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Alex Wynn

Bond University, awynn@student.bond.edu.au

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Negotiation and anti-competitive corporate behaviour

Richard Pratt and the Visy executive saga and the class action against Amcor

Alex Wynn

The cartel involving Richard Pratt's Visy companies and Amcor, their biggest rival in the corrugated fibre packaging (cardboard box) industry, was recently the subject of a Federal Court judgment imposing record fines upon Visy for anti-competitive conduct.

The Australian Competition and Consumer Commission (the ACCC) brought a claim against Visy in late 2005 for operating a price-fixing cartel with Amcor. The ACCC had found out about the conduct when Amcor 'decided' to cease the cartel conduct, reported it and claimed immunity in return for cooperating with the regulator.

During the two years between the ACCC commencing its case and Visy's reticent admissions, a great deal of negotiation activity took place. This article attempts to deconstruct the negotiation from the public documents available, including material released by the regulator, the parties and the Federal Court. It hypothesises what may have been some of the issues, positions and interests of the negotiating parties over this period; touches upon the earlier negotiating that led to the case; and speculates upon the ramifications for the various parties' interests in the future.

At the outset it is worth noting that there is little to indicate any integrative bargaining behaviour. The characteristics of distributive bargaining — to wit the mistrust and suspicion referred to by Lewicki et al¹ — are prevalent features of the saga. Lies, threats and bluffs are the essential toolkit for a classical positional negotiator. They would all appear to have been prevalent between the parties.

Preliminary — the first 'negotiations'

Well before the infamous meeting between Richard Pratt and the then Amcor chief executive Russell Jones at the All Nations Hotel in 2001, parties connected to the two businesses, but whose names are unknown, began the process of competitor collusion. Every negotiation has a beginning — in this case by first mooted the notion that the arch rivals should not compete on price so as to maximise profit from their shared customers. This unknown discussion between unknown parties might be described as the first negotiation.

The 'agreement' or understanding reached between Richard Pratt and Russell Jones did not arise spontaneously. The meeting was not accidental. They were colluding illegally in making arrangements that would have far-reaching impacts upon a whole range of other persons, the invisible end-use consumers and later litigious parties — that is, other rivals and their own customers. The 'over-arching understanding' reached between Pratt and Jones is the deal cementing the first negotiation phase and was described by Justice Heerey as 'the single most serious contravention'² of the provisions of the *Trade Practices Act 1974* (Cth) (TPA). In simple terms, that meeting represents the end of the first negotiating phase.

The deal comes unstuck

James (Jim) Hodgson is not a name well known to the public. He was a senior executive at Amcor who left the company to set up his own business in 2004. His departure and business plan was badly received by Amcor which initiated litigation. An application for discovery led to the issue of an Anton

Piller order allowing for a search of Hodgson's home. Allegedly unknown to the new management team at Amcor, Hodgson was part of the group of persons engaged in cartel behaviour with Visy. It was Hodgson's clandestine audio recordings of conspiratorial conversations, which when discovered, led to the cartel's exposure.

The furtive conduct by Amcor and Visy executives, which was revealed by both Hodgson's audio recordings and subsequent documentation disclosed by Amcor to the ACCC, made Visy's denials of wrongdoing almost comical. Secret meetings took place in car parks and motels. Pre-paid untraceable mobile phones were the preferred means by which the executives of each organisation communicated with one another to give effect to the cartel conduct.

Key parties and their interests

Amcor

Amcor Limited is one of Australia's largest cardboard paper and packaging companies with domestic and overseas operations. It claims annual sales worldwide of in excess of AU\$10.8 billion. It has over 86,000 shareholders and for the most recent tax year made a profit of almost AU\$1.2 billion. Russell Jones was the chairman at the time of the fateful agreement.

Visy

Amcor's key rival in the Australian cardboard paper and packaging industry is Visy. Amcor and Visy share 90% of the market between them. Within the Visy group there are a large number of separate proprietary limited companies connected with the core



business of recycling and creating cardboard packaging.

The Visy companies also operate overseas, principally in the US. Throughout this article, except where indicated, Visy is used as a generic description for all the linked companies. Harry Debney was until recently the CEO and Rod Carroll was formerly Visy's General Manager.

Richard Pratt

Visy is owned principally by the billionaire Richard Pratt and claims to be the largest privately owned such company in Australia. Pratt is one of Australia's and the world's richest men.

