

MEMORANDUM OF ADVICE

1. Our instructing solicitors act on behalf of the Shopping Centre Council of Australia ("SCCA"). SCCA represents investors in, and managers of, shopping centres in Australia.
2. The SCCA is concerned about proposed amendments to the Trade Practices Act 1974 (Cth) ("**the Act**"), sought to be made by a bill, the *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008* ("**the Bill**"), which was recently introduced into the Commonwealth Parliament. On 4 December 2008 the Senate referred the provisions of the Bill to the Senate Standing Committee on Economics for report by 20 February 2009.
3. According to the Explanatory Memorandum, the Bill is intended to:

"establish criminal penalties for serious cartel conduct, and to make related amendments. "
4. The Bill targets what it terms "cartels". According to the Explanatory Memorandum, the framers of the Bill consider a cartel to be:

"A cartel is an agreement between competitors not to compete, by manipulating prices, sharing a customer base, restricting supply, or rigging a tender process. Such conduct harms consumers, businesses and the economy by increasing prices (including input prices), reducing choice and distorting innovation processes."
5. The Bill proposes the proscription of cartels through the criminalisation of certain conduct, and the enactment of civil penalty provisions in relation to such conduct.
6. Of concern to the SCCA is the limited nature of a defence provided for those engaged in the conduct of activities through joint venture arrangements. The SCCA's concern stems from the fact that many shopping centres in Australia are owned and operated within a joint venture structure, and often joint venture participants are also interested in, or operate, other shopping centres which are in competition with each other in the market for the supply of retail space.

As is the case with most joint ventures, we are instructed that it is normal for the co-owners of the joint venture shopping centres to jointly approve decisions made in relation to the operation of those centres. Those joint approvals include things such as the approval of budgets for rent, and the terms, including the pricing of rents, for leases to be offered at each centre. The SCCA is concerned about whether or not such approvals, given by management committees, which themselves are constituted by representatives of joint venture parties who are otherwise in the same market, might be arrangements or understandings, the making of which might constitute a criminal offence, and which would be subject to the proposed civil penalty provisions. There is concern that the joint venture defence provided in the Bill, because of the way in which it is drafted, would not apply in such circumstances.

7. 7. For the purposes of advising we have been asked to assume that in respect of each of the shopping centres jointly owned in Australia there exist formal contracts between the parties which contemplate such approvals being made by management committees constituted in the manner we have described above. The SCCA's concern is that the joint approvals may be considered arrangements or understandings (but not contracts) containing a "cartel provision" (being a concept defined in the draft Bill, to which we refer below), and that the making of and giving effect to such approvals could constitute and be characterised as the making of or giving effect to an arrangement or understanding containing a cartel provision. The SCCA is concerned that that would not be covered by the proposed joint venture defence.
8. We are asked to advise whether the SCCA's concerns are justified, and if so, how the Bill might be amended to address the SCCA's concerns.
9. We are also asked to consider whether the current s 4J of the Act, which defines "joint venture" for the purposes of the Act, is broad enough to cover joint ventures undertaken pursuant to a trust structure, or whether the definition of joint venture should be broadened to make it clear that the defence applies to joint ventures undertaken through a trust structure.

The Offences and Civil Penalty Provisions

10. The Bill proposes the enactment of two criminal offences of present relevance. They are contained in ss 44ZZRF and 44ZZRG ("the Offences"), which are in the following terms:

"44ZZRF Making a contract etc. containing a cartel provision

Offence

- (1) *A person commits an offence if*
- (a) *the person makes a contract or arrangement, or arrives at an understanding; and*
 - (b) *the contract, arrangement or understanding contains a cartel provision.*
- (2) *The fault element for paragraph (1)(b) is knowledge or belief.*

44ZZRG Giving effect to a cartel provision

Offence

- (1) *A person commits an offence if*
- (a) *a contract, arrangement or understanding contains a cartel provision; and*
 - (b) *the person gives effect to the cartel provision.*
- (2) *The fault element for paragraph (1)(a) is knowledge or belief"*

11. The Bill thus proposes the criminalisation of conduct by which a person enters into a contract, arrangement or understanding, where it contains a "cartel provision", knowing or believing that the contract, arrangement or understanding contains the cartel provision (but without having to know or believe that the provision is a "cartel provision"). Equally, it will be an offence for a person to give effect to (which we understand to mean, put into execution) a cartel provision in a contract, arrangement or understanding, knowing or believing that the person is giving effect to such a

provision (but again, without having to know or believe that the provision is a "cartel provision").

