Introduction

Many thanks for this opportunity to discuss the recent reforms to the law on cartels in Australia.

The new legislation brings Australia into line with the toughest approaches in the world. Domestically this means serious cartel conduct will get the harsh treatment it deserves, as being anathema to the public interest, and internationally that Australia will no longer be regarded as a second order priority when it comes to addressing international cartel activity.

A number of issues have been raised by the corporate sector and the legal fraternity as to how we respond now that the criminal offence is part of our toolkit. Questions that have been asked include:

- How will the criminal offence and civil prohibitions operate? If given the option of either, what will the ACCC prefer?
- Will the ACCC’s approach to cartel investigation differ from the past?
- How will the ACCC’s immunity policy work?

So today I plan to survey the rationale for the legislation – which the Australian Competition and Consumer Commission has publicly supported for a number of years – then step through the changes to the Trade Practices Act 1974 (the Act) and finally discuss how we will go about applying the law in practice.

There have been some misconceptions and misunderstandings which I hope I can allay today – and look forward to your questions at the end to deal with any lingering concerns.

Why criminalise cartels?

The criminalisation of cartels, which came into effect on 24 July this year, is our most significant competition reform in recent times.

The OECD recognises cartel conduct as extremely damaging and the most egregious form of antitrust violation. That is why it recommended that member countries have laws in place that effectively deter, detect and punish hard core cartel conduct.¹

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The effect of a serious cartel is best summarised in the words of Heerey J in the 2007 Visy cardboard box cartel case when he said:

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. The cartel in this case therefore had the potential for the widest possible effect.

Price fixing and market sharing are not offences committed by accident, or in a fit of passion. The law, and the way it is enforced, should convey to those disposed to engage in cartel behaviour that the consequences of discovery are likely to outweigh the benefits, and by a large margin.

Critical to any anti-cartel regime is the level of penalty for individual contraveners. We tend to overlook the fact that corporations are constructs of the law; they only exist and possess rights and liabilities as a consequence of the law. Heavy penalties are indeed appropriate for corporations, but it is only individuals who can engage in the conduct which enables corporations to fix prices and share markets.

A prime focus of our competition enforcement activity over recent years has been our declaration of war against cartels – secret collusive agreements between competitors to fix prices, rig markets, allocate markets between each other and collusively bid. These are simply theft by well dressed thieves carrying brief cases. Cartel operators are corporate fraudsters who defraud their customers and consumers.

The ACCC for many years has supported the criminalisation of cartel conduct and believes the parallel operation of a criminal cartel offence and civil prohibition, now in the Act as amended by the Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009, will allow for a proportionate response to cartel conduct.

One of the reasons why the ACCC was so vocal in supporting the criminalisation of cartel conduct is its value as a deterrent. Whereas pecuniary penalties, no matter how large, may be regarded by some as merely a business cost, the risk of imprisonment alters the equation completely. No price can be given to the loss of one’s liberty and a conviction is a permanent stain on anyone’s resume.

Until July this year, only civil penalties were available to prosecute cartel conduct. As a consequence, cartel operators did a simple calculation:

“if I get caught I will simply have to pay a fine out of the money I have stolen and I get to keep the rest!”

Criminal penalties will apply to all serious cartels that are initiated or given effect after 24 July 2009. As a result Australia now has a dual criminal and civil cartel enforcement regime, which means that the most serious cartel conduct will be pursued criminally.

In providing a gaol term for cartel behaviour, Australia has joined Canada, France, Germany, Ireland, Israel, Japan, South Korea, Mexico, Norway, Slovak Republic and the United Kingdom.

Under the criminal penalty regime, the ACCC, in conjunction with the Commonwealth Director of Public Prosecutions (CDPP) can prosecute participants in the most serious hard core cartels with a view to securing criminal convictions and gaol sentences of up to ten years, as well as
substantial civil penalties. There is also the prospect of being barred from corporate management for life.

