

CORRS IN BRIEF

17 JUNE 2009

THE CARTEL CONDUCT AMENDMENTS TO THE TPA: WHAT YOU NEED TO KNOW

The *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (**Cartel Amendment**) has now been passed by both houses of Federal Parliament. Its significant provisions become operative on 24 July 2009, and will criminalise serious cartels. Those involved in cartels will risk substantial fines and imprisonment for up to 10 years.

"Cartels are a cancer on our economy. Their price fixing, bid rigging and market sharing are a silent extortion that in many instances do far more damage to our economy, to business, and to consumers, than many of the worst consumer scams. ..."

Regardless of their size, the Australian Competition and Consumer Commission regards fighting this insidious and damaging behaviour as a major priority for our enforcement programme here within Australia and as part of a global network of competition agencies in detecting and breaking up international cartels."¹

This In Brief outlines:

- the current regime regarding cartels under the Act;
- the changes;
- the implications of the changes for ordinary commercial arrangements; and
- issues concerning investigations, enforcement and penalties.

Executive Summary

The Cartel Amendment comes into effect 28 days after assent, and is expected to commence within the next month. It applies to arrangements already in place.

The amendments prohibit competitors making or giving effect to a contract, arrangement or understanding which contains a cartel provision. Cartel provisions:

- fix prices;
- restrict outputs in the production or supply chain;
- allocate customers, suppliers or territories; or
- rig bids.

Cartel participants are now liable to criminal sanctions, including up to 10 years in prison for individuals convicted of involvement in a cartel and a maximum penalty for corporations which may exceed \$10 million.

The ACCC's Immunity Policy For Cartel Conduct has been revised to allow for civil *and* criminal immunity to be granted to the person first in the door. The risk of imprisonment and the offer of immunity for whistleblowers provides strong incentives for individuals involved in cartels to 'blow the whistle'.

The Cartel Amendment potentially affects ordinary commercial transactions between competitors, such as supply arrangements, joint tendering arrangements and joint ventures.

While there are exceptions intended to minimise the impact of the Cartel Amendment on ordinary commercial transactions, they are narrow and technical. Significantly, the joint venture exception is subject to a number of limitations (outlined in **section 3.1** below) which may leave the parties to existing and proposed joint ventures at risk of inadvertently contravening the prohibitions against cartel provisions.

¹ G Samuel, ACCC Chairman, 24 November 2004, "[Cracking Cartels International and Australian Developments](#)".

IMMUNITY POLICY

The accompanying In Brief deals specifically with the ACCC's revised Immunity Policy, how civil and criminal immunity will be granted, and how the memorandum of understanding with the Commonwealth Director of Public Prosecutions will work – [follow this link to view](#).

1 CURRENT REGIME

1.1 Prohibition against exclusionary provisions and price-fixing provisions

The Act already prohibits cartels. Specifically, the Act already prohibits any provision of a contract, arrangement or understanding (CAU) made between competitors which has:

- the purpose of restricting from whom any of the parties will acquire goods or services, or to whom any of the parties will supply goods or services (**exclusionary provisions**); and
- the purpose or likely effect of regulating the price of goods or services acquired or supplied by the parties (**price fixing provisions**).

A contravention of either of these prohibitions currently exposes a company to a maximum penalty of the greater of:

- \$10 million;
- three times the value of the benefit obtained by the company from the contravention; or
- 10 per cent of the corporate group's annual turnover (if the value of the benefit cannot be determined by the court).

Individuals involved in a contravention of these prohibitions currently face penalties of up to \$500,000.

1.2 Perceived inadequacies in the current regime

Under the current regime, a contravention of the prohibition against exclusionary provisions or the prohibition against price fixing provisions is only a civil offence. The main objective of the Cartel Amendment is to impose criminal sanctions on serious cartel conduct.

