender and insufficient attention being given to the character of the offence. It is easy to forget that these individuals have a clear option whether or not to engage in unlawful activity, and have made the choice to do so.”

Cartel activity will not be deterred if the potential penalties are perceived by firms and their executives to be outweighed by the potential rewards. This is where criminal sanctions are qualitatively different.

¹ *Australian Competition and Consumer Commission v FFE Building Services Limited* [2003] FCA 1542, at para 29-30

² *ACCC v ABB Transmission and Distribution Limited (No. 2)* [2002] FCA 559, at para.28.

A paper presented at the EU Competition Law and Policy Workshop found that even in jurisdictions where the regulatory authorities have strong investigatory powers:

- only one in six or seven cartels is detected;
- the average length of a cartel is six years;³ and
- the cartel increased the prices of affected commodities by 10% when taking into account all factors.

Using these estimates, Woulter Wills,⁴ the paper's author, calculates that a penalty would not deter price fixing unless it was at least 150% of the annual turnover in the corrupted market.

Under this formula, Australia's current maximum penalties would not appear to be a sufficiently strong deterrent compared to the rewards on offer for participating in cartels.

The ACCC therefore welcomed the *Dawson Committee's* recommendation for an increase in the maximum penalty for cartel behaviour to \$10 million or three times the gain from the contravention or where the value cannot be determined, 10 per cent of the annual turnover of the body corporate and its related bodies – whichever is greater.

A bill making changes to this effect was before parliament when the election was called and the increased penalties have bipartisan support. If implemented, such changes should reduce the risk of pecuniary penalties being seen as merely a cost of doing business, as just another tax on a minor misdemeanour.

However, financial penalties alone are not the answer. Another US study of almost 400 firms convicted of price fixing⁵ estimated that optimal penalties would have bankrupted at least 58% of those firms. And even if a company does survive, penalties will often ultimately end up being passed on to the consumer in the form of higher prices.

A criminal penalty on the other hand has no such qualifications – it is a penalty from which no company or shareholder can be forced to pick up the cost.

Jim Griffin, who recently announced his resignation from the position of Deputy Assistant Attorney General of the US Department of Justice Anti-trust Division, last year told Commission staff that in his 25 years prosecuting cartels he had listened to many accused say they would gladly pay a higher fine to avoid imprisonment but he had never once heard anyone offer to spend extra days in jail in exchange for a lower penalty recommendation.

³ Bryant and Eckard, *Price Fixing: The probability of getting caught*. The Review of Economics and Statistics 1991 at 531.

⁴ *Does the effective enforcement of articles 81 and 82EC require not only fines on undertakings but also individual penalties, in particular imprisonment?* (2001) EU Competition Law and Policy Workshop Proceedings.

⁵ Cray Craft and Gallo *Anti trust sanctions and a firm's ability to pay* (1997) 12 Review of Industrial Organisation 171.

To illustrate he spoke of a senior executive who explained that:

‘So long as you are only talking about money, the company can at the end of the day take care of me – when you talk about taking away my liberty, there is nothing that the company can do for me.’

Leniency Policy review

We believe our leniency policy is proving to be a very effective incentive for exposing cartels that might otherwise have escaped detection, or escaped detection for longer.

But with any new program there are always improvements that can be made and the 10 applications we have received for leniency since the policy was introduced 17 months ago have raised several key issues about its future operation and effect.

Therefore, as foreshadowed at the time the policy was announced, I am today announcing a review of the leniency policy, releasing a discussion paper that canvasses a number of issues upon which the ACCC is seeking comment.

- ***Recognition of “Markers”***

Under our existing rules, applicants for leniency must give their full name and address, and a fairly comprehensive outline of the cartel conduct.

In the United States it is possible to “put down a marker” and establish whether an amnesty is available and thus secure a place as the first in line, before being required to provide full details.

The benefits of such a change would be that it would further encourage the “race to the confessional”, particularly in circumstances where the applicants themselves may not yet be in possession of all of the details of their company’s involvement in a cartel, but don’t want to miss out on the leniency offer by delaying further. If the ACCC recognised a marker, it would be expected that a tight time limit of 28 days would be applied for the presentation of full information, to prevent abuse of this rule.

- ***Offering leniency to both corporations and individuals at the same time***

Under the “first through the door policy” once an individual has obtained leniency for exposing a particular cartel, no one else can benefit.

There may be circumstances where it is beneficial to also extend leniency to a corporation as well, especially where the first individual has only limited knowledge of the cartel.

However, this would not work in reverse as there does not appear to be any justification for offering leniency to an individual once a corporation has come forward.

- ***Accepting further leniency applications once the original leniency application has been rejected, revoked or withdrawn***

The ACCC's current policy is that once an application for leniency is received, no other person involved with a particular cartel can benefit, regardless of the outcome of that application.

We believe it would be desirable to amend the leniency policy so that in cases where an application was refused, revoked or withdrawn, another applicant may then be eligible to take advantage of the policy.

- ***Raising the threshold for ACCC "awareness" of a cartel***

The ACCC currently only grants full immunity when a leniency applicant alerts us to a cartel of which we had no prior knowledge. This means that even in cases where we may have had some knowledge but have not commenced an investigation – a leniency application may not be eligible for full Part A immunity.

A less onerous threshold may be more appropriate. One option would be to set the threshold where the ACCC's knowledge of the case had not reached the stage where we had information sufficient to enable us to exercise our compulsory evidence gathering powers.

