

An Update On
Australian Cartel Laws,
Limitation Periods and
Their International Reach

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1. Overview

Over the last 2 years there have been a number of important proposed changes to the laws in Australia which regulate cartel conduct and the way in which the laws are administered. These changes impact significantly on the determination of how to respond to a government investigation into cartel conduct in Australia.

The most critical changes are:

- the introduction in 2003 by the Australian Competition and Consumer Commission ("ACCC") of its new leniency policy which adopts a broadly similar approach to the leniency policy applied in the United States and UK;
- the decision of the Full Court, Federal Court in *Bray v Hoffman La Roche Limited*¹ which accepted that foreign corporations which participate in cartel conduct affecting Australian markets can be liable in Australia even if they have no direct business presence in Australia but have Australian subsidiaries;
- the Federal Government's proposal to remove, from the definition of *per se* cartel conduct, bid rigging, market sharing and production restriction arrangements and to address these under a "*substantial lessening of competition*" standard;
- the Federal Government's proposal to introduce criminal sanctions for *serious cartel conduct*, the timetable for which remains unclear; and
- the decision in *Energex v Alstom Australia* (2004)² on limitation periods applicable to civil damages claims in cartel cases.

This paper provides an overview of the laws in Australia which govern cartels and the way investigations into cartel conduct are conducted; and discusses the proposed changes and clarification of the Australia cartel laws.

2. Cartel Regulation in Australia

2.1 Prohibited cartel conduct in Australia

In Australia, the federal *Trade Practices Act 1974* (Cth) ("TPA") prohibits restrictive trade practices in trade and commerce within Australia or between Australia and other nations.

¹ (2003) ATPR 41-946.

² [2004] FCA 575, 7 May 2004

While the TPA does not use the term “cartel”, Part IV of the TPA regulates the types of conduct and arrangements (both horizontal and vertical) that one might associate with cartels, including the following types of conduct which are *per se* illegal under Australian law, regardless of their purpose or effect on competition:

- *price fixing* agreements³; and
- making or giving effect to *exclusionary provisions*⁴.

Other horizontal practices which do not fall within the strict meaning of price fixing arrangements or exclusionary provisions are prohibited if they have the purpose, or have or are likely to have the effect of, substantially lessening competition in an Australian market.

Both individuals and corporations are prohibited from engaging in or being involved in these types of conduct.

3. The Australian Competition and Consumer Commission

3.1 Role of the Australian Competition and Consumer Commission

The ACCC is an independent statutory authority which is responsible for the administration and enforcement of the TPA.

In enforcing the TPA, the ACCC may institute proceedings in the Federal Court of Australia seeking a variety of orders (including monetary penalties, damages (in a representative capacity), injunctions, and, in certain circumstances, divestiture of acquired assets). The ACCC may also authorise individual exemptions from Part IV, and obtain information, documents and evidence by compulsory process.⁵

³ Section 45A of the TPA.

⁴ Section 45 and section 4D of the TPA. *Exclusionary provisions* include boycotts by competitors of dealings with another person or classes of persons as well as some market sharing, bid rigging and production restriction arrangements. For conduct to fall within the meaning of an exclusionary provision it must be directed at particular persons or classes of persons. These persons can be anyone provided the persons or class of persons can be identified in some way and may include competitors, suppliers or customers.

⁵ The Federal Court of Australia has exclusive jurisdiction to hear proceedings for penalties under section 86(4) of the TPA. Proceedings for the recovery of pecuniary penalties are instituted by the ACCC. Penalty proceedings are "adversarial" in nature and can be brought only by the ACCC. A civil standard of proof applies, that is on a "balance of probabilities". However, in view of the significant monetary penalties available under the TPA, Courts have tended in practice to apply a stricter standard of proof "on the probabilities"

In addition to penalties, private actions for damages including class actions can be brought under the *Federal Court of Australia Act 1976* (Cth).⁶ A person who suffers loss or damage caused by conduct of another person in contravention of the restrictive trade practices provisions can bring an action to recover the loss or damage against that other person (or any other person involved). The ACCC may also commence representative actions on behalf of persons who suffer loss or damage. Treble damages are not available.

3.2 ACCC powers of investigation

The ACCC may require any person who it reasonably believes is capable of providing information or evidence in relation to a suspected contravention of the TPA to produce such documents or information or provide such evidence orally or in the form of a written statement to the ACCC (a "section 155 notice").⁷

Further, the TPA does not expressly extend the operation of section 155 to conduct which occurs outside Australia. As far as we are aware, the ACCC has not attempted to serve a section 155 notice outside Australia.⁸ Under normal principles of international comity, service outside Australia is likely to be beyond the ACCC's power.⁹ Even if the ACCC's powers under section 155 do operate extraterritorially, the ACCC does not have the power to apply to the Court to enforce a section 155 notice if a foreign person chooses to ignore it.

This section 155 procedure may only be used to investigate a suspected contravention where the ACCC has "reason to believe" there may be a breach of the TPA. It may not be used once Court proceedings have been commenced.

⁶ Actions for damages are also adversarial.

