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Working Party No. 3 on Co-operation and Enforcement

Criminalisation of cartels and bid rigging conspiracies – Note by Australia

9 June 2020

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More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/criminalisation-of-cartels-and-bid-rigging-conspiracies.htm>

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Australia

1. Introduction

1. In the early twentieth century, three countries had criminal cartel laws. They were Canada, the United States of America and Australia. By 1920, there had only been sporadic enforcement under those laws. One hundred years later more than 30 jurisdictions have criminalised cartels or bid rigging. Over the last two decades, there has been steady and substantial growth in active enforcement under these laws.

2. Even though active enforcement is growing, criminal cartel enforcement is difficult work for the agencies entrusted with it. At least three characteristics of criminal cartel investigations increase the challenges for enforcers:

- **Detection** - Cartels historically have been difficult to detect and investigate. They usually involve secret collusion between competitors. Cartel leniency and immunity policies address this problem.
- **International cartels** - The most detrimental cartels often operate across international borders making investigations and evidence gathering more challenging for national enforcers. International enforcement cooperation involving exchange of information and the provision of mutual assistance is therefore of vital importance in cartel investigations.
- **Prosecutorial burden** - Enforcers must meet the high standards of proof and fairness that criminal courts legitimately demand of prosecutors and investigators. As with other forms of competition enforcement, those accused of cartel collusion have strong incentives to fight and defend themselves. Generally, they also have the resources needed to test and challenge the investigation process.

3. This paper describes the progress made in Australia as it has developed its criminal enforcement program. It also outlines the legal framework, critically important Immunity (or Leniency) policies and the role of international cooperation.

2. Progress in Australia

4. For more than 60 years after the enactment of Australia's cartel law in 1906, there was only one successful case¹. It was a very large case and only partially successful. It involved miners and shippers of coal from the Hunter Valley in New South Wales. The trial judge ordered substantial fines, miners paid their fines but the shippers appealed and had their fines overturned.

5. There was no further cartel enforcement action in Australia until the mid-1970s. Largely this arose from the High Court of Australia's decision in *Huddart, Parker & Co Pty Ltd v Moorehead* (**Huddart-Parker**), which limited the Australian Parliament's ability to make laws controlling intrastate trading by corporations².

¹ *Attorney-General of the Commonwealth of Australia v. The Associated Northern Collieries and Others* (1911) 14 CLR 387. Aspects of the case were later appealed successfully to the High Court of Australia and the Privy Council.

² *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330.

6. In 1971 the High Court overruled the decision from *Huddart-Parker*³, which paved the way for the establishment of a new agency, the Trade Practices Commission (the **TPC**). At that time, a ‘civil penalty’ regime was enacted as part of the *Trade Practices Act 1974*. That law prohibited cartels including bid rigging but sanctions were limited to non-custodial orders including penalties and injunctions.

7. The Australian Parliament amended the *Trade Practices Act 1974* and criminalised cartels in 2009. The TPC had become the Australian Competition and Consumer Commission (the **ACCC**). It is responsible for cartel investigations. The independent national prosecutor (the Commonwealth Director of Public Prosecutions or **CDPP**) instigates cartel prosecutions.

8. Since 2009, the ACCC has invested substantial resources and made significant operational changes to develop its criminal cartel enforcement capacity. Australia’s cartel provisions are now in the *Competition and Consumer Act 2010* (the **CCA**) which is Australia’s national competition and consumer law.⁴

9. It has taken a number of years for the ACCC to adapt its investigative processes to the requirements of criminal investigations and embed its new capability. This work is continuing but there has been substantial progress adapting to the different practical and legal requirements of criminal cases.

10. As at May 2020, ACCC investigations have led to the CDPP taking prosecutions against three companies who have pleaded guilty or have indicated an intention to plead guilty:

- Nippon Yusen Kabushiki Kaisha sentenced in 2017
- Kawasaki Kisen Kaisha Ltd sentenced in 2019
- Wallenius Wilhemson Organisation has indicated it intends to plead guilty and will be sentenced later in 2020.

11. The CDPP has also commenced prosecutions against 5 companies, a trade union and 15 individuals:

12. In February 2018, charges were laid against the Country Care Group Pty Ltd, its managing director and a former employee, relating to alleged cartel conduct involving assistive technology products used in rehabilitation and aged care facilities. The company and its managers were committed to stand trial in the Federal Court of Australia; a trial date was set down, however the trial date has recently been vacated. The trial judge has elected not to set a new trial date due to uncertainty surrounding Covid-19.

