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## The ACCC's immunity policy: A new application of the "Prisoner's Dilemma"

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*This article discusses the ACCC's development of an immunity policy to fuel distrust between price-fixing firms and facilitate a real world "Prisoner's Dilemma", one which deters potential, and cracks existing, price-fixing cartels.*

### INTRODUCTION

The motivation behind firms colluding on price is simple: extract maximum profits by overcharging consumers.

The requisite element in price-fixing collusions is trust: trust that the other colluders will first adhere to the price-fixing agreement and, second, will not inform or assist the regulator with details of the cartel. Up until recently there has been little regulatory drive to foster distrust between cartel participants in Australia. Accordingly, despite its illegality, the rewards gained from price fixing have generally proved greater to cartel firms than the risk of, and the consequences of, being caught.

This article discusses how price fixing exemplifies the classic "Prisoner's Dilemma" paradigm, one in which participants must decide on the basis of potential consequences whether to pursue, or defect from, the cartel, and whether to co-operate or not co-operate with the regulator. The article argues that the development of an immunity policy by the regulator, coupled with soon to be introduced criminal sanctions against individuals, greatly assist efforts to thwart potential and existing price-fixing cartels.<sup>1</sup> It achieves this purpose by fostering distrust between firms and undermining the motivation for collusion.

### COLLUSION AND PRICE-FIXING CARTELS

Price fixing, as is currently proscribed under Australian law, occurs where two or more competing firms enter into a contract, arrangement or understanding where its purpose or likely effect is to fix, control, or maintain the price of goods supplied.<sup>2</sup>

Price collusion by trade rivals has existed since the beginning of the industrialised economy. As economist Adam Smith observed:

People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.<sup>3</sup>

The goal of price fixers is to set the highest possible price for goods supplied to consumers to extract maximum profit. Through varying levels of sophistication ranging from a complicated written agreement to a gentleman's handshake, two or more colluding firms dictate to consumers the price at which they sell goods. As the current Chairman of the Australian Competition and Consumer Commission (ACCC) notes, the "major reason cartels continue to flourish is that they are potentially so highly profitable".<sup>4</sup>

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<sup>1</sup> Although this article focuses on price-fixing cartels, its observations would apply equally to other forms of collusion such as market sharing or bid rigging.

<sup>2</sup> *Trade Practices Act 1974* (Cth), ss 45-45A. It currently attracts a maximum penalty of at least \$10 million for companies.

<sup>3</sup> Smith A, *An Inquiry into the Nature and Causes of the Wealth of Nations: A Selected Edition* (Oxford University Press, 1999) p 129.

<sup>4</sup> Samuel G. "The Enforcement Priorities of the ACCC" (2006) 14 TPLJ 71 at 77.

In effect, the gap between the cartel price and competitive discounted prices is "stolen" from consumers. Price fixing is not only illegal, but rightly regarded by regulators alike as systemic theft from consumers.<sup>5</sup>

### THE PRISONER'S DILEMMA AND ITS APPLICATION TO PRICE-FIXING CARTELS

The Prisoner's Dilemma,<sup>6</sup> a form of non-zero-sum game, was recently described in the following way:

The Prisoner's Dilemma starts from the premise that two individuals have committed two crimes, one minor and one major. The police arrest both individuals and hold them for interrogation. The investigators have sufficient evidence to convict both suspects on the minor charge. However, the minor charge entails only a minimal amount of jail time, say, one year. In contrast, if an uncooperative suspect is convicted of the major crime, he will be sentenced to ten years in jail. Unfortunately, the investigators will not have sufficient evidence of the major crime unless at least one of the prisoners confesses.

Separated from each other, the interrogator offers each prisoner the following deal: "turn state's evidence against your partner and, if he does not confess, we'll put him away for ten years and you'll serve no time in jail; however, if both of you confess, then you'll each receive a five year sentence."