As the subject of Australia's quintessential 'migrant makes good' story, billionaire businessman Richard Pratt would not have enjoyed the media circus which surrounded the punishment imposed on his business by the Federal Court for anti-competitive corporate behaviour. Usually in the press for more flattering reasons, Pratt's expressions of remorse for the illegal activities of himself, his business and its executives failed to strike a chord of sincerity, at least with one significant interested party, Justice Heerey.³

Richard Pratt is a media figure attracting a good deal of publicity. He has established his own philanthropic organisation, the Pratt Foundation, which very publicly spends millions of dollars each year on good causes. He is the chairman of the AFL team Carlton. He enjoys celebrity status. Pratt's character plays a pivotal role in the negotiation — as does the character of any major participant in a negotiation. The personal and business ethics of a participant influence behaviour.

Richard Pratt and his Visy businesses have a long history of involvement in litigation with the ACCC and its predecessor the Trades Practices Commission (TPC) in relation to anti-competitive corporate behaviour. As long ago as 1984 Visy was involved in a case against the TPC, where Visy tried to set aside injunctions preventing it from acquiring control of a competitor.⁴

'I know a lot more now' sounds a

little unlikely coming from Richard Pratt in the circumstances. It may be assumed that from a negotiator's perspective this was simply a case of a hard positional stance to reinforce attempts to preserve Pratt's post-court public image and attempt to save face.

ACCC

The Australian Consumer and Competition Commission (the ACCC) is the Federal Government agency with responsibility for upholding anti-competition legislation and subordinate legislation. One of the key legislative instruments applicable in the anti-competitive arena is the TPA.

The ACCC operates a 'leniency policy' for cartel behaviour. The policy was first published in 2003. This has since been updated but the core purpose of the policy remains to encourage participants to a cartel to volunteer admissions and evidence in return for immunity from an ACCC court claim. It is under this umbrella that Amcor sought shelter from the ACCC in the wake of discovering the documents and tapes found during its Anton Piller search in 2004.

It is important to note that while the ACCC leniency policy trades 'final immunity' from ACCC court proceedings it can make no such deal with respect to other aggrieved parties who may have lost out by virtue of the cartel. Apart from the class action headed by Jarra Creek, Amcor is also defending a claim from one of its largest customers, Cadbury Schweppes for damages arising from the Amcor-Visy arrangements.

Amcor is a listed company with responsibilities to all of its shareholders. Visy on the other hand is a privately-owned business. The constraints upon the board of Amcor in discovering the existence of the cartel would not have been so pronounced in Visy. If the roles had reversed and Visy had 'discovered' the cartel one has to wonder whether the whole saga would have come to light and whether the myriad of subsequent negotiations by the huge number of affected parties would ever have occurred.

Graeme Samuel

Graeme Samuel has been the chairman of the ACCC since 2003. On 2 November 2007 he delivered an illuminating statement to the media following the Court's sanctioning of the 'agreed fines'. In his statement Mr Samuel made the remark that the penalties imposed, 'represent the high watermark in the enforcement of competition law in Australia.' The amendments to the TPA (effective from 1 January 2007) allowing for a penalty to be based upon the potential gain or turnover of the cartel operator must have been a source of frustration to him. The 'high watermark' could then have been much higher.

However, Mr Samuel makes his own position clear later in the same statement calling for the imposition of criminal sanctions including time in jail for corporate executives engaged in cartel behaviour. This is analogous to the remarks made by Justice Heerey. It seems Mr Samuel was pleased with the outcome, but vexed by the relative 'toothlessness' of the penalties available for those he regards and refers to as 'well-dressed thieves'.

Justice Peter Heerey

Justice Peter Heerey of the Federal Court had the job of determining whether the amount of penalty negotiated between Visy and its executives on the one hand and the ACCC on the other was suitable. His 66-page judgment actually imposed the fines. His proper concerns to see justice done according to the law mean applying the same sentencing principles (typically referred to as consistency, proportionality, totality and concurrency) as applicable in any other case.

Justice Heerey seems to have found the legislative shackles upon the range of penalties at his disposal frustrating. Unlike similar anti-competitive provisions in similar societies (such as the US and the UK) the Australian TPA does not impose a criminal sanction upon transgressors of cartel conduct. One can only speculate how Pratt might have breathed a sigh of relief when he first learned that the worst that could happen to him was the imposition of a financial penalty well within his means.