- In June 2018, charges were laid against Citigroup Global Markets Australia Pty Limited (**Citigroup**), Deutsche Bank Aktiengesellschaft (**Deutsche Bank**) and Australia and New Zealand Banking Group Ltd (**ANZ**) and several senior executives. The charges involve alleged cartel arrangements relating to trading in

³ *Strickland v Rocla Concrete Pipes Ltd* [1971] HCA 124 CLR 468. The decision in this case widened the application of the Australian Constitution’s corporations power, giving the Commonwealth broader power regulate the trading activities of corporations.

⁴ In addition to the CCA (which is a national law), each state/territory in Australia has enacted a Competition Code. The Competition Codes have the same provisions covering cartels as those in the CCA. The Competition Codes apply to cartel conduct in circumstances where Australia’s national government does not have jurisdiction because of constitutional limitations. They were implemented in 1995 as part of Australia’s National Competition Policy. For an example of a state Competition Code, that of New South Wales can be viewed at: <https://www.legislation.nsw.gov.au/#/view/act/1995/8/full>.

ANZ shares held by Deutsche Bank and Citigroup. ANZ and each of the individuals are alleged to have been knowingly concerned in some or all of the alleged conduct.

- In August 2018, charges were laid against the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) and its Australian Capital Territory (ACT) Divisional Branch Secretary. The defendants were each charged with attempting to induce suppliers of steel-fixing and scaffolding services to agree to contracts, arrangements or understandings containing cartel provisions in relation to services provided to builders in the ACT in 2012 and 2013.
- In April 2019, criminal cartel charges were laid against a money transfer business and five individuals for allegedly fixing the Australian dollar/Vietnamese dong exchange rate and the fees they charged to their customers. This matter arose out of a joint investigation with the Australian Federal Police.
- Charges relating to attempts to obstruct justice have been laid against Jason Ellis a former senior manager with BlueScope Steel Limited (**BlueScope**). The charges arise from an ACCC cartel investigation. BlueScope and Mr Ellis are separately the subject of civil enforcement action under the civil penalty cartel provisions of the CCA.

13. The ACCC has become very experienced in some critical criminal investigative techniques including search warrants. It also relies heavily on a sophisticated cartel immunity and cooperation program and recently adopted an anonymous whistle blower tool.

14. The ACCC's cartel enforcement program also involves proactive strategies, such as community education, collaboration with domestic and international agencies, and proactive intelligence gathering.

15. The ACCC has observed that its work in this area often generates significant publicity, even beyond the business media, and shines a spotlight on the cartel provisions. This has often been effective in deterring collusion and changing the conduct of businesses even before a final court outcome.

16. In Australia, since the criminalisation of cartels, domestic and international cooperation has become increasingly important and useful. The ACCC has updated its immunity policy⁵ and has dedicated resources to increasing its criminal investigative capabilities, including working with the CDPP and other agencies and institutions involved in the process to prosecute criminal cartel conduct. International cooperation has allowed more open dialogue between competition agencies about what works well in each jurisdiction and this has allowed for the adoption of more effective enforcement strategies. The ACCC has access to a number of international agreements and treaties that support the cooperation. These are discussed below.

3. Availability and scope of criminal sanctions

17. Part IV of the CCA prohibits cartel conduct which includes four forms of activity: price fixing, output restriction, customer or territory allocation and bid rigging.⁶ The CCA sets out parallel criminal offences and civil penalty provisions relating to cartel conduct,

⁵ See: [ACCC immunity and cooperation policy for cartel conduct](#).

⁶ *Competition and Consumer Act 2010* (Cth) ('CCA') s 45AA.

both of which provide for significant penalties against corporations and individuals.⁷ Australia adopted this approach in 2009 to target cartels based on the OECD's 1998 Cartel Recommendation that countries ensure their competition laws effectively halt and deter hard core cartels, in particular by providing 'effective sanctions, of a kind and at a level adequate to deter firms and individuals from participating in such cartels'.⁸ The new cartel regime also gave effect to the recommendations of the Dawson Review which was an independent review undertaken in 2003 that examined options for strengthening Australia's competition law framework.⁹

18. Since 2009, both criminal and civil liability attaches to corporations who are, or but for the cartel would be, in competition,¹⁰ when the corporation makes,¹¹ or gives effect to,¹² a contract, arrangement, or understanding (CAU) that contains a cartel provision.

