

ICCC 2018 World Competition Day

Port Moresby, 5 December 2018

Cartel Conduct: Challenges and Responses

Brent Fisse

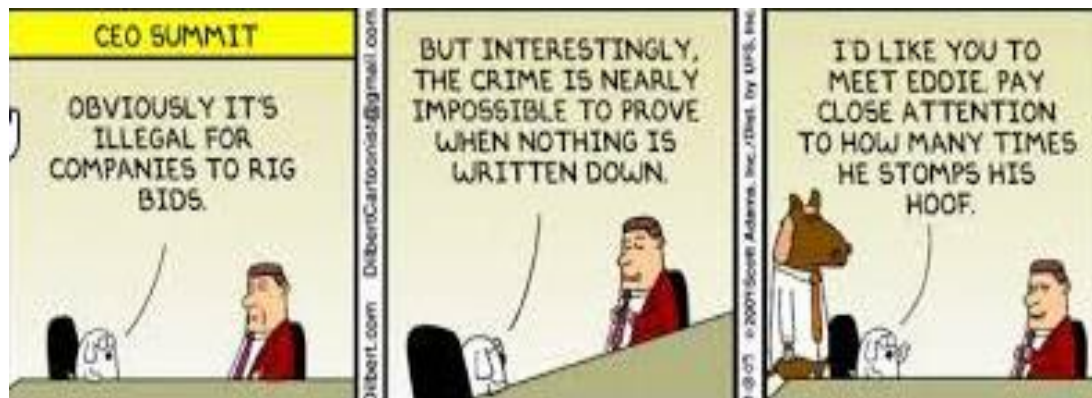


Overview

- ▶ Coming to grips with cartel conduct in PNG:
 - perhaps worst form of anti-competitive conduct
 - emerging challenge that ICCC is addressing (eg by introducing a Leniency Policy)
 - Consumer and Competition Framework Review (2017) (CCFR) recommended improvements to ICCC Act
- ▶ What is cartel conduct?
- ▶ Why is cartel conduct harmful?
- ▶ Legal definition of cartel conduct
- ▶ Individual and corporate liability
- ▶ Exemptions from cartel prohibitions
- ▶ Investigation of cartel conduct
- ▶ Sanctions and remedies against cartel conduct
- ▶ Promoting compliance
- ▶ Conclusions/further questions

What is cartel conduct?

- ▶ Cartel conduct is an agreement by competitors (or likely competitors) to coordinate their prices or output in order to increase their collective profit
- ▶ Main types of cartel conduct:
 - price fixing
 - bid-rigging
 - cover pricing
 - boycott
 - market sharing
 - allocating customers
 - limiting production or supply
- ▶ ICCA Act now prohibits price fixing and exclusionary provisions



- ▶ International air cargo cartel:
 - In June 2006, competition authorities simultaneously raided airline offices in the United States and Europe, in order to investigate claims that many major airlines had colluded in the setting of their fuel and security surcharges. German carrier Lufthansa informed the authorities of the illegal agreements and were granted immunity from prosecution.
 - Competition regulators around the world took action against various airlines in Europe, the United States, Korea, Australia, New Zealand, Canada, and India. Penalties imposed have exceeded one and a half billion US dollars and several airline executives have faced jail terms. In addition, several airlines have faced class actions and have had to compensate customers for hundreds of millions of dollars.
 - In Australia, the ACCC pursued 15 local, European and Asian based airlines for price fixing in the Australian air cargo market. Federal Court penalties totaling \$111.5 million include a \$20 million penalty against Qantas, \$5 million against British Airways, \$5.5 million against each of Japan Airlines and Korean Airlines, and \$15 million against Air New Zealand (in 2018).

Why is cartel conduct harmful?

- ▶ Cartel conduct is highly likely to cause economic harm:
 - often seen as the most adverse type of anti-competitive conduct
 - overall loss may be worse than eg overall loss from theft and fraud
 - international cartels can have *adverse effect on developing economies*
- ▶ *Overcharges* are main form of economic harm:
 - Connor & Landes (2012) review of economic studies' post-2000 sample indicated national and international cartel median overcharges averaging 20% and 25.8%
 - London Economics:

Table 3: Surveys of cartel overcharges (including only private cartels)

Study	Number of cartel episodes	Overcharge (% of counterfactual price)	
		Median	Mean
Griffin (1989)	38	39%	53%
Cohen and Scheffmann (1989)	5-7	14%	8-11%
Posner (1976, 2001)	12	38%	49%
Levenstein and Suslow (2002)	22	45%	43%
Werden (2003)	13	18%	21%
OECD (2003)	13	14%	22%
Connor and Lande (2008)	374	25%	49%
Connor (2010)	1.089	23%	46%

Source: Connor (2010) and London Economics

Why is cartel conduct harmful? (cont.)

- ▶ Also a *deadweight loss*:
 - consumers lose as a result of their withdrawal from the market due to an unacceptable high price – they are forced to give up consumption of the cartelised product and to use their income on an inferior substitute if one exists
 - for producers, the reduction in industry output means operating at suboptimal levels or exiting the industry – some labour and plant resources will not be used
- ▶ Market forces are unlikely to prevent cartel conduct:
 - typically secret and difficult to detect
 - cartelists have strong incentive to cheat but cheating may not happen or be widespread enough to destabilise cartels
- ▶ Enforcement implications:
 - global trend is to prohibit cartel conduct and to treat cartels as an enforcement priority
 - some countries (eg US, Canada, Australia, UK) have cartel offences punishable by jail