It is expected that criminal penalties for cartel conduct will also provide the ACCC with greater opportunities to detect cartel conduct when it occurs. This is particularly so with the incentives under the ACCC’s Immunity Policy for Cartel Conduct, which provides immunity for the first cartelist to self report. Individuals will have to make some choices – do they look after themselves and report the cartel conduct, or risk being named by another cartelist and most significantly, risk being gaoled.

Additionally, the tools now available to investigate criminal activity will improve detection and the effective prosecution of cartels.

This includes enhanced investigative powers under the Act in relation to search warrants and telephone interception, surveillance, extradition and mutual assistance legislation.

Our transition to criminal penalties is of intense interest internationally. In the past, Australia was seen as the soft underbelly in international cartel operations. In relation to immunity and cooperation on investigations, cartel participants used to put dealing with Australian regulators as a second order priority, knowing that if prosecuted in Australia, the worst that could happen would be the payment of a fine – out of the ill-gotten gains from participation in the cartel.

The advent of criminal sanctions means those who engage in some of the most serious forms of theft from consumers and businesses, will be treated like the criminals they are. They may carry a briefcase rather than a gun, but if a business executive steals millions from consumers, he or she will be exposed to the same prospect of time behind bars.

Now let’s look at the Act in some more detail.

**Cartel conduct under the Act**

**The mechanics – how does it work?**

The Act provides for a civil cartel prohibition and a criminal cartel offence. Both are centred on 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; and
- bid rigging.

As you’re well aware before 24 July this year such conduct was already illegal under the Act with civil sanctions, but now those types of cartels can be prosecuted either civilly or criminally.
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. Briefly looking at the fault elements:

- Making a CAU containing a cartel provision - it will be necessary to establish that an individual or corporation intended to enter into a contract, arrangement or understanding and that she/he or it 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 she, he or it intended to give effect to that cartel provision.

It remains possible to take cases involving the substantial lessening of competition under section 45 on the basis of the purpose, effect or likely effect of a provision of a CAU.

Section 4D was retained as a backstop for the new cartel provisions. Primarily this is because the new cartel provisions don’t have the same scope as section 4D. Section 4D may extend to matters outside serious cartels, whereas the types of conduct within section 44ZZRD all fit within the OECD’s 1998 recommendations.

What are the penalties for cartel conduct?

**Individuals**

For individuals, the cartel offence is punishable by imprisonment of up to ten 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**

Sanctions for corporations under the cartel offence and civil prohibition are to be applied by using a very similar mechanism:

For each contravention of the cartel offence or civil prohibition the fine or pecuniary penalty (respectively) will not exceed the greater of:

a) $10,000,000

b) 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

c) Where the gain cannot be estimated 10% of the corporate group’s annual turnover in a 12 month period when the offence/contravention occurred.

Some of the other forms of relief available in relation to the cartel offence and civil prohibition include injunctions, orders disqualifying a person from
managing corporations and community service orders. Let me turn now some of the other new provisions in the Act.

**Other new provisions**

*Investigative powers that can only be used criminally*

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

I expect that the ACCC and the Australian Federal Police (AFP) will jointly investigate matters involving the cartel offence where telephone interception or surveillance devices will be used. However neither option can be used for investigation of an alleged contravention of the civil prohibition.

Telephone interception powers have been used successfully in Canada in relation to petrol price fixing, and in the United States. Many people here may have seen the compelling video evidence in relation to the US Department of Justice lysine investigation – it is this sort of evidence which could flow from a surveillance device warrant.

*Investigative powers that can be used both civilly and criminally*

Telephone interception and surveillance device warrants aside, the investigative powers for cartel conduct under the Act, such as search warrants and section 155 notices, can be used for both civil and criminal investigations. For this reason the ACCC will generally use the one investigative team for cartel conduct rather than having separate teams based on the civil or criminal power.

*Search warrants*

The ACCC’s ability to use search warrants has been strengthened 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 AFP assistance to the ACCC in the execution of search warrants
- allowing temporary exit of premises being searched and resumption of the search and 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 section 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.

