Law Council
OF AUSTRALIA

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

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

Dear Mr Hawkins,

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

I have pleasure in enclosing a submission to the Senate Economics Committee on the latest draft of the *Trade Practices Amendment (Cartel Conduct and Other Measures Bill)* 2008.

The submission has been prepared by the Trade Practices Committee of the Business Law Section of the Law Council of Australia. The submission has been endorsed by the Business Law Section. Owing to time constraints, the submission has not been reviewed by the Directors of the Law Council of Australia Limited.

If you have any questions regarding the submission, in the first instance please contact the Committee Chair, Dave Poddar, on [02] 9296 2281.

GPO Box 1989, Canberra,
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone +61 2 6246 3788
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

Thank you for giving us the opportunity to comment and providing us with an extension of time in which to do so.

Yours sincerely,

Bill Grant
Secretary-General

30 January 2009

Enc.

Trade Practices Committee
Business Law Section
Law Council of Australia

Submission to the Senate Economics Committee on Latest Draft of the *Trade Practices Amendment (Cartel Conduct and Other Measures Bill) 2008*

1 Introduction

1.1 The Trade Practices Committee of the Business Law Section of the Law Council of Australia (**the Committee**) provides this submission to the Senate Economics Committee on the *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008* (**the Bill**), introduced into Parliament on 3 December 2008. The Committee is grateful for the opportunity to participate in the current consultation process.

1.2 The Bill is an important piece of legislation, driven by strong policy considerations. It is crucial for cartel legislation to be targeted and well drafted in order to ensure that cartel behaviour is discouraged and consumers benefit from effective competition in all markets in Australia. The Committee believes that the Bill needs to be amended to achieve these objectives.

2 Executive Summary

2.1 The Committee has previously provided submissions to the Commonwealth Government on earlier drafts of the Bill[1]. The Committee supports the introduction of criminal sanctions for cartel conduct. The Committee, however, remains concerned by a number of aspects of the current Bill, including with respect to its structure, the drafting techniques it employs, and its substantive content. The Committee believes that if the current Bill is passed unchanged, many legitimate and common commercial arrangements (including many involving small businesses) may become unlawful and subject to criminal or civil sanctions. As noted in the Committee's submission of 6 March 2008, this would extend the criminalisation of cartel activity in Australia into many areas of commercial conduct that would not be subject to criminal sanctions in other leading jurisdictions. Moreover, as currently drafted, the Bill would be inconsistent with recommendations of the Dawson Committee, which advocated that "*there should be criminal sanctions for serious cartel behaviour*"[2].

2.2 Consistent with our previous submissions, the Committee wishes to ensure that the Bill will operate harmoniously with the existing provisions of the *Trade Practices Act 1974 (Cth)* (**the TPA**). In particular, this submission addresses three key issues and, to the extent possible in the time available, proposes solutions to the problems identified:

(a) the structure and drafting of the proposed amendments. The Committee advocates the following changes to the structure and drafting of the Bill:

(i) confining the proposed cartel offences to 'serious' cartel conduct;

(ii) confining the proposed new civil cartel prohibitions to types of cartel activity that warrant per se liability;

(iii) confining the exercise of prosecutorial discretion in determining when criminal charges will be pursued;

(iv) removing the unnecessary duplication and complexity that the Bill would currently create, in that cartel conduct will potentially be subjected to the existing civil cartel provisions, the new civil cartel provisions and the new criminal cartel provisions;

---

[1] Submissions were made to the Commonwealth Treasury on 6 March 2008 in respect of the First Exposure Draft and on 21 November 2008 in respect of the Second Exposure Draft. A copy of the second submission was forwarded to the Senate Economics Committee Secretariat on 23 December 2008.

[2] Dawson Report, Chapter 10, p.161.

