

CARTEL OFFENCES UNDER THE TRADE PRACTICES ACT 1974 (Cth)

DEFINITIONAL ISSUES

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Abstract

Cartel offences are soon to become part of federal criminal law. The political decision to enact cartel offences has been a major factor in the development of the forthcoming extensive changes to the federal criminal justice system.

In January 2008 the new Government released an Exposure Draft Bill setting out amendments to the *Trade Practices Act 1974* (Cth) and seeking comments from the public. The cartel offences in the Exposure Draft Bill are complex and have been widely criticised in public submissions.

The definition of cartel offences under the Exposure Draft Bill raises many issues. The cartel offences proposed:

- are subject to over-reach in many significant respects, including coverage of many forms of conduct that are not anti-competitive;
- are uncertain in definition and difficult to apply, whether for judges and jurors, corporations and their advisers, investigators, or prosecutors;
- impose vicarious individual and corporate criminal responsibility;
- create avenues for unmeritorious defences; and
- are not labelled clearly in terms of their main subject matter (collusive interference by competitors with market forces).

The Government is now considering submissions made on the Exposure Draft Bill and is likely to revise the definition of the cartel offences. The outcome remains uncertain.

1. Introduction

The question of definition of cartel offences in Australia has been the subject of discussion and debate for over six years but remains unresolved.

In 2002, the ACCC made detailed submissions to the Dawson Committee¹ but those submissions were flawed.² The Dawson Committee did not attempt to discuss the question of criminalisation in the detail expected and referred the most difficult issues back to the Government.³ Late in 2003 the Government created a Working Party to consider those issues, including the definition of the cartel offence.⁴ The Working Party reported to the Treasury in April 2004. However, the Working Party Report has never been published, access under the *Freedom of Information Act 1982* (Cth) has been refused, and the Report may not have been made available to the new Government after its election in November 2007.⁵ In February 2005 the Treasurer issued a press release outlining the proposals for cartel criminalisation including a brief outline of the cartel offence proposed.⁶ In January 2008 the new Government released the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 - Exposure Draft Bill (**EDB**) setting out amendments to the TPA and seeking comments from the public.⁷ The EDB was prepared by the previous government. The cartel offences in the EDB are complex and raise many questions. The draft provisions have been widely criticised in public submissions.⁸ Detailed criticisms are made in Fisse, “Defining the Australian Cartel Offences: Disaster Recovery” (paper presented at Competition Law Conference 24 May 2008, updated and revised version available at: www.brentfisse.com).

¹ ACCC, *Submission to the Trade Practices Act Review*, June 2002, at <http://tpareview.treasury.gov.au/submissions.asp>.

² See, eg. Business Council of Australia, *Supplementary Submission to the Review of the Trade Practices Act 1974 and its Administration*, 2002; Law Council of Australia, *Submissions to the Trade Practices Act Review Committee*, 2002., at <http://tpareview.treasury.gov.au/submissions.asp>.

³ Trade Practices Review Committee, *Review of the Competition Provisions of the Trade Practices Act* (2003) ch. 10. See the criticism in B Fisse, “The Dawson Review: Enforcement and Penalties” (2003) 36 UNSW LJ 315 at 317.

⁴ Treasurer, ‘Working Party to Examine Criminal Sanctions for Cartel Behaviour’ (Press Release, 3 October 2003), at <http://www.treasurer.gov.au/tsr/content/pressreleases/2003/086.asp>.

⁵ *Fisse v Treasury* [2008] AATA 288, [124]. An appeal against the decision of the AAT is to be heard by the Full Federal Court on 26 September 2008.

⁶ Treasurer, ‘Criminal Penalties for Serious Cartel Behaviour’ (Press Release 2 February 2005, No. 4 of 2005), at www.treasurer.gov.au/tsr/content/pressreleases/2005/004.asp.

⁷ The EDB was accompanied by a Discussion Paper of 7 pages. See at <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1330>.

⁸ The submissions are available at <http://www.treasury.gov.au/contentitem.asp?NavId=066&ContentID=1350>, last viewed 7 May 2008.

The expectation is that criminal cartel provisions will be introduced into Parliament later this year.