Legal definition of cartel conduct

- ▶ Good legal definition avoids:
 - over-reach
 - under-reach
 - uncertainty
 - manipulation/evasion
 - unnecessary complexity/technicality
- ▶ Contract, arrangement or understanding between competitors:
 - basic requirement for cartel conduct, but note:
 - prone to evasion if interpreted to require ‘commitment’
 - may be outflanked by ‘facilitating practices’ (eg most-favoured-customer price guarantee)
 - potential risk of algorithmic coordination of market conduct without any contract, arrangement or understanding between competitors
- ▶ Price fixing:
 - is comparative market price relevant?
- ▶ Exclusionary provisions:
 - outmoded concept
 - does not cover market sharing, allocating customers, limiting production/supply
 - defence of no SLC is too lax
 - modern definition of cartel conduct needed (CCFR)
- ▶ Territorial jurisdiction where cartel conduct is organised offshore:
 - why should D have to be resident or carry on business in PNG?
 - test should be whether conduct is likely to affect a market in PNG (CCFR)

Individual and corporate liability

- ▶ ICCA Act imposes individual and corporate liability
- ▶ *Individual liability* is important:
 - social value of holding individuals accountable for their actions
 - individual liability essential for deterrence
 - individual liability facilitates enforcement against corporations
- ▶ *Corporate liability* is important:
 - significant practical limitations on holding individuals liable for cartel conduct
 - corporate liability is an alternative where individual liability would be harsh or inappropriate
- ▶ Sensible balance needs to be struck:
 - NB danger of reliance on corporate liability exclusively and letting individuals off hook



Exemptions from cartel prohibitions

- ▶ Cartel prohibitions are strict (no need to prove purpose, effect or likely effect to substantially lessen competition) and potentially wide-reaching:
 - need to be subject to sensible exemptions otherwise law will over-reach
 - no rule of reason defence unlike US or EU
- ▶ Authorisation by ICCC is possible but costly and time-consuming
- ▶ Useful other exemptions include:
 - related corporations
 - joint ventures and collaborative ventures (CCFR)
 - supply/acquisition agreements between competitors (CCFR)
 - collective bargaining (CCFR)

Investigation of cartel conduct

- ▶ ICCC Leniency Policy:
 - major initiative, follows approach taken in many other countries to offer a strong incentive to corporations and individuals to report cartel conduct to the Commission
 - cooperation from leniency applicants has cracked more cartels than all other tools (US DOJ)
 - has led to detection and dismantling of the large global cartels and record-breaking fines in the US, EU, Canada, Australia, and elsewhere
 - grant of immunity requires compliance with the conditions set out in paras 19 (corporations) and 21 (individuals)
 - some conditions may be worth tightening up:
 - need to limit immunity to first to report?
 - immunity should always be conditional on ongoing cooperation?
 - corporate immunity will confer immunity on employees as well – make employees subject to agreement to cooperate (as in Canada)?
 - *immunity* needs to be distinguished clearly from *cooperation*:
 - cooperation is to be taken into account when assessing penalty
 - a separate Cooperation Policy should complement the Leniency Policy
- ▶ Search and seizure of computer-based or other electronic evidence:
 - ICCC Act s 129 needs to be modernised (CCFR)

Sanctions and remedies against cartel conduct

- ▶ Cartel conduct is subject to various sanctions and remedies under ICCA Act including pecuniary penalties, injunctions and banning orders (for individuals)
- ▶ Pecuniary penalties are low:
 - maximum corporate penalty should be increased to K20 million and alternative maximum penalty of double the gain or double the loss likely to be caused by a breach (CCFR)
- ▶ ICCA Act (s 93) should be amended to make it clear that a court may require a defendant to take specified precautions against repetition of a breach of the ICCA Act (CCFR)
- ▶ A power should be given to the ICCA to accept undertakings in relation to alleged breaches of ICCA Act and to apply to court to enforce the undertaking if the party fails to honor it (CCFR)
- ▶ The ban on indemnifying individuals for pecuniary penalties imposed (now limited to price fixing) should be extended to apply in relation to any breach of ICCA Act (CCFR)
- ▶ Admissions of fact in litigation by the ICCA, or agreed by a party in a settlement with the ICCA, should be admissible as evidence in private actions for damages (CCFR)
- ▶ ICCA does not have explicit power to bring actions for damages on behalf of victims:
 - recommendation that ICCA have that power (CCFR)
- ▶ Limitation period of 3 years:
 - recommendation that period be extended to 6 years (CCFR)

Promoting compliance

- ▶ Surveys in Australia and elsewhere have shown that awareness of cartel prohibitions in the business community is low – widespread ignorance
- ▶ One advocacy role of ICCC is to promote awareness of anti-cartel law:
 - consider eg video “The Marker” @ <https://www.accc.gov.au/media-release/accc-gets-on-the-front-foot-with-cartels-film-%E2%80%98the-marker%E2%80%98>
- ▶ Another role of ICCC is to encourage development and use of compliance programs:
 - well-run corporations have them
 - best practice around world
- ▶ A compliance program is likely to include:
 - clearly-stated compliance policies that are reinforced by top as well as middle-level management
 - systematic identification and management of risks created by the company's operations
 - clear allocation of responsibility for compliance functions to specified personnel
 - readable compliance guides setting out relevant rules (legal, corporate, and industry self-regulating), operating procedures for particular units in the organisation, and concrete examples
 - routine controls for monitoring and enforcing compliance together with safeguards for ensuring command of compliance problems by senior management
 - education and training of personnel
 - complaints handling procedure
 - interaction with enforcement agencies

Conclusions/further questions

References

PNG Treasury, *Consumer and Competition Framework Review* (2017)

Canada, Bureau of Competition, *Corporate Compliance Programs* (2015) @

<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03927.html>

RC Marshall & LM Marx, *The Economics of Collusion* (2012)

C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011)