This is the published version (version of record) of:

Clarke, Julie 2010-05-05, Running a Cartel? Go directly to jail, Law Institute journal, no. May, pp. 52-55.

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Last year new laws came into operation criminalising cartel conduct. Any agreement containing a cartel provision entered into or given effect to after that date is subject to the new laws and cartelists risk imprisonment of up to 10 years per contravention and criminal fines, in addition to existing civil penalties.

Cartels have been prohibited by the Trade Practices Act 1974 (TPA) since its inception and subject to civil penalties which have increased (from $250,000 to more than $10 million) and expanded (to include, for example, disqualification of directorship) in recent years. While these penalties are often considered substantial, they are modest by international standards. The $36 million fine levied against V existing and its directors should be contrasted with the $1.05 billion fine imposed on Intel by the European Commission, and even this is considered by some to be too low because the potential cartel gains, combined with the relatively small chance of detection, can still make cartelisation a rational choice on a conventional risk-reward analysis. Even when cartelists are detected and penalties imposed, they often do not effectively target the individuals involved.

With this in mind, the Dawson Committee, in 2003, recommended the introduction of criminal penalties for "serious" cartel behaviour. The new legislation implements this recommendation and it is expected that the possibility of incarceration will provide a level of deterrence that cannot be achieved by civil penalties alone. In the case of senior businessmen and women, the threat of imprisonment is likely to prove particularly potent.

CARTEL PROVISIONS

The new cartel laws are contained in a new Division 1 of Part IV of the TPA: the former s45A which, together with s45, prohibited price fixing, has been repealed. "Cartel provision" is defined in s44ZZRR-D as a provision of a contract, arrangement or understanding (CAU) that has:

- the purpose of:
  - preventing, restricting or limiting production, capacity or supply (output restriction); or
  - allocating customers or territories (market division); or
  - rigging bids (bid rigging)

and which satisfies the "competition condition" requiring at least two of the parties to the CAU to be competitors in the relevant market. Cartel conduct is prohibited per se under the new law; that is, without the need to demonstrate that it has the purpose or effect of substantially lessening competition (SLC).

The definition is highly complex, running to several pages of statutory text, and its scope is likely to give rise to uncertainty for some time. Price fixing is defined in the same terms as it was in the former s45A, but the term "likely" is now separately defined to include a "possibility that is not remote". It is not clear whether this will expand the scope of the price-fixing definition.
The other three forms of prohibited conduct are all newly defined. The first is output restriction, which will overlap considerably with the existing prohibition on exclusionary provisions (primary boycotts), defined in s4D. For example, an agreement between competitors having the purpose of preventing or limiting supply of the goods they produce to specified persons or classes of persons (such as discounters) will constitute a cartel provision and an exclusionary provision. Agreements which limit production (broadly defined) or capacity (by, for example, agreeing not to acquire new equipment to increase capacity) will also constitute unlawful output restrictions.

The second form is market allocation, which includes agreements to allocate suppliers, customers and territories. Some forms of market allocation between competitors might also constitute exclusionary conduct under s4D.

The final form of conduct, bid rigging (which overlaps with price fixing), is also defined broadly and includes various agreements to manipulate bids, including parties agreeing that only one will bid or that more than one will bid, but on the understanding that one bid will be likely to be more successful than the other.

Unlike price fixing, which may be established if the provision has the purpose or effect of "fixing, controlling or maintaining" prices, bid rigging, output restriction and market division all require proof of "purpose" and that purpose must be substantial. Consequently, it is not necessary, nor sufficient, to prove that conduct had the effect or likely effect of bid rigging, output restriction or market division.

"Purpose" is a particularly tricky element and no definition has been included to help, although it is clear that in determining purpose regard can be had to related provisions. The legislation refers to the "purpose of the provision", but it is now well established, in the context of Part IV, that it is the "subjective" purpose of the parties and not the "objective" purpose of the provision, that is relevant. Recent case law suggests that all the parties responsible for including the provision must have the requisite purpose and, although the purpose probably relates to the end sought to be achieved, the weight to be given to the immediate purpose remains unclear.

THE CRIMINAL OFFENCE
A corporation or individual commits an indictable offence if they make or give effect to a CAU containing a cartel provision and the necessary fault elements are present. The fault elements are intention to make or give effect to the CAU and knowledge or belief that the CAU contains a cartel provision. Intention is relatively uncontentious. The Criminal Code provides that a person has knowledge if "he or she is aware that it exists or will exist in the ordinary course of events", but belief is not defined and its ordinary meaning is far from clear, although recklessness and "wilful blindness" will not be sufficient.

