

COMPETITION ALERT

FEBRUARY 2008

DOING TIME UNDER THE TRADE PRACTICES ACT: THE CRIMINALISATION OF CARTEL CONDUCT

Background

On 11 January 2008, the Australian Federal Government released the exposure draft Trade Practices Amendment (Cartel Conduct and other Measures) Bill 2008 ("Bill") to criminalise serious cartel conduct, inviting public comment on the Bill. The release of the Bill is the first step in fulfilling the Australian Labor Party's campaign pledge to introduce laws to criminalise serious cartel behaviour within 12 months of taking office.

As the New Zealand Commerce Commission ("Commission") and the Australian Competition and Consumer Commission ("ACCC") have agreed to co-operate and co-ordinate competition regulation pursuant to a co-operation agreement signed by the parties on 31 July 2007,¹ legal practitioners and commercial parties in New Zealand ought to be watching the Australian process with interest and considering whether and how these changes might affect New Zealand.

Key features of the draft Bill

The draft Bill does not replace civil liability for cartel conduct; rather it supplants the existing civil penalty regime. What distinguishes between cartel conduct attracting criminal penalties, as opposed to civil penalties, is that for the former an intention of dishonestly obtaining a benefit is required. Given that by their very nature, cartels tend to be conducted in secret, adducing evidence of such dishonest intention has quickly emerged as one of the key controversies of the Bill.

Under the Bill, individuals found guilty of serious cartel conduct will face imprisonment of up to 5 years and/or fines of up to A\$220,000. Corporations found guilty of serious cartel conduct would be subject to fines of the greater of \$10 million, three times the gain from the cartel, or 10% of the annual turnover of the Australian corporate group. Both would be tarred with the sanction of a criminal record.

In light of the recent emergence of civil class actions against alleged cartel conduct in Australia,² of particular interest is the ACCC's ability under the Bill to provide documents and information to civil litigants for use in potential or actual class actions against cartellers. Conscious of the need to administer competing parallel civil and criminal proceedings, the Bill stipulates limited circumstances under which documents will be provided to civil litigants.

Reform a long time coming?

Criminalisation of hardcore cartel conduct was first mooted in the Dawson review of the Australian Trade Practices Act in 2003, which the Howard coalition Government responded to by putting forward a detailed proposal to criminalise cartel conduct in February 2005. However, much to the reported ire of the ACCC and some commentators, the Howard Government did not venture beyond these early stages of the legislative process. The draft Bill picks up the process using that 2005 proposal as its foundation.

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1. <http://www.russellmveagh.com/doclibrary/public/Competitionlaw/ComplawAug07.pdf>.

2. Class actions have been commenced by law firm Maurice Blackman against Qantas for its alleged role in alleged cartel conduct, as well as against Visy and Amcor for their respective roles in cartel conduct in the cardboard packaging industry.

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In addition to the draft bill, the Assistant Treasurer has released a discussion paper and a draft of the Memorandum of Understanding ("MOU") between the ACCC and the Director of Public Prosecutions ("DPP"), highlighting the need to manage the interrelationship between the ACCC as investigator and the DPP as prosecutor. Submissions are currently being invited on the draft legislation.

"Intention of dishonestly obtaining a benefit"

The draft Bill sets out two new criminal offences, which centre on criminalising an 'intention of dishonestly obtaining a benefit':

- (a) It would be an offence to enter into a contract, arrangement or understanding containing a cartel provision with the intention of dishonestly obtaining a benefit. This would not apply to contracts, arrangements or understandings made before the legislation takes effect.
- (b) It would be an offence to give effect to a cartel provision with the intention of dishonestly obtaining a benefit. This would apply to contracts, arrangements or understandings made before the legislation takes effect if they are still operating afterwards.

The key distinction between criminal and civil liability for cartel conduct centres upon the question of *mens rea*, a test which has been met with criticism given the inherent evidential difficulties in proving dishonest intent. It is worth noting that in the UK, which has a similar dishonesty component to its criminal legislative provisions, there has yet to be a successful criminal prosecution for cartel conduct. It is perhaps unsurprising then that the discussion paper accompanying the draft Bill seeks public input into whether the legislative reforms ought to include the mental element of "dishonest intent" as part of the criminal prohibition, or, rather, provide some other distinguishing element.

In practical terms, this means that, in order to secure a criminal conviction, the prosecution would have to convince a jury, beyond reasonable doubt, that the defendant:

- (a) did something that was dishonest according to ordinary people's standards ("objective limb"); and
- (b) knew that it was dishonest according to ordinary people's standards ("subjective limb").

In addition, the prosecution would have to prove that the defendant acted with the intention of obtaining a benefit. The benefit may be to a third person, and it is irrelevant that the benefit was not actually received or was impossible to achieve. Given the complexities of the subject, there is surprisingly no guidance in the draft Bill or discussion paper as to how the dishonesty element would be proved against corporations, namely, whether the provisions attributing fault to a corporation under the Australian Criminal Code would apply, or whether the common law "directing mind and will of the company" principle founded in the *Tesco*³ case would apply.

As it stands, a number of questions around the draft legislation merit consideration. For example, what criteria will the ACCC have to consider in determining whether to refer the matter to the DPP for criminal prosecution? At present, the draft MOU's guidance extends only to suggesting that "significant and serious cartel conduct" will be referred to the DPP. More fundamentally, questions such as whether carteliars ought to be candidates for imprisonment, and whether such level of deterrence is required, merit serious debate and consideration.

What is fairly certain, however, is that irrespective of whether needed or not, the proposed legislation is likely to provide additional incentives for carteliars to seek immunity from the ACCC for their conduct and to co-operate fully with any investigation by the ACCC into their conduct.

A candidate for trans-Tasman harmonisation?

Currently, breaches of competition law in New Zealand for cartel conduct, irrespective of their egregiousness, permit the Commission to seek financial penalties, potential civil damages and director disqualification. However, international trends towards criminalisation suggest that it would not be unexpected for New Zealand to follow the lead of Australia, and in turn the US

3. *Tesco Supermarkets v Natrass* [1972] AC 153.

and UK, and introduce criminal sanctions for hard core cartel conduct. Indeed, given the Commission's continued priority and focus on investigating cartel conduct,⁴ the purported deterrent effect of criminalisation must hold an attractive lustre for the Commission.

If New Zealand moves to criminalise cartel conduct in the future, breaches of the Commerce Act will undoubtedly be treated more seriously by both the Commission and the commercial sector. However, if New Zealand is to consider importing criminalisation from Australia and elsewhere, a number of fundamental questions need to be carefully considered. Namely, are juries and courts, and indeed the Commission, equipped to prosecute the dishonest intent of our corporations and business people beyond reasonable doubt? Or might criminalisation backfire, creating an unachievable threshold? And, given the Commission's recent high profile successes in uncovering and prosecuting cartels, does New Zealand need criminalisation?

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4. Paula Rebstock, *Speech to the New Zealand Institute of Management*, 21 March 2007.