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Alternatives to Leniency Programmes – Contribution from Australia

- Session II -

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This contribution is submitted by Australia under Session II of the Global Forum on Competition to be held on 7-8 December 2023.

More documentation related to this discussion can be found at: oe.cd/atlp.

Please contact Ms Lynn Robertson if you have questions about this document
[Lynn.Robertson@oecd.org]

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Alternatives to Leniency Programmes

- Contribution from Australia -

1. Introduction

1. Cartel conduct is, by its nature, secretive and difficult to detect. Detecting cartel conduct remains an ongoing challenge for competition regulators. While many jurisdictions rely on the use of leniency programs to detect cartel conduct, the development and implementation of a diverse range of alternative strategies is an important step in creating a more effective approach to detecting cartel conduct.
2. The Australian Competition and Consumer Commission's (ACCC) leniency program is set out in the *ACCC immunity and cooperation policy for cartel conduct* (the **Immunity Policy**). The Immunity Policy has, for many years, been one of the ACCC's key tools for detecting cartel conduct, providing incentives for businesses and individuals to disclose cartel behaviour.
3. In recent years, the ACCC has also had a significant focus on developing and implementing a range of methods of proactive cartel detection, to operate alongside the Immunity Policy. The ACCC considers that the ability to detect cartels proactively well as through the Immunity Policy is important to sending a strong message to businesses and individuals that there is a material risk that cartel conduct will come to the attention of the ACCC even if they do not self-report through the Immunity Policy. We consider that this strengthens the ACCC's deterrence message regarding cartel conduct and supports the operation of the Immunity Policy by providing additional incentives for businesses and individuals to self-report.
4. This paper describes the ACCC's experience with developing and implementing a proactive detection program to support its leniency program. It also discusses how proactive and reactive cartel detection methods may complement or impede leniency programs.

2. Alternate detection tools

5. Following a short-term decline in immunity applications during the COVID-19 pandemic, the ACCC identified a need to modernise its proactive detection program to ensure it remains at the forefront of detection methodology. The ACCC has developed and is implementing a suite of initiatives to drive proactive detection of cartel and other anti-competitive conduct. These include:
 1. using sources and products as a pipeline for new investigations;
 2. developing and refining a sophisticated cartel screening toolkit to more efficiently analyse large or complex procurement datasets;
 3. reinvigorating and maintaining an ongoing outreach and awareness program, including with government procurement professionals;
 4. forming strategic relationships with other domestic law enforcement agencies and procurement teams in government departments; and

5. improving and modernising intelligence tools and internal communication channels within the ACCC to ensure efficient information and intelligence exchange between the different work areas of the ACCC.

2.1. The ACCC's current toolkit

2.1.1. Proactive detection program

Using intelligence sources for proactive detection

6. The ACCC's Intelligence team plays a major role in the ACCC's proactive detection initiatives. The Intelligence team develops industry profiles containing risk assessments outlining the susceptibility of a particular industry to anti-competitive behaviour.
7. Markets are selected for risk profiling in consultation with the ACCC's Competition Division that undertakes its enforcement activity. The Intelligence team uses a wide variety of information sources to produce a structured competition assessment of each target market.
8. When assessing a market's susceptibility to anti-competitive conduct, the ACCC assesses a range of qualitative and quantitative criteria such as market concentration, supply shocks, mergers, product and geographic market conditions, vertical integration and collaboration between market participants, to produce an overall risk rating for the market and the potential harm to consumers. Where this rating is sufficiently high, the profile may be considered for further assessment. Since their inception in 2021 these short industry profiles have generated three ex-officio investigations for the ACCC's Competition Division.

Cartel Screening Toolkit

9. The ACCC's cartel screening project was initiated in late 2019 with the aim of creating a toolkit to enable algorithmic analysis of public procurement data to detect possible collusion. The screening toolkit is targeted towards cartels in public procurement as studies show that they have key elements that are appealing to cartelists; namely, repetitive processes in specialised industries of high value. In the case of bid rigging, the submission of bids by colluding tenderers presents a unique opportunity to use data to identify potential cartel conduct.
10. The ACCC's Strategic Data Analysis Unit (SDAU) has developed a sophisticated screening algorithm to implement a rules-based approach which identifies tenders that are more likely to contain collusive conduct. This is overlain with staff expertise in interpreting the results by bringing real world economic, intelligence and cartel expertise. Work is underway to continue to develop investigative staff expertise through close collaboration between SDAU and our specialised investigation teams. The SDAU continues to enhance the functionality of the tool including recent updates to allow ease of analysis.
11. The biggest challenge to the success of the cartel screening project remains access to high quality procurement data sets.

