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Cartels Overview

Paul Schoff and Andy Matthews*

Minter Ellison

Globalisation goes hand in hand with the internationalisation of cartels. And the more we continue to expose our economies to the world, the greater will be the need for us to work together to fight those who would abuse the opening up of our economies to extort our citizens.¹

This article overviews some of the recent developments in anti-cartel enforcement in the Asia-Pacific region. There has been a spate of legislative amendments and new competition regimes around the region in recent years. Many Asian countries are currently in the process of introducing new competition laws and regulatory authorities – India is expected to finalise legislation over the coming months, Hong Kong is drafting legislation based on the policy advisory group's recommendations and the recent public consultation, and China's Antimonopoly Law took effect on 1 August 2008. Korea established an international cartel unit in early 2008 and the Japan Fair Trade Commission has recently filed criminal charges in a price-fixing cartel case for the first time since 1991.

Background

Cartels are by no means a new concept.² The harm that they can do to domestic and global economies, and to individual consumers, is well recognised. But it is only relatively recently that there has been a real focus on cartels, and the ways in which they can be prevented. The US saw the need to detect and control cartels early on, and was well ahead of other key players in its introduction of a corporate leniency policy in 1978. Although that initial policy was relatively unsuccessful owing to a lack of certainty and transparency, the concept of a leniency policy was clearly a good one, and the policy was revised in 1993 with great success. It is now clear that the adoption of amnesty or leniency policies is a highly successful and important approach to cartel enforcement, and there has been a dramatic surge in cartel enforcement activity in recent times.³

It is apparent that an international turning point was the Organisation for Economic Cooperation and Development's (OECD) 1998 Recommendation concerning Effective Action against Hard-Core Cartels.⁴ The 1998 Recommendation proposed two areas of focus: convergence and effectiveness of laws prohibiting hard-core cartels, and international cooperation and conduct. The OECD and the International Competition Network (ICN) have both provided a forum for international cooperation and discussion about issues concerning detection and enforcement of cartels. Australia, Korea and Japan are members of the International Competition Network cartel working group. The impact of cartels has also been considered by the United Nations Conference on Trade and Development.

The OECD has produced a number of reports and recommendations relating to cartels,⁵ covering topics such as effective penalties and implementation of leniency programmes.

A working group on cartels was set up by the ICN in 2004, and presented its first work at the annual ICN conference in Bonn in June 2005.⁶ The ICN has conducted a 'stocktake' to establish

the nature and extent of cooperation between ICN members in international cartel cases, focusing on evidence gathering and evidence exchange.⁷ The ICN has also implemented a pilot assistance programme, which teams up more experienced competition agencies with newer competition agencies, so that the more experienced agencies can share experience and give advice, and which provides for a panel of agencies to be available for assistance and advice to less experienced competition agencies.⁸

The OECD's Third Report of December 2005 concluded that there had been a trend to legislative changes, which had given regulators greater investigative powers, increased penalties, and increased opportunities for regulators to cooperate.⁹ The report also noted that many regulators have created specialised cartel units and given cartel investigation a higher priority, and that fines are being imposed on a more regular basis and cooperation is occurring at an international level, including the exchange of cartel enforcement know-how. The report looked at the imposition of criminal penalties against individuals, and stated that they can be useful where used in a way that maximised their benefits (as a deterrent) and minimised costs (by using different standards of proof, different prosecutors, etc). International cooperation is also strongly encouraged by the report.¹⁰

Developments in the Asia-Pacific region

Australia

Amendments to the Trade Practices Act, effective on 1 January 2007, significantly increased the level of penalties that may apply for cartel conduct. Courts may impose either a fine of A\$10 million, a penalty of three times the gain from the conduct contravening the cartel provisions, or, where that amount cannot be calculated, up to 10 per cent of the turnover of the corporate group of which the contravening party is a member for the year when the offence occurred. In addition, individuals found guilty of cartel behaviour may be barred from holding office as directors or managers in public corporations, and companies are prohibited from indemnifying individuals for penalties imposed upon them.¹¹

The Australian Competition and Consumer Commission (ACCC) published an immunity policy, which is designed to be consistent with leniency policies in the US, UK, EU, Canada and South Korea. The immunity policy is a 'first-in' policy, which confers full amnesty from prosecution and penalty on the first eligible cartel participant who meets the cooperation requirements. It is not available to ring leaders or those who have coerced others to participate in the cartel.

