

RECENT OFT CARTEL DECISIONS ILLUSTRATE FUNDAMENTAL FLAWS IN UK CARTEL LAW

Brent Fisse

The enforcement of the new cartel prohibitions, and in particular the choice between criminal and civil enforcement and the allocation of individual and corporate criminal and civil responsibility, has yet to be charted in Australia.

The Office of Fair Trading in the UK (OFT) has recently thumped its chest loudly about two cartel decisions in the construction industry. What guidance emerges from those decisions?

1. Cover pricing in the UK construction industry

OFT announced on 22 September 2009 (<http://www.offt.gov.uk/news/press/2009/114-09>) that it had imposed fines totalling £129.5 million on 103 English construction firms that had engaged in bid-rigging with competitors.

OFT found that the firms had engaged in unlawful bid-rigging activities on 199 tenders from 2000 to 2006, mostly in the form of 'cover pricing'.

The OFT press release gives this account:

Cover pricing is where one or more bidders in a tender process obtains an artificially high price from a competitor. Such cover bids are priced so as not to win the contract but are submitted as genuine bids, which gives a misleading impression to clients as to the real extent of competition. This distorts the tender process and makes it less likely that other potentially cheaper firms are invited to tender.

In 11 tendering rounds, the lowest bidder faced no genuine competition because all other bids were cover bids, leading to an even greater risk that the client may have unknowingly paid a higher price.

The OFT also found six instances where successful bidders had paid an agreed sum of money to the unsuccessful bidder (known as a 'compensation payment'). These payments of between £2,500 and £60,000 were facilitated by the raising of false invoices.

The infringements affected building projects across England worth in excess of £200 million including schools, universities hospitals, and numerous private projects from the construction of apartment blocks to housing refurbishments.

Eighty-six out of the 103 firms received reductions in their penalties because they admitted their involvement in cover pricing prior to today's decision.

The OFT has also informed nine companies originally listed in its Statement of

Objections that it will not pursue allegations of bid-rigging against them as it considers it has insufficient evidence to proceed to an infringement finding.

Related guidance issued today by the OFT in conjunction with the Office of Government Commerce cautions procurers against excluding the infringing firms from future tenders, as the practice of cover pricing was widespread in the construction industry and those that have already faced investigation can now be expected to be particularly aware of the competition rules.

Simon Williams, the OFT's Senior Director for this case, said:

'Our investigation has uncovered significant infringements of competition law on nearly 200 projects across England. Bidding processes designed to ensure clients and in many cases taxpayers receive the best possible choice and price were distorted, creating a real risk of increased prices. This decision sends a strong message that anti-competitive and illegal practices, including cover pricing, must cease. The OFT welcomes initiatives by the leadership of the construction industry to add weight to that message through a clear compliance code which we hope will help to embed more fully a culture of competition within the construction sector.'

Two fundamental issues arise:

- Why were no criminal prosecutions for the cartel offence launched in relation to the bid-rigging that occurred after the cartel offence under s 188 of the Enterprise Act 2002 (UK) came into effect on 20 June 2003? Is the explanation that the cartel offence is only relevant where there are few defendants and not where cartel conduct is industry-wide or prevalent? Any such explanation would be contemptible. One likely explanation is OFT was concerned that, given the prevalence of cover-pricing in the industry,¹ juries would have difficulty finding that the individuals involved had acted dishonestly (the UK cartel offence requires dishonesty under the *Ghosh* test, which requires that the accused knew that his or her conduct was dishonest according to the standards of ordinary people).² If so, that would amount to a concession by OFT that the element of dishonesty is ill-suited to the definition of a cartel offence, the focus of which should be

¹ Cover pricing has been well-known in British building industry for over 50 years: see GF Carter, "The Building Industry" in D Burn, *The Structure of British Industry: A Symposium, Volume 1* (1958, Cambridge University Press) ch 2 at p 62. Whatever efforts may have been made by OFT to educate business about the prohibitions against bid-rigging in the Competition Act and the Enterprise Act, they do not appear to have been effective in the construction industry.

