



**International Bar Association
International Competition Enforcement
Conference
Tokyo**

**21st April 2005
Graeme Samuel, Chairman**

Late last year an event occurred that sent a shiver through the boardrooms of every Australian company and marked a watershed in the Australian Competition and Consumer Commission's fight against cartels.

Amcor, one of the biggest and most respected companies in Australia, and the country's leading manufacturer of cardboard packaging, announced it had reason to believe that a number of its current and former executives had engaged in anti-competitive conduct and that it had approached the ACCC.

As a senior Australian journalist said at the time:

Amcor's cartel crisis may be a watershed in the way listed companies approach the task of complying with non-financial rules and regulations.

The fact that the Australian Competition and Consumer Commission is investigating what it thinks are more than three dozen cartels is evidence that the behaviour Amcor says it has discovered inside its cardboard box division is more widespread in this economy than had been appreciated.

The significance of Amcor is that a problem has been found in a blue-chip company that had installed all the usual apparatus for detecting and eliminating such behaviour.¹

The real significance as far as the Australian Competition and Consumer Commission was concerned was the culture change it had signalled.

Instead of trying to sweep the issue under the carpet, the company moved swiftly to expose the cartel within its ranks.

In many ways it was to us, a validation of the increasingly high profile campaign we had been taking against cartels and a signal that even amongst big business, there was now a clear awareness that such behaviour could not be tolerated, or covered up.

It was not so long ago that such behaviour would have been considered by many in business as an entirely proper and normal part of doing business in Australia.

Prior to the introduction of the Trade Practices Act in 1974, Australia's relatively small and closed economy was riddled with bid-rigging, cartels, price fixing, anti-competitive practices and deception in marketing and advertising.

¹ Malcolm Maiden, *The Age*, Page 12, December 13, 2004.

While the legislation was long overdue, the delay did allow Australia to learn from the experiences of the US and Europe. It struck a sensible balance that recognised the need for strong competition laws, while acknowledging the need in a relatively small economy like Australia for some forms of anti-competitive behaviour to be authorised on the grounds of public benefit.

But the Act was a huge shake-up for many business figures who saw it as the absolute antithesis to the way they thought business should be done in Australia – colluding with competitors on price and markets and being protected from foreign and domestic competition by government regulation.

There are of course still plenty of people prepared to try to break the rules, to collude with competitors and divide up markets so they can stifle competition and inflate profits.

Just look at the damage done 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'.

In recent years, a number of very important developments have made the cost-benefit equation much more risky for cartel participants, and tipped the balance in favour of the regulator, and the consumer.

These include:

- The introduction of the leniency policy which offers immunity for cartel participants, (although not cartel instigators) who blow the whistle on cartels.
- The introduction of massively increased fines and criminal sanctions for cartel participants
- A number of high profile recent successes against cartels, getting the message across that this sort of behaviour is unacceptable, and very risky to those involved.

Role of the ACCC

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

Cartels are outlawed in Australia 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.

That's the legal definition that enables us to bust cartels, but as far as the Commission is concerned, cartels are a cancer on all our economies.

Their price fixing, bid rigging and market sharing are a silent extortion that steals billions of dollars from business, from taxpayers and ultimately from all of us as consumers through higher prices and lower standard of goods and services.

By controlling markets and restricting goods and services cartels can also put honest and well run companies out of business while protecting their own inefficient members and stifling innovation.

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.

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

- Just last month the Federal Court awarded penalties totalling more than \$23 million against 16 companies and executives for fixing the price of petrol in a regional Australian market.
- 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 refined in 2002 and complemented with a formal leniency policy initiated in 2003. This policy contains an automatic offer of immunity for eligible 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 cartel participants persuaded to break the code of silence.

Under the leniency policy, the ACCC offers:

- automatic 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
- automatic 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, Australian courts accept the principle that those who are the first to expose a cartel deserve more lenient treatment.

In the December 2003 *Tyco* case², 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.”

Last 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.”

So there is very strong evidence 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.

It’s even got to the extent where a recent newspaper report promoting a recent speech of mine gave advice to those attending on what time I was arriving, just in case they wanted to get to me and confess before their co-conspirators.

However, we also accept that with any new program there are always improvements that can be made and the 14 applications we have received for leniency since the policy was introduced nearly two years ago have raised several key issues about its future operation and effect.

Some of the proposals we are examining include:

² *Australian Competition and Consumer Commission v FFE Building Services Limited* [2003] FCA 1542, at para 29-30

- *Recognition of “Markers”*

Adopting the US system of allowing applicants to “put down a marker” and establish whether an amnesty is available before being required to provide full details.

This could further encourage cartels members to come forward, particularly in circumstances where they are not 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.

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

Under our “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.

- *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 now accept there may be cases where an application was refused, revoked or withdrawn where it’s beneficial to allow someone else to take their place.

- *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. A less onerous threshold may be more appropriate, such as where we knew about the cartel, but did not have enough evidence to exercise our compulsory evidence gathering powers.

- *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.

- *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.

We are currently considering responses to these proposals so we can finalise our review and further enhance this important weapon to detect and deter cartels.

