



Insight

Corporate & Commercial

June 2009

Trade Practices

Update on legislative changes to criminalise cartel conduct
New Prohibition against Component Pricing
A New Australian Competition and Consumer Act
Individuals may be personally liable for contraventions under the TPA

Update on legislative changes to criminalise cartel conduct

The Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (the Bill) passed through Parliament on 15 June 2009. As a consequence, there will be four new offences of “cartel conduct” under the Trade Practices Act 1974 (the TPA) when the amendments take effect (which is expected to occur in July 2009).

Background

Previously, the restrictive trade practices provisions in Part IV of the TPA were interpreted in such a way as to effectively prohibit some forms of cartel conduct. The aim of the new provisions is to provide sanctions for explicitly defined forms of conduct, so as to bring Australia in line with other countries that have already legislated to give effect to the OECD’s Recommendation on cartel conduct.

Prohibited conduct

The conduct to be prohibited, in the form of both a criminal penalty regime and a new parallel civil penalty regime, is the making of or giving effect to a contract, arrangement or understanding that contains a “cartel provision”. A provision is a cartel provision if:

- it is either directly or indirectly likely to have the effect of fixing, controlling or maintaining (or allowing for the fixing, controlling or maintaining) of prices, or
- it has the purpose of either directly or indirectly preventing, restricting or limiting the actual or likely production of, capacity to supply, or supply of goods; allocating customers, suppliers or geographical areas; or rigging bids, and
- at least two of the parties are or would otherwise be in competition with one another

The four new offences derive from i) the offence of “making” a contract, arrangement or understanding that contains a cartel provision and ii) the offence of “giving effect to” a contract, arrangement or understanding that contains a cartel provision, with both of these types of conduct prohibited under both criminal and civil law regimes.

What distinguishes criminal conduct?

The new provisions distinguish criminal conduct from other prohibited conduct by the “fault element”. The fault element is required to establish a criminal, but not a civil, cartel offence.

The original exposure draft of the Bill required an element of “dishonesty” to warrant the attraction of criminal liability. However in its final form this element was replaced by the element of “knowledge or belief” (as drawn from the Criminal Code).

This means that the criminal offence will be made out where it is determined, beyond reasonable doubt, that the prohibited conduct occurred and that the accused had “knowledge or belief” that the relevant conduct was proscribed cartel conduct. A person will have “knowledge” if they are aware that the relevant cartel conduct exists or will exist in the ordinary course of events. “Belief” is a lesser requirement that may be satisfied despite the accused having some doubt as to whether the alleged conduct was proscribed cartel conduct.

Penalties

Corporations found in breach of the new criminal provisions will be liable to pay the greater of:

- \$10 million
- Three times the gain attributable to the cartel as a whole; or (if this amount cannot be determined)
- 10% of the annual turnover of the corporation and its related corporations

Individuals found in breach of the new criminal provisions are to be made subject to imprisonment for a period of up to 10 years (increased from 5 years under the original exposure draft of the Bill), and criminal fines of up to \$220,000.



Insight - Corporate & Commercial

June 2009

The penalties for breach of the new civil provisions are to remain the same as those currently applied for the civil offences outlined in Part IV of the TPA.

Defences and exceptions

The new provisions provide a complete defence where the impugned cartel provision is for the purpose of a legitimate joint venture.

As it is now defined, the defence is broader than it was originally. Initially applying as a defence to civil actions only, it has been expanded to apply across the new criminal regime. As a concession to this, defendants bear the evidentiary burden of proving that the defence applies.

As further relief for the business community, a number of exceptions that are contained in the existing civil regime but were omitted from the previous versions of the Bill have now been included. Notably, the anti-overlap provisions associated with exclusive dealing arrangements (e.g. vertical supply arrangements) will continue to be considered under section 47 of the TPA rather than under the criminal and civil cartel conduct provisions. Conduct between related bodies corporate that would otherwise contravene the cartel conduct provisions is also exempt.

Immunity – an incentive to provide cartel information to regulators

The ACCC and the Commonwealth DPP (CDPP), both of which will be involved in the application and enforcement of the new provisions, have each released immunity policies relating to cartel offences.

Pursuant to these policies immunity applications are to be made to the ACCC, which will coordinate the applications. However if the ACCC assesses that a criminal cartel offence would be made out, the application is to be forwarded to the CDPP for consideration. This process is similar to that which is agreed to be adopted by the ACCC and CDPP in relation to prosecution: upon assessment by the ACCC, cases of “serious” cartel conduct will be referred to the CDPP.

Applicants for immunity should bear in mind two key points. First, that under the ACCC’s immunity policy immunity will only be granted to the first cartel participant, where they are not the “ringleader”. Secondly, that if the request for immunity fails, information provided for this purpose may be used in later civil or criminal proceedings not related to the cartel.

Conclusion

With the new cartel provisions taking effect very shortly, corporations should familiarise themselves with the nature of the conduct prohibited by the provisions, and self-educate on how to avoid the risk of contravention (including through the implementation of compliance programs).