From Prisoner A's perspective, he should confess. If Prisoner B does not confess, then A has to choose between one year in jail for the minor crime or no time in jail as the reward for providing evidence against B. A's rational choice is to confess and receive no jail time. If Prisoner B does confess, then A will receive a ten-year sentence if he does not confess and only a five-year sentence if he also confesses. The rational choice is to confess and serve five years in prison instead of ten. Thus, A is better off confessing regardless of whether or not B confesses. This makes confessing A's dominant strategy. Prisoner B's calculus is the same. Thus, if each prisoner pursues his individual self-interest, both prisoners will confess ... The irony of the Prisoner's Dilemma is that with mutual confession, both prisoners end up at their third best outcome (where each receives a five-year prison sentence). However, if the prisoners can operate as a team, they can move to the preferred outcome of mutual silence where neither confesses.<sup>7</sup>

Firms contemplating or actually participating in price-fixing cartels face a similar dilemma to the prisoners in that they are better off if they co-operate and operate as a team. Firms increase profits by charging a supra-competitive price so long as other firms co-operate by charging the same price.<sup>8</sup>

The dilemma facing cartel participants is that they must choose between co-operating with other cartel members by sticking to the agreed price or defecting (analogous to confessing) by charging a lower price to that agreed upon.

On the one hand, competition, the necessary antithesis to collusion, drives down prices because consumers, all other things being equal, will buy from the supplier who sells at the lowest price. The best outcome for a self-interested firm is to enter a cartel arrangement, and then defect by charging a slightly lower price to extract the most sales from consumers, hoping the other participants continue to adhere to the cartel price. However, every firm in a cartel arrangement faces a risk that other participants will cheat in this way. Therefore, in the short term, without effective trust, firms are likely to defect from a cartel price to obtain more sales.<sup>9</sup> Defecting can lead to a discounting war and the dissolution of a cartel as occurred with the International Steel Cartel in the 1920s.<sup>10</sup>

On the other hand, in the long term, firms are worse off by the practice of discounting and are therefore motivated to collude and maintain the cartel. The critical aspect of the Prisoner's Dilemma is trust. If you suspect your partners are renegeing on the deal, then you are better off repaying this

<sup>5</sup> Graeme Samuel recently described cartels "as a form of theft, and as a silent extortion of the economy that is bad for business, consumers and the economy" in Samuel, n 4 at 77.

<sup>6</sup> Axelrod R, *The Evolution of Cooperation* (New York Basic Books, 1984).

<sup>7</sup> Leslie C, "Trust, Distrust, and Antitrust" (2004) 82 *Texas Law Review* 515 at 520-521.

<sup>8</sup> Leslie, n 7 at 524.

<sup>9</sup> Leslie, n 7 at 526.

<sup>10</sup> Leslie, n 7 at 560, citing Stocking GW and Watkins MW, *Cartels in Action* (Twentieth Century Fund, 1946) p 186.

cheating with cheating.<sup>11</sup> Conversely, if you trust your partners, you are likely to continue to observe the cartel price and not defect. Accordingly, cartels employ a number of trust building devices to effectively maintain cartel arrangements. These include reducing the number of firms in an industry, personal relationships and friendships, goodwill gestures, price transparency, group identity and social norms such as the establishment of trade associations,<sup>12</sup> and reputation for being trustworthy.<sup>13</sup> As Leslie notes, "trust between partners in crime increases the chances of criminal success ... criminal conspiracies require trust just as beneficial cooperative ventures do".<sup>14</sup> Trust also allows cartels to increase the agreed price over time. This has been explained in the following way:

The basic task of a cartel is to set a uniform market transaction price. Uncertainty about the costs of monitoring and policing the agreement will often imply that a cartel will start with a price well below the monopoly price. As experience, trust, and discipline grow, the price will ratchet up towards the profit-maximizing monopoly price.<sup>15</sup>

Accordingly, trust is the primary means by which cartel participants address their own Prisoner's Dilemma.

### DEVELOPMENT OF IMMUNITY POLICIES IN AUSTRALIA AND OVERSEAS

Price fixing throughout industrialised economies is a constant challenge for competition regulators, which, until recently, has had little prospect of being successfully met.

Much of the difficulty with past investigations and prosecutions of price fixing has been evidentiary. Graeme Samuel himself concedes "the inherently secretive nature of cartels and the measures taken to avoid detection" makes investigations time consuming.<sup>16</sup> As Lee J also noted: "conduct will be covert and hard to detect and allegations that corporations have engaged in such conduct will be difficult to prove."<sup>17</sup> As regulators are "seldom privy to information about the formation and execution of anti-competitive agreements",<sup>18</sup> price-fixing arrangements often escape sanctions or are detected only after a cartel breaks apart.

