Australian Cartel Regulation

Law, policy and practice in an international context

Cartel regulation is a prime element of competition policy and an essential means of minimising the adverse effects of cartel activity on economic welfare. However, effective cartel regulation poses distinct challenges for governments, competition authorities and commentators across the globe.

In *Australian Cartel Regulation*, leading competition law experts Caron Beaton-Wells and Brent Fisse reflect on developments in anti-cartel law in Australia over the last 30 years. They provide a comprehensive account of the current law on cartels as well as discussing key issues that may arise in the future. The impact of the prohibitions, the exceptions, the principles and the rules governing corporate and individual liability; the policies that guide decisions on enforcement, immunity and cooperation; and the sanctions and the implications for compliance and liability control are all critically assessed. This definitive volume not only identifies the practical and theoretical issues, but also recommends workable solutions, and does so with the benefit of comparative analysis of the anti-cartel laws of major overseas jurisdictions. Many of the issues identified and discussed in *Australian Cartel Regulation* are common to any scheme designed to regulate cartel conduct.

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Foreword

In 2009, the Australian Parliament finally passed legislation, the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (Cth) which imposed criminal liability for price-fixing, market-sharing, and other forms of cartel activity.

This legislation has a tortuous history, going back to the *Australian Industries Preservation Act 1906* (Cth). It would be nice to think that the pace quickened after 2003 when the Dawson Committee recommended criminalisation of cartel conduct, particularly when that recommendation was accepted by the Commonwealth Treasurer the same year. However, as the authors demonstrate, what followed was a saga of 'secrecy, obfuscation and delay'.

The present work is a welcome attempt to unravel the key issues of law and policy raised by so major a change to the *Trade Practices Act 1974* (Cth) (TPA). The authors are leading academic and professional competition lawyers in Australia. They explain the new legislation in detail, point out its shortcomings, and propound sensible improvements.

Prior to the 2009 Act there was a substantial Australian jurisprudence on cartel conduct in the context of civil liability under the TPA. For example, the concept of 'contract, arrangement or understanding' with its underlying notion of commitment was well developed and understood, as witness the High Court's refusal of special leave to appeal from the decision of the Full Court of the Federal Court in *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* (2005) 159 FCR 452, special leave refused [2006] HCA Trans 272.

The task of identifying what cartel conduct was to become subject to criminal sanctions, while at the same time protecting legitimate commercial cooperation such as joint ventures, was admittedly not an easy one. The opportunity for professional and public input was limited; as the authors note, a working party appointed by the Government to consider the Dawson Committee's report did not release any discussion paper and indeed vigorously opposed a freedom of information application for the release of its report: *Fisse v Secretary, Department of the Treasury* (2008) 172 FCR 513.

While at least the misguided inclusion of a dishonesty requirement was thankfully abandoned, the overall result has many deficiencies, as this work convincingly demonstrates. Were the 2009 Act an essay submitted to the authors in their academic capacity, one suspects the student would be lucky to receive a C minus.

A basic problem is that the legislation was fated to be produced in the deeply entrenched Australian house style for legislative drafting. The authors say that the provisions

> . . . suffer from undue complexity, technicality and prolixity. They have multiple layers, intricate cross relationships, and hidden definitions.

(Another distinguished commentator, Russell Miller in his *Annotated Trade Practices Act*, 31st edn, p. 347, tersely describes the four page definition of 'cartel conduct' in s 44ZZRD as 'turgid'.)

As an example, a resolute reader who has struggled through the preceding 10 subsections of s 44ZZRD will be met with the following Delphic utterance:

> (11) For the purposes of this Division, a provision of a contract, arrangement or understanding is not to be taken not to have the purpose mentioned in a paragraph of subsection (3) by reason only of:
>
> (a) the form of the provision;
> (b) the form of the contract, arrangement or understanding; or
> (c) any description given to the provision, or to the contract, arrangement or understanding, by the parties.

The foregoing is not mere donnish disdain. This legislation has serious consequences for those who become involved in its application, including those facing imprisonment or financial ruin. Judges attempting to formulate intelligible directions and juries attempting to understand and apply those directions have had their tasks made more difficult by the structure and form of this legislation.

However, I should not leave readers with the impression that this work is confined to academic criticism or proposals for reform, valuable though it is in those respects. It is as well a thorough and perceptive analysis of this difficult legislation. In this area of the law, one could not of course express hope that the work would achieve a monopoly, or even a substantial degree of market power. Nevertheless, it will without doubt be quickly recognised as indispensable.

The Hon Peter Heerey QC
Dawson Chambers
Melbourne
May 2010

Foreword

The recent surge in countries seeking to criminalise price-fixing is a truly remarkable development. For more than 100 years, the United States was virtually alone in permitting prosecutors to proceed criminally in attacking alleged violations of the antitrust laws.

However, this generalisation may obscure as much as it reveals. In the United States, fines, as well as prison sentences, constitute criminal penalties. In Europe, however, and in much of the rest of the world (including Australia) that enforces antitrust laws of some kind or other, fines are a form of civil remedy and the European Commission (as well as the Australian Competition and Consumer Commission) has been able to secure some very large fines using civil enforcement tools.

So what is really at issue in the recent surge of criminalisation is the use of incarceration as a possible penalty for certain antitrust violations. And that is a remedy that, until very recently in the modern era, has rarely been used outside the United States.[1] Even in the US, it was not until the (quite modest) sentences handed out to 'white-collar' defendants in the so-called 'Great Electrical Equipment Conspiracy' in the 1960s that the public began to think of incarceration as a potential outcome for an individual convicted of an antitrust violation. This public perception was enhanced in 1974 when President Ford signed legislation that changed violations of the *Sherman Act* from misdemeanors to felonies and increased the maximum jail term from one to three years (increased to 10 years in 2004).