2. The cartel offences under the EDB

Section 44ZZRF of the EDB creates the indictable offence of making a contract or arrangement or arriving at an understanding containing a cartel provision:

- (1) A corporation commits an offence if:
 - (a) the corporation makes a contract or arrangement, or arrives at an understanding, with the intention of dishonestly obtaining a benefit; and
 - (b) the contract, arrangement or understanding contains a cartel provision.

Section 44ZZRG creates the indictable offence of giving effect to a cartel provision:

- (1) A corporation commits an offence if:
 - (a) a contract, arrangement or understanding contains a cartel provision; and
 - (b) the corporation gives effect to the cartel provision with the intention of dishonestly obtaining a benefit.

Under s 6 (in the amended form proposed) there will be certain limited circumstances in which the new cartel offences and civil penalty prohibitions under the new Division 1 of Part IV will apply to persons other than corporations. Also, the Schedule Version of the cartel offences and civil penalty prohibitions will apply in the States and Territories to a 'person'.

'Cartel provision' is defined in s 44ZZRD. A provision is a cartel provision if two conditions are satisfied in relation to the provision:

- (a) the purpose/effect condition set out in sub-s (2);
- (b) the competition condition set out in sub-s (3).

These conditions can be satisfied when the provision is considered with related provisions (s 44ZZRD(7)).

Under s 44ZZRD(2), the purpose/effect condition is satisfied if the provision has the purpose, or has or is likely to have the effect, of directly or indirectly:

- (a) price-fixing;
- (b) restricting outputs in the production and supply chain;
- (c) allocating customers, suppliers or territories; or
- (d) bid-rigging.

Each of these effects is defined under s 44ZZRD(2).

'Party' has an extended meaning: if a body corporate is a party to a contract, arrangement or understanding, each related body corporate is taken also to be a party (s 44ZZRC).

The offence under s 44ZZRG applies to contracts or arrangements made, or understandings arrived at, before, or after the commencement of the section (s 44ZZRG(3)).

Under the EDB the cartel offences are subject to a jail term of up to five years and a fine of \$220,000 for individuals.⁹ Corporations are punishable on conviction by a fine not exceeding the greater of the following:

- (a) \$10,000,000;
- (b) if the court can determine the total value of the benefits that:
 - (i) have been obtained by one or more persons; and
 - (ii) are reasonably attributable to the commission of the offence;3 times that total value;
- (c) if the court cannot determine the total value of those benefits—10% of the corporation's annual turnover during the 12-month period ending at the end

⁹ For a critique, see C Beaton-Wells and B Fisse, *Submission, The Exposure Draft Bill, Draft ACCC-CDPP MOU and Discussion Paper introducing criminal penalties for serious cartel conduct in Australia, 7 March 2008, Attachment: Issues Paper, Parts 17.3-17.4*, at <http://www.treasury.gov.au/contentitem.asp?NavId=066&ContentID=1350>, last viewed 14 July 2008 (to be published in (2008) 36 Australian Business Law Review (June)) (**Issues Paper**).

of the month in which the corporation committed, or began committing, the offence.¹⁰

The proposed cartel offences are called ‘making a contract etc containing a cartel provision’ and ‘giving effect to a cartel provision’ rather than, for example, ‘price-fixing’, ‘collusive interference with competition’ or ‘collusive subversion of competition’.

3. Summary of criticisms of the definition of cartel offences under the EDB

- The definition of cartel offences is more difficult than may first meet the eye. The approach taken in the EDB Bill is profoundly unsatisfactory. Rethinking and substantial redrafting are required. Statutory precedents in other jurisdictions provide limited assistance.
- The concept of dishonesty serves no useful purpose as an element of a cartel offence, is uncertain in meaning, creates avenues for unmeritorious denials of liability and, in terms of deterrence and public education, is a misleading label.
- The EDB provisions relating to price-fixing and exclusionary arrangements raise significant issues:
 - the definition of the physical elements of the offences creates over-reach;
 - several of the key concepts are uncertain or difficult to apply;
 - bid-rigging is covered by the prohibition against price fixing – separate prohibition is unnecessary.
- The fault elements prescribed for the EDB cartel offences suffer from three main problems:
 - the fault elements do not require the degree of blameworthiness implicit in the animating concept of serious cartel conduct;
 - the concept of recklessness is ill-defined and prone to unmeritorious denials of liability; and
 - the fault elements are unduly complex for jury trials.

