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Cartels: Overview

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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 gives an overview of 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 has brought into force the remaining provisions of the new Competition Act, Hong Kong aims to introduce a revamped Competition Bill into Hong Kong's Legislative Council by the end of June 2010 and China has released further guidelines for its Antimonopoly Law which took effect on 1 August 2008. Further, Malaysian competition legislation is expected to be in force by 2011. The Malaysian legislation is expected to cover anti-competitive agreements and abuses of a dominant position and to prohibit unfair trade practices. In addition, Korea recently fined six LPG suppliers 668.9 billion won for establishing a cartel, representing the highest penalty ever imposed on a single industry. Japan's revised Antimonopoly Act came into effect on 1 January 2010.

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 detection, and there has been a dramatic surge in cartel enforcement activity in recent times.³

An international turning point was the Organisation for Economic Cooperation and Development's (OECD's) 1998 Recommendation concerning Effective Action against Hard-Core Cartels.⁴ The 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 ICN 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 'stock-take' 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 experienced competition agencies with newer competition agencies so that the experienced agencies can share their expertise and offer advice. The programme also 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 towards legislative changes that gave regulators greater investigative powers, increased penalties, and also 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 with cooperation occurring at an international level, including the exchange of cartel enforcement know-how. The report looked at the imposition of criminal penalties against individuals, stating that they can be useful when employed in a way that maximised their effectiveness 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

On 24 July 2009, amendments to the Trade Practices Act 1974 (Cth) to criminalise cartel conduct came into effect.¹¹ The new legislation essentially sits on top of the existing provisions, which prohibit cartel conduct but extend the prohibition as outlined below. The amendments have introduced criminal offences and civil prohibitions that make it illegal to make or give effect to a contract, arrangement or understanding which contains a 'cartel provision'. Essentially, a cartel provision is a provision of a contract, arrangement or understanding 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. Contracts, arrangements or understandings entered into before the legislation came into force may be caught by this legislation and be subject to criminal penalties when the parties give effect to the relevant provision after 24 July 2009. Conduct prior to 24 July 2009 will continue to be dealt with under the existing cartel conduct prohibitions.

It is also important to note that the amendments associated with the introduction of criminalisation have potentially extended the extraterritorial reach of the cartel conduct provisions of the Trade Practices Act, for example by removing the reference to competition 'in a market' (being a market in Australia) and extending the definition of a 'party' to an arrangement that includes related corporate bodies, including overseas parents. In addition, regulators in other countries where cartel conduct is also a criminal offence and which have an extradition treaty with Australia, such as the US, UK, Japan and Germany, will now be able to request extradition of individu-

als from Australia for the purposes of criminal cartel proceedings overseas and vice versa.

The amended legislation provides for imprisonment for 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 amended legislation provides for fines of up to A\$500,000. A corporation may be fined up to A\$10 million or three times the value of the benefit to the entire cartel (whichever is greater), 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 Proceeds of Crime Act will also apply, so that corporations found guilty of cartel conduct will be additionally liable to restraining, forfeiture orders or both, and also for payment of pecuniary penalties representative of the amount of the benefit received from the offence. 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.¹²

The Australian Competition and Consumer Commission (ACCC) released guidelines on how the ACCC will investigate alleged cartel arrangements and make decisions in relation to referral of matters for possible criminal prosecution.¹³ The guidelines explain that, in the absence of a clear indication that the matter will be prosecuted criminally or subject to civil proceedings, the ACCC will investigate a matter in a manner that preserves its ability to seek criminal prosecution. The ACCC will consult with the Commonwealth Director of Public Prosecutions (CDPP) if it is contemplating referring alleged serious cartel conduct for criminal prosecution. The CDPP will provide preliminary advice to the ACCC as to whether the matter should be pursued with a view to criminal prosecution. The factors that will influence referral by the ACCC to the CDPP for criminal prosecution primarily relate to conduct that causes large-scale or serious economic harm, but also include clandestine and covert behaviour, etc.¹⁴