In the absence of direct evidence, ie a party giving evidence of the price-fixing arrangement, regulators rely on circumstantial evidence such as parallel pricing behaviour and forwarding of pricing

<sup>11</sup> Leslie, n 7 at 533, discussing Wright R, *Nonzero: The Logic of Human Destiny* (Pantheon, 2000) p 341.

<sup>12</sup> The Australian Competition and Consumer Commission (ACCC) has often been wary of the involvement of trade associations, such as the Service Stations Association in the retail petrol industry, as evidence of price collusion. See, eg *Trade Practices Commission v Service Station Association Ltd* [1992] ATPR 41-179 where a meeting organised by the Service Station Association and attended by service station operators to discuss profits with published recommended retail prices was found not to amount to price fixing.

<sup>13</sup> Leslie, n 7 at 519.

<sup>14</sup> Leslie, n 7 at 547.

<sup>15</sup> Leslie, n 7 at 555, citing Connor J, *Global Price Fixing: Our Customers are our Enemy* (Kluwer Academic Publishers, 2001) p 30 (emphasis added).

<sup>16</sup> Samuel, n 4 at 83.

<sup>17</sup> *ACCC v Midland Brick Co Pty* [2004] ATPR 42-008 at [15]. The Chairman of the ACCC recently conceded that the "[c]ourts are increasingly challenging the value of inferential evidence in proving that the parties made, or gave effect to, an agreement that was the result of a 'meeting of the minds'": see Samuel G, *The ACCC Approach to the Detection, Investigation and Prosecution of Cartels*, Paper presented to the Economics Society of Australia Detection of Cartels Symposium (28 September 2005) p 15. Most recently, Hoerny J in *Visy* made the following comments in relation to cartel behaviour: "Cartel behaviour of the kind with which this case is concerned is extremely destructive of the competition on which the prosperity of a free market economy depends. Often the profits can be immense, and the risk of detection slight. Of its nature, cartel behaviour is likely to occur in secret and between parties who seek mutual benefit. In the present case, detection occurred purely by chance when Amcor's solicitors, in the course of quite unrelated litigation, stumbled across incriminating material. Even then the present resolution may not have been reached were it not for two additional factors. First, the Commission's immunity policy and, secondly, the fact that there were not only witnesses prepared to give evidence, but also tape recordings of damning conversations": see *ACCC v Visy Industries Holdings Pty Ltd (No 3)* [2007] FCA 1617 at [306].

<sup>18</sup> Yadin O, "The Conspirator Dilemma: Introducing the 'Trojan Horse' Enforcement Strategy" (2001) 1 *The Berkeley Law & Economics Working Papers* (Article 2).

correspondence.<sup>19</sup> However, the problem with this, as Heerey J observed, is that "parallel pricing in itself, in this particular market [retail petroleum products market], is as likely to follow from the observation and independent decision of rival traders as from arrangement".<sup>20</sup>

By applying the Prisoner's Dilemma paradigm to price-fixing cartels, it is clear that policies and initiatives aimed at fostering distrust and driving a wedge between colluders are a more effective way of exposing cartels. As Leslie notes, "society should find ways to harness the lessons of the Prisoner's Dilemma and prevent players from overcoming the barriers to collective action".<sup>21</sup> Competition law has a role in undermining the trust building devices which form the basis of a durable cartel, and fostering distrust, even if only in one of the parties to the arrangement.<sup>22</sup>

The recent introduction of the Immunity Policy<sup>23</sup> by the ACCC, replacing the more discretionary Leniency Policy,<sup>24</sup> is critical to this process. Even under the former policy, around half of the ACCC's cartel investigations were prompted by firms seeking leniency.<sup>25</sup> As Lee J noted in the context of the former policy, "it can be understood why the ACCC has developed and published a policy to encourage disclosure of conduct that contravenes the Act in return for more lenient enforcement of the Act against the disclosing party".<sup>26</sup>

The policy is based on successful overseas models such as the United States Antitrust Division's leniency regime.<sup>27</sup> There, the first firm to confess receives total immunity from criminal prosecution provided that the regulator was already aware of the cartel and the firm was not a ringleader.<sup>28</sup> As with its United States' counterpart, the Immunity Policy "creates a race to confess", triggered initially by distrust.<sup>29</sup>

The Immunity Policy operates by granting immunity to the first price-fixing firm that applies and meets the criteria. Importantly, a firm is able to hold its position at the head of the queue by placing a marker and then has a reasonable period to conduct an internal investigation before reporting fully on