On a practical level, 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 was 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 relating to a potential breach of the cartel offence or civil prohibition.

In certain circumstances the ACCC can 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.

In addition to the changes evident in the legislation, the ACCC published a guidance note on how we proposed to manage cartel investigations, which supplements the Memorandum of Understanding on serious cartel conduct that we have with the CDPP. These documents are available on the ACCC’s website.

The Immunity Policy

Integral to the success of any cartel enforcement regime is an effective immunity policy. Such a policy encourages businesses and individuals to disclose cartel behaviour and assists the ACCC to stop the harm caused by such conduct and prosecutes participants.

The ACCC’s experience of cartels shows us that given their clandestine nature very few prosecutions result from evidence provided by consumers. The primary source of disclosure of a cartel is participants in the cartel under the ACCC’s Immunity Policy.

In the Tyco case, Justice Wilcox said, in relation to the ACCC’s leniency program:

“If this approach leads to a perception amongst colluders that it may be wise to engage in a race to the ACCC’s confessional, that may not be a bad thing.”

At present, the ACCC receives one or two approaches for immunity each month.

2 ACCC v FFE Building Services Limited [2003] FCA 1542. Tyco approached the ACCC under its Cooperation and leniency in enforcement policy:

http://www.accc.gov.au/content/index.phtml/itemId/429288/fromItemId/378016

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We are of the view however that the criminal sanctions recently introduced significantly increase the risks of those involved in cartels being caught.

Not only do cartelists need to be concerned that their fellow conspirators will turn them in, but their employees and ex-employees who wish to avoid gaol now have significant incentives to apply for immunity.

Modifications to the immunity process to pick up issues surrounding criminalisation have been made since the implementation of the new cartel enforcement regime. They include an amendment to the Immunity Policy, the Prosecution Policy of the Commonwealth and a MOU between the ACCC and CDPP.

Under the new arrangements, as is currently the case, the ACCC will grant civil immunity for cartel conduct in accordance with the immunity policy.

So let me know spend a bit of time expanding on the operation of the policy.

Both corporations and individuals may be eligible for conditional immunity from ACCC initiated civil proceedings if they meet the following conditions:

- at the time the ACCC receives the immunity application, the ACCC has not received written legal advice that it has sufficient evidence to commence proceedings in relation to at least one contravention of the Act resulting from the cartel conduct
- they were a party to the cartel
- they admit the cartel conduct is likely to constitute a contravention of the Act
- they are the first person/corporation to apply for immunity in respect of cartel conduct
- they have not coerced others to participate in the cartel and were not the clear leader in the cartel
- they have ceased involvement in the cartel or indicated to the ACCC they will cease involvement in the cartel
- the corporation’s admissions are truly corporate act as opposed to isolated confessions of individual representations
- both the corporation and individual undertake full disclosure and cooperation with the ACCC.

Both individuals and corporations may request the placement of a marker. This will have the effect of preserving for a limited time the recipient’s status as the first person to apply to the ACCC for immunity.

The ACCC will receive and manage requests for immunity from both civil and criminal proceedings and will make a recommendation to the CDPP as to whether the applicant meets the criteria set out in the Immunity Policy.

Following a recommendation from the ACCC, the CDPP will decide whether to grant immunity from prosecution by applying the same criteria as contained in the Immunity Policy. The decision of the CDPP whether to grant immunity will be communicated to the applicant at the same time as the ACCC’s decision on conditional immunity.
If the immunity ‘carrot’ has already been eaten, any subsequent parties will have their circumstances considered in accordance with the ACCC’s Co-operation policy and with the Prosecution Policy of the Commonwealth rather than pursuant to the Annexure to that policy.

Having dealt with the process of immunity applications under the new regime I’ll now offer some observations.

The ACCC expects that the incentives for persons to apply for immunity will be maintained, if not heightened, by the changes. At a procedural level the new process ensures applicants, whether they are a firm or person, will have certainty upfront that they’ll be spared sanctions for cartel conduct that are amongst the most stringent in the world.

