

COMPETITION

LEGAL UPDATE

APRIL 2005

Competition & Consumer Protection Law

Criminal penalties for serious cartel conduct

The Federal Treasurer, Peter Costello, has announced the Government will soon introduce jail sentences and other criminal penalties for serious cartel conduct. This legislative initiative follows last year's recommendation of the Dawson Committee arising from its review of the Trade Practices Act.

Key message

The Federal Government has indicated it will get tough on serious cartel conduct with new legislation in the spring session aimed at introducing jail sentences and other criminal penalties for individuals and corporations. The proposed criminal regime (coupled with the prospect of immunity for whistleblowers) calls for a heightened risk management response.

These criminal penalties, and in particular jail sentences, are likely to provide a strong disincentive against serious cartel conduct. The possibility of immunity being granted to those persons who first provide information to the Australian Competition and Consumer Commission (ACCC), will encourage anyone currently engaged in cartels to think hard about whether they should come forward to the ACCC to avoid jail, or take their chances. In addition, those thinking of entering into a cartel may become wary as to the possible consequences if one of the other participants should first go to the ACCC.

What is the new offence?

The proposed criminal cartel offence will prohibit:

- » a corporation or a person from making or giving effect to a contract, arrangement or understanding between competitors that contains a provision having the effect of:
 - fixing (or controlling) prices
 - restricting output
 - dividing markets by allocating customers, suppliers, territories or lines of commerce or rigging bids with the intention to *dishonestly obtain a gain from customers who fall victim to the cartel.*

The element of dishonesty goes to the heart of serious cartel conduct and distinguishes it from the civil offence which exists today. Dishonesty will be judged by a jury according to the standards of ordinary people, and the dishonesty element will be used to distinguish criminal cartel conduct from conduct caught by the existing civil contraventions.

The new criminal penalties

The maximum penalties for the offence will be:

- » imprisonment for 5 years
- » a fine of \$220,000 for individuals
- » a fine for corporations that is the greater of:
 - 3 times the value of the benefit from the cartel; or
 - where the value cannot be determined, 10% of annual turnover of the corporations and its related bodies in Australia.

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The civil penalty regime will continue in parallel. Legislation has already been tabled to substantially increase the fines for corporations to the greatest of:

- » \$10 million
- » 3 times the gain from the conduct
- » if the gain cannot be determined 10% of annual Australian revenue of the group.

For individuals, the maximum fine continues to be \$500,000.

Small business

It is not intended that the criminal penalties will apply to cartels which do not have a significant impact on the market or where the value of commerce affected is less than \$1 million in a 12 month period.

Administration

The ACCC will be responsible for undertaking investigations but prosecution of criminal cases will be undertaken by the Director of Public Prosecutions.

Timing

Legislation is currently being drafted and will then need to be circulated among the States and Territories. It is unlikely that legislation will be brought before Parliament before the Spring session this year.

Leniency Policy

The criminal penalties are designed to interact with the ACCC's Leniency Policy. Briefly, that Policy offers immunity from prosecution to the person (other than the ringleader) who first comes forward to provide information regarding cartel conduct of which the ACCC is either unaware or lacks sufficient information to take action.

The combination of jail sentences for cartel participants and the ability to obtain leniency for providing information is expected to encourage participants to approach the ACCC to seek to be first in the door.

Taubman banged up

The sight of the chairman of Sotheby's, 79-year-old billionaire shopping magnate and philanthropist, Alfred Taubman, being led off to jail having been sentenced to prison for a year and a day (and fined US\$9 million) for his involvement in pricing fixing between the international auction houses Sotheby's and Christie's, did wonders for antitrust enforcement in the United States.

Actions

For the Board of Directors:

- » The Board needs to consider whether an independent legal audit of its business should be commissioned to identify any high risk areas in the business, and to satisfy itself that no cartel activity exists within those areas and that sufficient controls are in place to minimise any future risks.
- » The Board needs to formulate and communicate its unequivocal commitment to trade practices compliance and its absolute opposition to any cartel activity.

« The introduction of criminal penalties coupled with the element of 'dishonesty', requires the Board take steps to ensure management has put in place an effective compliance program which is vigorously implemented on an ongoing basis. »

- » Where there is any reason for concern, the Board should investigate those concerns thoroughly and then consider whether the company needs to approach the ACCC to seek leniency. Given that criminal penalties are not yet in place, there are advantages in acting now.
- » The introduction of criminal penalties coupled with the element of 'dishonesty', requires the Board take steps to ensure management has put in place an effective compliance program which is vigorously implemented on an ongoing basis. Such a program will assist the Board to mount a defence that it has not engaged in dishonest conduct.

- » Ensure the compliance program is adequately funded and resourced so as to develop a sound corporate culture of compliance – an important element to assist in demonstrating the company did not intend the conduct to take place .
- » Recent cases have shown that a well devised compliance program is not sufficient in itself, commitment to the program at critical times will be the test. The recent Amcor investigations give some indication of what is required. Note also the critical comments in the recent decision of Justice Gyles in *ACCC v George Weston Foods Limited*.

"I am satisfied that the [compliance] program is a serious and well designed endeavour to ensure compliance with the [Trade Practices] Act. The problem is that it has little to do with the conduct exemplified in this case, namely, the deliberate action of an executive director of the company."

The judge was also critical of the conduct of the company in rehiring as a consultant the director who had engaged in the unlawful conduct.

- » Companies have to be prepared to take disciplinary action against employees and officers who do not comply with its compliance policy when such action is warranted.

Actions For Management:

- » Actively support any Board sanctioned independent legal audit of the business by identifying areas where cartel conduct may be possible (eg trade associations, tender practices, pricing decisions, production quotas, contacts with business partners who in some cases may also be competitors).
- » Develop a policy statement to be endorsed by the Board that unequivocally spells out the company's position that cartel conduct is unacceptable.
- » Implement a compliance program necessary to create a culture of compliance with the *Trade Practices Act* overall and specifically with the provisions carrying criminal sanctions.
- » Develop a program that encourages whistleblowers to come forward and provide information regarding cartel conduct with the whistleblower assured that whistleblowing is not a betrayal of the company nor disloyalty but in fact a service to the company.
- » In conjunction with the Board, develop an overall compliance program and processes suited to the needs of the particular business.

FOLLOW UP

Sydney Seminar

Middletons' Competition & Regulatory Team is holding a client briefing to consider the business implications of the proposed criminal offence for serious cartels, as well as other recent developments in competition law.

The breakfast briefing (scheduled for Tuesday, 24 May 2005) will feature David Smith, the ACCC Commissioner primarily responsible for the ACCC's cartel enforcement and leniency policy.

Please email us at competition@middletons.com.au if you wish to receive an invitation to this briefing.

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