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## The Criminalization of Serious Cartel Conduct in Australia

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## I. INTRODUCTION

On July 24, 2009, the Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009 (“Cartels Act”) came into force in Australia, introducing parallel criminal and civil prohibitions for designated serious forms of cartel conduct between competitors, namely price-fixing, market sharing, output restriction, and bid rigging. Each of these practices have featured heavily in court proceedings in Australia since the commencement of the Trade Practices Act 1974 and, in the last decade, have been the subject of considerable judicial, regulatory, and public concern as to their continuing presence in Australia and the apparently weak deterrent effect that available monetary penalties were having on enterprises and their executives.

The amendment reflected a growing trend towards criminalization of serious cartel conduct internationally, a movement that has been led by the United States and supported by international organizations such as the Organization for Economic Co-operation and Development (“OECD”)<sup>2</sup> and the International Competition Network (“ICN”).<sup>3</sup>

With the amendments, Australia has joined Brazil, Canada, Czech Republic, Estonia, Ireland, Israel, Korea, Japan, Norway, Romania, Russia, Slovakia, Slovenia, the United States, and the United Kingdom as countries that criminalize hard-core cartel activity.<sup>4</sup>

## II. A BRIEF HISTORY OF SERIOUS CARTEL CONDUCT IN AUSTRALIA

Since federation in 1901, a defining feature of Australian markets has been their predisposition towards price and non-price agreements between rival firms. Price-fixing and collusive bidding especially have featured heavily in the historical record. Because of the small size of the economy, most important Australian markets, especially those in the manufacturing sector, have been highly concentrated, and of course such concentration provides fertile ground

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<sup>2</sup> See, OECD 1998, Recommendation of the Council concerning Effective Action against Hard Core Cartels; OECD 2000, Hard Core Cartels; OECD 2003, Cartels: Sanctions Against Individuals DAF/COMP(2004)39. See the OECD’s work on Cartels available at [www.oecd.org/competition/cartels](http://www.oecd.org/competition/cartels).

<sup>3</sup> See, ICN 2005, Building Blocks for Effective Anti-Cartel Regimes; ICN 2007, Anti-Cartel Enforcement Manual; ICN 2008, Cartel Settlements. See the work by the ICN’s Cartel Working Group available at <http://www.internationalcompetitionnetwork.org/working-groups/current/cartel.aspx>.

<sup>4</sup> Several other countries provide for criminal penalty in limited circumstances. These include Austria (bid-rigging), Germany (bid-rigging), France (criminal penalty for individual conduct where the individual has personally and fraudulently taken a decisive action in the conception and/or implementation of the cartel), Greece (criminal sanctions for individuals participating in the management of a cartel), Hungary (cartels relating to public procurement), Poland (bid-rigging) and Spain (bid-rigging). Currently Chile, Mexico, New Zealand, and South Africa are considering the implementation of legislation to criminalize cartel offenses.

for horizontal and vertical price-fixing, as well as a myriad of other agreements such as geographic market sharing. But collusion has also been significant in un-concentrated markets as well. Trade associations have been instrumental in proving a focal point for orchestrating price-fixing and other collusive agreements.

Despite numerous federal and state inquiries over many decades into price-fixing and market power, both overall and in particular industries, as well as the introduction of major new commonwealth laws in 1906, 1965, 1974 and amendments in 1977 seeking to control price-fixing among other types of unilateral and joint misuse of market power (price-fixing was made a *per se* offense in the 1977 amendments), price-fixing has remained a source of major concern in Australia in the first decade of the twenty first century. So much so, that some judges, antitrust agency chairmen, academics, and politicians began to argue strongly for price-fixing to be made a criminal offense. Despite the maximum penalty having been raised in 1992 (and amended in 2007) to the largest of AUST\$10 million per offense, three times the benefit obtained by the action, or 10 percent of the firm's turnover in the year preceding the offense, large and small, domestic and foreign firms alike continued to fix prices. Apparently even the prospect of such penalties has not blunted the Australian penchant for price-fixing.

