

23 June 2009

## Commercial Law e-alert

### Anti-Cartel legislation update

#### Go directly to jail, do not pass go and pay \$10M

The "Go To Jail" card will soon be issued to individuals involved in serious cartel behaviour. Further to our previous E-Alerts of 20 November and 8 December 2008, the *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008* has passed through the Senate and is currently awaiting Royal Assent.

The new anti-cartel provisions criminalise price fixing, restrictive outputs, bid rigging in tenders, and market sharing or division. The test for price fixing under the *Trade Practices Act 1974* ("the Act") is amended to include arrangements that have the purpose, effect or likely effect, of directly or indirectly amounting to price fixing.

#### Criminal investigations

Our previous E-Alerts (available on [www.hunthunt.com.au](http://www.hunthunt.com.au)) discussed the implications for vertical supply agreements, the Australian Competition and Consumer Commission ("ACCC") and the Commonwealth Director of Public Prosecutions ("CDPP") proposed approach to the new regime, and the "whistleblower" immunity provisions.

The Memorandum of Understanding referred to in our alert of 8 December 2008 remains unchanged. At the recent Competition Law Conference 2009, the ACCC announced that it intends to publish a guidance note on how the ACCC will manage cartel investigations. The ACCC also stated at the Conference that "if the tests under the Prosecution Policy of the Commonwealth are satisfied, it should be clear to everyone that the ACCC will always support a criminal conviction".

#### Penalties

Individuals will now face potential criminal penalties of up to 10 years imprisonment and a fine of up to \$220,000, and for a corporation the stakes are the greater of: \$10M, three times the benefit gained from the cartel conduct, or 10% of the corporation's annual turnover. Under the civil prohibition, individuals may be liable for a penalty of up to \$500,000 per contravention.

#### Increased Investigatory Powers

In addition to the existing powers under the Act, the ACCC and the Australian Federal Police will have increased investigatory powers for criminal investigations, including the ability to apply for telephone interception and surveillance device warrants.

#### Dual proceedings

The Act will now contain both criminal and civil prohibitions, which are not exclusive. The civil prohibitions on cartel conduct essentially contain the same elements as the criminal scheme, with the exception of the standard of proof and criminal fault elements. If criminal proceedings fail, the ACCC retains the ability to pursue civil proceedings. However, if a criminal conviction is entered the civil proceedings will be withdrawn. This approach is similar to that under the *Corporations Act 2001* penalty provisions.

#### Exceptions – Joint Ventures and related bodies corporate

Joint ventures for the production or supply of goods or service constitute an exception to the anti - cartel laws by way of a full defence against criminal and civil actions for cartel conduct. The penalty provisions also do not apply to related bodies corporate.

#### Authorisation

The new anti-cartel provisions are extensively qualified and companies wishing to include cartel provisions in their contracts may request authorisation from the ACCC to do so, which will be granted if the ACCC believes the public benefit from the conduct would outweigh any public detriment.

#### If in doubt, seek legal advice

The ACCC has made it clear that criminal proceedings will be pursued if the CDPP deems appropriate. The ACCC will not allow a potential criminal conviction to be traded away by an offer to resolve the matter through civil penalty proceedings (e.g. the payment of large fine). The anti-cartel provisions are complex and the courts will not forgive a miscalculation. If you are currently party to a contract, arrangement or understanding that might contravene the new provisions or if you are considering engaging in such conduct, seek legal advice immediately. If you have any questions, please contact one of our experts.

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