

| | |
|---|--|
|  | <p style="text-align: right;">Competition Law Conference 2009</p> <p style="text-align: right;"><i>The conduct of cartel litigation: The ACCC enforcement perspective on serious cartels – some key issues and practical considerations</i></p> <p style="text-align: right;">Marcus Bezzi Executive General Manager Enforcement and Compliance Division</p> <p style="text-align: right;">23 May 2009, Sydney</p> |
|---|--|

Introduction

Today I've been asked to discuss the ACCC's conduct of cartel investigations. This issue has caused much debate and commentary especially with the impending changes to the *Trade Practices Act* which will create a criminal cartel offence.

The ACCC and CDPP have been working very closely together to prepare for the criminalisation of cartel conduct. I am therefore very pleased to be speaking this morning with Graeme Davidson, Deputy Director of the CDPP. Graeme will follow me discussing the role of the CDPP in the prosecution of the proposed cartel offence.

Many in the corporate sector and the legal fraternity have been waiting for some signs from the ACCC on how we will react when the new criminal offence becomes 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?

I'll do my best to answer these questions as well as allay any fears and correct some misconceptions that may exist about the way the ACCC will conduct cartel investigations.

Here is an overview of what I hope to cover in the next 25 or 30 minutes. My presentation is divided into two parts, first is a brief outline of the new law, secondly some discussion about investigations and prosecutions.

I should add that in addition to doing presentations such as this, the ACCC intends to publish a guidance note on how we propose to manage cartel investigations. I expect that it will be published after the enactment of the new

law. This will supplement the memorandum of understanding regarding serious cartel conduct that we have with the CDPP.

I'll begin by briefly reminding you of the rationale for the criminalisation of cartel conduct.

Why criminalise cartels?

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

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, as proposed in the *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008* ("the Bill"), will allow for a proportionate response to cartel conduct.

One of the reasons why the ACCC has been 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.

It is also expected that criminal penalties for cartel conduct will provide the ACCC with greater opportunities to detect cartel conduct when it occurs. This is particularly so with the incentives in place under the ACCC's Immunity Policy for Cartel Conduct ("Immunity Policy"), which provides immunity from prosecution by the ACCC for the first cartel member 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 cartel member and most significantly, risk being gaoled.

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

This includes enhanced investigative powers within the Bill in relation to search warrants and telephone interception, as well as the capacities made available by virtue of the offence under proceeds of crime, surveillance, extradition and mutual assistance legislation.

Now let's look at the Bill in some more detail.

¹ OECD, *Recommendation of the Council Concerning Effective Action against Hard Core Cartels*, 25 March 1998 <<http://www.oecd.org/dataoecd/39/4/2350130.pdf>>.

The Bill

As you're probably aware, the Bill to criminalise cartel conduct, was introduced into Parliament in December 2008. It gives effect to the OECD's 1998 recommendations.²

A Senate Committee called for submissions in relation to the Bill and was given a wide array of views, including many of those which are reflected in Brent Fisse's paper. Significantly none of the submissions opposed the criminalisation of cartel conduct and the bi-partisan Senate Committee recommended that the Bill be passed unamended.

What will be illegal?

The Bill criminalises the following cartel conduct:

- price fixing;
- restricting outputs in production or supply chain – for example agreeing to cut back on production;
- allocating customers, suppliers or territories; and
- bid rigging.

Such conduct is already illegal under the *Trade Practices Act* with civil sanctions. However if the Bill is passed those types of cartels could be prosecuted either civilly or criminally.

The mechanics – how the Bill does it

The Bill provides for a civil cartel prohibition and a criminal cartel offence. Both are centred upon the definition of **cartel provision**.

The definition of 'cartel provision' proscribes four varieties of conduct that may constitute "hard core cartels":

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

Just like section 45A of the TPA, which will be repealed if the Bill becomes law, 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 contract or arrangement, or arrives at an understanding (CAU) containing a cartel provision with its competitor, or if it gives effect to the cartel provision.

² This is explained at page 5 and 6 of the Explanatory Memorandum to the *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008*.

The element that distinguishes the cartel offence from the civil prohibition in the Bill is the need to establish certain fault elements under the *Criminal Code Act 1995*.

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. As at least one commentator has noted this “*subjective fault element of the cartel offence is more demanding to prove than the objective indicia*” that applies in a civil context.

What will stay and what will go?

The existing approach to addressing price fixing, via section 45A, will be jettisoned. Everything that is captured now by section 45A will be captured by the new cartel provisions.

It will remain possible to take substantially lessening of competition cases under section 45 on the basis of the purpose, effect or likely effect of a provision of a CAU.

