CHAPTER 10: PENALTIES AND OTHER REMEDIES

Background

The legislation

Under section 78 of the Act, criminal penalties cannot be imposed upon a person for the contravention of any of the provisions of Part IV. So far as penalties are concerned, the enforcement of Part IV is by way of civil proceedings. For breach of a provision of Part IV, the Federal Court may impose such pecuniary penalty as it deems to be appropriate. The power to impose a pecuniary penalty extends to secondary participants in the contravention, such as directors or employees of a corporation that commits a breach of a provision of Part IV. The maximum penalty payable is, for a corporation, $10 million and, for an individual, $500,000.

If a person has suffered loss or damage as a result of a contravention of Part IV, the Court may make an order that the defendant pay compensation.[1] Where a pecuniary penalty may also be imposed and the defendant does not have the financial resources to pay both the penalty and the compensation, the Court must give preference to making an order for compensation.

The Court may also, on the application of the ACCC, make a community service order, a probation order (requiring, for example, that a defendant attend a trade practices awareness program or that compliance programs be implemented), an order requiring the disclosure of information and an order requiring the publication of an advertisement in specified terms. The advertisement may be by way of adverse publicity containing information about the anti-competitive conduct where it is in addition to a pecuniary penalty.

The Court may only order divestiture where an acquisition of shares or other assets leads to a substantial lessening of competition. Court-ordered divestiture forces the sale of some or all of the shares or other assets unlawfully acquired. Alternatively, an acquisition may be declared to be void.[2]

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1 Section 87 of the Act. In addition, a person who suffers loss or damage due to a breach of Part IV can seek damages under section 82.

2 Section 81 of the Act.

Since proceedings for breach of Part IV are civil proceedings, the standard of proof is lower than for criminal offences. It is proof on the balance of probabilities rather than proof beyond reasonable doubt, although where the balance lies in a particular case will depend on the gravity of the breach alleged.[3]

Issues

The ACCC's proposal

The ACCC in its submission proposes the creation of criminal offences for conduct falling within the description of 'hard-core cartels'. These offences would carry a penalty of up to seven years imprisonment. The ACCC adopts the Organisation for Economic Co-operation and Development (OECD) definition of hard–core cartel conduct:[4]

> '… an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce.'

Sections 45, 46 and 47 of the Act (together with sections 4D and 45A) already prohibit conduct of the kind described in that definition, but do not create separate offences for such activities as price fixing, bid rigging, collusive tendering or market sharing. And, of course, the contravention of those sections carries only a civil penalty. However, it is apparent that the ACCC's proposal is that criminal offences should be created outside the Act (for example, by inclusion in the Commonwealth *Crimes Act 1914*) and that those offences should not extend to all the conduct prohibited by sections 45, 46 and 47. Only cartel conduct which may be described as 'hard-core' would be criminalised.

The OECD definition does not differentiate between conduct of the kind described, which is serious or hard-core, and that which is not. As will appear later, the ACCC has difficulty in formulating such a differentiation but it

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3 See *Heating Centre Pty Ltd v. Trade Practices Commission* (1986) Vol. 65 Australian Law Reports, p. 429 at p. 435.

4 OECD Council 1998, *Recommendation of the Council concerning Effective Action against Hard Core Cartels*. Adopted by the Council at its 921st session on 25 March 1998 and reprinted in OECD 2002, *Fighting Hard-Core Cartels: Harm, Effective Sanctions and Leniency Programmes*, OECD Publications, Paris, pp. 105-107.

nevertheless maintains its view that only really serious cases of cartel conduct should attract criminal sanctions.

In its submission, the ACCC describes the type of conduct it seeks to criminalise as:

> 'Agreements (contracts, arrangements or understandings) between competitors that would directly or indirectly:
>
> - fix a price of a product or service;
> - limit or prevent supply or production of a product or service;
> - restrict the ability of the parties to the agreement to freely supply specified goods or services or to freely supply goods or services to specified customers;
> - in response to a request for tenders, restrict the freedom of one or more of the parties to the agreement to put in independent tenders.'

Initially the ACCC submitted that criminal sanctions should only be applied to large corporations, because only large corporations were likely to be involved in international cartels. However, this met with opposition from those who would otherwise support criminal sanctions but who could not accept that the same behaviour should be criminal for some persons, namely, large corporations and their directors and employees and not for others, namely, smaller corporations and their directors and employees. It was pointed out by way of example that proceedings arising out of a price-fixing agreement between a large and a small corporation could, under the ACCC's proposal, result in the imposition of a term of imprisonment upon the directors and employees of the large corporation but not upon those of the small corporation, although the moral culpability was the same.

