

ACCC RAISES STAKES FOR CROOK CARTEL EXECES

By David Mason-Jones

Published in Chief Officer Magazine, Australia, 2005

* ACCC is The Australian Competition and Consumer Commission

<Standfirst>

It's a well used image – the carrot and the stick – but the ACCCs current strategy to eliminate cartels is based on exactly that. *David Mason-Jones* finds that those involved with cartel behaviour have a lot to weigh at the moment.

<Pull quotes>

The chances of being caught out are now higher with the increased focus the ACCC is giving cartels and it will be a different ball game altogether when it becomes a criminal matter.

The new Immunity Policy for Cartel Conduct is more focused and provides a greater level of protection to a person or company who blows the whistle on a cartel.

But this immunity is only extended under certain circumstances. It ONLY gives immunity to the first entity to roll over.

<Text starts>

After going to the ACCC to make full and frank statements about its role in a cartel, it is interesting to learn that Amcor already had procedures in place to prevent anti competitive behaviour. Despite this, Amcor now says that, within the executive structure of the company, the cartel activity still took place anyway.

The wider implication of this is that there must be many situations in Australia where executives and managers have engaged in, or are currently engaged in, secret behaviour which they have kept hidden from their boards and from the regulators. Amcor Limited and Visy Group are two high profile public companies where all levels of management are aware of the intensity of public scrutiny. But, if circumstances can arise which cause one of them to report a breach of the Trade Practices Act, then what room is there for other dirty washing to be hidden all over the place in Australia's corporate structures? There must be individuals out there who have done some hard soul searching over the Christmas break.

Robert Neely, partner Henry Davis York's Corporate Advisory group specialising in technology, communications and competition law, comments: "These people must now be weighing up the risks. The chances of being caught out are now higher with the increased focus the ACCC is giving cartels and it will be a different ball game altogether when it becomes a criminal matter."

Criminal sanctions as the stick

Did someone just say, 'criminal matter'? Yes, they certainly did and this is part of what is at stake now as Graeme Samuel, ACCCs Chairman, ratchets up the pressure to break

cartels in the Australian economy. This, I guess, is the stick part of the carrot and stick analogy.

Currently the penalties for cartel behaviour are civil penalties – in other words the offenders do not end up with a criminal record and cannot be sent to jail. There may be plenty of shame and considerable financial loss arising with civil penalties but the fact is that it is not a criminal matter.

“The penalties are already quite high,” says Neely, “both for companies and individuals, and there are significant non-financial consequences for companies, such as damage to reputation and brands. The stakes, however, are about to rise considerably. In 2005 the Treasurer announced that the government will move to make cartel behaviour a criminal matter.

“I would expect that the legislation to enable this will be introduced into the Federal Parliament this year. If it passes the legislation will bring Australia into line with competition regulation in the European Union and the United States.

“Assuming the legislation passes, this will now mean that, as an executive of a company, you may go to jail for being a participant in anti competitive arrangements such as cartel behaviour,” he says.

The Chairman of the ACCC, Graeme Samuel, has identified cartels as a particular focus of the ACCC, setting up a special branch to detect and deal with them.

Executives and board members who are aware of the dirty washing should take no comfort in the idea that the other parties to the arrangement will stay quiet and that the lid can be safely held on the whole conspiracy. This is because of Graeme Samuel’s initiative in making the second part of the strategy – the carrot – even more compelling than before.

An indemnity policy as the carrot

Gaining the first point of leverage into a cartel – or any arrangement involving anti competitive behaviour – has always been the major legal problem for regulators or other lawmakers in breaking up a cartel. At the point of conspiracy the participants become aware that they are vulnerable to legal penalties and must conduct their affairs in secret and each fears that someone might give the game away. .

Graeme Samuel is now exploiting the conspirators’ fear to gain leverage into the inner world of cartels and the mechanism for doing this has been, under certain circumstances, to raise the level of leniency extended to those who first blow the whistle. In fact the previous attitude of leniency has now been raised to the level of immunity – again, under certain circumstances.

Henry David York’s Neely says: “The ACCC has always had a leniency policy but this was just that – a policy to be lenient under certain circumstances on offenders if they

rolled over. The new Immunity Policy for Cartel Conduct is more focused and provides a greater level of protection to a person or company who blows the whistle on a cartel.

“But this immunity is only extended under certain circumstances,” he says.

Peter Armitage, Senior Partner, competition and consumer protection at Blake Dawson Waldron, says: “The immunity offer is a very big carrot and it’s not just a pepping up of the old leniency policy. It’s a fundamental change.

“The previous experience with the leniency policy was that the benefits of cooperation were unpredictable. It all still remained in the hands of the ACCC even after a person had come forward and given full and frank disclosures. The fundamental change is that you are now guaranteed immunity if you are the first to roll over and meet certain other qualifications – notably, that you were not the initiator of the cartel arrangement,” says Armitage.

