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

Submission
by

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The criminalisation of cartels: Long overdue and essential

The criminalisation of cartels is essential to the proper and efficient functioning of a market economy such as Australia. Cartels interfere with the proper functioning of a market by manipulating or seeking to manipulate the price and/or supply of goods or services for the purposes of having consumers pay more for good or services than they would otherwise have paid in the absence of the cartel. In this regard, a cartel is designed to suppress or prevent competition between market participants for their benefit and to the detriment of consumers.

Cartels are a form of organized crime. They are pre-mediated and designed by cartel participants to unjustifiably take money from consumers. In short, cartels represent an unjustified shifting of economic wealth from consumers to suppliers of goods or services. This shifting of economic wealth is unjustified simply because cartels breach a fundamental principle of a market economy and that is, that a freely functioning competitive process between competitors or potential competitors will, in the absence of market failure, deliver the lowest possible price.

Within this context, cartels represent one of the most serious forms of market failure. By tampering with or manipulating the competitive process, cartels tamper with or manipulate the price and/or supply of goods or services in an organized or coordinated manner designed to benefit the cartel participants by raising prices to consumers above competitive levels. Consumers are paying more for goods or services for no reason other than a group of competitors have decided amongst themselves that consumers should pay more. Consumers are being “ambushed” by the cartel for the purposes being “robbed” by the cartel participants.

Given that cartels represent one of the most serious threats to the proper and efficient functioning of market economies, there can be no doubt that cartels must be dealt with in the strongest possible manner. As with any unlawful taking of money cartels are criminal in nature and need to be treated as such for the simple reason that in our society we do not condone such behaviour.

Of course, the imposition of a criminal penalty is not to be treated lightly and that requires that any criminal offence be carefully drafted to state as clearly as possible the particular conduct giving rise to the offence. Clarity is essential, as is simplicity in the drafting of the criminal offence. Failure on these counts breaches another fundamental principle in our society and that is, that a person should be capable of understanding the nature of the criminal charge that he or she is facing or could potentially face. This principle is particularly sacrosanct when the criminal charge can lead to a jail term.

Cleary, a failure to clearly draft a criminal offence not only places an unfair burden on those seeking to comply with the law but it undermines the deterrence value of the offence as well as jeopardizing the successful prosecution of the offence.

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

Having regard to the fundamental principles at stake in the criminalisation of cartels, it is essential that the proposed cartel offences are clearly and concisely drafted. Unfortunately, and with all due respect to the drafters of the *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008*, the proposed Bill is flawed in a number of key respects. These flaws include:

(i) the proposed criminal offences are drafted in a complex and confusing manner;
(ii) the proposed Bill includes civil penalty provisions which are unnecessary given that equivalent provisions are already contained in Part IV of the *Trade Practices Act*;
(iii) the proposed criminal fine to be imposed on individuals is too low thereby minimising the deterrent value of the fine;
(iv) the proposed new joint venture defence is far too broad allowing serious cartel behaviour to escape prosecution; and
(v) the numbering system adopted in the proposed Bill is convoluted and confusing.

These flaws will place an unfair burden on those seeking to comply with the law but will undermine the deterrence value of the proposed offences as well as jeopardise the successful prosecution of the proposed offences.

Finally, the proposed Bill fails to include a mechanism to allow consumers and small businesses to efficiently recover losses arising from cartel behaviour.

List of recommendations

(1) Redraft the criminal offence provisions in a clear and concise manner;

(2) Remove the civil penalty provisions from the Bill;

(3) Raise the criminal fine for individuals engaging in or attempting to engage in criminal cartel behaviour to a maximum of $1 million;

(4) Maintain the current joint venture defence in s 76D in relation to both the proposed criminal cartel offences and proposed/existing civil penalty provisions;

(5) Simplify the numbering of legislative provisions in the Bill in a sensible manner; and

(6) Amend the *Trade Practices Act* to provide that the Court can issue a class compensation order whereby a Court would,

once a cartel offence has been proven or a breach has been found in an action brought by the ACCC, have the power to compensate affected consumers and small businesses without the need for those consumers and small businesses to bring their own action or recovery proceedings;

Simplifying the drafting of the criminal cartel offences

The drafting of s 44ZZRD which sets out the "cartel provisions" prohibited under the Bill is, with all due respect to the drafters, convoluted and would be difficult for a jury to follow or comprehend.

