

# Australia criminalises cartels

The expected introduction of a criminal cartel offence in Australia in 2006 marks a new and very significant development in aiding the Australian antitrust regulator, the ACCC, in its quest to eradicate cartel behaviour in Australia.

The ACCC has set up working relationships with its counterpart agencies in other jurisdictions, including the United States, Canada, the EU, the United Kingdom and Japan. It is clear that those relationships will be further extended, particularly in the Asia-Pacific region, as countries in the region increasingly implement competition law regimes which incorporate anti-cartel provisions.

## Background

In 2003 the Dawson Committee conducted a major review of Australian competition law and recommended the introduction of criminal sanctions for serious cartel behaviour, with penalties to include fines against any convicted corporation and imprisonment and fines, as appropriate, for implicated individuals.<sup>1</sup>

## Principal elements of the cartel offence provisions

The proposed new legislation will insert new "cartel offence" provisions within the current *Trade Practices Act 1974* (Cth). The detail of the legislation will only be known once the legislation is tabled in Parliament.

The elements of the cartel offence (all of which must be satisfied) will comprise:

1. an agreement made between or given effect to by two or more parties;
2. the parties who made the agreement are competitors in the supply or acquisition of goods or services in a particular market;
3. the agreement contains a provision which affects prices, restricts output, shares or divides markets or rigs bids; and
4. an intention to dishonestly<sup>2</sup> obtain a pecuniary or non pecuniary gain either for the defendant or for another person. It must be intended to obtain the gain from a person or class of persons likely to acquire or supply the goods or services to which the cartel relates.<sup>3</sup>

## Investigation and Prosecution

It is anticipated that the ACCC will investigate and the DPP will prosecute criminal cartel cases.

The ACCC has been working closely with the Department of Public Prosecutions ("DPP") on the legislation and administrative arrangements for its enforcement and a formal, publicly available, memorandum of understanding between the two agencies will establish high standards of co-operation at both the investigation and prosecution stages.

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<sup>1</sup> Review of the Competition Provisions of the Trade Practices Act, January 2003 (Dawson Committee), page 164.

<sup>2</sup> The dishonesty element distinguishes criminal cartel conduct from the conduct caught by the civil regime under the *Trade Practices Act*, which will continue to apply in parallel with the criminal provisions in respect of cartel conduct.

<sup>3</sup> "Criminal Penalties for Serious Cartel Behaviour", Treasurer of the Commonwealth of Australia, release 004 of 2005, 2 February 2005, page 4.

The ACCC has also established a cartel task force within the ACCC with the resources to investigate alleged cartel behaviour and has revised its Immunity Policy which provides for complete immunity for first-in-the-door applicants in relation to cartel behaviour previously undetected by the ACCC.<sup>4</sup>

The DPP and the ACCC will put arrangements in place to provide immunity for prosecution for "whistle blowers". The Government decided to adopt this approach following the success of immunity policies in other OECD countries which grant immunity to assist in cartel enforcement. The Government recognises that it needs to maximise the incentive for a party to approach the ACCC before it is aware of the cartel. The Government's criminal immunity approach is consistent with the ACCC Immunity Policy for civil penalty cases released in August 2005.

## Criminal sanctions

The maximum imprisonment for an individual convicted of a criminal cartel offence will be five years and the maximum fine will be \$220,000.

In the case of corporations, the maximum fine will be either \$10 million or three times the value of the benefit from the cartel. Where the value can not be ascertained, the maximum fine will be 10 percent of the annual turnover of the body corporate and all of its related bodies corporate (if any). It follows that, in the case of a large corporation which may have operations in many countries, there is a potential for a turnover based penalty based on the whole group's turnover to be extremely high.

## Sentencing discretion

As the ACCC does not have any formal sentencing or penalty guidelines, there is no predetermined method to assess criminal or civil penalties. The courts have developed a series of factors which are assessed in determining penalties in civil penalty cases, such as the need for general and specific deterrence; the nature and extent of the act or omission and any loss or damage suffered as a result of the act or omission; the circumstances in which the act or omission took place and whether the person has previously been found to have engaged in any similar conduct; the size, circumstances and behaviour of the company and individuals involved in the conduct.

In addition, the *Trade Practices Act* will provide that an individual may be disqualified from managing a corporation if convicted of a cartel offence. There are a range of other remedies under the *Trade Practices Act*, such as the payment of compensation, injunctions, adverse publicity orders and any other order the court may think fit.

## International enforcement co-operation

The ACCC has entered into bilateral co-operation agreements with the following anti-trust enforcement agencies:

- United States Federal Trade Commission;
- European Commission;
- New Zealand Commerce Commission;
- Commerce Commission of the Fiji Islands;
- Fair Trade Commission of the Republic of Korea;

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<sup>4</sup> The ACCC's current Immunity Policy is closely modelled upon the United States Department of Justice immunity policy and contains many of the features which have proved so effective in the United States in detecting and prosecuting cartel behaviour since its introduction in 1993.

- Taiwan Fair Trade Commission; and
- Consumer Affairs Council of Papua New Guinea.

The ACCC recently entered into a tripartite co-operation agreements with the following agencies:

- Canadian Competition Bureau and the New Zealand Commerce Commission;
- Taiwan Fair Trade Commission and the New Zealand Commerce Commission;
- United Kingdom Department of Trade and Industry, United Kingdom Office of Fair Trading and New Zealand Commerce Commission.

The co-operation agreements set out the scope of assistance that the respective anti-trust enforcement agencies will provide to each other.

The Australian Government also has in place an agreement (of treaty status) with the United States on Mutual Anti-Trust Enforcement Assistance. Assistance contemplated by the Agreement includes, among other things:

- disclosing or discussing antitrust evidence in the possession of an antitrust authority;
- obtaining antitrust evidence at the request of the other party; and
- providing copies of publicly available records in the possession of Government departments and agencies of the national Government of the party to whom the request is made.

The ACCC can use documents, information or other assistance provided by a foreign regulator in proceedings in the Federal Court if such material relates to the Australian issues pleaded in the proceedings and is admissible in accordance with the Australian rules of evidence under the *Evidence Act 1995 (Cth)*.

## Consequences and conclusion

The introduction of the criminal cartel provision and the finalisation of the ACCC revised Immunity Policy realises a long-held objective of the ACCC to substantially elevate the seriousness of the consequences of engaging in cartel conduct in Australia.

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