

COMMUNICATION FROM AUSTRALIA

The following is the final text of a paper received from the Permanent Mission of Australia which was circulated as an advance copy for the Working Group's meeting of 1-2 July 2002.

Hard-Core Cartels

This paper describes the main features of Australia's regulatory framework for dealing with hard-core cartels (HCCs), and discusses a case study drawn from Australian experience on the application of the relevant provisions. It also highlights work that the OECD has undertaken on hard-core cartels.

A. PROHIBITION OF HCC'S IN AUSTRALIA

1. Australia's competition law

1. Section 45 of Australia's competition law, the Trade Practices Act 1974 (TPA) prohibits hard-core cartels. Price-fixing, market sharing or restriction of supply agreements, exclusionary agreements and secondary boycotts all fall within this section. Price-fixing agreements are per se prohibited, whereas agreements to restrict dealings (eg, agreements to limit output or production) are assessed against a 'substantial lessening of competition' test.

2. The prohibition on price fixing (section 45A) operates where a provision of a contract, arrangement or understanding has the purpose or effect of "fixing, controlling or maintaining the price for, or a discount, allowance, rebate or credit in relation to, goods or services". The agreement must relate to the supply or acquisition of goods or services by parties who are in competition with each other.

3. Secondary boycotts occur when two parties act in concert to prevent or hinder a third party from supplying or acquiring goods or services from a fourth party. Section 45D deals with secondary boycotts for the purpose of causing substantial loss or damage to the business of the person unable to supply or be supplied goods or services. Section 45DA prohibits secondary boycott activity for the purpose of causing substantial lessening of competition in any market in which the person unable to supply or be supplied with goods carries on business. Lastly, section 45DB deals with boycotts with the purpose and effect of preventing or substantially hindering trade between Australia and overseas trading partners.

2. Sanctions against HCCs

4. Australia's Constitution requires that judicial power must only be exercised by the courts. Accordingly, section 77 of the TPA allows the ACCC to institute proceedings to recover penalties, subject to a statute of limitation period of six years, and section 76 empowers the Court to impose

them. The factors the Courts refer to in determining the level of pecuniary penalty include the deliberateness of the conduct, the period over which it extended and the amount of loss or damage caused. However, like any litigant, the ACCC can make submissions to the Court as to what it considers an appropriate penalty (maximum penalties are summarised below).

5. Actions under section 77 are civil proceedings and therefore attract the civil standard of proof. The ACCC is therefore required to establish the facts of the contravention on the balance of probabilities.

6. Pecuniary penalties available for hard-core cartels are summarised below.

- Corporations that contravene sections 45A and 45DA may incur penalties of up to AUD \$10 million per offence;
- Individuals that contravene sections 45A and 45DD may incur penalties of up to AUD \$500 000 per offence.
- Corporations that contravene sections 45D and 45DB may incur penalties of up to AUD \$750 000 per offence;
- Individuals that contravene sections 45DA and 45DB are not subject to monetary penalties.

7. In addition, the ACCC may seek interlocutory or final injunctions under section 80 of the TPA. Injunctions can be mandatory (requiring certain future conduct) or prohibitory (requiring the cessation of certain conduct). In order to obtain the award of an injunction, the ACCC must show that there is a serious question to be tried and that the balance of convenience favours the granting of the injunction.

8. The ACCC can also seek award of damages pursuant to section 82 of the TPA. Such actions are subject to a three-year limitation period. It should be noted that section 82 damages are designed not to punish, but to compensate for actual loss suffered.

3. Administrative Action

9. Apart from the judicial remedies outlined above, the ACCC may also accept court-enforceable undertakings under section 87B of the TPA, rather than pursue litigation. This approach may result in quicker and less costly resolution of the matter while still attaining the ACCC's enforcement objectives.

B. CASE STUDY – FIRE PROTECTION INDUSTRY

10. The following three related cases involved illegal activity in the fire protection industry in the State of Queensland, Australia.

11. The ACCC's investigations commenced after a 'whistle-blower' provided information in relation to cartel activity in the installation of fire sprinklers and alarm systems. During the ensuing investigation, evidence surfaced about misleading and deceptive conduct in the maintenance of fire protection systems, and then about secondary boycott activity by an industry-related union.

12. The seriousness of the misconduct uncovered was exacerbated by the fact that many of the buildings affected were public facilities: schools, hospitals, retirement homes, cinemas and shopping centres.