These changes were first recommended by the *Report on the Competition Provisions of the Trade Practices Act 1974 (Dawson Report)* in 2003, the rationale being that criminal sanctions would provide a greater deterrent to engaging in cartel conduct. Mr Chris Bowen, the then Minister for Competition Policy, stated in a press release after the Bill was released that *"The possibility of criminal sanctions for company executives will increase the deterrent effect for*

*businesses that may otherwise rationalise corporate fines as the 'cost' of doing such business."*² Criminal sanctions for cartel conduct have also been justified as a penalty that cannot be passed on to shareholders³, and as a move that *"brings this country into line with the United States, Canada and the United Kingdom who have had similar sanctions in place for some time now"*.⁴

2 THE CHANGES

The Cartel Amendment creates parallel civil and criminal prohibitions against making a CAU that contains a cartel provision or giving effect to a cartel provision.⁵

These prohibitions are absolute and apply regardless of the effect of the conduct on competition.

The Cartel Amendment repeals the existing prohibition on price fixing (section 45A) but retains the existing prohibition on exclusionary provisions (section 4D). Retention of the prohibition on exclusionary provisions may cause overlap with the new prohibition on cartel provisions.

2.1 The price of contravention?

The price of contravening the prohibitions is steep. The penalties may arise not just where the conduct is carried into effect, but where there is an attempted contravention, or where accessory involvement occurs.⁶ The maximum penalties for each offence under the Cartel Amendment are as follows:

	Criminal Contravention	Civil Contravention
Company	A penalty of the greater of: <ul style="list-style-type: none"> • \$10 million; • three times the value of the benefit obtained (apparently by any person) from the contravention; or • 10 per cent of the company's (and its related bodies corporate) annual turnover (if the value of the benefit cannot be determined by the court).⁷ 	Same as criminal ⁸
Individual	<ul style="list-style-type: none"> • Imprisonment for up to 10 years; or • a fine of 2,000 penalty units – currently \$220,000; and • a criminal record.⁹ 	Civil penalty up to \$500,000 ¹⁰

2 See Minister for Competition Policy and Consumer Affairs press release dated 27 October 2008 at <http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/087.htm&pageID=003&min=ceb&Year=&DocType=0>

3 Speech by Graham Samuel "Cartels, Criminal Penalties and the Leniency Policy" International Competition Enforcement Conference, Tokyo 21 April 2005.

4 Above at n2.

5 See sections 44ZZRF and 44ZZRG for the criminal offence and sections 44ZZRJ and 44ZZRK for the civil contraventions.

6 ie aiding abetting, inducing or being knowingly concerned in a breach; s76 for civil actions and s79 for criminal conduct.

7 Section 44ZZRF(3) and section 44ZZRG(3) and the definition of 'annual turnover'.

8 Section 76(1A)(aa).

9 Section 79(1).

10 Section 76(1B).

In either criminal or civil proceedings, a range of other orders may be made. These include injunctions, community service orders, probation orders, adverse publicity orders, orders disqualifying a person from managing a company, orders declaring void or varying contractual terms and orders for the payment of compensation.

Also, directors and officers may not be indemnified from any civil liability or legal costs incurred in unsuccessfully defending civil proceedings. There is, however, nothing to prevent directors and officers being indemnified from legal costs in defending criminal proceedings.

In a criminal proceeding, any profits can also be disgorged from the individual or company under the *Proceeds of Crime Act 2002*.

2.2 What is the difference between criminal conduct and civil conduct?

Put simply, there is no real difference and the legislation gives no guidance as to when conduct will be pursued as a criminal or civil contravention. Both the criminal and civil provisions prohibit making, or giving effect to, a CAU that contains a cartel provision. The same conduct can expose a person or a company to criminal or civil consequences.

The difference comes into play when a decision is taken by the Australian Competition and Consumer Commission (ACCC) to commence proceedings – it will choose whether to run a civil proceeding or seek criminal prosecution. If criminal proceedings are to be commenced:

- the elements of the offence must be proved to the criminal standard of beyond reasonable doubt (as opposed to the civil standard of balance of probabilities); and
- an additional 'fault element' of 'knowledge and belief' must be proven beyond reasonable doubt.

