

Chapter 2

Provisions of the bill

The criminal cartel provisions

2.1 The principal purpose of this bill is to establish a definition of and a basis for penalising criminal cartel activity.

Defining criminal cartel conduct

2.2 Subdivision A of the bill addresses the threshold issue of 'what is cartel conduct'. Proposed subsection 44ZZRA provides that criminal cartel provisions *only* relate to conduct that may be described as:

- price fixing;
- sharing or allocating a customer base;
- restricting supply; or
- rigging a tender process.

2.3 These activities are considered 'hard core' cartel conduct. They are based on the OECD's 1998 *Recommendation* (see paragraph 1.4). Any other anti-competitive conduct which is already regulated by the Trade Practices Act (TPA) is not intended to be caught by the new provisions.¹

Purpose and competition conditions

2.4 Proposed subsection 44ZZRD(1) sets out two criteria which must be satisfied if a 'contract, arrangement or understanding' is to be considered a 'cartel provision'. First, it must have the purpose, or has or is likely to have the effect, of directly or indirectly fixing, controlling or maintaining a price (44ZZRD(2)) or restricting output, market sharing or bid rigging (44ZZRD(3)). And second, at least two of the parties to the contract or agreement must be, or are likely to be, in competition with each other (44ZZRD(4)).

The 'physical' and 'fault' elements

2.5 A criminal offence under subsection 3.1 of the Criminal Code requires both physical and fault elements. To be found guilty of a criminal offence, it must be proved beyond reasonable doubt that the defendant committed the conduct (physical) *and* had knowledge or belief of this action (fault). A civil offence contains only a physical element (see paragraph 2.9).

1 Paula Pyburne, *Bills Digest*, Parliamentary Library, p. 14.

2.6 Subdivision B establishes two offences to be tried by juries. Proposed subsection 44ZZRF provides that a corporation commits a criminal offence if it knowingly makes a contract, understanding or arrangement that contains a cartel provision. Proposed subsection 44ZZRG provides that a corporation commits a criminal offence if it knowingly gives effect to a contract, understanding or arrangement that contains a cartel provision.

Criminal penalties

2.7 Proposed new subsections 6(5B) and 79(1)(e) establish a maximum prison term of ten years and/or a fine not exceeding \$220,000. The Assistant Treasurer noted:

...the government gave extensive consideration to the appropriate jail term. The maximum jail term in the draft exposure bill released in January was five years. However, a 10-year jail term better reflects the seriousness of the crime. A maximum 10-year prison sentence already exists for directors who wilfully defraud or deceive a body corporate, or for directors who fraudulently appropriate the property of a body corporate. The proposed 10-year jail term will also put Australia on par with the United States as having the world's longest jail terms for this serious crime.²

2.8 Although the bill establishes the option of imprisonment, the courts are not obliged to impose a custodial sentence and a sentence of less than 12 months may be converted into a fine. Proposed subsections 44ZZRF(3) and 44ZZRG(3) allow for a fine for criminal cartel offences not exceeding the greater of:

- \$10 million;
- three times the total value of benefits gained from the offence; or
- 10 per cent of the corporation's annual turnover during the 12 month period ending at the end of the month in which the corporation committed the offence.

The civil penalty provisions

2.9 As with the criminal penalty provisions, the bill's civil penalty provisions only relate to conduct which is described as price fixing, restricting outputs in the production or supply chain, allocating customers, suppliers or territories or bid-rigging. Any other anti-competitive conduct already regulated by the TPA is not intended to be caught by the new provisions.³ Proof of a civil offence under the proposed legislation will require the prosecution to prove that the conduct had the purpose or likely effect of fixing prices, restricting output, market sharing or bid rigging and that the parties were in competition with each other.

2.10 Subdivision C contains two parallel civil provisions. A civil offence will be found where a corporation 'makes' (44ZZRJ) or 'gives effect to' (44ZZRK) a contract, understanding or arrangement which contains a cartel provision. There is no

2 The Hon. Chris Bowen, 'Second Reading Speech', *House of Representatives Hansard*, 3 December 2008, p. 2.

3 Paula Pyburne, *Bills Digest*, Parliamentary Library, p. 16.

requirement to prove that the person had knowledge or belief that the contract, understanding or arrangement contained a cartel provision. The maximum penalty payable by a person other than a body corporate is \$500,000.⁴

Investigating civil and criminal offences

2.11 The ACCC will be responsible for investigating suspected breaches of the cartel offences. If it believes the conduct is a criminal offence, the matter will be passed to the Commonwealth Director of Public Prosecutions (CDPP). The CDPP must prove that the corporation knew or believed that the agreement contained a cartel provision.

