



20 January 2009

By email: economics.sen@aph.gov.au

The Secretary
Senate Standing Committee on Economics
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Sir/Madam

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

Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the *Trade Practices Amendment (Cartel Conduct and Other Measures Bill) 2008* (the **Bill**) that proposes to amend the *Trade Practices Act 1974* (Cth) (the **Act**). We have previously made a submission to the Treasury Discussion Paper on Criminal Penalties for Serious Cartel Conduct (the **Discussion Paper**).

Consumer Action supports the Bill. We believe that the introduction of a criminal regime for serious cartel conduct is an important advance for competition policy in Australia because such cartels have a serious and deleterious impact on consumers. In particular, cartels can increase prices and limit supply so that goods or services are completely unavailable for some consumers or unnecessarily expensive for others, and, because cartels are secret, consumers have no capacity to avoid their impact. Cartel conduct distorts the operation of markets and results in consumers, and sometimes primary producers, being overcharged or underpaid as relevant.

For these reasons, Consumer Action has strongly supported moves to criminalise cartel conduct since the publication of the Dawson Committee's report of its review of the competition provisions of the Act in 2003, which recommended the criminalisation of cartel conduct. Internationally, many nations have laws providing for terms of imprisonment for cartel conduct, including Canada, France, Germany, Ireland, Israel, Japan, South Korea, Mexico, Norway, the Slovak Republic, the United Kingdom (**UK**) and the United States.

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The Bill

Consumer Action considers that the Bill generally provides for the appropriate implementation of the Government's announced intentions regarding the amendment of the Act. Some brief comments about specific aspects of the Bill are set out below.

Penalties for cartel offences committed by persons other than bodies corporate

Cartel conduct is very hard to detect and successfully prosecute and individuals who participate in the creation and management of cartels are therefore unlikely to be prosecuted. For crimes that have a low level of successful detection and prosecution, it is necessary to impose higher penalties to achieve an optimal level of general deterrence.¹ Further, the threat of imprisonment has been recognised as a strong deterrent against the formation of cartels.² We suggested in our submission to the Discussion Paper that a 10 year maximum prison term is a suitable prison term to achieve general deterrence and would also be consistent with existing prison terms for other white-collar Commonwealth offences such as bribery.³

We therefore support the Bill's proposed new subsections 6(5B), 79(1)(e), 44ZZRF(4) and 44ZZRG(4) of the Act to the extent that they propose the relevant cartel offences, if committed by a person other than a body corporate, are punishable on conviction by a term of imprisonment not exceeding 10 years.

However, we also stated in our submission to the Discussion Paper that the proposed maximum fine for individuals who have engaged in criminal cartel conduct of \$220,000, which may be imposed in addition to or as an alternative to imprisonment, is not sufficient, particularly given that the maximum civil penalty for contravention of the new and existing civil penalty prohibitions on cartel conduct (and breaches of other provisions under Part IV of the Act) is \$500,000. The Bill's proposed maximum fine of 2,000 penalty units under proposed new subsections 6(5B), 79(1)(e), 44ZZRF(4) and 44ZZRG(4) remains inadequate, and should be increased to at minimum be consistent with the relevant civil penalties.

Penalties for cartel offences committed by bodies corporate

For corporations and other bodies corporate found guilty of criminal cartel conduct, the Bill's proposed penalty is a fine of a maximum of the greater of \$10 million, 3 times the benefit of the misconduct or 10% of the body corporate's annual turnover. Consumer Action considers that this proposed maximum penalty is consistent with existing civil pecuniary penalties for cartel conduct in the Act, and in our view is the minimum starting point for a criminal penalty for corporations who commit cartel offences. We therefore support these provisions of the Bill.

¹ See, eg, James Mayanja, 'Promoting Enhanced Enforcement of Directors' Fiduciary Obligations: The Promise of Public Law Sanctions', (2007) 20 *Australian Journal of Corporate Law* 157, pages 175-176; Stephen Yoder, 'Criminal Sanctions for Corporate Illegality', (1978) 69 *The Journal of Criminal Law and Criminology* 40, page 45.

² Sjoerd Arlman, *Crime But No Punishment: An empirical study of the EU's 1996 Leniency Notice and cartel fines in article 81 proceedings*, draft of 26 August 2005, page 12. Available at:

http://www.encore.nl/publications/crime%20but%20no%20punishment_arlman.pdf.

³ *Commonwealth Criminal Code* 1995 section 141.1.

Telephone interception powers

The Bill proposes a new subsection 5D(5A) of the *Telecommunications (Interception and Access) Act 1979* (Cth) that would deem a criminal cartel offence under the Act to be 'serious offence' for the purposes of obtaining a telecommunications service warrant under that act by application to a relevant court.