In response to these views, the ACCC accepted that a crime for one should be a crime for all and proposed the criminalisation of hard-core cartel behaviour for all, and not just large, corporations. In doing so, it remarked that there would be a judicial discretion to impose lesser penalties where the impact of the cartel was limited and this was likely to ensure appropriate penalties for offences by smaller corporations.

Divestiture

Some submissions proposed that divestiture should be made available to address a wider range of anti-competitive conduct, primarily on the basis that divestiture would provide a strong deterrent to such conduct. The proposals put to the Committee were that divestiture should be available as a remedy for breaches of section 46 and that it should be available as a remedy for a concentration of ownership that has the effect of substantially lessening competition.

Cy-pres orders

In a small number of submissions it was proposed that the Court's power to order the payment of compensation or damages be extended to incorporate orders in the nature of cy-pres orders. Such orders might be used in circumstances where aggregate detriment is identifiable and quantifiable, but those affected are either insufficiently defined or too dispersed to allow an appropriate distribution of compensation or damages. A cy-pres order would require the payment of compensation or damages into a trust fund to be spent in a manner directed by the Court, for example, for the promotion of consumer or other affected interests.

International context

The enforcement of competition regulation is supported by the imposition of penalties in many countries, either civil as in the case of Australia, or civil and criminal.

The OECD has recently undertaken a comprehensive review of penalties applicable to breaches of competition laws, especially price fixing, bid rigging, horizontal market sharing and the imposition of output restrictions.[5] The survey of the OECD's 30 member countries revealed that 23 countries provided for fines or monetary penalties against firms, 13 countries provided for fines or monetary penalties against individuals, and nine countries provided for terms of imprisonment.

Of the 23 countries that provide for monetary penalties to be imposed on firms, 13 set the maximum penalty as the greater of different amounts, being either a

5 OECD 2002, *Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws*, OECD Directorate for Financial, Fiscal and Enterprise Affairs, Competition Committee, Report Number 7.

fixed maximum or a maximum expressed as a proportion of turnover, revenue or illegal gain. Australia was one of only three countries that provided for a fixed maximum fine or penalty. The maximum penalty was set at 10 per cent of the firm's annual domestic turnover in many countries.

Of the 23 countries that allow monetary penalties to be imposed on firms, four countries (the United States, Germany, Canada, and South Korea) have imposed penalties in excess of US$10 million on at least one firm. A further five countries (including Australia) have imposed penalties in excess of US$1 million on at least one firm.

There are 13 member countries of the OECD that provide for fines or monetary penalties against individuals. Of these, eight countries (including Australia) set a fixed maximum, with the remainder setting either a proportional fine, a combination, or leaving the maximum unspecified.

Of the 13 countries that may impose monetary penalties on individuals, only four countries (Australia, Canada, Germany, and the United States) have done so. However, unlike Canada, Germany and the United States, Australia is yet to impose a monetary penalty on an individual in excess of US$100,000.

There are nine member countries of the OECD that provide for terms of imprisonment, with maximum terms ranging from two to six years.

In the United States criminal offences have been on the statute book for anti-trust offences since the introduction of the Sherman Act in 1890. The maximum penalty for individuals is imprisonment for three years, with fines of US$350,000 or twice the illegally gained amount, or twice the amount lost by the victims. For corporations, the fine is US$10 million, or twice the amount illegally gained or lost.[6] These penalties are complemented by third-party suits for treble damages or restitution.[7]

In recent years in the United States, there has been a significant increase in the number of criminal prosecutions and in the size of fines and gaol terms. Ten years ago the largest corporate fine was US$2 million. Recently, six anti-trust offenders were each fined US$100 million or more, including a US$500 million fine in relation to an international vitamin cartel.[8] An increase in the detection of cartels and successful prosecutions (although most cases are settled under a

6 See Sections 1 and 2 of the *Sherman Act 1890* (United States) and the *Criminal Fine Improvements Act 1987* (United States).
7 Section 4 of the *Clayton Act 1914* (United States).
8 Department of Justice 2002, *Status Report: Criminal Fines*.

well-developed system of plea bargaining) have been attributed to a new clear and certain leniency policy backed up by the threat of criminal sanctions.[9]