With the repeal of section 45A, the joint venture defence for price fixing, section 76D, will also be repealed. A new JV defence for both civil and criminal cartel provisions has been introduced. I will deal with that a little later.

Section 4D will be 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 of “hard core cartels” whereas the types of conduct within section 44ZZRD all fit within the OECD's 1998 recommendations.

How liability will be determined

The cartel offence

Committal proceedings are likely to be heard before a magistrate in a state or territory court. The issue for the magistrate is whether the charges the person is facing are sufficiently strong to face trial before a jury.

If the person is committed to stand trial, the matter will be heard in either the Federal Court or a state or territory Supreme Court. That will be at the election of the prosecution. I expect that unless there is a good reason not to do so, most matters will be heard in the Federal Court. The prosecution will

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

The civil prohibition

The onus of proof, the balance of probabilities, and forum for prosecution of the civil prohibition, the Federal Court, will be the same as for existing prosecutions under section 45.

Accessorial liability, attribution of liability

The ACCC will retain the ability to plead 'knowingly concerned' via section 79. A new head of accessorial liability will be created, 'attempts to contravene'.³

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 section 84.

The penalties

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.

I'd now like to examine some of the other new provisions in the Bill.

³ New section 79(1)(aa)

Other new provisions

Investigative powers that can only be used criminally

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

For example, telephone interception powers have been used successfully in Canada in relation to petrol price fixing. Many people here may have seen the compelling video evidence in relation to the US DOJ lysine investigation; this sort of evidence could flow from a surveillance device warrant.

I expect that the ACCC and the 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.

Investigative powers that can be used both civilly and criminally

Telephone interception and surveillance device warrants aside, the investigative powers for cartel conduct, such as TPA 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 conduct search warrants will be advanced by the Bill, 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 will mean 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 will be created to enhance confidentiality of cartel information provided to the ACCC. It will be 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 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

I'd now like to examine some exceptions to the new cartel regime.

In the Bill, the following exceptions may apply to cartel conduct:

- collective bargaining notices;
- authorisations;
- joint ventures; and
- anti-overlap provisions.

Let me go into some more detail.

Collective bargaining notice

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; and
- 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. I understand the exception was grounded upon a need to provide certainty for genuine joint venture parties while also not providing camouflage for cartelists.

Sections 44ZZRO and 44ZZRP provide an exception for both corporations and un-incorporated businesses in relation to the cartel offence and civil prohibition respectively.

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.⁴ And that party will also need to ensure that the cartel provision is for the purposes of a joint venture and that the joint venture is for joint production or supply.

This is not to say that acquisition by a joint venture will take it outside the joint venture exception. A joint venture for production or supply will naturally protect the acquisition of goods and services for the purposes of the joint venture.

'Anti-overlap' provisions

Much as you'd currently think about whether '4D' type conduct should be considered under section 47 of the TPA you'll also be considering such matters under a revised TPA.

The Bill contains 'anti-overlap' provisions along the lines of existing subsections 45(5) to (7), and exemptions along the lines of subsection 45A(4) of the TPA.

I'll now discuss how the new cartel provisions will be prosecuted by the ACCC.

When and how will the new provisions be prosecuted by the ACCC?

The ACCC takes the view that whenever possible serious cartel conduct should be prosecuted criminally. The parallel criminal and civil regime for cartel conduct will ensure that serious cartel conduct can be prosecuted criminally while less serious breaches can be pursued under the civil prohibition.

And when I'm talking about serious cartel conduct in my view, this will invariably be conduct that has the potential to cause large scale or serious economic harm.

As ACCC Commissioner Sarah Court reflected last month:

The decision as to whether conduct should be dealt with either criminally or civilly is nothing new to Commonwealth law enforcement agencies.

ASIC routinely determines whether to take criminal or civil prosecutions; the ATO routinely decides whether to recover tax monies by civil debt recovery proceedings or whether to refer the evasion of those moneys to the Director of Public Prosecutions for a criminal prosecution.

⁴ Or at least what the parties intend and reasonably believe to be a contract.

Similarly the ACCC itself already routinely makes decisions in the consumer protection area whether to refer conduct to the CDPP for a prosecution of an offence pursuant to Part VC of the Act, or whether to institute civil proceedings in relation to that same conduct.

The draft memorandum of understanding between the ACCC and CDPP in relation to serious cartel conduct sets out a number of matters which the ACCC will have regard to in deciding whether to refer a matter to the CDPP.⁵ Those factors include whether:

- the conduct was longstanding or had, or could have, a significant impact on the market in which the conduct occurred;
- the conduct caused, or could cause, significant detriment to the public, or a class thereof, or caused, or could cause, 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 exceed \$1 million within a 12 month period (that is, 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); and
- in the case of bid rigging, the value of the bid or series of bids exceeded \$1 million within a 12 month period.

