

### **CRACKING CARTELS— KEVIN CONTEMPLATES THE CLINK—16 JANUARY 2008**

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#### **INTRODUCTION**

On Friday 11 January 2008, Chris Bowen, the new Assistant Treasurer and Minister for Competition Policy, released the exposure draft Trade Practices Amendment (Cartel Conduct and other Measures) Bill 2008 to criminalise serious cartel conduct for public comment.

This forms part of the ALP's campaign pledge to introduce laws to criminalise serious cartel behaviour within the first twelve months of office.

The key features of the draft Bill are:

- An intention of dishonestly obtaining a benefit would be a requirement for a criminal conviction. The fact the cartel was conducted in secret and any steps the defendant took to cover their tracks would be powerful evidence of dishonesty.
- Individuals found guilty of serious cartel conduct would face imprisonment of up to 5 years and/or fines of up to \$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.
- The Australian Competition and Consumer Commission's ability to provide documents and information to civil litigants for use in potential or actual class actions against cartelists would be limited to the circumstances set out in the draft Bill.

The criminalisation of cartel conduct is likely to provide additional incentives for cartelists to seek immunity from the ACCC for their conduct and to co-operate fully with any investigation by the ACCC into their conduct.

The legislation to criminalise cartel conduct has been a long time coming. Criminalisation of cartel conduct was first mooted in the Dawson review in 2003 and the previous Coalition Government put forward a detailed proposal to criminalise cartel conduct in February 2005, but it was not translated into legislation. The draft bill closely follows the model proposed by the previous Coalition Government.

In addition to the draft bill, the Assistant Treasurer released a discussion paper and a draft of the Memorandum of Understanding ('MOU') between the Australian Competition and Consumer Commission ('ACCC') and the Director of Public Prosecutions ('DPP'). The Government is seeking submissions on the draft legislation and MOU by 29 February 2008.

A brief outline of the proposed legislation follows:

#### **NEW CRIMINAL OFFENCE**

The draft Bill sets out two new criminal offences:

- It would be an offence to make 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.
- 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.

A cartel provision is a provision to fix prices, restrict output, divide markets or rig bids by parties that are, or would otherwise be, in competition with each other.

The draft legislation also contains two new civil penalty provisions which essentially mirror the criminal offences, but do not have the requirement of an 'intention of dishonestly obtaining a benefit.' While the draft Bill presents these civil penalty provisions in a new form, in substance, they are the same as the civil liability provisions that are currently in the *Trade Practices Act 1974* (Cth) ('TPA').

The draft legislation proposes exemptions from both criminal and civil sanctions in relation to collective bargaining, authorised conduct and arrangements between related bodies corporate.

As is the present case, there would be a defence to the civil penalty provisions available for joint ventures that do not substantially lessen competition.

### **'INTENTION OF DISHONESTLY OBTAINING A BENEFIT'**

The legislation uses the mental element of an 'intention of dishonestly obtaining a benefit' to distinguish between criminal and civil liability for cartel conduct. The discussion paper that accompanied the draft Bill seeks public input into whether to include the mental element of 'dishonest intent' as part of the criminal prohibition, or provide some other distinguishing element.

Under the current proposal, in order to secure a criminal conviction, the prosecution would have to convince a jury, beyond a reasonable doubt, that the defendant:

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

Additionally, 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 would be irrelevant that a benefit was not actually received or was impossible to achieve.

The inclusion of a 'dishonesty' element in the offence is based on the cartel offence in the United Kingdom. There has yet to be a successful criminal prosecution for cartel conduct in the United Kingdom.

However, unlike in the draft Bill, the UK criminal offence only applies to individuals and does not apply to corporations. There is no guidance in the draft Bill or discussion paper as to how the dishonesty element would be proved against corporations, whether the provisions attributing fault to a corporation under the Criminal Code would apply, or whether the common law 'directing mind and will of the company' principle in *Tesco* would apply.

The majority of countries that have adopted criminal sanctions for cartel conduct follow the United States model. Under the United States system, criminal prosecutions are taken only for conduct which is deemed to be *per se* unlawful (horizontal price fixing, bid rigging, output restrictions and market allocation). If a US court finds that a *per se* illegal agreement exists, the prosecution only needs to prove, beyond a reasonable doubt, that the defendant knowingly entered into the agreement. Where conduct could be pursued either civilly or criminally, the decision whether to proceed to a criminal prosecution is an exercise of prosecutorial discretion depending on a range of factors, not dissimilar to those the ACCC would have to consider in determining whether to refer the matter to the DPP.

