Chapter 3

Submissions on the bill

3.1 The committee's inquiries highlighted three inter-related concerns with the bill. The first is that there are insufficient criteria distinguishing between criminal cartel activity and innocent or less anticompetitive conduct. The second and associated difficulty is that the bill's defences are seen by some as too narrow, in particular the threat of criminal action against legitimate joint venture activity. The third concern is the wide discretion given to the ACCC as to whether to pursue a civil penalty, initiate criminal proceedings or allow the behaviour to continue unchecked. Critics argue that the bill does not provide the necessary clarity as to which actions would attract criminal proceedings. This chapter examines each of these three criticisms.

What is (and is not) criminal cartel activity?

3.2 The first—and most fundamental—objection to the bill is that it does not distinguish criminal cartel conduct from civil offences. More precisely, it does not establish the point at which an activity goes beyond a civil cartel offence dealing with 'anti-competitive conduct' and becomes a criminal cartel offence deserving (if found guilty) of a gaol term.

3.3 Chapter 2 noted that the bill specifies that both civil and criminal cartel provisions relate to price fixing, sharing or allocating a customer base, restricting supply or rigging a tender process. This remit is consistent with the OECD's 1998 recommendation.

3.4 But these four areas of potential cartel conduct may attract either a civil or criminal penalty, depending on the circumstances of the case. The bill does not establish precisely what constitutes a criminal cartel offence as opposed to a civil offence. It does state that a criminal cartel offence must have both a 'physical' and 'fault' element, but the physical element of a criminal cartel provision is not explained. The prosecutor therefore has only broad guideposts as to whether to treat an activity as a criminal, as opposed to a civil, offence. Critics argue that the bill thereby creates uncertainty as to which matters would proceed to criminal prosecution and which would only be dealt a civil penalty. Moreover, they cite a risk that even ordinary commercial transactions would be captured under the bill's criminal offences.

3.5 In its opening statement to the committee, the ACCC foreshadowed these criticisms. The Chief Executive Officer, Mr Brian Cassidy, defended the approach taken in the bill:

> I am aware that in the comments the committee has received there has been some discussion of the definition of a cartel offence…with some seeking of a more simple way of defining what a criminal offence is and what a civil offence is. From the commission's point of view, we are simply not aware of a satisfactory way of doing that. Inevitably, whether a particular conduct should be treated as criminal or civil will depend on the particular circumstances of the conduct. If you take price fixing, for argument's sake, it certainly is regarded as being at the more serious end of cartel conduct. But even there, there is some price-fixing behaviour that should be subject to criminal proceedings. On the other hand there is other price-fixing conduct about which, because of its circumstances, or perhaps the lack of knowledge of those involved in what they were doing, or the minimal effect that the conduct has, you can make a fairly compelling argument that even though the category of conduct itself is fairly egregious in terms of those sorts of criteria, it really does not warrant being pursued as a criminal offence…We are not aware of a simple approach in this area of the law, as I suspect you could say in a number of other areas of the law—a simple approach to be able to ex ante define exactly what is criminal and what is civil.[1]

3.6 Treasury noted similarity between the US anti-cartel legislation and the proposed bill in that both have 'parallel civil and criminal prohibitions in one, where it is up to the regulators to determine which way the case will go forward'. Ms Holdaway noted that 'the US is probably the one [country] that has had the most experience in this area and probably the greatest amount of success as well'.[2]

Two doctors in a country town…

3.7 Several submitters underscored the lack of definition in the bill by giving examples of 'innocuous and insignificant' commercial activity that would be considered a criminal cartel offence.[3] The law firm Speed and Stracey gave six examples of conduct that they argued is commonplace but may be subject to prosecution under the bill. One of these examples, a key point of reference at the public hearing, concerned:

> Two doctors in a country town agreeing that they will restrict the services they provide—with one to work on Saturdays and the other on Sundays (rather than both being permanently on call).[4]

---

1 Mr Brian Cassidy, *Proof Committee Hansard*, 16 February 2009, p. 40.

2 H. K. Holdaway, *Proof Committee Hansard*, 16 February 2009, p. 3.

3 See Speed and Stracey, Submission 6, pp. 1–2; Mr Brent Fisse, *Submission 5*; Law Council of Australia, *Additional information*, Tabled 16 February 2009.

