



Australian
Competition &
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Commission

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Promoting Competition and Fair Trading

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Graeme Samuel, Chairman

In recent years, the Australian Competition and Consumer Commission (ACCC) has investigated and prosecuted domestic cartels in industries ranging from electrical transformers, concrete, industrial foam, fire protection and masonry to freight services and vitamins.

Currently, the ACCC has 14 cases before the courts and more than 30 suspected cartels have been identified.

Some of these involve very small scale local price-fixing arrangements, others are nationwide and a few are operating globally. I am reasonably confident that the Commission will soon be able to start court action, potentially in co-operation with international regulatory agencies, to try and bring these secretive cartels to a halt.

Why am I so keen on busting cartels? Because frankly, cartels – that is, price fixing, bid rigging and market sharing – can in many instances do far more damage to our economy, to business, and to consumers, than many of the worst consumer scams.

Cartels are a cancer on the economy, a silent extortion.

Cartels thrive on secrecy. The price fixing and fixed tenders only work because the public don't know much about them and it's therefore very hard for regulators to uncover them.

Cartel penalties and detection

I'd like to tell you now about what Australia is doing to tackle cartels, focussing on two key areas – the finding of a recent independent review of the Trade Practices Act established by the Australian government which looked at penalties for cartels, and the ACCC's leniency policy for those who expose cartels.

Dawson Review

The Australian law covering cartel conduct is a civil regime. Presently under the Act, corporations involved in cartels face civil penalties of up to \$10 million, whilst their executives face penalties of up to half a million dollars.

So while participation in a cartel may be worth tens of millions of dollars, the worst penalty any business person faces if caught is a stiff monetary penalty.

I am certain the cost/benefit analysis will take on a different perspective if executives involved in the cartel arrangements instead find themselves facing several years behind bars.

This was also the view of the Dawson Committee, the independent review of the Trade Practices Act set up in October 2001 by the Australian government, and which reported early last year.

The Dawson Committee recommended that:

- The maximum penalty for corporations be raised to the greater of \$10 million or three times the gain from the cartel or, if the gain cannot be quantified, 10 per cent of the corporation's turnover;
- The Federal Court be given the option to exclude an individual implicated in a cartel from being a director of a corporation or being involved in its management; and
- Corporations be prohibited from indemnifying, directly or indirectly its officers, employees or agents from financial penalties.

In addition, and most importantly, Dawson concluded that overseas experience showed criminal sanctions did deter serious cartel behaviour and should be introduced in Australia for hard core cartel behaviour.

However, before criminal sanctions are introduced for serious cartel behaviour, the Committee asked that certain issues be addressed. The issues include the development of a satisfactory definition of serious cartel behaviour and a workable method of combining a clear and certain leniency policy with a criminal regime.

Subject to this proviso, the Committee recommended the introduction of criminal sanctions for serious or hard-core cartel behaviour, with penalties to include fines against any convicted corporation and imprisonment and fines, as appropriate, for implicated individuals.

The ACCC supports the Committee's recommendations and the Australian Government has accepted them in principle. Work is well under way on the issues raised by the Committee prior to consideration of the legislative package.

Serious tax cheats are imprisoned, sometimes even pensioners who defraud social security are sent to jail. Why should executives who deliberately enter secretive cartel arrangements to defraud their customers or taxpayers be treated any differently?

Aside from important considerations of equity in the law, simply put, jail, like death, clarifies the mind marvellously well.

Jim Griffin, the 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 fine recommendation.

To illustrate he spoke of a senior executive, who was committed to compliance with anti-trust laws, and 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.’

These remarks go straight to the heart of why criminal penalties must be introduced for hard core cartel behaviour.

Hard-core cartels are the most serious and harmful violations of competition law. They hurt consumers and businesses by artificially inflating the price of goods and services and restricting supply. They also act like a dead weight upon an economy by reducing competition in a market, inhibiting innovation, limiting employment opportunities and stunting flow-on effects to other markets.

Cartel Detection

The difficulty in stopping cartels is that they operate in great secrecy and the evidence is hidden away. The challenge in penetrating this shroud of secrecy is to encourage corporations and their executives to reveal the collusive conduct and expose its co-conspirators.

One of the reasons for the success we are now having in busting open this secrecy is a leniency policy introduced last year by the ACCC.

For a number of years and consistent with the approach adopted by a number of overseas regulatory authorities, the ACCC has used leniency in its enforcement program to encourage parties to cooperate with its investigations and court actions.

Importantly, the Australian Federal Court has also recognised the importance of cooperation with the ACCC as a significant mitigating factor when imposing sanctions against businesses and executives who have contravened the Act.

The Cooperation Policy

The ACCC’s “*Cooperation and Leniency in Enforcement Policy*” was first published in October 1998.

Put briefly, it indicates that cooperation and assistance can be rewarded through partial or complete immunity from ACCC action, administrative resolutions and so on. It sets out the sorts of matters to which the ACCC is likely to regard when determining its approach to the cooperating party.

Whistleblowers

In 2002, the ACCC raised the importance of confidentiality when “whistleblowers” contact the ACCC, in a presentation entitled “Should whistleblowing be encouraged and protected and is it?”¹

Regardless of whether “whistleblowers” are offenders or not, the ACCC is concerned to ensure that an environment is created and maintained that encourages genuine complaints and provides some confidence to complainants that disclosure of their identity and/or information they provide will be preserved on a confidential basis if they wish.