Multiple party negotiations

In the instant case there were, and indeed still are, multiple parties who have an interest in the outcome of the negotiation process. Apart from the corporate entity of Visy and the ACCC, the individual executives of Visy were drawn into the negotiation. Without their admissions and agreements the matter could easily have progressed to a contested hearing with all of the unwanted disclosure (from Visy's perspective) and unnecessary expense (from the ACCC's perspective).

Further, in a case as multi-faceted as Visy-Amcor-ACCC there would have been a large number of negotiation team members involved for each party. The use of teams would have enabled the issues to be broken down and discussed by the team members with either the relevant executive authority or expertise. It is arguable that the team for Visy would have been weighed down by the overbearing presence of its immensely powerful figurehead, Pratt. Domination by one person in a team can be counter-productive as it dilutes the decision-making ability of the other members.

Multi-party negotiations take place constantly yet much of the literature on negotiation centres upon two-party disputes. Even within a party there will often be disparate interests. For instance, Richard Pratt the individual was a separate party to Visy in the ACCC action yet no-one would sensibly argue against his being the person that finally consented to the final penalty imposed upon Visy and the statements of regret.

More subtly, each of the persons in the legal, regulatory and executive negotiating teams would have their own agendas and interests, be they career aspiration or self-preservation.

The different roles of the persons who were present may have been dictated by their professional positions (the investigating ACCC officers for example) or their conduct (the transgressors for example).

On a practical level the number of persons present at the negotiations, the teams of lawyers, the parties, the regulator's lawyers, would have required a sufficient physical facility — a venue capable of hosting the meetings with privacy and comfort for a potentially large group of be suited representatives.

The mechanics of the negotiation process: agenda

Commercial negotiations with the financial ramifications of the Visy affair are highly complex and multi-faceted. The agendas alone would have been a subject of negotiation. Keeping a sensitive topic off-agenda would be a

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bargaining chip in itself. The negotiations may have been sufficiently complex to warrant a chairperson, or at the very least a facilitator. It is trite to say that control of the process of negotiation is of great advantage to a negotiator.

The negotiated penalties in the Amcor-Visy cartel affair and its Federal Court culmination would almost certainly have necessitated multiple meetings, or iterations, and negotiation processes. In the progress of negotiations involving such an intricate set of circumstances as presented in the Visy saga each meeting would have had to cover discrete ground. The sheer volume of material would have been vast, based upon the size, scale and duration of the illicit activity. It is perhaps to the credit of the Federal Court's Justice Heerey that his judgment went only to 66 pages!

Decision making in negotiation

In a complex negotiation involving multiple parties and representatives there can be a difficulty in identifying the person with ultimate responsibility for making a decision. It would be inconceivable in the Visy and ACCC discussions for Richard Pratt not to have played a central role in any key concessions made by his team. This would not necessarily mean that he attended every meeting or took part in every telephone discussion but rather that he would have sanctioned the concessions beforehand. The negotiation team would have known how far they could go.

From the ACCC's perspective, as a government agency they are bound in red tape and bureaucracy. Decision-making processes for the regulators would be far more structured and in keeping with positional and departmental hierarchies. The volume of people and amount of material would have meant delays in analysing and conveying information and positions of the other side to the relevant decision makers and then relaying the response.

Relevant law

The salient law underpinning the recent court case between Visy and the ACCC (which was 'settled' by Visy's agreement to the imposition of a record fine) is found within the TPA.



Constraints upon negotiation strategies

Apart from the common law imposition of good faith as a term implied into contractual relations, the TPA makes unlawful both misleading and deceptive conduct⁵ and unconscionable conduct.⁶ Solicitor and Barrister Rules throughout the States also impose requirements upon legal practitioners to act with honesty.⁷

Price fixing

The key operative provision against the collusive pricing behaviour of Visy (and indeed Amcor) is found at s 45A in Part IV of the TPA that deals with restrictive trade practices.

The provision is prolix, running to six operative sub-clauses,⁸ but in essence the conduct prohibited is making (or proposing) a contract, agreement or understanding with respect to pricing which has (or could have) the effect of 'substantially lessening competition.'