19. A cartel provision, is defined in s 45AD of the CCA as a provision in a CAU between competitors that has the purpose or effect of directly or indirectly:

- fixing, controlling or maintaining prices (price fixing)
- preventing, restricting or limiting production, capacity or supply (output restriction)
- allocating customers, suppliers or geographical areas (market sharing)
- rigging bids or tenders in relation to the supply or acquisition of goods or services (bid rigging).

20. The CCA also prohibits CAUs and concerted practices that have the purpose, effect or likely effect of substantially lessening competition in a market, even if that conduct does not meet the stricter definitions set out above (see s 45 of the CCA). These are not considered to be "cartel provisions" for the purposes of the CCA and they do not attract criminal sanctions.

21. In relation to cartel conduct, the primary factor that distinguishes the criminal cartel offence from the civil prohibition is the need to establish certain fault elements. In particular, criminal liability requires the prosecution to prove that the corporation or individual had the requisite *mens rea* of knowledge or belief with respect to whether the CAU contained a cartel provision.¹³ Please see Section 4.2 for further information on how criminal and civil cartel matters are distinguished in Australia.

⁷ Contraventions of civil penalty provisions are pursued by the ACCC in the courts as civil proceedings and provide for the imposition of monetary penalties or other orders such as community service orders and injunctions. However, they do not attract criminal processes or penalties such as fines or terms of imprisonment for individuals.

⁸ Organisation for Economic Cooperation, *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels* (OECD Recommendation C(98)35/FINAL, 25 March 1998), 2.

⁹ Trade Practices Committee of Review (Dawson Committee), *Review of Competition Provisions of the Trade Practices Act* (Commonwealth of Australia Report, 31 January 2003), 161-2 ('Dawson Review').

¹⁰ CCA s 45AD(4).

¹¹ *Ibid* ss 45AF, 45AJ.

¹² *Ibid* s 45AG, 45AK.

¹³ *Ibid* s 45AF(2), 45AG(2).

3.1. Range of sanctions

22. There are significant civil and criminal penalties available for both corporations and individuals who engage in cartel conduct. There are not additional remedies for cases involving bid rigging on public contracts, however there are a wide range of remedies available.

3.1.1. Criminal and civil penalties - Corporations

23. For corporations, the maximum fine or pecuniary penalty for each criminal cartel offence or civil contravention (whichever applies) will be the greater of:

- AUD \$10 000 000
- three times the total value of the benefits obtained and reasonably attributable to the conduct (assuming the Court can determine such value) or
- if the total value of the benefits cannot be determined, 10% of the annual turnover of the corporation (including related corporate bodies)¹⁴ attributable to Australia during the 12 months ending at the end of the month in which the conduct occurred.¹⁵

3.1.2. Criminal and civil penalties - Individuals

24. Individuals found guilty of cartel conduct can face criminal or civil penalties, including:

- up to 10 years imprisonment and/or fines of up to AUD \$420 000 per criminal offence
- a pecuniary penalty of up to AUD \$500 000 per civil contravention.¹⁶

25. Punishing firms that engage in cartel behaviour is essential to deterrence, however, Australia also views the treatment of individuals under its sanctions regime as necessary both to halting the formation of cartels and to their detection. The prospect of significant fines and/or 10 years imprisonment has an immediate deterrent effect for individuals, who, if not held personally liable for their actions, might perceive the threat of sanctions to be so remote from the illegal conduct that it constitutes an acceptable risk. For that and other reasons, it is illegal for a corporation to indemnify its officers against legal costs and any financial penalty arising from cartel conduct.

3.1.3. Other sanctions

26. The Court has broad powers to make other remedial orders that it considers necessary to resolve the matter before it or address the harm.¹⁷

27. The Court may impose a disqualification order which prohibits an individual from being involved in the management of a company for any period of time that the court

¹⁴ The annual turnover of a body corporate is defined such as to include turnover of any related bodies corporate: section 76(5) of the CCA.

¹⁵ CCA s 76(1A).

¹⁶ Ibid s 76(1B).

¹⁷ Ibid ss 80, 86C-E and 87.

considers appropriate, based on the circumstances of the case.¹⁸ To impose a disqualification order, the Court must be satisfied that a person has breached, attempted to breach, or been involved in a breach of the CCA and that the order is justified in all the circumstances, having regard to the need to protect the public from future misconduct or where a person has had little regard for their legal obligations.

