



Level 4/22 Walker Street
PO Box 1090
Townsville QLD 4810
Phone 07 4722 1669
Fax 07 4724 3901
Website www.ergon.com.au

20 January 2009

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

Dear Sirs,

Thank you for the opportunity to comment and make submissions in relation to the Inquiry into the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (the 'Bill').

Ergon Energy supports the introduction of legislation to strengthen existing provisions of the Trade Practices Act 1974 that prohibit serious cartel conduct.

Ergon Energy notes that the Bill tabled in the House of Representatives in December 2008 included a number of changes to the October 2008 exposure draft, and in particular included additional 'anti-overlap' provisions and retained the existing exceptions to the Trade Practices Act 1974 in relation to collective acquisition of goods and services.

Ergon Energy is supportive of the above-mentioned changes made to the October 2008 exposure draft. However, we note that the Bill does not propose any increase in the current maximum threshold of \$3Million for collective bargaining notifications under the Trade Practices Act 1974. Accordingly, we request that the Committee give consideration to increasing the maximum threshold.

The position of joint ventures under the proposed legislation has become very complicated and it seems that the applicable defences in relation to joint venture arrangements have been narrowed by the Bill.

There are now two different joint venture defences that can apply to the same conduct. The existing joint venture defences for collective boycotts apply where the conduct is for the purposes of a joint venture and does not have the purpose or likely effect of substantially lessening competition. However, the same conduct is also prohibited under the new civil cartel prohibitions and a different joint venture defence applies.

In such a scenario, the only prudent course for businesses is to ensure that all joint ventures comply with all the requirements of both civil joint venture defences. In practice, this means that anything short of a contractual arrangement will be vulnerable and there will be limits on the types of joint ventures that will qualify for the defences as not all joint ventures will be for the production and/or supply of goods or services.

Ergon Energy notes that joint venture arrangements are a common feature of many commercial arrangements in Australia, particularly in the construction, energy, mining and infrastructure sectors. Previous reviews, including the 2003 Review of the Competition Provisions of the Trade Practices Act, chaired by Sir Daryl Dawson ('Dawson Review') have found that joint ventures can be economically efficient and pro-competitive, particularly in achieving economies of scale and scope. In fact, the Dawson Review recommended that the scope of existing joint venture exemptions be broadened. This ultimately led to the inclusion of the current sections 76C and 76D to provide certain defences for joint ventures in relation to the exclusionary provisions and price fixing prohibitions contained in the Trade Practices Act 1974.

However, giving effect to the Bill means some currently lawful joint ventures may be a criminal offence once these amendments are passed. Ergon Energy considers this would have an adverse impact on the viability of a number of common commercial arrangements operating lawfully in Australia at present. Such an approach could also lead to increased transactional and administrative costs for businesses, such as Ergon Energy, which procure goods and services from various joint venture style arrangements and strategic alliances that would either need to cease or would need to be modified to comply with the new requirements.

In light of the potential pro-competitive effects and benefits of joint venture arrangements, Ergon Energy requests that the Committee give further consideration to the manner in which the cartel provisions are intended to apply to such arrangements to avoid the anomalous result mentioned above. For example, the existing exemption for joint ventures in section 76C could be retained with appropriate amendments to ensure it applies to the cartel provisions. It is also suggested that any applicable defence covers "arrangements" and "understandings", as well as "contracts".

There is one further apparent anomaly in the proposed legislation which Ergon Energy wishes to comment on. The existing prohibition on exclusionary provisions (or collective boycotts) in section 4D is not to be repealed, even though the proposed criminal cartel offences and civil cartel prohibitions contained in the proposed Bill cover substantially the same conduct (namely, restricting output, allocating customers, suppliers or territories and rigging tender bids). Presumably, the existing prohibition will continue to operate in parallel with the new provisions, and certain conduct could fall within both prohibitions. Ergon Energy is concerned that this will create uncertainty and requests that further clarification be given as to how these two provisions are intended to operate in relation to each other.

Yours faithfully



Graeme Finlayson
Company Secretary