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IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

Contribution from Australia

-- Session II --

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-- Australia --

1. Introduction

1. As international trade has increased in frequency, scope and sophistication, international cooperation has become increasingly important to Australia's ability to investigate and pursue cartels affecting Australian markets. In this global context, competition authorities can only be truly effective by working together to ensure that cartels can be prosecuted effectively in all jurisdictions.

2. Australia's anti-cartel enforcement capabilities have benefited directly from international cooperation. For example, in 2009, Australia secured a court order for AUD \$8.24 million in a multi-jurisdictional cartel case, a matter that could not have been prosecuted without the cooperation and assistance Australia received from agencies in other jurisdictions.

3. Australia has a number of formal and informal mechanisms that provide for international cooperation and the sharing of information in cross-border cartel investigations. This range of mechanisms provides Australia with flexibility in its approach to cartel investigations and allows it to assess each matter on a case by case basis. Australia protects shared information via legislative and informal safeguards, which require recipient jurisdictions to treat the information appropriately and to use it for the purpose for which it was provided.

4. Australia sees challenges and opportunities for improving cooperation with other jurisdictions and the efficiency of multi-jurisdictional cartel investigations. Some challenges include differences in legal and cultural practices between jurisdictions. Possible improvements include streamlining processes and greater use of confidentiality waivers for information provided by non-agency informants.

5. In this paper, Australia will discuss, in relation to cartel investigations, its mechanisms for cooperation with other jurisdictions, the safeguards in place to mitigate risks of exchanging confidential information and possible methods for improving the current state of international cooperation. The paper concludes by reiterating Australia's firm commitment to international cooperation in cartel investigations and advocating for the strengthening of inter-agency cooperation in international anti-cartel enforcement and continued improvement of the current international cooperation processes.

2. Existing tools and types of cooperation

Australia's competition agency, the Australian Competition and Consumer Commission (ACCC), cooperates with its competition counterparts through a variety of formal and informal means, both generally and in respect of cartel investigations. Having access to a comprehensive range of cooperation measures enables flexibility and enhances the effectiveness of the ACCC's coordination with other jurisdictions. Australia's cooperation in respect of cartel investigations primarily relates to the exchange of information and intelligence, including for example, in appropriate circumstances, sharing documents and investigation strategies on common cases, or engagement on specific issues such as amnesty and leniency.

2.1 *Methods of formal cooperation*

6. Formal mechanisms for international cooperation are provided for under Australian legislation and under bilateral and plurilateral treaty arrangements. These include:

- the Competition and Consumer Act 2010 (CCA)¹
- the Mutual Assistance in Criminal Matters Act 1987 (MACMA)
- the Mutual Assistance in Business Regulations Act 1992 (Cth) (MABRA)
- the Agreement between the Government of Australia and the Government of the United States of America on Mutual Antitrust Enforcement Assistance (the US-Australia Agreement)
- confidentiality waivers
- the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the Convention) and in particular:
 - letter of request
 - taking of evidence by consular officials, and
- free trade agreements (FTAs).

7. It is important to note that the MACMA, the MABRA and the Convention enable the ACCC to actively gather information, documents and evidence on behalf of foreign agency. The CCA does not allow the ACCC to gather such items on behalf of the agency but rather provides a framework to disclose (in certain circumstances) existing information previously gathered under the CCA. Most of Australia's FTAs contain a commitment to consult on matters of mutual interest but no obligation to gather or disclose information. Further detail about the ACCC's formal mechanisms for cooperation is set out below.

2.1.1 *Competition and Consumer Act 2010*

8. A foreign agency can make a formal request for the ACCC to provide information, which would be considered under section 155AAA of the CCA. This section enables the ACCC to disclose to foreign government bodies (including competition counterparts) 'protected information', that is, information provided to the ACCC in confidence and information gathered under the ACCC's compulsory powers. The ACCC will disclose such information only if the ACCC's Chairperson is satisfied that particular protected information will enable or assist a competition counterpart to perform or exercise any of the functions or powers of that agency.

9. Generally speaking, the ACCC adopts a two-step process where its international counterparts may first be authorised to access information to determine its relevance and to narrow down any subsequent request to use the information for other purposes.