Penalties

Section 76 of the TPA provides the court with the power to impose substantial financial penalties for each contravention of Part IV. The maximum penalties are prescribed by the legislation and are fixed as monetary amounts or, in a change to the legislation too late for this case, amounts having a correlation with the potential corporate gain or business turnover. For individual transgressors, the maximum penalty which the court may impose is \$500,000.⁹ For corporate entities this maximum is \$10,000,000.¹⁰

As stated above, for corporations, the maximum penalties provided for in s 76 can now vary according to the size of the financial gain made as a consequence of the behaviour contravening the TPA. This method of calculating the penalty is of significance to Pratt and Visy given that the figures relating to the contravention, according to the solicitors for the Amcor class action plaintiffs, ran into hundreds of millions of dollars.

On the face of it, 'settling' for the imposition of a financial penalty of \$36,000,000 seems to have been

contrary to Visy's best interests. However if there was a time to be culpable under the TPA it was for activity prior to 1 January 2007.

Section 76(1A)(b)(ii) of the TPA now allows for a pecuniary penalty of up to three times the value of the benefit reasonably attributable to the contravening conduct. If the anecdotal allegations by the class action plaintiffs are even partly right, the penalty that could have been imposed by the Federal Court under these new provisions in the TPA would have run into hundreds of millions of dollars. From Visy and Pratt's perspective they were 'caught' at the right time.

It is a trait of positional negotiators to minimise disclosure. Visy and Pratt curtailed the disclosure requirement by agreeing to the ACCC's claim and settling upon the pecuniary penalty. The Court therefore never saw the full extent and effect of the cartel conduct on Visy's profits and turnover. For those embarked upon a class action against Amcor (and Visy as third party) this will have been very disappointing.

A classically interest-based negotiator would look to draw out all of the problems to be resolved. Given the riskiness of that type of discussion, in light of the scale of money involved in potential class actions, it must have been the case that the Visy team adopted a positional hard line stance, agreeing to small concessions to make the \$36,000,000 fine appear attractive to the ACCC. To the investigating officers and to Graeme Samuel the deal struck must have been seen to serve its public purpose.

There is no criminal sanction or non-pecuniary penalty for a breach of Part IV of the TPA. This situation does not reflect of the situation in overseas jurisdictions, such as the US, Japan and much of Europe, including the UK, where a prison sentence may be imposed upon those involved in unlawful cartel conduct.

The fact that the court is unable to impose a criminal penalty upon the perpetrators of cartel conduct was an obvious source of frustration for the Federal Court when it handed down judgment ratifying the Visy penalty.¹¹

Interestingly Kevin Rudd included in

his 2007 electoral campaign promises to introduce the criminal sanctions foreshadowed as appropriate by the Dawson Committee. It remains to be seen how much of a priority criminalising cartel conduct will be to the new Labor government.

Negotiation and lawyers

Lawyers are often concerned with legal rights and obligations to the exclusion of wider issues. Pursuing a purely legal objective will rarely deliver a wholly satisfactory outcome to a party.

A legal dispute might be better seen as a manifestation of a problem or conflict between competing interests of different persons. From a commercial perspective any over-concentration on legal positions will lead to expensive and uncertain litigation. Large legal bills and ultimately no participation in decision making are certainties of resolving dispute by dint of court process.

Little formal training in negotiation is required in order to qualify as a lawyer. Experience and aptitude are seen to make effective negotiators. Indeed, David Spencer makes the comment¹² that no amount of literature (about negotiation) can be a substitute for experience.

Richard Pratt is a commercially-minded man. His negotiation team will have been cognisant of this when acting for him in striking the deal with the ACCC. No amount of legal manoeuvring was going to let him off the hook for the charges laid while Amcor and its current crop of executives provided the unarguable evidence to the regulator. However there is advantage to be gained in a negotiation by being resistant to admit and concede — these were tactics employed by the Visy team to wear down the ACCC and to try to distance Pratt from any personal misconduct.

In the legal profession rules apply to practitioners engaged in negotiation, as with other aspects of practice. For example in Victoria (where the discussions in the Visy ACCC negotiation primarily took place) the *Professional Conduct and Practice Rules 2005* is the body of rules applicable to solicitors. It contains a



preamble to the section dealing with relations with other practitioners which says 'practitioners should act with honesty, fairness and courtesy'. The same tenet applies to relations with third parties.