2.12 It is proposed that a Memorandum of Understanding (MOU) will be signed between the ACCC and the CDPP to establish those factors to be considered by the ACCC in deciding whether to refer a matter to the CDPP for prosecution and by the CDPP in deciding whether to prosecute. The proposed factors are:

- (i) That the conduct was longstanding or had, or could have, a significant impact on the market in which the conduct occurred;
- (ii) The conduct caused, or could cause, significant detriment to the public, or a class thereof, or caused, or could cause, significant loss or damage to one or more customers of the alleged participants;
- (iii) One or more of the alleged participants has previously been found by a court to have participated in, or has admitted to participating in, cartel conduct either criminal or civil;
- (iv) The value of the affected commerce exceeded or would exceed \$1 million within a 12-month period (that is, where the combined value for all cartel participants of the specific line of commerce affected by the cartel would exceed \$1 million within a 12 month period); and
- (v) In the case of bid rigging, the value of the bid or series of bids exceeded \$1 million within a 12 month period.⁵

2.13 The MOU provides that the ACCC will manage the immunity process for criminal cartel conduct in consultation with the CDPP.

Telephone interception powers

2.14 Cartel conduct is very hard to identify and prove. A criminal offence requires proof that the defendant knew the cartel provision existed ('fault element'). The Consumer Action Law Centre noted in its submission that cartel participants conduct themselves in secret and there can be great difficulty gaining evidence in cartel

4 See Explanatory Memorandum, p. 38.

5 Australia Competition and Consumer Commission, *Submission 12*, p. 4.

conduct cases, meaning that telephone interception warrants are an important potential source of evidence.⁶

2.15 Proposed subsection 5D(5A) of the *Telecommunications (Interception and Access) Act 1979* (Cth) would deem a criminal cartel offence under the Act to be a 'serious offence' for the purposes of obtaining a telecommunications service warrant under that Act. This will enable the ACCC to seek to use intercepted material in relation to cartel investigations.

Exemptions and defences

2.16 Subdivision D—proposed sections 44ZZRL–44ZZRP—of the bill lists explicit circumstances in which the criminal offences and/or the civil offences are exempt from operation. The criminal and civil offences will not apply:

- where a corporation has given the ACCC a collective bargaining notice under subsection 93AB(1A) in relation to a contract, understanding or arrangement containing a cartel provision that satisfied the purpose/effect condition in proposed subsections 44ZZRD(2) and 44ZZRD(3);
- where a corporation has applied for authorisation from the ACCC within 14 days of making a contract, understanding or arrangement which contains a cartels provision and that provision will not come into force unless and until authorisation is given (44ZZRM);
- where the contract, arrangement or understanding is between related corporate bodies (44ZZRN); and
- where a contract containing a cartel provision is for the purposes of a joint venture and this venture is for the production and/or supply of goods and services and is carried on by a body corporate formed by the parties (44ZZRO(1) and 44ZZRP(1)). Item 21 of the Bill repeals section 45A of the TPA which prohibits price fixing in 'contracts, arrangements and understandings'. Item 29 of the Bill repeals section 76D relating to joint venture defences.

2.17 The last provision relates specifically to a contract, as opposed to an understanding or arrangement. Paragraph 4.32 of the Explanatory Memorandum states:

'Contract' has its ordinary meaning of an agreement binding or enforceable at law. It can apply to a range of agreements, both written and oral, provided they meet the common law criteria for a contract. In the context of the TP Act, the term refers to agreements that are distinct from those covered by 'arrangements' or 'understandings', which apply to agreements that may not give rise to legally enforceable rights.⁷

6 Consumer Action Law Centre, *Submission 8*, p. 3.

7 Explanatory Memorandum, p. 64.

Anti-overlap exceptions

2.18 Following a consultation process last year, the government decided to allay some stakeholders' concerns that certain innocuous commercial activity would be captured by the 'per se' prohibitions of the TPA and inserted a number of 'anti-overlap provisions'. The 'per se' prohibitions refer to activities so likely to be detrimental to economic welfare, and so unlikely to be beneficial, that they should be proscribed without further inquiry (see paragraph 1.3). The 'anti-overlap provisions' are exceptions to the TPA's 'per se' provisions.

2.19 While there are anti-overlap exceptions already within the Trade Practices Act, there was concern that the bill would over-ride them. Accordingly, proposed subsections 44ZZRQ–44ZZRV preserve these provisions. They relate to:

- covenants under section 45B;
- resale price maintenance under section 48;
- exclusive dealing under section 47;
- dual listed companies under section 49; and
- acquisition of shares in the capital of a body corporate or the assets of a person under section 50.