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## PENALTIES

The proposed penalties for criminal offences by individuals and corporations are:

	Individual	Corporation
<b>Imprisonment</b>	Up to 5 years	No
<b>Criminal fines</b>	Up to \$220 000	The greater of: <ul style="list-style-type: none"> <li>• \$10 million</li> <li>• 3 x the gain from the contravention, or</li> <li>• if the gain cannot be assessed, 10% of the annual turnover of the body corporate and related bodies corporate.</li> </ul>
<b>Criminal record</b>	Yes	Yes
<b>Proceeds of Crime Act (disgorging of profits)</b>	Yes	Yes

In addition to the criminal sanctions above, the defendant could also be subject to related civil orders which could include a community service order, an adverse publicity order, an order disqualifying a person from

managing a corporation or an order to make compensation.

The proposed penalties for the new civil offences are the same as those that apply to the existing civil offences (for example, a

penalty of up to \$500,000 for an individual).

Corporations are prohibited from indemnifying their officers for penalties and legal costs incurred as a result of a contravention of cartel laws.

## CRIMINAL VS CIVIL

The following table sets out the key areas in which criminal and civil cartel proceedings would differ under the proposals:

	Civil	Criminal
<b>Investigating body</b>	ACCC	ACCC
<b>Decision on immunity</b>	ACCC	DPP (upon recommendation of the ACCC)
<b>Prosecutor</b>	ACCC	DPP
<b>Burden of proof</b>	Balance of probabilities	Beyond reasonable doubt
<b>Court</b>	Usually Federal Court	Federal or State Court
<b>Decision maker</b>	Judge	Jury

Co-ordination between the ACCC and the DPP, including in relation to the administration of an immunity policy for criminal cartel offences, is intended to be facilitated by a MOU between the two agencies. A draft MOU was released together with the draft legislation.

The draft MOU identifies a series of criteria which the ACCC will consider when determining whether to refer a case to the DPP for criminal prosecution.

These factors include the duration of the cartel, the impact on the market, the detriment to the public and recidivism.

One criterion to be considered by the ACCC is whether the value of affected commerce would exceed \$1 million within a 12 month period or, in the case of bid rigging, whether the value of the bid or series of bids would exceed \$1 million within a 12 month period.

The draft MOU foreshadows a revised Immunity Policy for Cartel Conduct, incorporating the criminal offences. However, the draft MOU does not comment on how applications for leniency under the ACCC's co-operation policy will be determined. This will be a critical factor for defendants wishing to co-operate but who have been unable to obtain immunity.

## **ENHANCED SURVEILLANCE POWERS— WIRE TAPS**

The Government seeks views whether telephone interception powers should be made available as an investigative tool. Currently, telephone interception warrants are generally only available if the offence is punishable by imprisonment for a maximum period of at least 7 years. The cartel offence in its current form would provide a maximum sentence of 5 years.

While telephone interception powers would be useful to assist in establishing liability in a case where participants communicated primarily by telephone (such as the allegations made in the failed Geelong petrol case), surveillance that has been undertaken in United States and Europe has resulted from a co-operating witness either carrying a recording device, or recording a cartel in operation at a pre-arranged meeting.

## **DISCLOSURE OF CARTEL INFORMATION**

The draft legislation also contains amendments concerning the ACCC's disclosure of 'protected cartel information'. Protected cartel information is defined as information that was given to the ACCC in confidence and related to a breach, or possible breach, of the cartel provisions.

The proposed provisions allow the ACCC to refuse to grant a request under section 157(1) of the TPA to access protected cartel information by a person or corporation against whom the ACCC has instituted proceedings. Additionally, the disclosure of 'protected cartel information' to a Court or Tribunal will only be with leave of the Court or Tribunal, after the Court or Tribunal considers the factors

listed in the proposed legislation. These amendments will possibly make it more difficult for third party plaintiffs seeking damages to obtain copies of confidential documents given to the ACCC in the course of a cartel investigation.

However, the proposed legislation also contemplates a provision similar to Section 25 of the Australian Securities and Investments Commission Act, in that the ACCC may disclose protected cartel information upon application from a person who has instituted proceedings against cartelists or is considering instituting proceedings against cartelists. The draft Bill lists criteria the ACCC must consider in deciding whether to grant access to the materials. Depending on how the ACCC administers these provisions, they may allow greater access to cartel information to those, such as class action lawyers, wishing to assess whether the commencement of proceedings is worthwhile.

## **NEXT STEPS**

The closing date for submissions on the discussion paper is 29 February 2008.

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