The Cartel Criminalisation Bill - An Australian Perspective

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• The rationale for criminalisation – the debate Australians never really had

• Parallel criminal and civil prohibitions – convergence with Australia

• The collaborative activity exemption – divergence from Australia
The rationale for criminalisation
Rationale

• **Increased detection** – will the spectre of criminal sanctions increase leniency applications?
  - for domestic cartels – Australian experience suggests not
  - for international cartels – possibly – some argue criminal sanctions place a jurisdiction on the “must report” list

• **Increased deterrence** - will the spectre of criminal sanctions boost deterrence?
  - for domestic cartels, esp. involving SMEs – UoM research suggests this is questionable if not unlikely
  - but may spur improvements in corporate compliance, esp. in larger businesses
• **Increased international cooperation** – will criminalisation promote greater cooperation between the CC and other competition authorities?
  - cooperation seems robust already (eg airline cases)
  - cooperation with non-criminal jurisdictions may reduce

• **The SEM agenda** – is criminalisation necessary / desirable to promote trans-Tasman harmonisation?
  - alignment of prohibitions/exemptions will assist with certainty and precedent – but must sanctions be aligned?
  - is harmonisation a principled basis for criminalisation?
• **Appropriate punishment** – are criminal sanctions appropriate to punish behaviour that is or should be seen as morally reprehensible?

  - moral characterisations may be problematic in economic policy discourse and may engender resistance from business

  - UoM research suggests the public morally disapprove of cartel conduct without strongly supporting criminal sanctions
Parallel criminal and civil prohibitions
Parallel prohibitions

- **The NZ prohibitions mirror the Australian model** – same physical elements for criminal and civil liability but additional fault elements for the offences

- **Advantages**
  - avoids difficulties of formulating legislative distinctions between “serious” and “not so serious” conduct
  - provides flexibility and proportionality in enforcement responses

- **Disadvantages**
  - requires all investigations to start as criminal
  - relies on enforcement guidelines to provide certainty
  - dilutes the labelling / educative effect of the criminal law
• The Australian Guidelines

- Non-binding, non-exhaustive, non-prescriptive – can/should it be otherwise?

- Focus on conduct “likely to cause large-scale or serious economic harm” – read SMEs are excluded?

- Relevant factors include:
  - longstanding conduct
  - significant market impact
  - significant detriment, loss or damage to the public
  - prior similar conduct admitted or found by a court
  - value of affected commerce / bid exceeding AU$1m
  - other? eg secretiveness
Parallel prohibitions

- **The Australian Guidelines – limitations**
  - the qualifiers are opaque
  - the value of affected commerce “threshold” is arbitrary
  - reliance on prior admissions may be problematic
  - other obviously relevant factors are not mentioned eg deliberateness, coercion
  - evidentiary assessments may be determinative

- The reality may be that until there has been some experience with enforcement, discretion will be exercised on a “you know when you see it” basis
Collaborative activity exemption
• **The NZ exemption diverges from the Australian model** – collaborative activity exception with clearance vs joint venture exception with authorisation

• **Drawbacks of the Australian approach**
  - there are two different joint venture exceptions
  - the activity must be a joint venture
  - there must be a contract (or an arrangement or understanding believed to be a contract)
  - the joint venture must relate to production or supply
  - authorisation involves delay, expense and satisfaction of a public benefits test
For more information
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