(v) correcting the inconsistencies highlighted in paragraph 3.1(f) below;

(vi) making the definitions consistent with the remainder of the TPA by removing the proposed definitions in clause 44ZZRB, and the whole of clause 44ZZRE, from the Bill;

(vii) removing clause 44ZZRC from the Bill (extended meaning of party), to avoid any overreaching or uncertainty that this provision may cause by deeming entities to be parties to a criminal cartel;

(viii) simplifying the numbering of the new provisions by moving their position to sections 50B to 50W in Part IV of the TPA;

(b) the joint venture exceptions in clauses 44ZZRO and 44ZZRP. The Committee recommends amending the proposed joint venture exceptions so that:

(i) they apply to arrangements and understandings, as well as to contracts;

(ii) they apply to the acquisition of goods and services, as well as in relation to the production and/or supply of goods or services;

(iii) the proposed joint venture exception in relation to the civil cartel provisions is removed from clause 44ZZRP, with the existing civil joint venture defence in section 76C being expanded to apply to the new civil cartel provisions;

(iv) as regards unincorporated joint ventures, the exceptions should apply to a contract, arrangement or understanding between the joint venturers and a third party, even though the third party is not a participant in the joint venture; and

(c) amending the collective bargaining provisions of the TPA so that:

(i) the monetary limit is raised to $10 million;

(ii) a collective bargaining notice submitted to the Australian Competition and Consumer Commission (**ACCC**) under section 93AB(1)(a) will be deemed to have been made on behalf of all contracting parties.

3 Structure of the Proposed Amendments and Drafting Issues

3.1 The Committee remains concerned by the following aspects of the structure of the proposed cartel amendments:

(a) ***The cartel offences are not confined to serious cartel conduct*** - instead of seeking to apply criminal sanctions to 'serious' cartel conduct as originally proposed by the Dawson Committee[3], the Bill proposes the creation of cartel offences that apply to a wide range of conduct that would not satisfy a criterion of 'seriousness' (based on the effect on competition) and in some cases is not even unlawful under the existing regime.

We acknowledge that there are significant legal, conceptual and drafting issues associated with the task of defining 'serious' cartel conduct for the purposes of criminalisation. However, the Committee is concerned about the introduction of broadly defined offences, the application of which is limited only by the exercise of prosecutorial discretion (see further sub-paragraph (c) below).

[3] Dawson Report, Chapter 10. The Dawson Committee recommended that criminal sanctions would be appropriate only for those restrictive trade practices which amounted to "serious cartel conduct" or "the most serious kinds or cartel behaviour", with other restrictive trade practices being subject to the existing civil framework of Part IV of the TPA.

In response to criticisms made of the Exposure Draft Bill released on 11 January 2008, the Bill introduces express fault elements for the cartel offences that will not apply to the new or existing civil cartel provisions[4]. Further fault elements are implied into the cartel offences by the Criminal Code[5]. These fault elements are an important means of distinguishing between conduct attracting criminal liability and conduct attracting civil liability. However, it is the Committee's view that these discriminators are not sufficient while the physical elements of the cartel offences and new civil cartel prohibitions remain the same.

In its submission dated 5 March 2008, the Committee recommended that both the physical and fault elements of the cartel offences should be more narrowly defined than the elements of the civil prohibitions[6]. In paragraph 10 of its March submission the Committee suggested as follows:

"It may be appropriate, at least in the initial instance, to limit the definition of 'serious cartel conduct' to egregious price fixing, collusive tendering and bid rigging, leaving aside the more difficult territory of exclusionary conduct. Such an approach would achieve the central objective of imposing criminal sanctions, including the jailing of individuals who engage in the most pernicious form of anticompetitive behaviour, with the attendant educative and deterrent results"[7].

The Committee continues to support this view.

(b) ***The new civil cartel provisions are not confined to conduct that clearly warrants per se liability*** - in formulating the new prohibitions, the Government has relied on the 1998 recommendation of the Organisation for Economic Cooperation and Development (**OECD**) that price fixing, output restriction, market sharing and bid rigging are the types of cartel conduct that warrant tough sanctions [8]. However, this recommendation was intended to provide a broad guide to legislators, not to provide a blue print for statutory drafting. Furthermore, the OECD added a significant qualification to its definition by excluding provisions that are *"reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies"*. This important rider on the OECD's recommendation appears to have been overlooked in the drafting of the proposed new civil cartel prohibitions.