Finally, after much debate, considerable vacillation, and, ultimately, inaction by the Liberal government of John Howard, a new Labor government led by Kevin Rudd came into power late in 2007, and introduced extensive and complex amendments to the Trade Practices Act in 2009, which allowed so-called "cartel provisions" (price-fixing, output restriction, market sharing, and bid-rigging) to be prosecuted as criminal offenses, if they could be shown to have certain anticompetitive purposes or effects. Civil offenses and penalties (at the same level as existed prior to the amendments) remain for less serious cartel-like offences, the seriousness of the charge to be determined at the discretion of the Australian competition authority, the Australian Competition and Consumer Commission ("ACCC"). Criminal prosecutions will be launched by the office of the Commonwealth Director of Public Prosecutions ("DPP"), but only after consultation and in conjunction with the ACCC.

### III. THE PREVIOUS PENALTY REGIME AND CARTEL ACTIVITY

Before 1965, restrictive trade practices were widely regarded as "normal business behavior" in Australia. Under the Restrictive Trade Practices Act 1965, certain types of collusive agreements between competitors were required to be registered on an official secret or confidential register of restrictive agreements, and for which conduct they were then protected from prosecution until such time as the then Commissioner of Trade Practices chose to consider the agreement and determine whether it was against the (broadly defined) public interest. In contrast, the Trade Practices Act 1974 ("TPA") prohibits contracts, arrangements, or understandings between competitors that have the purpose or effect, or likely effect, of substantially lessening competition.<sup>5</sup> Certain types of arrangements, such as price-fixing, are prohibited *per se* (this has been the case since 1977) on the grounds that they are considered as anticompetitive in character.<sup>6</sup> However it is possible to seek an authorization for price-fixing, on

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<sup>5</sup> C. Beaton-Wells, *Capturing the Criminality of Hard Core Cartels: The Australian Proposal*, 31 MELBOURNE UNIV. L. REV. pp. 675-704 (2007).

<sup>6</sup> Price-fixing became illegal *per se* in 1977 after s 45A was added to the TPA, see D.K. Round & L.M. Hanna, *Curbing corporate collusion in Australia: The role of section 45A of the Trade Practices Act*, 29(1) MELBOURNE UNIV. L. REV pp. 242-269, (2005).

the grounds that the public benefits arising from this conduct outweigh its ensuing anticompetitive detriments.

It is noteworthy that the Trade Practices Bill that was originally presented to the Parliament in 1973 contained provisions for criminal sanctions by way of fines rather than custodial sentences, but it ran into hostile opposition from the business community. Consequently, the TPA contained only civil penalties for anticompetitive behavior.<sup>7</sup>

The TPA introduced a pecuniary penalty regime. Until late 1992, the penalties provided for a maximum of AUST\$250,000 per offense for corporations and AUST\$50,000 per offense for individuals. Penalties were then increased and set at maximum levels of AUST\$10 million for corporations and AUST\$500,000 for individuals for each contravention. In January 2007, penalties were further increased for corporations to the higher of AUST\$10 million or three times the benefit derived from the contravention or, if the benefit is unascertainable, 10 per cent of the annual turnover of the corporation (and any related corporations).

Despite these increases in the penalty amount, the ACCC's experience in cartel investigation suggests that these pecuniary penalties have not provided a sufficient deterrent to hard-core collusion by big business. There have been a number of notable price-fixing cases over the past decade which have attracted large penalties but, obviously, not carrying enough commercial weight to deter others from fixing prices and engaging in collusion.

