



CARTEL POLICY

... SUFFICIENTLY REPREHENSIBLE TO BE PUNISHABLE BY THE IMPOSITION OF A GAOL SENTENCE.

... LENIENCY OR AMNESTY POLICY ... A POTENT MEANS OF UNCOVERING CARTEL BEHAVIOUR.

Report of the Trade Practice Act Review Committee 2003 (Dawson Report)

Cartels are bad for the economy and bad for consumers. By controlling markets and restricting goods and services they can put honest and well run companies out of business while protecting their own inefficient members and stifling innovation. This costs consumers billions of dollars in higher prices. As recommended by the Dawson Report the ACCC has recently released a revised immunity policy for cartel conduct. It is also readying itself for when cartel conduct will be punished by higher fines and jail terms and has established a criminal enforcement and cartel branch to prepare the ACCC for running criminal cartel investigations.

First in, best protected

On 5 September 2005 the ACCC's revised immunity policy for cartel conduct replaced its 2003 leniency policy.

The immunity policy maximises incentives for cartel participants to self-report their involvement in a cartel and provides certainty for applicants about how the ACCC deals with immunity applications.

The immunity policy confers full amnesty from prosecution and penalty to the first eligible cartel participant to report their involvement in a cartel and to cooperate with the ACCC's investigation and prosecution of other cartel participants.

THE ACCC'S NEW IMMUNITY POLICY, WHICH INCLUDES THE IMMUNITY POLICY INTERPRETATION GUIDELINES, LENIENCY DISCUSSION PAPER AND LENIENCY POSITION PAPER ARE AVAILABLE ON THE ACCC WEBSITE AT WWW.ACCC.GOV.AU.

Cartel conduct is taken to be any of the following categories of conduct engaged in by two or more businesses who are, or otherwise would be, in competition with each other:

- > price fixing
- > market sharing, including bid rigging, customer sharing and market allocation
- > agreements not to compete with each other or to limit or restrict competition between them
- > production or sales quotas.

For eligible applicants the immunity policy:

- > provides automatic full immunity to the first person who self-reports their involvement in a cartel, until the ACCC has legal advice that it has enough evidence—previously, full immunity was available only if the ACCC was unaware of the cartel when the participant self-reported
- > implements a 'marker' system allowing potential applicants to secure their place in the immunity queue while they complete internal investigations
- > removes the need for immunity applications to be in writing
- > provides that when a corporation qualifies for immunity the default position is that all current and former employees will also have immunity

- > clarifies that if the first to apply for immunity is unable or unwilling to meet all the requirements for immunity, a subsequent applicant may still qualify for immunity
- > clarifies that the ACCC may, in appropriate cases, approach an individual cartel participant about the availability of immunity.

The ACCC's new immunity policy, which includes the immunity policy interpretation guidelines, leniency discussion paper and leniency position paper are available on the ACCC website at www.accc.gov.au.

Let the punishment fit the crime

The extraordinary profits that can flow to cartel participants means that slap-on-the-wrist penalties have often failed to act as a disincentive. The ACCC therefore welcomed the Dawson Report's recommendations that the Trade Practices Act be amended to provide:

- > a maximum pecuniary penalty for corporations to be the greater of \$10 million or three times the gain from the contravention, or
- > where the gain cannot be readily ascertained, 10 per cent of the turnover of the body corporate and all of its interconnected bodies corporate (if any).

The second major change, after the increase in pecuniary penalties, is the future introduction of the criminal offence for cartel behaviour. This offence is specifically for cartel conduct—not other conduct under the anti-competitive provisions of the act. Executives will also still face the \$500 000 non-indemnifiable penalty. In addition, they can be banned from managing companies under the Dawson changes. The legislation is not yet tabled for the offence, but the point is that executives will be facing a possible term in jail. The Treasurer's announcement of the offence stated that:

The proposed criminal cartel offence will prohibit a person from making or giving effect to a contract, arrangement or understanding between competitors that contains a provision to fix prices, restrict output, divide markets or rig bids, where the contract, arrangement or understanding is made or given effect to with the intention of dishonestly obtaining a gain from customers who fall victim to the cartel.