Planning for the negotiation

Planning for the series of negotiations by Amcor, Visy and the ACCC would have been a crucial stage in determining the outcome. Lewicki et al refer to planning prior to negotiation as 'the dominant force for success'.¹³

After discovering the incriminating material during the Anton Piller search the clock began to run for Amcor to decide what to do. The few days between receiving the incriminating material and deciding what to do were vital for Amcor to make initial preparations and to research their position in terms of the ACCC's leniency policy which was to provide them with immunity. Whether Amcor also properly assessed its overall exposure risk to claims from all affected purchasers during the existence of the cartel seems at best doubtful, but clearly there was compunction upon the Amcor board of directors to act quickly.

Visy meanwhile may have become aware of the revelations through the commercial grapevine or one of its co-conspirators within Amcor. The position of Visy differs in their not having to respond to such a wide group of hands-off shareholders as Amcor was, but instead primarily to one man, Richard Pratt. It would be fascinating to know whether any negotiation skirmishes took place between Visy and Amcor between the discovery of the cartel by the new executives and the point when Amcor got around to reporting the cartel. The time lag suggests rather more than legal research occurred at this time.

Amcor's preparation for reporting to the ACCC was effectively the first step along the way to extracting itself from the cartel. The assessment made by the board to report the cartel would have

considered the likely penalties for the breaches of the TPA and that these could be avoided with immunity.

Visy during the pre-reporting period would have been active in terms of closing down the illegal operations and in briefing its lawyers in readiness. A cynic might suggest that there would be ample opportunity to prevent full disclosure by adopting the Arthur Andersen 'Enron' strategy of document destruction.

The opening of negotiations

There are typically three ways in which negotiations are opened:

- high soft/low soft;
- reasonable firm;
- problem solving.

One can only surmise how the ACCC and Visy commenced their negotiations after Amcor had made their admissions to the ACCC in November 2004. It must be the case that the government agency whose purpose is to uphold the TPA would have taken a reasonably firm approach. Not only does the ACCC have a duty to see justice done, it must ensure justice is seen to be done:

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public exposition of the illegal cartel conduct acts as a deterrent to others.

Further, officers and agents of the ACCC would in all probability claim the moral high ground. The ACCC is not constrained by profit-making or loss-minimising considerations. It does, however, face the accountability and budgetary constraints of any government agency.

Richard Pratt and Visy would have entered into the negotiation process driven largely by financial motivations to minimise the likely pecuniary

penalty. Richard Pratt may also have been concerned about the impact on his personal reputation. As a public figure, he has enjoyed his reputation as a philanthropist.

As an 'opening stance' in the negotiation Visy might well have taken the view that to sit back and see how much material the ACCC had would provide them with an insight into the strength of the ACCC's case. This would have involved a careful balance by Visy, being both inquisitive and relatively non-responsive. It is in some ways a 'fishing expedition'. Concessions made by Visy would have been minor in order to elicit the ACCC's disclosure.

Throughout the litigious period that followed the initial report, Visy maintained its position that it was trying to gain market advantage over Amcor and not exploit its customers. This stance, upon which the Court later poured scorn, has remained unaltered even after settlement and this inflexibility and unwillingness to make admissions shows a tendency towards hard bargaining by Pratt and his organisation.

Sponging and delaying as techniques during the negotiation process

The negotiation technique of sponging is used to draw the vitriol from a situation by allowing an aggrieved party to vent their anger. Essentially it refers to the negotiator being a passive listener to the complaints of the other party. However the notion of Pratt or any of his lieutenants passively listening to a litany of complaints from the ACCC's officers is unlikely.



Nonetheless, Amcor and Visy may in time use sponging techniques to deflate any expectancy of their customers who seek to renegotiate prices in future contractual arrangements.

It is a fundament of good negotiation strategy that the negotiators try to glean an insight into the interests of the parties. It is all very well for a party to take a particular position — Amcor say, denying liability in the Jarra Creek (the class action) claim — but quite another to get to their interests. These could be denying and delaying a strong *prima facie* claim to frustrate and demoralise the claimants, possibly exhausting their resolve and resources which could diminish or defeat a claim that Amcor is unwilling or unable to pay.

Offers — no early offers and linked bargaining

The time and expense of running the litigation would have weighed heavily upon the public purse from which the ACCC receives its funding. Visy and Richard Pratt had no such constraints. This imbalance would have provided Visy with a strong bargaining chip in its opening offers to settle. There is no evidence of any early offer by Visy. Indeed, from the material and Visy's early strong denials of misconduct, it seems reasonable to assume that Visy's strategy was to weaken the ACCC by 'creating doubt'. It may perhaps have simply presented an opportunity for the regulator to withdraw its case generously, linking this demand with an offer not to sue in return.