'Fault elements' are a concept in the Criminal Code and are used to ensure that a person accused of a criminal offence has the requisite 'guilty mind'. The 'knowledge and belief' fault element requires a person to have knowledge of all of the elements that cause the making or enacting of the cartel provision to be a criminal offence. This does not mean that the person needs to know that making a CAU that contains a cartel provision is illegal. Rather it means that the person must know that, for example, a contract made by a person has a provision that has the effect of fixing prices and the contract is made with a competitor.

The ACCC has made clear that serious cartel conduct will be dealt with criminally, and that there is no prospect of

avoiding a criminal prosecution by offering to admit to a civil contravention and pay a large fine.

2.3 What is prohibited cartel conduct?

As indicated above, the Cartel Amendment prohibits making a CAU that contains a cartel provision or giving effect to a cartel provision.

The central section of the Cartel Amendment is section 44ZZRD which defines a cartel provision. A provision of a CAU will be a cartel provision if it satisfies either of the following conditions:

- it has the purpose, effect or likely effect of directly or indirectly fixing, controlling or maintaining prices for the supply or acquisition of goods or services (**the purpose/effect condition**); or
- it has the purpose of directly or indirectly preventing, restricting or limiting outputs, sharing markets or rigging bids (**the purpose condition**);

and

- it is part of a CAU made between parties that are, or but for any CAU would otherwise be, in competition with one another (**the competition condition**).

Put simply, a cartel provision is a deal made between competitors to:

- fix prices;
- restrict outputs in the production or supply chain;
- allocate customers, suppliers or territories; or
- rig bids.

Each of these forms of "cartel provision" is discussed separately under the following headings.

2.4 Price fixing – either purpose or effect

The Cartel Amendment prohibits a provision of a CAU made between competitors which has the purpose, effect or likely effect of (directly or indirectly) fixing, controlling or maintaining the price for (or discount, rebate, allowance or credit provided in relation to):

- goods or services supplied (or likely to be supplied) to customers by any of the parties to the CAU;
- goods or services acquired (or likely to be acquired) from suppliers by any of the parties to the CAU; or

- goods or services which will be, or are likely to be resupplied by any customer of a party to the CAU.

A provision of a CAU will not be a cartel provision by reason only that it *recommends* a price, discount allowance, rebate or credit.¹¹

2.5 Restricting outputs in production or supply

The Cartel Amendment prohibits a provision of a CAU made between competitors which has the purpose of (directly or indirectly) preventing, restricting or limiting:¹²

- the production or likely production of *goods*;
- the capacity or likely capacity to supply *services*; or
- the likely supply of goods or services to particular persons or classes of persons,

by all or any of the parties to the CAU.

2.6 Market sharing (allocating customers, suppliers or territories)

The Cartel Amendment prohibits a provision of a CAU which has the purpose of allocating to any party to the CAU:

- the customers to be supplied by a party;
- the suppliers who will supply a party; or
- the geographical areas in which goods or services are to be supplied to customers or acquired from suppliers.

2.7 Bid rigging

The Cartel Amendment prohibits a provision of a CAU which has the purpose of ensuring that:

- one or more parties bid and the others do not bid;
- two or more parties bid, but on the basis that one is more likely to succeed;
- whilst parties bid, some will pull out or not finalise their bids; and
- whilst parties bid, they have worked out a material component of at least one bid.

The definition of a “bid” is wide. It includes a bid or tender and any preliminary step taken by a potential participant in a bidding or tendering process.¹³

2.8 Existing arrangements

Existing arrangements are caught by the Cartel Amendment. The Cartel Amendment prohibits giving effect to a cartel provision in a CAU made before the amendments are enacted.¹⁴

2.9 Look wider than the words – extended operation

(a) For price fixing – look beyond the provision

A provision of a CAU will have the required purpose, effect or likely effect of fixing, controlling or maintaining prices if:

- that provision;
- that provision in combination with other provisions of the CAU; or
- that provision in combination with the provisions of another CAU which has at least one party in common with the first CAU,

have that purpose, effect or likely effect.¹⁵

(b) In all cases, look beyond the immediate parties to the CAU

The Act exempts conduct between companies in the same corporate group from liability (see 2.10 below).

