

BENCH TEST

CARTEL OFFENCES

CHARGE 5

- Subject:** Direction on elements of the cartel offence under TPA s 44ZZRF
- Origin:** Direction to jury by Carteltale J in *R v Samuel* (2009)*
- Rating:** Section 6 of Charge 5 is Spontaneously Combustible (see also section 6 of Charge 6 as derived from the direction in *R v Emerson* (2009)*)
- Advice:** Do not use section 6 of Charge 5 under any circumstances - compare Charges 1 and 2, which have a Low Fire Danger rating

CHARGE 5

[The accused is alleged to have arrived at an understanding containing a cartel provision.]

1. Introduction - elements of cartel offence under s 44ZZRF

Engaging in cartel conduct is a crime. In order to find the accused guilty of this crime, there are *3 elements*, each of which the prosecution must prove beyond reasonable doubt. I will list them for you and then explain each one in detail.

The *first element* that the prosecution must prove in this case is that the accused arrived at an understanding containing a cartel provision.

The *second element* that the prosecution must prove is that the accused intended to arrive at that understanding.

The *third element* that the prosecution must prove is that the accused knew or believed that the understanding contained a cartel provision.

Before you can find the accused guilty you must be satisfied that all three of these elements have been proven beyond reasonable doubt.

I will now explain each of these elements in more detail.

2. Understanding

[See Charges 1 and 2, section 2]

3. Intention to arrive at the understanding

[See Charges 1 and 2, section 3]

4. Cartel provision

[See Charges 1 and 2, section 4]

5. Knowledge or belief that the cartel provision was contained in the understanding

[See Charges 1 and 2, section 5]

6. Gist of the cartel offence in ordinary language

I have indicated to you orally the elements that the prosecution must prove beyond reasonable doubt. The element of a cartel provision is complicated, as I have also indicated to you. However, it is important for you to focus on the right or wrong of the accused's conduct and not to get bogged down in technicality.

You will all be familiar with the offence of theft and that of obtaining by a false pretence. The cartel offence is like theft or obtaining by a false pretence. Like theft or obtaining by a false pretence, there is a callous, deliberate act of greed designed to line the pockets of the perpetrator. The main purpose and effect is to rip off consumers. Keep these basic points in mind.

Practice Notes

1. Section 6 of Charge 5 was held to be a misdirection by the Full Court of the Federal Court in *R v Samuel* (2009).^{*} The Court overturned the conviction of the accused and made these criticisms:

“This part of His Honour’s direction was highly prejudicial to the accused and a blatant misdirection.

First, the elements of the cartel offence must be applied to the facts in evidence. Directing a jury to focus on the right or wrong of the accused’s conduct and not to get bogged down by technicality is a fundamental misdirection, as is patent from *Alford v Magee* (1952) 85 CLR 437, 466 (Dixon, Williams, Webb, Fullagar and Kitto JJ) and a long line of case-law to similar effect (see eg *The Queen v Thompson* [2008] VSCA 144).

Secondly, the offence alleged against the accused was the cartel offence under s 44ZZRF; it was not theft, obtaining by a false pretence, extortion or any other offence. The role of a trial judge is to direct the jury on the elements of the offence alleged to have been committed, not some offence that may or may not be analogous to the offence allegedly committed.

Thirdly, the cartel offence is not analogous to theft or obtaining by a false pretence. There are numerous differences, including the following. The cartel offence, as defined under the *Trade Practices Act 1974* (Cth), is not an offence against property but an offence of unjustified restraint on competition. The cartel offence requires the making of a contract or arrangement or the

arriving at of an understanding. The cartel offence does not require dishonesty. The cartel offence is not subject to the defence of claim of right.

Fourthly, the test of liability for the cartel offence cannot be reduced to one of right or wrong. Liability depends on whether or not the elements of the cartel offence are proven beyond reasonable doubt. It does not depend on moral conceptions of right or wrong. His Honour's reference to right or wrong was a dangerous and highly prejudicial diversion from the legally required elements of the cartel offence alleged against the accused.

It important not to be led astray by the well-known views on this question that have been expressed by the Chairman of the Australian Competition and Consumer Commission (see 'Firms Behind on Cartel Legislation', *The New Lawyer*, 27 April 2009, p 1; 'Why not send cartel leaders to jail?', *The Age*, November 3, 2007). Populist attempts to explain the cartel offence or cartel conduct in terms of theft, fraud, extortion, or such other conceivable possibilities as 'racketeering', 'conorting with competitors', 'commercial incest', 'market pollution', 'demandcide', 'supplycide', 'industrial sabotage' or 'cancer', are fundamentally misguided. They have no place in our criminal justice system."

2. See also section 6 of Charge 6, as derived from *R v Emerson* (2009).* The conviction in *R v Emerson* was overturned by the Full Court of the Federal Court on the grounds of prejudicial hyperbole and tendentious moralising.
3. For useful commentaries[√] see: Wood J, "Jury Directions" (2007) 16 JJA 151; Eames J, "Tackling the Complexity of Criminal Trial Directions: What Role for Appellate Courts?" (2007) 29 ABR 161; Eames J, "Towards a Better Direction – Better Communication with Jurors" (2003) 24 ABR 35; Greenwood J, "Considerations to be Taken into Account in Framing a Cartel Offence" Paper presented at the Competition Law Conference, 24 May 2008, Sydney, www.fedcourt.gov.au/aboutct/judges_papers/speeches_greenwoodj4.rtf

* Hypothetical

[√] Real