- ***Interaction between leniency and cooperation policies***

The leniency policy ONLY applies to cartel conduct and can offer immunity from prosecution. The cooperation policy applies to all forms of conduct and allows the ACCC more discretion, but the applicant less certainty, as to outcome.

We are seeking comment on whether the interaction between the two policies can be improved, while maintaining the pre-eminence of the leniency policy – the cooperation policy must not be allowed to water down the incentive provided by the leniency policy to report cartel behaviour to the ACCC.

- ***Paperless or "oral evidence" only applications***

A number of leniency applicants have requested they be allowed to only give oral evidence and even make a formal application over the phone or in a meeting - avoiding giving the ACCC anything in writing. This minimises the risk to them that they, or the ACCC, will be required to disclose written evidence on subpoena that could assist a third party to claim damages. On the other hand, it must be acknowledged that it will be necessary for the ACCC to make its own record of the details of the application, including the name of the applicant at the time of the application.

- ***Leniency for applicants who have not breached the Trade Practices Act***

Some applicants, out of caution, seek leniency for cartel conduct that is not ultimately found to have breached the Trade Practices Act. It may still be helpful to receive this evidence, but on the other hand it may be seen as a wasteful use of our resources.

- ***Publicising the role of leniency applications in cartel investigations***

The ACCC is committed to transparency, but leniency applications are by their very nature confidential. One way of making this process more transparent would be through media releases after court proceedings are finalised which outline the role of a leniency application in a case and a mention in our annual report of the number of leniency applications for the year.

However, any reporting must take into account any disincentives this may create for potential applicants.

All these proposals reflect the initial thinking of the ACCC and we are seeking comment by January 30 so we can finalise our review and further enhance this important weapon in the fight against cartels.

Cartels team

As you might expect, the Commission's Enforcement and Compliance Division has already made cartels its top priority.

However, we believe the formation of a dedicated Anti-Cartels Team within the Commission will enable us to apply the Division's extensive skills and experience in a more structured and focussed manner.

The Team, which commenced operation at the start of this month, will not take over the routine work of our regional offices but will instead help to develop strategic investigation/litigation plans and be an additional resource that can be deployed on the highest priority matters.

In addition the Team will

- be responsible for further developing and raising awareness of our leniency policy
- collaborate with other areas of the ACCC and external counterparts to coordinate and progress ACCC anti cartel results
- actively identify emerging issues in Australia and other jurisdictions concerning cartels and related matters and will work closely with our existing International Enforcement team.

But its emphasis will be on increasing the detection and treatment of domestic cartels and in building the ACCC's capacity for incisive anti-cartel action.

Government procurement campaign

One of the principal ways major cartels make their profit is by targeting purchasing contracts – government and private.

They ensure the buyer pays the highest possible price to the cartel participants by colluding to ensure there is no competition for the contract.

Government purchasing is particularly exposed to cartel formation and continuation because the transparency required in government contracts

provides cartels with the information to allocate markets, fix prices and police their members to ensure they stick to the deal.

Purchasing or procurement agents should therefore be in the front line of the fight against cartels. However, the experience of both the ACCC and our counterpart agencies overseas is that they are rarely a prime source of information.

The ACCC therefore believes the fight against cartels can be advanced through a campaign to inform and better motivate buyers or procurement agents in both the government and private sector to detect and report cartels.

When you think about it, those in charge of buying or tenders should have reasonable knowledge of industries from which they regularly obtain substantial goods and services, and therefore are in a good position to identify conduct that might indicate the existence of cartels.

So working with these experts in the field about how to better detect and report cartels should help alert us sooner to cartel conduct.

The Canadian Competition Bureau for example began a Bid Rigging Education Program in 1991, which involves 10 seminars each year designing formal training to enable employees to be registered as "Certified Procurement Persons".

In the United States, federal agencies are required by law to notify the Attorney-General about questionable bids or proposals, and the law extensively outlines practices and events that procurement personnel are to consider suspicious.

At the ACCC we have decided the most effective way of raising awareness about cartels is to directly contact buyers and purchasing agents on selectively targeted issues and to prepare easily accessible material that can be used within agencies to raise awareness about cartels.

We aim to make this a two way flow of information so we can build the relationships which will encourage the buyers to talk to us when they see suspicious behaviour.

We will, for example, meet next week with the Commonwealth Department of Finance and Administration, the key Federal Government department concerned with public procurement on how we can work together to raise awareness of cartels and disseminate information.

We also plan to produce a CD based on the Canadian Competition Bureau's initiative which contains a complete multimedia bid-rigging information/checklist resource.

It advises buyers how to protect their company or department by reporting suspicious behaviour when they obtain quotes or run a tender such as:

- tenders that all appear to quote the same price
- tenders that appear to intentionally not conform to specifications
- an unexpected refusal to tender where there is no logical commercial rationale not to
- tenders that appear to have been rigged to ensure that one particular person gets the job.

If you go to our internet site, you will also find we have established a dedicated Anti-Cartel section with information on cartels and in particular bid-rigging material.

Conclusion

In closing, the ACCC wishes to thank the Australian Agency for International Development (AusAID) for providing financial assistance, enabling several delegates to attend this conference.

I would also like to thank the ACCC staff who have worked very hard over the past few months to organise this event and, of course, I would also like to thank our speakers and panellists.

As I said at the outset, cartels are a cancer on the economy and through their bid rigging, price fixing and market sharing, do harm to all of us as consumers and taxpayers.

Only by all of us working together, sharing our knowledge and pooling our resources, can we break the secrecy that protects cartels, and help defeat those who would seek to restrict competition and distort markets to benefit the greedy few, at the expense of the vast majority of honest taxpayers and consumers.