The policy allows for a 'marker system', that is, a system that allows an applicant to 'mark their spot' in the amnesty queue while undertaking an internal investigation and assembling evidence necessary to make an application. The marker is available for an 'indicative time frame' of 28 days, but the ACCC can extend or reduce this period.¹² The policy permits oral applications for immunity, an element designed to address concerns that written applications may not be protected by legal privilege and could be discoverable in relation to actions in foreign jurisdictions.¹³ A clear

standard of knowledge of the ACCC has been set for determining that immunity is unavailable. Immunity will be available to applicants satisfying all conditions as long as the ACCC has not received written legal advice that it has sufficient evidence to commence proceedings in relation to at least one contravention of the Act in relation to a cartel.¹⁴ Significantly, the requirement for companies that receive immunity to make restitution has been removed. Although it is essentially inappropriate for a company in a cartel to be able to keep its 'ill-gotten gains', the restitution requirement was acknowledged by the ACCC to be a significant deterrent to reporting, and also created a lack of clarity as to interaction with private proceedings.

On 3 December 2008, the Australian federal government introduced its legislation to criminalise cartel conduct under the Trade Practices Act 1974 (Cth) into Federal Parliament. The Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Bill) passed the House of Representatives on 11 February 2009 and on 26 February 2009 the Senate Economics Committee recommended no changes to the Bill. The Bill will come into force 28 days following royal assent, which will likely take place in 2009. The Bill creates a new definition of cartel conduct that is in some respects broader than the existing law, creating new civil offences. The Bill also creates a criminal offence of making or giving effect to a contract, arrangement or understanding that contains a cartel provision. Essentially, a cartel provision is a provision which has the purpose or effect of price fixing, or the purpose of preventing, restricting or limiting production, market sharing or bid rigging by parties that are (or would be) competitors. The criminal offence requires that a 'fault' element be satisfied. The Bill provides for imprisonment for a period of up to 10 years and fines of up to A\$220,000 for individuals involved in criminal cartel conduct. For individuals involved in civil cartel conduct, the Bill provides for fines of up to A\$500,000. A corporation may be fined for up to the greater of A\$10 million or three times the value of the benefit to the entire cartel, and if the value cannot be determined then the fine may be up to 10 per cent of the corporation's annual turnover for involvement in criminal and civil cartel conduct.

The ACCC has recently released a draft revised Immunity Policy for Cartel Conduct and Immunity Policy Interpretation Guidelines, which provides guidance on how the ACCC intends to investigate, prosecute and grant immunity for cartel conduct under the new laws. This Policy will come into force on the introduction of the new penalty provisions. The Policy confirms that the ACCC will be responsible for granting immunity from civil proceedings and the Commonwealth Director of Public Prosecutions (CDPP) will be responsible for granting immunity from criminal prosecution, upon the recommendation of the ACCC. Nevertheless, the ACCC will receive and manage all immunity requests. The granting of immunity will be in accordance with the ACCC Immunity Policy and the CDPP Prosecution Policy, pursuant to an eligibility criteria that includes being the first participant in a particular cartel to admit its conduct to the ACCC, where that party was not the cartel ringer leader and where full admissions and ongoing assistance are provided to the ACCC. The revised Immunity Policy permits individuals to submit immunity applications, which may contrast with the interests of their corporate employer. The alignment between the ACCC and the CDPP in relation to granting immunities will likely encourage disclosure by cartel participants.

A trend towards class actions commencing in Australia arising from international cartels may also be identified, exemplified by the international air cargo investigation, which started internationally

in 2006 and resulted in the commencement of an Australian class action in early 2007.

New Zealand

New Zealand's penalties for cartel conduct were significantly toughened in 2001 following a 1998 review by the Ministry of Economic Development.¹⁵ The maximum penalty for businesses increased from NZ\$5 million to the greater of NZ\$10 million or three times the value of any commercial gain resulting from the breach or, if the commercial gain cannot be determined, 10 per cent of the turnover of the business of the body corporate and all its interconnected bodies corporate. The maximum penalty for individuals is NZ\$500,000 and the court must order individuals to pay a pecuniary penalty unless the court considers there is 'good reason for not making that order'.¹⁶ Attempting, aiding, abetting, counselling and procuring, inducing and attempting to induce others to contravene the Act, and being in any way, directly or indirectly, knowingly concerned in or party to a contravention, and conspiring to contravene the Act all potentially attract these penalties.¹⁷ Individuals who have engaged in price fixing or exclusionary arrangements can now also be excluded from management of a body corporate for up to five years. Companies are also expressly prohibited from indemnifying individuals who engage in price fixing against any pecuniary penalties imposed or costs incurred in defending or settling proceedings.