It is not necessary that the party knew the conduct was unlawful and it is possible for one party to be found guilty of a cartel offence even if other parties have been acquitted, unless a finding of guilt in those circumstances would be inconsistent with their acquittal. For example, a finding that X is guilty because a provision has the effect of price fixing would be inconsistent with a finding that Y is not guilty because the provision does not have that effect, but a finding that X is guilty because they had the requisite "knowledge or belief" would not be inconsistent with a finding that Y is not guilty because they lacked such knowledge or belief.

In all cases, for a party to be convicted of an offence under ss44ZZRF or 44ZZRG, a jury must be unanimously convinced that all elements have been established "beyond a reasonable doubt".
The civil prohibitions
Parallel civil prohibitions are contained in s44ZZRJ and 44ZZRK and are identical to the criminal offences save for the absence of any fault element.

CRIMINAL OR CIVIL ACTION?
An earlier proposal to distinguish “serious” cartel conduct for purposes of the criminal offence by incorporation of a “dishonesty” element was abandoned. Instead, the Australian Competition and Consumer Commission (ACCC) will determine which matters will be referred to the Commonwealth Director of Public Prosecutions (CDPP) for criminal prosecution, and the CDPP will decide which matters to prosecute. They will be guided by the ACCC’s Cartel Guidelines32 (the Guidelines) and the Memorandum of Understanding (MOU) between the ACCC and CDPP. The Guidelines state that “serious” cartel conduct should be “prosecuted criminally whenever possible” and define serious cartel conduct as the type that “usually causes, or has the potential to cause, large scale or serious economic harm”. Indicators of “seriousness” include whether the conduct is long-standing and could significantly affect the market, whether the conduct caused or could have caused significant public detriment or significant loss or damage to one or more customers, whether the participants have previously engaged in cartel conduct and whether the value of commerce affected exceeded $1 million within 12 months or would have done so.23 The list is non-exhaustive and none of the “indicators” are essential for the conduct to be considered “serious”. In particular, “clandestine” behaviour may be treated as “serious” even where less than $1 million of commerce is affected.24

It is possible for the ACCC to pursue civil penalties if criminal proceedings fail,25 or for civil penalties to be pursued as an alternative to criminal action. The ACCC has made clear it will not allow a person to “seek to trade off a possible criminal prosecution with civil settlement”.26

JOINT VENTURES
Before the new laws, a defence for price fixing was available for joint ventures (JV) where it could be demonstrated the CAU did not have the purpose, effect or likely effect of SLC. A new JV defence has been created for civil and criminal cartel conduct applicable to cartel provisions contained in a contract made for the purposes of a JV where the JV is for the production and/or supply of goods or services.27

The defence has been validly criticised as both too broad28 and too narrow.29 It is too broad because there is no requirement to demonstrate that the conduct did not have the purpose or effect of SLC. This was removed because a competition test was considered “extremely problematic” for a jury.30 However, where such purpose or effect can be demonstrated, the agreement will still be caught by s45.

More problematic is the fact that the defence is restricted to contractual JVs. The reason for this has not been adequately explained and poses a real risk for business engaged in genuine and pro-competitive JV activity. For example, any arrangement or understanding made as a preliminary step to a formal JV contract will be caught, even where a subsequent contract – on identical terms – is not.31 Similarly, arrangements or understandings made after a contractual JV is formed and related to that JV, but not specifically referred to in the contract, will not have the benefit of the defence.32

A late amendment to the Bill extended the defence to arrangements or understandings where parties intended them to be contracts and reasonably believed them to be contracts. This is a narrow and technical exception that fails to deal with concerns.

The new defence is also limited to JVs for the production and supply of goods or services; acquisitions by JVs are not caught unless made by a JV which has been formed for the purpose of production or supply of goods and services.33 Although the reason for this restriction remains unclear, it is mitigated by the existence of other exceptions that might allow joint acquisitions, including joint acquisitions of shares,34 pricing of goods or services to be collectively acquired and the advertising price for the resupply of jointly acquired goods or services.35

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EXCEPTIONS AND ANTI-OVERLAP
There are exceptions to the civil and criminal prohibitions on cartel conduct, including notified collective bargaining, authorised conduct and CAUs between related bodies corporate. Anti-overlap provisions operate for some conduct, including resale price maintenance, exclusive dealing and mergers, but, importantly, not for s45, including primary boycotts.