While the complexity of the cartel provisions is related to the attempt by the draftsperson to ensure that the cartel provisions as defined cover all forms of conduct to be caught by both the criminal cartel offences and the civil penalty provisions in the Bill, the clear danger of such a strategy is that the draftsperson has failed to distinguish between conduct that is sufficiently serious to justify a criminal offence and conduct that is less objectionable and should only be subject to a civil penalty.

By seeking to cover all forms of conduct to be caught by both the criminal cartel offences and the civil penalty provisions, the definition of a "cartel provision" becomes unnecessarily complex. Such complexity can easily be avoided by (i) removing the civil penalty provisions proposed by the Bill and continuing to rely on the existing civil penalty provisions in Part IV of the *Trade Practices Act*; and (ii) confining the scope of the Bill to merely identifying the particular conduct that is sufficiently serious to justify criminalisation of the conduct.

After all, as the stated objective of the Bill is to criminalise serious cartel behaviour it should be focused solely on that objective rather than trying to criminalise cartels and at the same time trying to replicate the existing civil penalty provisions found in Part IV of the *Trade Practices Act*. By focussing solely on criminalising serious cartel behaviour, the drafting of the Bill could be simplified considerably.

In short, the Bill should refrain from trying to reinvent the wheel regarding the proposed civil penalty provisions and instead stick to clearly defining the particularly objectionable conduct that needs to be criminalised because it represents an unlawful taking of money from consumers.

Given that the essence of serious cartel behaviour is the tampering with or manipulation of the price and/or supply of goods or services in an organized or coordinated manner designed to benefit the cartel participants by raising prices to consumers above competitive levels, there would be clear merit in drafting criminal cartel provisions to specifically target such conduct.

Within this context, and given that the clear intent behind serious cartels is to raise prices, or more specifically to unlawfully take money from consumers, it would be appropriate to define criminal cartel offences by reference to organised or coordinated conduct amongst competitors or potential competitors designed to raise prices or otherwise interfere with the price mechanism to the detriment of consumers.

With these parameters in mind, the following drafts of specific criminal cartel offences are set out below to illustrate how such offences could be drafted in a targeted yet plain-language manner:

Draft price fixing offence

It is an offence for 2 or more competitors or potential competitors to make or attempt to make a contract or an arrangement, or arrive at or attempt to arrive at an understanding that has the purpose, or effect or likely effect of fixing, raising, controlling, maintaining stabilising or influencing the price for, or a discount, surcharge, allowance, rebate or credit in relation to, the supply or acquisition of goods or services.

Draft supply manipulation offence

It is an offence for 2 or more competitors or potential competitors to make or attempt to make a contract or an arrangement; or arrive at or attempt to arrive at an understanding that;

(i) prevents, restricts, limits, fixes, controls, stabilises, divides up or influences the supply or production of goods or services; or
(ii) seeks to prevent, restrict, limit, fix, control, stabilise, divide up or influence, the supply or production of goods or services;

for the purpose, or in a manner that has the effect or likely effect of fixing, raising, controlling, maintaining, stabilising or influencing the price for, or a discount, surcharge, allowance, rebate or credit in relation to, the supply or acquisition of goods or services.

Draft market sharing offence

It is an offence for 2 or more competitors or potential competitors to make or attempt to make a contract or an arrangement; or arrive at or attempt to arrive at an understanding that;

(i) divides up amongst any or all of the competitors or potential competitors the customers or potential customers for goods or services; or
(ii) seeks to divide up amongst any or all of the competitors or potential competitors the customers or potential customers for goods or services;

for the purpose of, or in a manner that has the effect or likely effect of fixing, raising, controlling, maintaining, stabilising or influencing the price for, or a discount, surcharge, allowance, rebate or credit in relation to, the supply or acquisition of goods or services.