12. The Bill also proposes the enactment of cognate civil penalty provisions. They are contained in ss 44ZZRJ and 44ZZRK ("the Civil Penalty Provisions") which are in the following terms:

"44ZZRJ Making a contract etc. containing a cartel provision

A person contravenes this section if

- (a) the person makes a contract or arrangement, or arrives at an understanding; and*
- (b) the contract, arrangement or understanding contains a cartel provision.*

Note: For enforcement, see Part VI.

44ZZRK Giving effect to a cartel provision

(1) A person contravenes this section if;

- (a) a contract, arrangement or understanding contains a cartel provision; and*
- (b) the person gives effect to the cartel provision.*

Note: For enforcement, see Part VI.

(2) Paragraph (1)(a) applies to contracts or arrangements made, or understandings arrived at, before, at or after the commencement of this section."

13. By the Civil Penalty Provisions, the same conduct that is criminalised by the Offences may render the person committing it liable to significant civil penalties.
14. Both the Offences and the Civil Penalty Provisions are premised on the concept of a "cartel provision". A "cartel provision" is defined by s 44ZZRD in the Bill. It is a lengthy and complicated definition which provides:

"44ZZRD Cartel provisions

- (1) *For the purposes of this Act, a provision of a contract, arrangement or understanding is a cartel provision if;*
- (a) *either of the following conditions is satisfied in relation to the provision:*
- (i) *the purpose/effect condition set out in subsection (2);*
- (ii) *the purpose condition set out in subsection (3); and*
- (b) *the competition condition set out in subsection (4) is satisfied in relation to the provision.*

Purpose/effect condition

- (2) *The purpose/effect condition is satisfied if the provision has the purpose, or has or is likely to have the effect, of directly or indirectly:*
- (a) *fixing, controlling or maintaining,- or*
- (b) *providing for the fixing, controlling or maintaining of;*
- the price for, or a discount, allowance, rebate or credit in relation to:*
- (c) *goods or services supplied, or likely to be supplied, by any or all of the parties to the contract, arrangement or understanding; or*
- (d) *goods or services acquired, or likely to be acquired, by any or all of the parties to the contract, arrangement or understanding or*
- (e) *goods or services re supplied, or likely to be re supplied, by persons or classes of persons to whom those goods or services were supplied by any or all of the parties to the contract, arrangement or understanding; or*
- (f) *goods or services likely to be re supplied by persons or classes of persons to whom those goods or services are likely to be*

supplied by any or all of the parties to the contract, arrangement or understanding.

Note 1: The purpose/effect condition can be satisfied when a provision is considered with related provisions-see subsection (8).

Note 2: Party has an extended meaning-see section 44ZZRC.

Purpose condition

- (3) *The purpose condition is satisfied if the provision has the purpose of directly or indirectly:*
- (a) *preventing, restricting or limiting:*
 - (i) *the production, or likely production, of goods by any or all of the parties to the contract, arrangement or understanding; or*
 - (ii) *the capacity, or likely capacity, of any or all of the parties to the contract, arrangement or understanding to supply services; or*
 - (iii) *the supply, or likely supply, of goods or services to persons or classes of persons by any or all of the parties to the contract, arrangement or understanding; or*
 - (b) *allocating between any or all of the parties to the contract, arrangement or understanding.,*
 - (i) *the persons or classes of persons who have acquired, or who are likely to acquire, goods or services from any or all of the parties to the contract, arrangement or understanding; or*
 - (ii) *the persons or classes of persons who have supplied, or who are likely to supply, goods or services to any or all of the parties to the contract, arrangement or understanding; or*

