Freehills

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23 January 2008
Matter 80844066

Dear Senator Hawkins

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

I was one of the persons consulted by Minister Chris Bowen (**the Minister**) in relation to proposed Government action regarding the above legislation, which has been referred to the Senate Committee (**the Committee**). I was encouraged to make specific submissions in relation to the Bill. As a member of the Trade Practices Committee of the Law Council of Australia, I will also be providing input into its submission. This submission is a personal one.

My submission to the Committee is in relation to the proposed review of the joint venture exception under the *Trade Practices Act 1974* (Cth) (**TPA**) by virtue of the potential operation of the Bill. First, however, may I provide some background.

For many years, the treatment of joint ventures under the TPA was regarded as inappropriate. It did not recognise the importance of joint ventures in an economy, especially an economy such as ours. In the USA, where strict *per se* liability has existed for cartel conduct for many years, joint ventures have been treated as an exception pursuant to the operation of the rule of reason. As recently as 2006, the Supreme Court of the United States confirmed the importance of joint ventures to the economy, recognising that they should be treated differently under the *Sherman Act* (see *Texaco Inc v Dagher et al* (2006) 126 S Ct 1276; (2006) 547 US 1).

In Australia, as a result of recommendations of the Dawson Committee in 2003, amendments were introduced into the TPA, in particular in the form of s 76D, aimed at providing greater 'comfort' for the pursuit of a genuine joint ventures in Australia.

The Bill is, regrettably, deficient in dealing appropriately with genuine joint venture activity. Although it arguably improves the position of persons engaging in joint venture activity in one sense (removing the obligation of the joint venture parties to establish that the joint venture activity is not anti-competitive, as is currently required in s 76D) it worsens the position for them in a very significant fashion. The Bill, if passed in its current form, will lead to great uncertainty, the removal of the encouragement that joint ventures must receive in this country, and place at risk the consistent treatment of serious cartel activity, the eradication of which I support.

The major changes to the legislation that are contained in the Bill have been driven, to a large extent, by what I perceive to be a misunderstanding by the regulator, the Australian

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Competition and Consumer Commission (**ACCC**) and Treasury, on the very dramatic benefits that joint ventures provide our economy. They do not fully recognise that artificial joint venture activity will not be able to rely on the proposed 'protection' unless they operate under a 'genuine' joint venture exception. The proposal in the Bill places the onus on the joint venture party to establish that they are conducting their joint venture activity pursuant to a genuine joint venture (I will not go into the detail of the drafting). This creates a very heavy onus on the proponents to the relevant joint venture activity to establish their entitlement to rely on the exception. The courts will quickly see through artificial attempts to use defences that are not appropriate because there is not a genuine joint venture. The High Court of Australia in dealing with a related issue – whether the overlap between ss 45 and 47 in the TPA applied in the *Visy* litigation (*Visy Paper Pty Ltd v ACCC* [2003] HCA 59), provided a clear illustration of this proposition.

The Bill has changed the approach to the treatment of joint ventures, so that they only apply to contracts. The current legislation refers to "contracts, arrangements, or understandings". Paragraph 4.32 of the Explanatory Memorandum in support of the change notes:

> "'Contract' has its ordinary meaning of an agreement binding 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. In the context of the [TPA], the term refers to agreements that are distinct from those covered by 'arrangements' or 'understandings', which apply to agreements that may not give rise to legally enforceable rights."

Why the legislation has decided to change the coverage to contracts alone is puzzling. This suggests an increasing concern (which has not been illustrated by decided cases) that the term/expression "contract, arrangement or understanding" as used throughout the TPA is inappropriate. The Minister has published for consideration a proposition from the ACCC that the word "understanding" in the TPA should be a specific defence by reference to a new set of definitial criteria as a result of a case. Even if this proposal is accepted, there is no reason why such an extended definition should not apply to joint ventures, together with the concept of an arrangement. Many joint ventures will proceed through a series of both written and unwritten agreements and arrangements. The onus will be on the parties to establish that those arrangements are for the purpose of a genuine joint venture as required by the definition of joint venture in s 4J. The language of the provision should be changed to include "arrangements" and "understanding".

A potentially more serious problem with the proposed provision is the fact that the exception to the prohibition against joint venture cartel activity both criminally and civilly will only apply to the "production and/or supply of goods or services". This language is contrary to the reach of the TPA which relates to activity in trade or commerce. Many joint venture activities arise in the context of the acquisition of goods or services. This is particularly relevant in many service industries. Furthermore, joint research and development activities are absolutely critical in many areas of technology, defence resources, financial services, as well as a number of industries which would arguably be precluded from relying on the joint venture exception. Joint marketing, which is highly relevant to our resources industry, is also likely to be excluded from the joint venture exception. The ACCC in authorisation decisions, and many reports have consistently supported the concept of joint marketing for resources.

I would be happy to appear before the Committee to elaborate on these submissions

Yours sincerely

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