In a very recent price-fixing case, four foreign-based suppliers of marine hose were ordered to pay penalties exceeding AUST\$8 million for engaging in cartel conduct.<sup>8</sup> Dunlop Oil & Marine, Bridgestone Corporation, Trelleborg Industrie SAS, and Parker ITR were charged with giving effect to an international cartel arrangement that included the Australian market from 2001 to 2006, for the supply of marine hose. The ACCC alleged the companies submitted "rigged" bids to supply marine hose to customers in Australia such as Woodside Energy Ltd, BHP Billiton Petroleum Pty Ltd, and ConocoPhillips (03-12) Pty Ltd. The penalties reflect some discount for co-operation with the ACCC when it instituted its investigations into the cartel (such co-operation discounts are not uncommon in Australia). The actual making of the cartel arrangements occurred outside Australia. As a result, the penalties imposed relate only to dealings by the companies that gave effect to the cartel conduct, and not to the separate contravention of making a cartel, arrangement, or understanding. The international cartel was effectively terminated in May 2007 following searches and arrests conducted simultaneously by the U.S. Department of Justice, the U.K. Office of Fair Trading, the European Commission, and Japan's Fair Trade Commission. Since then cartel members have been, to varying degrees, the subject of global enforcement action.

In another case of an international cartel, the ACCC instituted separate proceedings against many international airlines for price-fixing in relation to fuel surcharges applied to the international carriage of air cargo.<sup>9</sup> In April 2010, Malaysian Airline System Berhad became the thirteenth airline to be the subject of ACCC proceedings. Actions are still proceeding against Singapore Airlines Cargo Pte Ltd, Cathay Pacific Airways Ltd, Emirates, PT Garuda Indonesia

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<sup>7</sup> A. Fels, *The Criminalization of Serious Cartel Conduct: Issues and Questions for Discussion*, paper presented at the 7th Annual University of South Australia Trade Practices Workshop, Adelaide, 16-17 (October 2009).

<sup>8</sup> ACCC 2010a, \$8 million plus penalty imposed on cartel members, Media Release 74/10, available at <http://www.accc.gov.au/content/index.phtml/itemId/923519>.

<sup>9</sup> ACCC 2010b, ACCC institutes proceedings against Malaysian airline companies for alleged price-fixing of air freight, Media Release 72/10, available at <http://www.accc.gov.au/content/index.phtml/itemId/923374>.

Ltd, Thai Airways International Public Company Limited, and Korean Air Lines Co. Ltd. Proceedings against British Airways PLC, Cargolux Airlines International SA, Martinair Holland NV, Qantas Airways Ltd, Société Air France, and Koninklijke Luchtvaart Maatschappij NV (KLM) have been concluded, resulting in penalties totaling more than AUST\$41 million. The ACCC alleged that these airlines entered into arrangements or understandings between 2000 and 2006 to fix the price of a fuel surcharge and a security surcharge that applied to their carriage of air cargo. The penalties were said to reflect the serious nature of the cartel contraventions and, in the case of Qantas (which suffered a AUST\$20 million penalty), its very large share of the Australian segment of the market, but in absolute dollar terms the penalties were not especially high in relation to the likely revenue gains to the airlines.

In a widely publicized case of a domestic cartel, a record penalty of AUST\$36 million was ordered against Visy Board Pty Ltd and its owner, Richard Pratt, for price-fixing and market sharing with its rival, Amcor Limited, for the supply of corrugated fiberboard packaging throughout Australia.<sup>10</sup> This penalty incorporates the individual penalty against Pratt for his role in approving the arrangement. The court also ordered separate penalties totaling AUST\$2 million against two former executives of Visy. Federal Court Justice Peter Heerey stressed that the cartel had the potential for the widest possible effect as every man, woman, and child in Australia would use or consume something every day that at some stage has been transported in a cardboard box. Heerey J further observed that critical to the success of any anti-cartel regime is the level of penalty that can be applied to individuals, noting that many countries with free market economies have enacted laws that make cartel conduct by individuals subject to criminal sanctions, including imprisonment. The ACCC's success in this particular case was largely attributable to its "whistle blowing" policy that encouraged Amcor and former Amcor executives to come forward and provide information and evidence with the incentive of complete immunity from any action by the ACCC.