The ACCC has also published an Immunity Policy for Cartel Conduct and Immunity Policy Interpretation Guidelines, which were revised as part of the move to criminalisation and provide guidance on how the ACCC will investigate, prosecute and grant immunity for cartel conduct under the new laws. The immunity policy is designed to be consistent with leniency policies in the US, UK, EU, Canada and South Korea. The policy confirms that the ACCC is responsible for managing requests for immunity from both criminal and civil prosecutions. The ACCC has the power to grant immunity from civil proceedings and will make recommendations to the CDPP about immunity from criminal proceedings. However, the CDPP will decide for itself whether to grant immunity from criminal prosecution in accordance with the Prosecution Policy of the Commonwealth (including the Annexure to the policy). Eligibility criteria for immunity includes being the first participant in a particular cartel to admit its conduct to the ACCC, where that party was not the cartel ring-leader and where full admissions and ongoing assistance are provided to the ACCC. Bearing in mind that, unlike other systems, the ACCC cannot levy fines and must prove contraventions in a court, this has important consequences for the disclosure of information provided by applicants under its Immunity Policy. 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 is designed to 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

In January 2010, the New Zealand Ministry of Economic Development (MED) released a cartel criminalisation discussion paper (the Paper) for public consultation.¹⁵ The consultation follows the recent introduction of criminalisation in Australia and the two countries' commitment to a high-level outcome of ensuring that those who engage in anti-competitive conduct face the same penalties in both countries. The Paper requests input on several areas, including how the physical and mental elements of the offence should be defined. The Paper suggests three possible approaches to defining the offence: adapting the existing price-fixing prohibition; adopting the Australian legislation; or creating a new offence based on first principles. Submissions on the discussion document were due by 31 March 2010.

The Paper follows significant increases in civil penalties in 2001 for cartel conduct prohibited by the Commerce Act 1986 (the Act).¹⁶ Prohibited conduct includes price fixing, market sharing or bid rigging by competitors, and restricting or limiting production. 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. Attempting, aiding, abetting, counselling or procuring, inducing or attempting to induce others to contravene the Act, or being in any way directly or indirectly knowingly concerned in or party to a contravention, or conspiring to contravene the Act, all potentially attract these penalties.¹⁷ Individuals 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.

On 1 March 2010, the New Zealand Commerce Commission (NZCC) published its revised leniency policy (Revised Policy).¹⁸ The Revised Policy continues to provide immunity from NZCC-initiated proceedings to the first party that applies with relevant information. (Immunity is not available if the NZCC has opened an investigation regarding conduct relating to the application, unless the NZCC considers it is not in a position to issue proceedings.) However, the Revised Policy amends this process by introducing a marker system common in many other jurisdictions. The system allows applicants to mark a place-holder while they compile the necessary evidence. Markers will generally need to be perfected within 28 days. Another new feature is Amnesty Plus, already in place in the US, Canada, Australia and the UK, which allows an applicant not eligible for immunity for one cartel to receive a reduced penalty for involvement in that cartel by informing the NZCC of another separate cartel. The Revised Policy also introduces a 'ringleader' exception, where immunity will not be available to ringleaders.

The NZCC has several ongoing legal proceedings for alleged cartel conduct. These include proceedings initiated in 2007 against companies and individuals in the corrugated fibre packaging industry, against European suppliers of gas-insulated switchgear, proceedings filed in 2008 against 13 airlines and seven airline staff for their alleged involvement in the air cargo cartel (another US-based individual was added to the proceedings in December 2009) and proceedings filed in 2009 against one of the largest providers of waste oil services in New Zealand, and one of its directors.

Proceedings for a wood preservative chemicals cartel, which has already resulted in total fines of over NZ\$7.5 million in both civil enforcement action and criminal actions (for misleading the NZCC), are continuing. Three overseas resident individuals have unsuccessfully challenged the jurisdiction of the New Zealand courts over their conduct in both the High Court and on appeal to the Court of Appeal (CA). The CA held that it would create a significant loophole if international entities involved in cartel arrangements directed at New Zealand markets could insulate themselves from liability simply by not holding meetings in or sending communications to New Zealand. The Court held that where directions in furtherance of the cartel were given to New Zealand ‘actors’ while the actors were outside New Zealand, and where they carried out acts in New Zealand to give effect to the cartel, the overseas residents whose directions had been followed would be regarded as having committed conduct in New Zealand. Knowledge by the New Zealand actor was not necessary. Two of the three individuals involved have appealed the findings to the Supreme Court (New Zealand’s highest appellate court), which heard their arguments in November 2009 but have yet to issue a decision.

In late 2008, one party involved in the gas-insulated switchgear industry 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 the statutory maximum penalties were increased. In October 2009, one of the defendants in the air cargo proceedings successfully challenged the continuation of NZCC orders under section 100 of the Act prohibiting airline employees from disclosing information given to the NZCC. The NZCC is appealing the case to the CA.