10. Section 155AAA itself does not impose any factors that the ACCC must consider when disclosing generally protected information to a foreign government body. However, the ACCC will elect whether to disclose protected information to foreign government bodies after weighing certain considerations, which will vary according to the circumstances but may include: Australia's relations with other countries; the need to avoid disruption to national and international efforts relating to law enforcement; the interests of the administration of justice; regard for the ACCC's policies, including its immunity policy for cartel conduct; and the effect that disclosure could have on the safety of an informant,

¹ Formerly the *Trade Practices Act 1974* (TPA). The CCA superseded the TPA on 1 January 2011.

as well as the fact that disclosure may discourage informants from providing information in the future. Decisions to release information will be made in accordance with the relevant provisions in the CCA and such decisions will be made on their merits.

11. Prima facie, section 155AAA of the CCA ensures that information received by the ACCC (from both international and domestic sources) is treated confidentially. However, by setting out specific exemptions, it also allows the ACCC to share information with foreign competition agencies when appropriate, to assist with their cartel investigations. This in turn benefits Australia as the effects of a cartel can often extend beyond a single country's borders.

12. The New Zealand Commerce Commission also has a special arrangement with Australia in relation to enforcement proceedings with a trans-Tasman element. The *Trans-Tasman Proceedings Act 2010* was made to:

- streamline the process for resolving civil proceedings with a trans-Tasman element in order to reduce costs and improve efficiency;
- minimise existing impediments to enforcing certain NZ judgments and regulatory sanctions; and
- implement the Trans-Tasman Agreement in Australian law.²

13. The CCA contains provisions relating to the *Trans-Tasman Proceedings Act 2010* that allow an Australian court to conduct proceedings in New Zealand and a New Zealand court to conduct proceedings in Australia. For example, section 155A of the CCA provides the ACCC with the power to obtain information and documents in New Zealand relating to trans-Tasman markets and section 155B allows the ACCC to receive information and documents on behalf of the New Zealand Commerce Commission. However, these provisions are not used as frequently as section 155AAA of the CCA.

2.1.2 *Mutual Assistance in Criminal Matters Act 1987 (MACMA)*

14. Australia may provide and obtain assistance from foreign governments in relation to criminal investigations via mutual legal assistance, which occurs under the remit of Australia's *Mutual Assistance in Criminal Matters Act 1987*. Australia can make or receive a request for mutual assistance from any country. The process is assisted by over 20 bilateral mutual assistance treaties and some multilateral international conventions to which Australia is a party.

15. The MACMA regulates how Australia can provide or request international assistance in criminal matters. Some examples of the assistance that Australia can provide to requesting countries are: gathering evidence; executing a search warrant; seizing, restraining or confiscating property; and enforcing foreign orders or pecuniary penalties. The MACMA also facilitates the participation of certain witnesses in foreign criminal proceedings.

16. The ACCC has twice assisted the United States Department of Justice (US DOJ) to execute search warrants in Australia under the MACMA. In one of these cases, the US DOJ launched an investigation into suspected practices in a particular industry. The investigation involved companies operating out of Australia. The US DOJ requested Australia's assistance in gathering information related to the investigation from Australian territory. Australia agreed to the request and assisted the US DOJ and

² Please note: provisions to implement the Trans-Tasman Agreement in New Zealand law are in the corresponding New Zealand legislation.

Federal Bureau of Investigation staff, who visited Australia in person, to collect information from Australia. The US DOJ has provided feedback that the information was useful to its investigation.

2.1.3 *Mutual Assistance in Business Regulation Act 1992 (MABRA)*

17. The MABRA enables Australia to provide assistance to foreign regulators in obtaining relevant information, documents and evidence for purposes relating to the administration and enforcement of a foreign business law. Unlike under the MACMA, Australia will only provide assistance under the MABRA if it receives an undertaking from the foreign agency that the information or evidence provided to the foreign regulator will not be used for the purposes of criminal proceedings against the person or for proceedings against the person for the imposition of a penalty.

