

IMPORTANT NOTICE

Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009

The Parliament of Australia has passed the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (the Act), which amended the *Trade Practices Act 1974* (TPA) to provide criminal penalties for cartel conduct

The main provisions of the Act commence on 24 July 2009. The Act contains criminal penalties for proscribed forms of cartel conduct.

A civil prohibition will operate in relation to the same forms of cartel conduct.

Also included in the Act are provisions that:

- enhance the ACCC's capacity to conduct search warrants
- enhance confidentiality of information provided to the ACCC in relation to cartel conduct
- enable telephone interception to be used for investigation of the cartel offence.

The mechanics—how the Act does it

The Act provides for a civil cartel prohibition and a criminal cartel offence. Both are centred upon the existence of a cartel provision within a contract, arrangement or understanding (CAU).

The definition of 'cartel provision' includes four varieties of cartel conduct:

- price fixing
- output restrictions
- allocating customers, suppliers or territories
- bid-rigging.

The definition of cartel provision also requires that at least two of the parties to the agreement as to price, output restrictions etc. be persons who are, or are likely to be, in competition with each other.

As did s. 45A of the TPA (now repealed), the cartel provision addresses price-fixing agreements on a 'purpose' or 'effect' basis. It remains the case that the prohibition on cartel conduct in the form of output restrictions, allocation of customers and bid-rigging is based on purpose.

A company will have contravened the civil prohibition if it makes a CAU containing a cartel provision with its competitor or if it gives effect to the cartel provision.

The element that distinguishes the cartel offence from the civil prohibition in the Act is the need to establish certain fault elements under the *Criminal Code Act 1995*. An overview of the application of those fault elements is provided below:

Making a CAU containing a cartel provision

It will be necessary to establish that an individual or corporation **intended** to enter into a CAU and that they **knew or believed** the CAU contained a cartel provision.

Giving effect to a cartel provision

It will be necessary to establish that an individual or corporation **knew or believed** a CAU contained a cartel provision and that they **intended** to give effect to that cartel provision.

What will stay in the TPA and what will go?

The per se prohibition on price fixing contained in ss. 45 and 45A of the TPA has been repealed and replaced by the new cartel provisions. Conduct that was captured by s. 45A will be captured by the new provisions.

Section 45 of the TPA otherwise remains and will continue to prohibit a CAU that contains an exclusionary provision or provisions that have the purpose, effect or likely effect of substantially lessening competition. The prohibition of exclusionary provisions by ss. 45 and 4D is retained as a backstop for the new cartel provisions, primarily because the new cartel provisions do not capture the same breadth of conduct as s. 4D.

With the repeal of s. 45A, the joint venture defence for price fixing, s. 76D, is also repealed. A new joint venture exception has been introduced for the cartel offence and civil prohibition.

How liability will be determined

The cartel offence

The prosecution will need to prove the charge beyond reasonable doubt and a unanimous jury verdict is required.

The civil prohibition

The prosecution will need to establish the contravention on the balance of probabilities.

Accessorial liability, attribution of liability

A new head of accessorial liability will be created: 'attempts to contravene' (paragraph 79(1)(aa)).

The TPA will continue to permit the state of mind and/or conduct of a director, employee or agent to be attributed to that person's employer via s. 84.

The penalties

Individuals

For individuals, the cartel offence is punishable by imprisonment of up to 10 years and/or fines of up to \$220 000 per contravention.

Under the civil prohibition, individuals may be liable to a pecuniary penalty of up to \$500 000 per contravention.

Corporations

For corporations, the fine or pecuniary penalty for each contravention of the cartel offence or civil prohibition (whichever applies) will not exceed the greater of:

- \$10 000 000
- three times the total value of the benefits obtained by one or more persons reasonably attributable to the commission of the offence/act or omission in contravention of the civil prohibition
- where those benefits cannot be fully determined, 10 per cent of the corporate group's annual turnover in the 12-month period when the offence/contravention occurred.

