

THE DAWSON REVIEW: ENFORCEMENT AND PENALTIES

BRENT FISSE*

I INTRODUCTION

The Dawson Review¹ ('the Review') was heralded by the Government as a major event on the competition law calendar in Australia. In the area of enforcement and penalties, the Review disappoints, especially on the much-publicised issue of whether or not Australia should adopt the Australian Competition and Consumer Commission ('ACCC') proposal that 'hard-core' cartel conduct be criminalised.²

What follows is a brief critique of the Review's recommendation in these areas:

- criminal sanctions for 'hard-core' cartel conduct;
- civil monetary penalties;
- incentives for employees to spill the beans on cartels;
- individual liability; and
- compliance programs.

II CRIMINAL SANCTIONS FOR HARD-CORE CARTEL CONDUCT?

The Dawson Review recommends that criminal sanctions be introduced for serious cartel conduct subject to resolving some of the problems raised by the ACCC's submission in support of criminalisation of 'hard-core' cartels. Recommendation 10.1 is as follows:

- The Committee is of the view that solutions must be found to the problems identified by it before criminal sanctions are introduced for serious cartel behaviour. The problems are, importantly, the development (preferably by a joint body representing the DPP, the Attorney-General's

* Special Counsel, Gilbert + Tobin, Lawyers. The comments made here represent the personal views of the author.

1 Committee of Inquiry for the Review of the *Trade Practices Act*, Parliament of Australia, *Review of the Competition Provisions of the Trade Practices Act* (2003) (the 'Dawson Review').

2 Ibid 147.

Department, the ACCC and the Treasury) of a satisfactory definition of serious cartel behaviour and a workable method of combining a clear and certain leniency policy with a criminal regime. Subject to this proviso, the Committee recommends the introduction of criminal sanctions for serious, or hard-core, cartel behaviour, with penalties to include fines against any convicted corporation and imprisonment and fines, as appropriate, for implicated individuals.³

This recommendation does not pave a very useful way forward, for the following reasons:

- The level of analysis supporting this recommendation is low. The Committee is content to limit its review to outlining the issues raised in submissions relating to the ACCC's proposal, and has stopped well short of giving any definitive assessment of the reasons for and against criminalisation. The important ultimate issue of whether or not serious cartel conduct should be criminalised is left unresolved.
- The recommendation does not address all the issues raised by the ACCC's proposal but seems to say that only two of them need to be addressed in the further review recommended. One difficult and important additional issue is the operation of s 155 of the *Trade Practices Act 1974* (Cth) ('TPA') in the setting of criminal proceedings. The Committee takes the position that the ACCC must in effect elect not to rely on s 155 if it wishes to rely on criminal proceedings. If this is to be so then the ACCC would have a major disincentive to pursue criminal proceedings and its success in getting criminal sanctions introduced would be largely pyrrhic.
- The recommendation that the presently unresolved issues be resolved by a joint body representing the Commonwealth Director of Public Prosecutions ('DPP'), the Attorney-General's Department, the ACCC and the Treasury is unsatisfactory. The parties nominated have obvious axes to grind and do not adequately represent the views of the business community and legal profession. There needs to be representation from a much wider range of interested parties, including judges experienced in handling Part IV cases (as has been the practice of the Australian Law Reform Commission for references in this area).⁴
- The recommendation as worded states that the introduction of criminal sanctions should be predicated on finding a workable method of combining a clear and certain leniency policy with a criminal regime. This seems to imply that somehow there has to be a leniency policy, which is tail-wags-the-dog logic.
- More fundamentally, the Dawson Committee has made no headway in answering the key question: what exactly is the 'hard-core' or 'serious' cartel conduct that warrants criminalisation? The Review identifies many

³ Ibid 164.

⁴ The Commonwealth Government Response (16 April 2003) states that the Government will further consider the question of criminalisation but does not specify the mechanism of review.

of the relevant issues but then passes the buck to another body to do the hard analysis and develop compelling answers. This is a disappointing outcome from a high profile, high cost review exercise. The ACCC's position that criminal sanctions be introduced for hard-core cartel conduct was one of the major reasons for setting up the Dawson Committee as an independent avenue of review. The Committee has failed to perform one of its most obvious and important tasks.