Professor Robert Marks, Professor of Economics at the Australian Graduate School of Management says: “I have no direct knowledge of the number of cartel cases the ACCC is investigating at the moment or whether this is on the increase. It would appear, however, that the combined effect of the indemnity policy and the moves to criminalise cartel behaviour would be increasing the incentives for people with a guilty conscience to “fess-up” that is, to come forward and make their full and frank admissions.”

“Now,” says Blake’s Armitage, “there is a clear and certain benefit in talking to the ACCC and those with knowledge of a cartel must now be asking if there someone out there who is going to take advantage of the attractive offer to get out of it scot free.”

Practical limitations of indemnity policy

AGSMs Marks points out: “Directors and executives need to be aware that the indemnity currently offered is only an indemnity against civil proceedings by the ACCC. The indemnity does nothing to restrict claims for damages by the customers of companies undertaking cartel behaviour.

“These customers have been ripped off by the inflated prices created by the illegal cartel arrangement,” says Marks.

It would therefore appear that customers would have a cause of action to sue for the margin between what was the inflated price and what would have been the competitive market price if it were not for the cartel. In practical effect, this third-party legal action may not be taken up where the item is a high-volume, low-priced consumer item in the mass consumer retail market. But, “where you are buying boxes at wholesale – in large volumes – and it can be proven that you were paying an inflated price all the way along, then I would imagine you would have an arguable case for damages,” says Marks.

Raising the bar to criminality

There is still some uncertainty as to how the indemnity will work when the matter becomes a criminal matter because the ACCC does not have the power to offer an indemnity against criminal prosecution. The possibility of a criminal indemnity may exist but it will have to come from the DPP, and ACCC and DPP will have to define carefully their respective roles if criminal leniency is to be offered in the future.

When raising the bar to the criminal level of proof there are also some evidentiary problems which may make cases harder to prosecute. Blake Dawson Waldron's Armitage says: "The APCO case brought by the ACCC recently in regard to alleged petrol price fixing in Ballarat has shown that a case may still not be proven even if there are people who have rolled over. The problem for ACCC is that it has to prove that certain conversations amounted to an "arrangement" or an "understanding". On appeal it was found that certain conversations which ACCC relied on to prove their case, did not actually constitute an "arrangement or understanding"."

In a civil case such as this the standard of proof is that the court must be thoroughly satisfied on the balance of probabilities. In a criminal case the level of proof is beyond reasonable doubt.

The interesting thing that may happen when cartel behaviour becomes a criminal matter is that, if the APCO case shows that conversations can be hard to use as evidence in a civil case, how much harder will they be to use in a criminal case. There may even be some executives out there who are coolly working out the probability that a case can really be made to stick against them in a criminal trial. This would really represent a crash-or-crash-through attitude to criminal behaviour.

"The quality of the evidence is critical to ACCCs case. As a whistle blower you can expect to be very vigorously tested by the ACCC," comments Armitage.

Conspirators to weigh options – all bad

This personal position of someone who would be covered by an immunity is now under a considerable time stress. Such a person – or company – would know that, in the same conspirators' circle, there would be others who could well qualify for the immunity. But there is only one immunity and that is to the first person or company which comes forward. In this way, there could well be a race between conspirators to the ACCCs door to tell all.

The race to the ACCC is not only to get there before the others but also to get there before the sanctions become criminal. While the criminal sanctions will only apply to conduct which occurs after they are introduced, some cartels are ongoing and so a current cartel will be criminal if it continues past the cut off date.

For those who are not covered by the indemnity, that is, those who were the initiators of cartel behaviour, it must be a time for tough decisions. If they opt to try and tough it out they live a life always knowing that there are others in the conspiracy who are assessing the indemnity policy. For those who are not covered by the indemnity, they may have to

simply take a moral decision to go the ACCC anyway and face the consequences while it is still a civil matter.

Reputational damage

For those not eligible for an indemnity, it may not only be the moral factors that lead to a roll over. In an increasingly media conscious business environment, executives know the financial loss that results from reputational damage and the erosion of brand image. These are measurable, bottom line, effects. Such executives may see owning-up as a better damage mitigation tactic than trying to tough it out and being shown to be dishonest in the end.

The reputational damage – the damage to the brand – can be of two types. Firstly, there’s what you’ve done in the past. Your customers will know about this and this damage can never be repaired. Secondly, there is the damage that can be done if you add to the first level of damage by trying to defend something that is indefensible. This can cause a compounding effect on the original damage.

Samuel’s credibility

The current action by ACCC also contains some credibility issues. AGSMs Marks says: “There is also the matter of credibility. In this case the credibility of Graeme Samuel is at stake more than the credibility of the ACCC itself. You will recall that Samuel’s appointment was held up for several months because there were objections from the States that he was ‘too close to the big end of town’.

