



Economics Society of Australia Detection of cartels symposium

28th September 2005
Graeme Samuel, Chairman

The ACCC approach to the detection, investigation & prosecution of cartels

Introduction

Cartels are bad for the economy and bad for consumers. They 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.

One of the earlier speakers, Mr Patrick Rey, has said in a recent paper:

“There is almost universal agreement that price fixing and market allocation cartels reduce economic efficiency. Most competition systems condemn such arrangements and there is a growing international consensus that competition agencies should devote strong efforts to enforcing prohibitions against cartels.”¹

The major reason cartels continue to flourish is that cartels are potentially so highly profitable. Cartels artificially create market power, and so create monopoly rents for cartel participants. By way of example, in Australia it has been estimated that the participants in the express freight cartel, which operated for approximately 20 years through the 1970s and 1980s in a market

¹ Aubert C., Rey, P. and Kovacic, W., *The impact of leniency programs on cartels*, 2003.

worth between \$1 billion and \$2 billion dollars annually, ripped-off Australian consumers in the order of \$3 billion - \$4 billion.²

All OECD jurisdictions see fighting cartels as a high priority.

In Australia, the Government and the ACCC both regard the impact of cartels seriously. Indeed, the Government has introduced legislation into Parliament to significantly increase the penalties for those found to have participated in a cartel and has announced its intention to introduce criminal penalties.

The ACCC has had some success prosecuting cartel offences:

- Earlier this year the Federal Court ordered \$23.3 million in penalties against eight companies and eight individuals for petrol price fixing in the Ballarat region in Victoria. These arrangements maintained higher petrol prices for consumers in the Ballarat region. Apco and its director were subsequently found by the Full Federal Court to have not demonstrated the necessary commitment to the price fix and were absolved, although the ACCC has sought special leave to appeal the Full Court's decision to the High Court.
- In 2004, George Weston Foods was fined \$1.5 million because 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.

² This estimate is based upon OECD calculations included in the 2002 *OECD Report on the Nature and Effect of Cartels* that suggest the average price rise may be in the order of 15 to 20 percent. There is however debate about the exact extent of price rises caused by price fixing. In 2001 W. Wils [*Does the Effective Enforcement of Articles and 81 and 82 EC Require Not Only Fines on Undertakings But Also Individual Penalties, in Particular Imprisonment?* 2001 EU Competition Law and Policy workshop/proceedings] stated that:

- the risk of detection is estimated at between 13% and 17%. That is, only one in 6 or 7 cartels is detected
- that the average length of a cartel is six years
- that prices of affected commodities increase by 10%.

Using these estimates, Wils calculated that a penalty would not deter price fixing unless it was at least 150 percent of the annual turnover in the products concerned in the violation. The research does support the conclusion that cartels are so profitable and difficult to detect that it may be impossible to set a pecuniary penalty at a level adequate to deter collusion without threatening the very existence of offending firms.

- Also last year the Federal Court imposed record penalties totalling \$35 million in relation to an electricity 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.

The ACCC has also commenced proceedings recently in a number of cases including:

- ACCC v Admiral & Ors – airconditioning installation (Western Australia)
- ACCC v Barton Mines Corp & Ors – industrial garnet production – (national)
- ACCC v Auspine Ltd & Ors – Timber costs estimating (South Australia)
- ACCC V Gullyside Pty Ltd – petrol retailing (Queensland)
- ACCC v Leahy Petroleum Ltd & Ors - petrol retailing (Victoria).

And the ACCC is ramping-up even further its fight against cartels. It has embarked on a clearly defined and calculated campaign to raise awareness of cartels and to prioritise cartel detection and prosecution.

The priority the ACCC gives to the fight against cartels is demonstrated in the recent establishment of the criminal enforcement and cartel branch which is devoted to cartel issues and to preparing the ACCC for running criminal cartel investigations.

Anyone who has paid even the smallest attention to the media in recent months will know that being caught and prosecuted is now more of a risk than ever.

Participation in a cartel is still seen as an acceptable risk by some in the pursuit of corporate profits or an easy life – rather than the corporate fraud that it is. The proposed amendments to the Trade Practices Act that will substantially raise the penalties for offenders and the proposed introduction of

criminal sanctions for cartel conduct following the Dawson Committee review of the Trade Practices Act, may change this calculation. The amendments demonstrate the consensus that exists about the importance of tackling cartels and the need for effective deterrence.