- The Committee does not stay to examine whether issues arise from the use of fines as a criminal sanction against corporations or the extent to which non-monetary sanctions (eg, adverse publicity orders, probation and community service orders) should be used more extensively to reflect the criminality of serious cartel conduct.⁵

III CIVIL MONETARY PENALTIES

The Dawson Committee recommended:

The Act should be amended so that the maximum pecuniary penalty for corporations be raised to be the greater of \$10 million or three times the gain from the contravention or, where gain cannot be readily ascertained, 10 per cent of the turnover of the body corporate and all of its interconnected bodies corporate (if any).⁶

The merit of this recommendation is much less obvious than the Review suggests:

- The Committee does not explain why this recommendation is necessary or appropriate given the introduction of probation and other non-monetary penalties against corporations under the *TPA*. The European Union ('EU'), United Kingdom ('UK'), New Zealand and the Organisation for Economic Co-Operation and Development ('OECD') are much less advanced in their rethinking of sanctions against corporations, yet the Committee uncritically follows the fixation with monetary sanctions apparent in these countries and organisations.⁷
- The Committee does not examine the practical problems posed by a regime of turnover-based monetary penalties. The turnover-based fine of £6.8 million recently imposed in the UK on Genzyme Limited for exclusionary pricing illustrates both the crudity of turnover as a measure of proportionality in sentencing, and the understandable hostility of the business sector to penalties unrelated to the revenue derived from the particular products in relation to which breaches of the law have been

5 See also, Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, Report No 68 (1994); Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties In Australia*, Report No 95 (2002).

6 Dawson Review, above n 1, 164–5.

7 The Commonwealth Government Response uncritically accepts the recommendation made in the Review.

committed.⁸ Further, the Committee does not examine the workability or otherwise of the guidelines on assessing turnover that have been found to be necessary in the EU and the UK.

IV INCENTIVES FOR EMPLOYEES TO SPILL THE BEANS ON CARTELS

The Dawson Committee has taken the ACCC to task for not adequately explaining how the draft leniency policy for cartel conduct, advanced by the ACCC in mid-2002, would work in the context of the ACCC's proposal that criminal liability be introduced for hard-core cartel conduct. After pointing to several overseas models, the Committee recommended that the task of finding a workable solution be left to a joint body representing the DPP, the Attorney-General's Department, the ACCC and the Treasury.

The Review seems to endorse the idea of a leniency policy for cartel conduct without discussing the merits and demerits of the ACCC's draft leniency policy or the leniency policies in place in some overseas jurisdictions. This unquestioning approach is regrettable:

- The ACCC's draft leniency policy (as finalised in June 2003) is problematic. One issue is why immunity should be given to the first corporation or individual who happens to spill the beans. Conceivably, a second, third or fourth corporation or individual could independently spill the beans without being prompted by the ACCC and do so more effectively than the first. Why should the first be given more weight than the quality and/or quantity of the beans spilled?
- Granting immunity from enforcement action or prosecution is difficult to justify in the case of individual offenders who have deliberately broken the law, especially if their conduct was more culpable than that of other employees who are left to bear responsibility. In this situation, the ACCC draft policy denies immunity only to persons who have 'coerced' others to participate in the cartel, or who is 'the clear individual leader in the cartel'. A more even-handed approach would be to offer structured discounts on the level of penalty or sentence to all individual defendants for specified levels of cooperation and evidence.
- It is an open question whether or not a leniency policy is likely to be more effective in eliciting evidence or information about cartels than a policy of strengthening the protections available to whistle blowers. Such protections include the provision of compensatory relief or at least a fighting fund that can be drawn upon to support legal action to enforce the protections given. The Dawson Committee stays clear of this issue. The Committee recommends a radical increase in the amount of pecuniary penalties that can be imposed on corporate defendants without

⁸ The fine imposed reportedly equated to a fine of £230,000 per patient for the patients affected by the unlawful pricing.

addressing the possible enforcement-related uses to which these additional funds might well be put.