Other non-European countries which have criminal sanctions against individuals include Canada and Japan. In Canada bid rigging is an offence per se and conspiracies to unduly prevent, limit or lessen competition are also criminal offences. Conspiracies carry fines of up to Can$10 million and imprisonment for up to five years, whereas bid-rigging and conspiracies with an international aspect carry unlimited fines and sentences of the same length.[10] Canada also has in place a leniency policy similar to that in the United States.[11]

Within Europe, France, Ireland and Norway all have criminal sanctions for cartel behavior and in Germany and Austria bid rigging is a criminal offence.[12] With the proposed modernisation of the European Community competition regime, additional powers will be transferred to both national competition authorities and national courts to apply European Community competition law. Member states will be free to adopt measures, including criminal sanctions, deemed appropriate.

The United Kingdom has recently undertaken a wide ranging review of its competition regime and has provided for criminal penalties of imprisonment for up to five years in its *Enterprise Act 2002*.[13] It has a leniency policy in place.[14]

The OECD survey revealed that only the United States and Canada have actually imprisoned individuals for anti-competitive conduct. The United States, for example, imprisoned 18 individuals (for an average term of eight months) in the year 2000. In Canada three individuals have been sentenced to prison for anti-competitive conduct (with two of those people being ordered to serve their sentences in the community).

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9 See the United States Department of Justice Antitrust Division's corporate and individual leniency policies in OECD 2002, *Fighting Hard-Core Cartels*, op. cit., Annex A.

10 Sections 45, 46 and 47 of the *Competition Act 1985* (Canada).

11 See the Canadian Competition Bureau's immunity program in OECD 2002, *Fighting Hard-Core Cartels*, op. cit., Annex C.

12 OECD 2002, *Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws*, op. cit., pp. 24-26. For Austria see Roniger, R. and Hemetsberger, W. 2002, *Austrian Competition Law: Overview and Recent Developments*.

13 Section 188 of the *Enterprise Act 2002* (United Kindom).

14 See the Office of Fair Trading's guidelines on the appropriate amount of a penalty in OECD 2002 *Fighting Hard-Core Cartels*, op. cit., Annex B.

Analysis

Should there be criminal sanctions here?

There was general agreement in the submissions made to the Committee that, notwithstanding the difficulty in arriving at a satisfactory definition, serious or hard-core cartel activity may be sufficiently reprehensible to be punishable by the imposition of a gaol sentence. There was, however, disagreement as to whether a strong enough case had yet been made out for the introduction of criminal sanctions in this country or, at all events, for their introduction at this time. This disagreement stemmed from a number of considerations, some practical and others based upon a wariness about extending the criminal law into the area of economic regulation. In that area the law tends to be aspirational rather than prescriptive, something that is reflected in the object of the Act which is 'to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'. The difficulty in defining the requisite degree of criminality to justify the imposition of criminal sanctions was a matter of real concern.

The predominant reason for suggesting that there should be criminal penalties was that the threat of imprisonment would be an effective deterrent to cartel behaviour. A number of submissions pointed out, however, that it had not been shown that the large pecuniary penalties already provided by the Act were not a sufficient deterrent. Indeed, it was observed that the maximum penalties had not yet been imposed so that it was not possible to gauge their deterrent effect. Moreover, the ACCC does not seem to have sought the highest penalties or the other remedies, such as probation, which have been recently introduced.

It was said that the higher standard of proof — proof beyond reasonable doubt — in a criminal prosecution would, particularly in complex cases, make it difficult to obtain convictions before a jury. Under section 80 of the Constitution, the unanimous verdict of a jury would be necessary for the kind of crime proposed by the ACCC. Proof of a civil breach of the Act on the balance of probabilities before a single judge was, it was said, far easier.

It was pointed out that civil proceedings could be settled and offered a great deal more flexibility to the ACCC in the conduct of litigation arising from breaches of the Act than would criminal prosecutions involving, as they would, the intervention of the Commonwealth Director of Public Prosecutions (DPP). It was also felt that there would be difficulties in the implementation of a leniency policy in the context of a criminal prosecution. In this country, plea

bargaining, where it is used at all, is used with caution and indemnities against prosecution are rarely given and then only by the prosecuting authority.

There were also problems, it was said, with the provision of civil and criminal proceedings for the same conduct. Not only did some consider it wrong that a regulatory agency, such as the ACCC, should initially have the option of deciding whether to prosecute a breach of the Act in criminal proceedings or commence a civil action, but it was also pointed out the permissible methods of investigating a breach would depend upon whether the eventual proceedings were civil or criminal and this would introduce undesirable complications.

