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Legislation, not guidelines, is real cartel issue

Opinion

Caron Beaton-Wells

Lawyers and business people have been complaining for months that there is too much uncertainty surrounding the scope of the new cartel laws. The senate economics committee acknowledged their concern but saw the answer in Australian Competition and Consumer Commission guidelines rather than in changes to the cartel bill.

The ACCC has now released those guidelines only to be met with criticisms that they lack detail and clarity. The guidelines on the new laws represent little more than a summary of information that has been in the public arena for some time. But both the committee and the critics appear to have missed the point. The problem is with the legislation, not the guidelines.

First, the new cartel offences are drawn too widely, capturing potentially competitively neutral or even pro-competitive conduct, and the exceptions (particularly for joint ventures) are too restrictive to compensate.

Second, the statutory provisions are excessively prescriptive and inflexible. The result is that the ACCC is constrained, as will be the courts, in the extent to which they may relieve the uncertainty through narrow interpretation.

Neither regulators nor judges are entitled to, in effect, rewrite the law. Consider the pivotal definition of a "cartel provision". It runs for six pages of dense statutory text (just under 2000 words).

Compare the legislation in the US and European Union. The same proscriptions are expressed in a few sentences. This has enabled the enforcement agencies to publish detailed guidelines explaining their interpretation of the statute and courts to "read down" and refine it over many years of case experience.

Overly inclusive and prescriptive definition is an entrenched feature of Australia's Trade Practices Act (as it is of several other laws — the Tax Act being an obvious example). Addressing these issues would require wiping the slate clean and starting again. It would mean changing the approach to drafting, so as to promote purposive over literal interpretation. This, in turn, would require that regulatory and judicial wisdom is valued over legislative foresight.

Although interesting to contemplate, the reality is that an overhaul of this nature and extent is no more than a pipedream. Meanwhile, it is constructive to focus on the critical insights that are available from the ACCC guidelines. The most significant of these is that, as a matter of policy, the ACCC will seek to have cartel conduct pursued as a criminal matter whenever the conduct can be considered anything other than "relatively minor". This suggests that, as a starting point, cartel cases will be approached as potentially criminal rather than civil, as reflected in what is said in the guidelines about the approach to investigations, co-ordination with the DPP, concurrent proceedings and charge negotiations.

A similar approach has been taken to conduct banned under the corporations law, with indications that prosecution tends to be preferred over civil penalties whenever available on the evidence. Ironically, in 2007, a Treasury review of corporate law sanctions suggested criminal sanctions were being overused and commercial decision-making inhibited as a result.

Whether the same view will be reached in relation to cartel sanctions cannot be predicted. It depends on the ACCC's exercise of judgement on a case-by-case basis over the coming years. For now, unless lobbying for a wholesale re-writing of the law, critics will have to be content simply to wait and see.

■ *Caron Beaton-Wells is an associate professor at the Melbourne Law School.*