

JAIL ON THE MENU FOR CARTELS

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THERE ARE COUNTLESS WAYS THIEVES ATTEMPT TO STEAL FROM AUSTRALIAN CONSUMERS EVERY YEAR. BUT UNTIL RECENTLY, FEW PEOPLE WOULD HAVE SUSPECTED A SINGLE MASS CONSUMER THEFT WOULD COME VIA A HUMBLE CARDBOARD BOX.

IN NOVEMBER last year Justice Peter Heerey handed Visy Board and several of its executives penalties totalling \$38 million for its involvement in an extensive price fixing cartel in the fibre board box industry with major competitor Amcor.

As Justice Heerey noted in his judgment:

Every day every man, woman and child in Australia would use or consume something that at some stage has been transported in a cardboard box. The cartel in this case, therefore, had the potential for the widest possible effect.

While the penalties are the largest ever handed down for a cartel in Australia, businesses claim this amount is less than the amount lost by Australians who for years unknowingly paid artificially high prices for fibre board products produced by the market's two dominant suppliers. They are also only a fraction of some of the massive penalties handed down to cartels overseas.

When recorded transcripts of conversations between executives of Visy and Amcor were made public, they showed the two businesses had clearly traded contracts with each other through a series of secret conversations. Amcor was granted immunity from prosecution after confessing its involvement in the illegal deal, but both businesses have been named in class action compensation cases involving several major customers.

The cartel was tried as a civil matter. Australia's laws do not currently allow for criminal prosecution of cartels.

That case proved to be one of the catalysts to re-ignite national debate about the scope of the damage cartels do to every day customers—and whether current penalties were providing a sufficient deterrent.

In a number of Australia's major trading partner countries, cartels can be tried as criminal cases, providing for much higher penalties and potential jail terms for those found guilty of the most serious offences.

In January the Federal Government placed the issue back on the political agenda in Australia with the release of an exposure draft Bill and discussion paper on adding criminal sanctions for cartel activity to the Trade Practices Act.

The government is proposing amendments to the Act which could see individuals jailed for up to five years and fined \$220 000.

The changes follow the 2003 review of the competition provisions of the Trade Practices Act conducted by the Dawson committee. Among the committee's recommendations was for Australia to introduce criminal sanctions for cartel activity in line with countries like the United States, Canada and Britain.

The government has also released for public consultation a draft memorandum of understanding between the Commonwealth Director of Public Prosecutions and the ACCC. Under the draft cartels Bill, the ACCC would be responsible for investigating suspected breaches of the criminal cartel sanctions while the DPP would prosecute the cases.

At the beginning of 2007 stiffer penalties came into force, meaning corporations could face the greater of \$10 million, three times the value of the illegal benefit gained or where the gain could not be ascertained, 10 per cent of the group's turnover in the preceding 12 months.

There are several reasons the ACCC has advocated the introduction of criminal sanctions for the most serious cartel members. A number of international studies and reports from overseas competition regulators have found the threat of jail time to be a far greater disincentive for company executives to collude with their competitors than financial penalties alone.

Research conducted at Purdue University in the United States looked at 800 overcharges in the last 125 years and concluded that the median overcharge created by a cartel was around 19 per cent. Other research based on a review of over 500 cartel episodes estimates that on average cartels increase prices by more like 20–30 per cent.

The US research also found that the average amount consumers are overcharged by cartels is higher in countries that do not have criminal cartel laws.

When the United States Department of Justice interviewed members of major international cartels in 2006, it questioned a number of executives why they had stopped their cartel arrangements at the US border, despite the illegal deals flourishing elsewhere. The business leaders said the threat of being sent to jail under the US's anti-trust laws was the biggest single motivation for not running cartels on US soil.

With many cartels now major global operations operating across numerous national borders, there is also some evidence to suggest that members are more likely to cooperate with authorities in countries that have the power to send them to jail than those that do not.

This is particularly the case where cartel members seek to take advantage of immunity policies to save themselves from jail terms. Priority is typically given to those jurisdictions with jail terms, while those cartel members may be slower to approach authorities in other countries where the penalties are less imposing.

The government's discussion paper outlines a number of potential issues that still need to be resolved.

These may include guidelines for determining whether a case should be taken as a civil or criminal matter, and what sort of powers should be extended to the ACCC to conduct investigations.

While these and other issues still need to be worked through before Australia can implement a criminal regime for cartel offences, it seems community and government support is solidly behind putting those who steal from millions of consumers behind bars. ●

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IMMUNITY POLICY

AS PART OF its work in detecting and shutting down cartels, the ACCC offers immunity to cartel members who come forward and confess their involvement. The immunity policy is only offered to the first business or individual who comes forward and confesses their involvement. This policy provides a powerful incentive for cartel members to confess before those they are colluding with can get their names down for immunity.

Several OECD countries have similar immunity policies that have been responsible for unearthing many cartels that may otherwise have gone undetected.

There are strict conditions attached to the policy, including that immunity cannot be granted to the ringleader of a cartel, and that those seeking protection must agree to cooperate fully with the ACCC's investigation. ●