² See further M O'Kane, *The Law of Criminal Cartels* (2009, Oxford University Press) 71 (but contrast 53 where it is suggested that there was sufficient evidence to establish dishonesty). The cartel offences under TPA ss 44ZZRF and 44ZZRG do not require dishonesty. For a critique of the original proposal to make dishonesty an element of the cartel offences in Australia, see B Fisse, "The Cartel Offence: Dishonesty?" (2007) 35 ABLR 235; C Beaton-Wells & B Fisse, "Criminalising Serious Cartel Conduct: Issues of Law and Policy" (2008) 36 ABLR 166, 171, 182-9.

on agreements by competitors not to compete against each other. Another possible explanation is that there was insufficient evidence of a cartel agreement, although that seems unlikely. The Press Release and other information published by OFT to date do not answer these and other questions about the decision not to prosecute. Indeed, they seem studiously to avoid them.

- All the parties fined were companies. There is no general provision for individual liability for breaches of the prohibitions against anti-competitive agreements in the Competition Act 1998 (UK) and disqualification orders under Company Directors Disqualification Act 1986 (UK) are limited in scope (eg they are limited to a person who is a director). The limited extent to which provision is made for individual civil liability for cartel conduct is very different to the position in Australia and is inconsistent with the general principle that individuals are individually responsible for their conduct³ In terms of policy and legislative design, the allocation of individual and corporate responsibility for cartel conduct should not depend on whether the enforcement proceedings are civil or criminal.

Cover pricing in the construction industry or any other industry in Australia today almost certainly would result in criminal prosecution of individuals and corporations and civil enforcement proceedings against individuals and corporations lucky enough to escape criminal prosecution.⁴ A plea of ignorance of the law is most unlikely to attract any sympathy from the ACCC or the CDPP or any court.

2. Price fixing by recruitment agencies in the UK construction industry

OFT announced on 30 September 2009 (<http://www.of.gov.uk/news/press/2009/119-09>) that it had imposed fines totalling £39.27 million on six recruitment agencies for price-fixing and the collective boycott of another company in the supply of candidates to the construction industry.

The OFT press release gives this account:

The OFT has concluded that A Warwick Associates, Beresford Blake Thomas, CDI AndersElite, Eden Brown, Fusion People, Hays Specialist Recruitment,

³ See further B Fisse & J Braithwaite, *Corporations, Crime and Accountability* (1993, Cambridge University Press).

⁴ Civil enforcement proceedings have succeeded in numerous cases of cover pricing; see eg *TPC v TNT Australia Pty Limited* [1995] ATPR 41-375; *ACCC v J McPhee & Son (Australia) Pty Ltd* [1998] ATPR (Digest) 46-183; *ACCC v ABB Power Transmission Pty Ltd* [2004] FCA 819; *ACCC v Admiral Mechanical Services Pty Ltd* [2007] FCA 1085; *ACCC v FFE Building Services Limited* [2003] FCA 1542; *ACCC v Tyco Australia Pty Ltd* [1999] FCA 1799. Civil proceedings have recently been commenced by the ACCC against three Queensland construction companies in relation to alleged cover pricing before the cartel offences came into effect:
<http://www.accc.gov.au/content/index.phtml/itemId/893715>

Henry Recruitment and Hill McGlynn & Associates all breached the Competition Act 1998. They were found to have engaged in the following anti-competitive conduct:

- Collective boycott - an agreement to withdraw from and/or refrain from entering into contracts with an intermediary company, Parc UK, for the supply of candidates to construction companies in the UK.
- Price-fixing - an agreement and/or concerted practice to fix target fee rates for the supply of candidates to intermediaries and certain construction companies in the UK.

The OFT has concluded that this conduct forms one single overall infringement of the Competition Act 1998, which had as its object the prevention, restriction or distortion of competition in the market for the supply by recruitment agencies of professional, managerial, trade and labour skills required by the construction industry in the UK.