However, the Cartel Amendment also provides that, for the purposes of cartel conduct, if a body corporate is a party to a CAU, then each related body corporate is also taken to be a party to the CAU.¹⁶

This includes all related bodies corporate in the analysis of the purpose/effect and purpose conditions, and also the competition condition. The result that:

- a provision of a CAU;
- between two companies (A and B), which do not compete with each other,

may be a cartel provision if there is competition between say party A and a related body corporate to party B.

2.10 Exceptions

The Cartel Amendment contains ten ‘exceptions’, which identify circumstances in which a person who makes or gives effect to a cartel provision will not contravene the criminal offences or the civil prohibitions.

¹¹ Section 44ZZRD(6).

¹² Section 44ZZRD(3).

¹³ Section 44ZZRB.

¹⁴ Section 44ZZRG(1)(b) and (4).

¹⁵ Section 44ZZRD(8) and (9).

The collective bargaining exception – a person may make or give effect to a cartel provision that would otherwise be considered price fixing, restricting outputs or sharing markets if they have successfully lodged a collective bargaining notice (under the new section 93AB(1A) of the Act) with the ACCC.¹⁷

The authorisation exception – the ACCC may, on application, authorise making or giving effect to a cartel provision. Authorisation will only be granted if the ACCC is satisfied that the provision would result in a public benefit likely to outweigh the public detriment arising from any loss of competition. Further, the Cartel Amendment allows a contract containing a cartel provision to be made before applying for authorisation if the contract includes a condition that the provision will not come into force until authorisation is granted, and application for authorisation is made within 14 days.¹⁸

The related bodies corporate exception – this exception allows a cartel provision to be made and put into effect when the only parties to the relevant CAU are related bodies corporate.¹⁹

The joint venture exception – this exception applies to a contract containing a cartel provision (or an arrangement or understanding containing a cartel provision if the parties intended and reasonably believed it to be a contract), if the cartel provision is for the purpose of a joint venture for the production and/or supply of goods and services (see section 3.1 below).²⁰

The exception in favour of real estate covenants – this exception allows a cartel provision if it constitutes a covenant in a real estate transaction governed by section 45B of the Act.²¹

The resale price maintenance exception – this exception allows a cartel provision that constitutes resale price maintenance under section 48 of the Act, or would constitute resale price maintenance if it prohibited the imposition of maximum prices by suppliers on resellers as well as minimum prices.²²

The exclusive dealing exception – this exception allows a cartel provision that constitutes exclusive dealing under section 47 of the Act.²³ Where competitors are also in a supplier customer relationship, the intention appears to be that provisions restricting other acquisitions by the customer or restricting the customer in resupplying the goods or services will continue to be governed by the exclusive dealing provisions of the Act, rather than the cartel provisions.

The dual listed company exception – this exception allows a cartel provision that is a provision in a dual listed company arrangement under section 49 of the Act.²⁴

The exception in favour of acquisitions of shares or assets – this exception allows a cartel provision which provides for

the acquisition of shares or assets.²⁵ The intention appears to be that acquisitions of shares and assets will continue to be governed by the merger provisions of section 50 of the Act, rather than the cartel provisions.

The exception in favour of collective acquisitions – this exception allows a cartel provision that relates to the price of goods or services to be collectively acquired by the parties to the CAU.²⁶

Care must be taken in relying on any of these exceptions. First, care will need to be exercised to ensure that the exception is applicable. The exceptions are defined very specifically. Where an exception is applicable, in some cases careful drafting of contracts will help make it clear that an exception is applicable. Secondly, care must be taken to ensure that the person relying on the exception can prove entitlement to claim it. In each case, the exceptions make it clear that the person relying on the exception must be able to prove entitlement to it.