Other prominent price-fixing cases in recent years have included:

- In April 2010, the Federal Court in Perth handed down its final orders in a long running cartel case which had involved bid rigging and price-fixing in relation to tenders for the supply and installation of commercial and industrial air conditioning and mechanical services in Western Australia. Penalties totaling almost AUST\$9.3 million were imposed on 17 companies and 22 individuals.
- In January 2010, penalties totaling AUST\$4 million were imposed on April Fine Paper Trading Pte Ltd, a Singapore company, and a related company, April International Marketing Services Australia Pty Ltd, for fixing the price of copy paper and uncoated wood-free folio paper supplied to Australian customers. The penalties were significantly discounted due to the co-operation of the two companies.
- In 2008, penalties in excess of AUST\$2.5 million were imposed on FChem (Aust) Limited, Osmose Australia Pty Ltd, and a former managing director of Osmose Australia for price-fixing in the timber preservatives industry. The conduct came to the ACCC's attention when Koppers Arch Wood Protection (Aust) Pty Limited came forward with information concerning the conduct. Koppers was granted immunity from prosecution

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<sup>10</sup> Australian Competition and Consumer Commission v Visy Industries Holdings Pty Limited (No 3) [2007] FCA 1617 (2 November 2007).

under the ACCC's leniency policy. The penalties were discounted to reflect the parties' co-operation with the ACCC in its investigation.

- In 2005, a penalty of over AUST\$20 million was imposed on a total of 16 companies and individuals for fixing the retail price of petrol in the Ballarat region of the state of Victoria.
- In 2004, the Federal Court in Sydney ordered penalties of over AUST\$14 million against ABB Power Transmission Pty Ltd, ABB Transmission, and Distribution Limited, and their senior executives for market sharing and price-fixing in the market for power transformers and distribution transformers in Australia. These penalties brought the total penalties imposed on companies and individuals involved in the cartel to over AUST\$35 million. Other companies involved include Alstom Australia Ltd, Wilson Transformer Company, Schneider Electric (Australia) Pty Ltd, and AW Tyree Transformers.
- In 2001, penalties totaling AUST\$26 million were imposed on Roche Vitamins Australia Pty Ltd, BASF Australia Limited, Aventis Animal Nutrition Pty Ltd, and their executives for price-fixing and market sharing in animal vitamins in the Australian market.

#### IV. WHY ARE TOUGHER PENALTIES NEEDED?

There is a growing realization among competition agency commissioners and staff, as well as judges in Australia and elsewhere, that hard-core collusion is a form of theft and is in the same class as white-collar crimes.<sup>11,12</sup> This view is an important basis for considering changing both the quantum and nature of the penalty in order to punish future collusion.

A second rationale for criminal sanctions is to provide effective deterrence to future cartel behavior. The general deterrent effect of enforcement is critical because it is impossible to monitor all businesses and it is difficult to detect and successfully prosecute all violations. This is especially true for cartel conduct that is clandestine.<sup>13</sup>

Deterrence requires that a cartelist perceive the expected private costs of price-fixing, including any penalty or fine, to exceed the anticipated actual benefits. This would require an allowance to be made for the probability of detection and being found guilty. It is estimated that monetary penalties would have to be much higher than the current levels to effectively deter cartel behavior, and that such an increase would be ineffective and politically infeasible.<sup>14</sup> Truly optimal pecuniary penalties risk bankrupting the firms concerned, or being passed on ultimately to third parties such as employees, creditors, and customers.<sup>15</sup> For these reasons pecuniary penalties are considered as unlikely to sufficiently deter serious cartel conduct.<sup>16</sup>

Furthermore, corporate sanctions present an agency issue because prices are fixed by individuals—not corporations. It therefore seems most appropriate to focus deterrence on those

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<sup>11</sup> A. Fels, *The Trade Practices Act and World's Best Practice: Proposals for Criminal Penalties for Hard-Core Collusion*, paper presented at the Australian Institute of Criminology, Melbourne, (September 2, 2002).