4 Speed and Stracey, *Submission 6*, p. 1.

3.8 Prima facie, the case seems a reasonable rostering arrangement where the intent is to allow each doctor a day off work. And yet, because its effect is to restrict supply, the arrangement would potentially be caught by the bill's criminal provisions. As Mr Peter Speed, partner at Speed and Stracey, noted:

> …taking the doctor example, if that matter went to the judges they would have no choice according to the law but to determine that the individual is guilty of a cartel or a criminal cartel. They would have some flexibility in terms of the sentencing, but the provision is quite prescriptive and they must follow what the legislature puts down. If it is limiting or restricting the supply of services, then you are guilty of the offence.[5]

Prices

3.9 The doctors example raises the question of what should be the distinguishing criteria in determining whether an activity is a criminal cartel offence under the bill. Some witnesses argued that evidence of criminal cartel activity should be based on the effect that the activity in question has on price.

3.10 For example, Mr Speed argued that:

> …ultimately, there is an indicator—and I think that is probably appropriate—of price being the matter that is relevant. Some of these provisions could, for instance, identify that the capacity constraint is there to influence price and the market allocation restraint is there to influence price. So, with the examples of the doctors…if they were colluding such that they would get Saturday off and Sunday on, such that they could charge higher prices, then there is obviously an issue in terms of cartel conduct. But if it is not related to price et cetera, and it is simply to get the day off, and the prices will not change and it has no purpose in relation to price, then it is hard to see why it is offensive or why it is being caught by these provisions.[6]

3.11 Associate Professor Zumbo of the School of Business and Taxation Law at the University of New South Wales also proposed a price fixing offence which has the purpose or effect or likely effect of 'fixing, raising, controlling, maintaining, stabilising or influencing' price.[7] He emphasised in his verbal evidence that identifying criminal cartel conduct must be focused on what happens to prices as a result of the activity:

---

5 Mr Peter Speed, *Proof Committee Hansard*, 16 February 2009, p. 18.

6 Mr Peter Speed, *Proof Committee Hansard*, 16 February 2009, p. 16.

7 Associate Professor Frank Zumbo, *Submission 11*, p. 6.

> I believe strongly that the distinguishing criteria is the concerted, organised behaviour to raise prices, because the economic literature is quite clear that these cartels are there to raise prices.[8]

3.12 Associate Professor Zumbo told the committee that in the case of the doctors:

> They might have discussions and say, 'We're going to take off Saturday and we'll raise our price,' then they see that the price has gone up and they say, 'Well, maybe we should take Friday off, and the price will go up on a Friday.' The problem with that example is that at the moment the legislation captures that conduct—full stop. They could be prosecuted as a criminal cartel…Even if the price stays the same on a Saturday and Sunday, they could be caught because there is an output restriction. That is my concern. I would have no problem with them simply reducing by one day a week without price changing. If, however, the price changed significantly and it looked like a front for trying to jack up the price, then I would be concerned.[9]

3.13 Treasury argued that limiting the criminal provisions to focus only on price would compromise the OECD Recommendation which found that hard core cartels should be prohibited outright, without the need to prove additional elements before the court (such as price).[10]

Dishonesty

3.14 The other potential mechanism to identify a criminal cartel offence is whether the activity was undertaken dishonestly. The United Kingdom legislates that an individual who 'dishonestly' agrees to cartel conduct such as price fixing, can face imprisonment for up to five years, and/or an unlimited fine.[11] However, the legislation has to date secured only one conviction. The widely cited reason is the need to prove that the person/s had the intention of *dishonestly* obtaining a gain from cartel activity. As Andreas Stephan from the University of East Anglia has observed:

> It was thought that incorporating the moral element of 'dishonesty' into the offence would harden public attitudes. However, this has not happened in the absence of regular convictions and may be problematic because dishonesty necessitates a contemporary moral judgement on the part of the

8 Associate Professor Frank Zumbo, *Proof Committee Hansard*, 16 February 2009, p. 29.

9 Associate Professor Frank Zumbo, *Proof Committee Hansard*, 16 February 2009, p. 30.

10 Treasury, *Answers to Questions on Notice*, 23 February, p. 4.

11 section 190, *Enterprise Act 2002*

> jury and therefore relies on attitudes being sufficiently hardened in the first place.[12]

3.15 Under the Sherman Act, the United States has had criminal sanctions for price-fixing since 1890. Unlike in the UK, however, there is no 'dishonesty' test. As the Court of Appeals noted in *United States v Aston* (1992):