But for a variety of reasons there has developed over the last 10 or so years a belief in many modern industrial societies on the need to have incarceration as a potential sanction for price-fixing and related cartel behavior. In that regard, Australia has caught up to the US. But there the similarity ends, as this book by Beaton-Wells and Fisse clearly demonstrates. There is no separate 'cartel statute' under US antitrust law; price-fixing and other cartel activities are covered by the general purpose s 1 of the *Sherman Act*, which outlaws simply 'every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce . . . '. The statute declares that a violator of the statute is deemed to be guilty of a felony but the decision of the DOJ whether to proceed criminally or civilly is a matter of prosecutorial discretion. There is no separate legislation setting out any distinction between criminal and civil offences and the principal antitrust casebooks used in the US contain few if any significant court decisions expounding on the difference. There are cases expounding on the distinction between conduct that is unlawful per se and conduct that must be proven

1 It is worth noting, however, that under the first recorded antimonopoly act, the Edict of Zeno, a violator could be condemned to permanent exile. See KG Elzinga and W Breit, *The Antitrust Penalties*, Yale University Press, New Haven, 1976, pp. 21–2.

to be anti-competitive under the rule of reason but many civil cases (both government and private) result in a per se violation. There is of course a difference in the burden of proof (beyond a reasonable doubt in criminal cases) and at least a nominal requirement of intent for a criminal conviction. But that's about it. If one had to come up with a rough and ready rule on when the government is likely to proceed with (and win) a criminal conviction, it is for agreements on price or output that are naked (i.e. are not associated even facially with any kind of joint venture) and are done in secret.

So it will come as a shock to the American reader to learn that the new Australian statute that regulates unlawful cartel activity runs to 13 pages. But that is the joy of studying comparative law! The US legislative model has a distinctive history and is not transplantable in Australia and other jurisdictions where competition legislation is much more prescriptive. Because of the length and complexity of the Australian legislation, it may not be so surprising that an entire book is needed to explain and critique it. The work also canvasses issues that are the subject of ongoing debate and development around the world, including facilitating practices, joint ventures and corporate criminal liability. Hence the student of comparative law, as well as Australian practitioners and enforcement agencies who need to be knowingly concerned in the application of the legislation, will find much to learn from this comprehensive analysis by Beaton-Wells and Fisse.

George Hay
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Contents

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Associate Professor Caron Beaton-Wells is a researcher and the Director of Studies in competition law at the Melbourne Law School, University of Melbourne. She is also the Director of the University of Melbourne's Competition Law & Economics Network. She has published widely in the field, including *Proof of Antitrust Markets* (2003). Caron has been a member of the Victorian Bar since 1997, practising predominantly in federal jurisdictions (having previously been a solicitor at Mallesons Stephen Jaques). She is a member of the Trade Practices Committee of the Law Council of Australia, the Academic Society for Competition Law and the American Bar Association's Sections of Antitrust Law and International Law and a founding member of the Academic Board of the Asian Competition Law and Economics Centre. She has been a Visiting Fellow to the University of Oxford Centre for Competition Law and Policy and St John's College, has participated in the International Competition Network as a Non-Governmental Advisor and has consulted to the Organisation for Economic Cooperation and Development.

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Brent Fisse has extensive experience in trade practices and competition law, corporate regulation and e-commerce. Brent became a partner of Gilbert + Tobin in 1995, after acting for the firm for two years as a consultant. Since retiring from Gilbert + Tobin in 2004, Brent has run his own specialist trade practices advisory practice. He is an adjunct professor of law at Sydney University and La Trobe University and has been a Senior Fellow of the Melbourne Law School since 2007. He teaches a postgraduate course on cartels at the University of Melbourne. He was a professor of law at the University of Sydney from 1985 to 1995. Brent is a member of the American Bar Association Antitrust Section and the Law Council of Australia's Trade Practices Committee. He is a board member of REGNET and the managing director of Lexpert Publications Pty Ltd. His publications include *Corporations, Crime and Accountability* (1993) (with John Braithwaite).

Preface

This book is the product of sustained cartel activity between the authors for more than three years. Facilitating practices during 2007 led to a mutual commitment in January 2008 to tackle the host of problems raised by the exposure draft anti-cartel legislation released by the Australian government of the day. The collusion later intensified as waves of further problems rose from later exposure draft provisions and then from the legislation enacted in July 2009. Overt acts have proliferated, often at conferences and seminars and in advices. All statements in the pages ahead are those of co-conspirators. No immunity application has been made. Authorisation has not been sought.

We have tried to provide a detailed account and critique of current Australian law. The work is also intended to be constructive where better approaches are needed. The critique and the improvements proposed are informed by comparison with approaches taken in the US, Europe, Canada, New Zealand and other jurisdictions. Some of those approaches are themselves less than satisfactory and call for improvement. From that perspective, Australian cartel regulation may be seen as a test refinery of imported and locally produced concepts. We leave it to readers to judge whether the resulting spirit is not only output-expanding but also welfare-enhancing.

Many have been knowingly concerned in this project. Some have counselled our thinking on particular issues. Others have contributed by answering questions, making comments and providing references. None has relieved us from full responsibility. We are grateful to all who have assisted. Special mention should be made of Philip Williams, who fielded our toughest questions on economic issues. We are indebted also to our research assistants – Christopher Tran, Kathryn Tomasic, Neil Brydges, Janette Nankivell and Susan Cirillo. Finally, the book would not have been written but for the patience and support of Michael, Clare and Mikey, and Heidi, Oscar and Bertie.

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Caron and Brent
Melbourne, Sydney
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