New Prohibition against Component Pricing

In force from 25 May 2009, the Trade Practices Amendment (Clarity in Pricing) Act 2008 (the Act) is a response to the use of component pricing in representations by businesses to consumers.

The Act modifies sections of the Trade Practices Act 1974 (the TPA) so as to prevent businesses from engaging in component pricing – the practice of advertising prices in component parts, for example \$X plus \$Y – without providing additional information of a specified nature.

The prohibition

The impetus for the prohibition is the perceived danger of component pricing: that it can create the impression that a product or service is being offered at a lower cost than its actual price.

The new section 53C prohibits corporations from using component pricing when representing the price of a good or service, unless they also prominently specify the total price that the consumer must pay (to the extent that this is quantifiable).

What conduct is affected?

The new component pricing obligations only apply to representations made by corporations to non-corporations, and only where the representations made are as to goods or services “of a kind ordinarily acquired for personal, domestic or household use or consumption”.

However all representations “in connection with” the supply or promotion of such goods and services are regulated.

Practical implications

If a corporation wishes to use component pricing in a regulated representation, under the new laws it will also have to prominently display the minimum total price a consumer is to pay for the product or service, with this expressed as a single figure.

Optional charges (such as some credit card surcharges) are not required to be included in the single figure price. Conversely, taxes and charges imposed on the corporation in relation to the supply and then passed onto the consumer, e.g. GST, must be disclosed.

The requirement to convey total price is dependent upon it being quantifiable (i.e. readily convertible into a dollar amount) at the relevant time. Accordingly, the diverse elements of the total price – such as charges – need only be included if they are quantifiable at the time of making the representation.

The central obligation of the new s 53C requires that corporations engaging in component pricing also include a single figure price for goods and services “in a prominent way”, meaning in a manner that is “at least as prominent as the most prominent of the parts of the consideration for the supply”.

Penalties

Corporations should be aware that the consequences of non-compliance will involve not only civil, but also criminal, sanctions. The amending Act modifies TPA section 75AZ, meaning that contravention of the new component pricing obligations may result in company fines of up to \$1.1 million.

Conclusion

The section 53C and section 75AZF amendments are not intended to outlaw the use of component pricing, but rather to impose conditions upon such use. The primary obligation imposed by the amendments is the obligation to prominently specify a single price that the consumer will be required to pay for the relevant product or service, where this is quantifiable.

Consequently corporations, and in particular those who make public representations in connection with the sale of goods and services to consumers, should remain vigilant in the making of such representations.

General guidelines on how best to comply with the new provisions are available from the Australian Competition and Consumer Commission website at <http://www.accc.gov.au/content/index.phtml/itemId/871339>. The website also provides specific compliance information for the electrical goods, whitegoods and furniture industry, the travel industry and the motor vehicle industry, at <http://www.accc.gov.au/content/index.phtml/itemId/871346>, <http://www.accc.gov.au/content/index.phtml/itemId/871368> and <http://www.accc.gov.au/content/index.phtml/itemId/871382> respectively.

A New Australian Competition and Consumer Act

Consumer regulation in Australia is currently constituted by the Trade Practices Act 1974 (the TPA) at national level, and various laws – for example the Victorian Fair Trading Act 1999 – at State level. This obviously implies a lack of consistency, as well as the potential for both overlap and gaps in regulation.

Following a Productivity Commission review of the nation's consumer policies, a COAG meeting in October 2008 reached some core agreements on the modification of Australia's consumer protection legislation. The Government now proposes to introduce a national consumer law, in order to (i) increase consistency and (ii) increase effectiveness.

Proposed changes

Through the introduction of a national consumer law to be applied both nationally and in each State and Territory – and to be named the "Australian Competition and Consumer Act" to better reflect its purpose – the proposed reforms would seek to achieve the Government's policy objectives in three key ways:

- (a) The introduction of a provision regulating unfair contract terms, modelled on those already included in the Victorian Fair Trading Act
- (b) The introduction of enhanced penalties and enforcement powers
- (c) The incorporation of "best practice" provisions deriving from the State Fair Trading Acts

A new product safety regulatory framework and review of statutory warranties is also proposed, with the current TPA providing the foundation for all the suggested legislative changes.

Unfair contract terms

The proposed prohibition of "unfair" contract terms, which has already been agreed upon by COAG, would only apply to standard form, non-negotiated contracts, and not to terms that have been actively agreed upon by the parties.

On 11 May 2009, the Government released an Exposure Draft of the Trade Practices Amendments (Australian Consumer Law) Bill 2009, which sets out the proposed unfair terms regime and is expected to be introduced to Parliament in its winter sitting. Comments on the Draft were received for a mere 11 days, from 11 until 22 May.

Under the regime (which will most likely be put to Parliament without amendment), a term would be considered "unfair" if it (i) created a significant imbalance in the contractual rights and obligations of the parties, and (ii) was not reasonably necessary to protect the legitimate interests of the party advantaged by the term. In considering whether an unfair term claim should succeed, the Court would have to assess the extent to which the term would, or would be likely, to cause detriment. It would also have to assess whether or not the term was "transparent" – that is, in plain language and legible.