> Under the Sherman Act, price fixing is illegal per se. If you find there was a conspiracy to fix co-payment fees, it does not matter why the fees were fixed or whether they were too high or too low; reasonable or unreasonable; fair or unfair. It is not a defence to price fixing that the defendants may have had good motives, or may have thought that what they were doing was legal, or that the conspiracy may have had some good results.[13]

3.16 A 'dishonesty' clause was included in the January 2008 Exposure Draft Bill but was subsequently deleted. Treasury told the committee that the feedback it has received on the dishonesty clause during last year's consultation process:

> …was that it would greatly increase the difficulty of bringing a successful prosecution, to the point where there was great concern that cartel conduct would not be captured by the provisions of the bill. It would be provided for in the legislation, but enforcement would effectively become virtually impossible.
>
> …
>
> In the absence of the dishonesty element, what was inserted was that it would not be necessary for the prosecution to prove that the corporation knew or believed that the contract contained the cartel provision. Without specifying that, the provisions of the Criminal Code, which applies to all Commonwealth laws, would make the necessary element mere recklessness, which was felt to be quite low. It is not enough, for a jail term of this magnitude, for parties to be simply reckless as to whether or not a cartel exists. What we are looking at is deliberate knowledge or belief on the part of the parties involved.[14]

3.17 Several submitters welcomed the omission of a 'dishonesty clause'.[15] The Consumer Action Law Centre argued that:

---

12 Andreas Stephan, 'The Cartel Offence: Lame Duck or Black Mamba?', *Centre for Competition Policy Working Paper 08-19*, November 2008, p. 32, http://ccpweb.mgt.uea.ac.uk/publicfiles/workingpapers/CCP08-19.pdf

13 *United States v Aston, 974 F.2d 1206 (1992) at 1210.*

14 Mr Scott Rogers, *Proof Committee Hansard*, 16 February 2009, p. 6.

15 See also the comments of Justice RV Giles AO, 'Comments on seminar on criminalising cartel conduct', *Australian Business Law Review*, 241, vol. 36, 2008, p. 241.

> We were of the view that the inclusion of the requirements to make out dishonesty would have had a severe hampering effect on the effectiveness of the legislation, particularly in view of…the high standard of proof that will still be required to make out an offence under these provisions. We are aware that the UK is one of the only other major jurisdictions that has a dishonesty requirement, and that law is notable for its lack of use. We were concerned that the inclusion of such a requirement would hamper the intent behind the legislation.[16]

3.18 Not all submitters were opposed to a 'dishonesty' test, however. As Mr Speed told the committee:

> A criminal offence is morally reprehensible and really requires a guilty mind. Therefore, if your purpose in doing it is simply to get the day off, and it is not offensive…then it should not be a criminal offence. If it has an effect such that it does substantially lessen competition, which is the typical test for when conduct that is slightly anticompetitive is too great, then that should be the test applied to that example.[17]

Joint venture exceptions

3.19 A second criticism of the bill relates to the proposed joint venture exceptions. There are two opposing strands of argument. The first is that the bill's joint venture defences are too narrow and may result in the criminalisation of legitimate joint venture activity. As chapter 2 noted, proposed subsections 44ZZRO and 44ZZRP relate only to a 'contract', not an 'arrangement' or 'understanding'; they also refer only to ventures which 'produce and/or supply goods and services' (see paragraph 2.16). The opposing view is that the defences are too broad and that, particularly through joint ventures formed through oral contracts, they risk sheltering cartelists.

Are the joint venture exceptions too narrow?

3.20 Several witnesses criticised the bill for subjecting joint ventures operating outside of contracts and in activities not relating to the production and/or supply of goods and services to the civil and criminal cartel offences.

3.21 The Shopping Centre Council offered pointed criticism of the bill for excluding joint ventures formed through 'arrangements' or 'understandings' from the cartel defence. Mr Milton Cockburn, Executive Director of the Centre, surmised that these exclusions were made to ensure that joint venture structures could not be used to camouflage cartel conduct. However:

> We believe this argument carries little weight. First, sections 44ZZRO(2) and 44ZZRP(2) provide that it is the joint venturers who bear the onus of

16 Ms Catriona Lowe, *Proof Committee Hansard*, 16 February 2009, pp. 46–47.

17 Mr Peter Speed, *Proof Committee Hansard*, 16 February 2009, p. 16.

> demonstrating that a joint venture actually exists. Second…the courts will quickly see through artificial attempts to use defences that are not appropriate because there is not a genuine joint venture. Third, it is our strong view that any attempt to cloak cartel conduct under the guise of a joint venture would be obviously transparent and would fail.[18]