⁷ Section 155(1) provides that:

"...if the Commission, ... has reason to believe that a person is capable of furnishing information, producing documents or giving evidence relating to a matter that constitutes, or may constitute, a contravention of this Act, ... a member of the Commission may, by notice in writing service on that person, require that person:

- (a) to furnish to the Commission ... any such information;*
- (b) to produce to the Commission ... any such documents; or*
- (c) to appear before the Commission ... to give any such evidence ... and produce any such documents."*

It is a criminal offence for a corporation or an individual to refuse to answer a section 155 notice.

⁸ Although we understand that in some matters the ACCC has threatened to do so.

⁹ Putting to one side the special powers of the ACCC to serve a notice in New Zealand in relation to a "Trans Tasman market" investigation - s. 155A.

3.3 ACCC Search powers

The ACCC may also enter the Australian premises of a person who it has reason to believe has engaged in or is engaging in conduct which contravenes the TPA for the purposes of inspecting documents, making copies of those documents or taking extracts of these documents.¹⁰

3.4 No privilege against self incrimination

A corporation or individual person is not excused from answering a section 155 notice on the ground that the response may tend to incriminate the person.¹¹ There is no right to remain silent. Further, a person may not refuse to answer a section 155 notice on the ground that the answer may tend to expose the person to a penalty. Testimony of an employee which has been compelled by the ACCC using a section 155 notice can be used against that individual and his or her individual's employer in proceedings for breach of the TPA.

3.5 What about legally privileged material?

The ACCC is not able to override legal professional privilege. There is no express provision in the TPA which deals with the ACCC's rights with respect to legal privilege. Until the controversial decision of the Federal Court in the *ACCC v The Daniels Corporation* in March 2001 suggested the ACCC could override attorney client privilege,¹² it had generally been assumed that a person would be excused from answering a section 155 notice on the ground that the response was protected by legal professional or client legal privilege.¹³

In 2002, the Federal Court's decision in favour of the ACCC was overturned on appeal to the High Court of Australia. In an unanimous decision, the High Court found that section 155 of the TPA, being silent as to the subject of legal professional privilege, did not, by any necessary implication, abrogate legal professional privilege. This means that the ACCC does not have the power to compel a person to produce to it communications between a client and his/her lawyer made for the dominant purpose of giving or obtaining legal advice or for the provision of legal services.¹⁴

¹⁰ Section 155(2) of the TPA.

¹¹ Section 155(7) of the TPA.

¹² (2001) 182 ALR 114.

¹³ In *Daniels*, the Federal Court held that the ACCC when investigating possible contraventions of the TPA may, by using a section 155 notice, require a corporation or person to produce legally privileged material.

¹⁴ *Daniels Corp International Pty Ltd v Australian Competition and Consumer Commission* (2002) 192 ALR 561. The authors' firm acted for a second corporation which participated in the High Court appeal.

This decision has brought the ACCC's investigatory powers back in line with the powers of its fellow anti-trust regulators in the United Kingdom, the United States, Canada and the European Union.

3.6 International co-operation in cartel investigations

The ACCC has entered into bilateral co-operation agreements with the following anti-trust enforcement agencies:

- United States Federal Trade Commission;
- European Commission;
- New Zealand Commerce Commission;
- Fair Trade Commission of Taipei;
- Commerce Commission of the Fiji Islands;
- Fair Trade Commission of the Republic of Korea;
- Taiwan Fair Trade Commission; and
- Consumer Affairs Council of Papua New Guinea.

The ACCC recently entered into a tri-partite co-operation agreements with the following agencies:

- Canadian Competition Bureau and the New Zealand Commerce Commission;
- Taiwan Fair Trade Commission and the New Zealand Commerce Commission;
- United Kingdom Department of Trade and Industry, United Kingdom Office of Fair Trading and New Zealand Commerce Commission.

The co-operation agreements set out the scope of assistance that the respective anti-trust enforcement agencies will provide to each other. The legislative basis for the ACCC to provide information and assistance to foreign regulators is the *Mutual Assistance in Business Regulation Act 1992 (Cth)*, under which a foreign regulator may request the ACCC to obtain, and the ACCC may provide to the foreign regulator upon request, information, documents or evidence specified in the request. The ACCC may comply with such a request if authorised to do so by the Commonwealth Attorney-General.

Under the *Mutual Assistance in Criminal Matters Act 1987 (Cth)*, a foreign country can request that the Commonwealth Attorney General obtain evidence, information, documents and provide other assistance in relation to a criminal proceeding in that foreign country.

The Australian Government also has in place an agreement of treaty status with the Government of the United States on Mutual Anti-Trust Enforcement Assistance. Various requests or investigations have been made on both sides to date. One of the objects of the Agreement is that the parties intend to co-operate on a reciprocal basis in providing and obtaining antitrust evidence that may assist in determining whether a person has violated, or is about to violate, their respective antitrust laws. Each party agrees, subject to that party's laws, enforcement policies and other important interests, to inform the other party about activities that appear to be anticompetitive and that may be relevant to, or may warrant, enforcement activity by the other party's antitrust authorities.

Assistance contemplated by the Agreement includes, among other things:

- disclosing or discussing antitrust evidence in the possession of an antitrust authority;
- obtaining antitrust evidence at the request of the other party; and
- providing copies of publicly available records in the possession of government departments and agencies of the national government of the party to whom the request is made.