The ACCC has advocated strongly for, and supports, these legislative developments.

Indeed, I believe the very fact that the maximum penalty will be raised to be the greater of \$10 million or three times the gain from the contravention (or, where the gain cannot be readily ascertained) 10 percent of turnover of the body corporate and all its interrelated companies, is likely to give rise to higher penalty orders being made by courts.

There is also an increasing culture of cooperation between international regulators to meet the challenge of cracking cartels that operate internationally. The ACCC is in the forefront of this effort and is working increasingly closely with other international agencies, particularly with our counterparts in the European Union, Canada and the United States.

Today I would like to cover several important developments and other issues in the ACCC's cartel enforcement effort including:

- our strategies to enhance cartel detection
- preparation that is under way for the anticipated criminalisation of cartel conduct
- the ACCC's new Immunity Policy – what are the changes and how will the policy operate
- the ACCC's processes for investigating alleged cartels – and some of the challenges we face in prosecuting these collusive agreements and
- the role of private damages actions.

Cartel detection

Cartels usually involve secrecy and deception. Collusion is difficult to detect—there may be little documentary evidence and parties often go to great lengths to keep their involvement secret. In these circumstances, discovering and proving the existence of cartels can be more difficult than other forms of corporate misconduct.

The ACCC has undertaken a number of initiatives to heighten cartel detection and prosecution. The ACCC has:

- as I have already mentioned, created a new national unit – the criminal enforcement and cartel branch – to apply the ACCC’s extensive skills and experience in cartel matters in a more structured and focussed manner. The branch is in the process of ensuring that the ACCC is geared-up to handle criminal investigations and prosecutions from day one. For instance the branch is well advanced in re-designing the ACCC’s evidence gathering and management systems to satisfy criminal standards. The ACCC is consulting with numerous other regulators and the DPP on this project
- developed and disseminated an interactive CD package aimed at raising cartel awareness among government procurement officials – and we are seeking to work with industry to deliver a similar package to private industry before the end of the year
- provided advanced training to enhance the skills of our investigators.

I expect that these initiatives will bear fruit quickly. Indeed, the ACCC is already investigating information received from a number of government agencies that has been reported following publication of the procurement package.

But perhaps the most important initiative is the ACCC’s newly released Immunity Policy. The Immunity Policy makes it more likely that cartel participants will break ranks and report illegal conduct to the ACCC, and more likely that perpetrators will be caught and punished.

Before examining the ACCC's investigation and prosecution processes, I want to discuss the ACCC's new Immunity Policy – how it will work and why it has been crafted in the way it has, but most importantly how it will operate and assist in the conduct of ACCC investigations.

The Immunity Policy

It is precisely because cartels are difficult to detect that we have an Immunity Policy. International experience is that immunity policies help break open the secrecy that is the foundation stone of cartel activity. Encouraging businesses and individuals to blow the whistle on cartels assists the ACCC to detect otherwise covert arrangements, to stop the harm they cause and prosecute participants.

The ACCC's 2003 Leniency Policy offered full or partial immunity to cartel participants who blew the whistle on their co-conspirators. The Leniency Policy was introduced to enhance the incentives then existing under the ACCC's 2002 Cooperation Policy for cartel participants to blow the whistle.³

The Leniency Policy proved to be a most effective weapon in our fight against cartels.

About half of the ACCC's in-depth cartel investigations are as a direct result of people taking advantage of this policy.

³ In 2002 the ACCC published its cooperation policy for enforcement matters (cooperation policy). The cooperation policy is expressed in general terms and applies to all potential contraventions of the *Trade Practices Act 1974*. The cooperation policy essentially acknowledged what had been happening in practice, where leniency was given to those parties that disclosed illegal conduct or assisted the ACCC in its investigation and any subsequent litigation. The nature and extent of leniency under the cooperation policy was assessed on a case-by-case basis having regard to the factors it set out. The cooperation policy provides more discretion than the leniency policy. It allows the ACCC to give parties the full range of benefits for cooperation, from immunity from prosecution and or penalty, to penalty discounts. These benefits are available to persons who do not qualify for leniency. The benefit of the Leniency Policy is that it increases certainty for corporations and individuals in the way they will be treated by the ACCC if they are the first to self-report involvement in cartel conduct. In contrast, the cooperation policy affords additional discretion to the ACCC and therefore less certainty to industry.