28. Additionally the Court may grant an injunction in terms it considers appropriate where it is satisfied that a person has engaged in, or is proposing to engage in, conduct contravening CCA provisions including those under Part IV.¹⁹ The Court must be convinced that, on the balance of convenience, an injunction should be granted.

29. The Court can make a number of further remedial orders under the CCA, such as community service orders and orders requiring the respondent to establish a competition compliance or education and training program. These forms of relief are generally less suited to criminal cartel cases considering the seriousness of conduct.

3.2. Cases in which criminal penalties have been imposed

3.2.1. *Nippon Yusen Kabushiki Kaisha (NYK)*²⁰

30. In July 2016, following an investigation by the ACCC, Japan-based global shipping company NYK pleaded guilty in the Federal Court to criminal cartel conduct. This was the first criminal charge laid by the CDPP against a corporation under the criminal cartel provisions of the CCA.

31. NYK was charged with giving effect to cartel provisions in an arrangement or understanding with other shipping lines relating to the transportation of motor vehicles to Australia between 2009 and 2012.

32. The cartel operated from at least February 1997 and affected vehicles transported to Australia by NYK and other shipping lines from locations in Asia, the US and Europe on behalf of major car manufacturers including Nissan, Suzuki, Honda, Toyota and Mazda.

33. In August 2017, the Federal Court convicted NYK of criminal cartel conduct and imposed a fine of AUD \$25 million.

34. Justice Wigney stated that the fine “incorporates a global discount of 50 per cent for NYK’s early plea of guilty” and that “but for the early plea and past and future cooperation, the fine would have been \$50 million.”²¹ In this case, the maximum penalty was calculated on the basis of 10 per cent of NYK’s annual turnover in connection with Australia, in the 12 months prior to the commencement of the offence. On that basis, NYK’s conduct attracted a maximum penalty of AUD \$100 million.

35. Justice Wigney stated in his judgment the “cartel conduct of the sort engaged in by NYK warrants denunciation and condign [fitting] punishment” because “it is ultimately detrimental to, or at least likely to be detrimental to, Australian businesses and consumers. The penalty imposed on NYK should send a powerful message to multinational

¹⁸ Ibid s 86E.

¹⁹ Ibid s 80(1)(a).

²⁰ *CDPP v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876.

²¹ *CDPP v Nippon Yusen Kabuhiki Kaisha* [2017] FCA 876 [299].

corporations that conduct business in Australia that anti-competitive conduct will not be tolerated and will be dealt with harshly”.²²

3.2.2. *Kawasaki Kisen Kaisha Ltd (K-Line)*²³

36. In November 2016 the CDPP laid criminal charges against Japan-based company, K-Line, in respect of alleged cartel conduct arising from the same cartel to which NYK pleaded guilty.

37. K-Line pleaded guilty in April 2018, and on 2 August 2019, K-Line was ordered by the Federal Court to pay a fine of AUD \$34.5 million.

38. K-Line’s conduct was punishable by a maximum penalty of AUD \$100 million, based on 10 per cent of K-Line’s agreed annual turnover relating to Australian business activities in the 12 months prior to the commencement of the offence.

39. The Court allowed for a discount of 28% for K-Line’s early guilty plea, and for their level of assistance and cooperation. The Court considered these elements as signs of contrition.

40. The Court held that without K-Line’s early guilty plea and cooperation, K-Line would have been fined AUD \$48 million.

41. In his judgement summary, Justice Wigney stated that the “penalty imposed on K-Line should send a powerful message” and that “anti-competitive conduct will not be tolerated and will be dealt with harshly when it comes before this Court”.²⁴

42. The ACCC’s prosecution of other alleged cartel members is continuing.

3.2.3. *Custodial sentences*

43. No custodial sentences have been handed down to date, because no cases where charges have been laid against individuals have yet been decided. Charges have been laid against 15 individuals following ACCC investigations into alleged cartel conduct in five separate criminal cases currently before the courts.

4. Process for enforcing criminal sanctions

44. Since 2009, the ACCC has invested significant resources towards developing a criminal investigation capacity. The ACCC built a substantial team of specialist criminal cartel investigators, and this has been necessary to conduct careful and thorough criminal investigations.

45. The ACCC has also invested significant resources into developing its relationship with other agencies involved in the process for obtaining criminal sanctions, such as the CDPP and the Australian Federal Police (AFP). This has been coupled with capacity building work with international counterparts such as the United States Department of Justice (US DOJ) and Federal Bureau of Investigation.

²² Ibid [300].