Penalties in the first cartel prosecution to be brought by the New Zealand Commerce Commission (NZCC) since the maximum penalties were increased (wood preservative chemicals) now total more than NZ\$7.5 million in both civil enforcement action and criminal actions (for misleading the NZCC). Seven companies and four individuals have been prosecuted by the NZCC so far. The penalties relate to price fixing, market sharing and attempts to exclude a competitor. One of the corporate defendants was fined NZ\$3.6 million, comprising NZ\$2.85 million for price fixing and NZ\$750,000 for attempted exclusion, in a court-endorsed settlement with the NZCC. Those fines took into account the early admission of liability and cooperation with the NZCC and were expressed to reflect a reduction of approximately 50 per cent from the fine that would have been imposed had those factors not been present. The case marked a steep increase in cartel fines in New Zealand as the fine imposed for price fixing was almost double the previous highest corporate fine. A subsequent settlement in the case has seen the highest-ever fine imposed on an individual – NZ\$100,000, comprising NZ\$65,000 for price fixing and NZ\$35,000 for attempted exclusionary conduct. In 2008, three further companies were fined a total of NZ\$1.9 million for price-fixing and market sharing. The court reduced this fine substantially because of cooperation with the NZCC in providing information for its investigation. Proceedings are continuing against three overseas resident individuals, who had unsuccessfully challenged the jurisdiction of the High Court and on appeal to the Court of Appeal.

The NZCC initiated legal proceedings in 2007 for alleged cartel conduct against companies and individuals in the corrugated fibre packaging industry, against European suppliers of gas-insulated switchgear alleged to be involved in a global cartel affecting the New Zealand electricity industry, and also against 13 airlines and seven airline staff for their alleged involvement in the air cargo cartel in 2008. In late 2008 one party involved in gas-insulated switchgear admitted participating in the cartel and was fined over NZ\$1 million plus costs (this fine was low as the conduct occurred before 2001 when penalties increased as noted above).

The NZCC has been keen to test the boundaries on the extra-territorial application of New Zealand competition law. In a landmark ruling the High Court found that it had jurisdiction to hear cartel penalty claims brought against overseas defendants for their participation in cartel conduct that was implemented in New Zealand. In March 2009 the Court of Appeal upheld the High Court's ruling confirming the law's extraterritorial reach.

The NZCC introduced a leniency policy in 2004 (the policy is currently under review). Under the leniency policy, the NZCC will grant immunity from prosecution to the first person in a cartel to come forward and provide information. Under its cooperation policy, the NZCC may agree to a lower level of enforcement action if the participants are willing to cooperate.

Korea

In 2004, amendments to the Competition Act increased maximum fines, introduced a new leniency programme to increase predictability and incentives for applicants, and introduced a reward system for cartel informants with a ceiling of 5 per cent of the penalty. For example, in 2004 the Korean Fair Trade Commission (KFTC) gave a reward of 5 per cent of the penalty to an informant who provided information about bid rigging in broadcast television.¹⁸ Korea also has a programme to better detect suspected cases of bid rigging.¹⁹ This leniency programme provides various levels of immunity for the first applicant and second applicant and incorporates a 'marker system'.

In 2005, the KFTC issued a revised enforcement decree and notification, which is designed to increase predictability and simplify procedures for voluntary report of cartels to the KFTC. During 2006 the conditions relating to the informant reward payment were eased by the KFTC so as to encourage people to come forward with cartel information. An average of 110,316 Korean won in fines was imposed during the 2002 to 2006 period, with some of the fines reduced or wholly exempted in the 19 leniency applications accepted in that period (14 applications were accepted in 2005 and 2006). Interestingly, leniency applications may be made not only by fax or e-mail but also orally.

In recent years, the KFTC has not been shy to prosecute and impose fines. During the first half of 2007, the KFTC imposed fines of 329 billion won. This is a marked increase compared to the previous year's fines of 111 billion won, and the total fines of 1.2 trillion won imposed over the 20 years in which the KTC has had the authority to impose fines. Between the years 2002 to 2006, an average of 40 cartel prosecutions were successfully brought by the KFTC, increasing over the years to 47 in 2006. The maximum fines for cartel offences have increased to 10 per cent of affected sales, rather than the previous maximum of 5 per cent.

In July 2007 the KFTC fined three Korean sugar manufacturers for their role in price fixing over a period of 15 years. One of the three companies was exempted from a half of the fines imposed on it and its management is safe from prosecution thanks to its participation in the prosecution under the leniency programme – this despite its previous involvement in price fixing in other categories of staple foods.