The party to whom the request is made may deny assistance if, in the case of Australia, the ACCC or the Attorney-General's department determines that execution of the request would not be authorised by the domestic laws of Australia.¹⁵

The ACCC can use documents, information or other assistance provided by a foreign regulator in proceedings in the Federal Court if such material relates to the Australian issues pleaded in the proceedings and is admissible in accordance with the Australian rules of evidence under the *Evidence Act 1995* (NSW).

There are no formal domestic co-operation agreements in place in Australia, for example with the police, Customs agencies or state-based anti-trust agencies.

4. Sanctions and Penalties

4.1 Current penalties

In Australia, civil penalties may be imposed on corporations and individuals for breach of the cartel provisions of the TPA described above. The maximum penalties are as follows:

¹⁵ Section 155AA of the TPA provides that an ACCC official must not disclose any information that it obtained under section 155 and that relates to restrictive trade practices except where the official is performing duties or functions as an ACCC official or when the ACCC or the official is required by law to disclose the information.

- (a) for a corporation, A\$10 million per contravention;
- (b) for an individual, A\$500,000 per contravention.

The ACCC may also apply to the Federal Court for any or all of the following orders against individuals or corporations involved in contraventions of Part IV:

- (a) community service orders;
- (b) probation orders (orders requiring a company to establish a compliance or training program or revise its internal procedures); or
- (c) adverse publicity orders (which may require the publishing of advertisements).

4.2 Criminal penalties - the possibility of jail

Currently, the TPA does not impose any criminal sanctions for breach of Part IV of the TPA. In 2003, an independent review of the TPA (the "**Dawson Review**") recommended that criminal sanctions be introduced for *serious cartel conduct*.¹⁶ This recommendation has been accepted, in principle, by the Federal Government. As yet no details have been provided about how or when these reforms will be introduced or the proposed length of jail sentences (the ACCC proposed, in its submission to the Dawson Review, maximum sentences of 7 years).

To deal with these issues, in 2003 the Federal Government established a working party ("**Working Party**") to consider and report on whether appropriate criminal offences for cartel behaviour can be introduced into Commonwealth law. At time of writing, the Working Party had not completed its report.

The Working Party is considering the following issues:

- definition of the activities that comprise cartel behaviour;
- options for criminalising cartel behaviour including recommendations as to the elements of any offence;
- the possibility of the proposed offence overlapping with existing civil prohibitions in the TPA and measures to manage any such overlap;
- the appropriate sanctions for the proposed offence;
- appropriate defences against a proposed offence; and

¹⁶ The Dawson Review was conducted by a committee headed by a former justice of the High Court of Australia, Sir Daryl Dawson.

- the development of an appropriate leniency policy.

Given that 2004 is an election year, and assuming a draft Bill to introduce criminal sanctions is proposed by the Working Party, it seems unlikely that any legislation will be enacted this year. However, whether or not the Coalition is returned, we expect either a Coalition or Labor Government will proceed with this reform in 2005.

4.3 Proposed changes to the definition of market sharing/exclusionary provisions

In 2003, the Dawson Review also recommended major changes to the treatment of market sharing, because of concerns that the provisions were too broad.

The Federal Government announced that the definition of "*exclusionary provision*" be amended so that an arrangement between competitors to restrict or limit their supply or acquisition of goods or services will only be prohibited outright if the restriction or limitation is directed at competitors of the parties to the arrangement (and not only to customers or suppliers).

This reform, if implemented, would mean that market sharing restrictions or limitations directed at suppliers or customers would only be illegal if the restrictions or limitations have the purpose or effect of substantially lessening competition in an Australian market.

The recommendations of the Dawson Review are controversial because so called market sharing would no longer be *per se* illegal.

As a result of the proposed change certain types of conduct such as big rigging, market sharing or production restrictions, which ordinarily would be regarded as typical cartel conduct, would only be illegal if the regulator or affected person could establish that the conduct had the purpose or effect of substantially lessening competition. The proposed draft legislation to give effect to these reforms has not yet been released.

There is some doubt whether the Government will soften the TPA on this issue, given recent comments about cartel matters.

4.4 Bigger fines - proposal for increased civil penalties

In addition to recommending the introduction of criminal sanctions for cartel behaviour, the report released on completion of the Dawson Review (the "**Dawson Report**") also recommended civil penalties for breaches of the TPA be increased. The Dawson Report proposed that:

- the maximum pecuniary penalty for corporations be increased to the greater of A\$10 million or three times the gain from the contravention, or if the gain cannot be readily ascertained, 10% of the turnover of the body corporate and all related bodies corporate;

- the Court be given the option of banning an individual implicated in a contravention from being a director of a corporation or being involved in management; and
- corporations be prohibited from indemnifying officers or employees or agents against penalties imposed under the TPA.

The Federal Government has, in principle, accepted these recommendations although it has not given any indication as to when and how such changes will be introduced to the TPA.

