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Working Party No. 3 on Co-operation and Enforcement

The Future of Effective Leniency Programmes – Note by Australia

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More documents related to this discussion can be found at
<https://www.oecd.org/competition/the-future-of-effective-leniency-programmes-advancing-detection-and-deterrence-of-cartels.htm>

Antonio CAPOBIANCO
Email : Antonio.CAPOBIANCO@oecd.org

JT03519365

Australia

1. Introduction

1. Detecting anti-competitive conduct remains a challenge for competition regulators. To address this challenge, the Australian Competition and Consumer Commission (ACCC) continues to develop its competition enforcement program in line with best practices. This reflects the ACCC's enduring commitment to prioritise cartel conduct and anti-competitive agreements and practices causing detriment to Australia.

2. For cartel conduct, one of the ACCC's key detection tools has been the implementation of the *ACCC immunity and cooperation policy for cartel conduct* (the **Immunity Policy**). International experience and the experience of the ACCC has shown that effective immunity and cooperation policies encourage businesses and individuals to disclose cartel behaviour. While the Immunity Policy continues to create a pipeline of cartel investigations, a short-term decline in immunity applications in 2020-21 prompted the ACCC to further develop and implement methods of proactive detection.

3. This paper describes the ACCC's progress towards developing and implementing a proactive detection program. It also covers limitations on the ACCC's use of some investigative tools, recent developments in the ACCC's implementation of the Immunity Policy and its cooperation with international counterparts.

2. Proactive detection

4. Following a decline in immunity applications in 2020-21, the ACCC identified a need to complement its existing enforcement work with a proactive detection program. The ACCC considers that an effective proactive detection program complements the Immunity Policy as a means of detection. It also reinforces the Immunity Policy by creating a more powerful disincentive to the formation of cartels and increasing incentives for cartelists to self-report due to the increased threat of detection.

5. The ACCC is developing and implementing a suite of initiatives to drive proactive detection of competition issues. They include, but are not limited to:

- using intelligence sources as a pipeline for new investigations;
- using a sophisticated cartel screening tool to analyse large datasets;
- using an anonymous whistleblower tool (Whispli);
- reinvigorating and maintaining an ongoing outreach and awareness program, including with government procurement officials;
- forming strategic relationships with law enforcement agencies and procurement teams in government departments; and
- maintaining open communication channels within the ACCC to ensure that information and intelligence relevant to competition enforcement is exchanged between different work areas.

6. Each of these initiatives are valuable on their own. They are also complimentary, and the ACCC anticipates they will provide a greater likelihood of proactively detecting anti-competitive conduct when utilised together.

2.1. The ACCC's current toolset

2.1.1. Using intelligence sources for proactive detection

7. The ACCC's Intelligence team has played a leading role in the ACCC's initiative to embed a proactive detection program within its enforcement work. A primary output of the Intelligence team is the regular production of industry profiles. Each profile contains a risk assessment of an industry's susceptibility to anti-competitive behaviour based on a range of quantitative and qualitative criteria (including market concentration, supply shocks, mergers, product and geographic market conditions, vertical integration and collaboration between market participants).

8. Markets are selected for profiling in consultation with the Competition Division and focus on sectors that have not undergone recent investigation or intelligence evaluation. The Intelligence team uses disparate sources of information to produce a structured competition assessment of each target market.

9. The Intelligence team assesses the qualitative and quantitative criteria and produces an overall risk rating for the market and the potential harm to consumers. Where this rating is sufficiently high, the profile may be assigned to an investigation team for further assessment. The ACCC's Competition Division currently has three ex-officio investigations in progress arising from the creation of industry profiles.

10. In 2019, we launched an online portal where whistle-blowers can anonymously report suspected cartels to the ACCC. The portal is encrypted and removes identifying metadata, allowing people to report cartel conduct with the confidence that their identity will not be disclosed. The portal has generated approximately **15%** of investigations.

2.1.2. Prioritisation

11. 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 are disrupted by the COVID-19 pandemic.

12. 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 ACCC's Strategic Data Analysis Unit to identify trends in complaints or industry practices that may warrant investigation.

2.1.3. Education and outreach

13. The ACCC continues to engage with market participants to develop relationships and encourage reporting of anti-competitive conduct. The ACCC considers it is important to have ongoing outreach work to maintain public and business awareness to increase the prevalence of self-reporting and whistleblowing.

14. 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.

15. In the context of competition issues in supply chains, the ACCC has been engaging directly with industry associations in relevant sectors.