A new international cartel unit commenced operations in March 2008. The new department of the KFTC focuses on cross-border multi-jurisdictional cartels by improving cooperation and communication with foreign antitrust authorities, especially the US and Japan. The unit sits under the cartel regulation policy bureau and has already started a number of investigations. In December 2008 the KFTC issued a corrective order and a 3.9 billion won surcharge

on four south-east Asian paper manufacturing companies that illegally agreed on the price of copy paper from 2001 to 2004. This was the first international cartel case handled by the KFTC through self-investigation. In consideration of the global economic crisis, the KFTC will support individuals and small- and medium-sized businesses. To assist with overcoming the crisis, the KFTC is proposing to ease regulation on enterprises and holding companies. As part of its 2009 operations plan, the KFTC has flagged plans to actively implement its cartel authorisation system.²⁰ The cartel prohibition of the Korea Monopoly Regulation and Fair Trade Act (MRFTA) exempts 'unfair collaborative acts' that are deemed by the KFTC to meet requirements set out in the presidential decree on MRFTA enforcement and have as their purpose industry rationalisation, research and technology development, overcoming economic depression, industrial restructuring, rationalisation of trade terms and conditions, or enhancement of competitiveness of small- and medium-sized enterprises.²¹

Japan

The Japan Fair Trade Commission (JFTC) is said to be a significant presence in antitrust enforcement,²² and in 2003 participated in a coordinated raid with the US, Canada and the EU against manufacturers of heat stabilisers. It has also been active in cracking down on domestic bid-rigging arrangements.²³

In 2002 Japan introduced harsher penalties for repeat offenders and increased the maximum amount of fines from ¥100 million to ¥500 million. New legislation adopted in 2005 increased surcharge rates and introduced a leniency programme.²⁴ Under the new legislation, surcharge rates increased from 6 to 10 per cent of the related turnover of the company and repeat offenders may be penalised up to 50 per cent.

The leniency programme allows up to three applicants to apply for a level of immunity in relation to the same cartel activities. In 2006, for the first time since the introduction of the leniency programme, three participants of a bid-rigging cartel concerning tunnel ventilation construction were afforded immunity under the leniency programme; the first applicant was given 100 per cent immunity, and 30 per cent immunity was given to the other two applicants.²⁵

Japan introduced a new competition law entitled the Act Concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade with effect from 4 January 2006. The new Act has strengthened the enforcement powers of the JFTC, authorising it to carry out on-site inspections and searches and seizures in a criminal investigation.

The JFTC has endeavoured to pursue international matters that exert a significant influence on the Japanese market in cooperation with overseas competition authorities and has been active in pursuing criminal enforcement actions. In March 2008, for the first time, the JFTC enforced its antimonopoly laws against five executives, four of which are foreign, for their role in an international marine hose cartel. It carried out the investigation at the same time as did the US Department of Justice and the European Commission. Previously the JFTC has not prosecuted foreign companies involved in extra territorial cartels, mainly due to its complicated competition legislation. In November 2008, investigations using the Commission's compulsory criminal investigation powers led to the filing of criminal charges with the prosecutor general concerning a price-fixing cartel among manufacturers and distributors of galvanised steel sheets. These were the first criminal charges filed in a price-fixing cartel case since 1991. Furthermore, the JFTC issued

a cease-and-desist order against marine hose manufacturers and distributors in an international price-fixing case.

Singapore

The Competition Commission of Singapore (CCS) was established on 1 January 2005 under the new Competition Act. The Competition Act contains provisions that prohibit price fixing, bid rigging and anticompetitive conduct. The prohibitions against anticompetitive behaviour took effect on 1 January 2006. Financial penalties for intentionally or negligently breaching the Act are set at a maximum of 10 per cent of the turnover of the business in Singapore for each year of infringement, up to a maximum of three years. Members of the companies involved may be held guilty of the offence together with the company, and injured parties may file civil actions within two years of the anticompetitive practice being dealt with in the courts.

The Competition Act applies to Singapore businesses and foreign businesses, although state businesses are excluded on the basis of national security, defence and strong public policy reasons.

The CCS adopted a leniency programme and in December 2005, following public consultation, released a guideline on lenient treatment. The leniency programme affords the first applicant 100 per cent immunity and subsequent applicants that apply before a notice is issued by the CCS up to 50 per cent immunity. The programme offers full and partial leniency. It does not offer protection from civil liability or prosecution by foreign countries' competition authorities.

In the period from its introduction through to July 2007, the CCS has received three notifications for decision, seven notifications for guidance and 14 complaints, mostly all in relation to anticompetitive agreements under section 34 of the Competition Act. A CCS decision in early 2007 found that although Qantas Airways and British Airways had entered into an anticompetitive agreement that breached the Act, the agreement met the net economic benefit exception and was thus not void and the organisations were not fined. In January 2008, CCS issued its first infringement decision against a bid-rigging cartel involving six pest-control companies and each company was fined over S\$260,000. The decision was an important demonstration that the CCS has developed the capability to enforce and act against anticompetitive activities. On a number of other occasions, the CCS intervened in anticipation of anticompetitive agreements being entered into and consequently the respective parties agreed to retract their proposed collective price increase. Specifically, the CCS prevented four of the biggest manufacturers of *Fa Ga*, a Chinese cake offered during prayers, from fixing the selling price of the product.