4.5 Level of recent significant penalties

Legal action instituted by the ACCC has led to the imposition of a number of significant penalties on cartel members, although not to the same level as recent fines imposed in the United States or Europe. For example, some recent noteworthy penalties include:

- between 2001 and 2004, in various actions commenced by the ACCC in relation to price fixing and market sharing contraventions in the Australian power transformer industry, the Federal Court imposed penalties totalling \$35 million in total against various corporations and employees;
- in 2002, in an action commenced by the ACCC against Roche Vitamins Australia Pty Ltd and others, the Federal Court imposed penalties of A\$15 million on Roche Vitamins Australia Pty Ltd, A\$7.5 million on BASF Australia Ltd and A\$3.5 million on Aventis Animal Nutrition Pty Ltd.
- in various actions brought by the ACCC between 1999 and 2002 in relation to an Australian fire protection industry cartel, the Federal Court imposed penalties of more than A\$15 million against 38 individuals and more than 20 companies, as well as ordering the payment of almost A\$600,000 of the ACCC's costs.

These are the highest penalties in Australia to date.

4.6 Limitation Periods for class actions and private damages claims

In Australia, private parties and consumers may also commence proceedings seeking injunctions and/or damages and other remedies in respect of contraventions of Part IV. Since amendments in 2001, which effectively cover conduct since 1 July 1998, the limitation period for damages under section 82 of the TPA is 6 years after the day on which the cause of action accrued, that is, when loss or damage is suffered as a result of such breach.

However, compensation may also be sought in respect of cartel conduct if an injunction is sought under a second provision of the TPA, section 87. Following a recent Federal Court decision in a class action over a cartel (which has now been settled)¹⁷, it has been held that there is no time limit, other than one imposed in the Court's discretion, for an action seeking *both* injunctions and compensation under s. 87 of the TPA. It remains unclear when the courts will allow such actions to be brought after 6 years after the loss is sustained¹⁸. The cases where such an action will be allowed have yet to be tested.

In the *Energex*¹⁹ case in 2004, the Court refused summary judgment sought by respondents who argued that reliance on s.87 to circumvent the 6 year rule was an abuse of process.

In an important decision, albeit interlocutory and subject to appeal, Weinberg J held:

- it was 'arguable', although he did not decide the issue, that the 6 year limitation under s.82 of the *Trade Practices Act* commences to run, not when a customer purchases goods or services at a price inflated by the cartel, but later, when it became 'manifest' to the customer that the market was 'rigged'.²⁰
- The doctrine of 'fraudulent concealment', relied on in US cases such as *Atlantic City Electric v General Electric*²¹ and *Bailey v Glover*²² may not be available for a statutory cause of action under the *Trade Practices Act*, on current Australian authority²³.
- Energex was not barred from seeking a perpetual injunction against the cartel members, under s.87 of the *Trade Practices Act* even though the ACCC had already obtained similar injunctions against the respondents in earlier proceedings; and

¹⁷ *Mayne Nickless Ltd v Multigroup Distribution Services Pty Ltd (2001)* 114 FCR 108.

¹⁸ In the *Mayne Nickless* case, the Full Court noted that, in exercising discretion to permit a claim, which was time barred under s.82, to be brought under s.87, a Court "*may be informed by the extent to which the primary injunctive relief [under s.87] would be of any utility*" (p.124).

¹⁹ *Energex* see footnote 2 above.

²⁰ *Energex* at [177-9].

²¹ 312 F2d (1962).

²² 88 US 342 (1874)

²³ *Energex* at [225-231].

- it was also arguable that by, submitting tenders to Energex over a period of years without disclosing that the bids were 'rigged', the Cartel members had engaged in tortious conduct, being deceit, for which they may also be liable.

While the decision in *Energex* is not the final word on any of these issues, it is an important decision, especially given the small number of damage cases brought to date in Australia in relation to cartel conduct.

In Australia, damages are assessed on the basis of the amount of loss or damage the person suffered as a result of conduct that contravened Part IV. Punitive, exemplary and treble damages cannot be awarded.

Class actions can also be brought for breach of the cartel laws in accordance with the *Federal Court Rules 1979* (Cth).

In a proceeding seeking damages for a contravention of the TPA, a finding of fact by the Court in penalty proceedings in which a person has been found to have contravened a provision of Part IV of the TPA is *prima facie* evidence of that fact in subsequent civil damages cases, including class actions.²⁴

The ACCC may also bring representative proceedings for damages on behalf of any person or class of persons who has suffered, or may suffer, loss or damage as a result of cartel activity. It may also intervene as a party in any court proceedings for damages as a result of a breach of Part IV.²⁵

5. Sentencing and determination of penalties in Australian cartel cases

5.1 Sentencing

The ACCC does not have any formal sentencing or penalty guidelines. Consequently, there is no scale or predetermined method to assess civil penalties. The Court may order a person to pay such pecuniary penalty in respect of each act or omission which is found to constitute a contravention of the TPA as the Court determines appropriate.²⁶ Relevant factors include the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission, the circumstances in which the act or omission took place and whether the person has previously been found to have engaged in any similar conduct. The following matters are also relevant to determining a penalty:

²⁴ Section 83 of the TPA.

²⁵ Section 87CA of the TPA.

²⁶ For further discussion on this issue see the following paper by Michael Corrigan, "*The ACCC's Leniency Policy - Issues for Australian Practitioners*", ACCC Enforcement and Leniency Conference 2002.

