

# AUSTRALIAN BUSINESS LAW REVIEW

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## ARTICLES

### **The Cartel Offence: Dishonesty? – Brent Fisse**

The new cartel offence proposed by the Government would be defined partly in terms of the element of dishonesty. The intention is to limit the scope of the offence to serious cartel conduct. Relying on the concept of dishonesty in this context is problematic. The requirement of an “intention to dishonestly obtain a gain” is not a touchstone of serious harm or serious culpability. The “standards of ordinary people” limb of the element of dishonesty is an undefined and undefinable populist notion the practical application of which will create real difficulties for judges and juries as well as for people in business and their advisers. The requirement for dishonesty of “knowledge that the conduct was dishonest according to the standards of ordinary people” is a subjective test that will allow large and sophisticated corporations to deny liability and quite possibly obtain an acquittal on the basis of mistake of law or self-preferring subjectivised beliefs about the morality of their conduct. Dishonesty is an unnecessary element of the proposed cartel offence given that there are other possible ways of effectively limiting the scope of the offence so that it will apply only to serious cartel conduct. The Dawson Committee never recommended reliance on the concept of dishonesty. The subsequent report of the Working Party to the Government has never been published. No country other than the United Kingdom has made dishonesty an element of a cartel offence, for good reasons. .... 235

### **A more efficient use of efficiencies in merger authorisation determinations – Arlen Duke**

This article considers the varying treatment of merger-related efficiencies in overseas jurisdictions and in Australian and New Zealand merger authorisation and clearance determinates. This analysis leads to the conclusion that the inclusion of an efficiency defence in the legislative regime that regulates the competitive effects of mergers tends to cause decision-makers to adopt a less sophisticated approach when assessing the competitive effects of merger activity. It is therefore argued that the Australian Competition Tribunal, the body now responsible for determining authorisation applications, should be alert to the fact that the effects of merger-related efficiencies are relevant to both the assessment of public benefits and public detriments. By considering the competition and resource saving effects of merger-related efficiencies separately, the tribunal will be better placed to assess the merger’s effect on competition and perform a more meaningful trade-off between competition and efficiency as part of its analysis of merger authorisation applications. .... 278

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