<sup>12</sup> T. Calvani & T. H. Calvani, *Custodial Sanctions for Cartel Offences: An Appropriate Sanction in Australia?*, paper presented at the 7th Annual University of South Australia Trade Practices Workshop, Adelaide, 16-17 (October 2009) now published in 17 COMPETITION AND CONSUMER L.J., pp.119-140 (2009).

<sup>13</sup> Fels 2002, *supra* note 11.

<sup>14</sup> Calvani & Calvani, *supra* note 12.

<sup>15</sup> C. Beaton-Wells, *Criminalising Cartels: Australia's Slow Conversion*, 31(2) WORLD COMPETITION, pp. 205-233, (2008).

<sup>16</sup> Calvani & Calvani, *supra* note 12

who actually engage in the prohibited behavior.<sup>17</sup> However, there is little evidence to suggest that large pecuniary penalties hurt individuals, and the risk of dismissal seems to have been generally low enough not to affect an executive's collusive pretensions. On the contrary, executives can benefit from cartels. There are bonuses and promotions, and it is difficult to prevent employers from paying the individuals' penalties.<sup>18</sup>

For these reasons it is argued that the penalty focus ought to be on natural persons and deterrence could be achieved by imposing custodial sentences. A criminal penalty has personal implications against which the company cannot indemnify an employee. The likelihood of acquiring a criminal record could significantly harm the professional career of the offender. Indeed, the fear of imprisonment is considered by competition officials and judges to be a far more effective deterrent than civil remedies.<sup>19</sup>

Another rationale is the need for Australia to remain in step with the law applying in many of its major trading partners. In particular, it is argued that in a globalizing world, the Australian economy is vulnerable to the operation of international cartels, and Australia needs to take tough action against practises that inflict significant harm on competition and consumer welfare.<sup>20</sup>

## V. THE ROAD TO THE ENACTMENT OF CRIMINAL PROVISIONS

In Australia, the campaign to criminalize serious cartel conduct was initiated and has been led by the ACCC.<sup>21</sup> In 1993, soon after he was appointed, the then Chairman of the Trade Practices Commission (now the ACCC), Professor Allan Fels, floated the idea of criminal sanctions for Part IV of the TPA. However, the issue quickly fell off the regulatory agenda because of the government's disinterest. The Government's argument was that it had recently increased penalties by a substantial amount and they should be given time to work.<sup>22</sup>

In 2001, Fels renewed the call for the introduction of criminal sanctions for hard-core cartels in Australia. The ACCC's call for criminalization was formalized in its submission to the Dawson Committee, which was charged with the task of reviewing the TPA.<sup>23</sup> In its January 2003 report, the Committee gave the proposal only qualified support, in part due to its perceptions that there would be practical difficulties in differentiating criminal cartel behavior from civil cartel behavior, and in combining criminal sanctions with the leniency policy administered by the ACCC.<sup>24</sup>

The proposal was supported by the Liberal Party government and in February 2005, the then Treasurer (in whose portfolio was responsibility for the TPA), Peter Costello, announced that criminal sanctions for serious cartel behavior would be introduced. In August 2007, the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill and the Federal Court Amendment (Criminal Jurisdiction) Bill were listed on the government's website as legislation

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<sup>17</sup> *Id.*

<sup>18</sup> Fels 2002, *supra* note 11.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Beaton-Wells, *supra* note 15.

<sup>22</sup> Fels 2009, *supra* note 7.

<sup>23</sup> Trade Practices Act Review Committee (Dawson Committee) 2003, Review of the Competition Provisions of the Trade Practices Act, Commonwealth of Australia, Canberra.

<sup>24</sup> *Id.*

proposed to be introduced in the Parliament. However, the fate of the bills was left hanging due to the 2007 federal elections.<sup>25</sup>

Shortly before the election, the then Prime Minister expressed reservations about the adoption of criminal sanctions, which was in conflict with the Treasurer, who supported criminalization. While the Liberal Party was uncertain and indecisive, the opposition, the Australian Labor Party, indicated its strong commitment to criminalization in the lead-up to the election.<sup>26</sup> After winning election the Labor Party proceeded to develop a new law and it was finally enacted in July 2009.