3.22 Mr Speed, who appeared both independently and before the committee with representatives from the Shopping Centre Council, argued that the bill should exempt joint venture activities that are conducted through a committee, rather than a contract. He referred to a situation where:

> …you have an overriding joint venture which is contractual, you have a committee which is fully contemplated by that joint venture, completely innocuous and typically commercial, making a decision where it is agreeing about what the budget should be. Whether that agreement is a contract and whether it is legally enforceable between the two competitors—who are not in this circumstance competitors because it is their joint shopping centre and they are only determining the rentals or setting the budgets for rentals of particular shops within that shopping centre—when they are doing that process—that is, doing what is called the cartel provision—it is that process which is not contractual and it is that process which we are concerned about.[19]

3.23 Mr Timothy Walsh, legal adviser to the Shopping Centre Council, told the committee that the solution to this problem was very simple:

> …what we are proposing is to submit a very simple amendment to the joint venture defence which we think covers our issue neatly and deals with the issue properly, and that is merely to insert, in the appropriate places within the relevant joint venture defences, both for the offence provisions and the civil liability provisions, the words 'arrangement and understanding'. That deals with the issue.[20]

3.24 The Shopping Centre Council also argued that legitimate joint venture activity in its sector might be unfairly captured by the bill's narrow reference to the production and supply of goods and services in proposed subsections (44ZZRO(1) and 44ZZRP(1)). In its submission, it gave the example of two shopping centre owners jointly owning a centre in one city. The two also independently own other shopping centres in the same city such that they are in competition for the supply of retail space for lease. The Council noted that if the reference to 'those goods or services' in proposed section 44ZZRD(4) is interpreted in a broad sense, the owners may be

---

18 Mr Milton Cockburn, *Proof Committee Hansard*, 16 February 2009, p. 23. See also, Mr Timothy Walsh, *Proof Committee Hansard*, 16 February 2009, pp. 24–25.

19 Mr Peter Speed, *Proof Committee Hansard*, 16 February 2009, p. 24.

20 Mr Timothy Walsh, *Proof Committee Hansard*, 16 February 2009, p. 24.

captured by the cartel provisions because they are in competition with each other outside of their joint venture arrangements.

3.25 The Law Council of Australia also emphasised that there are legitimate joint ventures that conduct activities other than producing goods or supplying services as their sole or dominant function, and that the bill is 'likely to prejudice innovation in a range of sectors…including financial services, information technology and resource extraction'.[21] Mr Dave Poddar, a partner at Malleson Stephen Jaques, told the committee that:

> …the bill talks only about joint production; it does not talk about joint acquisition. So if you have two parties that are seeking to do a research and development joint venture, that arguably is not captured by the current drafting. For example, in my home state of South Australia if we had a joint venture—of which I have given you some examples—seeking to do a water desalination plant or other type of plant, and if you had parties who are competitors in other parts of the world, they would also be subject to these types of laws if it were initial development which would not involve a production jointly. With the way the current language is drafted these things would all be subject to criminal prosecution. We do not see any current sense in the way they are drafted.[22]

Accordingly, the Council recommended amending subsection 44ZZRO(1)(b) to read 'for the production and/or supply or acquisition of goods and services.[23]

3.26 The Law Council also argued that the bill's joint venture exceptions should include 'arrangements' and 'understandings'. Professor Bob Baxt, a partner at Freehills and a member of the Council's Trade Practices Committee, told the committee that the omission of 'understandings' and 'arrangements' in the bill's joint venture exceptions was particularly troubling in the Australian context. He explained:

> Unfortunately, we have in this country—and it is something that we pay the price for in the way in which litigation has to be pursued—very strong black letter law drafting. As a result… we have to be careful in our drafting, and we have to make sure that we do not create barriers to genuine commercial activity. To me, the way that some of these provisions have been drafted does not achieve that.[24]

3.27 These concerns were echoed by another member of the Law Council's Trade Practices Committee, Mr Bill Reid. He was cautious of the ACCC's assurances that

---

21 Law Council of Australia, Correspondence to Treasury dated 21 November 2008, p. 4.

22 Mr Dave Poddar, *Proof Committee Hansard,* 16 February 2009, p. 49.

23 Law Council of Australia, Correspondence to Treasury dated 21 November 2008, p. 5.

24 Professor Bob Baxt, *Proof Committee Hansard*, 16 February 2009, p. 48.

joint venture activities falling outside the bill's exceptions would only be scrutinised if there was a deliberate attempt to manipulate the market. He told the committee:

> …the written law is the written law; it is set out with great specificity already. If a client finds itself in a position where, on the face of the written law, it has contravened it and exposed itself to its executives spending many years in jail, with enormous financial penalties as currently provided for in the provisions, that is not an adequate way forward, in my respectful opinion, to frame the law of this country.[25]

3.28 Ergon Energy also expressed concern with the bill's joint venture exceptions. It noted that these provisions might not only penalise existing joint venture activity but could also lead to increased transactional and administrative costs for entities which procure goods and services from various joint venture style arrangements and strategic alliances. Ergon Energy suggests that the existing exemption for joint ventures could be retained in section 76C with amendments to ensure it applies to cartel provisions.[26]

3.29 Mr Brent Fisse from the Trade Practices Committee of the Law Council of Australia has suggested the following five amendments to the proposed bill to clarify the legitimate joint venture activity would be exempt from the new cartel provisions.

- inserting a competition test in proposed subsection 44ZZRP based on the current section 76C. The test would be applied to civil cases under Part IV of the TPA where there is no trial by jury;
- to provide that a provision is "for the purposes of a joint venture" (subsection 44ZZRO and 44ZZRP) if the "dominant purpose" is to further a "pro-competitive activity of a joint venture";
- extending the wording in proposed subsections 44ZZRO and 44ZZRP to cover cartel provisions in understandings and arrangement, as well as contracts;
- extending the wording in proposed subsections 44ZZRO and 44ZZRP to read 'for the production, supply and/or acquisition of goods and services'; and
- inserting a competition test into subsections 44ZZRJ and 44ZZRK parallel to that in section 76C.[27]

Treasury and the ACCC's response on the joint venture exceptions

3.30 Treasury was asked its view of these concerns that the bill would threaten to prosecute legitimate joint venture activity. It noted that the exceptions proposed in the bill sought a balance between those who believed the joint venture defences are too

25 Mr Bill Reid, *Proof Committee Hansard*, 16 February 2009, p. 50.

26 Ergon Energy, *Submission 4*, p. 2.

27 Mr Brent Fisse, *Submission 5*, p. 6.

narrow and those who feared they are too broad, potentially offering a haven for cartelists (see paragraph 3.19).[28] Moreover, Treasury emphasised that:

> The joint venture exception—and, I guess, in relation to any number of other exceptions that are in the cartels offence or pre-existing in the TPA or criminal offences generally—are in the nature of exceptions and people will have to make a determination as to whether they need to get legal advice, or perhaps talk to the regulator or seek guidance that is put out by the regulator as to whether an activity is going to fall within the exception. It is difficult to say on particular factual cases as to whether you will or not but the ultimate recourse people have is to get authorisation.[29]

3.31 The ACCC noted in its submission that the majority of cartels prosecuted by the ACCC involve arrangements or understandings rather than legally enforceable contracts. The bill thereby excludes from exemption those joint venture activities most likely to involve cartel conduct.[30] Mr Cassidy developed this rationale at the public hearing:

> From our point of view, we see the focus on contracts as we move into a criminal regime as being desirable. The reason for that is that we are aware, from overseas experience, that there have been instances where cartels have been dressed up as joint ventures in an effort to evade the law. We are particularly aware that this has happened in the Canadian case. Their law in this area is fairly similar to ours. It seemed to us that any genuine joint venture is likely to rest on some sort of contractual arrangement, be it written or oral. Once you start getting into somewhat looser things—a joint venture based on an arrangement or an understanding—you are starting to get into territory where creative people can use a joint venture to try and dress up and protect what is otherwise a cartel.[31]

3.32 Mr Scott Gregson, General Manager at the ACCC, sought to allay concerns that the ACCC would be stepping in to prosecute joint ventures without regard to the circumstances of the case in question. He referred to Speed and Stracey's example of a joint venture between two competing coal miners establishing management committees comprising representatives of each competitor to agree on the operational aspects of the joint venture.[32] In this case, he argued:

> …the first thing we would note is that joint venture arrangements, particularly those that will set out the terms and conditions on which coal is dug out of the ground and ultimately sold, would ordinarily be the subject

