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## Serious cartels to be criminal offences

### Australia is likely to have criminal sanctions against serious cartels within 12 months.

The Rudd Government has issued an exposure draft of legislation to criminalise 'serious cartel conduct' under which cartel participants could be jailed for up to 5 years.

The draft Bill [known as the *Trade Practices Amendment (Cartel Conduct and other Measures) Bill 2008*] creates a criminal offence for making, or giving effect to, a contract, arrangement or understanding that contains a cartel provision 'with the intention of dishonestly obtaining a benefit'.

A cartel provision is a provision that relates to:

- price fixing
- restricting outputs
- allocating customers, suppliers or territories or
- bid rigging.

The maximum penalties proposed by the draft Bill are:

- for an individual – a term of imprisonment of 5 years and a fine of \$220,000 and

- for a corporation – a fine that is the greater of \$10 million or 3 times the value of the benefit from the cartel, or where the value cannot be determined, 10 percent of annual turnover.

It is questionable whether the Bill's use of a dishonesty test is the most effective criteria to adopt to distinguish criminal cartels from civil cartels. Instead of using a dishonesty test, it would appear preferable to define separately the morally reprehensible elements of 'hard core' cartel conduct which would make it suitable to be classed as a criminal offence.

However, regardless of how criminal cartels are ultimately defined by statute, clients should consider undertaking a full cartel audit of their businesses before the draft Bill becomes law, as the consequences of any breach of the proposed criminal law are so serious. It is anticipated that the criminal cartel offence will be enacted within 12 months.

## Expanded civil cartel offence introduced

### The Federal Government has released draft legislation to replace the current civil prohibition against cartels with a new and broader prohibition.

The draft Cartel Bill creates a new civil cartel offence which mirrors the criminal cartel offence, except that it does not require proof of 'dishonest intent'. The maximum pecuniary penalty for this civil offence will be \$500,000 for individuals and, for corporations, the same as the proposed criminal penalties.

The key elements of the new civil offence are outlined below.

#### Price fixing

The new price fixing offence is broader than the current prohibition (which is to be repealed) as it extends the concept of 'price fixing' to the downstream resale of those goods or services by customers of the parties who made the price fixing arrangement.

#### Production, output and supply restrictions

The new offence will also catch arrangements between competitors which have the purpose or effect of preventing, restricting or limiting:

- the production of goods
- the capacity to supply services
- the supply of goods or services to any persons or classes of persons.

For the first time, arrangements between competitors which limit or prevent their production of goods or capacity to supply services will be caught. Further, while the existing prohibition catches arrangements made for the purpose of restricting supply, the draft Bill will also catch arrangements having that effect, regardless of whether it was intended or not.

#### Bid rigging

The prohibition against bid rigging is also a new and potentially broad prohibition which attacks a range of collusive tendering practices.

In conclusion, the new civil cartel offence is expressed in different terms and is broader in scope than the existing prohibitions of the *Trade Practices Act*.

## New component pricing prohibition proposed

On 30 March 2008 the Rudd Government released a new exposure draft Bill to outlaw the practice of component pricing. The Government hopes it will enable consumers to readily identify the price they pay for products and services.

Component pricing occurs when a supplier identifies part of the total price (a component price), without also identifying the total price a person will be required to pay to obtain the product or service. For example, an advertisement for a car which identifies that a \$1,000 deposit is payable, without identifying the whole purchase price for the car.

The draft Bill [known as the *Trade Practices Amendment (Component Pricing and Other Measures) Bill 2008*] proposes to prohibit a corporation from using a component price in an advertisement without also prominently specifying the single price the consumer must pay to obtain the product or service, to the extent that it is quantifiable at the time of the advertisement.

It is intended that the single price will include a charge payable by the consumer to the supplier (eg a compulsory delivery or handling charge), any tax or charge imposed upon the supplier in relation to the supply (eg GST) and any amount payable by the supplier in relation to the supply (eg Passenger Movement Charge), but may exclude any amount payable by the consumer to a third party (for example, stamp duty).

The prohibition only requires the specification of a single price to the extent that it is quantifiable at the time of the pricing representation. If it is not quantifiable, it can not be readily converted into a dollar amount. For example, the price of fruit may continue to be

advertised as a per kilo price, as the total price will be dependent upon the quantity of fruit purchased.