Of particular concern to the Committee is the scope of the proposed new prohibition on output restriction in clause 44ZZRD(3). In response to criticisms made of the January Exposure Draft Bill, both restrictive *purpose* and *effect* must be demonstrated in order for the behaviour to be prohibited. Further, responding to criticisms made of the revised Exposure Draft Bill released in October, the Government has reinstated an 'anti-overlap' provision to ensure that provisions that should, by reason of their vertical nature, be subject to a competition test will be considered pursuant to section 47 of the TPA. The Committee commends these changes.

Nevertheless, as currently drafted, the output restriction prohibition is too broad. For example, it is broader than the existing definition under section 4D of exclusionary provisions that are prohibited per se under section 45(2)(a)/(b)(i) of the TPA, in spite of the fact that the breadth of the section 4D definition has been subject to long-standing criticism by the profession and academic commentators. The Dawson Committee officially recognised these shortcomings and made recommendations (which were rejected by the Government) with a view to addressing these problems. Despite subsequent decisions by the High Court in relation to section 4D which were considered to have dealt adequately with the problems of section 4D, there remains considerable uncertainty surrounding its interpretation. Such uncertainty is highly

[4] See proposed ss 44ZZRF(2), 44ZZRG(2).

[5] See the Explanatory Memorandum to the Bill, [2.22]-[2.36].

[6] See [30] of the submission.

[7] See [10] of the submission.

[8] See the Explanatory Memorandum to the Bill, [1.3].

undesirable in connection with a prohibition that imposes a strict form of liability, that is liability without the safeguard of a competition test.

In essence, the problem with the proposed new prohibition on output restriction is that it assumes that an arrangement between competitors that has the purpose of restricting supply, capacity or production will necessarily be anti-competitive. However, such arrangements might equally have purposes that are economically or socially beneficial, and yet will still be subject to per se liability and the substantial penalties attaching under the TPA. It is not a sufficient answer to this criticism, in the Committee's view, to say that parties to such arrangements can apply for authorisation. The authorisation procedure should not be seen as a remedy for poorly drafted and misconceived statutory prohibitions.

In its March submission, the Committee recommended that, in place of the proposed new civil cartel provisions, the Government retain the existing per se prohibitions on price fixing and exclusionary conduct but with minor amendments to address articulated concerns about these prohibitions. Alternatively, the Committee recommended that both the existing per se prohibitions be repealed and that a new set of per se prohibitions be formulated bearing in mind the shortcomings of their predecessors[9].

At the very least, if the Government maintains its proposal not to repeal the existing per se prohibition on exclusionary provisions, then the Committee recommends that the proposed new per se prohibition on output restriction under clause 44ZZRD(3) be removed from the Bill.

(c) ***Prosecutorial discretion should be more confined*** - if the statutory definitions of the cartel offences and the new civil cartel prohibitions remain the same (at least in terms of their physical elements), then it will fall to prosecutorial discretion to determine when conduct should be tried as a cartel offence rather than as a civil contravention, with significant consequences for defendants. It is currently proposed that such discretion be governed by a Memorandum of Understanding (**MOU**) between the ACCC and Commonwealth Director of Public Prosecutions (**CDPP**). The MOU identifies a series of factors to be considered by the ACCC in deciding whether to refer a matter to the CDPP for prosecution and by the CDPP in deciding whether to prosecute[10]. Those factors are as follows:

(i) the conduct was longstanding or had, or could have, a significant impact on the market in which the conduct occurred;

(ii) the conduct caused, or could cause, significant detriment to the public, or a class thereof, or caused, or could cause, significant loss or damage to one or more customers of the alleged participants;

(iii) one or more of the alleged participants has previously been found by a court to have participated in, or has admitted to participating in, cartel conduct either criminal or civil;

(iv) the value of the affected commerce exceeded or would exceed $1 million within a 12-month period (that is, where the combined value for all cartel participants of the specific line of commerce affected by the cartel would exceed $1 million within a 12-month period; and

[9] See [9] of the submission.

[10] The CDPP will also apply the Commonwealth Prosecution Policy which sets out its approach to the prosecution of all federal criminal offences.