²³ *CDPP v Kawasaki Kisen Kaisha Ltd* [2019] FCA 1170.

²⁴ *CDPP v Kawasaki Kisen Kaisha Ltd* [2019] FCA 1170 [413].

46. The ACCC and CDPP have entered into a Memorandum of Understanding (MOU) outlining the roles of each agency²⁵, from investigation of cartel conduct through to prosecution, as well as principles to guide dealings between the agencies. Similarly the ACCC has strengthened its relationship with the AFP, and the agencies have conducted joint cartel investigations and shared training programs.

4.1. Investigating criminal cartels

47. The ACCC is responsible for investigating cartels. Suspected serious cartels are investigated by a specialist branch of the ACCC and can be subject to enforcement action through either civil litigation or criminal prosecution.

48. Subject to meeting evidentiary thresholds, the ACCC has extensive powers to investigate cartels under the CCA. In relation to investigating criminal cartel conduct the ACCC may:

- Compel any person or company to provide information and/or documents that are already in existence and which relate to a suspected breach of the law.²⁶ In criminal cases, the ACCC cannot use compelled testimony against an individual where that person has been subject to a compulsory interview and incriminate themselves. However, such testimony can be used against others.
- Seek search warrants from a magistrate and execute these on company offices and the premises of company officers.²⁷
- Seek a warrant to access emails, SMS, MMS etc. stored on equipment operated by a telecommunications provider or internet service provider.²⁸
- Notify the AFP who in certain circumstances collect evidence using telephone interception and other surveillance devices.²⁹
- Request the extradition of individuals from countries where the relevant country has an extradition treaty with Australia, and vice versa.

49. The criminalisation of cartel conduct has enabled the ACCC to participate in joint investigations with other domestic law enforcement agencies, and thereby utilise a variety of covert investigative techniques available only when investigating criminal offences. As cartels are conspiracies and are usually carried out in secret, covert investigative tools are crucial to enable a regulator to obtain evidence of conduct as it takes place.

50. As noted above, the ACCC can use materials obtained through telephone interception pursuant to the *Telecommunications (Interceptions and Access) Act 1979* (Cth) in investigations of criminal cartel offences if conducted jointly with interception agencies such as the AFP. From our experience, using a combination of covert and overt investigative tools (for example, search warrants, surveillance devices and notices

²⁵ *Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission regarding Serious Cartel Conduct* ('MOU'): <https://www.cdpp.gov.au/sites/g/files/net391/f/MR-20140910-MOU-Serious-Cartel-Conduct.pdf>.

²⁶ CCA s 155.

²⁷ *Ibid* pt XID.

²⁸ *Telecommunications (Interception and Access) Act 1979* (Cth).

²⁹ *Ibid*.

compelling the production of documents) can assist in obtaining evidence, generating intelligence and securing the cooperation of key informants and witnesses.

4.2. Prosecuting ‘serious’ cartel conduct

51. In Australia, criminal prosecutions are taken by the CDPP, an independent prosecution service. It prosecutes alleged offences against Australian federal (Commonwealth) law. The ACCC investigates allegations of cartel conduct, refers a brief of evidence to the prosecutor and then if the CDPP decides to prosecute, the ACCC supports the CDPP in relation to that prosecution. The respective roles and responsibilities of the ACCC and CDPP in relation to cartel matters are recorded in the MOU between the two organisations.³⁰

52. In particular, the MOU states that the CDPP is responsible for prosecuting *serious cartel offences* and seeking associated remedies, including by taking certain proceedings. The ACCC is responsible for investigating cartel conduct and gathering evidence, managing the immunity process in consultation with the CDPP, and referring *serious cartel conduct* to the CDPP for consideration and prosecution.

53. The MOU includes a list of serious cartel factors that the ACCC will use to assess whether cartel conduct it is investigating amounts to serious cartel conduct and thus should be referred to the CDPP.³¹ The MOU provides that the ACCC is more likely to consider cartel conduct it is investigating to be serious (i.e. criminal) cartel conduct if one or more of the following factors apply:

- the conduct was covert
- the conduct caused, or could have caused, large scale or serious economic harm
- the conduct was longstanding or had, or could have had, a significant impact on the market in which it occurred
- the conduct caused, or could have caused, significant detriment to the public or a class of the public, or significant loss or damage to one or more customers of the alleged participants
- one or more of the alleged participants has previously been found by a Court to have participated in, or has admitted to participating in, civil or criminal cartel conduct
- senior representatives within the relevant corporation(s) were involved in authorising or participating in the conduct
- the Government and thus, taxpayers, were victims of the conduct - even where the value of affected commerce is relatively low
- the conduct involved the obstruction of justice or other collateral crimes committed in connection with the cartel activity.