3 IMPLICATIONS FOR ORDINARY COMMERCIAL ARRANGEMENTS

Cartels are clearly not ordinary commercial arrangements. However, the changes may catch a broad range of ordinary commercial conduct. Conduct that is currently lawful and does not harm competition may now be treated as a criminal offence. For this reason, companies will need to closely scrutinise arrangements to ensure that they do not contain a cartel provision, and take even greater care when dealing with competitors. This is particularly the case if they are currently relying on the existing joint venture defences.

Ordinary commercial arrangements made before the Cartel Amendment will also need to be considered because, as noted above, the prohibition against giving effect to a cartel provision applies to cartel provisions in a CAU made before the Cartel Amendment.

3.1 Joint venture arrangements

Joint venturers often agree who the joint venture will buy from and who it will sell to, and the price at which it will buy and sell. Where the joint venturers are competitors or would be competitors in the absence of the joint venture, such joint venture arrangements potentially contravene the existing prohibitions against exclusionary provisions and/or the price fixing provisions. They may also contravene the prohibitions against cartel provisions.

Currently, such arrangements are subject to joint venturers' defences.²⁷ These defences effectively exempt any exclusionary provision or price fixing provision where a person

16 Section 44ZRC.

17 Section 44ZZRL.

18 Section 44ZZRM.

19 Section 44ZZRN.

20 Section 44ZZRO [criminal provisions] and section 44ZZRP [civil provisions].

21 Section 44ZZRQ.

22 Section 44ZZRR.

23 Section 44ZZRS.

24 Section 44ZZRT.

25 Section 44ZZRU.

26 Section 44ZZRV.

establishes that the provision was made for the purposes of a joint venture and does not have the purpose or likely effect of substantially lessening competition.

The new prohibitions against cartel provisions are subject to a joint venture exception, but it only applies to a contract containing a cartel provision (or an arrangement or understanding containing a cartel provision if the parties intended and reasonably believed it to be a contract), if:

- the cartel provision is “...for the purposes of a joint venture...”; and
- the joint venture is “... for the production and/or supply of goods or services...”; and
- the joint venture is carried on jointly by the parties or, in the case of an incorporated joint venture, by a company formed by the parties for the purposes of enabling them to carry on the joint venture by means of their joint ownership or control of the company.²⁸

These limitations on the joint venture exception raise a number of issues for parties to existing and proposed joint ventures.

A significant issue for all joint venturers is that the exception only applies to cartel provisions in contracts, or arrangements or understandings which the parties intended and reasonably believed to be contracts. Many day to day decisions made by or on behalf of joint ventures, such as those made by boards and management committees, may constitute cartel provisions but are not in contracts, or arrangements or understandings intended and reasonably believed by the parties to be contracts. The Government has sought to address this issue, by suggesting that such decisions may be covered by the exception if they are made in accordance with a contract.²⁹

A further issue for some joint ventures is that the exception only applies to joint ventures for the production and/or supply of goods or services. Many joint ventures may be formed for purposes other than the production and/or supply of goods or services, such as joint ventures formed:

- to source a product used by the joint venturers in businesses they conduct separately, such as joint ventures formed to import goods for use in their separate businesses;
- to conduct research or product development;
- to conduct exploration for natural resources; and
- to conduct any pre production activity for the joint venturers.

The Government has sought to address concerns raised about this limitation by adding a note to the joint venture exception. This note suggests that a joint venture formed to conduct research and development may be a joint venture for the supply of services if it provides the results of its research and development to the participants in the joint venture.

The ACCC’s Executive General Manager, Enforcement and Compliance Division, has expressed the view that where a joint venture for the production of goods or services itself acquires goods or services for the purposes of the joint venture, it will still be able to rely on the joint venture exception.³⁰

As a result of these limitations, current and proposed joint venture arrangements should be checked to ensure that they do not contain cartel provisions where:

- the parties to the joint venture would otherwise be competitors; and
- the joint venture is not operated pursuant to a contract, the joint venture is not for the production and/or supply of goods or services, or possible cartel provisions are not for the purposes of the joint venture.