16. In 2022, the ACCC delivered more than 20 presentations to public procurement professionals and plans to double this in 2023. The ACCC intends to continue its engagement with members of the broader business community, including through presentations to industry associations.

2.1.4. Strategic partnerships

17. 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.

18. The ACCC aims to secure regular and ongoing communications with key agencies and explore the possibility of developing MOUs with additional relevant agencies as opportunities arise.

2.2. Tools and strategies currently in development

2.2.1. Cartel Screening Tool

19. The ACCC has developed a cartel screening tool for bid rigging conduct, which will better enable the use of data analysis techniques to identify potential investigation targets.

20. 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. Studies show that government procurement processes 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.

21. The ACCC's approach combines a rules-based algorithm, which identifies tenders that are more likely to contain collusive conduct, with the use of staff expertise in bringing real world economic, intelligence and cartel expertise to interpret these results. Our Strategic Data Analysis Unit has developed a sophisticated screening algorithm to implement the rules-based approach and work is underway to build ACCC staff's expertise through both the development of guidance and knowledge sharing between our data unit and other specialised teams.

22. The biggest challenge to the success of the screening project remains access to high quality procurement data sets. As part of the reinvigorated outreach and engagement program, the ACCC aims to obtain high quality data from procurement agencies at all levels of government.

2.2.2. International Case Dataset

23. In 2022, the Intelligence team and the 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.

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

25. The project team behind ICD is currently classifying cases by industry using fuzzy matching and supervised machine learning. Subsequently, data quality sampling will be performed to ensure the data is useful and accurate. Ultimately, the ACCC intends to visualise 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. Impediments to effective detection and investigation

26. Following the criminalisation of cartel conduct, the ACCC has participated in joint investigations with domestic criminal law enforcement agencies. These joint investigations have utilised a variety of covert investigative techniques available to those agencies when investigating criminal offences. As cartels are conspiracies and are usually carried out in secret, covert investigative tools are crucial to enable regulators to obtain evidence of conduct as it takes place.

27. In the ACCC’s experience, using a combination of covert (such as telephone intercepts and surveillance devices) and overt investigative tools (such as search warrants and notices compelling the production of documents) can assist in obtaining evidence, generating intelligence and securing the cooperation of key informants and witnesses. However, under the current legislative framework, the ACCC can only use materials obtained through telephone interception in investigations of criminal cartel offences if conducted jointly with interception agencies such as the Australian Federal Police.

3.1. Accessing telephone intercepts

28. Under the *Telecommunications (Interception and Access) Act 1979 (TIA Act)*, the ACCC is currently able to access and use stored communications and telecommunications data. Stored communications are the content of historical communications (such as SMS or email) held by the carrier. Telecommunications data are the underlying details or ‘metadata’ of communications, such as subscriber details, call time or call location.

29. The ACCC cannot presently access information about interception warrants or lawfully intercepted information from an interception agency. Only authorised agencies may obtain an interception warrant under the TIA Act; these are known as ‘interception agencies’ and they broadly include police, the Australian Security Intelligence Organisation and anti-corruption bodies.

30. The ACCC is not an interception agency or recipient agency under the TIA Act. This is despite the definition of ‘serious offence’ in the TIA Act including offences against provisions of the *Competition and Consumer Act 2010 (Cth)* relating to cartel offences commonly investigated and prosecuted by the ACCC. The ACCC therefore relies on joint investigations with interception agencies, such as the Australian Federal Police, whereby the interception agency applies for a telecommunications intercept warrant, accesses the intercept material and shares this with the ACCC as part of the joint investigation. The need for joint investigations to access this type of information can slow down the ACCC’s efforts to gather relevant evidence in its investigations, particularly where the intercepting agency has many competing demands.

4. Immunity

31. Australia considers an effective immunity and cooperation policy is integral to the detection, investigation, deterrence and prosecution of cartels. The Immunity Policy has been a very successful cartel detection tool in Australia, and has generated a significant number of investigations and enforcement actions. Matters involving an immunity applicant are well represented in the ACCC's portfolio of matters currently and historically where investigations have resulted in a court-based outcome.

32. The Immunity Policy sets out the ACCC's approach to applications for immunity from proceedings initiated or authorised by the ACCC or the Commonwealth Director of Public Prosecutions (CDPP) in relation to cartel conduct, and how cooperation provided to the ACCC by cartel participants will be recognised. 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 to the CDPP as to whether the immunity applicant meets the criteria set out in the Immunity Policy.¹

4.1. Recent trends

4.1.1. Quantitative trends

33. The ACCC observed a dip in approaches under the Immunity Policy during the period from December 2020 to October 2022, when we received around half the average level of applications. However, there has been a significant increase in applications over the past 6 months. In 2022-23, the ACCC has already received 15 immunity approaches, compared with 6 approaches in 2021-22. In recent years the ACCC has also observed an increasing proportion of leniency applications which relate to domestic-based conduct only.