Leniency Policy

On 30 June 2003, the ACCC released a formal leniency policy in relation to cartel conduct only. The leniency policy provides greater certainty and greater incentive for voluntary disclosure and cooperation by corporation and individuals who participate in cartels.

Under the leniency policy, the ACCC offers corporations (subject to conditions):

- Immunity from ACCC initiated proceedings, where the leniency applicant is first to disclose the existence of a cartel of which the ACCC was not previously aware; 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 has insufficient evidence to commence court proceedings.

¹ Transparency International Australia Conference – “*Whistleblowing: Betrayal or Public Duty*”. Tuesday 6 August 2002, Sydney Australia, Sitesh Bhojani, Commissioner, Australian Competition and Consumer Commission.

This policy encourages corporations and their executives to reveal the most serious contraventions of Australian trade practices law such as price-fixing, bid-rigging and market sharing. In return they receive a clear and certain offer of leniency.

The catch is that it is only the first in the door who benefits - be it a company or an executive. Their evidence then exposes others involved who will be investigated and, if the evidence permits, brought before the courts and given far stiffer treatment than those who first blew the whistle.

As Australian Federal Court Justice Wilcox noted:

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."

That said, whilst the leniency policy is generally applicable to all cartels affecting Australian markets, leniency comes with conditions attached.

The primary condition for an eligible leniency applicant is simple: they must cooperate fully and continuously with the ACCC in its investigation and in any court action. It is the cooperation and inside information that a cartel member can give the ACCC that provides the significant public benefit warranting significant leniency. However, this does not mean that leniency is dependent on the quality of evidence provided.

The classes of cartel participants to whom the ACCC will not give the benefits of the policy are equally simple: if the cartel participant has coerced others to break the law or was a clear leader in the cartel, the benefits of the leniency policy will not be available.

The leniency policy operates in conjunction with the existing cooperation policy and is intended to encourage individuals and corporations to step forward so that the ACCC can investigate and, evidence permitting, bring the cartel's other participants before the courts.

At this point, it is important to note that this leniency policy only applies to Australia's existing civil penalty regime. If the law is ultimately reformed to introduce criminal sanctions for hard-core cartels, the ACCC will reconsider its policy in light of those changes.

We understand the international experience to be that people coming forward under leniency policies may also expose further cartels not the subject of their initial application. This is proving to be the case in Australia as well.

Effectiveness of cooperation

So how successful is this policy? A good example is a recent case in relation to the fire protection industry from which I quoted Justice Wilcox's remarks earlier.

In May 2002, the ACCC instituted court proceedings against four companies and a number of individuals alleging that they entered into and gave effect to arrangements that determined fire protection tenders.

One of the companies involved in the conduct, the Tyco Group, approached the ACCC with information about the conduct, which was discovered through its trade practices compliance and training program.

The Tyco Group was able to take advantage of the ACCC's cooperation policy as its employees provided a very high level of cooperation with the ACCC's investigation and court proceedings.

As a result the ACCC did not seek pecuniary penalties against Tyco and its employees, while the court imposed multi-million dollar penalties on the co-conspirators.

In determining the amount of penalty, Justice Wilcox observed:

“It is now generally recognised that restrictive trade practices are inimical to a healthy competitive economy. ...The contravening conduct not only had the

potential to deprive building contractors, and their clients, of the lowest available price for fire protection services in relation to the particular job; but also had a tendency to undermine the entire tender system in the industry”.²

Global cartels and leniency

Australia, as an open economy and strong trading nation, feels the impact of both domestic and international cartels on Australian businesses and consumers. The ACCC sees the importance of attacking cartels which have the potential to impact adversely on Australian markets.

A difficulty for Australia, given the size of its economy and geographic position, is the detection of international and global cartels. In practical terms, many global and international cartels that impact on Australia are likely to develop, and be detected by antitrust agencies, overseas.

That is not to say that Australian traders exporting into or operating in international markets will not be involved in cartel conduct nor have the potential to bring cartel conduct to the ACCC’s attention. The ACCC sees inter agency cooperation agreements as vital in assisting the detection and prosecution of cartels, whether they impact upon or emanate from Australia.

What's more, the ACCC considers that its certain and clear Australian leniency policy provides incentive to corporations and individuals involved in international cartels, who are seeking leniency in a number jurisdictions, to also approach the ACCC.

The ACCC’s leniency policy for cartel conduct is still relatively new, but we have already applied it to both domestic and international cartels, including where leniency applicants are also engaging with other jurisdictions under their leniency policies.

² *ACCC v FFE Building Services Limited* [2003] FCA 1542 at [22] per Wilcox J.

ICN working group

Challenges posed in detecting, dismantling and deterring transnational cartels require an international response to provide complementary measures and guidelines that enhance competition in the global marketplace. For this reason, the ACCC is pleased with the proposed development of the Cartels Working Group and looks forward to positive outcomes.

Without a doubt, hard-core cartel behaviour poses a significant threat, not only to developed economies, but also to developing economies. It effectively cripples competition and this negative impact can be felt throughout the global marketplace.