CRIMINALISATION OF CARTELS

Submission of the National Criminal Law Liaison Committee of the

Law Council of Australia

General comment

The analysis in the LCA NCLLC submission is brief (4 pages) and fails to address the main arguments of those who oppose the inclusion of dishonesty as an element of the cartel offences proposed for Australia. Additionally, the submission preceded the decision of the House of Lords in *Norris* on 12 March 2008. The effect of that decision is to make dishonesty unworkable as an element of a cartel offence.

THE DISHONESTY ELEMENT

1. The current draft cartel provision is as follows (s44ZZRF):

> "(1) A person commits an offence if:
> (a) the person makes a contract or arrangement or arrives at an understanding, with the intention of dishonestly obtaining a benefit; and
> (b) the contract arrangement or understanding contains a cartel provision."

There is a lengthy definition of "cartel provision" (s44ZZRD).

The penalty for individuals is a maximum 5 years, 2000 penalty units or both.

2. The analogies between the proposed cartel offence and offences in the general criminal law relating to conspiracy to defraud and obtaining property or financial advantage by deception is generally apparent. The drafting of the proposed cartel offence follows the *Criminal Code Act* 1995 quite closely. (See s.134.1 Obtaining Property by Deception; s.134.2 Obtaining Financial Advantage by Deception; s.135.4 Conspiracy to Defraud.)

For example, conspiracy to defraud is defined under the *Criminal Code Act* 1995 (Cth) in the following terms:

> "Obtaining a Gain
>
> (1) A person is guilty of an offence if:
> (a) the person conspires with another person with the intention of dishonestly obtaining a gain from a third person; and
> (b) the third person is a Commonwealth entity.
>
> Penalty: Imprisonment for ten years."

Further sub-sections deal with an intent to cause a loss intent to cause a risk of loss to a third person and dishonestly influencing a public official.

Comments

The question raised for consultation is not whether the drafting in the Exposure Draft Bill follows that of conspiracy to defraud and other offences defined in terms of dishonesty under existing Commonwealth criminal law. The question is whether or not new cartel offences *should* be treated in the same way as existing offences of dishonesty acquisition of property or dishonest breach of duty as a corporate officer. The LCA NCLLC submission asserts that the offences are "analogous" but this assertion is unsubstantiated and is misleading. A cartel offence is concerned most obviously with collusive interferences with the competitive market process, ie collusive market abuse. Comparable offences under Commonwealth criminal law that also deal with market abuse are market manipulation, market rigging and insider trading. None of those offences is defined in terms of dishonesty. Those offences are not concerned with the dishonest acquisition of property or the dishonest breach of a duty as a corporate officer – they are concerned with market abuse. The same is true of a cartel offence, which is

concerned with collusive market abuse. See further *Issues Paper*, Part 6.3.1, available on the Treasury website at:

http://www.treasury.gov.au/documents/1350/PDF/Dr_Caron_Beaton-Wells_and_Mr_Brent_Fisse.pdf.

3. A recent English extradition decision of the Queens Bench in *Norris v. United States* (presently on appeal to the House of Lords) found that market rigging amounted to conspiracy to defraud under the UK common law.

Comments

The decision of the House of Lords in the Norris case on 12 March 2008 indicates that dishonesty is unworkable as an element of a cartel offence.

The House of Lords overturned the extradition order for price fixing. It was held that the conduct alleged in the indictment would not amount to a conspiracy to defraud at common law. Conspiracy to defraud requires more than simply an agreement in secret to fix prices – there must be deception or misrepresentation in addition to any false impression created by a simple price fixing agreement.

Assume that A and B, two competitors, agree to fix the price of airline tickets. They do not lie to anyone that the prices have been set by them independently of each other. They get on instead with implementing their price fixing agreement. Overcharges totalling $50 million result before B gets the wind up and applies for immunity under the ACCC immunity policy and the Commonwealth DPP immunity policy.

Under the House of Lords decision in *Norris*, there is no conspiracy to defraud in this example of simple price fixing because there is merely a simple price fixing agreement and no additional element of deception. It is irrelevant whether or not the overcharges total $50 million or even $500 million.

Would such conduct amount to a cartel offence under the exposure draft amendments to the Trade Practices Act released by the Government for public consultation in January? Under the exposure draft legislation the Commonwealth DPP would need to prove that A (and B if B fails to get immunity) acted with an "intention dishonestly to obtain a benefit." The issue of dishonesty would be a question for the jury to decide.

