State Chamber of Commerce (NSW)
Legal Counsel Forum
Co-operation, Cartels and Crime

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Imagine you are the national sales manager for a company. You are sitting at a conference table, attending a side meeting organised to coincide with your industry association's annual conference. The side meeting is a regular feature at the annual conference. Every year you meet with the sales managers for your employer's four key competitors. You make "orderly marketing" arrangements with your opposite numbers. Not that the prospect of competition worries you. Your traditional customers are very loyal and have been with your company for ages. Still it's good to know that your "competitors" won't be trying to steal those customers from you and that you'll continue to get a fair price for your products. Your fellow employees are assured of their jobs for another year and your shareholders are assured of a reasonable return on their investment.

Commercial co-operation is to be commended, isn't it?

Making an "orderly marketing arrangement" is participation in a cartel. Cartels are unlawful. Section 45(2) of the Trade Practices Act 1974 proscribes contracts, arrangements and understandings which:

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

In plain English, this means that you cannot agree with your competitors to undermine competition through price fixing, collusive tendering, market sharing or controlling outputs.

By participating in a cartel, you risk a maximum personal penalty of $500,000 and expose your corporate employer to a penalty of $10 million. I should add that those penalties are per offence / occurrence. So if you've been attending the trade association side meetings for years or have implemented customer-specific arrangements on numerous separate occasions – then your potential exposure will be significantly greater.

Proposed amendments to the TPA will see these numbers increase. The maximum penalty for corporations is slated to rise to the greater of:

- $10million; or
- three times the gain from the contravention; or
- where the gain cannot be ascertained – 10% of annual turnover of the body corporate and all its related entities.

They will also see individuals liable to be "banned" from being involved in the management of companies[1].

Perhaps even more significantly, it is proposed to introduce criminal sanctions for certain cartel conduct: criminal sanctions including jail terms. The draft legislation has not yet come before Parliament. Apart from the obvious discomfort that a stretch in prison might involve, a criminal regime will have implications for an individual's ongoing involvement in business and their ability to travel internationally.

Does anyone doubt that "orderly marketing" should be a crime? I'm sure that many people do. Those responsible for "orderly marketing" don't fit the criminal stereotype. They have nice teeth, good jobs, comfortable houses, their children might attend selective schools, they might be president of the local junior rugby club and chair the P & C. But one should not lose sight of the fact that the individuals involved typically make dishonest and self serving choices which can do widespread harm.

In his judgment in the *Transformers* matter[2], 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 are, however, important matters of which the sentencing judge should not lose sight.*
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> *The first is the gravity of an antitrust contravention. It is not unusual for anti-trust violations to involve far greater sums than those that may be taken by the thieves and fraudsters, and the violations can have a far greater impact upon the welfare of society…*
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> *Secondly, 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."*

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1 *Trade Practices Legislation Amendment Bill (No. 1) (Cth)* 2005. This Bill has not progressed, due in large part to the position famously take by Senator Barnaby Joyce on the changes to merger processes, the Bill would make, if passed.

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

In any case, it's worth noting that if the participants in a cartel *really do* have the public interest at heart and their conduct *really will* deliver community benefits, they can approach the ACCC for an "authorisation". For those of you who don't know, the ACCC can authorise most conduct that would breach Part IV of the TPA where, after a public consultative process, it finds that the proposed conduct is likely to generate pubic benefits which outweigh the anti-competitive detriments.

But let's go back to the side meeting coinciding with the annual trade association get together. You're at the table, chatting with your competitors, divvying up the market, agreeing on prices and so on. Are you comfortable?

Did you know that, historically, the chances of being caught are quite low. One European paper suggests they are in the order of 13-17% - so that only 1 in 6 or 7 cartels ever comes to the attention of regulators. The same paper suggests that cartels, on average last for around six years and affect the price of commodities by around 10%[3]. So, there's plenty of money to be made. It's not likely that you'll be caught – and even if you are, the highest penalty imposed on a single corporation for a part IV contravention is $9 million – for an individual $150,000.

But the on-going success of the cartel depends on trust.

