

## Additional comments by Senator Xenophon

The formation of cartels is, in Adam Smith's well-known words, 'a conspiracy against the public...a contrivance to raise price'.<sup>1</sup> Cartels distort the market place. While making the cartelists better off, they make the overall community worse off. Tougher legislation against cartels is welcome. In particular the prospect of a gaol sentence should concentrate the minds of business leaders thinking of engaging in cartel behaviour in a way that a fine may not.

Overseas studies confirm that criminalisation provisions can usefully add to the armoury of the competition authorities:

...the US has been very successful with a dual track. The movement in the international arena is towards the dual rather than single track,...<sup>2</sup>

This bill's aim of criminalising cartel conduct should therefore be supported. But this does not mean the current bill cannot be improved. Particularly when matters are going before a jury rather than just a judge, it is desirable that the law be as clear as possible.

The bill could be streamlined to focus more narrowly on the conduct it seeks to prevent, and assuage concerns that other conduct will be inadvertently criminalised.

There is therefore merit in the suggestions of Mr Speed and Professor Zumbo that the bill make clear that it is cartel behaviour that disadvantages consumers which is the target, not innocuous behaviour involving some cooperation between suppliers which does not have the intent or effect of disadvantaging consumers.

For example, in the 'two country doctors' example discussed in Chapter 3, if the rostering is just to ensure there is always one doctor available, without both having to work seven days a week, and there is no impact on price, then this should not be regarded as criminal behaviour. But if the doctors are effectively establishing a monopoly and using this to hike fees on weekends, then this is reprehensible conduct which the law should not allow.

Professor Zumbo suggests adding the following wording to the bill which would specify that the focus is on outlawing conduct that:

has the purpose, or effect or likely effect of, directly or indirectly, fixing, raising, controlling, maintaining, stabilising or influencing the price for, or

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1 *The Wealth of Nations*, book I, chapter X.

2 Ms H K Holdaway, Treasury, *Proof Committee Hansard*, 16 February 2009, p 5.

a discount, surcharge, allowance, rebate or credit in relation to, the supply or acquisition of goods or services.<sup>3</sup>

An alternative would be to draw on the factors listed in the proposed MOU between the ACCC and the DPP. This would involve amending the bill to outlaw conduct which:

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.<sup>4</sup>

Either approach should remove the concern of some witnesses about what they regard as innocuous activities being in breach of the law. Amending the bill to make clear it only outlaws behaviour that hurts consumers, rather than anything that affects output, would be a preferable way of addressing concerns about unintended consequences than broadening the terms of exemptions which could provide cover for activities which actually do harm consumers.<sup>5</sup>

Another means of reducing any uncertainty the bill might cause is requiring, and resourcing, the ACCC to streamline their approvals process so firms in doubt about the legality of their proposed operations can achieve some assurance quickly.

The comprehensibility of the legislation would also be aided if the amendments could be inserted in a way that avoided the need to refer to complicated sub-sub-sub-sections such as 'subsection 44ZZRF' and so on. Associate Professor Zumbo suggests:

The easiest solution would be to insert a new Part or Division at the end of the *Trade Practices Act*. That would make available a whole new set of numbers without the need to add letters to a number if the cartel offences were inserted within the existing body of the *Trade Practices Act*.<sup>6</sup>

The problem of complexity in trade practices legislation is not confined to the parts of the *Trade Practices Act* with which this bill is concerned. There is a need for a comprehensive, independent, review of the Act, by a body such as the Productivity Commission or a committee like the Henry Tax Review, to produce a simple act which promotes fair markets that operate in the interests of the whole community.

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3 Associate Professor Frank Zumbo, *Submission 11a*, p 3.

4 This wording is taken from the MOU, described in ACCC, *Submission 12*, p 4. If there are concerns that any such wording may later prove to be unsatisfactory, a provision could be inserted in the bill empowering the treasurer by a disallowable legislative instrument to specify one or more factors which the courts must consider in determining whether 'serious cartel conduct' exists.

5 For example, the Shopping Centre Council wanted the joint venture exemptions broadened to cover not just written or oral contracts, but agreements or understandings. This would offer too much scope for truly anticompetitive conduct to escape punishment.

6 Associate Professor Frank Zumbo, *Submission 11*, p 12.

**Senator Nick Xenophon**