Draft bid manipulation offence

It is an offence for 2 or more competitors or potential competitors to make or attempt to make a contract or an arrangement; or arrive at or attempt to arrive at or an understanding that;

(i) prevents the making of a bid for the supply or acquisition of goods or services by any or all of the competitors or potential competitors; or
(ii) restricts, limits, fixes, controls, or influences; or seeks to restrict, limit, fix, control, or influence a bid; or any terms or any part of the bid, for the supply or acquisition of goods or services made by any or all of the competitors or potential competitors;

for the purpose of, or in a manner that has the effect or likely effect of fixing, raising, controlling, maintaining, stabilising or influencing the price for, or a discount, surcharge, allowance, rebate or credit in relation to, the supply or acquisition of goods or services.

RECOMMENDATION

Redraft the criminal offence provisions in a clear and concise manner.

Removing the civil penalty provisions from the Bill

Given that “civil penalty” provisions are already found in s 45 and s 45A of the *Trade Practices Act*, there is no compelling case for the Bill to propose new civil penalty provisions. Since the purpose of the debate surrounding the criminalisation of cartels has obviously been to impose jail terms and criminal fines for cartel behaviour, there is much to be said for confining any proposed legislation to merely criminalising cartels. To go beyond that and start proposing new civil penalties in circumstances where there are already civil penalty provisions in the Part IV of the *Trade Practices Act* is to introduce a new layer of complexity in the Bill which is simply unnecessary.

In this regard, removing the proposed civil penalty provisions and continuing to rely on the existing civil penalty provisions of the *Trade Practices Act* would simply the Bill considerably and focus attention solely on the scope and drafting of the proposed criminal cartel offences.

RECOMMENDATION

Remove the civil penalty provisions from the Bill.

Raising the criminal fine for individuals to $1 million

The proposed criminal fine for individuals found guilty of a criminal cartel offence is too low. The proposed fine for individuals is currently set at $220,000. This is lower than current maximum civil penalty of $500,000. The lower criminal penalty has been justified in the Explanatory Memorandum on the basis that a criminal penalty should be lower than a civil penalty (see para. 2.48). With all due respect, this purported justification misses the central point of setting the size of the monetary penalty and that is, whether the proposed criminal fine for individuals of $220,000 is set sufficiently high to provide a clear deterrent to what is one of the most serious forms of detrimental conduct towards consumers.

Given that cartels can illegally extract considerable sums of money from consumers totalling millions or even hundreds of millions (or more), it becomes readily apparent that $220,000 is a minuscule amount and may offer little, if any, financial deterrent to those intent on engaging in criminal cartel behaviour. While, of course, the proposed maximum jail term of 10 years will also be available, it is equally clear that the $220,000 proposed maximum criminal fine does not send the same strong signal that a 10 year jail sentence sends to those considering engaging in criminal cartel behaviour. In short, the proposed criminal fine needs to the commensurate to the proposed jail term and, in this regard, a maximum criminal fine of $1 million would send a very strong signal to those thinking of engaging in criminal cartel behaviour.

Needless to say, if it is then considered necessary for a civil penalty to be higher than a criminal fine, a compelling case could be made to raise the current maximum civil penalty of $500,000 (also minuscule in the scheme of things) to an amount higher than the $1 million proposed in this submission as an appropriate maximum criminal fine.

RECOMMENDATION

Raise the criminal fine for individuals engaging in or attempting to engage in criminal cartel behaviour to a maximum of $1 million.

Maintain the current joint venture defence in s 76D in relation to both the proposed criminal cartel offences and proposed/existing civil penalty provisions.