India

In early March 2008, the current competition authority, the Monopolies and Restrictive Trade Practices Commission (MRTPC), held that nine cement manufacturers were guilty of operating a price-fixing cartel in 2000 and 2001. However, under the law currently in place, the authority cannot impose a fine on the cartel participants – it can only fine for failure to comply with a cease-and-desist order.

India is in the process of introducing a new competition law regime. Its Monopolies and Restrictive Trade Practices Act 1969 (1969 Act) was considered out of date by the turn of the century and the new Competition Act 2002 (2002 Act) was enacted on 13 January 2003 – although the Act has not come into force completely. The 2002 Act was enacted to fulfil India's obligations under

the World Trade Organization agreements and is the country's first comprehensive law dealing with unfair competition or antitrust issues. The Act's objective is not only to prevent practices that have an adverse effect on competition, but also 'to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade'. The 2002 Act will repeal the 1969 Act and the MRTPC when fully operational.

Parliament approved the 2002 Act, as amended by the Competition (Amendment) Act, 2007 (2007 Act) in September 2007. As stated in the preamble, the purpose of the 2007 Act is 'to establish a commission to prevent anti-competitive practices, promote and sustain competition, protect the interests of the consumers and ensure freedom of trade in markets in India.' Although the signs are promising for 2009, to date the 1969 Act has not as yet been repealed and all the provisions of the 2007 Act have not as yet been notified and are therefore not fully operational. Specifically, provisions of the 2007 Act relating to the establishment of the Competition Commission of India (CCI), appointment of chairperson and members, appointment of staff and undertaking of competition advocacy have been notified. However, provisions of the 2007 Act relating to inquiry into anticompetitive agreements, abuse of dominance and regulation of combinations, are yet to be notified. As a result, the CCI has not commenced advocacy and enforcement work. Instead, and consistent with its mandate, the CCI will continue to undertake measures for the promotion of competition advocacy, creating public awareness and imparting training within the CCI about the competition issues. In the interim, the CCI has also approached certain industries suspected of being involved in cartels, such as companies in the airline and explosives industries, and advised them to develop antitrust compliance programmes. In relation to cartel enforcement, the CCI will have a principal bench and additional benches. The benches will consist of a chairperson and between two to 10 members. The members will be full-time and will be composed of judges of a high court or persons with specific knowledge and professional experience in the field. The CCI will have the powers of a civil court. The Supreme Court of India will hear appeals from the CCI, although under the Competition (Amendment) Bill 2006 a Competition Appellate Tribunal is to be established to hear appeals from the CCI rather than the Supreme Court.

Hong Kong

The Consumer Council of Hong Kong (CCHK) undertook an investigation of possible cartel behaviour in the LPG industry in 2000 and released recommendations aimed at encouraging new entrants to the market, inducing price competition and improving government oversight.

In 2006, the Hong Kong government, on recommendation of the Hong Kong Competition Policy Advisory Group,²⁶ released a discussion paper in relation to the introduction of a Competition Act. The three-month public consultation period ended in February 2007. The new Competition Act will introduce a competition law regulatory framework including enforcement provisions and the prohibition of monopoly abuses and cartel practices similar to other jurisdictions and there are also plans to establish a Competition Commission. The proposals include the use of a leniency programme in relation to cartels. The legislative reform and leniency programme is supported by the Consumer Council of Hong Kong.²⁷ In 2008 the Hong Kong government decided to introduce a cross-sector competition law during the 2008 to 2009 legislative session. The government has published a draft framework for the

competition law and intends to introduce a Competition Bill in the 2008 to 2009 legislative session taking into consideration the various public comments.

China

China's new Antimonopoly Law, under consideration for over a decade, was passed by the standing committee of the National People's Congress on 30 August 2007 and came into force on 1 August 2008. The law will target monopoly agreements between business operators, abuse by a business operator of its dominant market position and mergers that have or may have the effect of eliminating or restricting competition. The law has many similarities to EU and UK competition law, though there are notable differences.

The National Antimonopoly Commission now leads investigations into anticompetitive conduct, rather than a multitude of various departments and laws as had previously been the case. The Commission has the authority to write antimonopoly policy, to draft guidelines and to carry out market investigations.