Under section 88 of the Act, the ACCC may authorise conduct that would otherwise be in breach of sections 45 and 47. That conduct could constitute cartel conduct and it was submitted that it was anomalous that conduct attracting a criminal sanction could be authorised. This consideration served to emphasise the necessity of finding some means of differentiating serious cartel behaviour which, presumably, would not be authorised, and other cartel behaviour which might be the subject of authorisation.

Hard-core cartel conduct

There are undeniable difficulties in defining a criminal offence which covers only serious cartel behaviour. It was not suggested that the offence should be an offence requiring no specific intent, but none has been identified. Nor have the acts required to constitute the offence been defined with any precision. The ACCC's initial proposal to confine the offence to large corporations was eventually recognised by it to be unacceptable. In other countries various solutions have been adopted.

In the United Kingdom a 'cartel offence' has recently been created by the *Enterprise Act 2002*. An individual is guilty of this offence if he or she dishonestly agrees with one or more persons to make or implement arrangements of a specified kind relating to at least two businesses. The arrangements specified are price fixing, limiting or preventing supply, limiting or preventing production, dividing supply or customers and bid-rigging.

In the United Kingdom, the test of dishonesty is used to identify serious cartel behaviour. The United Kingdom test of dishonesty is whether the acts in question were dishonest according to current standards of ordinary decent

people and, if so, whether the defendant must have realised that they were dishonest by those standards.[15]

Misgivings have been expressed about using the test of dishonesty in Australia[16] to identify serious cartel behaviour. It is thought that its application in the context of cartel behaviour is likely to cause difficulty to a jury, particularly where the proscribed activities are merely referred to by name — for example, price fixing or bid-rigging — and not by description. In its initial submission the ACCC did not support a requirement of dishonesty, but in a later submission did so, saying that it would be necessary to ensure that arrangements such as those entered into by the banks that set credit charge interchange fees (which the ACCC argues amount to price fixing) are not treated as criminal offences.

In the United States, criminal proceedings under the *Sherman Act 1890* are possible in respect of agreements in restraint of trade but they are confined to cases where there was a specific intent to restrain trade and are unlikely if there is a genuine dispute as to the existence of the agreement or there is an innocent reason for it.[17] Criminal proceedings are also less likely if the amount of commerce affected is small.

In Canada bid-rigging is an offence per se, but price fixing and market sharing conspiracies to unduly prevent or lessen competition must be proved according to the criminal standard of proof. Proving the prevention or lessening of competition to the criminal standard is difficult due to the technical nature of the economic arguments that are inevitably put before the jury. Out of 22 contested prosecutions, only three have resulted in conviction, mainly because of lack of evidence of undue lessening of competition or of the parties' intention that the agreement has that effect.[18] Canada is currently considering making price fixing and market sharing criminal offences per se.

Another issue that has been raised with the Committee is whether or not the relevant behaviour would need to have an adverse effect or likely adverse effect on competition, in addition to any other requirements, before it is considered 'hard-core cartel' conduct. The ACCC considered the suggestion that the criminal offence should be defined by reference to the consequences or

15 *R v. Ghosh* [1982] Law Reports (Queen's Bench), p. 1053 at p. 1064.
16 See *Peters v. The Queen* (1998) Vol. 192 Commonwealth Law Reports, p. 493.
17 See Sullivan, L.A and Grimes, W.S. 2000, *The Law of Antitrust: An Integrated Handbook*, West Group, St Paul, p. 892.
18 See House of Commons Standing Committee on Industry Science and Technology 2002, *Report 8, A Plan to Modernise Canada's Competition Regime*, Chapter 4.

effect of the conduct, but concluded that complex issues concerning the definition of the relevant market, unsuitable for submission to a jury, would arise. It did not support this proposal.

The ACCC suggested that, as a feasible alternative, cartel behaviour should only be a criminal offence where the accused knew that the conduct was in breach of, or was likely to be in breach of, the law. However, that suggestion would seem to cut across the principle that ignorance of the law is no excuse.

