



# Insight

Commercial Dispute Resolution

July 2009

## Cartel Conduct a Criminal Offence

On Friday, 24 July 2009, the main provisions of the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (**the Cartel Amendment**) which amend the *Trade Practices Act 1974* (TPA) to criminalise serious cartel behaviour come into affect. This will of course raise the penalties for anyone who engages in cartel behaviour

### What is cartel behaviour?

The Cartel Amendment prohibits competitors from making or giving effect to a contract, arrangement or understanding (**CAU**) that contains a cartel provision. A cartel provision:

- is one that has the purpose, effect or likely effect to directly or indirectly:
  - fix, control or maintain prices in the supply or acquisition of good or services; or
  - prevent, restrict or limit output, share markets or rig bids; and
- is part of a CAU between parties that, were it not for the CAU, would be competitors.

The definition of cartel provision prohibits the following conduct by competitors:

- **Price Fixing:** where the provision of a CAU has the purpose, effect or likely effect of directly or indirectly fixing, controlling or maintaining prices.
- **Restrictions on Output:** where the provision of a CAU has the purpose, effect or likely effect of directly or indirectly preventing, restricting or limiting:
  - the production, or likely production, of goods;
  - the capacity, or likely capacity, to supply services; or
  - the likely supply of goods or services to persons or classes of persons.
- **Allocation of Customers, Suppliers or Territories:** where the provision of a CAU has the purpose of allocating to any party of the CAU:
  - customers to be supplied;
  - suppliers who will be supplied; or
  - geographical areas in which goods or services are to be supplied to customers or acquired from suppliers.
- **Rigging of Bids and Tenders:** where the provision of a CAU has the purpose of ensuring that:

- one or more parties bid and the other(s) do not;
- two or more parties bid, but on the basis that one is more likely to succeed;
- whilst parties bid, some will pull out or not finalise their bids; and
- whilst parties bid, they have worked out a material component of at least one bid.

A bid includes a bid or tender, or any preliminary step taken by a potential participant in a bid or tender process.

### Civil and criminal prohibitions

As outlined earlier, the Cartel Amendment has introduced criminal prohibitions. These will run parallel with civil prohibitions. The differences between them arise in terms of who is responsible for prosecuting the action, the different standards of proof which must be shown, and the different consequences of being found to commit a criminal contravention as opposed to a civil contravention.

### When will cartel conduct be criminal conduct and when will it be civil conduct?

Civil prosecutions will continue to be conducted by the ACCC, who will have to prove the elements of a contravention on the balance of probabilities. Criminal prosecutions will be referred (by the ACCC) to the Commonwealth Department of Public Prosecutions (**CDPP**), in which case:

- each element must be proved to the criminal standard of proof of beyond and reasonable doubt; and
- an additional 'fault element' of 'knowledge and belief' will also need to be proved beyond a reasonable doubt.

The 'knowledge and belief' fault element is introduced by the Commonwealth Criminal Code to ensure that for a person to be found guilty of a criminal offence, they must have the requisite 'guilty mind'. It therefore requires an accused person to have knowledge of all of the fault elements that cause the making or enacting of the cartel provision to be a criminal offence.



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It does not mean that an accused person will need to be shown to have known that it is illegal to make a CAU containing a cartel provision. It means that it must be shown that the person knew that the CAU made with a competitor contained a provision which is a cartel provision.

Under a Memorandum of Understanding between the ACCC and the CDPP, when the ACCC makes a decision as to whether to refer conduct to the CDPP and the CDPP makes a decision as to whether to prosecute the conduct criminally; both authorities will have regard to the following factors:

- the seriousness of the alleged conduct and impact that it had on the particular industry in which it occurred;
- the time period over which the conduct occurred;
- the resulting harm, disadvantage or detriment to the public or to the customers of the accused;
- whether the value of the business affected by the cartel conduct over a 12 month period exceeds \$1m; and
- whether the accused has previously been charged with, investigated or been found guilty of cartel conduct.

## What are the penalties for cartel conduct?

The very serious penalties for companies and individuals that commit civil and/or criminal cartel conduct are listed in the table below:

Penalties under the Trade Practices Act for Cartel Conduct		
	Company	Individual
<b>Criminal Contravention</b>	A penalty of the greater of: <ul style="list-style-type: none"> <li>▪ \$10 million;</li> <li>▪ Three times the gain attributable to the cartel as a whole; or</li> <li>▪ 10% of the annual turnover of the company and its related companies (this penalty is only used when a Court cannot determine the 'gain').</li> </ul>	<ul style="list-style-type: none"> <li>▪ Up to 10 years jail; or</li> <li>▪ Fines up to \$220,000; and</li> <li>▪ A criminal record.</li> </ul>
<b>Civil Contravention</b>	Same as for Criminal Contravention	Civil penalty of up to \$500,000