(v) in the case of bid rigging, the value of the bid or series of bids exceeded $1 million within a 12-month period[11].

In the Committee's view, these criteria provide insufficient guidance to the business community and its advisers as to when a matter is likely to be pursued as a cartel offence. Of particular uncertainty is when the ACCC and/or the CDPP will regard the circumstances as involving 'significant' impact or detriment. Moreover, the impact of the $1 million value of affected commerce / bid(s) factors is unclear. It may be that the Government intends that they act as a threshold, such that where the value of commerce (or value of bid(s)) affected by cartel conduct exceeds or would exceed $1 million, the conduct's impact will then be assessed for 'significance'. If this is the intention, then the MOU should be amended to indicate as much. However, the point remains that, beyond the threshold, it is very difficult to ascertain where the boundary will be drawn between criminal and civil treatment.

In order to address this difficulty, the Committee suggests that the MOU identify as one of the criteria governing prosecutorial discretion, a more certain and effective measure of the seriousness of the case in question. The Committee recommends the value of affected commerce should be framed as a minimum percentage - say 20%, as under the United States Sentencing Guidelines. Further the Committee suggests that it be framed as the combined value of *all* sales by *all* competitors who competed over the relevant period in the specific line of commerce in the relevant geographic market affected by the cartel.

(d) ***Extended meaning of party should be removed-*** the Committee is concerned that clause 44ZZRC, which deems each related body corporate to be a party to a contract, arrangement or understanding that contains a cartel provision, is likely to create a number of negative consequences and unnecessary practical problems and complications.

For example, on a straight reading of the provision, where a corporation (A) is guilty of making a contract containing a cartel provision (but not giving effect to such a provision), clause 44ZZRC appears to deem each related body corporate to A a party to that contract, arrangement or understanding. It is unclear whether a related party that is "*taken to be a party*" is also deemed to satisfy the knowledge or belief element of the cartel offence in clause 44ZZRF without further steps being required[12]. If so, the related party will face principal liability. This would remove the current requirement of a fault element and create strict liability.

The current drafting in the Bill is unclear as to whether it would be open to an affected related party to rebut the presumption of guilt as a result of the operation of the relevant clause (i.e. on the basis that it did not have knowledge or belief). Even if the related party could seek to rebut the presumption, the Bill appears to create an undesirable effect, as an accessorial entity which is not the main actor in cartel conduct would seem to be subject to a lower standard of liability for a criminal offence than the actual cartelist.

The Explanatory Memorandum to the Bill does not address the point sufficiently. It states that the extended meaning of party "*does not deem a party to have breached the criminal or parallel civil prohibitions regarding making or giving effect to a contract, arrangement or understanding containing a cartel provisions*". Though the offence of "giving effect" to a cartel provision (clause 44ZZRG) will not apply to a related party purely through the operation of clause 44ZZRC, it remains unclear whether the offence of making a contract etc. containing a cartel provision (clause 44AARF) will apply to related parties solely through the operation of clause 44ZZRC.

---

[11] MOU, [4.4].

[12] The nature of different types of deeming provisions has been considered by the courts. See for example, *Macquarie Bank Ltd v Fociri Pty Ltd* (1992) 27 NSWLR 203, 207-8 per Gleeson CJ; *Sec. Dept of Family etc Services v Chamberlain* (2002) 116 FCR 348 at 353 per Kiefel J.

Notwithstanding the limited clarification provided in the Explanatory Memorandum, it is not sufficiently clear how the extended meaning of "party" will operate in practice, as it appears capable of introducing strict liability by virtue of nothing more than the relatedness of certain parties. This may create unwarranted liability, lead to substantial uncertainty for the business community, and undermine the legitimate conduct of business. The Committee therefore suggests that clause 44ZZRC be removed from the cartel bill. In the alternative, the clause should be amended to make it clear that unless a related party takes steps to make a contract, arrangement or understanding which contains a cartel provision it will not, by operation of clause 44ZZRC, be deemed to be a party to that contract, arrangement or undertaking such that it will face concomitant criminal or civil accessorial liability.