Other forms of relief relating to the cartel offence and civil prohibition include injunctions, orders disqualifying a person from managing corporations and community service orders.

Other new provisions

Investigative powers that can only be used criminally

Telephone interception and surveillance device warrants can be sought for investigation of the cartel offence and accessorial liability in relation to that offence.

Investigative powers that can be used both civilly and criminally

Other investigative powers for cartel conduct, such as TPA search warrants and s. 155 notices, can be used for both civil and criminal investigations.

Search warrants

The ACCC's ability to conduct search warrants has been enhanced by the Act, particularly in relation to seizure of electronic information.

Other amendments include:

- capacity to seize material relating to obstruction during a search warrant
- permitting Australian Federal Police assistance to the ACCC in the execution of search warrants
- allowing temporary exit of premises being searched and resumption of the search
- extending the period of time a seized article may be retained from 60 to 120 days
- the ability for a magistrate in any state or territory to issue a warrant that can be exercised across Australia.

Section 155

A change in the wording of s. 155 means that documents produced to the ACCC by an individual under paragraph 155(1)(b) can be used against that individual in criminal proceedings.

If the material already exists, it can be used against the individual in criminal proceedings. A corporation has no right against self-incrimination.

Protected cartel information

A new regime has been created to enhance confidentiality of cartel information provided to the ACCC. It is based on the concept of **protected cartel information**—that is, information given in confidence to the ACCC about a potential breach of the cartel offence or civil prohibition.

In certain circumstances the ACCC will be able to disclose protected cartel information and the court will also be able to compel the ACCC to provide such information. The test used by the ACCC and the court will be the same.

The regime provides for restrictions upon use of the information in secondary proceedings.

Exceptions to the new cartel regime

Certain exceptions exist to the new cartel regime. Broadly, they relate to:

- conduct subject to a collective bargaining notice
- conduct subject to authorisation
- joint ventures
- agreements between related bodies corporate
- collective acquisition of goods or services
- 'anti-overlap' provisions.

Collective bargaining notices

Section 44ZZRL provides that if you have a collective bargaining notice in place, businesses will be exempt from the cartel offence and civil prohibition insofar as the conduct is in relation to:

- price fixing
- restricting outputs
- allocating customers, suppliers or territories
- but **not** bid-rigging.

Authorisation

Authorisation is available for conduct in relation to:

- price fixing
- restricting outputs
- allocating customers, suppliers or territories
- bid-rigging

if the public benefit from the conduct would outweigh any public detriment.

Joint ventures

An exception to the cartel offence and civil prohibition has been created for joint ventures. The party claiming the joint venture exception will need to ensure that the portion of their agreement that would otherwise attract attention as a cartel provision is contained in a contract.

The party will also need to ensure that:

- the cartel provision is for the purposes of a joint venture
- the joint venture is for joint production or supply.

The joint venture exception extends to a situation where a person has an arrangement or understanding, but intended it to be, and reasonably believed it was, a contract.

Agreements between related bodies corporate

Much like the existing exception in subs. 45(8), s. 44ZZRN ensures that agreements solely between related bodies corporate will not fall within the cartel offence or civil prohibition.

Collective acquisition of goods or services

Much like the existing exception in subs. 45A(4), s. 44ZZRV ensures that there is an exception to the cartel offence and civil prohibition (for price fixing) for the collective acquisition of goods or services and/or the joint advertising of the price for the re-supply of the collectively acquired goods or services.

Anti-overlap provisions

Much like the existing 'anti-overlap' provisions in subss. 45(5) to (7), the new provisions governing cartel conduct will not apply to conduct captured by ss. 45B (covenants), 48 (resale price maintenance), 47 (exclusive dealing), 49 (dual-listed companies) and 50 (acquisition of shares or assets).

More information

More information about these changes is available on the ACCC website (accc.gov.au) or by contacting the ACCC Infocentre on 1300 302 502.