



Competition Law & Policy Institute Workshop

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





- **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





- **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



- **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



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