
COMPETITION

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FIXING THE PRICE FIXERS - JAIL TIME AND RECORD FINES



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Recent developments in Australia mean that those found guilty of cartel conduct could soon be facing up to ten years in prison. This update looks at Australia's draft legislation criminalising cartel conduct and a significant penalty recently imposed on Qantas for price-fixing - developments which highlight the growing consequences for those engaged in cartel conduct.

Criminalising cartel conduct - the Australian case

"We'll try to cooperate fully with the IRS, because, as citizens, we feel a strong patriotic duty not to go to jail."

American satirist Dave Barry's quote is apt given Australia's just released final draft legislation which criminalises cartel behaviour (e.g. price fixing, market sharing, bid rigging) and exposes business executives involved to up to 10 years in prison. Australia is far from unique in criminalising such conduct and joins the United Kingdom, the United States and Canada.

While these amendments are to the Australian legislation, they may have significant impacts for New Zealand businesses. Most immediately, New Zealand businesses involved in such conduct in markets affecting Australia will be exposed to criminal prosecution. In

addition, the fear of a prison sentence might prompt more cartel participants to proactively come forward, increasing the chances that cartels are exposed. As the United States Department of Justice has commented:

"Nothing in our enforcement arsenal has as great an effect as the threat of substantial incarceration in a United States prison - nothing is a greater deterrent and nothing is a greater incentive for a cartel member, once exposed, to cooperate in the investigation of his co-conspirators".

A flow-on effect is that given the ever increasing integration of the New Zealand and Australian economies, to the extent there is parallel cartel conduct in New Zealand, there may well be an increased likelihood of cartel detection in New Zealand. The draft legislation is expected to be introduced into the Australian Commonwealth Parliament by the end of 2008.

Criminalisation in New Zealand is not currently on the agenda. However, given the continued harmonisation of New Zealand and Australian law and the existence of criminal sanctions for other white collar offences such as tax and customs evasion and insider trading, in time, similar amendments to the Commerce Act must be likely.

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Qantas agrees to record fines with ACCC

Qantas has just been landed with what is reportedly the second largest fine in Australian competition law history for its involvement in a global conspiracy to fix air cargo freight rates after agreeing to pay an A\$20 million fine to settle the Australian Competition and Consumer Commission's (ACCC) investigation. This is the latest in a suite of settlements entered into by a number of airlines with competition regulators around the world. Qantas itself has already paid fines of US\$61 million in the United States where one of its former employees was also jailed for his role in the conduct.

This A\$20 million fine is evidence of the trend towards increasing penalties for cartel conduct in Australia and New Zealand, and indeed around the world. The most recent New Zealand example is the Commerce Commission's prosecutions relating to the timber preservatives cartel which saw the businesses and individuals involved fined over NZ\$7.5 million. The largest fines totalled NZ\$3.6m for one group of companies.

The size of these fines and the Commission's approach of prosecuting individuals should not be seen as isolated or extreme, particularly given the Commission's strongly held views that cartel conduct is covert in nature and can have very significant negative impacts on the economy.

Moreover, there is no "over-deterrence" problem when setting penalties for price fixing. This is in contrast to mergers for example, which are recognised as being generally desirable and where a large fine may deter pro-competitive mergers from proceeding to the detriment of the economy in the long run.

Individuals may feel comforted by the absence of criminal liability in New Zealand. However, the lack of a criminal sanction, combined with the Commerce Act's requirement that individuals be fined unless there is a good reason for not doing so, may encourage courts to increase individual liability in future cases.

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