Concurrent civil and criminal penalty regimes

Even if there were an additional element in a criminal cartel offence to distinguish it from a breach attracting a civil penalty and that element were present, the ACCC submitted that it should have the option of commencing civil proceedings where, for example, there was insufficient evidence to satisfy the DPP that there was a reasonable prospect of proving a case beyond reasonable doubt. That leaves the possibility that the ACCC might use criminal prosecution as a threat in circumstances where it had no intention of prosecuting. The ACCC recognised this to be undesirable and suggested the development of internal guidelines to overcome the situation.

There is a view that the same conduct should not be subject to civil and criminal sanctions: criminal conduct should be prosecuted as such, leaving civil proceedings for conduct appropriately dealt with by the imposition of pecuniary penalties. Many see a conceptual coherence in such a view, which maintains that civil penalties should not allow the criminal law to be by-passed when serious misconduct belongs there. However, the practice has grown up with other regulatory agencies, such as ASIC, of making use of concurrent civil and criminal penalty regimes for the same conduct. This practice is consistent with the approach of the DPP. If an appropriate civil remedy is available for certain behaviour, the DPP will give serious consideration to that fact in considering any criminal prosecution.

In 2000, the ALRC had referred to it a number of questions relating to civil and administrative penalties. In a discussion paper issued by it, the ALRC points to a number of risks associated with more than one type of sanction for the same conduct. The ALRC's concern appears to be more that fault elements and

procedural requirements for both types of sanction should be clearly spelt out, rather than the inherent desirability or undesirability of such an approach.[19]

The decision to pursue civil or criminal proceedings cannot easily be made at an early stage, but an early decision is called for because the investigative path will differ according to the choice made. For example, under section 155 of the Act, the ACCC may obtain evidence from a prospective defendant under compulsion. Self-incrimination is not an excuse, but the evidence is not admissible in criminal proceedings against the defendant. On the other hand, information obtained by search warrant under section 3E of the Commonwealth *Crimes Act 1914* would not be admissible in proceedings for a civil penalty.[20]

The ACCC indicated that it had consulted with the DPP and had formulated an outline of a proposed Memorandum of Understanding. The memorandum would be of the kind that exists between the DPP and other regulatory agencies and would provide for the investigation of offences by the ACCC and prosecution by the DPP. The ultimate decision whether to prosecute would lie with the DPP, but the decision to refer a matter to the DPP would rest with the ACCC. Many of the problems already referred to would, nevertheless, remain.

It is beyond the scope of this inquiry to suggest an answer to these problems. It is, however, apparent to the Committee that they need to be addressed and answered before the introduction of criminal sanctions. In the United Kingdom, after the decision to introduce criminal penalties had been made by the Government, a lengthy study of the problems surrounding implementation was undertaken.[21] The Committee considers a similar, focused implementation exercise should be undertaken here.

Criminal liability for corporations?

It has been assumed in the foregoing discussion that a corporation guilty of serious cartel conduct would be criminally liable along with individuals, who may be secondary participants, such as directors or employees of a corporation. A corporation cannot, of course, be imprisoned, but that does not mean that it cannot suffer the opprobrium of criminal conviction and be fined. The ACCC originally saw 'administrative' advantages in investigating and

19 See ALRC 2002, *Securing compliance: civil and administrative penalties in Australian Federal regulation*, Discussion Paper 65, ALRC, Sydney, pp. 267-300.

20 See *Williams v. Keelty* (2001), Vol. 184 Australian Law Reports, p. 411 at pp. 456-458.

21 See Hammond, A. and Henrose, R. 2001, *Proposed Criminalisation of Cartels in the UK*, Office of Fair Trading, London.

prosecuting corporations and individuals together, but in the end sought criminal sanctions only against individuals. The shift in view was, apparently, prompted by recognition of the fact that the burden of proof in criminal proceedings is more onerous than in civil proceedings and is not worth bearing if there is not a gaol sentence in prospect at the end. This is illustrative of the conceptual difficulties inherent in the co-existence of civil and criminal penalties for the same conduct.

A criminal conviction represents the condemnation of society in a way that the imposition of a civil penalty cannot and there is every reason why a corporation should suffer a conviction for the same conduct as an individual if a conviction is warranted. Moreover, there may be constitutional difficulties in the creation of a Commonwealth offence for individuals but not for corporations if the corporations power is relied on to support the provision. The matter warrants further consideration, but the Committee is not inclined in principle to favour the criminal prosecution of individuals on the one hand, and civil proceedings against the corporation on the other, for the same conduct.