Getting embroiled in a premature discussion about the size of any likely penalty would have been unwise. That approach could have entrenched the positions of the parties. The 'admissions' and concessions may never have been forthcoming if the negotiation was not 'ripe' for offers.

The outcome suggests that much linked bargaining was done late in the proceedings. In the case of Visy, 37 separate contraventions could have meant the ACCC pushing for a \$370 million penalty at court and then facing a hugely expensive appeal

process. However putting forward public acknowledgment of wrongdoing as an alternative to higher penalties drew together the parties' interests and led to the deal.

Visy maintained its stance that in its dealings with Amcor it was trying to gain a market advantage over its rival. Improbable as this may appear the framing of Visy's view in this regard and the fact that their position remained unaltered even after the Court decision may shed some light on Visy's attitude. The way in which a negotiating party perceives, or frames, its view impacts heavily upon its behaviour.

Concessions begrudgingly given

Had Visy immediately conceded the ACCC's case it would have sent a signal of weakness not only to the regulator but also to the marketplace. There was a large public element involved in Visy's reluctance to admit to the full extent of the cartel conduct. Knowing that Pratt and Visy were happy to engage in a dispute with the ACCC would have acted as a signal to Visy's customers and competitors that the company was no push-over.

In some ways Visy may have regarded the eventual outcome of the ACCC case as inevitable and indeed should (and probably did) have planned the result. Making the ACCC work so hard and for so long for its 'success' sets a precedent to other regulators and claimants. This public display of belligerence may very well have been one of the driving interests for Visy.

Ultimately Visy conceded that the ACCC's case was well founded enough to compel admissions of illegal conduct and to strike a deal as to the pecuniary penalties.¹⁴ The ACCC was bound by legislation for the penalty to be imposed by the Court which process led to the 'sackcloth and ashes' routine by Richard Pratt in his October appearances at the Federal Court. The Court appearances of Pratt and his executives were part of the bargain. They provided a visible public condemnation of the corporate transgressors which satisfied the ACCC's tenet. From Visy and Pratt's

perspectives such performances cost relatively little barring the lawyers and public relations teams who carefully controlled the words that were spoken.

The requirement for an 'umpire', in this case a Federal Court judge, was important to validate the ACCC's claim. His Honour Justice Heerey however, came into the game sporadically and significantly only after the parties had agreed to the appropriate penalty. While the judge did not have to agree with that penalty he would have been under enormous pressure to do so. Dismantling the agreement would have seriously damaged the efficacy of the ACCC's future claims and credibility. This factor would have been compelling to the Court.

The Amcor class action

Visy certainly dodged the 'winner's curse' of agreeing too quickly but perhaps the same could not be said of Amcor. Visy dragged its heels throughout the litigation process and the settlement reached regarding penalties was practically done at the court room door. After their relatively prompt admissions and co operation with the ACCC, Amcor were wrestling with a class action of their own (albeit they have dragged in Visy as a third party) and a high value claim from Cadburys. It is conceivable that Amcor's board may have felt some post-settlement remorse (with having gone to the ACCC so soon after discovery and without fully considering the ramifications for doing so).

No number of immunity deals with the ACCC or any other government agency was going to provide cover for the cartel members from claims by the affected customers. Visy's controlled and somewhat ambiguous admissions in the ACCC case do not exactly open the door for a flood of litigation but they do perhaps show vulnerability.

In 2006 litigation lawyers Maurice Blackburn initiated a class action claim against Amcor on behalf of businesses who bought corrugated fibre packaging from Amcor or Visy between 2000 and 2005.

In the group or class action the lead plaintiff is Jarra Creek Central Picking Shed Pty Ltd. The defendant is Amcor. Visy however have been joined as a



third party by Amcor. What this joinder means in effect is that if a judgment is made in favour of the plaintiffs, then Amcor will look to share the outlay of any awarded damages with their co-cartel member, Visy.

The case is continuing through its various interlocutory stages and is now at the point of discovery (or disclosure as it is referred to in Queensland). In October following an application by the plaintiffs for greater discovery an order was made by the Court compelling the disclosure of 17,000 or so documents. This application was resisted by the defendant and third party. The sheer volume of material being sought is indicative of a very long pre-trial process. Part of that process will inevitably encompass negotiations from tiny concessions along the interlocutory stages to possibly a full settlement conference.