The proposed new joint venture defence found in s 44ZZRO in relation to the proposed criminal cartel offences is far too broad. Similarly, the proposed new joint venture defence found in s 44ZZRP in relation to the proposed civil provisions are also far too broad.

Currently, s 76C and s 76D provide a defence to an action under s 45 if the person establishes that a provision of a contract, understanding or arrangement which would be in breach of s 45:

(a) is for the purposes of a joint venture; and
(b) does not have the purpose, and does not have and is not likely to have the effect, of substantially lessening competition.

While the defence found in s 76C and 76D is very wide, it is limited somewhat by the requirement that the joint venturers establish that the joint venture does not have the purpose, and does not have and is not likely to have the effect, of substantially lessening competition. This requirement assesses the joint venture by reference to the joint venture's impact on competition. If the joint venture fails this competition test, then the joint venture is so detrimental to competition and consumers that it should not be allowed to stand and, accordingly, the defence would fail.

Under the Bill a new joint venture defence in s 44ZZRO (Criminal prosecution) and s 44ZZRP (civil penalty proceedings) applies to a:

> (1) …to a contract containing a cartel provision if:
>
> (a) the cartel provision is for the purposes of a joint venture; and
>
> (b) the joint venture is for the production and/or supply of goods or services; and
>
> (c) in a case where subparagraph 4J(a)(i) applies to the joint venture—the joint venture is carried on jointly by the parties to the contract; and
>
> (d) in a case where subparagraph 4J(a)(ii) applies to the joint venture—the joint venture is carried on by a body corporate formed by the parties to the contract for the purpose of enabling those parties to carry on the activity mentioned in paragraph (b) jointly by means of:
>
> (i) their joint control; or
> (ii) their ownership of shares in the capital;
>
> of that body corporate.

While the proposed defence is confined to a “contract” the proposed defence is still far too broad as it removes the competition test currently found in s 76D. The omission of the competition test would mean that the proposed joint venture defence would be too easily established as all that the parties involved would need to prove is that there was a joint venture. This is an extremely low threshold and allows parties who are intent on engaging in cartel activity to simply structure their activities as a joint venture. Such ease in constructing a defence to the criminal cartel offences and civil penalty provisions would substantially undermine the ability to successfully prosecute cartels.

The already very broad width of the proposed new joint venture in s 44ZZRO and s 44ZZRP would be expanded dramatically if, as proposed by other submissions to this Inquiry, the proposed new joint venture defence was extended beyond “contracts” to include “arrangements” or “understandings.” Clearly any further widening of the already very broad proposed new joint venture defence in s 44ZZRO and s 44ZZRP would not only undermine considerably the ability to successfully prosecute criminal cartel behaviour, but the broadness of the proposed new joint venture defence would effectively be condoning cartel behaviour having a seriously detrimental impact on competition and consumers.

In the circumstances, it is appropriate to maintain the current joint venture defence in s 76D in relation to both the proposed criminal cartel offences and proposed/existing civil penalty provisions. While of course there remains the very real concern that the existing joint venture defence in s 76D may over time need to be tightened, there is no doubt that s 76D despite its faults is still preferable to the extremely broad scope of the proposed new joint venture defence in s 44ZZRO and s 44ZZRP.

RECOMMENDATION

Maintain the current joint venture defence in s 76D in relation to both the proposed criminal cartel offences and proposed/existing civil penalty provisions.

Simplifying the numbering of legislative provisions in the Bill in a sensible manner

With all due respect to the drafters of the Bill the numbering scheme adopted in the Bill is very confusing. The combination of a number and various letters of the alphabet to identify a legislative provision is difficult to follow and quite simply unnecessary. It needs to be remembered that cartel offences will be heard by a jury and it does not take much imagination to realise that juries will be easily confused by repeated mention of different legislative provisions combining a number and an array of letters.