- (a) the size of the contravening company;
- (b) the degree of power the company has, as evidenced by its market share and ease of entry into the market;
- (c) the deliberateness of the contravention and the period over which it extended;
- (d) whether the contravention arose out of conduct of senior management or at a lower level;
- (e) whether the company has a corporate culture conducive to compliance with the TPA; and
- (f) whether the company has shown a disposition to co-operate with the ACCC in relation to the contravention.

5.2 Negotiating Penalties with the ACCC - And the Court's Role

Co-operating parties can seek to negotiate "discounts" with the ACCC but these are subject to the discretion and approval of the Federal Court. If the respondent admits to the contravention and the parties have agreed upon a penalty they submit to the Court an agreed statement of facts and a joint submission as to the appropriateness of the agreed penalty. (In determining whether to reach an agreement on penalties, and what the recommendation to the Court should be, the ACCC takes into consideration the same factors the Federal Court takes into account (as set out above) as well as whether the contravening conduct has ceased.)

An agreement between the ACCC and relevant parties is reached generally where the corporation has not been granted complete immunity but has co-operated with the ACCC in a substantive way. These "agreed" penalties are not guaranteed as they are not binding upon the Federal Court. The Federal Court reserves its discretion whether or not to accept the penalties recommended to it by the ACCC and the defendant.

While the practice of the Court has usually been to confirm the penalties recommended to it as within the range of appropriate penalties that the Court would otherwise have imposed, recently some judges have indicated that they do not approve of the practice of regulators negotiating penalties with companies that break the law.²⁷

²⁷ " The willingness of the Court to exercise its own discretion was demonstrated in a recent case involving price fixing, market sharing and misleading conduct in the NSW fire protection industry. In *Australian Competition and Consumer Commission v FFE Building Services Ltd* [2003] FCA 1542, the parties recommended to the Court that a penalty of A\$1.5 million for FFE was appropriate. The Court considered that the penalties recommended by the ACCC and FFE were unacceptably low and noted that "there is a danger in judges of [the Federal] Court being overly influenced by the view as to penalty taken by the ACCC" (per Wilcox J). Instead, the Court imposed a A\$3.5 million fine on FFE.

In 2004, the Full Court of the Federal Court reviewed²⁸ recent cases and confirmed that, whilst the Court should use its own discretion in deciding appropriate penalties, the Court should accept "agreed" penalties which are within the range of what the Court itself would impose. This is interpreted to mean that, whilst the Court will not "rubber stamp" every agreed penalty, the Court should not depart from an agreed figure if it is within the permissible ranges of penalties which the Court regards as appropriate for the conduct in question.

6. ACCC Leniency Policy for Cartel Conduct

6.1 The new leniency policy

On 30 June 2003, the ACCC's Leniency Policy for Cartel Conduct ("**Leniency Policy**") took effect, bringing it into line with competition regulators in the United States, Canada, the United Kingdom and the European Union which offer leniency and immunity to whistle blowers. The Leniency Policy is published on the ACCC's website (www.accc.gov.au).

The Leniency Policy offers leniency for corporations and individuals involved in cartel conduct who voluntarily disclose the cartel conduct to the ACCC and co-operate with the ACCC throughout its investigation and any proceedings arising from the investigation. The Leniency Policy is particularly directed at large corporations and their directors, officers and employees that have engaged in hard core cartel conduct affecting Australian markets.

6.2 What conduct does the Leniency Policy apply to?

The Leniency Policy only applies to "cartel" conduct which is defined to include conduct engaged in by two or more competitors which falls within any of the following categories:

- price fixing;
- market sharing, including bid rigging or customer sharing; and
- the setting of production or sales quotas as between competitors.

6.3 How does an applicant obtain immunity?

In order to obtain immunity from the ACCC under the Leniency Policy, the participant seeking the immunity must satisfy the following requirements:

- (a) **It must be the first person (company or individual) to alert the ACCC to the cartel conduct:** The ACCC will only grant full immunity from ACCC instituted proceedings where it is

²⁸ *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCA FC 72.

unaware of the cartel conduct to which the disclosure relates and the corporation or person is the first person to alert the ACCC to the cartel conduct. (The ACCC cannot grant immunity where proceedings are instituted by a private party for breach of the TPA.)

The ACCC may still grant the person or corporation immunity from pecuniary penalties (but not necessarily from civil proceedings) where the ACCC is aware of the conduct but it has insufficient evidence to institute proceedings against the cartel.

While the Leniency Policy will only apply to the first person to approach the ACCC, the ACCC may offer some form of immunity to any subsequent applicants. In addition, the ACCC may consider any subsequent application for leniency pursuant to its Cooperation Policy (discussed further below).

- (b) **The applicant must give full and frank disclosure of the cartel conduct to the ACCC:** This extends to providing all evidence and information in the possession of or available to the person or corporation. The person or corporation must ensure that it continuously and expeditiously provides its co-operation and disclosure to the ACCC throughout its investigation and any ensuing proceedings.²⁹

The ACCC reserves its right to revoke a leniency granted if the person or corporation deliberately misleads the ACCC, provides false evidence or deliberately withholds or destroys important evidence.³⁰

- (c) **The applicant must not be the "ring leader":** This requirement means that the corporation or person must not have been the clear leader in the cartel. It should be noted that the organisation of meetings of cartel members or the maintenance of records by a member of the cartel will not, on its own, necessarily constitute clear leadership of the cartel. This is especially the case where the other cartel members are freely and willingly participating in the cartel.³¹

- (d) **In the case of a corporation, the disclosures must be "a truly corporate act":** In the case of a corporation, the disclosure must not be isolated confessions of individual representatives of the corporation.