<sup>19</sup> For example, simultaneous price movements by petrol retailers. In *ACCC v Leaky Petroleum Ltd* (2004) 141 FCR 183; [2004] FCA 1678, the ACCC alleged that a number of companies brought periods of discounted retail petrol prices to an end by fixing or controlling, or providing for the fixing or controlling of, increases in the retail prices of petrol in the Ballarat area. Expert economic evidence disclosed that, in a competitive market, it was unlikely a retailer would significantly raise prices without being confident that it would be matched, a risk lessened if competitors were aware of the increase and were likely to match it. The real issue was whether the matching of prices arose from an independent monitoring of boards rather than ongoing collusion. For an unsuccessful prosecution of a firm forwarding its price list to a competitor, see *Trade Practices Commission v Ennil Ltd* (1980) 43 FLR 353.

<sup>20</sup> *ACCC v Mobil Oil Australia Ltd* [1997] ATPR 41-568 at 43,896.

<sup>21</sup> Leslie, n 7 at 547.

<sup>22</sup> Leslie, n 7 at 622.

<sup>23</sup> *ACCC, Immunity Policy for Cartel Conduct* (2005); *ACCC, Immunity Policy Interpretation Guidelines* (2005).

<sup>24</sup> The Leniency Policy was a tool designed to encourage businesses to disclose cartel behaviour. It was introduced by the ACCC through its former Chairman, Alan Fels, improving on the ACCC's *Cooperation Policy for Enforcement Matters* (2002). See *ACCC, Leniency Policy for Cartel Conduct* (2003). Graeme Samuel announced a review of the Leniency Policy in 2004 to recognise markers and encourage a race to confession; see Samuel G, *Cracking Cartels International and Australian Developments*, Paper presented at the Leniency Programs and Cracking Cartels Conference (Sydney, 24 November 2004).

<sup>25</sup> Samuel, n 17, p 6.

<sup>26</sup> *ACCC v Midland Brick Co Pty Ltd* [2004] ATPR 42-008 at 48,828-48,829.

<sup>27</sup> The United States Antitrust Division's leniency program has led to a number of countries including Japan, Australia, Brazil, Canada, Germany, Ireland, Korea and the United Kingdom to announce new or revised leniency programs. See Hammond S, *An Update of the Antitrust Division's Criminal Enforcement Program*, Paper presented to the Antitrust Law Cartel Enforcement Roundtable (16 November 2005). In the United Kingdom, the Office of Fair Trading has a similar leniency policy which confers total immunity to the first member of a cartel who comes forward with relevant information and meets other conditions. See Office of Fair Trading (UK), *Leniency in cartel cases: A guide to the leniency programme for cartels* (2005).

<sup>28</sup> Leslie, n 7 at 640.

<sup>29</sup> Leslie, n 7 at 640.

its conduct. In a general sense, a firm must be a party to a cartel, it must admit its wrongdoing as a corporation, it must be the first to apply, it must not be the clear leader in the cartel, and it must cease involvement.<sup>30</sup>

Further, immunity may be available even if the ACCC has started investigating a cartel up to the point where it has received advice that it has sufficient evidence to commence proceedings.<sup>31</sup> If the criteria are satisfied, immunity is conferred on the company and its directors, officers and employees.<sup>32</sup>

While the ACCC's recent unsuccessful case against Geelong petrol retailers shows that the granting of leniency is no guarantee of effective evidence in a witness box and therefore success in a case,<sup>33</sup> overseas experience shows such policies are effective. The amnesty policy in the United States has worked: having exposed international cartels in marine transportation services, graphite electrodes, bromines, and vitamins, 30 convictions on price-fixing charges have been made, as well as over US\$1 billion in fines imposed.<sup>34</sup> The policy has also led to investigations of price fixing in one industry exposing price fixing in another. For example, a firm involved in price-fixing arrangements in different markets, although not the first to confess in one arrangement, could be the first to confess in another one.<sup>35</sup>

#### JAIL TERMS FOR INDIVIDUALS AND INCREASING MONETARY PENALTIES

The increasing investigation and prosecution of price-fixing cartels in Australia is evidence that past sanctions have not sufficiently deterred price fixers. Courts increasingly order penalties following consent between the ACCC and the offending firm, rather than through any meaningful analysis of the losses suffered by consumers.<sup>36</sup> As Merkel J observed: "there is some force in the observations ... that current penalties in Pt IV prosecutions appear to be on the low side. It may well be that a lower 'tariff' has emerged, in part, as a result of the Court's acceptance of settlements arrived at by the ACCC".<sup>37</sup> Accordingly, on one view, cartels continue to prosper because the risks and cost of potential penalties are outweighed by the financial gains from collusion.

