

Refer the Hon Chris Bowen.

Dear Minister,

Please accept the following as my submission on your Bill about cartel conduct. They are extracts from columns I wrote in the legal journal, *Justinian* (www.justinian.com.au).

The point is that the operation of a price-fixing cartel is organised crime on a huge scale. I believe at least two things are required:

- 1) Power to intercept telephone calls when there is reasonable cause to suspect cartel conduct, e.g. petrol companies.
- 2) Prison sanctions sufficient to deter.

Best regards,

Evan Whitton

Tue 19 Feb 08

From *Justinian* April 18, 2006

Organised crime is systematic criminal activity for money or power. By definition, cartelists are organised criminals, but it has taken 32 years for our politicians to grasp that simple fact, i.e. since section 45(2) of Lionel Murphy's *Trade Practices Act* of 1974 made cartels unlawful. Legislation making it a criminal offence is on the way, but is yet to be brought down.

A reason for the sluggishness may appear in a fascinating chat by Jennifer O'Neill, a Commissioner at the Australian Competition and Consumer Commission, to a forum of lawyers laid on by the NSW Chamber of Commerce on March 7. This is her portrait of mid-level cartelists:

“They have nice teeth, good jobs, comfortable houses, their children might attend selective schools, they might be president of the local junior Rugby club and chair the P & C.”

How could you put such respectable organised crims at risk of anal rape? She described one way they do the bidness:

“Imagine you are the national sales manager for a company. You are sitting at a conference table, attending a side meeting organised to coincide with your industry association's annual conference. The side meeting is a regular feature at the annual conference. Every year you meet with the sales managers for your employer's four key competitors. You make 'orderly marketing' arrangements with your opposite numbers.”

The ACCC could probably just bug the table and put them away, but that might miss senior executives. Those even more toothily handsome lads and lasses may seek to insulate themselves from the crime by a technique of communication used



at US General Electric: what Shakespeare called a “dropping eye” accompanied exhortations not to engage in price fixing.

John Brooks noted in *Business Adventures* (Gollancz, 1969) that William S. Ginn, a GE salesman, told Senator Estes (Coonskin) Kefauver (seen here) in 1961 that he first observed the technique in 1935, and that in 1948, when Robert Paxton, an upper-level GE executive, was giving the usual homily, Ginn broke in with: “I didn’t see you wink.”

Startled, Paxton replied sternly: “There was no wink. We mean it, and these are the orders.” Ginn ignored him because more senior executives did give him the nictate.

Jennifer O’Neill quoted an estimate that the operation of a cartel adds about 10 per cent to the price of a commodity. Every single person in Australia may thus be a victim of theft on a huge scale.

The ACCC has resorted to inducing cartelists to roll over in return for immunity, but that would probably be unnecessary if those eminent herps, Jackie, Petie and Philie, could grasp another simple fact: the rule against pattern evidence protects organised criminals.

From *Justinian* January 29, 2008

Cartels and organised crime: a problem of definition

On the matter of penalties for members of price-fixing cartels, I suspect that the problem for quite a lot of people is one of definition. Those so afflicted include politicians, their legal advisers, and media commentators.

They can hardly be blamed. It was only in 2001 that British historian Michael Woodiwiss came up with a definition that clarifies the issue.

In *Organized Crime and American Power: A History* (University of Toronto Press, 2001), Woodiwiss said organised crime is “systematic criminal activity for money or power”.

The definition includes the outwardly respectable no less than the Mob, and thus makes a deal of history and journalism obsolete, and would do so for the law except that the British legal system has been obsolete for 15 centuries.

Jennifer O’Neill, then a Commissioner at the Australian Competition and Consumer Commission said in March 2006 (*Justinian*, April 18, 2006) that a price-fixing cartel typically increases the cost of a commodity to consumers by about 10 per cent.

If you systematically do that for years, you are clearly an organised criminal. Let us play a few trills on the chronology flageolet:

1890. The *Sherman Act* makes a price-fixing cartel a criminal offence in the US.

1974. Section 45(2) of Lionel Murphy’s *Trade Practices Act* of 1974 makes cartels unlawful, punishable by fines only.



conduct
(b. 1934) AO 1985, AC 1998.

February 2003. A committee chaired by Sir Daryl Dawson (b. 1933, High Court 1982-97) recommends criminal penalties for cartels.

Late 2004. Executives of Amcor, a cardboard box manufacturer, approach the ACCC and admit to cartel with Visy Group, of which the proprietor is Richard Pratt

February 2005. The Coalition's perennial bridesmaid, Peter Howard Costello (BA LLB [Hons] Monash), says the government will introduce criminal penalties for severe cartel conduct. Nothing happens.

December 2005. The ACCC alleges that Richard Pratt (pic) and others had run a cartel to fix cardboard box prices between 2000 and late 2004. It is estimated that the cartel cost consumers between \$300 million and \$700 million. Pratt denies the allegations.

October, 2007. Shortly before the Visy trial is to begin in the Federal Court, Pratt admits the allegations are true and does a deal with the ACCC.

Responding, Prime Minister Howard says he knew Pratt very well; that he was a good citizen, and that: "We would continue to examine the strength of the trade practices law and if further changes were needed we would implement them but I'm not making any commitment beyond that."

The Ruddman decently refrains from suggesting that the government's inactivity for nearly three years on Sir Daryl Dawson's recommendation has put them at risk of being perceived as soft on organised crime.

November 2, 2007. Justice Peter Heerey fines Visy \$36 million. He says: "Every day every man, woman and child in Australia would use or consume something that at some stage has been transported in a cardboard box."

ACCC chairman Graeme Samuel says: "Cartels are theft, usually by well-dressed thieves."

January 11, 2008. Chris Bowen (BEc, Syd, pic), 34, assistant Treasurer to Wayne Maxwell Swan (BA [Hons] Qld), 53, releases a draft Bill and discussion paper. The Bill offers fines of up to \$10 million and jails terms of up to five years for serious cartel conduct. Three questions arise:

- Does the punishment fit the organised crime? Hardly. Would the maximum penalties be appropriate for criminals who break into a bank and rob it of \$500 million?
- Will the prospect of two or three years in prison be a really powerful deterrent to people trousering millions? Perhaps Mr Rodney Adler can supply a definitive answer.
- Do the lightish penalties put the government at risk of being seen as softish on organised crime? Submissions to Mr Bowen close on February 29. I think I should try to overcome inertia and send one.