

SHOPPING CENTRE

COUNCIL OF AUSTRALIA

24 December 2008

Committee Secretary
Senate Economics Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Sir,

Inquiry into the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008

The Shopping Centre Council of Australia (SCCA) is concerned that the proposed criminal and civil joint venture defences contained in the *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill* are deficient because they may not cover typical joint venture arrangements and understandings. Such arrangements and understandings were always intended to be exempted from the prohibition on cartel conduct. Unless the present drafting in the Bill is amended, we believe normal commercial conduct undertaken as part of a joint venture may not be covered by the statutory exemption and could therefore be exposed to criminal and civil penalties.

We are also concerned that there is doubt whether the current section 4J of the *Trade Practices Act* (which defines 'joint venture' for the purposes of the Act) is sufficiently broad to cover joint ventures undertaken pursuant to a trust structure.

1 Joint Venture Defences

Many shopping centres in Australia are owned and operated within a joint venture structure. Pacific Fair and Sunshine Plaza in Queensland; Warringah Mall, Erina Fair and Macarthur Square in Sydney; Chadstone, Knox City and Highpoint in Melbourne; Westfield Marion in Adelaide and Garden City Booragoon in Perth are just some of the major shopping centres which are owned in a joint venture structure. Often the joint venture participants also own interests in, and/or operate, other shopping centres which are in competition with each other in other areas of the market for the supply of retail space for lease.

As is the case in most joint ventures it is normal for the co-owners of the joint ventured shopping centre to jointly approve decisions made in relation to the operation of that centre. These joint approvals will include, for example, the approval of budgets for rent (including the pricing of rents) and the terms and conditions of leases to be offered at the centre. While in itself a shopping centre joint venture (and no doubt joint ventures in other industries) may be well documented and contractual, the relevant conduct may involve joint venture parties making or giving effect to what is technically a cartel provision that is contained in a loose arrangement or understanding rather than in the formal 'constitution' type documents (and despite those contractual documents most likely contemplating such arrangements or understandings.) To the extent that such activity may constitute and be characterised as the making of or giving effect to an arrangement or understanding constituting a cartel provision, it was intended that the Bill would exempt such activity from the prohibitions against such conduct.

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A cartel provision is defined in section 44ZZRD of the Bill. The relevant criminal offences provisions of the Bill are contained in sections 44ZZRF and 44ZZRG and the relevant civil penalty provisions are contained in sections 44ZZRJ and 44ZZRK. The defence to those sections for those engaged in the conduct of activities through joint venture arrangements are contained in sections 44ZZRO and 44ZZRP. While the definition of a cartel provision in section 44ZZRD is very wide, a particularly relevant provision is section 44ZZRD(4) which provides that where at least two of the parties to the contract, arrangement or understanding are, or are likely to be, or but for any contract, arrangement or understanding, would be or would likely to be, in competition with each other in relation to the likely supply of goods or services, in relation to the supply of those goods or services.

If we look at a situation (by no means uncommon) where shopping centre owner 'A' and shopping centre owner 'B' jointly own a shopping centre in one city and also independently own other shopping centres in the same city. 'A' and 'B' are, or are likely to be, in competition for the supply of retail space for lease. If the reference to "those goods or services" in section 44ZZRD(4) is understood to mean only the supply of retail space for lease at the jointly owned shopping centre, it seems unlikely that this would be considered a "cartel provision". This is because it is practically implausible, and is therefore unlikely to be considered, that 'A' and 'B' are in competition with each other (as opposed to having possible conflicts of interest) in relation to the likely supply of goods and services, "in relation to the supply of those goods and services".

If, however, the words "those goods and services" are construed in a more generic sense, then a serious concern arises. This is because 'A' and 'B', because of their independent ownership of other shopping centres in the same city, are likely to be in competition with each other in relation to the supply of retail space for lease in the widest sense and are therefore likely to be in competition "in relation to those goods and services." In this case there is a real possibility that this will be considered a "cartel provision" which was never the intention of the Bill.

Unfortunately, because of drafting changes between the first exposure draft Bill released earlier this year, and the Bill introduced into Parliament on 3 December 2008, such normal joint venture conduct may not be covered by the statutory exemption. The drafting changes mean there is now a disparity between the criminal offences provisions (sections 44ZZRF and 44ZZRG) and civil penalty proceedings (sections 44ZZRJ and 44ZZRK) - which refer to "a contract or arrangement, or arrives at an understanding" - and the provisions of the joint venture defence (sections 44ZZRO and 44ZZRP), which refer only to "a contract" and not to an "arrangement" or "understanding".