Increasing the range and severity of penalties for price fixing is essential. Clearly, corporations only commit illegal price fixing through individual executives.<sup>38</sup> As Finkelstein J observed: "Generally, the corporate agent is a top executive, who has an unblemished record ... It is easy to

<sup>30</sup> See *ACCC, Immunity Policy*, n 23, ss 4, 11. Further, in the United States and United Kingdom, a firm deemed to be a "coercer" will not be eligible for immunity. The elements of coercion are "an unwilling participant in the cartel" and "clear and positive steps from a coercer to pressure that unwilling participant to take part"; see Office of Fair Trading (UK), *Leniency and non-coercion* (2005) p 11 (an interim note on the handling of applications).

<sup>31</sup> Samuel, n 4 at 82.

<sup>32</sup> See *ACCC, Immunity Policy*, n 23, s 9. Even if the firm is ineligible for immunity, the Guidelines make it clear that the firm may still receive credit for co-operation under the co-operation policy; see *ACCC, Immunity Policy Guidelines*, n 23 at [65].

<sup>33</sup> See *ACCC v Leaky Petroleum Pty Ltd* [2007] FCA 794 at [131]-[136]; (2007) 160 FCR 321 where Gray J found that not one witness could remember a specific date or specific conversation concerning the fixing of prices.

<sup>34</sup> Leslie, n 7 at 642-643, also citing Connor, n 15, p 509 and Spratling GR, "The Race for Amnesty in International Antitrust - If You Don't Come in First, the Rewards for Second Place are No Small Consolation" (2000) 16 Int'l Enforcement 1, Rep 710 at 712.

<sup>35</sup> In the United States, Archer Daniels Midland Company was the last to confess in the lysine cartel but the first to confess in the citric acid cartel and therefore struck a favorable deal with authorities. See Leslie, n 7 at 643.

<sup>36</sup> In *ACCC v Tyco Australia Pty Ltd* [2000] ATPR 41-740, the court imposed corporate penalties of \$3.3 million and \$1.4 million as recommended by the parties, but noted that no attempt had been made to estimate the magnitude of losses to consumers caused by the price fixing. The difficulties in assessing the deterrent effect and profits made by contraveners is acknowledged in many other cases. See, eg *ACCC v Pioneer Concrete (Qld) Pty Ltd* [1996] ATPR 41-457, *ACCC v Foundate (Australia) Pty Ltd* [1998] ATPR 41-615; *ACCC v Tubemakers of Australia Pty Ltd* [2000] ATPR 41-745; *ACCC v Roche Vitamins Australia Pty Ltd* [2001] ATPR 41-809.

<sup>37</sup> *Schneider Electric (Australia) Pty Ltd v ACCC* (2003) 127 FCR 170 at 184; [2003] ATPR 41-957.

<sup>38</sup> Hammond SD, *Charting New Waters in International Cartel Prosecutions*, Paper presented to the National Institute for White Collar Crime (San Francisco, 2 March 2006) p 13.

forget that these individuals have a clear option whether or not to engage in unlawful activity, and have the choice to do so.<sup>39</sup> The spectre of potential imprisonment is likely to raise the cost of trust between colluders. The experience in the United States has been described as follows:

The real risk of imprisonment for cartel participation ratcheted up the stakes considerably. Before the first imprisonment of businesspeople for price-fixing in the 1950s, "[c]orporate antitrust convictions were the equivalent of corporate parking tickets". Once the courts began sentencing price-fixers to federal prison, it became easier for social norms of competition to take hold in many industries.<sup>40</sup>

In the United States, under the *Sherman Act 1890* (US), a conviction for price fixing can now result in imprisonment of 10 years, up from the previous three-year maximum, which reflects how serious cartel conduct is viewed in that country.<sup>41</sup> The United States experience shows that possible incarceration of individuals is a strong deterrent to committing price fixing.<sup>42</sup>

Coupled with the social stigma to the fallen executive, the sanction becomes a powerful deterrent and distrust device. It has been too easy in the past for the individual perpetrators of price-fixing arrangements to hide behind the corporate cloak. Corporate fines are small change, indeed, when compared with spending time in jail.<sup>43</sup>

The ACCC first advocated the introduction of jail sentences for individuals involved in serious collusion in 2003, after conceding that fines were not sufficient to discourage cartel behaviour.<sup>44</sup> Following recommendations of the Dawson Committee after a review of the *Trade Practices Act 1974* (Cth), a proposed legislative amendment will see jail terms of up to five years for individual price fixers.