Korea

In December 2009, the Korean Fair Trade Commission (KFTC) announced it would continue to concentrate on eradicating cartels as part of its 2010 ‘Work Plan’. The primary focus is on cartels relating to daily necessities and raw materials which are closely related to people’s lives and business operations, such as items making up a large share of the household budget and industrial equipment.¹⁹ In January 2010, the KFTC Chairman Chung Ho Yul explained the impetus behind focusing on eliminating cartels was to invigorate the economy and boost market competition.²⁰

The KFTC said this focus would also include the prevention of bid-rigging and building stronger international ties. In February 2010, the KFTC Chairman attended the Bilateral Consultation Meetings with international competition authorities in relation to cartel enforcement and policy direction.²¹

The KFTC’s focus on cartels comes after amendments to the Competition Act in 2004, including increasing maximum fines, introducing a new leniency programme and introducing a reward system for cartel informants. In 2005, the KFTC issued a revised enforcement decree and notification and in 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. This is reflective of the KFTC’s support of individuals and small- and medium-sized businesses as a way of attempting to overcome the economic crisis, which was part of the KFTC’s 2009 operations plan.

The KFTC continued to vigorously prosecute and impose fines for cartel behaviour during 2009. On 2 December 2009, the KFTC issued a corrective order and a 668.9 billion won surcharge on six liquefied petroleum gas (LPG) suppliers – E1, SK Gas, SK Energy, GS Caltex, Hyundai Oil Bank and S Oil – who had fixed LPG wholesale prices between 2003 and 2008. These surcharges represent the high-

est level ever imposed on a single industry. A tough stance was taken by the KFTC because LPG was a ‘typical daily necessity of ordinary people’.²²

Earlier in 2009, the KFTC fined five marine hose manufacturers over 557 million won for their involvement in a bid-rigging, price fixing and market-sharing cartel. The manufacturers – Bridgestone, Dunlop Oil and Marine, Trelleborg, Parker ITR and Manuli – were found to have engaged in bid rigging, price fixing and allocating market shares for marine hoses that were exported globally.²³

In August 2009, the KFTC imposed a combined fine of 25.5 billion won on three soft-drink manufacturers and corrective orders against a total of five soft-drink manufacturers for fixing the prices of carbonated drinks four times between February 2008 and February 2009. Two of the companies were exempt because they had voluntarily reported their involvement. Additionally, criminal charges were brought against the chief executive officers of two companies.²⁴

The KFTC also closed investigations into static random access memory (SRAM) manufacturers after it concluded there was no evidence that SRAM manufacturers had engaged in price fixing by contacting Korean customers and consumers, or that the manufacturers’ contacts overseas had anti-competitive effects on the Korean market.²⁵

Japan

Japan’s revised Antimonopoly Act came into effect on 1 January 2010. This further establishes the Japan Fair Trade Commission (JFTC) as a significant presence in antitrust enforcement.²⁶ The recent changes include the expansion of the scope of violations which are subject to surcharges. These now include any private monopolisation of an exclusionary nature and abuse of dominant bargaining positions. Businesses which are ringleaders in cartels or bid rigging will now be subject to increased surcharge rates.

Existing leniency laws have also been amended. Joint applications for leniency by various enterprises belonging to the same corporate group will be allowed. There will be an increase in the number of enterprises able to apply for leniency in a single infringement case and an increase in the length of statute of limitations pertaining to the issuing of surcharge payment orders.²⁷

These amendments mark a wave of changes made to Japanese cartel laws in recent years. These include: introducing harsher penalties in 2002 for repeat offenders; increasing the maximum amount of fines from ¥100 million to ¥500 million; adopting new legislation in 2005 to increase surcharge rates; and introducing a leniency programme.²⁸ Japan also introduced a new competition law entitled the Act Concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade which, with effect from 4 January 2006, 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; it has also recently voiced a commitment to strengthen its relations with international competition authorities.²⁹ In October 2009, the JFTC issued a cease-and-desist order to companies manufacturing and selling television cathode-ray tubes after it was found that they met regularly to set prices. A total of 11 companies were ordered to pay a total surcharge of ¥3,322,240,000. This investigation was undertaken in tandem with the United States Department of Justice and the European Commission, and evidences the JFTC’s commitment to building its international ties.

Closer to home, the JFTC investigated participants in bid rigging for vehicle management jobs. In June 2009, 10 of the 11 companies were issued with multiple cease-and-desist orders and ordered to pay a total of ¥2,602,990,00 in surcharges.

In January 2010, the JFTC ordered three electric cable companies based in Tokyo to pay a collective ¥630.01 million in surcharges for their involvement in bid rigging and creating a cartel to secure high-voltage electric cable supply orders.