There seems to be confusion within Maurice Blackburn as to when the likely trial of the action will take place.

According to a general statement from the firm the trial is likely to take place during 2008, but the chair of that same firm commented recently, 'There are many more years left in this case'.¹⁵ Of course, the pressing of the case all the way to a trial pre-supposes that a settlement is not reached beforehand between the parties. The chairman and head of Maurice Blackburn, Bernard Murphy has indicated that further confidential negotiations may be occurring behind the scenes, but until any eventual deal is reached and made public one can only speculate as to the negotiation tactics and strategies being employed.

Recent developments: New Zealand Commerce Commission

The cartel arrangements with Amcor continue to have ripple effects for Visy. Despite the Australian side of the behaviour having been finalised by the Federal Court decision of November, proceedings have now been commenced against Visy in New Zealand in relation to the same behaviour. The New Zealand Commerce Commission (NZCC) has issued proceedings against

Visy in the High Court of New Zealand in Auckland and again has granted immunity to the informant, again Amcor. This is an action which has flowed from the Australian Federal Court resolution with proceedings only getting underway 22 November 2007 (per the NZ Commerce Commission press release).

The New Zealand *Commerce Act 1986* has similar provisions to its Australian counterpart the TPA (to the point where the primary dollar sum fines are set at the same maximums albeit NZ currency), but significantly and, like the now amended TPA, the punitive element of the NZ legislation

to have been operative. Rod Carroll was the former general manager of Visy who was sacked by the group once the revelations about the cartel became public. In late October 2007 Harry Debney resigned his position after having given his evidence in the Federal Court hearing. His resignation statement tried to deflect responsibility for the TPA breaches away from Richard Pratt referring to a 'disproportionate focus' being placed on the chairman. Debney said that he was 'personally responsible for the Trade Practices breaches ... and for the actions of Rod Carroll'.

Debney's falling onto his own sword

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goes further in that where the commercial gain made from the anti-competitive behaviour can be ascertained, the penalty imposed may be up to three times that sum. There is no evasion by cooking the books since the legislation then goes on to provide that where that sum cannot be ascertained 10% of the offending corporation's turnover will be the maximum penalty sum. Visy thus faces a large NZ fine and will again see Mr Pratt and his Visy outfit's executives hauled over the coals for the cartel with Amcor.

The NZ case is at too early a stage to comment much further upon. If liability is not to be contested then one might surmise that Pratt's negotiation team will be winging their way across the Tasman Sea to try to strike up a similar deal with the NZCC. Otherwise, a lengthy litigation may ensue with some interesting calculations to be made along the way.

Denial to the end

Harry Debney was Visy's chief executive throughout the period in which the cartel with Amcor was found

at such a late stage of proceedings seems a remarkable act of selflessness until one considers that the resignation and statement came before Justice Heerey had delivered his judgment. These efforts at trying to take the blame (and share it with Rod Carroll) might cause a cynic to reflect that the resignation and the comments were part of a managed process to influence or manipulate the outcome with respect to Pratt.

In a letter issued to its customers in the wake of the ACCC case Visy said that 'Our actions were motivated by a desire to take advantage of our competitors'. Which may be seen either as a further exhibition of the lack of contrition by Visy for the cartel or more shrewdly perhaps another obstacle or water-muddying remark for any prospective litigants considering suing Visy.

McMahons National is another law firm threatening to act for multiple disgruntled packaging customers in a class action separate to that being run by Maurice Blackburn. The compensation figure which may be sought was referred to by Van Moulis of McMahon's as 'extraordinary'.



However the admissions from Visy do not go so far as to acknowledge that its customers lost out. Further they were clearly designed with an eye on the future. Mr Beach said to the Court that Justice Heerey 'ought not to infer that the affected customers sustained a loss'. This and the fact that Visy's statement began by restricting its comments to the ACCC case only with no admissions beyond those regulatory offences keeps up the post-ACCC settlement line that anyone thinking about mounting an action will be met with resistance.

Pratt's tenure as Carlton AFC chairman has been jeopardised by his involvement with the cartel. Members of football club boards need a gaming licence. This requires a gaming regulator to determine whether Pratt is 'of good repute, having regard to character, honesty and integrity'. Perhaps Mr Debney's doing the 'decent thing' for his old boss was part of the public relations exercise to spare the blushes of the great man in Melbourne's High Society.