18. Whether or not Australia will respond to such a request is ultimately decided at Ministerial level. In considering whether to provide such assistance, some of the issues that the MABRA requires Australia to consider are: whether Australia will be able to obtain the requested information, documents or evidence; the cost of providing it; whether the foreign regulator would be likely to reciprocate to a request from Australia; and whether the matter would be more appropriate for the request to be made via a mutual legal assistance request. In practice, Australia rarely receives a request for assistance under this legislation.

2.1.4 *Agreement between the Government of Australia and the Government of the United States of America on Mutual Antitrust Enforcement Assistance*

19. The Agreement between the Government of Australia and the Government of the United States of America on Mutual Antitrust Enforcement Assistance (the Agreement) provides that Australia and the United States of America can exchange evidence on a reciprocal basis for use in competition law enforcement and help each other obtain evidence from the other's country while ensuring that confidential information is protected.

20. In one example, the ACCC instituted proceedings against several corporations from a number of countries. The ACCC alleged that the companies entered into an agreement outside Australia to allocate market shares and fix prices for a good or service on an international basis, including for Australia, in contravention of section 45 of the then *Trade Practices Act 1974* (now the *Competition and Consumer Act 2010*).

21. To assist its case, the ACCC made a request under the Agreement for access to documents that were produced to a Grand Jury as part of a US DOJ investigation.

22. The ACCC liaised with US DOJ informally as to the scope of the request and the documents sought before making a formal request under the Agreement. The US DOJ then applied to the relevant US District Court to have the documents released. ACCC staff travelled to the US to inspect the documents for relevance. ACCC staff considered that the documents inspected were relevant to the ACCC's proceedings.

23. The US DOJ sought approval of the US Attorney-General to release the documents to the ACCC on public interest grounds and the documents were provided to the ACCC subject to the terms of the Agreement.

24. The ACCC maintained the confidentiality of the documents and returned the documents to the US DOJ when they were no longer required. The ACCC found the ability to access the US DOJ's information very useful in its investigation of suspected cartel conduct.

2.1.5 *Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Convention)*

25. The Convention enables a foreign court that is a signatory to the Convention to apply to an Australian court for certain orders, including an order for the examination of witnesses or the production of documents under relevant state or territory legislation. Australia will provide such assistance in relation to a proceeding that has been or is likely to be instituted in a court of the requesting jurisdiction, but not in respect of matters in an early investigation stage.

26. The Convention also provides for a diplomatic or consular agent of another country to gather evidence on a voluntary basis in Australia, within the area where the official exercises his or her functions. The consular official must only obtain such evidence in relation to proceedings that have already commenced within his or her own country and must also have the permission of the appropriate authority which has been designated by Australia.

2.1.6 *Free trade agreements*

27. Australia has five bilateral free trade agreements (FTAs) currently in force, and a further six in negotiation.³ Australia also has one regional FTA in force and a further three under negotiation.⁴ Most of these FTAs provide for 'consultation', although the obligation to consult is non-binding and at the discretion of parties to the agreement. 'Consultation' may include exchange of confidential information in relation to cartel investigations.

2.2 *Methods of informal cooperation*

28. Informal cooperation complements and enhances formal cooperation by building an understanding amongst jurisdictions of their respective legal systems and by enabling the exchange of information at an early stage of an investigation. The speed with which intelligence can be shared to support investigations in various jurisdictions is central to effective informal cooperation. Australia engages in informal cooperation through bilateral intelligence and information exchange and through its participation in multilateral forums.

2.2.1 *Cooperation arrangements*

29. The ACCC is party to several bilateral and plurilateral cooperation arrangements with agencies in other jurisdictions, including jurisdictions in the Asia-Pacific region, Europe and North America.⁵ Generally, these arrangements establish a framework for notification, cooperation and coordination on competition and consumer protection enforcement activities, exchange of information and avoidance of conflict.

30. The arrangements recognise that it is in the Parties' common interest to cooperate and share information where appropriate and practicable. However, the ACCC is not required to communicate

³ Australia currently has bilateral FTAs in force with Chile, New Zealand, Singapore, Thailand and the US. Currently under negotiation are: China, India, Indonesia, Japan, Malaysia and South Korea.

⁴ The regional agreement in force is AANZFTA (ASEAN-Australia-New Zealand Free Trade Agreement). Regional agreements under negotiation are: Gulf Cooperation Council, PACER Plus, Trans-Pacific Partnership.

