

Criminal Cartel Offence Recommended by Senate Committee Gaol Sentences Edge Closer

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1. Event

- 1.1 The Senate Standing Committee on Economics has recommended that the Senate pass the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 ("Bill").
- 1.2 If passed the effect on the Bill will be to create a criminal offence of:
 - (a) making;
 - (b) giving effect to;a contract arrangement or understanding that contains a Cartel provision.
- 1.3 For individuals these offences carry a maximum gaol term of 10 years and/or a fine not exceeding \$220,000.
- 1.4 For corporations, the fine for a criminal Cartel offence is not to exceed the greater of:
 - (a) \$10 million;
 - (b) three times the total value of benefits gained from the offence; or
 - (c) 10 per cent of the Corporation's annual turnover during the 12 month period ending at the end of the month in which the Corporation committed the offence.

2. What is a Cartel Provision?

- 2.1 A criminal Cartel provision is one that is contained within a contract, arrangement or understanding between competitors and relates to conduct that may be described as:
 - (a) price fixing;
 - (b) sharing or allocating a customer base;
 - (c) restricting supply; or
 - (d) rigging a tender process.

If has become common to refer to such behaviour as "hard core" Cartel conduct.

3. Criticisms of the Bill

- 3.1 A number of submissions to the Senate Committee criticised the fact that the Bill did not distinguish between conduct which would be subject to criminal sanctions and conduct which would be more appropriately dealt with by civil proceedings under the Trade Practices Act. A primary concern was that business would not have sufficient clarity as to what conduct might attract criminal sanctions and the Bill might consequently stifle legitimate competitive behaviour, or at least, behaviour which did not cause significant detriment to consumers.

- 3.2 The Committee's response was essentially two-fold:
- (a) persons with concerns as to whether their behaviour would contravene the new provisions could seek authorisation for such conduct from the ACCC;
 - (b) it was important that the ACCC retained flexibility in determining which conduct it considered warranted prosecution as "hard-core" Cartel conduct and which was undeserving of prosecution.
- 3.3 In this regard, the Committee noted that:
- (a) if was ultimately up to the Commonwealth DPP as to whether or not to prosecute;
 - (b) a requirement of acting 'dishonesty', originally contained with the Bill but subsequently omitted, would unduly restrict successful prosecutions (as it observed had occurred in the United Kingdom); and
 - (c) the ACCC had entered into a MOU with the CDPP as to what circumstances would warrant prosecution and recommended that the ACCC issue guidelines to the public based on the MOU which would provide some level of clarity to business.

4. The way forward

- 4.1 The enactment into law of the Bill is likely in the first half of 2009.
- 4.2 All businesses need to give critical consideration to any of their operational practices which may lead to inadvertent breaches of the new provisions and give consideration to whether or not to seek authorisation from the ACCC for any behaviour which may give rise to concerns.
- 4.3 Further comment will be provided on the ACCC guidelines once these are published.

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March 2009
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