

The Senate

Standing Committee on Economics

Trade Practices Amendment (Cartel
Conduct and Other Measures) Bill 2008
[Provisions]

February 2009

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ISBN 978-1-74229-069-0

Printed by the Senate Printing Unit, Parliament House, Canberra.

Senate Standing Committee on Economics

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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.

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.

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.

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

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'.¹ 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,...²

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

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.³

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.⁴

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.⁵

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*.⁶

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.

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

APPENDIX 1

Submissions Received

Submission Number	Submitter
1	Shopping Centre Council of Australia (SCCA)
2	CONFIDENTIAL
3	DomGas Alliance
4	Ergon Energy
5	Mr Brent Fisse
6	Speed and Stracey Lawyers
7	Motor Trades Association of Australia (MTAA)
8	Consumer Action Law Centre
9	Mr Bob Baxt
10	Law Council of Australia
11	Associate Professor Frank Zumbo
12	Australian Competition & Consumer Commission (ACCC)

Additional Information Received

- Received from Mr Scott Rogers, Treasury on 23 February 2009. Answer to question taken on notice in Canberra on 16 February 2009.
- Received from Ms Sue Scanlan, Motor Trades Association of Australia on 24 February 2009. Information requested from public hearing in Canberra on 16 February 2009.

TABLED DOCUMENTS

Canberra, 16 February 2009:

- Received from Associate Professor Frank Zumbo. Recommendations & Best Practices Paper & *'How high do cartels raise prices? Implications for optimal cartel fines'* paper.

APPENDIX 2

Public Hearing and Witnesses

CANBERRA, 16 FEBRUARY 2009

- ABBOT, Ms Simone, Acting Senior Adviser,
Competition Policy Framework Unit, Competition and Consumer Policy
Division, Department of Treasury
- BAXT, Professor Bob, Member,
Trade Practices Committee, Business Law Section, Law Council of Australia,
and executive member,
Business Law Section, Law Council of Australia
- CASSIDY, Mr Brian, Chief Executive Officer,
Australian Competition and Consumer Commission
- COCKBURN, Mr Milton Roy, Executive Director,
Shopping Centre Council of Australia
- COURT, Ms Sarah, Commissioner,
Australian Competition and Consumer Commission
- DELANEY, Mr Michael, Executive Director,
Motor Trades Association of Australia
- GREGSON, Mr Scott, General Manager,
Australian Competition and Consumer Commission
- HOLDAWAY, Ms HK, Acting General Manager,
Competition and Consumer Policy Division, Department of Treasury
- LAWRENCE, Mr Ian, Director,
Information Research and Analysis Branch, Australian Competition and
Consumer Commission
- LOWE, Ms Catriona, Co-Chief Executive Officer,
Consumer Action Law Centre
- PODDAR, Mr Dave, Chair,
Trade Practices Committee, Business Law Section, Law Council of Australia
- REID, Mr William, Member,
Trade Practices Committee, Business Law Section, Law Council of Australia
- RICH, Ms Nicole, Director,
Policy and Campaigns, Consumer Action Law Centre

- ROGERS, Mr Scott, Acting Manager,
Competition Policy Framework Unit, Competition and Consumer Policy
Division, Department of Treasury
- SCANLAN, Ms Susan, Deputy Executive Director,
Motor Trades Association of Australia
- SPEED, Mr Peter Stuart, Solicitor,
Speed and Stracey Lawyers
- SPIER, Mr Hank, Consultant,
Motor Trades Association of Australia
- WALSH, Mr Timothy Gerard, Legal Adviser,
Shopping Centre Council of Australia
- ZUMBO, Associate Professor Frank