

SHOPPING CENTRE

COUNCIL OF AUSTRALIA

17 February 2008

Mr John Hawkins
Secretary, Senate Economics Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Mr Hawkins,

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

Thank you for the opportunity of appearing before the Committee in relation to this Bill.

We believe it is common ground that legitimate commercial joint ventures are accepted as a vital and necessary means of undertaking business within Australia, providing an efficient means for the allocation of scarce capital and resources, thereby making it possible for major capital investment and projects to proceed. They have obviously brought enormous economic benefits to Australia.

Unfortunately, not only does the present drafting of the Bill catch much joint venture activity within the sweep of its definition of cartel conduct but the Bill's present drafting deprives access to the joint venture safe harbour which those activities were obviously intended to enjoy.

It seems apparent, however, from the ACCC's submission of 12 February 2008 and from Mr Cassidy's comments to the Committee, that the ACCC is opposed to reinstating the words "arrangement or understanding" in the joint venture defences (sections 44ZZRO and 44ZZRG.) This is despite the fact that:

- The non-inclusion of the words "arrangement or understanding" in the defences will render liable for civil and criminal sanctions a wide range of legitimate commercial endeavours undertaken by legitimate joint ventures.
- We explained to the Committee yesterday how the argument that this might "provide a refuge for cartels" lacks logic since "a contract" (which is the current requirement) may be oral.
- As Professor Baxt has noted, there is no evidence that the courts have interpreted the words "contract, arrangement or understanding", which are already used in the Trade Practices Act, in a manner that has caused problems for the ACCC.
- The courts will not allow parties to rely on the joint venture defences where the joint venture is a sham.
- The onus of relying on the joint venture defence lies with the joint venture parties. A person must therefore establish that there exists a joint venture "for the production and/or supply of goods or services" which is being "carried on jointly by the parties." This will be a heavy onus for any party attempting to camouflage illegitimate cartel activity behind the defence.

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- The ACCC's suggestion that, if joint venturers have any concerns, they can seek formal authorisation of their conduct under the authorisation provisions of the Trade Practices Act is impractical (given the dynamic nature of joint venture decision making), expensive, time consuming and contrary to the intention of the Bill which was to ensure such activity would be protected by a defence that was effective.

The ACCC's concerns that our proposed amendment to the joint venture defence could be used to cloak illegitimate cartel behaviour is overstated and misplaced. That is also the view of the Law Council of Australia and of several distinguished trade practices lawyers. Nevertheless, if the Committee is reluctant to recommend the amendment to these defences we suggested in our submission of 24 December 2008, we would like to repeat and emphasise to the Committee the alternative compromise we suggested at yesterday's hearing and which we previously set out in a letter of 28 November 2008 to the Assistant Treasurer and Minister for Competition Policy, the Hon Chris Bowen MP.

This alternative proposal is to amend the existing joint venture defences (sections 44ZZRO(1) and 44ZZRP(1)) along the following lines:

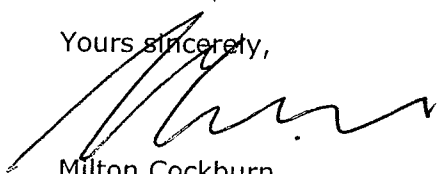
"Sections 44ZZRF and 44ZZRG do not apply in relation to a contract containing a cartel provision or in relation to an arrangement or understanding which is contemplated by a contract and which contains a cartel provision if . . ."

(Similar drafting changes would also need to be made to paragraphs (c) and (d) of subsection 1 of both sections.)

Although we do not accept the ACCC's concerns as valid, we believe this alternative wording should adequately address those concerns by ensuring that the activity to be shielded by the joint venture defence must still be directly linked to, and comprehended by, a formal joint venture contract between the joint venture parties. At the same time the alternative wording will permit those normal and legitimate activities of a joint venture that do not satisfy the formal legal requirements of a "contract" to be shielded by the defence, thus achieving the intended legislative objective of the defence.

If the Committee is not inclined to adopt our earlier submission regarding necessary changes to the joint venture defences in the Bill we would respectfully request the Committee to recommend this compromise in its report.

Yours sincerely,



Milton Cockburn
Executive Director