- (iii) *the geographical areas in which goods or services are supplied, or likely to be supplied, by any or all of the parties to the contract, arrangement or understanding; or*
 - (iv) *the geographical areas in which goods or services are acquired, or likely to be acquired, by any or all of the parties to the contract, arrangement or understanding; or*
- (c) *ensuring that in the event of a request for bids in relation to the supply or acquisition of goods or services:*
- (i) *one or more parties to the contract, arrangement or understanding bid, but one or more other parties do not; or*
 - (ii) *2 or more parties to the contract, arrangement or understanding bid, but at least 2 of them do so on the basis that one of those bids is more likely to be successful than the others; or*
 - (c) *2 or more parties to the contract, arrangement or understanding bid, but not all of those parties proceed with their bids until the suspension or finalisation of the request for bids process; or*
 - (iv) *2 or more parties to the contract, arrangement or understanding bid and proceed with their bids, but at least 2 of them proceed with their bids on the basis that one of those bids is more likely to be successful than the others; or*
 - (v) *2 or more parties to the contract, arrangement or understanding bid, but a material component of at least one of those bids is worked out in accordance with the contract, arrangement or understanding.*

Note 1: For example, subparagraph (3)(a)(iii) will not apply in relation to a roster for the supply of after hours medical services if the roster does not prevent, restrict or limit the supply of services.

Note 2: The purpose condition can be satisfied when a provision is considered with related provisions-see subsection (9).

Note 3: Party has an extended meaning-see section 44ZZRC.

Competition condition

(4) The competition condition is satisfied if at least 2 of the parties to the contract, arrangement or understanding.,

(a) are or are likely to be; or

(b) but for any contract, arrangement or understanding, would be or would be likely to be;

in competition with each other in relation to:

(c) if paragraph (2)(c) or (3)(b) applies in relation to a supply, or likely supply, of goods or services-the supply of those goods or services; or

(d) if paragraph (2)(d) or (3)(b) applies in relation to an acquisition, or likely acquisition, of goods or services-the acquisition of those goods or services; or

(e) if paragraph (2)(e) or (f) applies in relation to a resupply, or likely re supply, of goods or services-the supply of those goods or services to that re supplier; or

(f) if subparagraph (3)(a)(i) applies in relation to preventing, restricting or limiting the production, or likely production, of goods-the production of those goods; or

(g) if subparagraph (3)(a)(ii) applies in relation to preventing, restricting or limiting the capacity, or likely capacity, to supply services-the supply of those services; or

- (h) *if subparagraph (3)(a)(iii) applies in relation to preventing, restricting or limiting the supply, or likely supply, of goods or services-the supply of those goods or services; or*
- (i) *if paragraph (3)(c) applies in relation to a supply of goods or services-the supply of those goods or services; or*
- (j) *if paragraph (3)(c) applies in relation to an acquisition of goods or services-the acquisition of those goods or services.*

Note: Party has an extended meaning-see section 44ZZRC.

Immaterial whether identities of persons can be ascertained

- (5) *It is immaterial whether the identities of the persons referred to in paragraph (2)(e) or (9) or subparagraph (3)(a)(iii), (b)(i) or (ii) can be ascertained.*

Recommending prices etc.

- (6) *For the purposes of this Division, a provision of a contract, arrangement or understanding is not taken:*
 - (a) *to have the purpose mentioned in subsection (2); or*
 - (b) *to have, or be likely to have, the effect mentioned in subsection (2);*

by reason only that it recommends, or provides for the recommending of a price, discount, allowance, rebate or credit.

Immaterial whether particular circumstances or particular conditions

- (7) *It is immaterial whether:*
 - (a) *for the purposes of subsection (2), subparagraph (3) (a)(iii) and paragraphs (3)(b) and (c)-a supply or acquisition happens, or a likely supply or likely acquisition is to happen, in particular circumstances or on particular conditions; and*

- (b) *for the purposes of subparagraph (3)(a)(i)-the production happens, or the likely production is to happen, in particular circumstances or on particular conditions; and*
- (c) *for the purposes of subparagraph (3)(a)(ii)-the capacity exists, or the likely capacity is to exist, in particular circumstances or on particular conditions.*

Considering related provisions purpose/effect condition

- (8) *For the purposes of this Division, a provision of a contract, arrangement or understanding is taken to have the purpose, or to have or be likely to have the effect, mentioned in subsection (2) if the provision, when considered together with any or all of the following provisions:*
 - (a) *the other provisions of the contract, arrangement or understanding;*
 - (b) *the provisions of another contract, arrangement or understanding, if the parties to that other contract, arrangement or understanding consist of or include at least one of the parties to the first mentioned contract, arrangement or understanding,*
has that purpose, or has or is likely to have that effect.