Leniency policy

It appears to be generally accepted, particularly in overseas jurisdictions with experience in leniency policies, that a leniency or amnesty policy which provides clear and certain incentives to provide evidence is a potent means of uncovering cartel behaviour. Of course, certainty of detection is a better deterrent than severity of punishment for most criminal offences. The United States in 1993 introduced a dramatically expanded amnesty policy which provides automatic amnesty for violators of the anti-trust laws who are the first to come forward with evidence in specified circumstances. There is no prosecutorial discretion in those circumstances. This amnesty policy has been found to be the most effective investigative tool for detecting cartel behaviour. It has been suggested that the policy is particularly effective in the United States because of the existence of criminal sanctions, but the view has been expressed that an amnesty program can still succeed if the threat of heavy fines is significant enough.[22] Clearly individual liability is an important factor whether the liability be criminal or civil.

22 Griffin, J.M. 2002, *Key elements of an effective antitrust leniency policy and criminal penalties and deterrence – the American experience*, p. 7. Paper presented to the Australian Competition and Consumer Commission Conference, Competition and Consumer Protection Law Enforcement, 4-5 July 2002, Sydney.

The Canadian leniency policy is in similar terms, as is the United Kingdom leniency policy, which will continue to apply once the new criminal penalty regime is introduced.

The ACCC has for some time had a Co-operation Policy, but has recently released a draft cartel leniency policy with a view to providing greater certainty in its application for leniency so that the ACCC is better able to detect and break up hard core cartels operating in Australia. The policy promises immunity from proceedings (at the moment civil proceedings), subject to certain conditions, for corporations and individuals who are the first to disclose a cartel to the ACCC. Immunity from a pecuniary penalty would be available to corporations and individuals that come forward after the ACCC is aware of cartel conduct, but before the ACCC has sufficient evidence to institute proceedings.

Immediate difficulties would arise if criminal sanctions were introduced and the immunity offered by the draft policy were extended to them. Presumably immunity would have to be offered at an early stage to encourage disclosure, but the sole authority to grant immunity from prosecution lies within the discretion of the DPP[23], who at present is not involved in the early stages of an investigation. And as has already been noted, the DPP's discretion is sparingly exercised and would not, in accordance with present practice, easily accommodate the leniency policy proposed by the ACCC. Changes would be necessary to accommodate that policy. The difficulties that would arise have not been sufficiently addressed in the material provided to the Committee. However, similar difficulties existed in Canada, the United Kingdom and Ireland and they have been resolved in different ways. In Canada, the prosecutor (the Attorney-General) has established a special exception to the normally restrictive prosecutorial approach, in favour of an antitrust leniency policy.[24] In the United Kingdom, there is no present experience by which to assess the approach, but the Serious Fraud Office (the prosecutor) has agreed to allow the Office of Fair Trading (the investigating agency) to give 'no action letters'.[25] In Ireland, while discretion to grant immunity remains with the DPP, the DPP co-operates in the grant of immunity in cartel cases as recommended by the Competition Authority.[26]

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23 See sections 9(6) and 9(6D) of the *Director of Public Prosecutions Act 1983* (Commonwealth).

24 See Crampton, P. 2001, *Canada's New Competition Law Immunity Policy – Warts And All*, p. 7. Paper presented to The Competition Authority Conference, Using Immunity to Fight Criminal Cartels, 17 November 2000.

25 See Explanatory Notes, *Enterprise Act 2002* (United Kingdom) at paras. 403 and 413.

26 Competition Authority 2001, *Cartel Immunity Programme*.

Intimidation

Section 162A of the Act makes it an offence to threaten, intimidate or coerce persons, or cause or procure loss or damage to them, because they have provided, or are intending to provide, information or documents to the ACCC or the Tribunal. The penalty is a fine or imprisonment for 12 months. The ACCC suggested that section 162A needed strengthening to protect persons coming forward with evidence from the revelation of their identity or persecution by their employers. The Committee has not had any material put before it to show that the section is inadequate to achieve its purpose. However, the Committee notes the Government's stated intention in its CLERP 9 discussion paper to strengthen protection to whistleblowers.[27] The Committee is of the view that to the extent it is reasonable to do so, protection for whistleblowers for breaches of the Act should be kept in line with protection for whistleblowers under the *Corporations Act 2001*.

Pecuniary penalties

The pecuniary penalties currently provided by the Act for breach of Part IV are, for a corporation, for each act or omission, a maximum of $10 million and for an individual (including secondary participants), for each act or omission, a maximum of $500,000.