Education and outreach

12. The ACCC has a significant focus on engaging with market participants to develop relationships and encourage reporting of anti-competitive conduct. The ACCC considers outreach work to be critically important in building and maintaining public awareness of

the law in relation to cartel conduct to increase deterrence, self-reporting and whistleblowing.

13. In the context of cartels, the ACCC's outreach efforts have most recently targeted public sector procurement officials to educate them about the risks and indicators of cartel conduct in procurement processes, and methods to mitigate the risks. Procurement professionals are encouraged to contact the ACCC if they notice any suspicious behaviour.

Prioritisation

14. In addition to its enduring compliance and enforcement priorities, the ACCC sets annual priorities to address current issues affecting consumers and markets in Australia. Priorities are determined following external consultation and an assessment of existing or emerging issues and their impact on consumer welfare and the competitive process. In 2022-23, the ACCC's annual priorities include competition issues in global and domestic supply chains, particularly where they were disrupted by the COVID-19 pandemic.

15. The ACCC is implementing a plan to proactively detect anti-competitive conduct in supply chains including using industry surveys to better understand market dynamics. The Intelligence team is collaborating with investigation teams, infrastructure regulatory teams and the SDAU to identify trends in complaints or industry practices that may warrant investigation.

Strategic partnerships

16. The ACCC has ongoing relationships with law enforcement agencies and government procurement teams. The ACCC has developed these relationships through both its outreach work and by participating in multi-agency law enforcement forums, counter-fraud initiatives and developing domestic bilateral MOUs where there is benefit in doing so.

17. The ACCC is continuing to prioritise regular and ongoing communications with key agencies and is progressing the development of MOUs with additional relevant agencies as opportunities arise.

2.1.2. Reactive detection tools

Immunity Policy

18. The ACCC considers an effective immunity and cooperation policy is integral to the detection, investigation, deterrence and prosecution of cartels. Under the ACCC's Immunity Policy, the first cartel participant to self-report their involvement may seek both civil and criminal immunity for cartel conduct upon application to the ACCC. The ACCC is responsible for granting civil immunity, while the Commonwealth Director of Public Prosecutions is responsible for granting criminal immunity.

19. The ACCC's Immunity Policy has been a very successful cartel detection tool generating a significant number of investigations and enforcement actions, including both criminal and civil court-based outcomes.

20. The ACCC has recently commenced a review of its Immunity Policy and associated guidance, processes and procedures. The ACCC conducts periodic reviews to ensure it has the best possible opportunity to detect and break up cartels operating in Australia. The first stage of the review process involves gathering stakeholder feedback and liaising with international competition regulators to determine key issues that may be affecting the Immunity Policy.

Complaints and whistleblower reports

21. The ACCC continues to receive information regarding possible cartels from third party complainants and whistleblowers. These reports are received through the ACCC's anonymous online cartel reporting portal and its dedicated telephone hotline and email mailbox. Since 1 January 2022, complaints and whistleblower reports were responsible for initiating approximately 47% and 16% of the ACCC's cartel investigations respectively.

2.2. Tools and strategies currently in development

2.2.1. International Case Dataset

22. In 2022, the Intelligence team and Data Unit began compiling a dataset of international competition cases from the following sources: OECD, European Commission and US Federal Trade Commission databases, competition journal case data and ACCC competition cases. To fill in inevitable gaps in the data, the ACCC reached out to international regulators requesting competition and cartel case data. The ACCC received additional data from 16 international jurisdictions.

23. Using these different data sources, the ACCC created the International Case Dataset (ICD) consisting of over 14,000 international competition cases covering the past 20 years.

24. The project team behind ICD has classified cases by industry (ISIC Codes) using fuzzy matching and supervised machine learning. Data quality sampling has been performed to improve the training and refine the classification, with a view to ensuring the data is useful and accurate. Ultimately, the ACCC intends to use the ICD data to create prioritisation/risk dashboards and for ease of searching. The purpose of the ICD is to uncover 'blind spots' when conducting proactive competition assessments and to assist with developing case theory at the initial investigation stage.

3. Combining alternate detection tools with leniency

25. The proactive detection strategies discussed above are likely to reinforce the operation of the Immunity Policy by:

1. creating a more powerful deterrent to the formation of cartels, and
2. increasing incentives for cartelists to be the first party to self-report under the Immunity Program due to the increased threat of detection.

26. The ACCC notes that our enforcement actions, particularly high profile ones, reinforce the detection risks to cartel participants. There is an observed correlation between the public reporting of litigation commencement and judgments in ACCC cartel cases and an increase in applications under the Immunity Policy.

27. In the ACCC's experience, the Immunity Policy has been the most effective method in detecting cartels in Australia. As such, the alternate detection methods in use in Australia are viewed as complementary to, and strengthen the operation of the ACCC's Immunity Policy, rather viewed as an alternative, or replacement.