Considering related provisions-purpose condition

- (9) *For the purposes of this Division, a provision of a contract, arrangement or understanding is taken to have the purpose mentioned in a paragraph of subsection (3) if the provision, when considered together with any or all of the following provisions:*
 - (a) *the other provisions of the contract, arrangement or understanding;*
 - (b) *the provisions of another contract, arrangement or understanding, if the parties to that other contract, arrangement*

or understanding consist of or include at least one of the parties to the first mentioned contract, arrangement or understanding;

has that purpose.

Purpose/effect of a provision

(10) *For the purposes of this Division, a provision of a contract, arrangement or understanding is not to be taken not to have the purpose, or not to have or to be likely to have the effect, mentioned in subsection (2) by reason only of*

- (a) *the form of the provision; or*
- (b) *the form of the contract, arrangement or understanding; or (c) any description given to the provision, or to the contract, arrangement or understanding, by the parties.*

Purpose of a provision

(11) *For the purposes of this Division, a provision of a contract, arrangement or understanding is not to be taken not to have the purpose mentioned in a paragraph of subsection (3) by reason only of*

- (a) *the form of the provision; or*
- (b) *the form of the contract, arrangement or understanding; or*
- (c) *any description given to the provision, or to the contract, arrangement or understanding, by the parties."*

15. To qualify as a "cartel provision", the provision in question (which can be of a contract, or an arrangement, or merely an understanding), must:

- (a) satisfy the purpose/effect condition (sub-s (2)) AND the competition condition (sub- s (4)); or
- (b) alternatively, must satisfy the purpose condition (sub-s (3)) AND the competition condition (sub-s (4)).

16. The Bill proposes the enactment of a defence to both the Offences and the Civil Penalty Provisions we have referred to above. The defence to the Offences is provided by the proposed section 44ZZRO which is in the following terms:

"44ZZRO Joint ventures-prosecution

- (1) *Sections 44ZZRF and 44ZZRG do not apply in relation to a contract 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 or services; and*
 - (c) *in a case where subparagraph 4J(a)(i) applies to the joint venture-the joint venture is carried on jointly by the parties to the contract; and*
 - (d) *in a case where subparagraph 4(a)(ii) applies to the joint venture-the joint venture is carried on by a body corporate formed by the parties to the contract for the purpose 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."*

17. The proposed defence to the Civil Penalty Provisions is in section 44ZZRP. It is in sufficiently similar terms that we need not set it out in full here. We will refer to the joint venture defences provided by ss 44ZZRO and 44ZZRP simply as the "**Defence**".
18. It is immediately apparent that there is a disparity between the Offences and the Civil Penalty Proceedings, referring as they do to "*a contract or arrangement, or arrives at*

an understanding", and the provisions of the Defence, which refer only to "*a contract*" and not to arrangements or understandings. It is this disparity that is the cause of concern to the SCCA.

19. The Defence makes express reference to the definition of "joint venture" in s 4J of the Act. That provision is currently in force and provides:

"4J Joint ventures

In this Act:

- (a) *a reference to a joint venture is a reference to an activity in trade or commerce:*
 - (i) *carried on jointly by two or more persons, whether or not in partnership; or*
 - (ii) *carried on by a body corporate formed by two or more persons for the purpose of enabling those persons to carry on that activity jointly by means of their joint control, or by means of their ownership of shares in the capital, of that body corporate; and*
- (b) *a reference to a contract or arrangement made or understanding arrived at, or to a proposed contract or arrangement to be made or proposed understanding to be arrived at, for the purposes of a joint venture shall, in relation to a joint venture by way of an activity carried on by a body corporate as mentioned in subparagraph (a)(i) be read as including a reference to the memorandum and articles of association, rules or other document that constitute or constitutes, or are or is to constitute, that body corporate. "*