Consumer Action considers that this is appropriate in the case of cartel conduct investigations. The social harm that arises from cartel conduct is enormous in economic and consumer welfare terms and further, cartel conduct is generally very hard to identify and prove. Cartel participants conduct themselves in secret and there can be great difficulty gaining evidence in cartel conduct cases, meaning that telephone interception warrants are an important potential source of evidence available. The experience in the *Geelong Petrol* case suggests that in many circumstances telephone will be the primary means of communication between competitors within an industry and, in the absence of interception and recording of telephone calls, these calls may serve little evidential benefit in securing conviction.⁴

Fault element – 'knowledge or belief', not 'dishonesty'

We support the Bill's provision for the fault element for the cartel offences under the Bill's proposed sections 44ZZRF and 44ZZRG to be 'knowledge or belief'. As we noted in our submission to the Discussion Paper, a requirement to prove subjective dishonesty in engaging in cartel conduct would be so difficult for a prosecutor to prove that the deterrent effect of a criminal offence provision would be largely defeated. The only country that we are aware of that has a dishonesty element with regard to its criminal cartel offences is the UK, and its criminal liability provision for cartel conduct is notable for the almost total lack of enforcement.⁵ We therefore consider that not including this element in the Bill is appropriate.

Civil remedy and enforcement provisions

We consider it appropriate that the Bill provides for civil penalties for cartel conduct as this allows for an effective enforcement response to situations where wrongful conduct is insufficiently serious to warrant criminal prosecution (or where, because of its higher procedural and standard of proof requirements, criminal conviction is unlikely). Following an enforcement pyramid approach, it is desirable that there be a level of enforcement below criminal prosecution that still has a deterrent effect. Civil penalties, with their easier to satisfy standards of proof, fit this role.

In our submission to the Discussion Paper, we suggested that the court be empowered not only to make civil pecuniary penalties but also other civil orders such as management banning orders against individuals who participated in cartel conduct and compensation

⁴ *ASIC v Leahy Petroleum Pty Ltd* [2007] FCA 794 (29 May 2007).

⁵ Andrew Bell, 'Criminal Cartel discussion paper marks major changes to Trade Practices law', *Competition and Consumer Law Update*, Deacons, 1st Ed 2008. Available at: http://www.deacons.com.au/UploadedContent/NewsPDFs/CC_03_0208.html.

orders to parties who have suffered loss as a result of cartel conduct, which would make cartel participants disgorge wrongful gains.

The Bill empowers the court to make a variety of civil orders under sections 80, 86C, 86D, 86E and 87 of the Act, including adverse publicity orders and orders disqualifying a person from managing corporations. We support the availability of these orders and believe they give regulators and the court some flexibility to ensure appropriate and effective enforcement.

However, in providing for section 87 of the Act to be amended so that the Commonwealth Director of Public Prosecutions (**CDPP**) can apply for compensation on behalf of one or more persons who have suffered, or who are likely to suffer, loss or damage by conduct of another person that was engaged in a criminal cartel offence, the Bill replicates the current provisions in the Act that require the Australian Competition and Consumer Commission (**ACCC**) to obtain the consent in writing of each affected party before they can make an application on their behalf (s.87(1B)).

The requirement to obtain each individual party's consent in writing before either the ACCC or the CDPP can make an application for compensation is onerous to the point of effectively preventing these agencies from making any such application. The Productivity Commission has noted that the capacity for representative actions by consumer regulators is currently circumscribed due to current stipulation in the Act that consumers must give consent to be part of a representative action,⁶ and has recommended that an enhanced provision be incorporated to allow consumer regulators to take representative actions on behalf of consumers, whether or not they are parties to the proceedings.⁷

Consumer Action shares this view and recommends that the Bill be amended to align with the Productivity Commission's recommendation and allow the CDPP (or ACCC in the case of civil proceedings) to make applications for compensation on behalf of persons who have suffered loss or damage as a result of cartel conduct without having to obtain the consent of each such party beforehand.

Other matters

We understand that potential differences between the immunity policies of the CDPP and the ACCC with regard to participants in cartel conduct that come forward have been resolved by the creation of an 'Annexure to the *Prosecution Policy of the Commonwealth* for Immunity from Prosecution in Serious Cartel Offences'. Consumer Action supports this approach to granting immunity as the gathering of evidence in cartel conduct cases can be difficult and an effective immunity policy encourages a first whistleblower to come forward.

⁶ Productivity Commission, *Review of Australia's Consumer Policy Framework*, Productivity Commission Inquiry Report No. 45, 30 April 2008, Volume 2, page 216.

⁷ As above, pages 216-18.

Overall, Consumer Action considers that the Bill appropriately promotes the interests of Australian consumers by strongly combating anti-competitive conduct, and will make a valuable addition to Australia's competition law and policy framework.

Should you have any questions in relation to this submission please contact Nicole Rich on (03) 9670 5088.

Yours sincerely

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