The new Immunity Policy, which came into effect on 5 September 2005 supersedes the ACCC's 2003 Leniency Policy. The introduction of the Immunity Policy follows a review of the operation of the 2003 policy and takes account of experiences here and overseas. The changes seek to maximise incentives for cartel participants to report cartel conduct.

The ACCC published interpretation guidelines that accompany the Immunity Policy and explain how the policy will be interpreted and applied by the ACCC.

It should be remembered that the Immunity Policy, as its title suggests, grants immunity from prosecution to a person who has confessed to the ACCC their involvement in a cartel and therefore a breach of a serious provision of the Act.

In the absence of immunity they would be prosecuted and liable to substantial financial penalties and in the near future jail sentences. Under the Immunity Policy they will get off scot-free. The Immunity Policy recognises that there is a benefit in busting secret cartels if participants are given an incentive to confess and co-operate with ACCC efforts to investigate and prosecute.

A strong Immunity Policy is recognised by anti-trust authorities around the world as a valuable cartel busting tool.

The Immunity Policy delivers benefits to all Australians. It also provides a powerful disincentive to the formation of cartels because businesses perceive a greater risk of ACCC detection and court proceedings.

Some companies that are penalised may regard this as unfair. They see their competitors who may have been equally culpable in the cartel getting more favourable treatment. However, Australian courts accept the principle that those who are the first to expose a cartel and assist the ACCC investigations deserve more lenient treatment.

In the December 2003 *Tyco* case⁴, 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 saw the first real race to the ACCC’s confessional from companies in one alleged cartel that was 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.”

How does the Immunity Policy work?

I want to explain how the Immunity Policy operates using a simple example. More detailed information is available in the Immunity Policy Interpretation Guidelines.

Assume you are a company director and the CEO reports to the board that a senior manager of the company has been colluding with competitors to set prices.

Your company has a choice. It could sit on its hands and hope not to be caught. Alternatively, it could report the conduct and cooperate with ACCC investigations. Sitting on its hands would not be a good option. The chances are higher than they have ever been that if your company does not report the cartel, a co-conspirator will.

The policy makes it easy to apply for immunity.

⁴ *Australian Competition and Consumer Commission v FFE Building Services Limited* [2003] FCA 1542, at para 29-30

Under the previous policy it would have been necessary for the company to apply for leniency in writing and describe the conduct in some detail. Under the Immunity Policy a cartel participant has the choice of providing a detailed application in writing or by telephone. Alternatively, if the potential applicant is unable to provide details of the alleged cartel conduct at that time it can gain protection by placing a marker (providing it has a genuine intention to cooperate).

It is even possible to ring the ACCC on a hypothetical basis and ask whether immunity would be available for cartel conduct in a certain industry. If immunity is available, it is then possible to place a marker.

If your company places a marker, the ACCC will give you a reasonable period to conduct an internal investigation. At the end of this period, the company will be required to report fully on the conduct. If it does not report by the end of the marker period and no extension of the period has been granted by the ACCC, the marker will lapse. At this point you, and the company, are vulnerable again; it is open to another cartel participant to approach the ACCC. But as long as the company holds the marker, no other person involved in the same cartel will be allowed to take your place in the immunity queue.

I anticipate that most applications will take advantage of the marker process.

If your company places a marker and conducts an internal investigation into the conduct; it must then provide the ACCC with sufficient information for the ACCC to determine whether it satisfies the conditions for immunity.

The requirements that must be satisfied for conditional immunity are set out in the policy as follows:

- (i) the corporation is or was a party to a cartel

- (ii) the corporation admits that its conduct in respect of the cartel may constitute a contravention or contraventions of the TPA
- (iii) the corporation is the first to apply for immunity in respect of the cartel
- (iv) the corporation has not coerced others to participate in the cartel and was not the clear leader in the cartel
- (v) the corporation has either ceased its involvement in the cartel or indicates to the ACCC that it will cease its involvement in the cartel
- (vi) the corporation's admissions are a truly corporate act (as opposed to isolated confessions of individual representatives).

If these requirements are satisfied, the company will be entitled to automatic conditional immunity.