The availability of criminal sanctions for cartel conduct may create a race between the company and its current and former employees for immunity. As a corporate executive once told a former Assistant Attorney General of the US Department of Justice:

*as long as you are only talking about money, the company can at the end of the day take care of me … but once you begin talking about taking away my liberty, there is nothing that the company can do for me.*

In the circumstances, an individual contemplating whether to continue on with an old cartel agreement may wish to stop and self report rather than risk imprisonment for any new conduct.

**Exceptions to the new cartel regime**

Certain exceptions exist to the new cartel enforcement 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 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 subsection 45(8), section 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 now repealed exception in subsection 45A(4), section 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 subsections 45(5) to (7), the new provisions governing cartel conduct will not apply to conduct captured by sections 45B (covenants), 48 (resale price maintenance), 47 (exclusive dealing), 49 (dual-listed companies) and 50 (acquisition of shares or assets).
The ACCC’s approach to prosecution

Now let me outline how the ACCC will approach enforcing the new dual civil and criminal cartel enforcement regime.

The ACCC has issued public guidance on how it will approach its investigation of cartels in an environment where cartel conduct can be prosecuted under the civil prohibition or criminal offence. Guidance is contained in the following key documents:

- MOU between the ACCC and CDPP
- ACCC approach to cartel investigations.

The ACCC has made clear, in the publication ‘ACCC approach to cartel investigations’ and other public statements, that if we form the view that the alleged cartel conduct is serious, the ACCC will refer the matter to the CDPP for consideration. The MOU, at paragraph 4.4, sets out a non-exhaustive list of matters which the ACCC will have regard to in deciding whether the conduct is serious and therefore should be referred to the CDPP, namely whether:

- the conduct was longstanding or had, or could have had, a significant impact on the market in which the conduct occurred
- the conduct caused, or could have caused, significant detriment to the public, or a class of the public, or caused, or could have caused, significant loss or damage to one or more customers of the alleged participants
- one or more of the alleged participants has previously been found by a court to have participated in, or has admitted to participating in, cartel conduct either criminal or civil
- the value of the affected commerce exceeded or would have exceeded $1 million within a 12-month period (i.e. where the combined value for all cartel participants of the specific line of commerce affected by the cartel would exceed $1 million within a 12-month period)
- in the case of bid rigging, the value of the bid or series of bids exceeded $1 million within a 12 month period.

Broadly, serious cartel arrangements involve conduct of the type that usually causes, or has the potential to cause, large scale or serious economic harm.

Upon ACCC referral, the CDPP will advise the ACCC whether a criminal prosecution should be commenced. In considering this issue the CDPP will have regard to the Prosecution Policy of the Commonwealth and the matters set out in paragraph 4.4 of the MOU.

The criteria governing the decision to prosecute is best summarised by Deputy CDPP Director Graeme Davidson:

> The Prosecution Policy requires that there be sufficient evidence to establish a prima facie case – and a reasonable prospect of conviction

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before prosecution action is instituted. The latter means an evaluation is required of how strong the case is likely to be when presented in Court. This must take into account matters such as the availability, competence and credibility of witnesses and their likely impression on the Court and the admissibility of any alleged confession or other evidence. The prosecutor is also required to have regard to lines of defence which are plainly open to, or have been indicated by, the alleged offender and any other factors which may affect the likelihood of a conviction.

Once a decision is made that the evidence is sufficient to provide a reasonable prospect of conviction consideration must be given as to whether prosecution is in the public interest. The relevant factors here are set out in the Prosecution Policy. Included in these factors are:

- the seriousness or conversely the triviality of the alleged offence;
- any mitigating or aggravating circumstances;
- the characteristics of the alleged offender such as age, health, intelligence;
- the age of the offence;
- the effect on public order and morale;
- the availability and efficacy of any alternatives to prosecution;
- the attitude of the victim;
- the likely length and expense of the trial (when considered in context);
- whether the alleged offender will cooperate in the investigation and prosecution of others;
- the necessity to maintain public confidence in basic institutions such as the Parliament and the Courts.  