“Already, by including Pratt personally in the Federal Court Statement of Claim, Samuel has proven that his ‘big end of town’ connections are no barrier at least to taking legal action. If the case against Pratt is successful, it will mean that the question mark over Samuel’s impartiality will be laid to rest forever,” says Marks.

If Samuel’s credibility soars in the coming months then the fear factor for the die-hard cartel participants will lift even further.

Conclusion

Perhaps words in a speech in Tokyo recently by ACCCs Chairman, Graeme Samuel summarise the importance of the Amcor action in coming to the ACCC under the, then, leniency policy. Samuel said: “The real significance as far as the ACCC was concerned was the culture change it had signalled.”

<text ends>

<Side box>

CARTELS A DRAG ON THE ECONOMY

The formation of cartels represents an economic cost to the consumer and the economy as a whole. AGSMs Marks says: “The existence of cartels is certainly a drag on the efficiency of an economy. There is something in it for the companies

and, to the extent that the prices they can charge are higher than the market prices under a competitive market, they are ripping us all off as customers and they are ripping the economy off as a whole.”

ACCCs Samuel cites the damage done in Australia from these three cartels before they were detected and busted by the ACCC.

- From the 1970s until the early 1990s, three express freight companies, which controlled 90 per cent of the Australian market worth between \$1 billion and \$2 billion per year, fixed prices and divided up the market to protect themselves from competition. If a customer switched companies, on occasions they even went so far as to deliberately lose or damage freight to encourage their return to the original carrier.
- From 1989 to 1994 a Queensland pre-mixed concrete cartel divided up between them the sale of \$1.1 billion worth of concrete. Over the course of more than 50 meetings the cartel participants fixed prices and agreed not to compete on specified major projects. They even engaged an accountant to monitor market shares to ensure no-one 'cheated' on the illegal fix.
- The Queensland fire protection cartel, which ran for 10 years until 1997, rigged contracts worth more than half a billion dollars across almost the entire fire alarm and fire sprinkler installation industry in Brisbane. The participants referred to the regular meetings they held to fix tender prices as the 'Coffee Club'.

In recent years, a number of very important developments have made the cost-benefit equation much more risky for cartel participants, and tipped the balance in favour of the regulator, and the consumer.

<Side Box>

CORRUPTION PERCEPTION INDEX

Blake Dawson Waldron’s Peter Armitage says that the trend in Asia is for countries to be introducing competition policies or strengthening them. Japan, for example, has just recently introduced a leniency policy in regard to cartel arrangements.

Transparency International prepares a Corruption Perception Index (CPI) While the concept of corruption covers a much wider field than just cartel behaviour, the index may give a broad indication as to how effective various regulators have been at creating a transparent business environment in the Asia Pacific region. Countries are rated in relation to an index score they achieve in a series of surveys.

Latest available results (2004) for our region show:

Country	Global ranking	index score
New Zealand	2 nd	9.6
Singapore	6 th	9.3
Australia	9 th	8.8

Hong Kong	16 th	8.0
Japan	24 th	6.9
Taiwan	35 th	5.6
Malaysia	39 th	5.0
South Korea	47 th	4.5
Thailand	64 th	3.6
Sri Lanka	67 th	3.5
India	87 th	2.8
Philippines	102 nd	2.6
Vietnam	102 nd	2.6
Indonesia	122 nd	2.0
Myanmar	142 nd	1.7

<Side box>

<Sidebox 3 starts>

AMCOR GOES TO ACCC

Amcor's full and frank dealings with the ACCC

In November 2004, the Amcor Board first became aware of information that raised concerns about potential breaches of Australian and New Zealand competition laws. The Board immediately took action to notify the ACCC, NZCC and the ASX.

On 6 December 2004, the Board of Amcor resolved to accept offers of resignation given by senior Amcor executives and also terminated a consulting arrangement.

On 21 December 2005, ACCC commenced legal proceedings today in the Federal Court against certain Visy Group companies and executives. The proceedings are in respect of alleged cartel conduct in the Australian corrugated box industry. No Amcor Group company or executive is a party to the ACCC proceedings.

The ACCC also announced it had granted immunity to Amcor in accordance with the terms of its Leniency Policy for Cartel Conduct. Amcor does not expect to be the subject of any proceedings by the ACCC for a pecuniary penalty or otherwise.

As part of the grant of its immunity, Amcor will continue to assist the ACCC in relation to its investigation and proceedings.

Visy's statement

On 21 December 2005, a joint statement by Richard Pratt AC, and Harry Debney CEO - Visy Industries said in part: "The ACCC has made allegations against Visy and against each of us personally. We reject entirely the allegations concerning our personal conduct. At no time have we approved or sanctioned any market sharing or price-fixing arrangement or understanding with Visy's competitors.

In the joint statement it was pointed out that market share had actually altered during the period of the allegations, 2000-2004. The statement says: “Our own analysis shows that during this period Visy increased its market share from 49% to 53%, while our major competitor’s share fell from 45% to 40%.”

<Sidebox 3 ends>