Full cooperation

Full, frank, expeditious and continuous cooperation is essential. The ACCC has high expectations. This obligation should not be underestimated.

Be under no illusion, receiving conditional immunity is not a free pass. Full cooperation is likely to be costly, onerous and time-consuming. It is only with full cooperation that the ACCC can hope to obtain evidence that would be useful in prosecuting a cartel.

An immunity applicant must provide all evidence and information in their possession, or available to them where ever it is located, and at their own expense. Examples of how the obligation to cooperate has played out in recent investigations include:

- requiring a company to engage forensic IT experts to analyse electronic records – this process allows the ACCC to review all electronic documents, including documents that may have been deleted.

- requiring the applicant to review telephone records
- requiring the applicant to deliver up for analysis mobile telephones and original diaries
- requiring that an executive based overseas travel to Australia to make a statement.

As part of an immunity applicant's obligations to cooperate with the ACCC, the immunity applicant must not disclose that it has applied for immunity without first informing the ACCC. On a number of occasions immunity applicants have announced to the Australian Stock Exchange or another foreign regulator that they have applied to the ACCC for immunity in relation to cartel conduct. The ACCC understands that under the ASX listing rules and the Corporations Act corporations are obliged to continuously disclose information that may have a material affect on their share price in order to maintain an orderly and informed share market.

However, immunity applicants need to be mindful that disclosure may jeopardise ACCC investigations, particularly covert investigations. It should be possible to manage the timing of disclosure so as not to put an investigation at risk.

In some circumstances, making public statements could be completely inconsistent with the obligation to cooperate and may in fact jeopardise the protection otherwise afforded the corporation under the Immunity Policy.

What if the ACCC has already commenced an investigation into the conduct?

Another important development that will increase certainty for those contemplating self-reporting cartel conduct is that conditional immunity will be available even if the ACCC has commenced an investigation into the alleged cartel – provided that the ACCC has not received advice that it has sufficient evidence to commence proceedings. Immunity may even be available to a

company that has been issued with a notice under section 155 or whose premises have been searched pursuant to a search warrant. This is a major initiative. Under the 2003 policy, only partial protection (from penalty) was available if the ACCC was “aware” of the alleged conduct. It can no longer be argued that an applicant does not know how it will be treated when it approaches the ACCC.

Second applicant

Another important development in the Immunity Policy is that if the first to apply for immunity is unable or unwilling to meet all the requirements for immunity, a subsequent applicant may still qualify for immunity. This maximises the incentive for applicants to cooperate fully with the ACCC. The first applicant knows that if it fails to satisfy the requirements for conditional immunity, its place will be taken by a co-conspirator. The first applicant will then be vulnerable to prosecution.

What if it becomes apparent during an investigation that the leniency applicant was a ring leader?

It remains important to determine whether an immunity applicant was a ring leader.

A corporation will not be eligible for corporate conditional immunity if it has coerced any corporation to participate in the cartel or is the clear leader in the cartel. Similarly, an individual will not be eligible for conditional individual immunity if his/her employer has coerced another corporation to participate in the cartel and he/she has played a role in coercing the other corporate participants.

But the ACCC recognises that in many cartels there is no coercion or clear leader. There will need to be strong evidence of coercive behaviour. In particular, there must be clear evidence that the coercer pressured unwilling participants to be involved in the cartel conduct.

The investigation process – gathering evidence

Beyond immunity applicants, the ACCC learns of allegations of cartel conduct from a number of sources including anonymous whistleblowers, suspicious customers, disgruntled employees and counterpart agencies in other jurisdictions.

Investigations into cartels are some of the most complex and difficult investigations that the ACCC undertakes. Proving a criminal cartel offence will take that difficulty to a new level. The inherently secretive nature of cartels and the measures taken to avoid detection often necessitate time consuming and resource intensive investigations.

The ACCC gathers information from a wide range of sources. In a typical investigation, the ACCC will usually gather information about communications between competitors (for example by analysing telephone records and emails). An example from one recent case that illustrates how resource intensive a cartel investigation may be is that the ACCC analysed more than 20 archive boxes of telephone call records. This revealed more than 1600 calls between competitors.

In another case, the ACCC is reviewing over 1.1 million electronic documents copied from the computers of an alleged cartel participant.