In 2003, Parc entered the market with a new and innovative business model to act as an intermediary between construction companies and different recruitment agencies for the supply of candidates, which put pressure on the margins of recruitment agencies.

Instead of competing with Parc - and each other - on price and quality, the parties formed a cartel, referred to as 'the Construction Recruitment Forum', which met five times between 2004 and 2006. In this forum, they agreed to boycott Parc and also co-operated to fix the fee rates they would charge to intermediaries, such as Parc, and also certain construction companies.

Beresford Blake Thomas and Hill McGlynn & Associates have been granted immunity from fines as they are part of the corporate group which first provided the OFT with evidence of this cartel activity. All parties applied for and were granted leniency, apart from A Warwick Associates which is in liquidation. The total level of fines before reductions for leniency were taken into account was £173 million.

Heather Clayton, OFT Senior Director, said:

'This is a serious breach of competition law and the level of fines reflects this. Cartels such as these can impact on other businesses, in this case construction companies, by distorting competition and driving up staff costs. Ultimately it is the consumer and the wider economy that loses out from such behaviour.'

As in the cover pricing case (see above), two fundamental issues arise:

- Why were there no criminal prosecutions for the cartel offence? OFT states that it was a “serious breach of competition law” but seems to have backed away from criminal prosecution. The Construction Recruitment Forum appears to have been a blatant cartel. The meetings of that cartel occurred after extensive publicity about the introduction of the cartel offence in 2002-2003. Was there a concern about being unable to prove the element of dishonesty? Was there some evidentiary or other reason for not prosecuting the individuals who ran that Forum? Whatever the reason, no explanation is given in the information published by OFT.
- All the parties fined were companies. Under the perverse structure of UK cartel law, the individuals who participated in the Construction Recruitment Forum would be subject to individual liability only if they were prosecuted for committing the cartel offence or, if directors of the recruitment companies (which many of them may not have been), subjected to a disqualification order under the Company Directors Disqualification Act 1986 (UK).

Price fixing via an industry forum in Australia today almost certainly would result in criminal prosecution of the individuals and corporations concerned and civil enforcement proceedings against individuals and corporations lucky enough to escape criminal prosecution. The same is true of a collective boycott operated through an industry forum if the collective boycott contains a cartel provision (as defined in s 44ZZRD of the TPA). A cartel provision would be present if the purpose of the cartel arrangement or understanding is to restrict or limit the supply, or likely supply, of goods or services to persons or classes of persons (s 44ZZRD(3)(a)(iii)). That situation could easily arise where competitors A and B refuse to deal with an intermediary (eg an intermediary in the position of Parc UK in the OFT case) and thereby intend to foreclose the supply of services procured by that intermediary. Simpler types of collective boycott may involve an exclusionary provision but not a cartel provision, in which event the civil prohibition against exclusionary provisions under s 45(2) would apply but not the cartel offence under s 44ZZRF or s 44ZZRG.

3. Conclusion

UK cartel law is fundamentally flawed, partly because of the element of dishonesty required for criminal liability, partly because civil liability is skewed toward corporate liability, and partly because criminal liability applies only to individuals. The recent decisions by OFT discussed above illustrate these flaws.

The OFT decisions also highlight the dangers of loss of credibility and compromise of deterrent impact where an enforcement agency describes a cartel case as serious yet gives no explanation, or an unconvincing explanation, for not bringing criminal proceedings. The situation is comparable to the concern understandably voiced in Australia about the Steve Vizard matter in 2005, where Vizard escaped prosecution for insider trading in circumstances that seemed more serious than those regarded as sufficient to prosecute Rene Rivkin. It remains to be seen whether or not the management of public expectations

by the ACCC and the CDPP will be effective and avoid dud performances of the kind given by ASIC and the CDPP in the Vizard affair.

To conclude, the recent OFT decisions look suspiciously like case studies for lawmakers and enforcement agencies on how not to regulate cartel conduct.