

SPUN OUT

PETER COSTELLO'S PALACE REVOLUTIONS ON CARTEL CRIMINALISATION

Peter Costello was very good at some things as a politician but hopeless on cartel criminalisation.

His record was as follows.

January-April 2003

Having received the report of the Dawson Committee (which recommended in principle that serious cartel conduct be criminalised),¹ Costello did not release the report until 16 April 2003 together with the government's response.²

April-October 2003

Costello took his time over the appointment of a working party to examine the issues that the Dawson Committee referred back to the government for consideration by a working party. He announced the appointment of the working party on 3 October 2003.³ The working party report was prepared but never published. An FOI application in 2007 to obtain access to the working party report failed.⁴ The fact that a report of this kind was not made public indicates a lack of commitment by Costello to transparency. That lack of transparency about the report of the working party was maintained by the Rudd government.⁵ Eventually a copy of that report was obtained on 2 December 2010 upon application under the FOI Act after amendments to that Act came into effect (copy available at: <http://www.brentfisse.com/news.html>).

February 2005

On 2 February 2005 Costello issued a 13 page press release announcing that the government would introduce cartel offences.⁶ That release referred to the working party report but concealed the fact that the approach adopted by the Government had departed significantly from the recommendations of the working party.

¹ Trade Practices Committee of Review, *Review of the Competition Provisions of the Trade Practices Act*, January 2003, pp. 163-164, at <http://tpareview.treasury.gov.au/content/report/downloads/PDF/Chpt10.pdf>.

² Treasurer, 'Commonwealth Government response to the review of the competition provisions of the Trade Practices Act 1974', 2003, at <http://www.treasurer.gov.au/DisplayDocs.aspx?pageID=&doc=publications/TPAResponse.htm&min=phc>.

³ Treasurer, 'Working Party to Examine Criminal Sanctions for Cartel Behaviour', Press Release, 3 October 2003, at <http://www.treasurer.gov.au/tsr/content/pressreleases/2003/086.asp>.

⁴ *Fisse v Secretary, Department of the Treasury* (2008) 172 FCR 513. Further background and documents relevant to the freedom of information request are available at <http://www.brentfisse.com/news.html>.

⁵ Requests were made to Chris Bowen and John Faulkner to release the working party report but got nowhere.

⁶ Treasurer, 'Criminal Penalties for Serious Cartel Behaviour', Press Release No 4 of 2005, 2 February 2005, at www.treasurer.gov.au/tsr/content/pressreleases/2005/004.asp.

The working party report included three recommendations that were not mentioned or reflected in the press release:

- (1) notification of a contract, arrangement or understanding to the ACCC should be a defence in criminal proceedings for cartel conduct;
- (2) secrecy should be a requisite element of the cartel offence proposed; and
- (3) dishonesty should not be an element of the cartel offence proposed.

None of those recommendations was followed by the government in the approach set out in the press release of 2 February 2005. For example, the approach outlined in the press release made much of the point that dishonesty would be required as a key element of criminal liability for cartel conduct.

(A copy of the working party report, as released to B Fisse on 2 December 2010 pursuant to an FOI application made on 1 November 2010) is available at: <http://www.brentfisse.com/news.html>)

Instead of coming out into the open about the working party's recommendations, Costello's press release concealed the fact that the government had departed in major ways from those recommendations. The concealment survived until 2 December 2010 when a copy of the working party report was obtained under an FOI application.

February 2005 – December 2007

Noises were made by others from time to time about the introduction of a Bill⁷ but these turned out to be vapourware. Perhaps Costello was mesmerised by the definition of a cartel provision⁸ cooked up by his bureaucrats and suffered some kind of mental block. The main explanation is that he suffered an onset of cold feet from exposure to the increasingly icy wind of the forthcoming federal election, but he did say publicly on 9 October 2007 that the government wanted to make serious cartel conduct an offence.⁹ That statement was contradicted a day later when John Howard poured cold water on the proposal.¹⁰

⁷ See eg Australian Government, *Budget Paper No 2: Budget Measures 2006–07*, 2006, Pt 2: Expense Measures - Treasury, at <http://www.budget.gov.au/2006-07/bp2/html/index.htm>.

⁸ TPA s 44ZZRD, which runs almost to 4 pages.

⁹ See Asia Pulse, 9 October 2007.

¹⁰ The high profile enforcement action against Visy and Richard Pratt in the lead-up to the federal election caused the Prime Minister, John Howard, to retreat with indecent haste; see 'PM back-pedals on cartel penalties', *Australian Financial Review*, 10 October 2007, p. 1; C Bowen, 'Howard and Costello take conflicting positions on criminal penalties for cartel behaviour', Press Release, 9 October 2007, at <http://www.alp.org.au/media/1007/msat090.php>.

January 2008

On 11 January 2008 the new Labor government released an Exposure Draft Bill for the introduction of cartel offences.¹¹ This exposure draft represented where things had got up to under Costello's command. The Exposure Draft Bill was riddled with problems¹² and was far more complex and controversial than Costello's press release in February 2005 had foreshadowed.

March 2009

On 17 March 2009 Costello is reported to have claimed that he deliberately did not introduce anti-cartel legislation into Parliament and to have cautioned the Opposition to be wary about making cartel conduct an offence.¹³ Assuming that this statement is accurate, four or more years is a long time for anyone to chew the cud and indicates indecisiveness and/or failure to come to grips with the issues in a timely way.

Conclusion

The anti-cartel legislation that Australia has wound up with today is profoundly unsatisfactory because the design of that legislation was never thought through properly.¹⁴ One root cause is the failure of the Dawson Committee to do its job by not developing specific recommendations on the definition of a cartel offence.¹⁵ That problem was not resolved by the working party which, apart from rejecting the idea that dishonesty would be a suitable element, failed to come up with a satisfactory definition of a cartel offence. Another root cause is the lack of political leadership shown by Costello in this area from the time of receipt of the Dawson Committee Report by him in January 2003 until the change in government in December 2007.

15 March 2010, as updated on 25 April 2011

¹¹ Treasury, *Criminal Penalties for Serious Cartel Conduct – Draft Legislation*, Treasury Website, at <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1330>.

¹² See C Beaton-Wells and B Fisse, 'Criminalising Serious Cartel Conduct: Issues of Law and Policy', *Australian Business Law Review*, vol. 36, 2008, p. 166.

¹³ 'Costello puts his oar in on cartels law', *Australian Financial Review*, 17 March 2009, p. 9.

¹⁴ See C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (Cambridge University Press, 2011).

¹⁵ See B Fisse, 'The Dawson Review: Enforcement and Penalties', *University of New South Wales Law Journal*, vol. 26, 2003, p. 315.