²⁹ See section 6.8 below for a discussion of the criticism of the ACCC policy of requiring written confessions and witness statements to be provided.

³⁰ See section 6.9 below for a discussion on when it is unlawful to destroy documents.

³¹ An example of the sort of behaviour which may indicate that a cartel member may be considered the "ring leader" of a cartel is the situation where the dominant player in a market coerces a new entrant to the market to maintain current price structures.

- (e) **In the case of a corporation, restitution must be made:**
Where possible, the corporation must make restitution to injured parties for its conduct in the cartel. Importantly, the immunity offered by the ACCC does not extend to limit the rights of injured third parties to take action under the TPA to recover damages against the cartel participants, including the participant who approached the ACCC.

6.4 Leniency/immunity for directors, officers and employees

If a corporation qualifies for immunity from proceedings or immunity from a pecuniary penalty, all directors, officers and employees of the corporation who admit their involvement in the cartel as part of the corporate admission and provide the ACCC with full and frank disclosure in similar terms to that required for the corporation, will receive leniency in the same form as the corporation.

6.5 When to approach the ACCC for leniency/immunity

The Leniency Policy only applies where the ACCC is unaware of the alleged cartel, or the ACCC is aware of the alleged cartel but has insufficient evidence to institute proceedings in respect of the cartel.

The ACCC will consider itself aware of an alleged cartel where it has in its possession, at the time of the initial application for leniency, information from any source suggesting that the cartel has operated in Australia or has affected a market in Australia.

The ACCC will consider itself to have sufficient evidence to institute proceedings in respect of the alleged cartel where it has sufficient material in its possession at the time of application for leniency, to institute proceedings on reasonable grounds in respect of at least one contravention.

Accordingly, the best time to approach the ACCC if possible is well before the ACCC has commenced its investigation and before it becomes aware of the cartel. Or, if that is not possible, the best time would be before the ACCC has completed its investigation, and certainly before it has instituted proceedings in respect of any one of the cartel participants.

If a corporation or individual who is involved in cartel conduct is contemplating making a leniency application but is uncertain as to the possible application of the Leniency Policy to them, it is possible for the corporation or individual to approach the ACCC for a clarification specific to their situation. This clarification may be done on a "hypothetical" or an "off the record" basis. Any information provided to the ACCC in this context would ordinarily not be used by the ACCC for any purpose other than to provide the requested clarification.

6.6 What if the applicant is not "first in"?

The ACCC guidelines entitled "*ACCC Co-operation Policy for Enforcement Matters*" ("**Co-operation Policy**") cover all applications for

leniency that are not covered by the Leniency Policy, including applications by a corporation or individual who is not "first in".

Under the Co-operation Policy, leniency, including immunity for *individuals* is most likely to be granted to individuals who:

- come forward with valuable and important evidence of a contravention of which the ACCC is either otherwise unaware or has insufficient evidence to initiate proceedings;
- provide the ACCC with full and frank disclosure of the activity and relevant documentary and other evidence available to them;
- undertake to co-operate throughout the ACCC's investigation and comply with that undertaking;
- agree not to use the same legal representation as the firm by which they are employed; and
- have not compelled or induced any other person/corporation to take part in the conduct and were not a ringleader or originator of the activity. Immunity would not be granted where the person seeking leniency has compelled or induced any other person/corporation to take part in the conduct or was a ringleader or originator of the activity.

Under the ACCC's Co-operation Policy, leniency is most likely to be considered for a *corporation* on the same criteria as for an individual, plus the following:

- upon its discovery of the breach, the corporation takes prompt and effective action to terminate its part in the activity;
- the corporation is prepared to make restitution where appropriate;
- the corporation is prepared to take immediate steps to rectify the situation and ensure that it does not happen again, undertakes to do so and complies with the undertaking; and
- the corporation does not have a prior record of TPA, or related, offences.

The ACCC has granted immunity or leniency to individuals or corporations who co-operate with it in respect of matters that would otherwise attract penalties. Generally, a decision to grant leniency to a defendant will be in the form of an agreement between the party and the ACCC on penalties.

6.7 Will a leniency application be confidential?

The ACCC will respect requests for information disclosed to be treated confidentially during the course of its investigations and will resist, to the

extent it can, any request to disclose the information from foreign regulators. This only prevents the ACCC from disclosing the confidential information to third parties, it does not prevent the ACCC from using the information for the purposes of its investigations.

In any event, all such confidentiality will be subject to the ACCC's practice of fully publicising the cartel at the time the ACCC commences proceedings in the Federal Court and also when the Court determines penalties. The ACCC practice is to initiate substantial publicity in respect of these decisions including issue of background papers to the media, media interviews and subsequent publicity in ACCC publications. The ACCC will not settle an investigation on a confidential basis where breaches of the TPA are established.