The existing JV defence for primary boycotts continues to apply and is broader in scope than the cartel defence, applying to arrangements and understandings as well as contracts. To apply, however, it must also be demonstrated that the JV does not to have the purpose, effect or likely effect of SLC. As a result of the different JV defences, JV parties to a primary boycott must ensure that they satisfy both definitions to escape contravention; importantly, they must ensure that their JV is formalised in a contract.

IMMUNITY
Cartel arrangements are almost always covert so that detection and proof remain difficult. These difficulties will be exacerbated by the requirement to prove the existence of a cartel provision beyond a reasonable doubt, increasing the need for an effective immunity policy to encourage participants to notify the ACCC of their unlawful conduct in return for immunity from prosecution. By increasing the risk of detection, cartel immunity policies play an important role both in identifying and deterring cartel conduct.

The CDPP has acknowledged the importance of the cartel immunity policy and has, for the first time, amended the Prosecution Policy of the Commonwealth to enable immunity to be granted in the early stages of a cartel investigation. The ACCC has also updated its immunity policy36 in relation to civil proceedings. In the case of criminal prosecutions, the ACCC will make recommendations to the CDPP about whether the applicant meets the immunity criteria and the CDPP will make a determination based on the same criteria, including whether the corporation or individual was or is a party to the cartel (or a director, officer or employee of a party), whether they admit their conduct may contravene the TPA, whether they are the first to apply, whether full cooperation is provided and promised and whether they were the cartel leader. The ACCC also must not already have sufficient evidence to commence proceedings in relation to the cartel conduct.
NEW INVESTIGATORY POWERS

In addition to its already extensive investigatory tools, the ACCC, when aware of cartel conduct that might be pursued criminally, may notify and work with the Australian Federal Police. This may enable the gathering of evidence through surveillance and telephone interception.

CONCLUSION

Civil penalties alone cannot provide an effective deterrent against cartel conduct; criminal penalties are necessary and appropriate. But the devil is in the detail and there’s plenty of detail in the new cartel laws. A wide range of cartel conduct is now prohibited per se and subject to considerable criminal penalties. Parties to joint ventures, in particular, must be wary of the more limited scope of the new JV defence and should be advised to formalise any agreement that might contain a cartel provision in a contract. The consequences for failing to do so are now very serious.

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1. Introduced by the Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009 (the Cartel Act).
2. For individuals up to $200,000 and for corporations criminal fines equal to those available civilly—s79(1) and ss4A2Z8–4A2Z8G respectively.
3. The definition extends to “the price for, or a discount, allowance, rebate or credit”—sA2Z8E9(2).
5. The definition extends to “the price for, or a discount, allowance, rebate or credit”—sA2Z8E9(2).
6. See, for example, Rural Press Ltd v ACCC (2003) HCA 75.
7. See, for example, Rural Press Ltd v ACCC (2003) HCA 75.
8. See, for example, Rural Press Ltd v ACCC (2003) HCA 75.
9. See, for example, Rural Press Ltd v ACCC (2003) HCA 75.
10. See, for example, Rural Press Ltd v ACCC (2003) HCA 75.
11. Section 4F.
12. Section 4A2Z88.

16. Sections 4A2Z8F and 4A2Z8G respectively.
17. Criminal Code, s5.6.
18. Section 4A2Z8J.
19. Section 5.3.
21. Section 4A2Z8H.
22. ACCC, ACCC: approach to cartel investigations, July 2009 (Guidelines).
23. Or where the value of the bid or bids exceeded $1 million within 12 months, see MOU and Guidelines.
25. Any action for civil pecuniary penalties will be stayed during a criminal proceeding.
27. The exception is highly complex: ss4A2Z8O–4A2Z8P.
29. Fisse, “The contract requirement for the joint venture exceptions under sections 4A2Z8O and 4A2Z8P of the Cartel Bill” (June 2009).
30. Explanatory Memorandum to the Cartel Act.
31. See, for example, Beaton-Well and Fisse, note 15 above, p14.
32. Fisse, note 29 above.
33. Sections 4A2Z8O and 4A2Z8P.
34. Section 4A2Z8U.
35. Section 4A2Z8V.
36. ACCC, ACCC immunity policy for cartel conduct, July 2009.