Do you trust your co-conspirators to leave your customers alone – to back you up on the Autumn price rise – not to go ahead with a new state of the art factory? You all lie without a second thought when approving the "minutes" of the side meeting that suggest you occupied yourselves reviewing technical standards.

Do you trust your co-conspirators to maintain healthy marriages? More than one cartel has come to the ACCC's attention via a tip-off from a spurned wife or lover.

Do you trust your co-conspirators to maintain happy and functional workplaces? Again – more than one cartel has come to the ACCC's attention via a disgruntled employee.

Do you trust your co-conspirators not to slip up? One cartel came to the attention of the Canadian authorities when the correspondence through which "competing" tender bids were nutted out was inadvertently included in a bundle of material popped into the tender box.

More importantly now, do you trust your co-conspirators not to go to the ACCC and spill the beans? Why would they consider doing that? Self interest and the ACCC"s immunity policy.

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[3] 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

The ACCC's current immunity policy for cartel conduct was launched almost 6 months ago (5 September). As the name suggests, immunity from prosecution is offered to a person or organisation confessing their involvement in a cartel to the ACCC – but it's only offered once. It's a case of first in best dressed. Before an applicant for immunity under the policy will be granted conditional immunity, they must meet the following requirements:

(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).

But if they meet those requirements, immunity is automatic. Even if the applicant is a recidivist or a company with which the ACCC has had a long-running public battle – that's it.

However, receiving conditional immunity is not a completely free pass. The ACCC expects full, frank, expeditious and continuous cooperation in return. An immunity applicant must provide all evidence and information in their possession, or available to them wherever 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.

Second and subsequent through the door will not necessarily go away completely "empty handed". They will not get immunity (unless applicant no. 1 loses immunity) but co-operation can be rewarded with agreed penalty submissions and "discounts".

For this audience - which I think is predominantly legal counsel rather than sales managers – you may never find yourself sitting at the trade association table making the agreements, wondering why it is that Joe is so late, wondering whether Joe is coming and if not why not.

It is much more likely that through a compliance audit or following a change in staff, or even following an ACCC information request, you will find yourself across the desk from someone who has concerns or suspicions. In practice, what should you do? With appropriate, authority, I would urge you to contact the ACCC with a view to finding out whether immunity is available (this can be done by making a hypothetical inquiry describing the industry or market of concern) and put down an immediate "marker". Such a marker reserves your place in the immunity queue while you make your own investigations. If those investigations confirm your worst fears – you are then in a position to proceed with an application for immunity.

I would urge you not to delay for risk of finding yourself in the position of one lawyer who lamented to the general manager of our enforcement division, *"You're telling me that the leniency carrot has been eaten and all that's left is a stick"*.

Some may think that there can be no principled basis on which two companies who have done exactly the same thing should be facing two very different outcomes, one facing court proceedings and high penalties and the other holding a get-out-of-jail-free card. But I'm pleased to say that this is not a view shared by Federal Court judges.

In the December 2003 *Tyco* case[4], Justice Wilcox noted in relation to a deal done under the ACCC's cooperation policy:

> *"Through its solicitors, Tyco alerted ACCC to the fact of the contravening conduct. Tyco, and its relevant executives, agreed to provide evidence to ACCC in return for a leniency agreement under which ACCC agreed not to seek the imposition of a penalty upon any of them. No doubt it was appropriate for ACCC to offer leniency; without such an offer, ACCC may not have been able to prove the collusive conduct…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 ACCC's confessional, that may not be a bad thing."*

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

Finally – while speaking on the subjects of criminal conduct and of co-operation, I should note that the ACCC is concerned at the lack of co-operation it has been getting in some recent investigations where it has sought information using its compulsory (section 155) powers. You probably know that the ACCC has the power to require people to attend and give evidence before it on oath – or to produce documents. A failure to comply with such a notice (either by not producing all the documents contemplated or by telling the ACCC bald-faced lies) can itself amount to a criminal offence. In other forums, the ACCC chairman has already put lawyers on notice that the ACCC's patience in this regard is wearing thin and that the ACCC has been discussing its concerns with the DPP.