## Exempt conduct

There are ten exemptions under the Cartel Amendment where a person who makes or gives effect to a cartel provision will not contravene the cartel provisions of the TPA:

- **The Collective Bargaining Exception:** where a collective bargaining notice has been successfully lodged under section 93AB(1A).
- **The Authorisation Exception:** where the ACCC has previously authorised the making or giving effect to the cartel provision.
- **The Related Bodies Corporate Exception:** where the CAU is only between parties who are related bodies corporate.
- **The Joint Venture Exception:** where the cartel provision is for the purpose of the joint venture for the production and/or supply of goods and services.
- **The Exception in Favour of Real Estate Covenants:** where the cartel provision constitutes a covenant in a real estate transaction governed by section 45B of the TPA.
- **The Resale Price Maintenance Exception:** as these types of arrangements will continue to be governed by section 48 of the TPA.
- **The Exclusive Dealing Exception:** as these types of arrangements will continue to be governed by section 47 of the TPA.
- **The Dual Listed Company Exception:** where the cartel provision is a provision in a dual listed company arrangement under section 49 of the TPA.
- **The Exception in Favour of Acquisitions of Shares or Assets:** it should be noted that the acquisition of share and assets will still be covered by section 50 of the TPA.
- **The Exception in Favour of Collective Acquisitions:** a cartel provision relating to the price of goods or services collectively acquired by the parties to the CAU.

Care must be taken if one of these exceptions will sought to be relied upon, because it is up to the person seeking to rely on the exception to prove an entitlement to it.

## When can a party to cartel conduct obtain immunity?

An individual or a company who is a party to cartel conduct can obtain immunity for both civil and criminal offences if it/they are the 'first in the door' to report the conduct to the ACCC.

All immunity applications are made to the ACCC for both civil and criminal immunity. If the ACCC believes that there may be criminal conduct involved, they will refer the matter to the CDPP along with their recommendation as to whether criminal immunity should be granted.



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The applicant will have to satisfy the following requirements to be granted immunity by the ACCC and/or the CDPP:

- The applicant is 'first in the door' to report the conduct to the ACCC and seek indemnity;
- The applicant was, or is, a party to the cartel conduct;
- The applicant is not the 'ringleader' or instigator of the cartel conduct;
- The applicant must provide full and frank disclosure to the ACCC/CDPP and must cooperate with the ACCC/CDPP in its investigations and/or prosecution;
- As at the date of the immunity application, the ACCC must not have received legal advice that it has enough evidence to prosecute the conduct without the cooperation or evidence of the applicant;
- The applicant must admit at least one breach of the Trade Practice Act for a cartel offence; and
- The applicant has undertaken to the ACCC that it will cease the cartel conduct (if it has not already).

If immunity is granted, is there any other exposure a party to cartel conduct should be concerned about?

The Amcor/Visy cartel case demonstrates how that even if a party is granted immunity by the ACCC, there are still consequences. In that instance, while Amcor received immunity from the ACCC for its conduct, it has been sued by disgruntled customers who allege that they were overcharged because of Amcor's arrangement with Visy. ACCC does not extinguish the rights of person to bring such claims.

Apart from the serious legal consequences of entering into a cartel in terms of being prosecuted for criminal and civil penalty breaches, it should always be remembered that by entering into a CAU containing a cartel provision, it will also affect a party's relationships with those outside the CAU who are affected by it. It may not be possible to repair these relationships with customers and/or suppliers once they become aware that they were adversely affected by the cartel provision.

### Authors

**Julian Lane**, Senior Associate  
Melbourne, Commercial Dispute Resolution

**Juliet Chipp**, Lawyer  
Melbourne, Commercial Dispute Resolution

### Contact details

#### Melbourne



Howard Rapke, Partner

T: +61 (0)3 9321 9752

E: [howard.rapke@holdingredlich.com.au](mailto:howard.rapke@holdingredlich.com.au)

#### Sydney



Harold Werksman, Partner

T: +61 (0)2 8083 0405

E: [harold.werksman@holdingredlich.com.au](mailto:harold.werksman@holdingredlich.com.au)

#### Brisbane



Paul Venus, Partner

T: +61 (0)7 3135 0613

E: [paul.venus@holdingredlich.com.au](mailto:paul.venus@holdingredlich.com.au)

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#### Melbourne

350 William Street, Melbourne VIC 3000  
T +61 (03) 9321 9999 F +61 (03) 9321 9900

#### Sydney

Level 65, MLC Centre, 19 Martin Place, Sydney NSW 2000  
T +61 (02) 8083 0388 F +61 (02) 8083 0399

#### Brisbane

Level 1, 300 Queen Street, Brisbane QLD 4000  
T +61 (07) 3135 0500 F +61 (07) 3135 0599