Another important task for ACCC investigators will usually be to fully review pricing information with a view to establishing any correlation between pricing movements and communications between competitors.

The ACCC is also likely to interview a wide range of people including customers, suppliers and industry bodies. Some interviews will be less formal, but others will involve the use of the ACCC's coercive powers under section 155. In this case, interviewees will usually be represented – which again raises the level of complexity of an investigation.

One misconception is that information from an immunity application will ‘stitch-up’ the other cartel participants and deliver the ACCC a successful case. The immunity applicant’s information is usually very useful, but it is only the beginning of an investigation to find sufficient evidence to litigate successfully.

Unlike in some jurisdictions, the success or otherwise of an immunity application is not dependent upon the quality or value of the evidence provided by the applicant. That said, the Immunity Policy is a great tool to break open cartels. It certainly helps the ACCC obtain evidence, but it is only one component of a cartel investigation.

While it is not unheard of for an immunity applicant to supply a ‘smoking gun document’, it is more usual that the ACCC receives a ‘road map’ of the cartel. It will always be necessary for the ACCC to investigate the admissions from other sources to validate the information provided and prove our case. Exactly what investigative steps are required will vary from case to case.

What must we prove?

To prove a breach of the Act, the ACCC must demonstrate that there was an agreement between competitors and/or that *that* agreement was put into effect. Because of the nature of penalty cases under the Trade Practices Act the ACCC must prove these matters to a standard that is higher than the usual civil burden of ‘balance of probabilities’.

The ACCC must prove its case to a *quasi-criminal* standard, where the existence of the material facts must be proved ‘clearly’, ‘unequivocally’, ‘strictly’ or ‘with certainty’.⁵

When criminal sanctions are introduced, and it is necessary to prove matters ‘beyond reasonable doubt’, the evidentiary hurdles will be even higher.

⁵ *Briginshaw v Briginshaw* (1938) 60 CLR 336.

Cartel cases come in a variety of shapes and sizes. Some, a very few, have written agreements. These are the easiest to prove. More common, there is no express agreement and the ACCC must rely on a mixture of direct and circumstantial or inferential evidence to prove a contravention. Courts are increasingly challenging the value of inferential evidence in proving that the parties made, or gave effect to, an agreement that was the result of a 'meeting of the minds'. University of NSW associate professor of law, Frank Zumbo, recently commented that:

*Circumstantial evidence may be the smoke, but there needs to be more.*⁶

Some cartels are given effect infrequently in circumstances where participants are likely to remember specific instances of conduct, such as the allocation of a small number of major tenders.

In contrast, some cartels, particularly price fixing cartels, are given effect much more frequently. The collusion becomes part of the normal course of doing business. In these circumstances, it may be very difficult for participants to recall specific instances of giving effect to the cartel. Obtaining direct evidence that an agreement has been given effect can be problematic in these circumstances.

In the recent Ballarat petrol case⁷ the ACCC succeeded in proving price fixing allegations against eight corporations and eight executives.

The ACCC's case was based on evidence which included records of telephone conversations between competitors and the correlation between the calls and the timing of price rises.

Justice Merkel stated that:

⁶ ACCC's price-fixing win overturned, David Hughes, Australian Financial Review, 18 August 2005.

⁷ ACCC v Leahy Petroleum [2004] FCA 1678 (17 December 2004)

*In summary, the price-increase information and the pattern of calls ... are consistent with and supportive of the inference the ACCC seeks to draw, particularly when the direct evidence about the content of the communications between the corporate respondents is considered.*⁸

Two parties, Apco Service Stations Pty Ltd and its managing director successfully appealed this decision on the grounds that there was no agreement or commitment between the appellants and the other parties to increase prices.

At first instance, it was found that the Apco CEO was:

*aware of the purpose of price-increase and follow-up calls...received and acted upon those calls... and determined whether to substantially match them...*⁹

And further that the CEO was:

*aware that the price-increase and follow-up calls were part of a long standing and collusive process...*¹⁰

On the basis of these findings, His Honour concluded that:

- *the calls to [the CEO] were a significant aspect of any pricing fixing arrangement;*
- *the calls increased the likelihood of APCO increasing its prices...*
- *the calls made it more likely that the price increase would be taken up by APCO and would therefore 'stick' [among the other retailers].*¹¹

On the other hand, the Full Court said:

If [the respondents] were not committed to increase prices, the fact that sometimes they did so is consistent with them exercising their own judgment on those occasions. Unilaterally taking advantage of

⁸ ACCC v Leahy Petroleum at 281-91.

