

Chapter 1

Background

1.1 A cartel is an anti-competitive arrangement between two or more businesses.¹

1.2 Under the restrictive trade provisions of Part IV of the TPA (sections 45 to 51AAA), cartel behaviour is prohibited and subject to civil sanctions. Part IV of the TPA lists four prohibitions on behaviour considered to be anti-competitive in the context of a 'contract, arrangement or understanding' between competitors.² These are:

- *exclusionary provisions* or provisions which have the purpose or likely effect of substantially lessening competition (subsection 45(2)).³ These are arrangements between two or more persons in competition with one another where the arrangement has the purpose of restricting the supply of goods. The TPA prohibits some exclusionary dealing outright: in other instances, it is subject to a test as to whether it has substantially lessened competition in a market;
- *price fixing* (section 45A), where a contract, arrangement or understanding shall be deemed to have the purpose or likely effect of substantially lessening competition if the provision has the purpose or likely effect of fixing, controlling or maintaining prices;
- *'third line forcing'* (subsections 47(6) and (7)) involving the supply of goods or services on condition that the purchaser buys goods or services from a particular third party, or a refusal to supply because the purchaser will not agree to that condition; and
- *resale price maintenance* (section 48), which is an arrangement between a supplier and a reseller that means the reseller will not advertise, display or sell the goods the supplier supplies below a specified price.

1.3 Price fixing is a 'per se' offence—regardless of its effect on competition in the market, it is prohibited. Currently, however, there are only civil penalties. The TPA has authorisations for third line forcing (subsection 90(8)), resale price maintenance and exclusionary conduct (section 88) based on a test as to whether it has substantially lessened competition in a market. Section 76D of the Act establishes a defence in relation to the price fixing provisions in section 45A where it is established that the

1 Australian Competition and Consumer Commission, <http://www.accc.gov.au/content/index.phtml/itemId/694995>

2 An 'arrangement or understanding' is a form of either verbal or written agreement that falls short of a common law contract. It must involve 'a meeting of the minds' of the parties to it, and there must be a consensus as to what is to be done, rather than simply a hope that something will be done. Explanatory Memorandum, p. 49.

3 Section 4D of the TPA defines exclusionary dealing and the way it operates with section 45(2).

provision is for the purposes of a joint venture *and* that it 'does not have the purpose, and does not have and is not likely to have the effect, of substantially lessening competition'.

1.4 The Trade Practices Amendment (Cartel Conduct and Other Measures) Bill gets tougher on 'hard core' or 'serious' cartel conduct by applying criminal sanctions. The Organisation for Economic Cooperation and Development describes 'hard core' cartel conduct as:

An anticompetitive agreement, anticompetitive concerted practice, or an anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce.⁴

1.5 The bill provides that a corporation commits an indictable offence if it knowingly makes or gives effect to a cartel provision.⁵ The bill defines a criminal cartel provision as relating to conduct which is described as price fixing, restricting outputs in the production or supply chain, allocating customers, suppliers or territories or bid-rigging. Corporations found guilty of this offence will face a maximum penalty of \$10 million or three times the value of the benefit obtained as a result of committing the offence. Individuals found guilty of cartel conduct face a maximum gaol term of 10 years and a fine of \$220 000. These amendments give effect to the government's pre-election commitments (see paragraph 1.10).

The deterrence and detection of criminal sanctions

1.6 The twin purpose of the bill is to deter and detect criminal cartel conduct.⁶ The provision of criminal offences for cartel conduct will act in concert with the Australian Competition and Consumer Commission's (ACCC) Immunity Policy for Cartel Conduct and increase the likelihood that company executives will report their own behaviour. They themselves would gain immunity from prosecution while sending their co-conspirators to court.⁷

1.7 The bill will also deter cartel conduct. The ACCC noted in its submission that 'the incentive for individuals not to engage in cartel conduct is at its highest when the

4 OECD Council, 1998, Recommendation of the Council concerning effective action against hard core cartels, Adopted by the Council at its 921st session on 25 March 1998.

5 The prosecution will be required to prove that the corporation intended to make a contract, arrangement or understanding, and that the corporation knew or believed that the contract, arrangement or understanding contained a cartel provision.

6 The Hon. Chris Bowen, *Second Reading Speech*, 3 December 2008, p. 12310

7 Australian Competition and Consumer Commission, *Submission 12*, p. 3.

sanction for engaging in serious cartel conduct is a gaol penalty'.⁸ Justice Heerey has put the case for gaol terms more colourfully:

If price fixing is made a crime, conviction and punishment in itself will be sufficient to establish "deterrent and educative value". The fate of a businessman with a home in Hawthorn or Brighton, a flat at Mt Buller and children at Xavier or Carey, who is compelled to spend two or three years locked up with murderers, rapists and drug dealers, should have substantial deterrent and educative value for persons minded to commit like offences.⁹

1.8 The need for tougher penalties to deter serious cartel conduct was a key recommendation of the 2003 Dawson Review of the TPA. It concluded that, 'in the light of submissions made to it and growing overseas experience, criminal sanctions deter serious cartel behaviour and should be introduced for such conduct'. It added that these criminal sanctions should be applied to cartel behaviour generally, not just the activities of large corporations.¹⁰

1.9 In 2005, the Treasurer, the Hon. Peter Costello announced the government's intention to amend the TPA to introduce criminal penalties for serious cartel conduct. A bill was prepared, but never introduced.

