

BENCH TEST

CARTEL OFFENCES

CHARGE 6

- Subject:** Direction on elements of the cartel offence under TPA s 44ZZRF
- Origin:** Direction to jury by Cartelepathy J in *R v Emerson* (2009)*
- Rating:** Section 6 of Charge 6 is Spontaneously Combustible (see also section 6 of Charge 5 as derived from the direction in *R v Samuel* (2009)*
- Advice:** Do not use section 6 of Charge 6 under any circumstances - compare Charges 1 and 2, which have a Low Fire Danger rating

CHARGE 6

[The accused is alleged to have arrived at an understanding containing a cartel provision.]

1. Introduction - elements of cartel offence under s 44ZZRF

Engaging in cartel conduct is a crime. In order to find the accused guilty of this crime, there are 3 *elements*, each of which the prosecution must prove beyond reasonable doubt. I will list them for you and then explain each one in detail.

The *first element* that the prosecution must prove in this case is that the accused arrived at an understanding containing a cartel provision.

The *second element* that the prosecution must prove is that the accused intended to arrive at that understanding.

The *third element* that the prosecution must prove is that the accused knew or believed that the understanding contained a cartel provision.

Before you can find the accused guilty you must be satisfied that all three of these elements have been proven beyond reasonable doubt.

I will now explain each of these elements in more detail.

2. Understanding

[See Charges 1 and 2, section 2]

3. Intention to arrive at the understanding

[See Charges 1 and 2, section 3]

4. Cartel provision

[See Charges 1 and 2, section 4]

5. Knowledge or belief that the cartel provision was contained in the understanding

[See Charges 1 and 2, section 5]

6. Gist of the cartel offence in ordinary language

I have indicated to you orally the elements that the prosecution must prove beyond reasonable doubt. The element of a cartel provision is complicated, as I have also indicated to you. However, it is important for you not to get bogged down in technicality.

Cartel conduct is a question of self-control. People have the choice between doing it or to stop themselves doing it. Accordingly, you should put yourselves in the shoes of the accused and ask whether or not you would have retained your self-control in the situation presented to the accused. If you would have retained your self-control then you should find the accused responsible for committing the offence alleged.

Practice Notes

1. Section 6 of Charge 6 was held to be a misdirection by the Full Court of the Federal Court in *R v Emerson* (2009).* The Court overturned the conviction of the accused and made these criticisms:

“This part of His Honour’s direction was highly prejudicial to the accused and a blatant misdirection.

First, the elements of the cartel offence must be applied to the facts in evidence. The offence is not defined in terms of an unreasonable failure to exercise self-control. In introducing a test of unreasonable lack of self-control into his direction, His Honour appears to have been influenced by the law of provocation in offences against the person. Doubtless, the adulterous drafting of s 44ZZRD was a contributing factor, especially given the ocular inspection that His Honour was obliged to make. However, fortunately or unfortunately, provocation is not the basis of the law as stated in s 44ZZRD of the Trade Practices Act.

Secondly, His Honour also appears to have been influenced by the reported statement of the Minister for Competition Policy and Consumer Affairs that the technicalities of s 44ZZRD do not matter because executives in any doubt about their conduct ‘should simply stop it’ (Australian Financial Review 26 August 2009, p 11). Attempted home-spun truths of that kind obscure rather than clarify what the law requires. They also attempt to substitute a moral dictate for legal definition. Moreover, the moral dictate issued by the Minister is itself open to question given the findings in the Kinsey Report and other empirical studies. With all due respect, his statement seems best regarded as a wank.

Thirdly, we doubt that any attempt to direct a jury on s 44ZZRD in terms of simple moral precepts will avoid misdirection. To the extent that ethical obligations are imposed in relation to not engaging in cartel conduct (eg, ‘it is your moral duty not to breach the cartel laws’; ‘do unto others as you would have them do unto you’; or ‘do the right thing and abstain from intercourse with a competitor before merger’), they are too high level to be useful, except perhaps as a form of extra-curial light relief.“

2. See also section 6 of Charge 5, as derived from *R v Samuel* (2009).* The conviction in *R v Samuel* was overturned by the Full Court of the Federal Court on the ground of prejudicial misstatement of the elements of the cartel offence under s 44ZZRF.
3. For useful commentaries[√] see: Wood J, “Jury Directions” (2007) 16 JJA 151; Eames J, “Tackling the Complexity of Criminal Trial Directions: What Role for Appellate Courts?” (2007) 29 ABR 161; Eames J, “Towards a Better Direction – Better Communication with Jurors” (2003) 24 ABR 35; Greenwood J, “Considerations to be Taken into Account in Framing a Cartel Offence” Paper presented at the Competition Law Conference, 24 May 2008, Sydney, www.fedcourt.gov.au/aboutct/judges_papers/speeches_greenwoodj4.rtf

* Hypothetical

[√] Real