Opinion

Unfit for purpose criminal cartel laws need a radical rewrite

Warnings that new legislation introduced in 2009 would catch ordinary commercial behaviour fell on deaf ears, but have proved prescient.

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The recent experience of the failed prosecution of Country Care and then the collapse of the high-profile prosecution of ANZ, Citigroup, Deutsche Bank and some of their current and former executives, demonstrates a need to substantially reform Australia's criminal cartel laws.

In the Country Care case, after a 12-week trial the jury took less than three hours to bring back a unanimous "not guilty" verdict. In the prosecution of the banks and executives, the Commonwealth Director of Public Prosecutions abandoned the case entirely, more than three years after charges had been brought and six years after the relevant events occurred.

Commonwealth Director of Public Prosecutions Sarah McNaughton. Throughout 2021 there was a creeping reduction in charges in the banking cartel case. **David Rowe**

This result followed a creeping reduction throughout 2021 in the charges brought by the Commonwealth Director of Public Prosecutions. Initially, two-thirds of the charges were dropped. Then all charges against ANZ and one of its executives were dropped.

These are the only two contested prosecutions to date under these laws that have proceeded to the Federal Court.

While those failed prosecutions were the result of a variety of issues, they also revealed fundamental difficulties with the drafting of cartel laws themselves.

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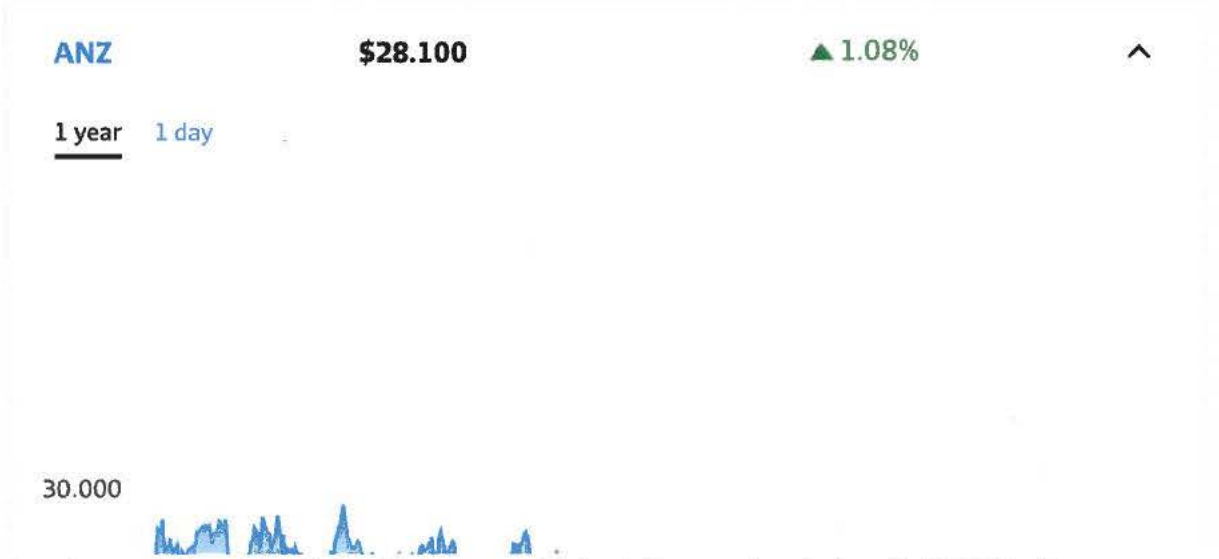


In 2003, the Dawson review recommended that Australia introduce criminal sanctions for serious or "hard-core" cartel conduct.

However, that review warned that many problems remained to be solved before criminal sanctions should be introduced, especially the need to find a satisfactory definition of the offence and to draw an appropriate distinction between hard-core cartel conduct worthy of criminal consequences, and less serious behaviour.

Taking these steps is necessary to prevent the enormous human cost imposed on those entangled in such prosecutions.

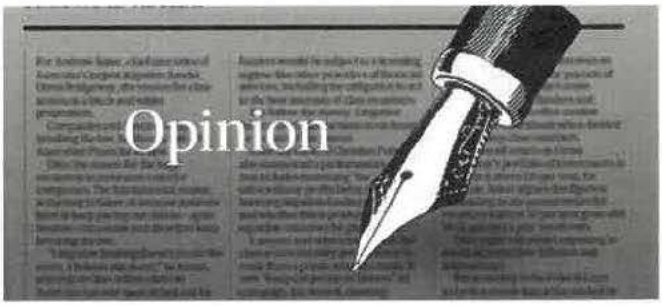
Unfortunately, that warning was largely ignored when the criminal cartel provisions were introduced in 2009.

Those provisions largely co-opted the existing civil provisions, with the additional threshold of establishing requisite fault.

At the time, submissions in response to the draft exposure legislation referred to the complexity of the drafting of the offence, and noted that, due to its lack of clarity, the new laws potentially caught ordinary commercial behaviour.

Those submissions fell on deaf ears, but have proved prescient.

The Harper reforms in 2017 made some improvements, particularly in terms of important clarifications to the joint venture defence to cartel conduct – but, unfortunately, did not substantively address the complexity of the provisions.



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In the banks cartel prosecution, the Commonwealth Director of Public Prosecutions struggled to formulate a satisfactory indictment. It took multiple attempts and two decisions from the court.

Justice Michael Wigney noted that the criminal cartel offence provisions are "devilishly complex and labyrinthine", adding that it was difficult to think of any offence more complex and difficult.

Wigney pointed out that by the time the maze of provisions is worked through, it is very easy to lose sight of exactly what conduct the offence provisions are intended to bring to account and punish.

Even more bluntly, he suggested that those responsible for drafting the cartel offence provisions could not have set foot in a criminal trial court before, and had approached the drafting task "as if it were akin to producing a cryptic crossword".

Bear in mind, this was well before any issue had come near a jury.

Wigney was right. The cartel provisions need radical redrafting.
They are not fit for purpose.

When criminal sanctions are appropriate

To be clear, this is not a call for the removal of criminal cartel laws. Consistent with the approach in other jurisdictions, there remains a strong policy argument that

criminal sanctions are appropriate for serious cartel conduct.

Nor is this a basis for the cartel laws to be amended so as to make it easier for the Australian Competition and Consumer Commission and the Commonwealth Department of Public Prosecutions to prosecute them.

To the contrary, the principal issues that need to be addressed are those that the Dawson review identified nearly 20 years ago – a clear, simple definition of the offence, and a satisfactory means of distinguishing what is truly "hard-core" cartel conduct.

This latter aspect cannot safely be left to the discretion of the ACCC and CDPP, as recent experience has clearly demonstrated. Under the terms of the current memorandum of understanding between the CDPP and ACCC, virtually all alleged cartel conduct could be said to be "serious".

It is to be hoped that whoever wins government later this year identifies reform of the criminal cartel laws as a matter to be addressed in the next Parliament.

In the meantime, the ACCC and CDPP should take into account the complexity of the current laws when deciding whether to commence new prosecutions and the scope of those actions.

Taking these steps is necessary to prevent the enormous human cost imposed on those entangled in such prosecutions, as well as the very significant financial implications for Australian taxpayers.

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