¹⁰ For a critique, see Issues Paper, Parts 17.2, 17.5.

- The EDB impose vicarious individual and corporate criminal responsibility in relation to the physical elements and the fault elements of a cartel offence. This is a questionable departure from principle.
- The cartel offences are not subject to an adequate range of defences and exemptions:
 - vertical arrangements are not exempted;
 - there is no joint venture defence; and
 - there is no exemption of collective acquisitions and joint advertising of goods or services collectively acquired.

4. Back to the drawing board - an alternative possible approach

4.1 Suggested offences of collusive suppression of competition and giving effect to collusive suppression of competition

As an alternative approach, offences of collusive suppression of competition and giving effect to collusive suppression of competition might be defined along these lines:¹¹

- (1) A corporation shall not:
 - (a) intentionally make a contract or arrangement or arrive at a understanding with a competitor in the knowledge or belief that the contract, arrangement or understanding contains a cartel provision; or
 - (b) intentionally give effect to a cartel provision in the knowledge or belief that the provision is a cartel provision contained in a contract or arrangement made, or an understanding arrived at, by the corporation and a competitor.
- (2) A cartel provision is a provision that is contained in a contract, arrangement or understanding between a corporation and a competitor, and:
 - (a) is intended by the corporation and the competitor to fix, control or maintain the price for, or a discount, allowance, rebate or credit in

¹¹ Perhaps as s 45AA under the Eveready-Duracell numbering scheme that has been adopted for the TPA.

relation to, goods or services supplied or acquired or to be supplied or acquired by the corporation or the competitor, or by any body corporate that is related to either of them; or

(b) is intended by the corporation and the competitor to lessen competition between the corporation and the competitor, or between the corporation or the competitor and a third party competitor, by restricting or preventing the supply or acquisition of goods or services by the corporation or the competitor, either generally or in particular circumstances or on particular conditions.

(3) Intention is defined as under s 5.2 of the *Criminal Code* (Cth):

(a) A person has intention with respect to conduct if he or she means to engage in that conduct.

(b) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.

(c) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

(4) In proceedings against a person in relation to a contravention of (1)(a) or (b) it is a defence (the defence of legitimate primary intention) if the person establishes that the cartel provision is intended primarily:

(a) to increase the output of goods or services, to reduce their cost, to improve their quality or to achieve the use of environmentally sustainable resources;

(b) to prevent a serious risk to a person's life or the health or safety of the public or a section of the public or to remedy serious physical harm occasioned to a person or serious damage to property;¹² or

¹² Compare *Criminal Code* (Cth) s 100.1.

- (c) to prevent a serious risk to the environment or to remedy serious harm occasioned to the environment.¹³
- (5) Existing defences and exemptions applicable to the per se civil penalty prohibitions against price fixing and exclusionary provisions apply, in suitably revised form, to the offences under (1)(a) and (1)(b).

The prime features of the approach indicated above are as follows:

- the existing per se civil penalty prohibitions against price fixing and exclusionary provisions are taken as the starting point, rather than the ill-defined OECD concepts deployed in s 44ZZRD of the EDB;
- the offence of collusive suppression of competition reflects the concept of serious cartel conduct in these main ways:
 - (a) an intention to fix prices or restrict competitive conduct is required – recklessness is insufficient (contrast the position under ss 44ZZRF and 44ZZRG);
 - (b) an intention to fix prices or to lessen competition with a competitor is required on the part of all the parties alleged to be principal offenders – it is insufficient that only two alleged principal offenders acted with that intention (contrast the position under ss 44ZZRF and 44ZZRG);
 - (c) the intention must be that of the parties, as distinct from the “purpose of the provision” (contrast the position under the existing and proposed per se civil penalty prohibitions);
 - (d) the concept of an exclusionary provision is re-defined in terms of interference with competition instead of the much broader concept of restriction of supply or acquisition (contrast s 4D);¹⁴

¹³ Compare *Criminal Code* (Cth) s 100.1.