(e) ***Unnecessary duplication and complexity*** - the Bill does not propose to repeal the existing civil prohibitions (other than section 45A in relation to price fixing), which will result in those civil prohibitions continuing to operate in parallel with both the new civil prohibitions and offences. For example, an agreement between two competitors to boycott a particular supplier would currently involve an "exclusionary provision" in breach of section 45 of the TPA. Under the Bill, it will continue to constitute a contravention of section 45 and would also constitute a contravention of the new civil prohibition on restriction of supply. Further, subject to satisfaction of the fault elements, it could constitute a cartel offence. This level of duplication represents unnecessary regulation and is likely to lead to unwarranted confusion and increased compliance costs for businesses, as well as unduly protracted and expensive litigation. Greater clarity of application is necessary in the Committee's view; and

(f) ***Inconsistency*** - in addition to the points discussed above, the Bill is not consistent with certain existing provisions of the TPA. This is likely to result in unintended outcomes and avoidable confusion as to the application of the legislation. For example:

(i) clause 44ZZRD(3)(a)(iii) of the Bill (which defines the "purpose" condition of the cartel provision) refers to the supply of goods or services to "*persons or classes of persons*". This differs from sections 4D and 47(2)(f) of the TPA which refer to "*particular persons or classes of persons*". This seemingly minor discrepancy changes the existing law regarding cartels, and creates a very real risk that conduct that is currently lawful will nonetheless fall within the new cartel provisions; and

(ii) clause 44ZZRU has introduced an exception in relation to a contract, arrangement or understanding containing a cartel provision, "*in so far as the cartel provision provides directly or indirectly for the acquisition of*" any shares of a body corporate or assets of a person. The Committee welcomes the introduction of an exception of this nature. However, the manner in which this exception is drafted is inconsistent with, and potentially much narrower than, the existing equivalent exception in section 45(7)[13]. The proposed new exception should mirror the existing wording in order to provide consistency and practical coverage so that legitimate merger and acquisition agreements will not be subject to cartel liability.

(e) ***Special definitions*** - the Bill includes numerous special definitions that are expressed only to apply to this proposed new Division in Part IV of the TPA, even though some of these terms are used extensively throughout other Divisions of Part IV of the TPA.

For example, the term "likely" is a key term which currently appears in sections 45, 47 and 50 and which has been the subject of extensive judicial consideration.

[13] That is, the exception should be in relation to "*a contract, arrangement or understanding in so far as the contract, arrangement or understanding provides, or to or in relation to a proposed contract, arrangement or understanding in so far as the proposed contract, arrangement or understanding would provide, directly or indirectly for the acquisition of any shares in the capital of a body corporate or any assets of a person*".

Nevertheless, it is proposed to be the subject of a special definition for the purposes of the Bill, with that definition not applicable to the remainder of Part IV of the TPA. Another example is the term "annual turnover", which is also given a special definition notwithstanding the fact that the term appears in a similar context in section 76.

This questionable approach is compounded by clause 44ZZRE, which provides that this Division be disregarded in determining the meaning of terms in other parts of the TPA. This unduly complicates the TPA and appears to be unnecessary. Any additional definitions should be included in section 4 of the TPA and should apply to the whole of the TPA. Such an amendment would make clause 44ZZRE redundant.

(g) ***Numbering*** - The numbering of the proposed cartel provisions is unnecessarily complex. Clause numbers consisting of two digits and four letters (e.g., clause 44ZZRA) are not conducive to ease of comprehension or application of law.

The numbering could be easily simplified by placing the proposed cartel provisions after, rather than before, the existing operative restrictive trade practices provisions of sections 45 to 50. This would enable the cartel provisions to be numbered with only one letter instead of four (e.g., section 50B, et seq.).

3.2 In the Committee's view, inconsistency in drafting makes effective and consistent interpretation of the Bill difficult and is likely to undermine the policy goals behind the Bill.