---

28 Mr Scott Rogers, *Proof Committee Hansard*, 16 February 2009, p. 4.

29 Mr Scott Rogers, *Proof Committee Hansard*, 16 February 2009, p. 7.

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

31 Mr Brian Cassidy, *Proof Committee Hansard*, 16 February 2009, p. 42.

32 Speed and Stracey Lawyers, *Submission 6*, p. 2.

> of a contract that in many cases would be in writing and, if not, certainly one that would be enforceable being oral and, hence, why we have some comfort in the reference to contracts delivering the protection required for joint ventures.[33]

3.33 The ACCC also responded to the Shopping Centre Council's concern that routine non-contractual arrangements between joint venture partners would not benefit from a joint venture exemption. Mr Cassidy told the committee:

> …without wishing to get into a debate about shopping centres and the like, is that I wonder about the extent to which the sort of conduct envisaged would fall under the bill anyway. In a sense, if it were conduct being undertaken under the head contract where the head contract was in turn subject to the joint venture exemption, I do not think it would fall within the scope of the bill anyway.[34]

3.34 The Shopping Centre Council in a supplementary submission suggested the following amendment to ensure that looser arrangements that may extend from a joint venture contract be exempted from the cartel provisions.

> Sections 44ZZRF and 44ZZRG do not apply in relation to a written contract containing a cartel provision or in relation to an arrangement or understanding which is contemplated by a contract and which contains a cartel provision if…[35]

3.34 However the ACCC indicated that if an arrangement or understanding (such as an agreement of a committee) was undertaken under the broader terms of a contract and that contract was subject to a joint venture exception, the conduct would also attract an exception.

3.35 Treasury noted in a supplementary response to matters raised at the hearing that:

> …if a clause(s) in a contract between (for example) shopping centre owners provides that they will decide at a later date the rent within their shopping centre, and then later act on their agreement to set the rent, the question that would arise is whether or not the parties were making or giving effect to a provision contained in your contract. If the original contract contains provisions providing for the decision as to rent, the joint venture exception

33 Mr Scott Gregson, *Proof Committee Hansard*, 16 February 2009, p. 43.

34 Mr Brian Cassidy, *Proof Committee Hansard*, 16 February 2009, p. 42.

35 Shopping Centre Council of Australia, *Submission 1a*, p. 2.

> protects both the agreement that was made, and the process of implementing that agreement (that is, giving effect to the contract).[36]

Are the joint venture exceptions too broad?

3.36 Others argued that the bill would enable cartels to hide behind joint venture structures. The DomGas Alliance, for example, argued that the bill would 'significantly weaken the existing civil penalty provisions against price fixing and will encourage anti-competitive cartel conduct'. It expressed concern that the bill abolishes the competition test that currently applies under section 76D and forgoes the need for producers to seek authorisation of their price fixing arrangement by the ACCC. It argued that the competition test for the joint venture defence should be retained in civil penalty cases.[37]

3.37 In the course of the committee's deliberations, Treasury was asked whether abolishing section 76D would allow greater scope for cartels to be protected through joint venture status. It responded that it was not possible for companies to establish a sham joint venture simply to get out of a cartel provision. The bill's defence applies only to cartel activity, not to the other anti-competitive provisions of the TPA. Even those joint ventures that meet the bill's defences must still comply with other provisions of the TPA. Those joint ventures that do not meet the bill's defences can seek protection through the ACCC's authorisation process.[38]

The ACCC's discretion

3.38 The underlying area of concern with the bill is the level of discretion that is conferred to the ACCC. This reflects the lack of a distinguishing criterion in the bill as to which activities would and would not be referred by the ACCC to the Director of Public Prosecutions as a criminal matter.[39] It also reflects concern that the bill's joint venture defences would shift a heavy burden onto the ACCC to conduct an authorisation process for all joint ventures not formed through a contract and not engaged in activities relating to the production and supply of goods and services.

3.39 As the bill is currently drafted, any businesses that enter into a contract, arrangement or understanding that restricts supply—even if the activity is innocent and regardless of its impact on price—will be subject to the criminal cartel offences. However, the ACCC claims that it will continue to use its judgment as to whether to refer matters to the DPP. Further, it is then up to the DPP whether it takes the matter

---

36 Treasury, *Answers to Questions on Notice*, 23 February, p. 4.

37 DomGas Alliance, *Submission 3*, p. 3.

38 Mr Scott Rogers, *Proof Committee Hansard*, 16 February 2009, p. 4.

39 Associate Professor Frank Zumbo, *Proof Committee Hansard*, 16 February 2009, p. 28.

to court. As Mr Brian Cassidy, Chief Executive Officer of the ACCC, told the committee:

> In terms of a doctor with a rostering arrangement—and I might say, historically, we have been very favourably inclined to rostering arrangements particularly as far as doctors are concerned, and we have guidelines to that effect—…even if we decided to pursue that criminally, and I would have to say to you that I think that there is very little prospect that we would, then quite separately the Director of Public Prosecutions, using those criteria which are specified in the Commonwealth's prosecution policy, has to reach his own separate decision that there is something there that is worth pursuing criminally.[40]

3.40 Mr Gregson added his own assurances:

> …the ACCC is unlikely to be rushing off to court either civilly or criminally without identifying exactly what the issues are and whether indeed there is detriment there to the Australian community. So it should not be assumed that the ACCC will simply launch into court proceedings if there are some of those unintended consequences. I might also emphasise what Mr Cassidy has said here, which is that in the majority of these arrangements, and it is a little different in the joint ventures, the goalposts are not significantly changing and, in many cases, what is prohibited under the new provisions will be prohibited currently. So, with the queries we have had in relation to doctors and in relation to franchising, there should not be a mad rush to the authorisation table in that, if there are concerns, they should be present now. The thought that, again, these would somehow be elevated into a criminal sanction is perhaps not the case.[41]

3.41 This noted, there is concern that there could be no guarantee for the doctors in the case mentioned above that the ACCC would not pursue the matter criminally. As Mr Speed told the committee:

> I think having faith in them [the ACCC], or the DPP, to the extent that the laws are not sufficiently prescriptive is an error. It is an error (a) in having faith in them and (b) in putting laws out there that have sufficient clarity such that I know when a doctor comes in to see me and says, 'Can we do this or can we not?' I can say more than, 'I hope you can because I hope the ACCC will go that way or I hope the DPP will go that way.'[42]

3.42 Speed and Stracey elaborated on these concerns in their submission:

---

40 Mr Brian Cassidy, *Proof Committee Hansard*, 16 February 2009, p. 40.

41 Mr Scott Gregson, *Proof Committee Hansard*, 16 February 2009, p. 43.

42 Mr Peter Speed, *Proof Committee Hansard*, 16 February 2009, p. 18.

> In the future, with a change in personnel or attitude, perhaps as a result of pressures to get "good press", to get "good results", to generate "wins" and to cut costs, it is inevitable that the ACCC's ability to justly and fairly make decisions—as to what conduct is offensive, what conduct justifies a civil penalty and what conduct deserves a criminal sanction—will be compromised. Rather than putting the ACCC in this impossible position of being the investigator, prosecutor and judge the Parliament should itself decide, and concisely prescribe, which conduct, of that which technically infringes the current proposed provisions, does not warrant prosecution, which conduct is more serious and warrants the imposition of civil penalties and which conduct is very serious and warrants criminal prosecution.[43]

3.43 In the absence of a defence written into the legislation or tighter drafting of the legislation, the only certainty the doctors could secure against prosecution is through an ACCC authorisation. As Treasury noted:

> Depending on the nature of the agreement—the doctor is probably a good example—people can seek authorisation. That is a separate exception under the law and that is carried over into the cartel. So in relation to what those doctors are doing at the moment they can continue to get certainty by continuing to do that same activity in relation to seeking an authorisation from the ACCC.[44]

3.44 Mr Cassidy assured the committee that:

> …if parties to a rostering arrangement were feeling uneasy, our authorisation process can be quite quick, and, once we get the application, we can decide to grant interim authorisation which gives every protection while the authorisation process is being gone through.[45]

Joint venture authorisations

3.45 In terms of a joint venture defence, the ACCC emphasised that the bill provides persons with the capacity to seek authorisation from the ACCC if they wish to engage in coordinated activity without legally binding agreements and in circumstances not involving joint production or supply.[46] This drew a sharp rebuke from the Shopping Centre Council:

> …that joint venturers can seek authorisation for coordinated activity not specifically contained in a contract, is impractical and, quite frankly, absurd. Is it seriously suggested that every joint venture in Australia now

---

43 Speed and Stracey, *Submission 6*, p. 4.

44 Mr Scott Rogers, *Proof Committee Hansard*, 16 February 2009, p. 6.

45 Mr Brian Cassidy, *Proof Committee Hansard*, 16 February 2009, p. 41.

46 Australian Competition and Consumer Commission, *Submission 12*, p. 7. Proposed subsection 44ZZRM

> having to lodge an authorisation to the ACCC—and, by the way, having to lodge continuous applications for authorisations—is a sensible and practical solution to this problem?[47]