Visy's agreed statement delivered to the Federal Court by its QC Jonathan Beach contained a concession that the group would implement a trade practices compliance program. Justice Heerey made this concession into an order. In the negotiation with the ACCC this concession about future compliance will have provided some self-justification to the regulator without costing Visy much at all in relative terms.

Conclusion

The saga and negotiations in this case are ongoing; between Visy and the NZCC, between Amcor and the class action plaintiffs, between Visy and Amcor, between how many unknown parties and their lawyers.

Visy had been engaged in cartel conduct and, like Amcor, must have participated in the scheme for financial gain. The protestations about making no profit on the scheme are treated with scepticism by all outside the cartel. Once the whistle had been blown Visy would have been motivated by a desire to minimise the financial impact of any penalties. Further it would (and still does) have needed to carefully frame any statements to try to avoid glaring admissions that could lead to subsequent legal action.

Meanwhile the reality for Amcor is that despite having taken the moral high ground by reporting the cartel with Visy, they now find themselves defendant to a class action seeking damages from the period the cartel operated. The plaintiffs claim the reparation of the inflated pricing and the figure work looks likely to be the subject of much negotiation in its own right.

Amcor might have thought that the ACCC's shield of immunity would have helped protect their position when they first volunteered information about the existence of the cartel. That goes only so far. While the ACCC states that it will not become involved in any class action against a party with immunity it can make no such promises in relation to the victims of the cartel, to wit the customers who paid too much for a long time.

Richard Pratt found himself embroiled in a negotiation about how best to extract himself from the difficulties his own greed had got him into. In typical entrepreneurial fashion the solution he proffered was financial. The fines handed out by the Federal Court were in keeping with those negotiated (and in accordance with the law). While at record levels for such penalties it is inconceivable to suggest that they represent any real punishment to Pratt whose personal net worth according to Forbes Magazine is in excess of US\$2,000,000,000. In those terms a fine of less than 2% of that wealth is nothing more than a nuisance.

The real retribution thus far to Pratt will be to his ego and to his permanently tarnished reputation. So in assessing his worst alternative to a negotiated settlement at least with the ACCC, Pratt would have been relatively confident that he had precious little to worry about. In relative terms of course.

The full extent of the long-term ramifications for Richard Pratt and Visy for the cartel with Amcor is not yet known. The Australian Federal Court case is at an end so far as the ACCC is concerned but the equivalent NZ case remains on foot and rather more worrying for Pratt in financial terms the class action against Amcor has seen Visy added as a third party. Solicitors acting for the class action plaintiffs are seeking damages for the over inflation of prices

during the operation of the cartel and are talking very large numbers indeed. Bernard Murphy estimates potential damages in the region of \$700,000,000.

The real price of price fixing between Visy and Amcor is a negotiation for the future. ●

Alex Wynn is a Queensland based lawyer with Robinson & Robinson Lawyers practising exclusively in litigation and dispute resolution. A graduate of the Professional Legal Training Program at Bond University, he is currently completing his Masters in Law (Legal Practice) at Bond and can be contacted at <alexw@robs.com.au>.

Endnotes

1. Lewicki, Saunders and Barry *Negotiation* (5 Ed) p 66–68.
2. *ACCC v Visy Industries Holdings Pty Ltd (No 3)* [2007] FCA 1617 at [298.1].
3. At [322] wherein his Honour says, 'contrition here probably has a substantial element of regret at being found out'.
4. *Visy Board Pty Ltd v Trade Practices Commission Nos VG249, 302, 303 and 308 of 1983* (1984) 2 FCR 113; ATPR 40-448; 53 ALR 283.
5. Section 52 of the TPA.
6. Sections 51AA–51AC.
7. See for example *LSC v Mullins* [2006] LPT 012 in which a barrister's non-disclosure of a client's changed circumstances learnt during a negotiation was found to be professional misconduct.
8. Subsections (2) and (3) have been repealed.
9. Section 76(1B)(b).
10. Section 76(1A)(b)(i).
11. *ACCC v Visy Industries Holdings Pty Ltd (No 3)* [2007] FCA 1617 at [309]–[311].
12. D Spencer, *Essential Dispute Resolution* (3rd ed), p 30.
13. Above note 1 at p 113.
14. This conclusion was reached by Visy in the wake of their losing an application to suppress discovery on 12 September 2007 — see *Visy Industries Holdings v ACCC* [2007] FCAFC 147.
15. *ABC Law Report* 30 October 2007.