

Chapter 4

The committee's view

4.1 This chapter presents the committee's views on the three issues of contention discussed in Chapter 3: the lack of a definition of, and mechanisms to distinguish, criminal cartel conduct; the scope of the bill's joint venture exceptions; and the resulting discretion that the bill potentially gives to the ACCC in determining which alleged cartel activities to pursue criminally.

The threshold issue—what is criminal cartel conduct?

4.2 Chapter 3 noted the ACCC's doubt as to whether there is a mechanism that could be established in law that would properly guide a regulator to pursue (from the outset) either a civil or a criminal cartel investigation. Both the ACCC and Treasury emphasised that this issue could only be settled based on the facts of each particular case. Indeed, Treasury emphasised the importance of giving the ACCC flexibility to investigate a matter on civil grounds, but with the option of going down the criminal path where appropriate.

4.3 The bill certainly provides this flexibility. The question is whether it provides too much, to the point where the business community and the public at large could not be sure what will—and what should—guide the ACCC in pursuing criminal cartel investigations.

4.4 The committee recognises that some measure of clarity and certainty is important if the proposed legislation is to be an effective deterrent against cartel activity, without deterring ordinary day-to-day commercial transactions. The bill's undisputed strength is in establishing criminal offences and penalties for cartel conduct and providing the regulator with the flexibility needed to successfully prosecute such cases. Its weakness is this flexibility creates a level of uncertainty. Where two or more competing businesses enter into an agreement which restricts the supply of a good or service there is a view they are not always acting as an illegal cartel, but nevertheless they are potentially subject to criminal sanctions. The difficulty is that on the basis of the provisions in the bill, it is unclear where the line is drawn between non cartel behaviour, and civil and criminal offences.

4.5 The committee considers the proposal of defining criminal conduct on the basis of the effect that the activity has on price is too restrictive as the only indicator of criminal conduct. The committee agrees that a more focussed definition of the factors to be considered when prosecuting criminal cartel conduct would clarify for the business community, the ACCC, the DPP and the courts whether or not a criminal offence applies. However cartel conduct may not result in an immediate increase in price. For example if two competitors deliberately collude to fix prices below the

competitive level to squeeze out another competitor, the primary outcome may be a reduction in price.

4.6 Another difficulty with this approach is that it elevates the importance of 'price fixing' in determining a criminal offence to the exclusion of the three other elements in proposed subsection 44ZZRA. The ACCC told the committee that an instance of 'price fixing' would not automatically be treated as a criminal offence. Depending on the knowledge of the parties involved and/or the minimal effect that the conduct might have, the ACCC may choose to pursue a civil offence. It was not confident that legislators could construct any basis upon which to delineate between civil and criminal offences (see paragraph 3.5).

4.7 The committee supports the government's decision to omit a 'dishonesty' clause from the bill. A similar clause was inserted into the United Kingdom's *Enterprise Act 2002* and has since been widely blamed for the lack of successful criminal cartel convictions. It is difficult to persuade a jury that an action is 'morally reprehensible', as opposed to merely 'intended'. The bill's proposed requirement of knowledge or belief that a contract contains a cartel provision is a lower threshold and one which a jury is more likely to comprehend.

4.8 The committee is concerned that any attempt to legislate what it is—in all cases—that constitutes a criminal cartel offence risks restricting the judgment of the regulator. The ACCC's case-by-case judgments are important because they are contextual and weigh various factors, one against others. It is the ACCC's judgment that will authorise a doctors' rostering arrangement which does not raise prices or restrictive agreements between franchisors and franchisees.¹ This flexibility is valued by both the government and the ACCC.

4.9 Accordingly, the committee does not support an attempt to delineate between civil and criminal cartel offences. Instead, it proposes the release of detailed guidelines by the ACCC on passing of the legislation providing a non-exhaustive list of factors so that businesses could have an understanding of the kind of behaviour that would have the potential for prosecution. These factors should be based on those listed in the proposed MOU between the ACCC and the DPP. Having these factors clearly listed in comprehensive guidelines should provide some certainty.

4.10 The committee emphasises the importance of the ACCC publishing guidelines on what is and is not acceptable activity in relation to cartels. It agrees with the Motor Trades Association that the ACCC should publish guidelines on how it will administer the new provisions. These guidelines should refer to those factors listed in the proposed Memorandum of Understanding between the ACCC and the DPP.

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

Recommendation 1

4.11 The committee recommends that, following the passage of this bill, the ACCC issue guidelines on those factors that are, in all the circumstances, most likely to lead it to refer an activity to the DPP as a possible criminal cartel offence.

Joint venture exceptions

4.12 Chapter 3 noted the bill's joint venture exceptions have attracted criticism from those who claim they are too narrow, while others fear that they are too generous and potentially often sanctuary for cartelists. The committee believes that the bill strikes an appropriate balance.

4.13 On the one hand, the bill removes the current caveat in section 76D that the joint venture activity does not have the purpose, effect or likely effect of substantially lessening competition. On the other, it focuses the new defence on a joint venture formed through a contract—written or verbal—and focused on the production and supply of goods and services.

4.14 The committee acknowledges the concerns of the Shopping Centre Council that looser arrangements extending from a joint venture contract should be exempted from the cartel provisions. It notes, however, that both the ACCC and Treasury have indicated that if an arrangement or understanding is 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.

4.15 The committee believes the government is right to direct its attention, in the context of criminal cartel activity, to joint ventures that are formed through non-contractual means. The Canadian experience has been that cartel activity is more common among joint ventures that operate through 'arrangements' or 'understandings' rather than through a contract.

4.16 The committee does acknowledge that the bill is potentially a strong inducement for those joint ventures that are currently operated through an arrangement or understanding to be reformed as a contract and for new joint ventures to set up a written contract. It is expected that the Government will assess the impact of this bill when it is in operation to ensure that it does not unduly restrict business activities.

The ACCC's discretion

4.17 It is important that the ACCC develop and publicise its own guidelines on the factors most likely to lead it to refer an alleged cartel activity to the DPP for investigation. In the absence of a clear mechanism with which to delineate civil from criminal cartel activity, these measures are key to allaying the business community's concerns about the ACCC's broad remit under the proposed bill.

4.18 That said, the committee does not agree with the concerns of many witnesses that the bill would allow the ACCC to pursue innocuous (and previously legal) activities. The claim that the bill would give the ACCC too much discretion in determining the pursuit of criminal cartel cases is overstated. The ACCC currently exercises discretion on a range of TPA-related matters which require it to investigate activities and assess possible breaches of the Act based on all the relevant circumstances. The committee sees no reason why it could not ably do the same in relation to criminal cartel investigations. Moreover, the ACCC is only one part in the process of a criminal cartel prosecution. The matter is subsequently investigated by the DPP and only then would it go before a judge and jury.

Recommendation 2

4.19 **The committee recommends that the Senate pass the bill.**

Senator Annette Hurley

Chair