Although the Government also proposes that certain classes of term might, by Regulation, be categorised as unfair (resulting in their being effectively "banned"), the Exposure Draft merely provides "examples" of terms that might be considered unfair.

If the Bill proceeds through Parliament without substantial amendment, the unfair contract term regime will apply for the protection of both businesses and consumers, and will be able to be invoked by both the buyer and the supplier under a contract. In the meantime, therefore, review of standard form contract terms is recommended.

Enhanced penalties and enforcement powers

In addition to the extra powers that will be enjoyed by the ACCC if the Government's Cartel Conduct Bill gets passed, it is proposed that ACCC powers be generally increased to match those of State regulators and that, specifically, it be given that the ability to:

- issue infringement notices
- issue substantiation notices, and
- "name and shame" those who contravene relevant laws



Insight - Corporate & Commercial

June 2009

- seek remedies on behalf of consumers, so that redress is available to consumers without their having to be a party to proceedings in court.

It is also proposed that both pecuniary penalties and disqualification orders be introduced and be given extensive reach, so that disincentive and punishment are proportionate in the face of breach. Although consumer law already provides for criminal penalties, the availability of civil pecuniary penalties would allow the lower civil standard of proof to apply, and would add another layer of response to infringing conduct.

“Best practice” reforms

In the augmentation of the TPA, the Government intends to identify the “best practice” components of State and Territory consumer legislation, so as to take the best from existing laws in crafting a national standard.

Timeline for implementation

It is clear from Government statements that these reforms have been placed on a fast track to becoming legislation, and a substantial number are expected to be in force by the beginning of 2010.

Individuals may be personally liable for contraventions under the TPA

In a recent case the Federal Court has found that a nappy company publicly making false claims as to its products’ biodegradability was engaging in conduct falling foul of sections 52 and 53 of the Trade Practices Act 1974 (the TPA). Claims that the nappies were “100% biodegradable” were made on product packaging, in advertising and on the company’s website. Upon finding that the nappies were not in fact fully biodegradable, the Court held that the company had engaged in misleading or deceptive conduct, and made false or misleading representations, of the types prohibited by sections 52 and 53 respectively. This was punishable by injunction restraining the company from engaging in further similar conduct, and by order that it publish a corrective advertisement and implement a trade practices compliance program.

Section 80 of the TPA gives the power to order an injunction against a person who is “knowingly concerned” in the contravention of a provision under Part V of the Act. Sections 52 and 53 fall within this Part. The Court consequently ordered an injunction against a director of the company who had approved the biodegradability claims when she knew they were not true. The five year injunction disallows the former director from being party to any nappy biodegradability claims without having received independent scientific verification of the claims’ veracity.

Already concerns have been raised about the speed at which this is to occur, especially given the short timeframe given for the making of submissions on the Consultation Paper. Corporations are worried about the amount of time they will be given to arrange their affairs, with some calls for a transition period.

Practical considerations

Although the passing of the proposed reforms would – valuably – increase national consistency, it is true that they will involve a significant overhaul to Australia’s consumer laws. In the expectation that the proposed changes will be made, businesses can familiarise themselves with the mooted provisions – and in particular those on unfair contract terms – with a view to ensuring future compliance.

Conclusion

This case serves as a reminder of two points. First, that given the increasing interest in “green” matters, companies should take care when making claims as to the environmental merits of their products and be willing to verify their claims with scientific evidence. Secondly, that – as highlighted by ACCC Chairman Graeme Samuel – “directors cannot hide behind their companies”: “[i]f a director or employee is knowingly concerned in their company’s misleading conduct, then those individuals also risk personal fines and injunctions”. Directors and employees should note that section 80 covers various forms of indirect liability, and that the scope of the “knowingly concerned” element is broad: persons need only be “in any way, directly or indirectly, knowingly concerned in, or party to, the contravention”, or be proposing to be knowingly concerned in such a way.



Insight - Corporate & Commercial

June 2009

Key Contacts

If you would like any further information in relation to this decision or any other aspect of class action litigation, please contact :

MELBOURNE

Daniel Marks
Partner

T +61 (0)3 9321 9992
E daniel.marks@holdingredlich.com.au

Michael Linehan
Partner

T +61 (0)3 9321 9807
E michael.linehan@holdingredlich.com.au

SYDNEY

Ian Robertson
Partner

T +61 (0)2 8083 0401
E ian.robertson@holdingredlich.com.au

Donna Bartlett
Partner

T +61 (0)2 8083 0420
E donna.bartlett@holdingredlich.com.au

BRISBANE

Paul Venus
Partner

T +61 (0)7 3135 0613
E paul.venus@holdingredlich.com.au

Philip Vickery
Partner

T +61 (0)7 3135 0632
E philip.vickery@holdingredlich.com.au

Disclaimer

The information in this publication is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavour to provide accurate and timely information, we do not guarantee that the information in this newsletter is accurate at the date it is received or that it will continue to be accurate in the future.

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 (0)7 3135 0500 F +61 (0)7 3135 0599