The law has extraterritorial application. There are exemptions available to domestic enterprises, such as to the agricultural sector, but these are limited. It applies to 'business operators', a term encompassing natural persons, legal persons and other groups providing goods and services, who operate in China or whose extraterritorial monopolistic conduct has an anticompetitive effect in markets in China. The law is applicable to activities outside of China and a foreign undertaking may be subject to administrative investigations by the Commission. If the foreign undertaking is involved in a monopoly agreement or has abused its dominant market position, which can have the effect of eliminating or restricting competition in the Chinese market, the foreign undertaking can be subject to the Commission's administrative decisions and sanctions in the same manner as a domestic enterprise in China.

Under the law the anticompetitive effect does not have to be substantial. It has a broader definition of monopolistic behaviour, covering monopoly agreements, abuse of dominant market status and the concentration of business operators that has, or may have, the effect of eliminating or restricting competition. There are exemptions available to business operators who have entered into 'monopoly agreements', but they must show that the agreement does not substantially restrict competition, that consumers will benefit, that the quality or efficiency of goods is improved, or that the purpose of the agreement was to, among other purposes, improve technology, develop new products or to improve small and medium-sized business operators' competitiveness. The State Council may prescribe other circumstances appropriate for exemptions.

The law introduces a whistleblower regime, whereby an informer can confidentially supply details of monopolistic conduct, provided that it is in writing and backed up with evidence. The Commission may grant reduced or exempt punishment to those business operators who give details of a monopoly agreement in which they are involved.

Penalties for breaching the law include the confiscating of illegal gains and a fine of between 1 and 10 per cent of the previous year's sales revenue. The penalties cannot be imposed on individuals involved unless the individual fails to provide information or otherwise conceals, destroys or provides fraudulent information during an investigation. The new law extends penalty imposition onto industrial and trade associations that have historically assisted trade members' activities in monopolistic conduct. Trade associations may be fined up to 500,000 renminbi and deprived of their business.

China's Antimonopoly Law provides a sound structure for the antimonopoly regime. Nevertheless, there remains various ambiguities within the new legislation including in relation to the operation of the cartel provisions. For example, there is some uncertainty in relation to the definition of horizontal and vertical cartels, the scope of the leniency programme regarding cartel arrangements, the definitions of the relevant market, the relevant product and the relevant geographical market for the calculation of the market share of undertakings. Clarification in regard to the above matters is anticipated which will assist with the implementation and enforcement of China's new Antimonopoly Law.

Cooperation

It is becoming increasingly common for international agencies to cooperate in order to investigate and enforce against cartels. One example of a recent coordinated investigation is of several producers of rubber chemicals:

In Canada, the Competition Bureau discovered that several producers of rubber chemicals had conspired to fix prices and share customers. Their cartel involved regular meetings, communications with other producers, agreements to coordinate the timing and amounts of price increases for certain rubber chemicals and to share customers and sales volumes, and the exchange of sales data and customer information on a periodic basis in order to monitor and enforce adherence to the agreement. Crompton Corporation admitted that it participated with other rubber chemical suppliers in an international conspiracy to increase the price of certain rubber chemicals and was sentenced to a fine of \$9 million for its part in the international price fixing conspiracy.

In the United States, the Antitrust Division has obtained over \$100 million in fines after investigating the same cartel. Crompton pled guilty and was sentenced to pay a \$50 million criminal fine. Bayer AG, a German manufacturer of rubber chemicals, pled guilty and was sentenced in December 2004 to pay a \$66 million fine for its participation in the cartel. Two Crompton executives were charged with participating in the cartel. In November 2004, a Bayer executive was also charged with participating in the rubber chemicals cartel. All three have agreed to plead guilty and cooperate with the continuing investigation. The Bayer executive has since then agreed to serve a four month prison term, and pay a US\$50,000 fine. The Crompton executives' sentencings have been postponed pending completion of their cooperation.

The European Commission's investigation of the cartel continues.²⁸

According to the OECD, whereas more experienced competition authorities are typically leading international investigations, other less experienced countries are getting involved too. One example cited by the OECD is Korea:

Korea also contributed to the prosecution of international cartels. In what was the first case of extra-territorial application of Korean competition law to an international cartel, the Korean Fair Trade Commission in 2002 imposed surcharges of about 11.2 billion won (approximately US\$8.5 million), along with a corrective order, on 6 graphite electrodes manufacturers, including four Japanese companies (Showa Denko, Nippon Carbon, Tokai Carbon, SEC), one German company (SGL Carbon) and one US company (UCAR International). Korea estimated that Korean purchasers of graphite electrodes, who purchased 90 percent of their total demand from cartel participants, had suffered damages of approximately 183.7 billion won (approximately US\$139 million) as a result of the global cartel.²⁹

The involvement of greater numbers of countries in the prosecution of international cartels is of great significance. This is because having a larger number of prosecuting jurisdictions can increase the exposure of cartel participants to greater fines, which acts as a greater deterrent to cartel arrangements. International cooperation, including exchange of information, is seen as a critical factor in controlling international cartels, and also in controlling domestic cartels where companies involved have foreign offices. In many cases investigations of international cartels are constrained by the inability of many competition authorities to formally exchange information. Nonetheless, informal cooperation can and has been a very effective contribution to effective competition enforcement. For example, coordination of surprise investigations over several jurisdictions can greatly assist authorities in maintaining surprise and avoiding potential evidence destruction, tampering or removal.