**Charge negotiation – no negotiations with the ACCC**

As described above, the ACCC has articulated a firm policy position on serious cartel conduct – we’ll promptly refer such matters to Australia’s public prosecutor for consideration of criminal prosecution. A person will not be permitted to seek to ‘trade off’ a possible criminal prosecution with civil settlement. This is not a subject for negotiation.

Cartelists will not be able to stop this process by offering a fat cheque as a civil penalty.

Nor will the ACCC put itself in a position where there might be a perception that it is using the possibility of a referral of a matter for consideration of criminal prosecution to leverage cooperation or resolution of civil proceedings.

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If we were to be asked -

"Is there a way that we can pay a significant financial penalty and avoid the prospect of a gaol sentence?"

we will walk out of the room. The ACCC will not engage in any discussions on a civil resolution until it has formed a view as to the seriousness of the conduct, and in consultation with the CDPP, whether a criminal prosecution should be commenced.

And then the only way that an investigation will move from criminal to a civil investigation will be if the ACCC, in consultation with the CDPP, determined that it would not be possible to satisfy both the CDPP’s criteria - reasonable prospect of prosecution, and it being in the public interest to criminally prosecute.

What this means is that the ACCC will not engage in discussions with parties under investigation as to possible resolution of civil proceedings until it has formed a view as to the seriousness of the conduct and either:

- made a decision not to refer the matter to the CDPP, or
- received advice from the CDPP that a criminal prosecution should not be commenced.

The great strength that gives us is this: the prospective defendants know that the moment a criminal investigation has started it cannot be stopped.

I have to stress that the ACCC will not be interested in pursuing minor matters through the criminal regime. We will deal with those matters as we have in the past.

The clear ACCC position is that criminal prosecutions will be for serious cartel conduct where there is a proper evidentiary basis and public interest in pursuing criminal remedies. Important safeguards in the system include:

- the CDPP’s independence from the ACCC
- the extensive duty of disclosure that will be applicable to the ACCC’s investigation
- the distinguishing fault element in the criminal offence
- the committal process – for a cartel offence committal proceedings will be heard before a state or territory magistrate – the magistrate must determine whether the charges the person is facing are sufficiently strong for a trial before a jury, and
- finally, if the person is committed to stand trial, there is a requirement firstly to prove the charge beyond reasonable doubt, and secondly that there be a unanimous jury verdict.

**The conduct of ACCC investigations**

As discussed earlier, the ACCC has a number of tools that may be used in investigations into possible contraventions of the cartel prohibition and the cartel offence.
However there are some evidential limitations to the use of information for criminal prosecutions. To ensure fairness in dealing with people who may be charged with criminal offences and to ensure that information obtained in the course of an investigation can be used against possible defendants in a criminal prosecution, ACCC investigators will:

- use ‘cautions’ in certain circumstances placing the person on notice that their responses may later be given in evidence
- conduct voluntary interviews with regard to safeguards in Part IC of the Crimes Act 1914 (Cth), and
- ensure evidence is handled in accordance with continuity of evidence principles.

As I mentioned earlier, if the ACCC is aware of ongoing cartel conduct that may be prosecuted under the cartel offence, it may consider whether to contact the AFP with a view to joint operations taking place. This would provide the opportunity to capture evidence via surveillance devices and telephone interception.

**Conclusion**

The criminalisation of cartel conduct does not provide a green light for the ACCC to drastically change the way we have been dealing with cartel conduct.

Rather, the changes to the Act give the ACCC the necessary tools to detect, deter and punish hardcore cartel conduct.

However if the CDPP advises that a criminal prosecution should be pursued for serious cartel conduct, we won’t be looking into a civil prosecution in the first instance – a criminal prosecution will follow.

The new aspects of the Trade Practices Act and the other materials I’ve referred to today enable us to respond to cartel conduct in a proportionate and appropriate way in the interest of all Australians.