It is generally accepted that an effective sanction for cartel activity should take into account the expected gains from the cartel. In a recent study in Norway it was remarked that:

> 'The most important principle for levying fines is the expected loss for violating the law should exceed the gain.'[28]

A similar study in New Zealand drew the same conclusion.[29] Accordingly, the New Zealand Act now provides for an increased pecuniary penalty for breaches of the equivalent of Part IV of our Act. It is, in the case of a corporation, the greater of — (I) NZ$10 million; or (II) either — (A) if it can be

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27 Commonwealth of Australia 2002, *Corporate disclosure: strengthening the financial reporting framework*, Corporate Law Economic Reform Program (CLERP) Paper No. 9: Proposals for Reform, Commonwealth of Australia, pp. 178-179.

28 Norwegian Competition Authority 2001, *Sanctioning pursuant to the Norwegian Competition Act* cited in OECD 2002. *Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws*, op.cit., p. 13.

29 Office of the Minister for Enterprise and Commerce 1998, *Review of the penalties, remedies and court processes under the Commerce Act* cited in OECD 200). *Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws*, ibid.

readily ascertained and if the Court is satisfied that the contravention occurred in the course of producing a commercial gain, three times the gain resulting from the contravention; or (B) if the commercial gain cannot be readily ascertained, 10 per cent of the turnover of the body corporate and all of its interconnected bodies corporate (if any).[30] The Committee considers this to be a desirable provision and for that reason, and because it is in the interests of closer economic relations between the two countries, is of the view that the Australian Act should be amended along the same lines.

The New Zealand legislation also prohibits a corporation from indemnifying a director, servant or agent of the corporation against liability for payment of a pecuniary penalty imposed for price fixing.[31] The Committee considers that there should be a similar provision in our Act, but that it should extend to indirect as well as direct indemnification and should apply generally to pecuniary penalties imposed for breaches of Part IV.

A further provision in the New Zealand Act provides that a court may make an order that a person who is in breach of the equivalent of Part IV be excluded from the management of a corporation.[32] The Committee considers that such a provision would have considerable deterrent effect and should be included in our Act to prevent persons being directors or (as applicable) involved in the management of corporations. Such a provision was supported by the ALRC in its 1994 report on the consumer protection provisions of the Act[33] and has already been established in the *Corporations Act 2001*.[34]

Criminal sanctions for serious cartel behaviour

Despite the problems associated with the introduction of criminal sanctions, the Committee is persuaded by the submissions made to it, particularly in relation to the growing experience overseas, that there should be criminal sanctions for serious cartel behaviour. The problems associated with the introduction of criminal sanctions, which are referred to above, have, however, not been sufficiently addressed and answers must be found before criminal offences are created. Most importantly, a satisfactory definition of serious cartel behaviour needs to be developed and there needs to be a workable method of combining a clear and certain leniency policy with a criminal

30 Section 80 of the *Commerce Act 1986* (New Zealand).
31 Section 80A of the *Commerce Act 1986* (New Zealand).
32 Section 80C of the *Commerce Act 1986* (New Zealand).
33 See ALRC 1994, *Compliance with the Trade Practices Act 1974*, ALRC Report No. 68, ALRC, Sydney, pp. 80-82 and Rec. 24.
34 Section 206C of the *Corporations Act 2001* (Commonwealth).

regime. It is desirable that Australia should remain abreast of international developments with regard to sanctions, particularly in areas, such as extradition, where reciprocity is necessary.

Divestiture

In Australia, the remedy of divestiture is, under the Act, restricted to circumstances where an acquisition of shares or other assets leads to a substantial lessening of competition. Thus, the remedy is only available in the context of mergers. Divestiture may be appropriate in this context because it deals with recent conduct (the acquisition of identifiable shares or assets) that has given rise to a breach of the Act.

By contrast, section 46 of the Act prohibits the taking advantage of substantial market power for a proscribed purpose. A corporation with substantial market power does nothing illegal through the simple possession of shares and other assets. The prohibited conduct is the taking advantage, for a proscribed purpose, of that market power. Conceptually, divestiture is inappropriate in this context because there is no clear nexus between the assets to be divested and the contravening conduct. For example, identifying the specific assets to be divested to preclude a corporation from taking advantage of its market power for a proscribed purpose would be difficult at best and arbitrary at worst.