6.8 Criticism of ACCC Leniency Policy

In contrast to leniency policies in the United States and Canada which put in place a paperless application process, the ACCC's Leniency Policy requires an applicant to give written "full and frank" disclosure to the ACCC. This involves providing a written witness statement and/or confession to the ACCC detailing the cartel's activities as part of the leniency application. This requirement has attracted substantial criticism as such written confessions and statements are now likely to be discoverable by courts in other jurisdictions, including United States courts.

Further, under the Australian rules of discovery, copies of such statements or confessions which are retained by the applicant or its lawyers would be discoverable in subsequent proceedings for simple damages arising out of the cartel.

A number of commentators have suggested that these concerns will act as a serious disincentive to companies considering making use of the Leniency Policy and that the ACCC should modify its procedures to avoid requiring companies to create such discoverable "smoking guns".³²

There have been reports that the ACCC is prepared to be flexible on this issue. However, it is too early to tell whether this will be so. In the authors' experience the ACCC has tended to require the provision of written witness statements in cartel applications and this has required considerable care in avoiding creating documents which will be damaging to the applicant in other jurisdictions.

6.9 Destruction of documents and evidence

In Australia, parties to litigation have a duty to give discovery of all documents that are relevant to the issues in dispute in the litigation. It is a breach of this duty for a party to destroy any documents or evidence that is relevant to anticipated or current litigation. Non compliance with

³² See "*The Transformation of International Cartel Enforcements*", Gary R Spratling and D. Jarrett Arp (2003) p.38.

discovery obligations can attract serious sanctions including contempt of court, dismissal of proceedings or the striking out of the defence.

Importantly, the duty has also been held to extend to documents and evidence relevant to litigation that has not commenced but is reasonably anticipated. Accordingly, the destruction of documents and evidence before the commencement of litigation may also "attract a sanction (other than the drawing of adverse inferences) if that conduct amounts to an attempt to pervert the course of justice".³³

6.10 What about international cartel conduct?

The Leniency Policy is designed to bring to light serious, covert, hard core conduct which affects Australian markets. The ACCC will actively investigate and take enforcement action against international cartel conduct which affects Australia to the extent permitted by the TPA. Accordingly, the Leniency Policy applies to international cartels that affect Australia in the same way that it applies to domestic cartels.

The ACCC has stated that potential leniency applicants involved in an international cartel affecting Australia should have regard to the following matters:

- a leniency application made to a foreign competition enforcement agency will not be considered an application in Australia under the Leniency Policy; and
- leniency applicants should contact the ACCC at the earliest possible stage. The ACCC will grant leniency in accordance with the policy even when there is uncertainty as to liability in Australia as a result of jurisdictional issues.

6.11 Will the Leniency Policy apply if criminal sanctions are introduced?

There is some concern that the certainty and transparency afforded by the Leniency Policy will be compromised by the introduction of criminal sanctions for serious cartel conduct. This is as a result of an inconsistency between the Leniency Policy's guarantee of amnesty and the Commonwealth Director of Public Prosecutions approach to granting undertakings which retains significant prosecutorial discretion.

However, the ACCC has recognised that if criminal sanctions are introduced for cartel conduct, it will need reconsider the Leniency Policy in light of those changes and it has indicated that it will liaise with the Department of Public Prosecutions and the Attorney General in relation to the introduction of a leniency policy for criminal offences for cartel behaviour in the event that criminal sanctions are introduced.

³³ *British American Tobacco Australia Services Ltd v Cowell (as representing the estate of Rolah Ann McCabe, deceased)* [2002] VSCA 197.

7. When Do Australian Courts have Jurisdiction over international cartels?

7.1 Extraterritorial operation of the TPA

The TPA will apply to the conduct of a foreign corporation or a foreign individual that otherwise falls within the TPA if that conduct:

- (a) took place in Australia; or
- (b) took place outside Australia if:
 - (i) the corporation was incorporated in Australia; or
 - (ii) the corporation was carrying on business in Australia at the relevant time; or
- (c) took place outside Australia but was engaged in by an Australian citizen or person ordinarily resident within Australia.³⁴

Determining whether conduct took place in Australia or was engaged in by a corporation that was incorporated in Australia or by an Australian citizen or person ordinarily resident within Australia can be a relatively straight forward task. However, clearly there are some complexities which are discussed further below.

7.2 When do foreign corporations risk carrying on business in Australia?

The term "carrying on business" is not defined in the TPA. The question of whether a foreign corporation is carrying on business for the purposes of section 5(1) of the TPA requires a detailed assessment of the facts.³⁵

This issue recently arose for consideration before the Federal Court in a class action which had been commenced in Australia against a number of foreign respondents and their Australian subsidiaries (the *Bray* case)³⁶. The class action was for damages and other orders arising from a contravention of the TPA prohibition on price fixing and other exclusionary practices in relation to the vitamin industry.

In that case, in deciding whether the foreign respondents were carrying on business in Australia, the relevant question for the Federal Court was

³⁴ Section 5(1) of the TPA deals with the extraterritorial operation of the TPA and provides relevantly provides that the cartel provisions of the statute " ... *extend to the engaging in conduct outside Australia by bodies corporate incorporated or carrying on business within Australia or by Australian citizens or persons ordinarily resident within Australia*".

³⁵ *Luckins v Highway Motel* (1975) 7 ALR 413 at page 429.