4 Joint Ventures

Introduction

4.1 The Bill proposes removing the existing defence for joint ventures in section 76D and replacing it with new exceptions in clauses 44ZZRO and 44ZZRP which, in some respects, are more limited. The Committee's concerns are that the proposed joint venture exceptions:

(a) may penalise legitimate joint venture activity that would ordinarily be pro-competitive or competition neutral; and

(b) are inconsistent with the existing defence under section 76C which is intended to be preserved.

Comments on the joint venture exception proposed by the Bill

4.2 The Committee has five practical concerns about the impact of the joint venture exceptions of the Bill.

4.3 First, the Bill limits joint venture exceptions to contracts, rather than also to arrangements or understandings as is usually the case under the TPA. This may result in operational decisions or agreements by joint venturers which are not enshrined in a contract falling within the definition of a 'cartel provision', even though they are made for the purposes of a legitimate joint venture. The Committee recommends that this wording should be made consistent with the remainder of the TPA, i.e. it should refer to "*contracts, arrangements or understandings*". If the policy reason behind the definition is to seek to ensure that the most serious cartelists cannot claim that their cartel is a joint venture, then the Bill has put legitimate commercial activity at risk of criminal sanctions unnecessarily because "hardcore cartelists" could still claim to have a "contract".

4.4 Second, the drafting of clauses 44ZZRO and 44ZZRP is such that the exception is only applicable to joint ventures which are "*for the production of goods and/or supply of goods or services*". As drafted, the exception is overly prescriptive. The Committee does not support the notion behind the current drafting that the only legitimate joint venture is one that "*produces goods*" or "*supplies services*" as its sole or dominant function. Moreover, this definition is contrary to the wider definition of joint venture in section 4J which does not seek

to prescribe the type of activity in trade or commerce that a legitimate joint venture may pursue.

4.5 In our experience, legitimate joint ventures may be created to cooperate in activities which may not be covered by the current drafting in the Bill. In particular:

(a) the joint acquisition of goods and/or services - this can occur in a number of industries, including among small businesses that intend to pool their resources in order to obtain more favourable terms of trade;

(b) joint research and development - such joint ventures may occur in cutting-edge industries such as biotechnology or defence. Where research is conducted without a specific end product being produced, the Bill as currently drafted may result in criminal liability attaching to the participants; or

(c) joint marketing or advertising - the purpose or end result of joint marketing ventures is unlikely to be anti-competitive and may in fact provide choice to consumers. Nevertheless, this type of joint venture may be subject to civil or criminal sanctions under the Bill.

4.6 The narrow scope of the existing definition that requires a joint venture to produce and/or supply goods or services is likely to prejudice innovation in a range of sectors which play a vital role in the Australian economy, including financial services, information technology and the important resources sector. It may also result in unwarranted criminalisation of legitimate activity.

4.7 Third, the inclusion of clause 44ZZRP is arguably unnecessary because a civil case cannot be run concurrently with a criminal one, nor will a civil case be pursued subsequently in the event that a criminal conviction is obtained. Consequently, in the Committee's view, it is preferable for civil liability for cartel activity to be subject to the existing civil provisions under sections 4J and 76C, which operate effectively, rather than to introduce changes with the clause 44ZZRP exception, substantially amending the existing rules. The removal of clause 44ZZRP and reliance on section 76C (with appropriate modifications to cover cartel provisions) is recommended. Even with the removal of clause 44ZZRP, a criminal prosecution could still take place in appropriate circumstances.

4.8 Fourth, with regard to unincorporated joint ventures, the drafting of the criminal and civil joint venture exceptions in the Bill require that the joint venture be carried on jointly "*by the parties to the contract*" under consideration (clauses 44ZZRO(1)(c) and 44ZZRP(1)(c)). The Committee believes that in certain circumstances third parties may not benefit from the joint venture defences. For example, where unincorporated joint venture parties enter into a contract with a third party (e.g., to acquire output produced by the joint venture), that contract may contain a cartel provision. However, as that third party is not a joint venture participant, the defence as currently drafted would not apply.