1.10 On 9 October 2007, the Labor Party pledged as part of its election platform to introduce legislation providing criminal sanctions for cartel conduct within 12 months of being elected to office. In January 2008, the Minister for Competition Policy and Consumer Affairs, the Hon. Chris Bowen, released an Exposure Draft Bill for consultation and a discussion paper. Treasury received numerous submissions on the exposure draft.¹¹ There followed a further period of consultation between the government and trade practices and criminal law experts. A revised Exposure Draft Bill was released on 27 October 2008. The bill was introduced into the House of Representatives on 3 December 2008. It was referred by the Senate to the Senate Economics Committee on 4 December 2008 and is due for report by this committee on 26 February 2009.

Overseas legislation

1.11 Treasury explained to the committee that the bill has been 'influenced largely by the developments in the international forum, particularly the OECD'.¹² In 1998, the OECD recommended that member countries ensure that their competition laws

8 Australian Competition and Consumer Commission, *Submission 12*, p. 3.

9 'Comments on the seminar on criminalising cartel conduct, ABLR 36, No. 241, 2008, p. 249.

10 Review of the Trade Practices Act, 'Overview', <http://tpareview.treasury.gov.au/content/report/html/Summary.asp>

11 Treasury, Submission: Criminal penalties for serious cartel conduct—Draft legislation, 4 March 2008, <http://www.treasury.gov.au/contentitem.asp?ContentID=1350&NavID=037>

12 H. K. Holdaway, *Proof Committee Hansard*, 16 February 2009, p. 1.

provide effective sanctions and enforcement procedures and institutions to detect and remedy hard core cartels.¹³ Several countries now have laws providing terms of imprisonment for cartel conduct. These include Canada, France, Germany, Ireland, Israel, Japan, South Korea, Mexico, Norway, the Slovak Republic, the United Kingdom and the United States.¹⁴

The Visy/Amcor case

1.12 The most significant Australian price-fixing case was prosecuted in 2007 against the Visy Group of companies. Amcor approached the ACCC seeking immunity from prosecution in relation to an alleged price fixing cartel it had conducted with Visy in the sale of cardboard boxes between 2000 and 2004. In 2007, the Federal Court found that Visy had committed 69 contraventions of the TPA and fined the Visy group of companies \$36 million. However, there was no provision to apply criminal penalties for cartel conduct.¹⁵

1.13 The Visy case focussed attention on the need for criminal sanctions for cartel conduct to complement the existing pecuniary penalties. The Chairman of the ACCC, Mr Graeme Samuel, argued that while the Visy decision was proof that the ACCC's Immunity Policy works:

Australia must fall in line with other jurisdictions by imposing criminal sanctions that includes jail terms for executives who engage in cartel activities. Let me be clear - nothing concentrates the mind of an executive contemplating creating or participating in a cartel more than the prospect of a criminal conviction and a stretch in jail. When monetary penalties and damage to reputation are the only risks, some greedy executives will run the gauntlet. But a criminal conviction coupled with jail time for executives to meditate on their actions would in my mind provide the greatest deterrent. Our colleague regulators in jurisdictions with criminal sanctions have no doubt as to the impact of jail as a deterrent against cartel conduct. They give examples of executives caught out in cartels offering to pay a higher fine rather than go to jail. But they never have anyone offering to trade off more time in jail for a lower fine.¹⁶

13 Organisation for Economic Cooperation and Development, *Recommendation of the Council concerning effective action against hard core cartels*, May 1998.

14 Ms Simone Abbot, Treasury, *Proof Committee Hansard*, 16 February 2009, p. 2; Consumer Action Law Centre, *Submission 8*, p. 1.

15 See Paula Pyburne, *Bills Digest*, Parliamentary Library, p. 5.

16 Mr Graeme Samuel, Opening Statement, Visy News Conference, 2 November 2007, <http://www.accc.gov.au/content/item.phtml?itemId=802637&nodeId=6131d945203f7f1ac39efde321315e44&fn=Opening+statement+-+Visy+news+conference.pdf>

Conduct of this inquiry

1.14 The committee advertised the inquiry nationally and posted details about the inquiry on its website. In addition, it wrote to selected organisations and relevant statutory authorities advising them of the inquiry and inviting them to make submissions.

1.15 The committee received 12 submissions to the inquiry, 11 of which were made public. The public submissions are listed at Appendix 1, and are available at the Committee's website;

http://www.aph.gov.au/Senate/committee/economics_ctte/tpa_cartels_09/index.htm.

1.16 A public hearing was held in Canberra on 16 February 2009. The witnesses who appeared are listed in Appendix 2. The committee thanks all those who participated in the inquiry.