## VI. THE NEW STATUTE

The Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009 (Cartels Act) has resulted in a substantial redrafting of Part IV of the TPA and redefines many breaches of Part IV as cartel behavior. These prohibited types of conduct are described in s 44ZZRD as a contract, arrangement, or understanding that contains a cartel provision, that is undertaken by parties that are each other's competitors and amounts to price-fixing (a purpose/effect/likely effect condition), output restriction, market sharing, or bid rigging (these last three being purpose conditions). These two conditions provide that the prohibited conduct may be either direct or indirect in its implementation.

Prior to the Cartels Act, all cartel proceedings were brought under ss 45 or 45A of the TPA. The civil prohibition in s 45 remains, and prohibits an agreement between competitors which contains an exclusionary provision, or which has the purpose or likely effect of substantially lessening competition. S 45A, which treated price-fixing as a *per se* breach, has been repealed.

The Cartels Act introduces parallel criminal offenses and civil penalty provisions relating to cartel conduct. There is no single bright line to determine what might be charged as a criminal offense, and what will be prosecuted under the civil regime. The maximum penalties for a corporation and an individual for civil and criminal offenses are summarized in Table 1. It is noteworthy that the maximum dollar fine for a criminal offense is considerably lower than that which can be imposed under a successful civil action. Reasons for this have never been provided in any convincing detail, but it may be inferred that the non-pecuniary consequences for an executive of being found guilty of a criminal offense will be far more damaging (and therefore provide a more forceful deterrent to others) to that person's long-term career prospects and thus of greater import than a higher civil dollar penalty.

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<sup>25</sup> Beaton-Wells, *supra* note 15.

<sup>26</sup> *Id.*



**Table 1. Penalties (AUST\$) under the TPA for Serious Cartel Conduct\***

	Individuals		Corporations	
	Civil	Criminal	Civil	Criminal
Pecuniary penalties	Up to \$500,000	Up to \$220,000	<i>The greater of:</i> a) \$10 million; b) 3 times the gain from the contravention; or c) If the gain cannot be assessed, 10 percent of the corporate group's annual Australian turnover	
Imprisonment	–	Up to 10 years	–	–
Criminal record	–	Yes	–	Yes
Barred from company management	Yes	Yes	–	–
Indemnification prohibited	Yes	Yes	–	–

\*Adapted from A. Haly, *Cartel conduct Criminalised in Australia*, (June 17, 2009) available at <http://www.mallesons.com/publications/2009/Jun/9954937w.htm>.

Civil prosecutions will continue to be conducted by the ACCC, which will continue to require proof according to the civil standard of the balance of probabilities. For criminal sanctions to apply, the prosecution will have to establish certain fault elements under the Criminal Code 1995. That is, the prosecution must prove beyond reasonable doubt that the individual (or corporation) intended to enter into the contract, arrangement, or understanding and knew or believed that it contained a cartel provision, and intended to give effect to that provision.<sup>27</sup>

The first exposure draft bill of the Cartels Act identified the element of an “intention of dishonestly obtaining a benefit” as the distinguishing factor between civil and criminal cartel conduct. This was in line with the existing legislation in the United Kingdom. The wisdom of including the dishonesty requirement was widely questioned and was omitted in the second exposure draft released in October 2008.<sup>28</sup>

The DPP is responsible for prosecuting criminal cartel matters. The ACCC and the DPP have established a memorandum of understanding which provides that the ACCC will be

<sup>27</sup> ACCC 2009, *Cartels: What you need to know. A guide for business*, Canberra.

<sup>28</sup> L. Woodward & G. Edgerton, *Uncertainties in criminal cartel offences*, 61(8) KEEPING GOOD COMPANIES pp. 43-45, (2009).

responsible for investigating suspected cartel conduct and it will refer appropriate cartel conduct to the DPP for prosecution.<sup>29</sup>

The memorandum provides that the ACCC will generally not refer less serious conduct to the DPP and will focus on conduct of a type that can cause large scale or serious economic harm. This will be influenced by considerations such as whether the conduct was longstanding or had a significant impact on the market in which the cartel operated, whether the conduct caused significant detriment or loss to the public (including customers), whether the participants are repeat offenders, and whether the value of the affected commerce exceeds AUST\$1 million within a 12-month period. The DPP will consider these same factors when deciding whether to prosecute.