⁹ Apco Service Stations Pty Ltd v ACCC [2005] FCAFC 161 (17 August 2005), [40]

¹⁰ Ibid.

¹¹ Ibid. [31]

*commercial opportunity presented is not to arrive at or give effect to an understanding in breach of the Act.*¹²

The ACCC is in the process of seeking special leave to appeal this decision to the High Court.

There have also been moves in the Federal Court toward a preference for oral testimony from witnesses over affidavit evidence. While in principle this is a good idea, it also has the potential to extend enforcement proceedings and introduce more uncertainty to litigation – it is difficult to know how any witness will perform in the witness box, and what effect this might have on the case.

This will increasingly be important if the credibility of witnesses as to the existence of agreements between parties becomes central and the value of inferential or circumstantial evidence is reduced.

Search warrants

The burden of proof in a criminal cartel prosecution is of course higher than in civil proceedings. To assist us obtaining necessary evidence, the government has introduced legislation that will give the ACCC powers to seek a search warrant from a magistrate to search for and seize evidentiary material relating to contraventions of the Act.

These new powers will bring the Act into line with powers available to other competition enforcement agencies around the world, such as the US Department of Justice, European Commission, and the Canadian Competition Bureau and will assist us in gathering evidence.

The ACCC's view is that having search warrant powers is vital, particularly in an environment where cartel participants face significant sanctions, including jail. The capacity to search and seize the evidence is an important

¹² Ibid. [56].

development in the ACCC's ability to gather evidence using an element of surprise, rather than relying on the information and evidence provided by the company in response to a section 155 Notice, which compels recipients to produce relevant information or documents or attend an interview.

Protecting the integrity of our investigations

For some time the ACCC has been concerned that responses to section 155 notices have been less than thorough. The ACCC has been carefully monitoring responses to its statutory notices and discussing our concerns with the DPP. The ACCC is concerned that less than candid responses may be becoming more common. There are penalties under the Trade Practices Act for non-compliance with such notices including imprisonment for up to 12 months.

As I have mentioned, investigations also usually involve numerous voluntary interviews, not under section 155. You may not be aware that it is also an offence under the Criminal Code, punishable by up to 2 years in jail, to provide false or misleading information to a Commonwealth officer in such an interview.

Further, destruction of documents to prevent them from being used in legal proceedings is prohibited under the *Crimes Act*,¹³ as is giving false testimony,¹⁴ fabricating evidence,¹⁵ intimidating witnesses,¹⁶ corruption of witnesses,¹⁷ deceiving witnesses¹⁸ and preventing witnesses from attending court.¹⁹ Penalties for any of these acts range from 1 to 5 years imprisonment.

It is critical that the integrity of the ACCC's information and evidence gathering processes are maintained. We regard this issue very seriously and we will

¹³ 1914 (Cth) section 39.

¹⁴ Section 35.

¹⁵ Section 36.

¹⁶ Section 36A.

¹⁷ Section 37.

¹⁸ Section 38.

¹⁹ Section 40.

not shy away from pursuing a matter with the assistance of the DPP where there is evidence that a person has not complied with his or her obligations under a section 155 notice or has lied to, or misled, ACCC investigators.

Instituting proceedings

There has been some media comment in the context of the successful appeal I have already mentioned in the Ballarat petrol case, that the ACCC institutes legal proceedings inappropriately.

In a recent article in the *Australian Financial Review* it was suggested that:

It is time for the ACCC to ... publicly provide an assurance that the [Immunity Policy] in future cartel matters shall be subject to stringent guidelines and practices to ensure that the policy is not misused or abused, or results in unnecessary damage.²⁰

Ironically, such comments contrast with a contrary perception sometimes promoted that the ACCC is 'gun shy' and will not institute proceedings unless it is almost certain of victory. Such comments, from either end, are misinformed and misleading.

Our investigations are undertaken in a responsible and thorough manner and are supervised by a number of committees drawing on the expertise of senior staff and commissioners. Avenues of investigation are pursued in response to information provided to the ACCC. We are required under the Commonwealth Legal Services Directions to have external legal advice that we have reasonable prospects of success before we are able to institute proceedings. In the Ballarat case it is also relevant that the Federal Court, at first instance, found our case proved.