Criminal penalties

Currently, Australia's cartel enforcement regime is a civil one. That means no-one goes to jail for participating in a cartel. However, in February this year, the Federal Government announced it was accepting the recommendations of the Dawson Committee and would be legislating to introduce criminal sanctions for hard-core cartels.

The Dawson *Review of the Competition Provisions of the Trade Practices Act* recommended the introduction of criminal penalties for serious cartel conduct, recognising the growing international experience that suggests they are effective in deterring serious cartel conduct.

Needless to say, the ACCC, which has been a strong advocate of criminal penalties for some time, was delighted by this announcement.

Under the new regime, The maximum penalties for the offence will be a term of imprisonment of five years and a fine of \$220,000 for individuals and a fine for corporations that is the greater of \$10 million or three times the value of the benefit from the cartel, or where the value cannot be determined, 10 per cent of annual turnover.

When you compare these with the existing maximum penalties of \$500,000 for an individual and \$10 million for a corporation, you can see why some commentators are predicting a rush to our confessionals before the introduction of criminal sanctions.

The higher penalties will go along way towards tilting the cost benefit analysis against those considering taking part in cartels.

Cartel activity will not be deterred if the potential penalties are perceived by firms and their executives to be outweighed by the potential rewards. Under Australia's existing penalty regime, there was a real danger that, at least for some of the bigger international cartels, the penalties were simply not a deterrent.

But there's always the danger that financial penalties will simply be passed on to shareholders, and those levied on executives will be picked up by shareholders.

Imprisonment has no such qualifications – it is a penalty for which no company or shareholder can be forced to pick up the cost.

Jim Griffin, who recently retired from the position of Deputy Assistant Attorney General of the US Department of Justice Anti-trust Division, 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.

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.’

The fact is, cartel behaviour is 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* matter³, 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.”

The introduction of criminal penalties for cartel type behaviour will put an end to this notion, and send a very clear signal that this is criminal behaviour that is totally unacceptable in our modern, open and competitive economy.

Now the Commission accepts that criminal penalties are not appropriate in all cases, and should be reserved for only the most serious cartels.

That is why we are entirely supportive of the guidelines introduced by the Treasurer which require the final decision on whether to launch a prosecution to be left up to the independent Director of Public Prosecutions, acting on advice from the Commission.

Once the legislation is passed by the Australian Parliament, the Australian Competition and Consumer Commission and the Director of Public Prosecutions will enter into a formal, publicly available Memorandum of Understanding (MOU) establishing procedures for the investigation of the cartel offence and the circumstances in which the ACCC will refer a case to the DPP for prosecution.

The MOU will also specify that in making an independent determination as to whether to prosecute a particular matter, the DPP will consider factors such as the impact of the cartel and the scale of detriment caused to consumers and the public, and previous admissions to or convictions for cartel conduct.

Government procurement campaign

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

³ *ACCC v ABB Transmission and Distribution Limited (No. 2)* [2002] FCA 559, at para.28.

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 regular seminars and 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 are also directly contacting buyers and purchasing agents and preparing 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 are working with the Commonwealth Department of Finance and Administration, the key Federal Government department concerned with public procurement, on how we can together raise awareness of cartels and disseminate information.

Global-cooperation

The examples I've quoted above were all entirely domestic operations, but as Dr Ulf Böge pointed out at the ICN annual conference in Korea last year, globalisation goes hand in hand with the internationalisation of cartels.

The more we expose our economies to the world, the more we will be exposed to those who would seek to abuse this to extort our citizens and the greater will therefore be the need for us to work together.

Given the size of the Australian economy and our geographic position, many global and international cartels that impact on Australia are likely to develop, and be detected, by antitrust agencies overseas.

Technological developments also continually require us to develop new investigative strategies and techniques to stay one step ahead of the cartels.

The ACCC therefore sees inter agency cooperation agreements as vital in assisting us to detect and break up international cartels. This is why the ACCC is putting a lot of effort at the moment in enhancing our relationships with overseas regulators in a range of enforcement areas.

Australia has, for example, a treaty with the United States which is both extensive and useful for tackling breaches of the Trade Practices Act. The ACCC also has memorandums of understanding with a number of countries which facilitate information exchange and enforcement cooperation on both consumer protection and competition matters.

An example of this is the infamous animal vitamin cartel initially exposed by US authorities and which led to the Australian Federal Court awarding record penalties totally \$26 million against a number of Australian subsidiaries of international vitamin companies.

The Commission has also instituted proceedings against several overseas vitamin companies for their participation in a cartel involving vitamin C for human consumption.

The ACCC hopes to commence negotiations on a treaty with the Japan Fair Trade Commission on competition matters later this year.

It is also important that the ACCC continues to be closely involved with organisations such as the International Competition Network. The ICN provides a forum in which members can consider ways to share the information needed to develop this cooperation and the techniques needed to further elevate and coordinate our enforcement efforts.

Anti-competitive conduct which occurs across borders can only be effectively addresses through the concerted efforts of the enforcement agencies in the affected jurisdictions. A single agency, working alone, cannot in these of open borders, free trade and the lightning speed and worldwide reach of the internet, successfully bring an end to conduct which is so damaging to all our economies