You can be assured that we will be taking a holistic approach to any potential referral of a matter for consideration of criminal prosecution. Following a referral, the CDPP will advise the ACCC whether a criminal prosecution should be commenced.

In considering whether a criminal prosecution would be appropriate the CDPP will have regard to the *Prosecution Policy of the Commonwealth* as well as the following factors set out in the memorandum of understanding:

- the impact of the cartel on the market;
- the scale of the detriment caused to consumers or the public; and
- whether any of the cartel members have previously been found by a criminal or civil court, or admitted, to have engaged in cartel behaviour.

What I can say for serious cartel investigations, is that if the tests under the *Prosecution Policy of the Commonwealth* are satisfied, it should be clear to everyone that the ACCC will always support a criminal prosecution.

⁵ It is proposed that the MOU will be signed after amendments to the TPA receive Royal Assent and before the commencement of any new cartel provisions.
<http://www.accc.gov.au/content/item.php?itemId=706268&nodeId=353cdd807d07c920e807e65c172e1086&fn=ACCC_CDPP_MOU.pdf>

For the legal representatives of people who are being investigated this means that there will be no point trying to negotiate resolution of a serious cartel matter in the way that may have been done when civil proceedings were the only available option. The ACCC will simply not negotiate with you when a criminal prosecution is available for such conduct. We will never allow the prospect of a criminal prosecution to be traded away by an attractive offer to resolve the matter through civil penalty proceedings and the payment of a large penalty.

The ACCC intends to engage with the CDPP as early as possible in any investigation of serious criminal cartel conduct. We will work very closely with them to form a view about whether there is the requisite evidentiary basis and sufficient public interest to support a criminal prosecution.

For serious cartel conduct, we would only be willing to commence negotiations for a resolution of an investigation through a civil penalty proceeding after the possibility of a criminal prosecution has been ruled out.

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 currently do.

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.

Next, I'll outline how the ACCC will conduct its investigations in light of the new Bill.

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 persons 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.

It's time now to discuss the ACCC's Immunity Policy.

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.

Modifications to the immunity process to pick up issues surrounding criminalisation were posted on the ACCC website in December last year. They include an amendment to the Immunity Policy, the Prosecution Policy of the Commonwealth and a MOU between the ACCC and CDPP. They set out important developments for the continued success of the Immunity Policy retaining key principles of certainty and upfront immunity.

These documents won't become operational until after the Bill passes the Parliament.

Under the new arrangements, as is currently the case, the ACCC will grant civil immunity for cartel conduct in accordance with the Immunity 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 TPA 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 TPA;
- 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 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; and

Both individuals and corporations may request for 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 whether to grant conditional immunity.

By this process applicants will have certainty upfront.

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 per se rather than pursuant to the Annexure to that policy.

Importance of legal advice

Clearly it is wise to get legal advice on agreements, arrangements or understanding involving competitors. Because imprisonment could be the consequence of bad advice it is very important that any legal advice is correct.

The Full Court of the Federal Court has stated explicitly that getting legal advice is not a discounting factor in reducing civil penalties.⁶ In *Universal Music Australia v ACCC* in a joint judgment the Court (comprising Wilcox, French and Gyles JJ) brought this point home starkly when they said: "*If a*

⁶ *Universal Music Australia Pty Ltd v Australian Competition & Consumer Commission* [2003] FCAFC 193 see paragraph 309 - "The fact that legal advice was obtained by one of the parties is also of little consequence. It illustrates that risk was appreciated. However, legal advice is obtained for the benefit of the company and only for the benefit of the company. It is not a discounting factor. If legal advice is wrong, that is a matter between the company and the legal adviser."

*company 'takes the odds', it must expect serious consequences if it miscalculates."*⁷

Conclusion

As you have heard today, the upcoming criminalisation of cartel conduct will not be used as a green light for the ACCC to drastically change the way we have been dealing with cartel conduct

The Bill gives the ACCC the necessary tools to detect, deter and punish hardcore cartel conduct.

However as I said earlier, if the CDPP advises that a criminal prosecution should be pursued for serious cartel conduct, we won't be looking into a civil prosecution – a criminal prosecution will follow.

The Bill enables us to respond to cartel conduct in a proportionate and appropriate way in the interest of all Australians.

Thank you.

⁷ Universal Music Australia Pty Ltd v ACCC [2003] FCAFC 193 at 310.