If dishonesty were to be an element of the new cartel offences in Australia the reasoning of the House of Lords in *Norris* will pave the way for easy acquittals in simple yet serious price fixing cases like the classic example of price fixing given above. First, accused will be able to argue that simple price fixing does not amount to conspiracy to defraud and for that reason they did not know that their conduct was dishonest according to the standards of ordinary people. Secondly, they will often be able to point to some public benefit (eg avoiding loss of jobs). Thirdly, they will always have the possible defence that the price fixed was believed by them to be a "reasonable" price. Fourthly, they will exploit the view expressed by the House of Lords that there are problems with the notion that mere secrecy can of itself make a price fixing agreement criminal.

The House of Lords decision will thus jeopardise the chance of success in simple yet serious cases of price fixing in the UK. Accordingly, the element of dishonesty is unlikely to survive in the UK cartel offence much longer. No other cartel offence in the

world is defined in terms of dishonesty and the inability to enable conviction in simple yet serious cases of price fixing will be the kiss of death to the weird UK experiment.

4. The relevant English legislation (2001) prohibiting cartel conduct includes the element of dishonesty. The offence is to dishonestly make a cartel arrangement. It does not include the intent to make a gain/cause a loss.

Comments

The "international precedent" for making "dishonesty" an element of a cartel offence is limited to the United Kingdom. The LCA NCLLC submission does not comment on the fact that dishonesty is not an element of cartel offences in the US, Canada, Japan, Korea and many other jurisdictions. The UK experiment has yet to pass the test of experience and is doomed by the recent decision of the House of Lords in *Norris*. The decision of the House of Lords in *Norris* means that it will be difficult successfully to prosecute simple yet serious cases of price fixing – see comments on para 4. above.

5. The proposal to include the element of dishonesty in the proposed Australian cartel offence has been criticised in an article by Brent Fisse, "The cartel Offence: Dishonesty?" (2007) 35 ABLR 235. The arguments against the inclusion of dishonesty in the proposed cartel offence are very similar to the arguments against the inclusion of dishonesty generally in the theft, fraud offences under the UK *Theft Act* and discussed in subsequent decisions culminating in the *Ghosh* test of dishonesty which has been codified in the *Criminal Code Act* 1995 (Cth): see s.130.3. That definition is as follows:

"For the purposes of this Chapter, dishonest means:
(a) dishonest according to the standards of ordinary people; and

(b) known by the defendant to be dishonest according to the standards of ordinary people."

Comments

The Fisse ABLR article does not argue that dishonesty is inappropriate as an element of existing offences that relate to the dishonest acquisition of property or the dishonest breach of a duty as a corporate officer. It argues that dishonesty is problematic and unnecessary as an element of a cartel offence. Numerous concerns are set out, including a detailed examination of the problems that a requirement of dishonesty almost certainly would cause *in the particular context of price fixing and other forms of cartel conduct*. The LCA NCLLC submission does not address those concerns.

6. Attached is an extract from the Report of the Model Criminal Code Offices Committee on Theft/Fraud offences which deals with the arguments for and against the inclusion of the concept of the dishonesty element in these offences.

Comments

This observation relates to offences of dishonest acquisition of property or dishonesty breach of duty as a corporate officer. In terms of its most obvious basic aim, a cartel offence does not relate to the dishonest acquisition of property or the dishonest breach of breach as a corporate officer. The most obvious basic aim of a cartel offence is to deter collusive interference with the competitive market process – it is an offence of collusive market abuse. See further *Issues Paper*, Part 6.3.1.

7. The conclusion outlined in the MCCOC Report followed the extensive national consultation on a discussion paper which proposed the element of dishonesty for these offences. The overwhelming outcome of the consultation was for the inclusion of dishonesty. The Government accepted that recommendation and enacted it in the *Criminal Code Act* 1995.

Comments

This observation relates to offences of dishonest acquisition of property. By contrast, a cartel offence is most obviously concerned with collusive market abuse.

The relevant question is not the value of the MCCOC Report in the context of offences against property. The relevant question is whether or not a requirement of dishonesty is fit for purpose in the particular context of price fixing and other forms of serious cartel conduct. See further *Issues Paper*, Part 6.3.1.

7. The English Law Commission has recently reviewed the law on fraud and deception, including the standard arguments put for and against the *Ghosh Test*. In its final report in 2002, the Law Commission concluded as follows:

> "The fact that *Ghosh* dishonesty leaves open the possibility of variance between cases with essentially similar facts is, in our judgment, a theoretical risk. Many years after its adoption, the *Ghosh Test* remains, in practice, unproblematic. We also recognise the fact that the concept of dishonesty is now required in a very large number of criminal cases, so to reject it at this stage would have far reaching effects on the criminal justice system."

Comments

See the comment above re para 6. of the LCA NCLLC submission.