⁵ For further information about the ACCC's cooperation arrangements, please see <http://www.accc.gov.au/content/index.phtml/itemId/564911>.

information to the foreign agency if such communication would be incompatible with its interests in the application of Australia's competition law. The ACCC may provide information on a confidential basis.

31. The foreign agency may also informally request the ACCC's assistance in obtaining information located in Australian territory to aid in an investigation. However, no information will be exchanged pursuant to the arrangement which could not have been exchanged in the absence of the arrangement. The arrangement provides that requests will be addressed in as timely and practicable a manner as circumstances permit.

2.2.2 Confidentiality waivers

32. The ACCC also cooperates with other jurisdictions through the sharing of information under confidentiality waivers. In such a case, the ACCC seeks waivers from applicants under its immunity and cooperation policies to discuss the details of their applications with other jurisdictions in which the applicant has also sought immunity. Waivers vary from case to case and may provide for information sharing for the purposes of coordinating investigations through to sharing of specific information and documents provided by the applicants. Confidentiality waivers are increasingly being used in cartel investigations, as applicants for immunity under Australia's cartel provisions are often also seeking immunity in other jurisdictions.

2.2.3 International forums

33. Australia's participation in international forums enables the ACCC to foster its relationships with and learn from competition agencies in other jurisdictions. The ACCC is, for example, an active member of the International Competition Network (ICN). The ICN provides a valuable forum to build relationships between agencies, and exchange information and ideas on particular matters. The informal network, comprising over 120 competition agencies from around the world, provides practical assistance to its members through the publications of ICN Manuals and best practice materials. The ICN also facilitates practical cooperation through initiatives such as the current Cartel Working Group project to create a chart summarising the mechanisms available for sharing information between agencies.

2.2.4 Inter-agency communication

34. The ACCC also holds regular teleconferences with competition agencies from certain jurisdictions to share information and discuss issues of mutual interest. For example, in 2011, the ACCC, the New Zealand Commerce Commission (NZCC) and the Competition Commission of Singapore (CCS) established the Australia–New Zealand–Singapore Sharing Arrangement (ANZSSA). Under the ANZSSA, the three agencies participate in a monthly teleconference to discuss: case investigations of interest; intelligence activities; outreach, awareness and compliance activities; technical cooperation; and legal and policy developments. While the ANZSSA is a new cooperative arrangement, the ACCC has found this arrangement useful for staying informed of developments in the region and for building informal relationships with the NZCC and CCS.

3. The complementary nature of informal and formal assistance

35. A good example of the complementary nature of both informal and formal assistance is that of Australia's investigation into cartel conduct regarding the supply of marine hose to oil and gas suppliers. As mentioned in the introduction of this paper, in 2009 Australia successfully obtained an order for a total of AUD \$8.24 million against companies participating in this cartel.

36. The case was in relation to cartel conduct which occurred between 2001 and 2006 by four suppliers of marine hose to oil and gas producers. The conduct in question involved controlling prices, bid

rigging and allocating market shares. The cartel was effectively terminated in early 2007 following the execution of search warrants and arrests by the European Commission, Japan's Fair Trade Commission, the UK Office of Fair Trading (UK OFT) and the United States Department of Justice (US DOJ).

37. From Australia's perspective, the ACCC alleged that four foreign based suppliers of marine hose gave effect to global cartel arrangements by submitting rigged bids to supply marine hose to customers in Australia. While the making of the cartel arrangements occurred outside Australia, Australia's legislation enabled it to take action in relation to the dealings of the companies which gave effect to cartel conduct.

38. The successful outcome for the ACCC in this case would not have been possible without the assistance of both the US DOJ and the UK OFT, who provided information and documents that were significant to Australia's investigation. The information and documents were obtained informally from the US DOJ, and formally from the UK OFT via a request by the ACCC under the relevant section of the UK's *Enterprise Act 2002*. However, prior to the formal provision of this information, the ACCC and the UK OFT had been in close cooperation regarding the case, the processes related to the provision of formal assistance and the evidence that was available to be provided via a formal request. Through making use of the tools available under both forms of cooperation, Australia was able to maximise the information it obtained and provided in this matter and successfully prosecute and international cartel.