34. While the causes of these trends are unknown, the ACCC speculates that the dip in applications was likely attributable to the pandemic and the recent increase in immunity applications is at least partially attributable to successful outcomes in recent criminal cartel prosecutions and the ACCC's increased outreach efforts. This correlates with the theory that an increased threat of detection, combined with serious sanctions, will boost an immunity program.

4.1.2. Qualitative trends

35. The prevalence of numerous communications platforms and large volumes of data requires the ACCC to liaise closely with immunity applicants to ensure investigators obtain all relevant information to progress the ACCC's assessment of immunity applications.

36. The ACCC is observing increasing complexity in the factual matrix and company relationships between the entities it investigates. The *Competition and Consumer Act 2010* (Cth) prohibits cartel arrangements between competitors. However, the relationships between entities under investigation are often complex; for example, it may be apparent that both entities are in competition for the relevant products or services but they may also

¹ The CDPP may grant immunity from criminal prosecution for cartel conduct on the basis set out in Annexure B to

the Prosecution Policy of the Commonwealth.

have a relationship where one is a supplier, sub-contractor or joint venture partner to the other. This raises a number of legal and evidentiary considerations in terms of the statutory defences and exceptions available to suspected cartelists.

4.2. Efficacy of the immunity program

37. The ACCC conducts regular reviews of the efficacy and relevance of the Immunity Policy and the program supporting it. The ACCC's last review concluded in 2019 with the release of the current version of Immunity Policy and the *ACCC immunity and cooperation policy: frequently asked questions*, and brought about improvements to related policies and procedures.

38. The ACCC measures the effectiveness of the Immunity Policy by the extent to which it enables the detection and prosecution of cartels that may not otherwise be detected. Immunity applicants and their legal representatives may measure the effectiveness of the Immunity Policy based on the incentives it provides to seek immunity and cooperate with the ACCC, its ease of use and the level of clarity it provides about the immunity process, amongst other things.

39. Earlier this year, the ACCC commenced its fifth periodic review of the Immunity Policy. The ACCC will be engaging with a wide range of domestic stakeholders (including legal practitioners, the CDPP, and academics) and international counterparts to understand how the Immunity Policy and the program supporting it could be further improved. As part of the review, the ACCC will also be assessing the impact of amendments that came into effect following the last review in October 2019.

5. Effective cross-border cooperation

40. Cross-border cooperation also plays an important role in the ACCC's detection and investigation of anti-competitive conduct. The ACCC continues to collaborate closely with its international counterparts, reflecting the value and importance of reciprocal information sharing, cooperation and conformity, particularly in the immunity context.

41. 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 a long established and accepted practice.

42. The ACCC regularly engages closely with, and has received valuable cooperation from, its international counterparts in assessing immunity applications and investigating international cartels. In recent years this ongoing informal engagement has prompted several proactive cartel investigations in Australia.

5.1. Formal methods of cooperation

43. In terms of formal criminal enforcement cooperation, 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*).

44. 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

Government departments rather than directly through competition agencies. MLAT requests may also involve legal challenges leading to further delays.

45. 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.

46. For example, the ACCC continues to participate in a working group with the US Department of Justice and Federal Bureau of Investigation, Canadian Competition Bureau, New Zealand Commerce Commission, and United Kingdom's Competition and Markets Authority, focussing on illegal conduct relating to supply chains. This includes anti-competitive conduct such as cartels and any other activities that materially impact competition, such as exclusionary conduct by firms with market power.

47. The ACCC recognises there is scope to deepen international cooperation, and the ACCC is working with several international partners to improve information sharing and the capacity to provide and receive mutual assistance. In February this year, the ACCC signed a Memorandum of Understanding (MOU) with Italy's Autorità Garante della Concorrenza e del Mercato. The MOU provides for the sharing of information on issues of common interest and exchanges of staff. The MOU also creates opportunities to cooperate on investigations where there are common or cross-border issues, particular in the areas of cartels, digital platforms and market studies.

6. Conclusion

48. The ACCC is continuing to build its reactive and proactive detection capabilities and deepening its cooperation with international enforcement partners. Considerable progress has been made and much work is yet to be done to increase the ACCC's effectiveness in detecting, investigating and deterring anti-competitive conduct that affects the Australian economy.