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# **Cartel Enforcement in Australia**

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### I. INTRODUCTION

Historically cartel behavior in Australia has been subject to a civil penalty regime under the *Trade Practices Act 1974* (“the Act”). Since the 1974 enactment of the legislation, price fixing and similar anticompetitive contracts, arrangements, or understandings have been treated as per se illegal under the Act. However, the penalties for breaching these provisions were historically quite low until 2007 when the civil penalties were increased significantly (see below). There is now a very determined effort on the part of the new Federal Labor Government to introduce criminal sanctions against serious cartels and to bring Australia in line with the developments in the U.S., Canada and in other countries.

The relevant regulator, the Australian Competition and Consumer Commission (“ACCC”), has actively pursued stronger enforcement powers and harsher sanctions to address cartel conduct. Graeme Samuel, Chairman of the ACCC, once described cartels as a ‘cancer on our economy’, stealing ‘billions of dollars...from business, from taxpayers and ultimately from...consumers’.<sup>1</sup>

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<sup>1</sup> Graeme Samuel, Address at the Cracking Cartels and International Developments Conference in Sydney (November 24, 2004).

This paper considers both the existing civil regime for enforcing prohibitions on cartel behavior, as well as noting certain aspects of the foreshadowed criminal sanctions.

## **II. CIVIL OFFENSES**

Nowhere does the Act refer to the word ‘cartel’, but the ACCC describes a cartel as occurring where “two or more businesses get together and decide not to compete against each other.”<sup>2</sup> The main prohibitions are contained in sections 45, 45A, and 4D of the Act. Basically serious cartels (which will be the target of the proposed criminal sanctions) are regarded as comprising price fixing, market allocation, bid rigging, and restrictions on outputs (as per the OECD description).

### *The Current Statutory Prohibitions*

Section 45(2) of the Act relevantly provides that a corporation shall not make a contract or arrangement, or arrive at an understanding (or give effect to a contract, arrangement or understanding) that:

- contains an exclusionary provision or
- has the purpose, effect, or likely effect of substantially lessening competition.

An ‘exclusionary provision’ is defined in s 4D of the Act as a provision in a contract, arrangement, or understanding between competitors that has the purpose of preventing, restricting, or limiting either:

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<sup>2</sup>AUSTRALIAN COMPETITION AND CONSUMER COMMISSION, CARTELS: A GUIDE FOR CONSUMERS ON CARTEL CONDUCT (March, 2006).

- the supply or acquisition of goods or services to or from particular persons or classes of persons; or
- the supply or acquisition of goods or services in particular circumstances or on particular conditions

by all or any parties to the contract, arrangement, or understanding (including any related parties). The purpose does not have to be the sole or dominant purpose.

Section 45A of the Act provides (with limited exceptions) that a provision of a contract, arrangement, or understanding that has the purpose, effect, or likely effect of fixing, controlling, or maintaining the price of supply of a good or service by any of the parties to the contract, arrangement, or understanding will be deemed to have the purpose of substantially lessening competition—i.e. it is unnecessary to show that the purpose or effect of the price fixing agreement actually lessens competition.

In addition to the civil pecuniary penalties (which were increased on January 1, 2007) there is also a potential for private remedies (injunctions and damages) but there is no provision for treble damages in Australia.

The maximum pecuniary penalties available for each contravention were increased on January 1, 2007 to:

- \$500,000 for individuals, or
- for corporations, the greater of:
  - A\$10 million;
  - 3 times the value of the illegal benefit obtained (where the value of that

benefit can be determined); or

- 10% of the annual turnover in Australia of the body corporate (and any related body corporate) for the 12 months prior to the illegal conduct.

### **III. CRIMINALIZING CARTELS**

In 2002, the Federal Government of the day appointed a committee, the Dawson Committee, to review aspects of the Act. One of its major recommendations was that the government consider introducing criminal sanctions for cartels regarded as serious. The Federal Government, while agreeing with the proposal and drafting legislation, failed to introduce that legislation before it lost office to Labor in November 2007.

The new Federal Labor Government has committed itself to enacting legislation to criminalize serious cartel conduct. As part of this initiative it tabled for public discussion in January 2008 an exposure draft of the legislation that had been prepared by the previous government. That legislation was regarded by many as seriously flawed and was the subject of significant criticism. It is fairly clear that the new Government will now pursue the introduction of criminal legislation which will ban serious cartels—those probably defined as involving price fixing, bid rigging, restricted outputs in the production and supply chain, or the allocation of customers, supplies, or territories.