Singapore

In January 2010, the Statutes (Miscellaneous Amendments) Bill 2009 was considered by Singapore's Parliament. The Bill proposes to amend the Competition Act in several ways. The Bill provides the Competition Commission of Singapore (CCS) and Competition Appeal Board with additional powers to enforce the payment of financial penalties, but also provides incentives for infringing parties to pay on time. It does this by introducing payment schemes, such as payment by instalments. The impetus behind the latter amendment was to assist companies not otherwise able to pay the fine in one single payment.

Since the introduction of the prohibitions against anti-competitive behaviour, which took effect under the Competition Act on 1 January 2006, the CCS has been steadily expanding its activities. In November 2009, the CCS imposed fines totalling S\$1.69 million against 16 coach operators and their trade association, the Express Bus Agencies Association (EBAA), for fixing coach ticket prices. The CCS established that, through regular EBAA meetings, the operators had colluded in fixing minimum prices to different destinations in Malaysia from 2006 to June 2009. The operators had also added fuel and insurance charges to the prices they had set for the tickets.

The chief executive of the CCS Teo Eng Cheong said he would not be shy about also stepping in and prosecuting players in the petroleum industry for fixing prices, although to date no collusion had been discovered.³⁰

The CCS issued its first infringement decision in January 2008, against a bid-rigging cartel involving six pest-control companies; 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 anti-competitive activities. The CCS also intervened in anticipation of anti-competitive 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 gao*, a Chinese cake offered during prayers, from fixing the selling price of the product.

India

On 28 August 2009, after a wait of seven years, the Indian Ministry of Corporate Affairs issued a notification repealing the Monopolies and Restrictive Trade Practices Act 1969 (1969 Act) and bringing into force the remaining provisions of the new Competition Act 2002 (2002 Act) with effect from 1 September 2009. Full enactment of the 2002 Act now allows the Competition Commission of India to extend its role from the promotion of public awareness and training to fully incorporate advocacy and enforcement work. The 2002 Act was enacted to fulfil India's obligations under 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.

On 13 August 2009, the Competition Commission of India (CCI) introduced a leniency policy by bringing in regulations which prescribe the way in which the Commission can reduce penalties for members of a cartel who make a vital disclosure to the Commission or assist with investigations.³¹ The Regulations allow the CCI to grant lesser penalties depending upon factors such as the stage at which the applicant comes forward, the quality of information relied upon by the applicant and the evidence already in the possession of the Commission. A discount of up to 100 per cent can be obtained by an applicant who is the first to make a 'vital disclosure' to the Commission – one that, by providing evidence the Commission did not have in its possession at the time of application, allows it to either form a prima facie opinion regarding the existence of a cartel or to establish a contravention of the 2002 Act. Lesser discounts are also available to later applicants who provide significant added value to the evidence already in the possession of the Commission. A marker system is applied to determine the priority of applications. Any reduction in penalty is subject to conditions, including the cessation of participation in the cartel, requirements for the provision of relevant information, documents and evidence, and genuine cooperation.

In relation to cartel enforcement, the CCI is empowered to hold an inquiry in relation to certain cases, including cartel matters. After the inquiry, the Commission may make orders including a direction to discontinue conduct, impose a penalty, direct modification of an agreement, direct payment of costs or any other order it sees fit. On 15 May 2009, a Competition Appellate Tribunal was established to hear appeals from the CCI rather than the Supreme Court.³²

Hong Kong

The path to a general competition law regime in Hong Kong began in 2006 when the Hong Kong government, on the recommendation of the Hong Kong Competition Policy Advisory Group,³³ released a discussion paper concerning the introduction of a Competition Act.

In its annual report published on 8 December 2009, the Hong Kong government's Competition Policy Advisory Group (COMPAG) confirmed that a new Competition Bill would be introduced into Hong Kong's legislative council by the end of June 2010. This proposal comes following a public consultation in 2008, after which a previous bill was struck off the agenda for the 2008-09 legislative programme because of policy, technical and legal reasons.

In contrast to the initial bill, the new bill provides for a Competition Tribunal to be formed which will have a limited function of hearing and adjudicating cases, while the Competition Commission will investigate and prosecute cases. The new bill has a stronger focus on educating businesses and the public alike about competition law and promoting compliance programmes. The proposed bill exempts government and statutory bodies unless otherwise stated.