In the United States, divestiture is available to redress a broader array of anti-competitive conduct than in Australia. The experience there is that divestiture is a remedy which is much more suited to dealing with anti-competitive mergers than to dealing with the conduct of unified enterprises, as would be the case if it were applied to a misuse of market power. A corporation that has expanded by acquisition often has pre-existing lines of division along which it may more easily be split than a corporation that has expanded through organic growth. Courts have, in the United States, referred to the logistical difficulty of 'unscrambling' the latter without greatly harming the efficiency of a viable market participant.[35]

The alternative option of applying divestiture orders to a concentration of ownership that substantially lessens competition, is inappropriate. The proposal is very broad and would make a corporation with market power susceptible to court-ordered divestiture. This would create an uncertain

35 See *United States of America v. Microsoft Corporation*, United States Court of Appeal, 28 June 2001.

business environment. In particular, given that ownership of assets is a passive state, it is difficult to know what the divestiture would be aimed at, whether it be the substantial lessening of competition or the degree of concentration in the market.

It is thus inappropriate and, in the light of other remedies, unnecessary to recommend the extension of the remedy of divestiture.

Cy-pres orders

The proposal that the Court's power under the Act to order the payment of compensation or damages for breaches of Part IV be extended to incorporate orders in the nature of cy-pres orders also gives rise to problems. Such orders would involve the payment of compensation or damages into a trust fund to be directed toward purposes that are identified by the Court. For example, money from the trust might be used for the promotion of consumer or other affected interests. Acceptance of such a proposal would be to invite the Court, which is concerned with the administration of the Act, to become inappropriately involved in matters of policy in an area where the Act offers no guidance. At present, pecuniary penalties are paid into the Commonwealth's Consolidated Revenue Fund, the expenditure of which is a matter of policy for the Government.

Conclusions

- The Committee endorses an effective leniency policy. A leniency or amnesty policy that provides clear and certain incentives to give evidence is a potent means of uncovering cartel behaviour.

- The Committee is persuaded, in the light of submissions made to it and growing overseas experience, that criminal sanctions deter serious cartel behaviour and should be introduced. However a number of problems remain to be solved before the introduction of criminal sanctions, not the least being the need to find a satisfactory definition of serious, or hard-core, cartel behaviour and a workable way of combining criminal sanctions with a clear and certain leniency policy.

- The Committee is of the view that any criminal sanctions that are created should apply to all who engage in the cartel conduct and not just to large corporations.

- Comparable jurisdictions enable a court to deter illegal trade practices by imposing a maximum monetary penalty upon corporations that is either a multiple of the gain or a proportion of the corporation's turnover. Recent amendments in New Zealand provide a pertinent example. The Committee considers it desirable to amend the Australian law along the same lines.

- It should be an offence for corporations to indemnify individuals for pecuniary penalties which they may incur. Courts should be given the power to exclude individuals found to have contravened the Act from being directors of a corporation or from having any management role in a corporation.

- The Committee is of the view that to the extent it is reasonable to do so, protection to whistleblowers for breaches of the Act should be kept in line with protection for whistleblowers under the *Corporations Act 2001*.

- The Committee does not favour the proposal to expand the remedy of divestiture beyond the context of unlawful mergers. Likewise, the Committee does not consider it appropriate for the Court to be given the power under the Act to make orders in the nature of cy-pres orders.

Recommendations

10.1 The Committee is of the view that solutions must be found to the problems identified by it before criminal sanctions are introduced for serious cartel behaviour. The problems are, importantly, the development (preferably by a joint body representing the DPP, the Attorney-General's Department, the ACCC and the Treasury) of a satisfactory definition of serious cartel behaviour and a workable method of combining a clear and certain leniency policy with a criminal regime. Subject to this proviso, the Committee recommends the introduction of criminal sanctions for serious, or hard-core, cartel behaviour, with penalties to include fines against any convicted corporation and imprisonment and fines, as appropriate, for implicated individuals.

10.2 The Act should be amended so that:

10.2.1 the maximum pecuniary penalty for corporations be raised to be the greater of $10 million or three times the gain from the contravention or, where gain cannot be readily ascertained,

10 per cent of the turnover of the body corporate and all of its interconnected bodies corporate (if any);

10.2.2 the Court be given the option to exclude an individual implicated in a contravention from being a director of a corporation or being involved in its management; and

10.2.3 corporations be prohibited from indemnifying, directly or indirectly, officers, employees or agents against the imposition of a pecuniary penalty upon an officer, employee or agent.