³⁰ Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission regarding Serious Cartel Conduct (‘MOU’): <https://www.cdpp.gov.au/sites/g/files/net391/f/MR-20140910-MOU-Serious-Cartel-Conduct.pdf>.

³¹ Ibid 4.2.

54. Similarly, the CDPP will have regard to the above factors listed in the MOU, when considering whether a prosecution should be commenced.³²

55. The ACCC retains a discretion to commence civil proceedings in relation to cartel conduct. The ACCC practice reflected in the MOU is to refer serious cartel conduct to the CDPP. If the CDPP decline to prosecute, the ACCC may take a civil proceeding. For example, in August 2019 the ACCC commenced civil proceedings against BlueScope Steel Limited.³³

56. Section 5 below provides information on how the ACCC and CDPP consider immunity applications that relate to serious cartel conduct.

4.3. Sentencing offenders

57. The ACCC does not have the power to make a decision as to whether cartel conduct contravenes the CCA. In a criminal prosecution, the ACCC provides a brief of evidence to the CDPP. The CDPP makes a prosecution decision. The CDPP can then commence criminal proceedings in the Federal Court or another court with jurisdiction such as state Supreme Courts, alleging that a business or individual has contravened the cartel provisions of the CCA. The courts are responsible for hearing the proceedings, determining whether the law has been contravened and the remedy that should be imposed. Court settlements, judgments and the Court's associated reasoning are usually made publicly available.

58. The courts are responsible for determining what sanction to impose on corporations and/or individuals convicted of criminal cartel conduct. The *Crimes Act 1914* (Cth) provides that the Court must impose a sentence that is 'of a severity appropriate in all the circumstances of the offence'.³⁴

59. Part 16A of the *Crimes Act 1914* (Cth) provides guidance on the sentencing of federal offenders, in particular, the Court must take into account a number of factors, insofar as relevant, when imposing a jail term or fine. These include:

- the nature and circumstances of the offence
- other offences (if any) that are required or permitted to be taken into account
- whether the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character
- the personal circumstances of any victim of the offence
- any injury, loss or damage resulting from the offence
- the degree to which the infringing party has shown contrition for the offence by taking action to make reparation for any injury, loss or damage resulting from the offence, or in any other manner
- whether the infringing party has pleaded guilty to the charge in respect of the offence

³² *Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission regarding Serious Cartel Conduct* ('MOU'), 5.2: <https://www.cdpp.gov.au/sites/g/files/net391/f/MR-20140910-MOU-Serious-Cartel-Conduct.pdf>.

³³ <https://www.accc.gov.au/media-release/action-against-bluescope-for-alleged-cartel-conduct>.

³⁴ CCA s 16A.

- the degree to which the infringing party has co-operated with law enforcement agencies in the investigation of the offence or of other offences
- the deterrent effect that any sentence or order under consideration may have on the infringing party
- the need to ensure that the infringing party is adequately punished for the offence
- the character, antecedents, age, means and physical or mental condition of the infringing party
- the prospect of rehabilitation of the infringing party
- the probable effect that any sentence or order under consideration would have on any of the infringing party's family or dependents.

4.4. Number of criminal sanctions (corporations and individuals)

60. Since the criminalisation of cartels in Australia, criminal sanctions have been imposed twice on companies. We found that a number of factors have caused a lag from the introduction of the criminal provisions to the imposition of criminal sanctions. Firstly, the development of our specialised criminal cartel enforcement capacity required a significant investment of time and resources. Secondly, it was only possible to take criminal proceedings in respect of conduct that occurred after the commencement of the criminal provisions. Further, due to the emphasis on processes within a criminal investigation, we have found they can take longer than civil investigations.

61. As a consequence, we now have a series of matters under investigation or proceeding through the courts. Please see Section 2 for further information.

5. Leniency and corporate compliance programs

62. Australia considers that an effective immunity (leniency) policy is integral to the detection, investigation, deterrence and prosecution of cartels.³⁵ In 2009 the ACCC updated the *ACCC immunity and cooperation policy for cartel conduct (Immunity Policy)*³⁶ (which has been in place since 2003) to cover criminal immunity, building on the MOU with the CDPP and consulting more broadly with a number of other domestic and international agencies. The Immunity Policy has been a very successful cartel detection tool in Australia, and has generated a significant number of investigations and enforcement actions.