Criminalising price fixing, including the prospect of jailing price-fixing executives, when coupled with the lure of immunity,<sup>45</sup> considerably raises the trust stakes for colluders, making it easier for regulators to successfully prosecute and dismantle cartels.

### THE PRICE FIXER'S NEW DILEMMA

What the Commission's Immunity Policy and the proposed new sanctions create is a second distinct Prisoner's Dilemma, namely, whether participating firms will defect by exposing the cartel to the ACCC in exchange for immunity. This confession option for price fixers, based on the avoidance of punishment, more closely resembles that of the prisoners in the Prisoner's Dilemma.<sup>46</sup> These initiatives also compound the first dilemma faced by price fixers of whether to co-operate or defect from a cartel arrangement. Again, trust is the glue keeping the colluders together.

As with the investigators in the Prisoner's Dilemma, by openly offering the same deal to every member of the cartel, the authorities are able to fuel distrust between the players. The policy itself creates distrust by creating an incentive and reward to defect while fostering suspicion and risk that a cartel partner is going to avail itself of the reward. It "encourages insiders to provide information and penetrates the cloak of secrecy [by providing] clear and certain incentives to potential applicants to report to the ACCC".<sup>47</sup> As Samuel noted recently, "the Immunity Policy makes it more likely that

<sup>39</sup> *ACCC v ARB Transmission and Distribution Ltd (No 2)* [2002] 190 ALR 169 at 176-177; [2002] FCA 559.

<sup>40</sup> Leslie, n 7 at 631, also citing Connor, n 15, p 43.

<sup>41</sup> Hammond, n 38, p 13; Leslie, n 7 at 647.

<sup>42</sup> Hammond, n 38, p 13.

<sup>43</sup> Anecdotally, American executives would much rather pay a higher fine than go to prison. See Samuel, n 4 at 87. Most recently, Heerey J supported the legislative implementation of jail terms for price fixers, noting that "the Government has yet got around to introducing criminalisation": *ACCC v Visy Industries Holdings Pty Ltd (No 3)* [2007] FCA 1617 at [311].

<sup>44</sup> See Fols A, *Issues in Competition Law: A Perspective of the Australian Competition and Consumer Commission*, Paper presented to the Queensland Press Forum (12 June 2003) p 4.

<sup>45</sup> The current Immunity Policy only confers protection against civil proceedings issued by the ACCC but presumably will be amended to cover civil or criminal proceedings once the amendments take effect.

<sup>46</sup> Leslie, n 7 at 638.

<sup>47</sup> See ACCC, *Immunity Policy Guidelines*, n 23 at [8]-[9].

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cartel participants will break ranks and report illegal conduct to the ACCC, and more likely that perpetrators will be caught and punished".<sup>48</sup> The cartel firms also realise that even if all members keep quiet, there is still the chance of detection and penalties.

The dangle of the immunity carrot is critical. As Samuel recounted of one applicant's observation after being informed that it was not at the head of the leniency queue: "What you're telling me is that the leniency carrot has already been eaten."<sup>49</sup> The promises of immunity and whistle-blowing rewards reflect a trend by antitrust law enforcement agencies to use reward-based approaches (carrots), to complement punishment-based deterrence (sticks).<sup>50</sup>

Using rewards to create distrust among corporate criminals is aptly described in the following example:

As exemplified by the prisoners' dilemma game, prosecutors routinely separate criminals and offer reduced punishments for those who cooperate in convicting the others. In a recent, dramatic example of this approach, special deals between prosecutors and criminals cracked open a price-fixing arrangement between Sotheby's and Christie's art auction houses. The result will be hundreds of millions of dollars in fines and civil liability, as well as prison sentences.<sup>51</sup>

The impact that immunity policies have on the trust between corporate criminals was well captured by the comment:

When offered bounties and immunities, criminals would not be able to trust each other. Because each partner is a potential whistleblower, corruption [or for present purposes price fixing] might unravel because the necessary cooperation and trust is dissipated ... Insiders will engage in a race to be the first to disclose, fearing that others will bring forward the essential information and reap the reward and accompanying immunity.<sup>52</sup>

In a general sense, once the cartel's demise is imminent, distrust among colluders prospers.<sup>53</sup> Similarly, confession becomes the dominant strategy once a firm suspects its cartel partner is considering confession. This is exemplified by the recent confession and co-operation by Amcor with the ACCC on an alleged cardboard price-fixing cartel. In recent interlocutory proceedings, Heerey J described this in the following way:

The genesis of this proceeding is an unrelated action which Amcor took in late 2004 against some of its former officers. Amcor was granted an Anton Pillar order. On viewing some of the documents obtained on the resultant search Amcor and its solicitors took the view that they disclosed contraventions of Pt IV by Visy and Amcor. Amcor reported the matter to the ACCC, which subsequently granted it and its officers an immunity.<sup>54</sup>

Offering immunity also leads to firms having a reputation for co-operating with the authorities, thereby diminishing other firms' trust that the former will be effective cartel partners.<sup>55</sup> The act of generating confessions also spreads distrust throughout price-fixing industries generally.<sup>56</sup>

By facilitating another type of Prisoner's Dilemma through the immunity policy, regulators are also seeking to make "the expected costs of not confessing greater than expected value of not

<sup>48</sup> Samuel, n 17, p 5.

<sup>49</sup> Samuel, n 4 at 80.

<sup>50</sup> Depoorter B and De Mot J, *Whistleblowing*, George Mason University School of Law Working Paper Series, Paper No 13 (2004).

<sup>51</sup> Coote R and Garoupa N, *The Virtuous Circle of Distrust: A Mechanism to Deter Bribes and Other Cooperative Crimes*, Berkeley Program in Law & Economics, Working Paper Series, Paper No 32 (2000).

<sup>52</sup> Depoorter and De Mot, n 50, p 23.

<sup>53</sup> Leslie, n 7 at 600.

<sup>54</sup> *ACCC v Visy Industries* [2006] ATPR 42 202 at 44,838 (Heerey J); [2006] FCA 136. At the time of publication, the proceeding resolved with Visy being found to have engaged in 69 price fixing related contraventions of the *Trade Practices Act 1974* (Cth) and being ordered to pay \$36 million in pecuniary penalties. This avoided possible costly and lengthy litigation for the ACCC.

<sup>55</sup> Leslie, n 7 at 630.

<sup>56</sup> Leslie, n 7 at 643.

confessing<sup>57</sup> or merely withdrawing from the cartel. This is critical, since the confessing firm still exposes itself to civil proceedings<sup>58</sup> and, in the case of withdrawal, exposes itself to sanctions up to the point of withdrawal.

#### CONCLUSION

While cartel members attempt to escape Prisoner's Dilemma scenarios by developing strong trust measures, it is essential that competition law policy and regulators increasingly seek to fuel distrust to create and magnify the effects of the Prisoner's Dilemma.

The immunity carrot, coupled with proposed criminal sanctions, fosters distrust and gives rise to a new price-fixing dilemma between cartel firms, one that is likely to lead to more successful prosecutions of price-fixing cartels. Its clear incentives will effectively discourage firms from joining cartels and encourage cartel members to confess.<sup>59</sup>

Of course, there are several real world limitations in analysing price-fixing cartels within the Prisoner's Dilemma paradigm. Cartels often involve a group of firms, not just two; firms are able to communicate with each other; they have a long series of opportunities to co-operate or defect; and even have the option of not playing the game.<sup>60</sup> Notwithstanding these limitations, analysing cartels as a form of Prisoner's Dilemma assists regulators in breaking down trust between rival firms and highlights the motivation behind pursuing collusion.

<sup>57</sup> Leslie, n 7 at 641.

<sup>58</sup> The prospect of civil proceedings against price fixers is a double-edged sword for the regulator. On one hand, with a likely increase in private damages actions in Australia consistent with the United States, it offers a general deterrent. On the other hand, it affords a reason not to confess to the regulator.

<sup>59</sup> Leslie, n 7 at 680.

<sup>60</sup> Leslie, n 7 at 552.