20. As noted above, we are also asked to advise on this provision.

Developments since the Bill was announced

21. We understand that by letter dated 7 November 2008, from Mr Milton Cockburn, the Executive Director of the SCCA, to the Honourable Chris Bowen, Assistant Treasurer

and Minister for Competition Policy and Consumer Affairs, the SCCA raised its concerns about the Bill held by the SCCA with the Minister.

22. It seems that in response to those concerns, Mr Cockburn was advised that a definition of "contract" would now be included in the Bill along the following lines:

"A contract has its ordinary meaning of an agreement by [sic] 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."

We are unsure what the typographical slip was in this response. Perhaps it should have read: "an agreement recognised by ...".

23. We are instructed that it was indicated to Mr Cockburn that the strong advice received by the Minister and Treasury was that this additional definition would address the concerns held by the SCCA. In our opinion this is wrong and inexplicable.
24. We have been provided with a copy of a further letter dated 28 November 2008 from Mr Cockburn, on behalf of the SCCA to the Assistant Treasurer. That letter reiterated the SCCA's concerns, and suggested that the proposed insertion of a definition of "contract" along the lines indicated above, would not, without more, overcome the problem concerning the SCCA. The letter suggested that the following amendment be made to the Defence:

"Sections 44ZZRF and 44ZZRG do not apply in relation to a 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 ... "

Opinion

25. The definition of "cartel provision" contains a myriad of permutations and combinations, doubtless because of the potentially large variety of circumstances in which cartels can occur. We do not propose here to work through a catalogue of the potential permutations by which the definition of cartel provision in s 44ZZRD can be met.

26. Focussing as an example on s 44ZZRD(2), that statutory definition will be met if the provision in question:

- (a) has the purpose; or
- (b) has the effect; or
- (c) is likely to have the effect;

of directly or indirectly fixing the price for goods or services supplied, or likely to be supplied. As can be seen that is a definition with a very broad potential application.

27. So too s 44ZZRD(3). That sub-section prescribes the "purpose condition", and it is satisfied if the provision has the purpose, directly or indirectly of, for example, preventing, restricting or limiting the supply or likely supply of goods or services.

28. As this limited example demonstrates, both the "purpose/effect condition" in sub-s (2), and the "purpose condition" in sub-s (3), are likely to be of very broad application.

29. Section 44ZZRD(4) provides the "competition condition". We perceive that it is this condition that is intended to be the brake on the application of the statutory definition of "cartel provision", given the wide reach of sub-ss (2) and (3) and the conditions that they define. The "competition condition" will be satisfied where, for example, at least two of the parties to the contract, arrangement or understanding:

- (a) are; or
- (b) are likely to be; or
- (c) but for y 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.

30. The words "*those goods or services*" or "*those goods*" or "*those services*" in s 44ZZRD(4), seem likely to have been intended to be words of limitation, requiring the parties to the contract, arrangement or understanding to be, or be likely to be, in competition with other in relation to the supply or likely supply of the particular goods

or services the subject of the putative cartel provision. In such circumstances, it may well be arguable that the Offences would not apply in the circumstances contemplated by the SCCA, where, as co-owners of a shopping centre, it is difficult to see how they could ever conceivably be in competition with one another in relation to say, the provision of commercial premises as a lessor. It seems to us to be practically implausible that co-owners of property can be in competition (as opposed to having conflicts of interest) in relation to the rental or exploitation of that property.