³⁶ *Bray v F Hoffman La Roche Limited* (2003) ATPR 41-906

whether the Australian subsidiaries in question were doing their own business or the business of their foreign parents?³⁷

In answering this question, the Court examined the business conducted by the subsidiaries and all aspects of the relationship between the subsidiaries and their foreign parent corporations and considered the following questions:

- whether the foreign parent was the '**head and brain**' of the Australian subsidiary;
- the **degree of control** the foreign parent exerted over the Australian subsidiary;
- the **contributions** the foreign parent made to the Australian subsidiary;
- whether the Australian subsidiary made **contracts** with customers or others **in the name of**, or on behalf of, the foreign parent; and
- if so, whether the Australian subsidiary required **specified authority** in advance before binding the foreign parent to contractual obligations.

In *Bray*, the Federal Court was not satisfied that the evidence established that the foreign corporations carried on business in Australia through their subsidiaries. The following reasons were important:

- the Australian subsidiaries held their assets (including bank accounts) in their own names and employed employees and purchased and sold products in their own names;
- their businesses were not confined to the supply of group products;
- the accounts of each subsidiary were included in the consolidated group accounts but that is commonplace with subsidiaries and accords with established accounting and regulatory requirements;
- although there was some overlap between board members, the subsidiaries had different boards to the foreign parents;

³⁷ Order 8 of the Federal Court Rules prescribes the circumstances in which an originating process may be served outside Australia. Before it can grant leave, the Court must be satisfied that it has jurisdiction and that the Applicant has a prima facie case for relief, as well as being satisfied that the proceedings fall within one or more of the fourteen categories under which originating processes may be served outside the jurisdiction.

- the evidence did not suggest that the Australian subsidiaries were not maintained as distinct or separate entities or that the parents disregarded corporate boundaries;
- the foreign parents did not have employees in Australia or hold assets in Australia (save for intellectual property rights and shares in the Australian subsidiaries) and generally did not purport to engage in business in Australia; and
- while the foreign corporations were extensively involved in the implementation of the cartel arrangement in Australia, that involvement related to the cartel arrangement and not to the manner in which the Australian subsidiaries generally carried on their businesses.

7.3 Foreign parent corporations are not usually resident in Australia

Although the foreign corporations may have the ultimate legal right, as shareholders, to elect the boards of the subsidiaries and, therefore, in a practical and commercial sense, had the capacity to direct and control the commercial operations of the subsidiaries, in *Bray* this was held to demonstrate nothing more than an ordinary commercial and legal relationship that commonly exists between foreign corporations and local subsidiaries.

In *Bray*, the Court held that something more is required to establish that the Australian subsidiaries were carrying on the business of foreign parent corporations.

7.4 When does international cartel conduct take place in Australia?

It was not in dispute in *Bray* that the relevant cartel arrangements were made overseas. These arrangements fixed worldwide market share and prices on a worldwide basis (including Australia). The question for the Court was whether the cartel conduct also took place in Australia.

The Court accepted that the cartel conduct constituting communications (such as emails, facsimiles, letters and telephone calls) that were sent or made from outside Australia to local Australian employees implementing the cartel was conduct that took place in Australia. This was because the communications were directed to, and were expected to be received in, Australia and related to volume, price and customers in Australia.

The Court held that this factor, combined with the alleged implementation of the cartel arrangement by the officers of the subsidiaries in Australia (by way of supervision, constant communication and discipline imposed on subsidiaries for breach of the cartel arrangements) on a regular and ongoing basis over a lengthy period, constituted conduct of the foreign parents that took place in Australia and so was caught by the TPA.

On appeal this decision was upheld by the Full Federal Court.³⁸

7.5 Individuals and indemnity issues

Under Australian corporate law, an Australian corporation and its affiliates cannot pay the legal costs of, or penalties imposed on, its directors or senior management officers for conduct that was not undertaken in "good faith".³⁹ This will usually mean indemnities are illegal and unenforceable in cartel cases where the conduct would not satisfy a test of good faith conduct by the employee concerned, even if the employee made no personal gain and the gains derived from the cartel were to the benefit of the employer corporation.

Although the point has not been determined by an Australian Court, there is a view that the effect of the Australian Corporations Act is that no indemnity may be provided in respect of deliberate conduct by a director or officer which was known or appreciated to be contrary to Australian law.

A corporation may insure and indemnify the officer in respect of legal costs and penalties only where those costs or penalties were incurred in "good faith". An officer of a corporation includes a director or secretary and any person who makes decisions that affect all or a major part of the business of the corporation.

Involvement in cartel behaviour would be regarded as illegal by most persons engaged in Australian business and therefore may not attract the "good faith" protection permitting corporate indemnities to be provided. A director will be held to have acted without good faith where he or she acted dishonestly or did not make a real or genuine attempt to meet the standard of care required of him or her.

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Disclaimer: This paper is intended to provide commentary and general information. It should not be relied upon as legal advice. Formal legal advice should be sought in particular transactions or on matters of interest. Persons listed may not be admitted in all States.

³⁸ *Bray v F Hoffman La Roche Ltd* (2003) ATPR 41-946.

³⁹ Section 199A of the *Corporations Act 2001* (Cth).

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