¹⁴ See P Areeda & H Hovenkamp, *Antitrust Law*, chs 19B, 20D, 22A. On the underlying rationale for s 4D see W Pengilley, *Price Fixing and Exclusionary Provisions* (Prospect, 2001) Parts 8, 10; W Reid, “Exclusionary Provisions – Dead, Alive or Living in Mexico?” (2003) Law Council of Australia, Trade Practices Committee Workshop.

- (e) all the alleged principal offenders must be competitors, not merely two of them (contrast the position under ss 44ZZRF and 44ZZRG);
- (f) the defence of legitimate primary intention under (4)(a) enables liability be avoided where the cartel provision is ancillary to cooperative productive activity and hence a socially desired rather than unwanted type of conduct;
- (g) the defence of legitimate primary intention under provisions (4)(b) and (c) enable liability to be avoided where the cartel provision is ancillary to certain forms of cooperative activity that are plainly in the public interest; and
- (h) the defences and exemptions that apply to existing per se civil prohibitions (eg a defence for genuine joint ventures; an exemption for related corporations) are available (in adapted form).

4.2 Explanatory notes

- Provision needs to be made for the liability of individual employees or agents of a corporation¹⁵ if the view is taken that it is insufficient to rely on the *Criminal Code* (Cth) provisions on liability as an accomplice or the TPA provisions on ancillary liability, including liability for being knowingly concerned in an offence.
- The proposals above do not seek to change the present law on the meaning of “contract, arrangement or understanding”. The ACCC has proposed that s 45 of the TPA be amended to help overcome the difficulty of establishing an understanding.¹⁶ It is unclear whether or not that proposal is confined to the civil penalty prohibitions or extends to the cartel offences. The proposal has been criticised severely.¹⁷

¹⁵ See EDB, s 6(2C)(n) (extended application of cartel offences – reference to a “corporation” in Part IV Division 1 (other than s 44ZZRD) includes a reference to “a person not being a corporation”).

¹⁶ ACCC, *Petrol Prices and Australian Consumers* (2007) 230, Appendix R.

¹⁷ See I Wylie, "Understanding 'Understandings' under the Trade Practices Act - An Enforcement Abyss?" (2008) 16 TPLJ 20; I Tonking, “Belling the CAU: Finding a Substitute for ‘Understandings’ about Price” (2008) (forthcoming).

- The alleged principal offenders must be competitors at all levels of the supply, production or distribution chain to which the contract, arrangement or understanding and the cartel provision relate (contrast s 45A(1) which requires two parties to a contract, arrangement or understanding to be competitors only at the level of the goods and service to which the price fixing provision relates).¹⁸
- “Competitor” includes a corporation that would be likely to be a competitor but for the cartel provision.¹⁹ “Third party competitor” means a competitor of the parties who make a contract or arrangement or arrive at an understanding or give effect to a cartel provision contained in a contract, arrangement or understanding and who is not a party to that contract, arrangement or understanding.
- The concept of an intention to lessen competition between competitors in (2)(b) above is based partly on a redefinition of s 4D proposed by Pengilley.²⁰ This concept does not require an evaluation of competition in a market as a whole, nor of whether the restriction of supply or acquisition had the purpose, effect or likely effect of substantially lessening competition in a market.
- It is irrelevant under (2)(b) whether or not the restriction of output or the allocation of customers is targeted at competitors.²¹
- The definition of price fixing in (2)(a) above does not follow the notorious dictum of Lockhart J in *Re: Radio 2UE Sydney and Stereo FM Pty Limited and 2 Day-FM Limited* (1982) 62 FLR 437 at 448 that there is no fixing, controlling or maintaining of a price under s 45A(1) where the conduct

¹⁸ Consider the problem under 45A(1) discussed in A Nicotra & J O’Regan, “Dare To Deem - Does Section 45A Trade Practices Act Prohibit ‘Pro-Competitive’ Price Fixing?” (2001); AI Tonking, “Competition at Risk? New Forms of Business Cooperation” (2002) 10 Competition & Consumer Law Journal 169, Pts 10, 11. For further background, see Issues Paper, Part 5.3.1 B2.

