

Parliament of Australia

Senate Economics Committee

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

**Supplementary
Submission
by**

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Distinguishing between serious cartel conduct and less objectionable conduct

As noted in my original submission a fundamental flaw in the *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008* is that it fails 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.

In practice, this failure to distinguish between serious cartel conduct and less objectionable conduct means that the Bill leaves it entirely to the ACCC and the Commonwealth DPP to determine which conduct will be prosecuted as a criminal offence. With all due respect, leaving the choice of which conduct will be prosecuted as a criminal offence totally in the hands of the ACCC and the Commonwealth DPP is most unsatisfactory as it fails to provide appropriate certainty as to which conduct is sufficiently serious to constitute a criminal offence.

Such an unsatisfactory outcome can be easily avoided by an appropriate amendment to the criminal cartel offences. The suggested amendments are shown in bold italics:

44ZZRF Making a contract etc. containing a cartel provision

Offence

- (1) A corporation commits an offence if:
 - (a) the corporation makes a contract or arrangement, or arrives at an understanding; and
 - (b) the contract, arrangement or understanding contains a cartel provision; **and**
 - (c) ***the cartel provision (other than a cartel provision satisfying the purpose/effect condition in s 44ZZRD(2)) has the purpose, or effect or likely effect of, directly or indirectly, 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.***

44ZZRG Giving effect to a cartel provision

Offence

- (1) A corporation commits an offence if:

- (a) a contract, arrangement or understanding contains a cartel provision; and
- (b) the corporation gives effect to the cartel provision; **and**
- (c) ***the cartel provision (other than a cartel provision satisfying the purpose/effect condition in s 44ZZRD(2)) has the purpose, or effect or likely effect of, directly or indirectly, 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.***

For the sake of completeness it should be noted that these suggested amendments would also need to be made to the Schedule version of sections 44ZZRF and 44ZZRG. Needless to say, since cartel provisions relating to price fixing etc. covered in s 44ZZRD(2) already refer to the conduct's impact on price such cartel provisions do not need to be covered by the suggested amendments. The "price fixing" cartel provisions in s 44ZZRD(2) are, unlike the other cartel provisions covered in s 44ZZRD(3), already tested by reference to their impact on the price of goods or services.

Within this context, the suggested amendments would add a new requirement that in order for the cartel conduct under s 44ZZRD(3) to constitute a criminal offence the conduct in question must be designed to raise prices or otherwise interfere with the price mechanism to the detriment of consumers. Such an approach would provide an appropriate distinguishing criterion between serious cartel behaviour and less objectionable conduct. Indeed, the criterion's focus on the raising or manipulation of price amply highlights the evil that the criminal offence is trying to stop. Such manipulation or "rip off" is a matter that consumers and, more importantly, juries can easily understand.

Importantly, such an approach would also be consistent with the economic literature showing 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 raise prices above competitive levels to the detriment of consumers. This price gouging effect of serious cartel conduct is clearly demonstrated by a definitive study by Lande & Connor, "How High Do Cartels Raise Prices? Implications for Reform of the Antitrust Sentencing Guidelines," (2005) 80 *Tulane Law Review*, 513.

The need to distinguish between pro-competitive and anti-competitive joint ventures

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 is also far too broad. These proposed new joint venture defences do not provide an appropriate framework for distinguishing between pro-competitive and anti-competitive joint ventures. Significantly, despite such a framework being available in s 76C and s 76D of the *Trade Practices Act* such a framework is not adopted in the Bill. This omission is a further fundamental flaw in the Bill.

Within this context, it would be submitted that the approach in s 76C and s 76D should be adopted in relation to the joint venture defences under the Bill. 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.

These defences in s 76C and s 76D are 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. Such an approach could easily be adopted in the Bill through the following suggested amendment in bold italics:

44ZZRO Joint ventures—prosecution

- (1) Sections 44ZZRF and 44ZZRG do not apply in relation 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; **and**

- (e) ***the joint venture does not have the purpose, and does not have and is not likely to have the effect, of substantially lessening competition.***

44ZZRP Joint ventures—civil penalty proceedings

- (1) Sections 44ZZRJ and 44ZZRK do not apply in relation 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; **and**

- (e) ***the joint venture does not have the purpose, and does not have and is not likely to have the effect, of substantially lessening competition.***

The suggested amendment would introduce a competition test into the proposed new joint venture defence in the Bill as a mechanism for distinguishing between pro-competitive and anti-competitive joint ventures. In doing so, the suggested amendment would give genuine, pro-competitive joint ventures the benefit of a defence, but would deny such a defence to those joint ventures detrimental to competition and, in turn, consumers. After all, the

purpose of competition law should be to stamp out any anti-competitive activity detrimental to consumers. Of course, if the activity allegedly has any redeeming features, then those engaging in the activity should, like any joint venture not covered by the suggested amended defence, apply for an authorisation so that the conduct can be appropriately scrutinised. Were an authorisation to be granted, then the activity would have the benefit of the defence available for authorisations under the Bill.