* * *

Amnesty and leniency programmes, combined with tough penalties, are proven, successful methods of controlling and punishing cartel conduct domestically and internationally. Leniency policies need to be similar in material respects in order to maximise enforcement potential. This is particularly the case given that decisions to inform by cartel members are increasingly global decisions.³⁰

It is predicted that there will be continued convergence of cartel enforcement among jurisdictions worldwide, a trend that will likely be amplified by the commencement of class actions on behalf of those affected by cartels in different jurisdictions in the South-East Asian region. Although many countries now have policies that are substantially aligned, there are still some important differences across jurisdictions that can diminish incentives to apply for immunity for global cartels.³¹

Some commentators suggest that international cartel regulation should and will continue to move towards:

- a truly paperless process in all jurisdictions;
- establishment of procedures for active coordination between jurisdictions on fines and priority assignments for jail and with respect to individual defendants;
- adoption of consistent policy on whether an immunity applicant must reveal any and all other offences in which it may have been involved (an arguably unrealistic practice that will deter applications);
- permission of hypothetical and anonymous applications and enquiries across jurisdictions; and
- permission of 'first-place markers' that can be later perfected.³²

It is also predicted that there will be an increased focus on interference with the investigatory process. There will be a growth in prosecutions and amnesty withdrawals based on conduct that interferes with the investigation process, for example, by witness tampering and document removal or destruction.³³

According to the OECD:

Legislative changes in several member countries have conferred greater investigative powers on competition authorities, authorised stiffer sanctions, and increased the opportunities to effectively cooperate with foreign competition authorities. More competition authorities have created specialised cartel units and/or prioritised the fight against cartels among their activities. High fines are imposed on a regular basis. Cooperation has become much more common, and exchanges of cartel enforcement knowhow have intensified. But much remains to be done.³⁴

Notes

- * The authors acknowledge the assistance of Jackie Mortensen, Alison Bruscano and Robert Starke (Sydney) and Nicko Waymouth (Auckland) in the preparation of this paper.
- 1 Graham Samuel, 'Future Work of the ICN: Introduction to the 6th International Cartels Workshop', Third ICN Annual Conference, Seoul, 22 April 2004.
 - 2 As far back as 1776, Adam Smith wrote of the tendency for people of the same trade to conspire against the public, or to contrive to raise prices, whenever they meet together.
 - 3 G Spratling & D Jarrett Arp, 'International cartel enforcement and leniency programs: A global perspective', presented before the ICN Workshop on Leniency Programs and ACCC Cracking Cartels Conference, Sydney, Australia (hereafter, Spratling & Arp).
 - 4 Recommendation of the Council concerning 'Effective Action against Hard Core Cartels', c ('98) 35/Final, 13 May 1998.
 - 5 The main reports are: Recommendation of the Council concerning 'Effective Action against Hard Core Cartels', c ('98) 35/Final, 13 May 1998; 'Implementation of the Council Recommendation concerning Effective Action against Hard Core Cartels: First Report by the Competition Committee', 1 January 2000; 'Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels under National Competition Laws', DAFFE/COMP (2002) 7 (9 April 2002); and 'Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation', 15 December 2005.
 - 6 ICN, 'Defining Hard Core Cartel Conduct, Effective Institutions, Effective Penalties', Building Blocks for Effective Anti-Cartel Regimes, vol 1, prepared by the ICN working group on cartels for the ICN fourth annual conference in Bonn, Germany, 6–8 June 2005.
 - 7 Preliminary results were to have been presented at the ICN cartel workshop on 9–10 November 2005.
 - 8 'Pilot project to share experience of more experienced competition agencies with newer competition agencies' ICN news release, 14 December 2005 (www.internationalcompetitionnetwork.org/cpi/pilot.htm).
 - 9 'Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation', 15 December 2005 (hereafter, OECD Third Report).
 - 10 Ibid.
 - 11 OECD Third Report, p10.
 - 12 ACCC Position Paper, paragraphs 12–20.
 - 13 Id, paragraph 9.
 - 14 Id, paragraph 50.
 - 15 Ministry of Commerce (now Ministry of Economic Development): 'Penalties, remedies and Court processes under the Commerce Act 1986: A Discussion Document', January 1998.
 - 16 Commerce Act 1986 (NZ), section 80(2).
 - 17 Commerce Act 1986 (NZ), section 80(1).
 - 18 Spratling & Arp.
 - 19 OECD Third Report, p10.
 - 20 Republic of Korea Fair Trade Commission 'KFTC Newsletter' Issue 10 (22 January 2009).
 - 21 Monopoly Regulation and Fair Trade Act (1980), article 19(2).
 - 22 Spratling & Arp.
 - 23 Spratling & Arp.
 - 24 OECD Third Report, p10.
 - 25 Chairman Kazuhiko Takeshima, Japan Fair Trade Commission 'Japan's Endeavour for Establishing Rigorous Anti-Cartel Enforcement', remarks for the session on 'Cartels and other anticompetitive agreements', International Bar Association's Global Forum on Competition and Trade Policy Conference, New Delhi, India (November 2006).
 - 26 Economic Development Branch, Economic Development and Labour