4.9 Fifth, the Dawson Committee highlighted the importance in United States antitrust practice of a 'rule of reason' test in relation to joint ventures. Under such a test, agreements that may ordinarily be subject to per se prohibition when not made between joint venture parties may be examined under a rule of reason test if they are "*reasonably related to, and reasonably necessary to achieve pro-competitive benefits from, an efficiency-enhancing integration of economic activity*"[14]. The United States Congress has also provided that certain contracts established to carry out a range of research and development and production joint ventures can only be examined under the rule of reason. If, at the completion of the rule of reason analysis, the agreements are deemed reasonably necessary to produce the "*cognizable efficiencies*" flowing from the collaboration, any challenge to the agreement will be withdrawn.

[14] Dawson Committee Report, pp.138-139.

Suggested solutions

4.10 The Committee proposes the following solutions to the issues identified above:

(a) ***Contract, arrangement or understanding*** - as drafted, the Bill limits the application of the joint venture exception to provisions in contracts only. The Committee submits that the wording in clauses 44ZZRO(1) and 44ZZEP(1) should reflect the existing wording of the TPA in section 4J (and the wording of the proposed contravention to which it is to be an exception) by referring to a provision of a contract, arrangement or understanding;

(b) ***Purpose*** - the Committee is particularly concerned at the requirement as currently drafted, that a joint venture must be for the production and/or supply of goods or services in order for the defence to apply. This formulation is contrary to the recommendations of the Dawson Review Committee and the existing drafting in sections 76C and 76D. If the Bill is adopted as drafted, a number of legitimate joint venture activities may be subject to criminal or civil liability. The drafting of clause 44ZZRO(1)(b) should be amended to read *"for the production and/or supply and/or acquisition of goods or services"*;

(c) ***Civil liability*** - the Committee does not question the inclusion of criminal liability for joint venture activity which may contravene clauses 44ZZRF or 44ZZRG, and it supports the intention behind clause 44ZZRO. However, the overlap between the exception available to joint venture participants in civil cases created by clause 44ZZRP creates uncertainty. Consequently, the Committee suggests that clause 44ZZRP should be removed and the existing defence under section 76C (with appropriate modifications) continue to apply in civil cases. This would result in civil joint venture cases being assessed as to whether the cartel provision was for the purposes of a joint venture and, if so, whether or not it has the purpose, effect or likely effect of substantially lessening competition. The criminal aspects of the Bill would remain unaffected;

(d) ***Third party contracts*** - the Committee submits that the Bill be amended to allow third parties with contractual relations with the joint venture entity to benefit from the existing joint venture defence in situations where supply or acquisition agreements with the joint venture contain cartel provisions, provided that the agreement does not have the purpose or effect (or likely effect) of substantially lessening competition; and

(e) ***Rule of reason*** - the Committee submits that further analysis of the benefits of adopting a 'rule of reason' test in relation to joint venture agreements should be undertaken.

5 Collective Bargaining

5.1 Although the Bill includes an exception to the civil and criminal provisions for collective bargaining conduct which is notified to the ACCC under section 93 AB (1A)[15], there are two practical problems that the Committee wishes to raise:

(a) no change is proposed to the current monetary limit of $3m.[16] As a result, no collective bargaining exemption is available for the making or giving effect to a provision of a contract, or a series of contracts, where the collectively negotiated price for the supply or acquisition of goods or services under the contracts or contracts exceeds the threshold of $3 m; and

(b) where a collective bargaining notice has been submitted to the ACCC under section 93AB(1A), section 93AEA of the Bill prevents a further collective bargaining notice from being submitted by any person in relation to *"the same contract or proposed*

[15] See s 44ZZRL.

[16] See s 93AB(4).

contract or in relation to a contract or proposed contract to the like effect". This changes the existing position under section 93AB(7) which allows one party to notify the ACCC on behalf of another contracting party, but does not prevent further notification from being made.

5.2 Many collectively negotiated contracts relate to the supply or acquisition of goods for amounts in excess of $3m. Consequently, the Committee suggests raising the current threshold to a more commercially practical level of $10m. Further, the Committee suggests that section 93AEA is amended to make clear that where a notice is made to the ACCC pursuant to section 93AB(1A), it will be deemed to be made on behalf of all contracting parties.

30 January 2009