Following the technical aspects of the cartel offences as currently drafted in the Bill would be challenging enough for a jury without the jury also having difficulty trying to follow a convoluted numbering system. For example, just consider a jury being referred to a definition in s 44ZZRB that is relevant to a cartel offence described in s 44ZZRD which is illegal under s 44ZZRF. With the repeated references to different legislative provisions numbered in this way throughout a trial, it will not be too long before the numbering system will become a blur to the jury and may even test the memory of legal counsel and the judge involved in the case. Such confusion or potential confusion will jeopardise the running of the case and the chances of a successful prosecution.

This confusion and potential confusion can quite simply be avoided and it is disappointing that the drafters of the Bill have not taken this opportunity. The easiest solution would be to insert a new Part or Division at the end of the *Trade Practices Act*. That would make available a whole new set of numbers without the need to add letters to a number if the cartel offences were inserted within the existing body of the *Trade Practices Act*.

RECOMMENDATION

Simplify the numbering of legislative provisions in the Bill in a sensible manner.

Class compensation order

A key challenge faced by consumers and small businesses relates to their current inability to recover losses from cartel behaviour or breaches of the *Trade Practices Act* in a timely and cost-effective manner. All too often agencies like the ACCC can successfully prosecute breaches of the *Trade Practices Act*, but consumers or small businesses affected by the conduct find it to difficult to cost-effectively recover their losses.

Within this context, it is appropriate to consider a new approach to efficiently and effectively facilitating the recovery of losses from cartel behaviour or breaches of the *Trade Practices Act*. Such an approach could involve giving the Courts the power to make a "class compensation order" whereby the Court would, once a cartel offence has been proven or following a finding that there has been a breach of the *Trade Practices Act*, order the business to compensate all affected consumers or small businesses notifying a court-appointed assessor of their loss or other claim within a specified period of time.

Under a class compensation order, the Court would have the power to compensate affected consumers or small businesses without the need for those consumers or small businesses to bring their own action or recovery proceedings. In particular, a class compensation order would, once a breach has been found in an action brought by the ACCC, allow the Court itself to set up a framework:

(i) to ensure that affected consumers and small businesses are notified within a reasonable period of time that they are able to make a claim to the particular Court in relation to the contravening conduct;
(ii) allowing a reasonable period of time for affected consumers and small businesses to lodge their claim;
(iii) appointing an assessor, answerable to the Court, to review all claims lodged by affected consumers and small businesses within the specified time; and,
(iv) for the Court to finally approve any claim recommended by the assessor.

This process would be funded by the contravening party and would provide a streamlined process for dealing with individual claims arising from a proven breach. While there would be judicial oversight of the process, the Court itself would not be tied down by having to consider the factual background of each affected franchisee. Indeed, any factual assessment of individual claims can easily be undertaken by an assessor or assessors, who could conduct such assessments in a very efficient and cost effective manner without the need to take up valuable court time.

Thus, a class compensation order would not only enable consumers and small businesses affected by the contravening conduct to recover their losses in a streamlined manner, but such an order would be an excellent way to

avoid courts being clogged up by a proliferation of individual recovery actions which may occur at present. Importantly, a class compensation order would allow the Courts to respond flexibly and effectively to cases where a large number of consumers and small businesses are affected by the contravening conduct and, in this regard, the availability of a class compensation order would enable the ACCC to play a leadership role in targeting conduct that has a wide-ranging detrimental impact on consumers and small businesses.

My proposal for a “class compensation order” was considered on page 236 of an article published last year titled "Are Australia's consumer laws fit for purpose," (*Trade Practices Law Journal*, Vol. 15, p. 227). A copy of the article has been provided in Appendix 1 of this Submission.

RECOMMENDATION

Amend the Trade Practices Act to provide that the Court can issue a class compensation order whereby a Court would, once a cartel offence has been proven or a breach has been found in an action brought by the ACCC, have the power to compensate affected consumers and small businesses without the need for those consumers and small businesses to bring their own action or recovery proceedings.

APPENDIX 1

Zumbo, F., (2007), "Are Australia's Consumer Laws Fit for Purpose?" *Trade Practices Law Journal*, Vol. 15, pp. 227-237.