China

The Chinese State Council Antimonopoly Commission (the AMC) released market definition guidelines in July 2009 which apply to its Antimonopoly Law. The Antimonopoly Law Relevant Market Definition Guidelines (the Guidelines) identify markets where competition is said to have been restrained and will be a central facet in establishing breaches under the law. The Guidelines provide an outline of factors which determine a relevant market. These include product characteristics and user sales channels, price differentials, production processes, and transportation and switching costs. The Guidelines adopt the common hypothetical monopolist test to determine the sphere of a relevant market.

The provision of the Guidelines is a step towards a clearer anti-trust regime in China and assists the National Development and Reform Commission (NDRC) in mounting investigations against cartel behaviour.

A month earlier, the NDRC had released two draft rules under the Antimonopoly Law. These rules, issued by the State Administration of Industry and Commerce, prohibit certain pricing conduct that could be perceived as anti-competitive and administrative measures taken by public authorities which could restrict or eliminate price competition.

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 took place in Canada and involved 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.³⁴

Whereas more experienced competition authorities are leading international investigations as usual, according to the OECD less-experienced countries are also getting involved. One example cited 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.³⁵

The involvement of larger 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 to be 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 the decision to inform by cartel members is increasingly a global one.³⁶

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.³⁷

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

- a truly paperless process in all jurisdictions;
- the establishment of procedures for active coordination between jurisdictions on fines and priority assignments for jail and with respect to individual defendants;
- the 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.³⁸

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.³⁹

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.⁴⁰

Notes

- * The authors acknowledge the assistance of Jackie Mortensen, Alison Brusolino and Lesya Moroz (Sydney) and Nicko Waymouth and Rose Wang (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(1998) 35/Final, 13 May 1998.
- 5 The main reports are: Recommendation of the Council concerning 'Effective Action against Hard Core Cartels, c(1998) 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 See part IV of the Trade Practices Act 1974 (Cth).
- 12 OECD Third Report, p10.
- 13 Guidelines, ACCC approach to cartel investigations, 14 July 2009.
- 14 Memorandum of understanding (MOU) with the Commonwealth director of public prosecutions, 14 July 2009.
- 15 Cartel Criminalisation – Discussion Document, January 2010.
- 16 This followed a 1998 review by the Ministry of Commerce (now MED): 'Penalties, remedies and Court processes under the Commerce Act 1986: A Discussion Document', January 1998.
- 17 Commerce Act 1986 (NZ), section 80(1).
- 18 Cartel Leniency Policy and Process Guidelines, 1 March 2010.
- 19 'Strengthening Economic Fundamentals, Stabilising the Livelihood of the Low Income Class', Korea Fair Trade Commission press release, 16 December 2009.
- 20 'A New Year Message from the KFTC Chairman', KFTC press release, January 2010.
- 21 'KFTC Chairman Discusses International Cartel with Heads of Seven Competition Authorities', KFTC press release, 8 February 2010.
- 22 'Tough Corrective Measures Against LPG Price Cartel', KFTC press release, 2 December 2009.
- 23 'KFTC Fines Five Marine Hose Manufacturers Over 557 Million Won for Bid-Rigging, Price-Fixing and Market-Sharing Cartel', KFTC press release, 18 May 2009.
- 24 'KFTC Imposes Severe Sanctions for Fixing Beverage Prices', KFTC press release, 14 August 2009.
- 25 'SRAM Manufacturers Cleared of Price Fixing', KFTC press release, 21 April 2009.
- 26 Spratling & Arp.
- 27 'Message from Chairman Takeshima', Japan Fair Trade Commission press release, January, 2010.
- 28 OECD Third Report, p10.
- 29 'Message from Chairman Takeshima', JFTC press release, January 2010.
- 30 'Fixing the Problem of Price Fixing', Competition Commission of Singapore press release, 29 November 2009.
- 31 The Competition Commission of India (Lesser Penalty) Regulations, 2009 (No. 4 of 2009).
- 32 Ministry of Corporate Affairs notification, 15 May 2009.
- 33 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/.
- 34 OECD Third Report, p11.
- 35 Ibid, p12.
- 36 Spratling & Arp.
- 37 Ibid.
- 38 Ibid.
- 39 Ibid.
- 40 OECD Third Report.



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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 currently 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 an in-depth localised knowledge of how business is done in the 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

Andy heads Minter Ellison Rudd Watt's 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 experience base, including work in the aviation, dairy, energy, finance, forestry, health, insurance, meat processing, media, postal services, shipping and telecommunications industries.

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* 'Forty 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 varied experience including two years as associate to a judge of the High Court of Australia. He has worked at the London office of Minter Ellison and assisted on various European competition law matters.