¹⁹ See TPA s 4D(2), 45A(8).

²⁰ W Pengilley, *Price Fixing and Exclusionary Provisions* (Prospect, 2001) Attachments 1-2.

²¹ The Dawson Committee recommended that s 4D be amended by including such a restriction (following s 29 of the *Commerce Act 1986* (NZ)): Trade Practices Review Committee, *Review of the Competition Provisions of the Trade Practices Act* (2003) 128. However, that recommendation is unpersuasive because it lacks economic foundation and is inconsistent with US antitrust law: see W Reid, “Exclusionary Provisions – Dead, Alive or Living in Mexico?” (2003) Law Council of Australia, Trade Practices Committee Workshop.

affects the price "by improving competition".²² A test of improvement of competition has no coherent economic or other rationale: the question is whether the conduct is anti-competitive, not whether it is necessarily pro-competitive. If it is thought that the definition of price fixing should exclude conduct that is not anti-competitive, a far preferable approach would be to require an intention on the part of the alleged principal offenders to lessen competition between them.²³ Such a requirement is included in the suggested definition of a cartel provision where the provision is an exclusionary provision (see (2)(b) above).

- Unlike ss 44ZZRF and 44ZZRG, the provisions outlined above specify the required fault elements instead of implying them on the basis of the general fault principles of the *Criminal Code* (Cth).²⁴
- The requirement of intention means intention in the sense defined in s 5.2 of the *Criminal Code* (Cth).²⁵ The requirement of an intention to fix prices or lessen competition is an ulterior intention that, on one view, is not subject to s 5.2(3) of the *Criminal Code* (Cth) and bears its dictionary meaning.²⁶ If the extended definition of intention under the Code is to apply, that needs to be made clear. There is a good case for limiting intention with respect to a result to intention in the sense that the accused means to bring it about and deleting the extended definition under s 5.2.3(c) (ie deleting "or is aware that it will occur in the ordinary course of events").²⁷
- The physical element of "making" a contract, arrangement or understanding or "giving effect to" a cartel provision is *conduct* within the meaning of the

²² The dictum was not endorsed by the Full Federal Court on appeal and has no clear support in later Australian case-law.

²³ As required in *US v Joint-Traffic Association*, 171 US 505, 508-509 (1898). See further O Odudu, "The Role of Specific Intent in Section 1 of the Sherman Act" (2002) 25 *World Competition* 463.

²⁴ Consistently with the recommendation in Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia*, Report No 95 (2002) [11.54], 405, <http://www.austlii.edu.au/au/other/alrc/publications/reports/95/> viewed 14 February 2008.

²⁵ For a commentary, see S Odgers, *Federal Criminal Law* (Lawbook Co, 2007) 36-42.

²⁶ Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners* (2002) p 53. For the opposing view that the Code definition of intention applies more generally and to an ulterior intention of kind relevant here, see Odgers S, *Principles of Federal Criminal Law* (Thomson Lawbook Co., 2007) pp 36-38. See further I Leader-Elliott, "Benthamite Reflections on Codification of General Principles of Criminal Liability: Towards the Panopticon" (2006) 9 *Buffalo Criminal LR* 101 at 139-142.

²⁷ See further I Leader-Elliott, "Negotiating Intentions in Trials of Guilt and Punishment" in N Naffine, R Owens & J Williams eds), *Intention in Law and Philosophy* (Ashgate, 2001) 73.

Criminal Code. The physical elements that the provision be a “cartel provision”, and that it be “contained in” the relevant contract, arrangement or understanding, are *circumstances*. The physical element that the alleged principal offenders be in competition with each other is a *circumstance*. The effect that must be intended under the definition of a cartel provision (eg the effect of price fixing) is a *result*.

