

Costello working hard to avoid action on cartels

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The Treasurer has set up a cartel of his own to keep his cartel criminalisation bill secret, writes **Brent Fisse**.

The Amco-Visy price-fixing case highlights the failure of the federal government to introduce legislation making 'hard-core' cartel conduct a serious offence. It is now more than 4½ years since the Dawson committee recommended in principle that hard-core cartel conduct should be criminalised.

The government announced on October 3, 2003, that a working party on penalties would complete a review before the end of 2003. Its report and recommendations in 2004 have not been published, which is inconsistent with the government's Office of Best Practice Regulation policy statement on consultation.

The Treasury papers for the 2006 budget said the criminal cartel provisions were to be introduced to parliament in the 2006 winter sittings. However, they have never been introduced into parliament and the government has not published an exposure draft bill.

I made a freedom of information (FOI) application for the working party report in March 2007 and a review is under way in the Administrative Appeals Tribunal. To date, Treasury has granted access to 16 pages of the 68-page report. Ten weeks ago, Treasury threatened to stop access by means of the conclusive certificate blocking mechanism under the FOI Act. Treasury has yet to say whether it will in fact resort to that blocking mechanism.

The working party report deals with important and difficult issues on which public debate and comment should be encouraged. There are many important unresolved questions, including the definition of the cartel offence, immunity policy and procedure, and the powers of investigation that will apply.

One crucial question is the extent to which telephone taps and listening devices will be available for investigations. The Visy case, as well as experience in the US, Canada and the UK, shows the importance of being able to use electronic surveillance. Remarkably, it remains unclear exactly what use is to be made of electronic surveillance by the

Australian Competition and Consumer Commission or the Director of Public Prosecutions in cartel offence investigations. Treasurer Peter Costello's press release of February 2, 2005, does not discuss this important subject, but presumably the working party report did. The Treasurer appears to be ducking a sensitive issue.

The approach taken by Treasury so far in response to my FOI request, including the delay in deciding whether to issue a conclusive certificate, may be politically motivated. Another possible explanation is that the quality of the working party report is low and that Treasury did not have sufficient confidence in the report to make it public. This is suggested by the shallowness of the 16 pages of the report released to me so far.

The whole subject of cartel criminalisation should have been referred to the Australian Law Reform Commission, which has a strong track record of detailed reports based on consultation. In contrast, the working party consisted of faceless bureaucrats from Treasury, the ACCC, the Attorney-General's Department and the commonwealth

DPP. It is unknown whether or not the working party consulted any outsiders or, if they did, who they were.

When the cartel legislation eventually is made available for public comment, it needs to be reviewed closely in light of all preliminary official discussions of the issues. The Dawson committee report, submissions to that committee and the Treasurer's press release of February 2005 are the only official documents we have to go on. That press release is a 13-page effort that raises more questions than it answers.

"The Treasurer's inaction speaks much louder than his words."

Cartel criminalisation in Australia has been bungled by all the major players. The ACCC submissions to the Dawson committee were seriously flawed and got everyone off to a bad start. The Dawson committee never finished its job and served a number of unresolved major issues back to the government. The Treasurer set up the working party to consider those issues but never published the report.

The agencies represented on the working party (Treasury, the ACCC, the Attorney-General's Department and the Commonwealth DPP) all agreed to participate in the Treasurer's secret cartel.

The Treasurer has said on various occasions that he supports cartel criminalisation, but his inaction speaks much louder than his words. Now, Prime Minister John Howard, in the same breath as expressing his personal liking for Pratt the price-fixer, has cast doubt on whether the government is committed to the reform.

Sorting out this mess will be a challenge for whichever party wins the election (Labor has indicated that it intends to introduce criminalising legislation within 12 months if elected). As a starting point, the chance for effective public comment and debate should be created by releasing the working party report together with the draft of the legislation that the Treasurer claims to have had prepared.

■ *Brent Fisse is a Sydney-based competition lawyer. The ongoing FOI saga is documented at www.brentfisse.com.*