However, the Explanatory Memorandum is likely to create some confusion in circumstances where the price is a mixture of partly quantifiable and non-quantifiable charges, as it advocates that the quantifiable charges be specified, together with some indication that not all components are included in the single figure price. This may be difficult to achieve in an environment where consumers have become accustomed to taking the single figure price to be the total price.

The prohibition only applies to the pricing of products or services of a kind ordinarily acquired for personal, domestic or household consumption. The Explanatory Memorandum accompanying the Bill expresses the view that it is not intended to apply to business-to-business transactions or transactions with government. Unfortunately, the Bill itself fails to introduce this important limitation. The Bill's prohibition currently operates in connection with a corporation's supply, or promotion of the supply or use, of goods or services to 'a person', irrespective of whether that person is an end user or a re-supplier.

Businesses that anticipate practical difficulties with this proposed legislation are encouraged to identify the difficulties involved as part of the consultative process associated with this exposure draft Bill.

## ACCC releases new draft Merger Guidelines

On 8 February 2008 the Australian Competition and Consumer Commission (ACCC) published its new Draft Merger Guidelines (Draft Guidelines) for consultation. The Draft Guidelines are set to replace the ACCC's current merger guidelines released in 1999 (1999 Guidelines).

The Draft Guidelines outline the analytical framework which the ACCC will follow when considering whether a proposed merger would have the effect of, or be likely to, substantially lessen competition in a market in contravention of section 50 of *Trade Practices Act 1974* (Cth) (TPA).

### Major changes

The Draft Guidelines make a number of key changes to the 1999 Guidelines, including:

- the introduction of a tougher and more complex market concentration test

- the abolition of the existing ‘safe harbour’ thresholds
- the ACCC’s preference for divestiture undertakings to be implemented before or upon (but not after) the completion of a merger
- confirmation that the ACCC will examine internal company documentation when reviewing a merger.

### Introduction of a tougher and more complex market concentration test

It is disappointing the ACCC has rejected the use of market shares (which most businesses readily understand) as the key market concentration test in favour of a more complex model favoured by economists - the Herfindahl-Hirschman Index (HHI).

The HHI is calculated by adding the sum of the squares of the market share of each firm in the relevant market. The absolute level of the HHI indicates the level of concentration in a market. The ACCC has identified a market with a HHI of greater than 2000 to be concentrated. Measured against such a low HHI threshold, mergers would need to be notified, as many markets in Australia would qualify as concentrated by reference to this threshold.

### Abolition of existing ‘safe harbour’ thresholds

The 1999 Guidelines set out ‘safe harbour’ thresholds to assist merger parties when determining whether to notify the ACCC of a proposed merger. The 1999 Guidelines set out that the ACCC is likely to investigate a merger if:

- it results in the combined market share of the four largest firms being 75% or more and the merged firm will supply at least 15% of the relevant market or
- the merged firm will supply 40% or more of the relevant market.

In the Draft Guidelines, the ACCC has removed these ‘safe harbour’ thresholds. It now seeks to encourage merger parties to notify the ACCC in a range of different circumstances, including where the merged firm would operate in a market deemed by the ACCC to be a concentrated market by reference to a HHI of greater than of 2000.

No guidance is given as to what level of change in market concentration (the HHI delta) as a result of a merger is likely to attract ACCC scrutiny. It is disappointing that in an economy as small as the Australian economy, the ACCC is unwilling to identify a ‘bright line’ test (such as a minimum post-merger concentration change or HHI delta) below which a merger should be allowed to proceed.

### Divestiture to occur prior to merger

The Draft Guidelines express the ACCC’s preference for divestiture to occur on or before the completion of the merger. The introduction of this preference is likely to delay the completion of a number of mergers, posing unacceptable risks to the merger parties, particularly in the field of public company takeovers.

### Internal company documents to be scrutinized

The Guidelines also confirm that the ACCC intends to intensify merger scrutiny by utilising company documents, such as board papers, internal plans and financial accounts, as evidence in determining whether merger parties are likely to be effective competitors in the relevant market in the future.

### Conclusion

The Draft Guidelines appear to demand far more detailed analysis of the market in the lead up to a merger, while at the same time exposing merger parties to more scrutiny of its internal documents. This may require a different approach to be taken to merger analysis.