V INDIVIDUAL LIABILITY

The Dawson Review recommends that corporations be prohibited from directly or indirectly indemnifying officers, employees or agents against the imposition of a pecuniary penalty upon an officer, employee or agent.⁹

This recommendation is puzzling. It is far from clear that such a recommendation is necessary or appropriate given the current controls on indemnification under the *Corporations Act 2001* (Cth) (*'Corporations Act'*) and general law. Thus, there are restrictions under s 199A of the *Corporations Act* on the power to indemnify an employee. Section 199A(2) does not explicitly preclude an indemnity in relation to civil penalties for breaches of Part IV *TPA* where the employee was acting in 'good faith', as required under *Corporations Act* s 199A(2)(c). In some situations, an employee could breach Part IV of the *TPA* when acting in good faith, as in the case where he or she has acted in genuine reliance on legal advice, or on the basis of an honest mistake of fact. The Dawson Committee does not explain why the position should be any different in relation to the *TPA*.¹⁰

The Review's recommendation on prohibition of indemnification of fines, if taken to be necessary, is unduly limited in scope. If there is a need for a prohibition of indemnification, then presumably it should also apply to attempts to indemnify employees subjected to non-monetary sanctions such as gaol, probation or community service (eg, payments, additional leave, or HIH-style sponsored fine dining or other largesse, to alleviate the hardship of the non-monetary sanction).

A further recommendation in the Review is that a court be given the option to exclude an individual implicated in a contravention from being a director of a corporation or being involved in its management. While few would disagree that the power of disqualification should be an option, the recommendation does provoke a reality check: how important is this issue relative to other questions of individual liability and responsibility for breaches of Part IV that are not addressed by the Committee? It can safely be predicted that the power of disqualification will be exercised rarely. A far more central issue is the extent to which the ACCC currently seeks to impose individual liability in enforcement actions, or individual responsibility via s 87B *TPA* undertakings.

The Committee refers to the importance of individual liability but does not examine how or to what extent individual accountability is in fact currently being pursued by the ACCC. One issue is the extent to which individual persons are subjected to enforcement action in test cases where the ACCC has sought to take the law to its outer limits. The humane approach in such situations is to proceed

9 Dawson Review, above n 1, recommendation 10.2.3, 165.

10 The Commonwealth Government Response uncritically accepts the recommendation made in the Review.

against the corporate defendant alone and to spare the sentient from the ordeals and cost of defending themselves. Another issue is variability in the practice of pursuing individual accountability via internal disciplinary action as a condition of s 87B undertakings. This is a dark side of the ACCC moon and hence the place for regular probes by independent review bodies.

VI COMPLIANCE PROGRAMS

The Dawson Review embraces the value of compliance programs as an effective way of minimising breaches of the *TPA* and reducing the need for costly enforcement action by the ACCC. This is the resulting recommendation:

Businesses should seek to ensure that voluntary compliance programs are provided for their staff and the ACCC should review the assistance it is able to provide to business in this regard in consultation with interested parties through the reconstituted consultative committee recommended by the Committee.¹¹

This recommendation is very short on specifics. For instance, what exactly are exemplary models of compliance programs in Australian companies? It may be hypothesised that the more effective the projection of good and useful models of compliance programs, the more likely that best practice will be followed. Yet, the ACCC has made little attempt to date to project what these good and useful models are. Moreover, the Guide to AS3806 *Compliance Programs* (1998) largely repeats the content of the Standard without giving illuminating examples from best practice. Doing better is a major practical challenge that will, if it is to be met, take much more than the reconstitution of the consultative committee.

From a business perspective, the prospect of reliance on the ACCC for guidance on compliance programs will also be received with caution. ‘Compliance programs’ of value to business require attention to many issues including some (eg, managing the risk of creation of incrimination documents and emails; optimising reliance on legal professional privilege; managing the ACCC) that are not within the range of interest of the ACCC and may indeed be antithetical to what the ACCC perceives as being in that interest.

11 Dawson Review, above n 1, recommendation 1.5, 40.