Bureau 'Report on the Review of Hong Kong's Competition Policy', www.edlb.gov.hk/edb/eng/info/.	29	Id, p12.
27 Consumer Council press release, 'Consumer Council Submission on Government discussion document: Promoting Competition – Maintaining our Economic Drive', February 2007.	30	Spratling & Arp.
28 OECD Third Report, p11.	31	Ibid.
	32	Ibid.
	33	Ibid.
	34	OECD Third Report.

MinterEllison | L A W Y E E R S

Minter Ellison
Aurora Place
88 Phillip Street
Sydney NSW 2000
Australia
Tel: +61 2 9921 8888
Fax: +61 2 9921 8123
www.minterellison.com

Paul Schoff
paul.schoff@minterellison.com

Minter Ellison Rudd Watts
Level 20
Lumley Centre
88 Shortland Street
Auckland 1140
New Zealand
Tel: +64 9 353 9700
Fax: +64 9 353 9701
www.minterellison.co.nz

Andy Mathews
andy.mathews@minterellison.co.nz

Minter Ellison's Australasian competition (antitrust) group, with 60 lawyers, is one of the largest in the Asia-Pacific region. Our competition partners are regularly rated as among the leading lawyers in the competition field.

The group has a strong track record advising on many of the most significant mergers assessed by the Australian Competition Consumer Commission and the New Zealand Commerce Commission. The group's cartel unit is acting in a number of high-profile cartel cases. Advising on the impact of proposed joint ventures and vertical and horizontal restraints across Asian-Pacific jurisdictions are other facets of the group's work.

The firm's strength is its technical excellence and commercial acumen underpinned by industry sector understanding, and in-depth local knowledge of how business is done in markets in which it operates.

Our lawyers also advise Australian clients operating in the Asia-Pacific, and Asian regulatory authorities, on the application of regulatory and competition law issues across jurisdictions. Working closely with our New Zealand office (Minter Ellison Rudd Watts) we also act on trans-Tasman matters.

Minter Ellison is one of the largest full-service law firms in the Asia-Pacific region. The firm has more than 280 partners and almost 2,000 staff located in Australia, New Zealand, Hong Kong, the People's Republic of China, Indonesia (through an associated firm) and the United Kingdom.



Andy Matthews

Minter Ellison Rudd Watts

Andy heads Minter Ellison Rudd Watts' competition and regulatory (antitrust) team. He advises on all competition and regulatory matters, including mergers, cartels and leniency applications, and pricing and access issues.

Andy has extensive experience dealing with competition regulators in New Zealand, the EU and the UK. He has a broad industry background, including aviation, dairy, energy, finance, forestry, health, insurance, meat processing, media, postal services, shipping and telecommunications.

Andy is noted in various directories as a leading New Zealand competition lawyer, and was included in the additional list of 'Ones to Watch' in *Global Competition Review's* '40 under 40' in 2008.



Paul Schoff

Minter Ellison

Paul advises on the restrictive trade practices and consumer protection provisions of the Trade Practices Act, including misuse of market power, price fixing, and exclusive distribution arrangements. He also advises in the telecommunications and broadcasting area under Australia's Telecommunications Act, Broadcasting Services Act and Radiocommunications Act.

Paul has special expertise in the telecommunications and aviation industries, working with clients such as SingTel Optus, Broadcast Australia and Qantas. He advises on and obtains informal merger clearances from the ACCC for clients in a wide range of industries including FMCG, broadcasting, telecommunications and manufacturing.

Paul joined Minter Ellison in 1997 after experience including two years as associate to a judge of the High Court of Australia. He has worked in the London office of Minter Ellison and assisted on various European competition law matters.