4. Australia's cooperation relationships with other jurisdictions

39. As noted above, the ACCC has agency-to-agency cooperation arrangements in place with a number of foreign agencies. These agreements provide mechanisms for the informal sharing of information and for coordination of enforcement action. To facilitate these arrangements, ACCC senior management and investigators hold regular bilateral meetings with their counterparts, on a periodic or as-required basis, to discuss case issues such as investigative steps, timing, and settlement approaches.

40. The ACCC has a particularly close cooperative relationship with the NZCC. In 1994, the two parties entered into a Cooperation and Coordination Agreement, which formally recognised that it is in the parties' common interest to cooperate and share information where possible and practicable. In accordance with the agreement, where the parties pursue enforcement activities with regard to the same or related matters, they endeavour to coordinate their enforcement activities to the extent possible. However, neither party to the agreement is required to communicate information to the other if such communication would be contrary to the party's interests.

41. The ACCC values its cooperative relationships with other competition agencies and the information it gains through these relationships. The ACCC can rely on information gathered in another competition authority's investigation in the ACCC's own investigation to the extent that it can be used for intelligence in investigating or opening a case.

42. In court, admissibility of foreign evidence is governed by the *Foreign Evidence Act 1994* and matters are assessed on a case by case basis. Evidence will only be accepted in a criminal matter in an Australia court if it is received under the MACMA.

4.1 Safeguarding sensitive information

43. The ACCC considers that the ability to protect confidential information is extremely important to the ongoing success of its immunity program and cooperation policy and, therefore, to its ability to detect and pursue cartels.

44. The ACCC takes appropriate precautions to protect information relating to immunity applicants and the information that they may provide. The ACCC acknowledges that sharing such information with

other agencies raises certain concerns. However, the ACCC seeks to prevent adverse impacts on informants from disclosure of their information. It assesses requests to share immunity-related information on a case by case basis. Where appropriate, the ACCC will take steps in court to protect confidential information being disclosed.⁶

45. Recent changes to Australia's competition law provide enhanced protection for confidential information in the possession of the ACCC relating to cartel investigations. Three levels of protection are potentially available for information disclosed to the ACCC, including protecting certain cartel information, public interest immunity and legal professional privilege. A request for such documents/information and a challenge to any of those three limbs of protection is ultimately left to a decision of the court.

4.1.1 *Protected cartel information*

46. In addition to laws relating to the disclosure of general protected information held by the ACCC, provisions were introduced into Australia's cartel legislation in 2009 enable the ACCC to refuse to produce, or to prevent the ACCC from being required, to produce certain documents and information called 'protected cartel information'. Such information includes information which was provided to the ACCC in confidence, both voluntarily and compulsorily, which relates to a potential breach of the cartel offence or civil prohibition. In general, this protection applies to orders for the production of information before a court or tribunal and to discovery or production of information during an investigation, or to third parties.

4.1.2 *Public interest immunity and legal professional privilege*

47. Where the ACCC considers it is in the public interest to prevent disclosure of certain information, it may assert that claim to the court. The court will then make a decision whether to disclose the information. In making this decision the court considers the need to protect informers, thereby encouraging informers to provide information to the ACCC in the future, as well as the need to ensure that defendants receive a fair trial and whether the administration of justice would be impaired if the documents were withheld.

48. Claims for public interest immunity are assessed on a case by case basis and judges exercise their discretion in making any such orders.

49. The ACCC may also claim legal professional privilege over confidential communications concerning certain advice and litigation privilege, which protects communications between a solicitor and their client that were conducted for the purpose of receiving legal advice. Legal professional privilege may cover any documents made by a client to its lawyers and knowledge or opinions of clients derived from privileged communications made to them by their lawyers.

⁶ For information about recent ACCC efforts to protect confidential information, see, for example: ACCC v Cadbury Schweppes Pty Ltd; ACCC v Prysmian Cavi e Sistemi Energia Srl & Ors; Korean Airlines v ACCC. Please note, however, that all of these cases relate to a period before Australia's new competition law, the *Competition and Consumer Act 2010*, and the associated additional protections for cartel information came into effect.