- The provisions above explicitly require knowledge or belief in relation to the circumstances specified in the definition of the offence. This reflects the position that it is preferable for the fault elements to be explicit rather than implicit.²⁸ “Knowledge” is as defined in s 5.3 of the *Criminal Code* (Cth): “[a] person has knowledge of a circumstance or a result of he or she is aware that it exists or will exist in the ordinary course of events.”
- The meaning of “intention” in situations where an accused has multiple intentions requires a provision parallel to s 4F.²⁹
- The offence of giving effect to collusive suppression of competition should apply where the contract or arrangement was made or the understanding was arrived at before the commencement of the provisions creating the offence.³⁰
- The defence of legitimate primary intention under provision (4)(a) seeks to avoid over-reach by enabling liability for a cartel offence to be denied where the cartel provision is ancillary to co-operative efficiency-enhancing conduct. The concept of a “primary intention” is intended to reflect Taft J’s formulation of the principle of an ancillary restraint in *US v Addyston Pipe & Steel Co*.³¹ a restraint is ancillary and not naked where the “main purpose” of the restraint is to make a separate legitimate transaction more effective. The defence under 4(a) does not require a “joint venture” or the application of a competition test (contrast the joint venture defence under s 76C and s 76D)

²⁸ Consistently with the recommendation in Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia*, Report No 95 (2002) [11.54], 405, <http://www.austlii.edu.au/au/other/alrc/publications/reports/95/> viewed 14 February 2008.

²⁹ Contrast the possibility of a sole intention test corresponding to the sole purpose test adopted in *US v Addyston Pipe & Steel Co*, 85 Fed 271 at 282-283 (1898); *Dr Miles Medical Co v John D Park & Sons Co*, 220 US 373 (1911).

³⁰ As under EDB s 44ZZRG(3).

³¹ 85 Fed 271 at 282-283 (1898). See further RH Bork, *The Antitrust Paradox: A Policy at War with Itself* (Free Press, 1993) 26-30, 135-136, ch 13.

but, like ss 76C and 76D, places an affirmative as well as evidentiary burden of proof on the person seeking to rely on the defence.

- The defence of legitimate primary intention under provisions (4)(b) and (c) seek to avoid over-reach by enabling liability for a cartel offence to be denied where the cartel provision is ancillary to certain forms of cooperative activity that are plainly in the public interest.³² Little attention has been paid to the implications of the present per se civil penalty prohibitions in the context of collective action by competitors to refuse supply to terrorist organisations or to take action to protect the environment. Nor has sufficient attention been paid to the implications of those prohibitions in other contexts, including group action by competitors against infringements of intellectual property³³ or the group settlement of litigation. The defence under provisions 4(b) and (c) does not seek to cover all possible situations where an exemption might be justified as a matter of policy but attempts to close the most glaring gaps in the current array of defences and exemptions.

Would a defence of legitimate primary intention give rise to undue complexity and delay? Would the focus on intention create the opportunity for unmeritorious acquittals? These questions need careful consideration. The answers may point to the need for imposing a persuasive burden of proof on accused. They may also militate against defining the defence in terms of subjective intention, one possible alternative being a defence defined in terms of primary objective purpose.

- "Intention" in "primary intention" under provision (4) requires the accused to mean to bring about a relevant result within (4)(a)(b) or (c) - it does not mean intention in the extended sense of awareness that the result "will occur in the ordinary course of events" (contrast s 5.2(3) of the Criminal Code (Cth)).

³² To similar effect, see the principle of public interest ancillarity under EC competition law: see J Faull & A Nikpay, *The EC Law of Competition* (2nd ed, 2007) 237-239. In some cases the rule of reason in US antitrust law has been extended to take account of social justifications; see American Bar Association, *Antitrust Developments* (6th ed, 2006) vol 1, ch 1(3). But see JH Adler, "Conservation through Collusion: Antitrust as an Obstacle to Marine Resource Conservation" (2004) 61 *Washington & Lee LR* 3.

³³ Compare *Fashion Originators' Guild of America v FTC*, 312 US 457 (1941) as criticised in RH Bork, *The Antitrust Paradox: A Policy at War with Itself* (Free Press, 1993) 338-339.

- It is debatable whether the defence of legitimate primary intention should be an affirmative defence or impose only an evidentiary burden on the accused. The same applies to the joint venture defence in its applicable to the cartel offences.

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