3.2 Supply arrangements between competitors

Competitors can be in a supplier-customer relationship, as well as being competitors. For example:

- franchisors are sometimes simultaneously competitors with, and suppliers to, their franchisees;
- manufacturers are sometimes simultaneously competitors with, and suppliers to, their distributors; and
- competitors sometimes supply each other with services, such as toll manufacturing services.

Whenever these arrangements impose restrictions on supply by the supplier to third parties, resupply by the customer or on pricing (other than pricing between the supplier and customer), they potentially contravene the prohibition against exclusionary provisions and/or the prohibition against price fixing. They may now also contravene the prohibitions against cartel provisions.

Currently, if such restrictions fall within the exclusive dealing provisions (under section 47), they will not constitute exclusionary provisions or price fixing as a result of an ‘anti overlap’ provision (in section 45(6)). As such, they will generally only contravene the Act if they have the purpose or likely effect of substantially lessening competition. Similarly, if such restrictions regulate prices that may be charged by the customer when reselling, they may constitute resale price

²⁷ Section 76C for exclusionary provisions and section 76D for price fixing provisions.

²⁸ Sections 44ZZRO and 44ZZRP.

²⁹ The Supplementary Explanatory Memorandum to the Cartel Amendment states (in paragraph 1.12) as follows: “If a board or committee is established under the joint venture contract to regulate or manage the joint venture and the activities of that board or committee are contemplated and regulated by the joint venture contract, then the exceptions would appear to apply in relation to those activities”.

³⁰ M Bezzi “The conduct of cartel litigation: the ACCC enforcement perspective on serious cartels - some key issues and practical considerations” Competition Law Conference, 23 May 2009

maintenance, but will not constitute price fixing, as a result of 'anti overlap' provisions (in section 45(5)).

The prohibitions against cartel provisions are subject to similar anti overlap provisions.³¹ However, the Cartel Amendment make clear that anyone seeking to rely on the anti overlap provisions will bear the burden of proving that they are entitled to their benefit.

Current and proposed supply arrangements between competitors should therefore be checked to ensure that:

- they do not contain any exclusionary provisions or cartel provisions, or contemplate conduct that would amount to resale price maintenance; or
- any such provisions are 'protected' by the anti overlap provisions, anyone who would otherwise be in contravention of the Act can prove that they are entitled to the benefit of the anti overlap provisions, and that the conduct does not otherwise contravene the Act (for example, by substantially lessening competition).

3.3 Collective acquisitions

Groups are often formed to collectively acquire goods or services for members of the group. Typically they are small businesses operating as franchisees or part of a banner group. Examples include buying groups of:

- franchisees in the petroleum sector;
- franchisees in the bedding sector;
- banner groups of hardware stores;
- banner groups of pharmacies; and
- banner groups of supermarkets.

Whenever these arrangements are made between parties who would otherwise be competitors in acquiring or supplying the goods or services, they potentially contravene the existing prohibition against price fixing provisions. They may now contravene the prohibitions against cartel provisions.

Currently, the prohibition against price fixing is subject to an exception in favour of collectively acquired goods (in section 45A(4)) which enables competitors to fix the price at which they collectively acquire goods or services and fix the price at which they jointly advertise such goods or services.

The new prohibitions against cartel provisions are subject to a similar exception for collective acquisitions. However, again the Cartel Amendment make clear that anyone seeking to rely

on this exception will bear the burden of proving that they are entitled to the benefit of it.

Current and proposed arrangements for the collective acquisition of goods or services by parties who would otherwise be competitors in acquiring the goods or services should therefore be checked to ensure that the parties are able to prove that any conduct in the nature of price fixing relates to the acquisition or joint advertising of collectively acquired goods or services.

3.4 Collaborative bidding and tendering arrangements

Legitimate collaborative bidding and tendering arrangements can take a variety of forms. For example:

- two parties may wish to jointly bid or tender, such as where they believe that a joint response is more likely to be successful than individual responses or where they wish to share risk; or
- where one party agrees to supply the bidder/tenderer with goods or services for the purposes of the bid or tender, on the basis that it will not independently bid or tender.