If a cartel offence is to treated as an offence relating to the dishonest acquisition of property or the dishonest breach of duty as a corporate officer then arguably it should be included in Part 7.2 of the *Criminal Code* (Cth) ("Theft and other property offences"), Part 7.3 of the *Criminal Code* (Cth) ("Fraudulent conduct", or Part 2D.1 of the *Corporations Act* ("Duties and Powers"). Putting the cartel offences in those locations would be strange and misguided because a cartel offence is not in substance an offence relating to the dishonest acquisition of property or the dishonest breach of duty as a corporate officer – it is an offence of collusive market abuse. See further *Issues Paper*, Part 6.3.1.

8. While the vast majority of fraud cases do not give rise to difficulty in relation to the element of dishonesty, there are some cases - like *Feeley* and *Ghosh* - which are genuinely hard cases. It seems inevitable that similarly difficult borderline cases will arise under the new cartel provisions, however drafted. The definition of a "cartel provision" runs for several pages and includes numerous exceptions. The quest for precision is nearly always over-optimistic. (The sale shares by directors of the *ABC Learning Centres' directors* in the context of insider trading *may* illustrate the problem. For the sake of the argument, assume press reports that the directors are guilty of insider trading. They sold shares under compulsion from their lenders who forced the sale under margin lending provisions. It could not be thought that insider trading was intended to catch this conduct. A dishonesty element would cater for this sort of situation.)

Comments

This observation by the LCA NCLLC is remarkable because it makes no attempt to address the potential problems raised by critics of a requirement of intention dishonestly to obtain a benefit. For example, it is inevitable that some accused will argue that a price fixed with a competitor believed to be was a reasonable price and hence that the conduct was not known to be dishonest according to the standards of ordinary persons. Such an argument is legally irrelevant under the present law and should never become relevant, as Justice Heerey indicated at a seminar at the University of Melbourne on 25 February 2008:

> *It is hard to argue with the proposition that a person is not dishonestly obtaining a gain if he or she thinks a price (albeit a fixed one) is reasonable and fair. Certainly one would expect defence counsel to put such a proposition to juries. What is a jury to take as reasonable or unreasonable or fair or unfair? Presumably the jury would have to be satisfied beyond reasonable doubt that the defendant did not actually believe that the prices were reasonable or fair and knew that "ordinary people" would not believe them to be reasonable or fair."*

The LCA NCLLC submission suggests that dishonesty should be made an element of the offence of insider trading in order to give defendants an escape route in a situation like that recently experienced by ABC Learning Centres. This line of argument is unpersuasive. First, given the notorious difficulty of proving liability for insider trading currently, adding a requirement of dishonesty would make the offences a dead letter. Secondly, the law of insider trading was extensively reconsidered in Corporations and Markets Advisory Committee, *Insider Trading Report* (2003) – no one suggested, and CAMAC did not discuss, the possibility of adding dishonesty as an element of the insider trading offence. Thirdly, it is no defence to insider trading that an insider has been forced to sell shares because of a margin call and it is difficult to understand why market access to material information should be denied because an accused has been forced to sell as a

result of a margin call. Fourthly, in any event, dishonesty would be an opaque and most uncertain solution.

9. In principle, there seems to be no objection to criminalising cartel conduct where people have sought to obtain gain/cause loss by cartel conduct. However, such a criminal offence must be consistent with the dishonesty offences in the *Commonwealth Criminal Code*. Obviously, the Commonwealth has drafted the proposed cartel offence to be consistent with these provisions.

Comments

The LCA NCCLC submission presumes that a cartel offence should be characterised as an offence relating to the acquisition of property but does not justify that presumption. Most fundamentally and most obviously, a cartel offence relates to collusive market abuse, not the dishonest acquisition of property. See further *Issues Paper*, Part 6.3.1.

The fact that the Commonwealth has drafted the proposed cartel offences to be consistent with all or some of the dishonesty offences under the Criminal Code does not answer the question of policy raised by the Government for consultation. The question of policy is whether or not that such an approach is workable and otherwise sound in the context of cartel conduct.

10. The proposed offence is to carry a five year gaol sentence. If it is to be a criminal offence, the prosecution ought to be required to prove the same elements as they would be required to prove for an offence of fraud generally, or in particular, conspiracy to

defraud. In most cases, this will be unproblematic. However, in the marginal case, juries should determine whether the conduct is dishonest.

Comments

The new cartel offences should not be treated as having the same elements as conspiracy to defraud. The decision of the House of Lords in *Norris* means that simple yet serious cases of price fixing would not amount to a conspiracy to defraud. Clearly such cases should be covered by the new cartel offences or any suitable equivalent offence.

The observation that "in the marginal case, juries should determine whether the conduct is dishonest" is curious. The issue of dishonesty in the new cartel offences is a question of fact for the jury in all cases, not only "marginal cases".

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Comments by Brent Fisse, 14 March 2008