

## ANTITRUST ALERT

### AUSTRALIA SET TO CRIMINALIZE CARTEL CONDUCT

#### NEW LAW INCLUDES PRISON TERMS FOR INDIVIDUALS AND SUBSTANTIAL CORPORATE FINES

On June 15, 2009, the Australian Parliament passed a bill that will bring Australia within the handful of countries worldwide that sanction price-fixing, bid-rigging and other cartel conduct with criminal charges.<sup>1</sup> The bill is expected to receive Royal Assent shortly and will go into effect 28 days thereafter. This is a dramatic, but not unexpected, change in Australian law that should, among other things, make it easier to extradite individuals who are charged with antitrust crimes between the United States and Australia. The change should cause any company that either has operations in Australia or does business in Australia to immediately review and perhaps revise its antitrust compliance program.

The Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2009 provides criminal penalties for cartel conduct and enhances the government's ability to detect cartels by giving cartel enforcers wiretap authority. Under the new law, Australia's Trade Practices Act 1974 is amended to provide for a maximum jail term of 10 years and a fine up to AU\$220,000 for individual cartel offenders. Corporations that participate in cartels are subject to a maximum fine equal to the greater of AU\$10 million or three times the benefit obtained as a result of the cartel participation or, in certain circumstances, 10 percent of the entire annual sales turnover of the corporation. The bill also contains civil enforcement provisions that mirror the criminal provisions. The government's investigatory powers are expanded in a portion of the bill that amends the Telecommunications (Interception and Access) Act 1979 to enable the use of telecommunication interception powers to investigate suspected cartel activity.

The bill criminalizes those contracts, arrangements or understandings between competitors that include a "cartel provision" to fix prices, restrict outputs, divide or share customers or markets, or rig bids. For a price-fixing offense, the cartel provision must have had the purpose, effect or likely effect of directly or indirectly fixing prices. For an output restriction, market/customer division or bid-rigging offense, the cartel provision must have had the purpose of directly or indirectly restricting outputs, sharing markets or rigging bids.

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<sup>1</sup> Other countries outside the United States that criminalize cartel conduct include Brazil, Canada, Ireland, Japan and the United Kingdom.

Joint ventures for the production and/or supply of goods and services are specifically exempted from the bill. The joint venture defense, however, is available only under certain circumstances. Companies involved in joint venture activity in Australia or affecting Australian markets must be especially careful to meet the requirements of the new law.

The new bill is intended to “send a clear message about cartel conduct” and “demonstrates the Government’s ongoing commitment to strengthen laws promoting competition,” according to Australia’s Minister for Competition Policy and Consumer Affairs Craig Emerson. The bill is another reminder that more and more countries are following, with the explicit encouragement of the U.S. Department of Justice, the example of the United States in providing jail terms and other criminal sanctions for cartel offenders. Indeed, Mr. Emerson noted that the law “brings Australia into line with penalties in the United States.” One of the consequences of the new law will be that antitrust crimes will have “dual criminality” in both the United States and Australia for purposes of the extradition treaty between the two countries, which should make it easier to extradite, from one jurisdiction to the other, individuals charged with antitrust crimes. Corporations and individuals conducting business in Australia are urged to update their policies and compliance programs accordingly.

Advisors at Akin Gump Strauss Hauer & Feld LLP have extensive experience fashioning corporate compliance programs and representing companies in government investigations of cartels and related criminal conduct.

## CONTACT INFORMATION

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