31. That said, the position is not so clear that it is free from doubt. An alternative construction open on the wording of the competition condition would be that the words "those goods or services" should be construed in a more generic sense, such that the competition condition is satisfied where the parties to a contract, for example, would be likely to be in competition with each other for the supply of goods or services of that character. To take an example relevant to the instant case, suppose shopping centre operators, X and Y, jointly own a shopping centre in Sydney. Suppose that X also owns another shopping centre in Sydney, and Y also independently owns yet another centre. X and Y are, or are likely to be, in competition for the supply of retail leasing premises. If the reference to "those goods and services" in s 44ZZRD(4)(d) is understood as meaning the supply of retail leasing premises in a broad sense, then the competition condition may be satisfied. If the reference to "those goods and services" is understood as meaning only the supply of retail leasing premises at X and Y's jointly owned shopping centre, then the competition condition would probably not be satisfied.
32. Where the consequences are criminal, or at the least, involve the potential imposition of serious civil penalties, those likely to be subjected to these laws would be prudent to have regard to the potential breadth of the Offences and the Civil Penalty Provisions. Whilst a party in the position of a shopping centre owner may well have sound legal arguments open as to why the circumstances postulated do not fall foul of the Offences or the Civil Penalty Provisions, the position is not so clear as to make the SCCA's concerns unjustified, indeed, far from it given the potential consequences.
33. The seriousness of the proscription of the cartel conduct the subject of the Bill is evident by the fact that the conduct is rendered criminal, and the Offences are indictable offences, and the Civil Penalty Provisions can lead to civil penalties of up to

\$10 million, three times the value of the benefits obtained by the cartel conduct, or 10% of the annual turnover of the body corporate (see: s 76(1A)(a)).

34. Viewed in that light, the content of the Defence becomes significant.
35. The very inclusion of the Defence seems to suggest, and is likely in our opinion to be construed by a court as suggesting, that but for the inclusion of the Defence, all the conduct which falls within its ambit would otherwise be criminal under the Offences, and would otherwise be conduct for which civil penalties could be imposed pursuant to the Civil Penalty Provisions.
36. The ambit of the Defence is significantly narrower than the ambit of the Offences and the Civil Penalty Provisions. The Offences and the Civil Penalty Provisions cover a field in respect of which a "cartel provision" can appear in a contract, or an arrangement, or an understanding. In other words, conduct engaged in which does not lead to a legally binding contract is capable of falling foul of the Offences and the Civil Penalty Provisions. If such conduct occurs within the auspices of a joint venture arrangement, and if it does not result in a legally binding contract, then that conduct will be criminalised by the Offences and subject to civil penalties under the Civil Penalty Provisions. No defence will arise under the Defence. For the Defence to apply there must be "a contract containing a cartel provision". The word contract here seems to have its ordinary meaning. The use of the word "containing" suggests to us that for the Defence to apply the "cartel provision" must be a term of a contract. As far as we can discern, on the current wording of the Bill, and even with the proposed inclusion of the definition of "contract" referred to at paragraph 22 above, the Defence will still only apply where a cartel provision is a term of a legally binding contract.
37. It seems to us that the Defence clearly only covers a very narrow sub-set of the potential class of conduct that will be caught by the Offences and the Civil Penalty Provisions. Taking as an example the conduct of a management committee running a shopping centre pursuant to a joint venture, it is difficult to imagine how the decisions which result from the ordinary deliberations of a management committee could ever be terms of a contract. Assuming that that such decisions of a management committee would otherwise fall within the proscribed conduct covered by the Offences and the Civil Penalty Provisions, then the Defence would be ineffective to prevent that

conduct being criminal, or exposing those committing it to a liability for civil penalties.

38. Doubtless the drafters of this Bill, like all interested parties, including the SCCA, have a strong interest in ensuring that the ambit of the criminal conduct proscribed by the Bill is as clear as is possible in all the circumstances. That that is the object of both the legislature and those subject to the Bill once it becomes law, seems to us to be self-evident, given the desire of the legislature to proscribe conduct which it regards as inimical to the community at large, and the need for the business community to ensure that its conduct conforms with the letter and spirit of the law. Unfortunately there is uncertainty as to whether or not conduct of the kind that the SCCA is concerned about will be proscribed, in that the terms of the Defence are drafted in such a way that it is not clear that that form of commercial dealing is permitted.
39. To that end, in order to ensure that the Defence is available to all conduct done legitimately for the purposes of a joint venture, the provisions of ss 44ZZRO and 44ZZRP would need to be amended as follows:

"44ZZRO Joint ventures prosecution

- (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 or services; and*
 - (c) *in a case where subparagraph 4J(a)C 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 subparagraph 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 purpose 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."*

40. If the terms of s 4J were amended as we have suggested at paragraph 45 below, then the amendments to ss 44ZZRO (and also s 44ZZRP) would need to be altered accordingly.
41. The form of wording proposed by the SCCA in its letter dated 28 November 2008 to the Assistant Treasurer, referred to at paragraph 24 above, is narrower, in that provides that the Defence only applies where the arrangement or understanding in question must be "contemplated by a contract". That requires an antecedent contract before any arrangement or understanding can come within the ambit of the Defence. That form of wording also contains no amendment to s 44ZZRO(1)(c) or (d), such that the joint venture would need to be carried out pursuant to a contract before the Defence would apply. Any joint venture not conducted by the parties to a legally binding and enforceable contract would not therefore come within the Defence.
42. Although the drafters of the Bill may well have been concerned about the potential for "informal" joint venture arrangements to be relied upon in defence of prosecutions or in civil penalty proceedings, it will be the joint venturers who bear the onus of demonstrating that a joint venture actually exists (see for example: s 44ZZRO(2)). The requirement that the joint venture actually be carried on by the parties to a contract, and those parties alone, may be thought to be unduly restrictive.. For instance, unless acting as agents of the contracting parties, if related entities of the contracting parties were to be involved in the conduct of the joint venture, and share in the proceeds, then that would take the joint venture outside the ambit of the Defence.
43. In short, in our opinion, although it is not clear beyond doubt that the conduct the SCCA has referred to will be proscribed by the Offences or the Civil Penalty Provisions, one cannot be certain that it will not be caught by those provisions. As such, the SCCA's concerns seem to us to be well founded. The ambit of the Defence as presently drafted is narrow. If the conduct the SCCA has pointed to is criminalised by

the Offences, or covered by the Civil Penalty Provisions, then in our opinion the Defence will not apply to conduct of the kind described above, so as to exculpate shopping centre owners and others from criminal prosecution, or liability to pay civil penalties.

44. The addition of the definition of "contract" to include oral contracts intimated by the proponents of the Bill, to which we have referred at paragraph 22 above, does not seem to us to deal with concern that the SCCA has raised. The expansion of the definition of "contract" to include an oral contract adds nothing. The meaning of "contract" would have been construed that way in any event. Even if "contract" includes an oral contract this still means that the cartel provision must be a contractual term of that oral contract before the Defence is capable of applying.
45. In relation to s 4J of the Act, we are asked whether it is sufficiently broadly drafted to capture joint ventures conducted through the auspices of a trust structure. Although that section is in force, as far as we are aware, it has not been subjected to judicial consideration. Whilst we are of the view that the notion of an activity "carried on jointly by two or more persons" is arguably sufficiently broad to include a joint venture conducted through a trust, it would seem to us that a simple amendment could remove all doubt. The addition of a new sub-section 4J(a)(iii) in the following terms would clarify matters:

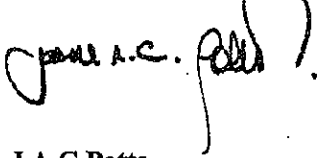
"(iii) carried on by a trustee on behalf of two or more beneficiaries where the trust was created for the purpose of enabling those persons to carry on that activity jointly; "

46. As we read the Explanatory Memorandum, the aim of this Bill is not to proscribe genuine commercial dealings conducted *bona fide* through the auspices of a joint venture. In our view, the amendments we have suggested would ensure that the Bill does not operate to stifle the operation of such commercial dealings.



Bret Walker

Fifth Floor, St James' Hall



J.A.C Potts

Eighth Floor, Selborne Chambers

18 December 2008

**THE SHOPPING CENTRE COUNCIL
OF AUSTRALIA**

**RE: *TRADE PRACTICES
AMENDMENT***

**(*CARTEL CONDUCTION AND
OTHER MEASURES*) BILL 2008**

MEMORANDUM OF ADVICE

Attention: Mr Peter Speed

Speed and Stracey

Solicitors

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