4. The Cartel

13. In February 2001, after four years of investigation and an eighteen-month trial, the ACCC secured an award of A\$15 million in penalties and costs. The case involved 38 individuals and more than 20 companies, ranging from large multinational corporations to small local operators. This constituted almost all Brisbane-based companies operating in the fire alarm and sprinkler installation service industry at that time.

14. The level of penalty reflects a number of factors, including the size of the companies, the level of management involved, and the nature and seriousness of the unlawful conduct. In his judgment, Justice Drummond noted that it could readily be accepted that substantial loss had resulted to consumers affected.

15. The ACCC alleged that anti-competitive arrangements were made at regular meetings over many years, beginning in the mid-1980s. At these meetings, the companies agreed which tenders each would win by agreeing on prices to be tendered. They also agreed they would not discount their tender prices beyond a certain range.

16. The ACCC also alleged that the parties agreed that all alarm projects would be tendered at a labour rate of A\$40 per hour with a margin on labour and materials of 40%. This was known as "the 40/40 agreement".

5. Maintenance of Fire Protection Systems

17. As a result of the above investigation, the ACCC discovered sufficient evidence to allege that numerous fire protection companies had committed various other contraventions of the TPA. The evidence suggested they failed to meet Australian Standards in routine inspection, testing and maintenance of fire protection systems for approximately 11 years, and had inadequate systems to verify whether checks had been performed. (Australian Standards must be met in order to ensure the reliability and performance of these systems.)

18. The Court ordered injunctions, refunds, issuance of public notices, institution of compliance programs and undertakings to maintain management control programmes after finding the companies had engaged in misleading and/or deceptive conduct, had made false representations regarding the standard or quality of services provided, and had accepted payment without intending or being able to supply goods or services.

19. The fact that the anti-competitive conduct in this case had the potential to put human lives at risk highlights the importance of a strong and effective competition regime that prevents hard-core cartel activity.

6. Secondary Boycott

20. A second 'spin-off' from the cartel investigation was the discovery of secondary boycott activity by the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union (CEPU).

21. The ACCC alleged that a number of contraventions of the secondary boycott provisions of the TPA had occurred between November 1997 and early February 1998.

22. The matter was settled between the ACCC and the CEPU by way of consent orders in the Federal Court which included:

- an injunction;

- implementation by the CEPU of a trade practices compliance programme;
- the CEPU notifying sprinkler fitter members, fire protection contractors and builders that the conduct had ceased;
- agreement by the CEPU to reinstate members who were suspended for involvement in subcontracting; and
- an agreed contribution by the CEPU to the costs of the ACCC's proceedings.

C. INTERNATIONAL PERSPECTIVES ON HCC CONCEPTS AND PRINCIPLES

23. Research and analysis on the nature and impact of hard-core cartels, and the need for effective sanctions against them, are embodied in the OECD's 1998 Recommendation on HCCs, and in the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.

7. OECD Council Recommendation on HCCs

24. The OECD's work programme on hard-core cartels has been underway for a number of years. The OECD Council Recommendation on HCCs was issued in 1998. The Recommendation and a subsequent progress report by the Competition Committee noted that HCCs impose significant harm upon consumers worldwide and called for enhanced sanctions against cartel participants to deter such conduct.

25. More specifically, the 1998 Recommendation concluded that "hard-core cartels are the most egregious violations of competition law, and ... they injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others".

26. The Recommendation further stated that "effective action against hard-core cartels is particularly important from an international perspective – because their distortion of world trade creates market power, waste, and inefficiency ...".

27. Most recently, the OECD this year issued a report on the Nature and Impact of Hard-Core Cartels and Sanctions against Cartels under National Competition Laws.

28. Australia supports the OECD's work on hard-core cartels and considers it appropriate and highly useful to use these achievements as a starting point for discussions within the WTO context.

D. CONCLUSION

29. Hard-core cartels are the most insidious form of anti-competitive conduct and must be stopped. They work to the detriment of customers and suppliers, act as barriers to the entry of new players, and undermine the benefits of trade liberalisation. The prevalence of cartels at the domestic and international level underpin the importance of having a comprehensive and effective domestic competition regime, the implementation of which can only be assisted through greater enforcement cooperation among competition agencies around the world.