63. The Immunity Policy sets out the ACCC's approach to applications for immunity from proceedings initiated or authorised by the ACCC or the CDPP in relation to cartel conduct, and how cooperation provided to the ACCC by cartel participants will be recognised.

64. The ACCC is responsible for granting civil immunity while the CDPP is responsible for granting criminal immunity, although the ACCC receives and manages requests for immunity for both criminal and civil proceedings, and makes recommendations

³⁵ The ACCC uses the term "immunity" instead of leniency to describe upfront immunity from prosecution. Leniency refers to the credit that may be given for cooperating parties who do not qualify for immunity.

³⁶ See: [ACCC immunity and cooperation policy for cartel conduct](#).

to the CDPP as to whether the immunity applicant meets the criteria set out in the Immunity Policy.³⁷

65. Immunity is available only to the first eligible party to disclose the cartel conduct. Second and subsequent applicants, who choose to cooperate under the Immunity Policy, may have their cooperation recognised in a variety of ways, including a reduction in the penalty or fine.

5.1. Leniency generates investigations

66. The Immunity Policy is one of the ACCC's key strategies for detecting and dismantling cartels. The ACCC has been able to undertake numerous in-depth cartel investigations as a result of applications received under the Immunity Policy.

67. In Australia, we have experienced a steady increase in approaches for immunity since the policy was introduced, and in particular following criminalisation. The number of immunity approaches has also increased noticeably in the past 12 months. This may be attributable to the increased number of criminal cartel charges, prosecutions and outcomes noted above, some of which have involved significant media coverage. It aligns with research into the Australian business community that has found that when business people are aware of the criminal consequences of cartel behaviour, they are more likely to expect detection and prosecution of cartel behaviour.³⁸

68. Community education and outreach is a key element in emphasising the seriousness of cartel conduct and the value of early cooperation. The ACCC placed considerable resources into raising awareness of criminal cartel laws before securing the criminal prosecutions outlined above.³⁹ The ACCC considers that it is important to have ongoing outreach work to maintain public and business knowledge.

5.2. Corporate compliance programs

69. In Australia, there is no specific credit awarded to corporate compliance programs in the cartel enforcement process. However, the Court can consider corporate compliance programs when assessing penalty.

70. While the Court considers compliance programs when assessing the level of a civil penalty, it is not enough to show that a compliance guide exists or that training has taken place.⁴⁰ It must be shown that these measures were effective in establishing a culture of compliance. This can be seen in civil competition case law, where the courts have been reluctant to accept the mere existence of a compliance manual as a mitigating factor.

³⁷ The CDPP will grant immunity from criminal prosecution for cartel conduct on the basis set out in Annexure B to the Prosecution Policy of the Commonwealth.

³⁸ *The deterrent impact of cartel criminalisation: Supplementary report on a survey of Australian public opinion regarding business people's views on anti-cartel laws and enforcement*, Christine Parker and Chris Platania-Phung, The University of Melbourne Cartel Project, Melbourne Law School, 12 January 2012. Available at https://law.unimelb.edu.au/data/assets/pdf_file/0008/1676069/ParkerandPlataniaPhungImpactofDeterrencerevisedtitle2.pdf.

³⁹ See, for example, the ACCC's *The Marker Video* at <https://www.youtube.com/watch?v=louVP9VvFlg>.

⁴⁰ An Australian Court has not considered compliance programs in the context of a criminal cartel contravention.

71. For example, in *ACCC v Visy Industries Holdings Pty Ltd (No. 3)*,⁴¹ which involved price fixing and market sharing in the market for the supply of corrugated fibreboard packaging, the Court made reference to the non-existence of a culture of compliance with the law. While noting that there was a trade practices compliance manual which indicated that Visy required strict compliance with the law, the senior management did not hesitate in embarking on unlawful conduct. The judge noted: “The Visy Trade Practices Compliance Manual might have been written in Sanskrit for all the notice anybody took of it.”⁴²

72. The ACCC recognises that competition agencies in other jurisdictions have taken different approaches towards giving credit for corporate compliance programs. ACCC experience is that activities taken in the context of a corporate compliance program can lead to the detection of cartels and related immunity applications. However, a poorly designed or implemented program is unlikely to be a mitigating factor in and of itself. If a compliance program is working well it should hinder or prevent cartel conduct and/or lead to its swift detection.