3.46 Mr Speed also questioned the process:

> It seems that we are not asking for a provision that is particularly going to protect us or solve the problem of a sham or ultralight joint venture. It seems strange that we do not get the benefit of the defence upfront. Instead everybody in this country that has a joint venture has to keep writing to the ACCC for authorisations.[48]

3.47 Mr Dave Poddar, a partner at Mallesons, told the committee:

> …the commission does a very good job in its authorisation notification procedures, but we do not believe it is appropriate to have a law which requires everyone to go to a regulator. It is a retrograde step to receive a tick for this conduct. What should in fact occur is that the conduct, if it is procompetitive, efficiency enhancing and to the benefit of Australians, should not be subject to this legislation.[49]

ACCC guidelines

3.48 The Motor Trades Association of Australia expressed general support for the bill, but urged the committee to recommend that the ACCC issue guidelines on the administration of the new provisions. It argued that these guidelines would assist all businesses to understand how the Commission is to determine whether to pursue civil or criminal proceedings.[50]

> The other point I will make is that the commission needs to issue the guidelines. We often find, as a trade association, that our interpretation may not end up being the statutory or official interpretation, so the guidelines are needed as a starting point from which we can draw down and prepare our educative materials... We do not think the job is finished until the commission prepares guidelines following passage and royal assent.[51]

3.49 Mr Cassidy made the following comment indicating the ACCC do plan on releasing guidelines:

---

47 Mr Milton Cockburn, *Proof Committee Hansard*, 16 February 2009, p. 23.

48 Mr Peter Speed, *Proof Committee Hansard,* 16 February 2009, p. 27.

49 Mr Dave Poddar, *Proof Committee Hansard,* 16 February 2009, p. 53. See also Mr Peter Speed, *Proof Committee Hansard,* 16 February 2009, p. 20. Associate Professor Frank Zumbo, *Proof Committee Hansard*, 16 February 2009, p. 35.

50 Motor Trades Association of Australia, *Submission 7,* p. 2.

51 Mr Michael Delaney, *Proof Committee Hansard*, 16 February 2009, pp. 11–12.

> The other thing I would say is that we have a whole range of guidelines in the public arena and I can well envisage that we will be putting out guidance on our approach to the criminal bill, assuming it is passed by parliament. In doing that, we will seek to provide as much guidance as we can.[52]

This issue is revisited in chapter 4.

The proposed Memorandum of Understanding

3.50 The Law Council of Australia argued in its submission that the proposed Memorandum of Understanding (MOU) between the ACCC and the Commonwealth Director of Public Prosecutions (CDPP) is inadequate. Specifically, it argued that the factors upon which the ACCC was to base its decision to refer a matter to the CDPP (and by the CDPP in determining whether to prosecute) offer insufficient guidance to the business community as to what constitutes a cartel offence. However, in the Council's opinion, these factors do not make clear the line between criminal and civil treatment. The Law Council recommended that the MOU should specify that one of the factors prompting action should be a minimum percentage of the value of affected commerce.[53]

Summary

3.49 There is unanimity that Australia should have criminal offences and penalties for cartel conduct. A gaol term is an effective deterrent against business people who would otherwise deliberately conspire to raise prices and/or restrict supply. Criminal penalties for cartel conduct also move Australia into line with its leading trading partners in comparable jurisdictions, which is important to deter transnational cartel activity. Fundamentally, the argument against this bill is that it does not address the critical issues of what constitutes a criminal cartel offence. and some argue it will cast the net too widely. Ordinary commercial activities, which inadvertently restrict the supply of goods or services, may attract a criminal penalty. But the decision to refer a matter to the DPP will ultimately rest with the ACCC, which in itself creates uncertainty.

3.51 However the counter argument, put by Treasury and the ACCC, is of the difficulty delineating between civil and criminal cartel conduct. A price fixing case may not be referred to the DPP because its intent and impact may be insufficient to secure a prosecution and may not warrant a gaol term. While it is desirable to have certainty in determining which cases will and will not attract a criminal cartel investigation, it is very difficult to legislate to this effect. The bill must therefore be

52 Mr Brian Cassidy, *Proof Committee Hansard*, 16 February 2009, p. 42.

53 Law Council of Australia, *Submission 10*, p. 5.

seen as providing the ACCC with the power to refer a matter for criminal prosecution while retaining flexibility for it to determine each case on the specific circumstances.