Where the parties to such collaborative arrangements would otherwise be competing bidders or tenderers, such arrangements may contravene the existing prohibition against exclusionary provisions or the new prohibitions against cartel provisions. Accordingly, in such circumstances collaborative bidding or tendering arrangements should be checked to ensure that they do not contravene these prohibitions.

4 INVESTIGATIONS, ENFORCEMENT, IMMUNITY AND LENIENCY

4.1 ACCC investigative powers

Comprehensive reforms to the ACCC's powers to enter and search premises and to seize evidentiary material commenced in January 2007. The Cartel Amendment further expands the ACCC's investigative capabilities, including by allowing it to obtain phone tapping and surveillance device warrants to investigate cartel conduct.

A number of amendments have been made to the ACCC's existing search and seizure powers. These amendments allow the ACCC to:

- be accompanied, in executing a search warrant, by Federal Police officers authorised to use force;

³¹ Section 44ZZRR [similar to section 45(5)] and section 44ZZRS [similar to section 45(6)].

³² G Samuel, ACCC Chairman, speech to National Press Club, 25 June 2008.

³³ Ibid.

- obtain a warrant compelling a person to provide assistance in accessing computer data (failure to comply will be an offence punishable by up to six months' imprisonment);
- pursue criminal convictions for persons giving false or misleading information or producing false or misleading documents (punishable by up to 12 months' imprisonment) or obstructing a Commonwealth official (punishable by up to two years' imprisonment);
- seek a term of imprisonment of up to 12 months (in addition to the existing \$3300 fine) for failure to comply with an ACCC inspector's requirement to answer questions or produce evidential material related to the ACCC's warrant;
- take photographs or make video recordings of the premises (either with the occupier's consent or for a purpose incidental to the warrant);
- temporarily suspend a search for up to an hour (or longer with the occupier's written consent); and
- remove items such as computers from premises for up to 72 hours (or longer with a magistrate's consent) to examine the items in order to determine whether they may be seized under the warrant.

The ACCC already had power in certain circumstances under the *Telecommunications (Interception and Access) Act 1979* to obtain stored communications warrants (ie to access emails, voicemail and SMS communications) and to access call data (such as call parties, location and duration). The recent amendments enable a warrant to be obtained (by the Federal Police on behalf of the ACCC) to intercept communications that would be likely to assist in the investigation of cartel conduct. The amendments also allow a surveillance devices warrant under the *Surveillance Devices Act 2004* to be obtained (again by the Federal Police on behalf of the ACCC) to assist in the investigation of cartel offences. Surveillance devices include listening devices, optical surveillance devices and tracking devices. These changes represent a significant expansion of the ACCC's powers to investigate suspected cartels and are likely to be particularly effective evidence gathering tools; particularly when used in conjunction with detailed information provided by applicants for immunity (discussed below).

With the criminalisation of cartels, the ACCC is likely to start exercising its compulsory powers of entry – known as “dawn raids” in other jurisdictions. Corporations should ensure that they have procedures in place to allow them to respond to the unexpected knock on the door, and to ensure that only those materials covered by a search warrant are seized.

4.2 Parallel offences and dual enforcement

Although it is intended that more serious conduct will be the subject of criminal proceedings and less serious conduct the subject of civil proceedings, the amendments allow both criminal and civil proceedings to be pursued in respect of the same conduct.

The parallel criminal and civil prohibitions will be enforced by separate regulators. The ACCC will continue to be responsible for enforcement of the civil prohibitions. However, the Commonwealth Department of Public Prosecutions (**CDPP**) is responsible for prosecuting all offences under Commonwealth law, including the prohibitions against criminal cartel conduct.

To clarify the division of responsibilities between the ACCC and the CDPP, the authorities have prepared a Memorandum of Understanding (**MOU**) regarding the enforcement of the Cartel Amendment. The MOU provides that the ACCC will be responsible for investigating suspected cartel conduct and the referral of appropriate cartel conduct to the CDPP for consideration for prosecution. The decision whether to commence criminal prosecution will be the CDPP's.