²⁰ Van Moulis, special counsel representing Apco, quoted by Duncan Hughes and Richard Kerbaj, *The loneliness of the corporate whistleblower*, AFR 29 August 2005, p53.

Litigation is a complex process and there are many contingencies. It cannot be expected that the ACCC will win every case. Nor can it be expected that a respondent will never succeed in an appeal against a decision in the ACCC's favour. But to suggest that the ACCC is careless when issuing proceedings is just wrong.

Additional complications arise where multi-national cartels are involved. For instance, there are practical issues of service of process and enforcement of court orders. In most cases leave will have to be obtained from a foreign court before service of Australian process can be affected overseas. Similarly, whether or not an order made by an Australian Court can be enforced in another jurisdiction will depend upon the law in that jurisdiction, and any treaty that may exist between Australia and that jurisdiction.

However the ACCC will continue to investigate and where appropriate, take enforcement action to prosecute international cartels because international cartels impact adversely on Australian consumers.

Media

It is crucial that the ACCC is transparent and accountable – the ACCC will continue to make measured, fair and accurate public comment about ACCC processes and enforcement decisions. Transparency and accountability is one of the keystones of public confidence in the administration of the Act.

Making public statements about 'real life' ACCC enforcement actions and processes educates consumers and businesses about their rights and obligations under the Act and is the most effective way of promoting compliance with the law.

However, the ACCC has two overarching considerations when making public comments. The publicity should not prejudice the right to a fair trial and it should not cause any unnecessary damage to reputation.

The ACCC will issue a news release when it decides to institute proceedings in relation to an alleged contravention that accurately describes the allegations and does not imply that the allegations are more than allegations.

In practice, the ACCC rarely makes public comments regarding an investigation because of the potential detrimental impact on the reputation of the parties.

Publication of ACCC policies such as the Immunity Policy also plays an important role in maintaining transparency.

The ACCC policy is clear: a person who has engaged in cartel conduct and applies for immunity will get off even if they are a major player in the cartel.

Immunity is not some secret deal completely at the ACCC's discretion. The Immunity Policy describes what is required of the immunity applicant and explains the public policy reasons behind the policy. It recognises that cartels are inherently secret and difficult to detect and that there is a public benefit in providing an incentive for cartel participants to break ranks. In some, but not all instances, the immunity application will lead to an investigation that culminates in successful proceedings to punish the other cartel participants. Even if no proceedings result, the consequence of an application will be to put an end to the cartel. This, in itself, is an important outcome.

Private damages proceedings

The ACCC's prime focus is on deterring, stopping and prosecuting cartels. But there seems to be a growing recognition by victims of cartels that they are entitled to seek redress. This coincides with an increased interest from private legal firms (and litigation funders) to pursue such private claims. Compensating victims in private damages actions has been the norm in North America for some time. My expectation is that compensation is set to become more common in Australia too, and this will surely act as a further deterrent.

The ACCC has been approached by both private legal firms and litigation funders seeking whatever assistance the ACCC can offer in the development of private damages claims. The ACCC sees private proceedings as a legitimate and valuable avenue of redress. However there are limits to what role the ACCC should play in such proceedings and what assistance it can provide.

For instance, it would not be possible for the ACCC to share information that had been obtained using the ACCC's compulsory information gathering powers under section 155 of the Act. Similarly, the ACCC obtains information on a confidential basis. It would not be possible to share this information without the consent of those who provided the information.

It has also been suggested that the ACCC should actively seek findings of fact that will assist private damages claimants. The ACCC will not shy away from this in appropriate circumstances. However, there may be legitimate reasons in a particular matter for the ACCC to obtain findings that do not cover all instances of certain conduct, or indeed, not pressing for findings of fact at all. The ACCC would not wish to jeopardise the public interest of obtaining an agreed penalty or other outcome merely because this would not advance a private damages action, or would advantage certain private parties over others.

Working with the Director of Public Prosecutions

As I have already mentioned, the Government has announced its intention to criminalise cartel conduct. This acknowledges the seriousness of cartel conduct and underscores that cartels are, in truth, a fraud on consumers and the economy and are, as has been noted by Justice Finkelstein, "morally offensive"²¹.