Thus in order to obtain the benefit of the exemption, the relevant conduct must now be "in relation to a contract containing a cartel provision" (see sections 44ZZRO(1) and 44ZZRP(1)). The actions of the representatives of the joint venture parties in approving rents and other details of leases in a management committee, for example, is an activity that occurs separately from the formal contracts that document the joint venture, even though it is an activity that is usually contemplated by those formal contracts. It is therefore likely that the activity itself is not covered by the exemption that applies to the making, or giving effect to, of a cartel provision contained in a contract. The first exposure draft Bill contained the additional words "arrangement or understanding", after the word "contract", but these have been removed in the Bill.

The ownership and operation of businesses and assets through a joint venture is, of course, a common feature of many industries, not just the shopping centre industry. The joint venture is a well established business format long recognised as achieving economic efficiencies within industry. We believe this drafting deficiency would have implications for joint ventures in many other industries, as the joint venture decision making procedures described above would be typical.

In order to put this issue beyond doubt, we believe that sections 44ZZRO(1) and 44ZZRP(1) should both be amended by the inclusion of the words underlined as follows:

(1) Sections 44ZZRF and 44ZZRG do not apply in relation to a contract, arrangement or understanding containing a cartel provision if:

(a) the cartel provision is for the purposes of a joint venture; and

(b) the joint venture is for the production and/or supply of goods and services; and

(c) in a case where sub-paragraph 4J(a)(i) applies to the joint venture – the joint venture is carried on jointly by the parties to the contract, arrangement or understanding; and

(d) in a case where sub-paragraph 4J(a)(ii) applies to the joint venture – the joint venture is carried on by a body corporate formed by the parties to the contract, arrangement or understanding for the purposes of enabling those parties to carry on the activity mentioned in paragraph (b) jointly by means of:

(i) their joint control; or

(ii) their ownership of shares in the capital

of that body corporate.

(2) A person who wishes to rely on subsection (1) bears an evidential burden in relation to that matter.

We are not aware of the reasons why the Bill now limits the defence to cartel provisions contained in a "contract". We suspect that the Bill's drafting reflects a concern that participants in a cartel will otherwise, post fact, claim that there existed a loose joint venture and thus seek to escape liability. It should be noted, however, that sub-section (2) above stipulates that it is the joint venturers who bear the onus of demonstrating that a joint venture actually exists.

Given the inclusion of criminal penalties in the Bill it is important that the Parliament errs on the side of caution in such matters. We believe the above drafting will address our concerns without negating the Government's objectives in introducing this Bill.

2. Section 4J Joint Ventures

Many joint ventured shopping centres are conducted by real estate investment trusts. It is not the purpose of the Bill to proscribe genuine commercial dealings conducted *bona fide* through the auspices of a joint venture. In the *Trade Practices Act*, "a reference to a joint venture is a reference to an activity in trade and commerce carried on jointly by two or more persons . . . [or] carried on by a body corporate formed by two or more persons . . ." (Section 4J.) It is arguable that this

is sufficiently broad to capture joint ventures conducted under the auspices of a trust structure but there is an element of doubt. This could be put beyond doubt by the addition of a new sub-section 4J(a)(iii) in the following terms:

"(iii) carried on by a trustee on behalf of two or more beneficiaries where the trust was created for the purposes of enabling those persons to carry on that activity jointly;"

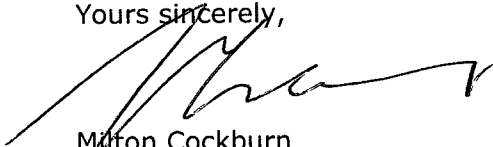
(NB. If this amendment is accepted, then the amendments to sections 44ZZRO and 44ZZRP we have suggested above would need to be altered accordingly.)

We respectfully request the Committee to consider and to recommend both amendments which we have proposed above.

We sought advice from Counsel (Bret Walker SC and J.A.C Potts) on these matters before preparing this submission. This Memorandum of Advice, dated 18 December 2008, is **attached**. This submission relies heavily on the advice of Counsel in these matters.

We are happy to elaborate on this submission.

Yours sincerely,



Milton Cockburn
Executive Director