The MOU provides that the ACCC will generally not refer less serious conduct to the CDPP and will focus on conduct of a type that can cause large scale or serious economic harm. The ACCC (in deciding whether to refer conduct to the CDPP) and the CDPP (in deciding whether to commence criminal prosecution) will have regard to the time period over which the conduct occurred, the resulting detriment to the public and any history of involvement in cartel conduct by the alleged parties. As an indicator of the substantiveness of the conduct required, the MOU suggests that, in deciding whether to refer a matter to the CDPP, the ACCC will consider whether the annual value of the business affected by the conduct exceeds \$1 million.

4.3 Applications for immunity and leniency

The ACCC's Immunity Policy for Cartel Conduct, which commenced in August 2005, provides for full immunity from prosecution and penalty to be granted to the first eligible cartel participant to report its involvement in a cartel and cooperate with the ACCC's investigation and prosecution of other cartel participants.

The Immunity Policy has proven to be highly effective in destabilising and uncovering cartel activity – since it was introduced, the ACCC has received an average of one application for immunity per month and currently has 21 suspected cartels under investigation.³² The ACCC expects the criminalisation of cartel conduct to greatly increase the incentives to seek immunity. The ACCC Chairman recently

commented that:

*"The threat of criminal sanctions focuses the mind of cartel criminals in a way that civil penalties alone cannot. That threat of time behind bars becomes a powerful motivator for them to confess and save their own skins through accessing the ACCC's immunity policy."*³³

It is critical for companies or individuals considering applying for immunity to understand precisely the risks that they are exposing themselves to in applying for immunity. The criminalisation of cartel conduct and the vesting of authority in respect of such conduct in a second government agency (ie the CDPP) obviously affects immunity decisions – the grant of immunity by the ACCC would be of little comfort to the applicant if the CDPP could then decide to commence criminal proceedings.

The desirability of certainty for immunity applicants is recognised by the MOU. It provides that the ACCC will receive and manage requests for immunity from both civil and criminal proceedings and make recommendations to the CDPP about whether the applicant meets the requirements of the ACCC's Immunity Policy. However, the decisions to grant immunity from civil and criminal proceedings rest separately with the ACCC and CDPP respectively. It remains to be seen whether this dual adjudication role will adversely affect the timeliness and certainty of immunity decisions.

On a related issue, the ability of third parties (such as customers seeking damages for losses resulting from cartel conduct) to obtain access to documents provided to the ACCC by a cartel participant in the context of an immunity application is also a disincentive to apply for immunity. The Act includes provisions requiring the ACCC to disclose to third party claimants documents that it holds relating to the third party's claim. In part to seek to address this issue, the Cartel Amendment gives a discretion to the ACCC and the Courts to refuse to disclose, or require the disclosure of, such information. In exercising this discretion, the ACCC, Courts and Tribunals are required to consider a limited range of factors including the potential for the order to discourage informants from providing information to the ACCC in future.

For further information, please contact:

Stephen Kroker
Partner, Melbourne
Tel +61 3 9672 3494
stephen.kroker@corrs.com.au

Richard Flitcroft
Partner, Sydney
Tel +61 2 9210 6435
richard.flitcroft@corrs.com.au

Bill Keane
Partner, Perth
Tel +61 8 9460 1600
bill.keane@corrs.com.au

Eddie Scuderi
Partner, Brisbane
Tel +61 7 3228 9319
eddie.scuderi@corrs.com.au

Mark McCowan
Senior Associate, Sydney
Tel +61 2 9210 6080
mark.mccowan@corrs.com.au

© Corrs Chambers Westgarth, 2009

This newsletter provides information about topical legal issues.

Information contained in this newsletter is intended as an introduction only and should not be relied on in place of legal advice.

If you do not wish to receive further information of this kind from Corrs, please provide us with the name of this publication, your name and contact details via mail: c/o Database Administrator, Marketing Department, Corrs Chambers Westgarth, GPO Box 9925 MELBOURNE VIC 3001; Tel +61 3 9672 3505; or email privacy@corrs.com.au.