²¹ Speech to ACCC Cracking Cartels Conference 24 November 2004.

Criminalisation also recognises that financial penalties alone are not the answer. A US study of almost 400 firms convicted of price fixing²² estimated that optimal penalties would have bankrupted at least 58 percent 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.

On the other hand, jailing an executive guilty for participating in a cartel is a penalty from which no company or shareholder can be forced to pick up the cost.

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

Before long, this equation will, I hope, play on the minds of Australian company executives.

The ACCC does not underestimate the additional hurdles that will be involved in gathering evidence that will be admissible in a criminal court and that will persuade a jury of 12 men and women to jail a person whom society has placed in a position of trust; a person who may have a reputation as an upstanding member of the community and who donates time and money to charities and community groups.

²² Cray Craft and Gallo *Anti trust sanctions and a firm's ability to pay* (1997) 12 Review of Industrial Organisation 171.

Justice Finkelstein noted recently in the Vizard case, that it is the positions of trust such people occupy in the community that may facilitate the commission of their crimes.

The ACCC already enjoys a good relationship with the DPP, but with the introduction of criminal cartel sanctions it will be absolutely critical that the two agencies work well together. It is after all the DPP who decides whether to lay criminal charges in a particular matter.

The ACCC and the DPP will enter into a formal, publicly available, Memorandum of Understanding (MOU) that will establish high standards of cooperation at both the investigation and prosecution stages.

In addition, the ACCC will issue guidelines, prepared in consultation with the DPP, outlining what factors will inform decisions about whether an investigation should be pursued with a criminal prosecution in mind.

The ACCC 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 factors announced by the Treasurer that the ACCC will be required to consider before referring matters to the DPP. These factors underscore that criminalisation is intended to apply to hard core cartel conduct. These factors are:

- whether the conduct was long standing or had, or could have, a significant impact on the market in which the conduct occurred
- whether the conduct caused, or could cause, significant detriment to the public or loss to one or more customers
- whether one or more of the participants has previously participated in cartel conduct
- whether the value of affected commerce exceeded \$1 million within a 12 month period; and

- whether, in the case of bid rigging, the value of the successful bid or series of bids exceeded \$1million within a 12 month period.

The Treasurer also announced factors the DPP will need to consider in deciding whether to launch a prosecution – these factors are:

- the impact of the cartel on the market
- the scale of the detriment caused to consumers or the public, and
- whether any of the cartel members have previously been a party to a cartel.

Cooperation between the ACCC and the DPP will be significant from the early stages of a matter. It is anticipated that the ACCC will liaise with the DPP as soon as it appears that a matter may warrant criminal prosecution and will take advice on what evidence will be required and how an investigation may best be managed to gather that evidence. There will also be very close cooperation where a cartel participant has sought immunity. The ACCC and the DPP will work closely together to ensure that there is certainty in relation to immunity from both civil and criminal liability. Both agencies understand that if this certainty cannot be delivered the Immunity Policy will be compromised.

I expect there will be instances when the DPP will not want to lay criminal charges in a matter referred to it by the ACCC. For instance, if the DPP does not believe the evidence will satisfy the criminal (beyond reasonable doubt) burden of proof.

The ACCC and the DPP will have dispute resolution mechanisms in the Memorandum of Understanding. However, the ACCC understands that it is ultimately the DPP's decision whether or not to commence criminal proceedings. If the DPP does not consider a criminal prosecution to be warranted, the Trade Practices Act will specifically provide that the ACCC may commence civil proceedings.

Conclusion

The OECD's conclusion in 2002 that cartels are the most 'egregious violations of competition law' explains why the fight against cartels is given priority in all jurisdictions with developed anti-trust laws including Australia. The ACCC will continue to give cartel detection, investigation and prosecution a very high priority.

With the proposed introduction of criminal sanctions, this fight will enter a new phase in Australia. There will be new challenges for the ACCC in bringing cartel offenders to book. But making those found guilty of participating in a cartel liable to go to jail underscores how seriously Parliament regards cartel offences.

The ACCC has been a champion of the introduction of criminal sanctions for cartels for some time and is devoting significant effort to gearing-up in readiness for the new regime to ensure that Parliament's intention is implemented.