4.1.3 Consultation

50. Where the ACCC is compelled to produce confidential information (for example, in response to a subpoena or a discovery order), it will endeavour to notify and consult the agency that provided confidential information about the proposed release of that information. In this way, the ACCC can afford the agency an opportunity to seek confidentiality orders.

51. The *Freedom of Information Act 1982* also requires the ACCC to consult, as far as possible, before disclosure, any person whose business or professional affairs or personal information is contained in a document and give such a person rights of review in relation to any decision to release such information.

5. Challenges and opportunities for improvement

52. International cooperation between competition agencies is inherently challenging, due to the differences in respective countries' legal systems, culture and language. Nevertheless, such challenges can be overcome, in most cases, by developing an understanding and tolerance of the systems, requirements and expectations of a counterpart jurisdiction.

53. A key issue that each country must manage when cooperating with another country is the difference between its enforcement priorities and those of its counterpart country. A case that is a high priority in one country may not be a high priority in the country it is requesting assistance from, which can influence how quickly a country - including Australia - responds to a request and the resources that are allocated to it. Similarly, each country may have divergent interests in the same investigation. For example, one country may be seeking evidence to prosecute a particular offender, whilst another country may be seeking information from that person in the same matter to investigate a much broader cartel arrangement.

54. The existence of separate immunity and/or leniency policies in different jurisdictions can present challenges for international cooperation in cartel investigations. For example, an immunity and/or leniency applicant may be open to prosecution in relation to a certain cartel in two jurisdictions. That applicant might obtain immunity from prosecution in only one of those jurisdictions. Immunity usually requires ongoing cooperation with that jurisdiction's competition authority and disclosure of all information relevant to the case. Exchange of that information between the competition authorities of the two jurisdictions may expose that applicant to prosecution in the second jurisdiction.

55. In addition to conditional immunity, the ACCC's immunity policy interpretation guidelines also outlines the ACCC approach of providing for 'amnesty plus' under its *Cooperation Policy for Enforcement Matters*.

56. If a person cooperates with the ACCC investigation into a cartel despite being ineligible for immunity because another person has been granted conditional immunity in relation to that cartel, the ACCC may recommend to the court a reduced penalty in civil proceedings and recommend to the Commonwealth Director of Public Prosecutions (CDPP) a reduced fine or sentence in criminal matters. If, in addition to cooperating with investigations into the first cartel, such a person reports a second cartel, and is granted conditional immunity in relation to the second cartel, the ACCC will recommend to the court a reduced penalty in civil proceedings and recommend to the CDPP a reduced fine or sentence in criminal matters be further reduced in relation to the first cartel. This arrangement is known as 'amnesty plus'.

57. Cartel prosecutions and related disclosure of information may also give rise to private actions against the applicant by parties affected by the alleged cartel. The ACCC's immunity and cooperation policies do not provide applicants with protection from private actions. Further, parties are not restricted from seeking redress from corporations and individuals who have been prosecuted in criminal or civil proceedings.

58. Legislative restrictions and a country's right to exercise its discretion to share information must also be considered. Australia's legislation specifies particular circumstances where it may request or share information, and ultimately each case is determined on a case by case basis.

59. A further challenge of international cooperation is the time and process involved in sharing information or working collaboratively with another jurisdiction, particularly through formal means. Delays may be incurred as jurisdictions undertake strict legislative and procedural procedures, such as seeking Ministerial or Court approval. Cooperation via mutual legal assistance, for example, whilst an essential part of many criminal investigations, can take many months or even years. In some cases, countries may be required to follow a lengthy process of intelligence or evidence exchange which may not lead to any concrete outcome.

60. Given these challenges, Australia considers that international cooperation in cartel investigation can continue to improve and become more effective. Some possibilities to explore might include:

- introducing necessary legislation providing competition agencies with a discretion to, where appropriate, share evidence it has gathered as part of compulsory domestic processes with international counterparts similar to section 155AAA of the CCA;
- streamlining the process for requesting and responding to requests for information related to cartel investigations;
- developing informal and formal relationships with competition agencies in other jurisdictions and addressing potential language barriers and costs for translation of documents; and
- increasing the use of confidentiality waivers from cooperation partners in multi-jurisdictional cartel investigations.