In the exposure draft maximum criminal penalties for individuals of 5 years were proposed together with the potential of a \$220,000 fine. However, the jail

sentence is unlikely to be increased when the final Bill is prepared and released for discussion later this year. It is expected that legislation will be passed early in 2009.

#### **IV. ACCC ENFORCEMENT OF THE LEGISLATION**

The ACCC is vested with a number of powers in order to detect breaches of the Act, cartels included. In order to enhance its attack on cartels and similar activity, the ACCC in 2003 introduced a Leniency Policy under which it provided whistleblowers an amnesty from civil prosecution if they provided information about price fixing and other similar agreements. That policy was replaced in 2005 by a new Immunity Policy which strengthened the provisions and also introduced a paperless process.

Under this immunity policy the ACCC will grant immunity to the first applicant in a cartel that approaches the ACCC about a cartel so long as the ACCC is not already aware of the cartel. Immunity is also conditional upon the applicant not being the ringleader and continuing to provide full disclosure and cooperation to the ACCC during its investigation and any resulting proceedings. The ACCC may revoke the immunity if it is satisfied that the applicant is not meeting these conditions. Parties who are not the ringleaders but who are willing to cooperate with the ACCC in a cartel investigation may receive a reduction in penalties under the ACCC's cooperation policy—which works side by side with the immunity policy.

The ACCC has had one very major success in relation to its immunity policy. In 2007 the Federal Court of Australia awarded pecuniary penalties totaling \$36 million against Visy Industries and three of its senior executives. Information provided by Amcor

(who received immunity from legal action under the ACCC's Immunity Policy) was key to the ACCC's case against Visy Industries.

The fact that a person seeks immunity will not prevent that person from being sued for civil damages in what are generally known as follow-on suits. To date, a number of court actions have been brought in relation to both the cardboard box cartel and the fuel surcharge cartel (which has had international repercussions). It is interesting to note that in respect of the latter the ACCC has not yet brought any proceedings. Civil litigants have also tried to obtain documentation received by the ACCC from the whistleblowers in order to launch follow-on suits. Because litigation funding is now possible in Australia as a result of a major High Court decision<sup>3</sup> class actions are now becoming more common.

At the time of writing the immunity policy only applies to civil matters.

Unlike the provisions in the renounced leniency policy, the immunity policy does not require immunity applicants to provide redress for cartel victims as a condition of immunity. While the ACCC has the power to seek damages in a representative capacity for victims of cartels, it has generally been reluctant to do so. As a result, private parties who suffer loss or damage as a result of cartel activities must institute a separate private action to recover that loss.

The ACCC plays an important role in the identification of cartels and the enforcement of prohibitions on cartel behavior. Its ability to perform this role is enhanced by the extensive investigatory powers conferred on it by the Act.

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<sup>3</sup>*Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386

*A. Section 155 notices*

In addition to using the immunity policy the ACCC has significant powers under section 155 of the Act to obtain information from potential members of a cartel or parties to anti-competitive agreements. The ACCC may issue a s 155 notice if it has reason to believe that a person is capable of furnishing information, producing documents, or giving evidence relating to a matter that constitutes or may constitute a contravention of the Act.

Failure to comply with a s 155 notice is an offence punishable by a fine of up to 20 penalty units (one penalty unit is currently set at A\$110) or 12 months imprisonment. Since April 2007 the ACCC has successfully prosecuted four defendants for failing to comply with a s 155 notice (for either refusing or failing to respond to the notice, or for giving false or misleading evidence in a s 155 examination).

*B. Authorization*

Under the Act, cartel conduct (as currently defined by the legislation) may be authorized by the ACCC on the basis that there are public benefits that flow from the proposed arrangements which outweigh any possible anticompetitive detriment. It is quite unlikely that the ACCC will grant authorization for naked price-fixing or market sharing arrangements but it is not impossible for this to occur. Authorization provides immunity not only from prosecution by the ACCC but from any civil action.

**V. CONCLUSION**

Cartel enforcement in Australia is still in its infancy. When criminal sanctions



are introduced Australia will become part of “the International Club” and persons involved in international cartels will seek immunity in Australia more readily than they currently do. There is not a very great incentive to seek immunity in Australia because there is no threat of the members of the cartel (rather their officers) being sent to jail. The potential of jail sentences being imposed will enhance the role of the ACCC’s crackdown on cartel conduct.