The criminal prosecution will be pursued before a judge and jury in the Federal Court of Australia, the court which hears cases under the Trade Practices Act but which has not heretofore heard criminal cases, while civil cases will continue to be determined by a single judge. The first criminal case is awaited with considerable interest by all concerned!

The Cartels Act expands the ACCC's existing search and seizure powers to include the power to obtain telephone interception warrants and use intercepted material in relation to cartel investigations. This is in addition to the ACCC's power to conduct raids to search for and seize documents and obtain production of documents, and to examine employees on oath.

The Cartels Act contains a number of exceptions or circumstances in which an individual or a corporation who makes or gives effect to a cartel provision will not contravene it. The exceptions principally relate to conduct subject to a collective bargaining notice or to authorization, joint ventures, agreements between related bodies corporate, collective acquisition of goods or services or for joint advertising of the price of goods, and anti-overlap provisions.

The new joint venture exception is highly controversial. Joint ventures are a common feature of the Australian commercial landscape, and have been accommodated in the TPA in the past, but the exception is now rather narrowly drafted in the Cartels Act. It would appear that a good deal of corporate joint venture activity in Australia could be at risk.

Immunity can be obtained for both civil and criminal prosecutions. The ACCC will receive and manage requests for immunity from both criminal and civil proceedings, and make recommendations to the DPP based on its assessment as to whether the applicant for immunity meets the criteria set out in the ACCC's immunity policy. The ACCC will decide whether to grant immunity from civil proceedings, and immunity from criminal proceedings will be determined by the DPP in accordance with the Prosecution Policy of the Commonwealth and upon the recommendation of the ACCC.

## VII. CHALLENGES

The new legislation has yet to be tested in court—new learning is in store. The criminalization of serious cartel conduct faces many practical and operational challenges, and no doubt the first criminal case will be strongly opposed. A crucial early task is to identify the bright line between cartel conduct that is criminal and that which is not. Initially this call lies in the hands of the ACCC, but of course ultimately it is for the DPP to decide. Many would argue that

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<sup>29</sup> Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission regarding Serious Cartel Conduct *available at* <http://www.accc.gov.au/content/index.phtml/itemId/882220>.

this power to recommend may well give the ACCC too much power in its investigations, especially given its past predilection to negotiate penalties with parties who have allegedly fixed prices. A harmonious and respectful working relationship will have to be established between the ACCC and the DPP. This may take time and in the process some egos may be bruised.

It remains to be seen what key parameters will be used by judges to determine the type and quantum of the penalty, and how they will go about instructing juries (that will be selected in the usual manner) in the face of all the uncertainties of economic evidence (and its jargon) and its proper interpretation. Australian judges traditionally have been cautious in penalizing anticompetitive conduct, especially in the face of new legislation. But given the judicial calls for treating price-fixing as theft, we might anticipate relatively tough penalties from the outset.

The joint venture exception clearly needs to be tested and amended if it is found to hamper the need in Australia for joint venture activity on the grounds of scale economies and other such efficiencies, especially in the booming mining sector of the economy.

Of course, most new laws create uncertainty and apprehension as to their impact. The Cartels Act is no different. It was introduced with widespread support. It is not likely to be heavily used, certainly at first. No doubt the ACCC and the DPP will seek to run a first case that will set a socially-favorable precedent. A loss or a favorable but conservative first judgment might set back for some time the quest for markets where prices are freely determined. But the government has signaled its intentions strongly. Serious cartel conduct is socially unacceptable and those who engage in it face the risk of being jailed or, as a consequence of being found guilty, face both a blow to their wallets and the prospect of a future other than in the corporate sector.