6. International Cooperation

73. Cartels often involve companies that operate across multiple jurisdictions, which makes international cooperation and information sharing crucial for successfully detecting and prosecuting cartel cases. Accordingly, international cooperation and intelligence sharing in criminal matters is long established and accepted practice.

74. The ACCC regularly engages closely with, and has received valuable cooperation from, its international counterparts in assessing immunity applications and investigating international cartels.

75. The most common and perhaps most significant form of cooperation between the ACCC and other international agencies is informal cooperation. Informal cooperation, such as the discussion of case theories and investigative strategies, can take place on any investigation, regardless of whether the agencies are able to exchange confidential information provided by the immunity applicant or other parties under investigation. There are a number of international cartel matters where the ACCC has benefitted significantly from informally discussing case theories and investigative strategies with the NZCC and other international agencies. These discussions provide critical context for our investigations, and enable us to ensure that any enforcement action taken by the ACCC in relation to an international cartel is targeted at addressing harm suffered by Australian businesses and consumers.

76. In our experience, criminalising cartel conduct has increased the ability and willingness of colleagues in other jurisdictions which have criminal cartel regimes to share confidential information and collaborate in relation to international cartel investigations. This is because criminalising cartel conduct opens up the possibility of mutual assistance requests (including police-to-police) which are an important tool in obtaining evidence for the investigation and prosecution of transnational crime.

77. For example, the ACCC has the power to request information and documents from parties by way of legislative notice. The use of these notices is complicated in the context of a criminal investigation due to the privilege against self-incrimination and there is

⁴¹ *ACCC v Visy Industries Holdings Pty Limited (No 3)* [2007] FCA 1617.

⁴² *Ibid* at [319].

complex case law as to multi-jurisdictional investigations and the use of information obtained by international regulators and provided to the ACCC.

78. In terms of formal criminal enforcement cooperation methods, the *Mutual Assistance in Criminal Matters Act 1987 (MACMA)* regulates how Australia can provide or request international assistance in criminal matters. The MACMA allows Australia to make or receive requests for mutual assistance from any country. This includes Mutual Legal Assistance Treaties (MLATs) and Antitrust Mutual Assistance Agreements (AMAAs).

79. Many countries have entered into MLATs as a means to cooperate in criminal matters. An MLAT is a bilateral treaty which allows signatories to request various types of assistance from each other, such as, the use of investigative powers (such as searches) and sharing of confidential information. MLATs require the underlying offence to be a crime in at least the requesting country's jurisdiction, sometimes both ("dual criminality").

80. MLAT requests can be resource intensive and very slow to process. Competition agencies must expect the often-complex MLAT decision-making processes of each jurisdiction. MLAT requests may need to go through the relevant domestic and foreign Ministry rather than directly through competition agencies. MLAT requests may also involve legal challenges leading to further delays.

81. AMAAs are less common than MLATs, although enable a greater level of cooperation. An example is the 1999 Antitrust Mutual Enforcement Assistance Agreement signed by the United States and Australia (**the US-Australia Agreement**). The agreement allows broad requests for assistance in criminal and civil non-merger antitrust matters, including the exercise of compulsory powers to obtain testimony and documentary information.⁴³ The ACCC has twice assisted the US DOJ to execute search warrants in Australia and the US DOJ provided feedback that the information was useful to its investigation. While these two instances have been successful, we acknowledge the limitations to such agreements, particularly since AMAAs require domestic laws to be in place to enable jurisdictions to enter into these more extensive cooperation agreements.

82. The ACCC recognises that there is scope to deepen international cooperation, and the ACCC is working with a number of agencies to improve information sharing and the capacity to provide and receive mutual assistance. The ACCC continues to be an active participant in international forums and groups, including the International Competition Network, the OECD Competition Committee, the Competition Committee under the ASEAN Australia and New Zealand Free Trade Area Agreement, the annual East Asian Top level Competition Officials meeting, and Asia-Pacific Economic Cooperation.

7. Conclusion

83. As the lead Australian cartel enforcer, the ACCC is continuing to review and improve its relevant policies and practices, build its criminal investigative capacity and deepen cooperation with the CDPP and other Australian and international enforcement partners.

84. Australia has made considerable progress in establishing an effective criminal cartel enforcement regime. Nevertheless, substantial challenges remain to achieve a

⁴³ OECD, *Improving International Co-operation in Cartel Investigations*, 2012, p. 35.

sustainable program, which remains an effective deterrent to competitors who collude to deny Australians the benefits of competition.