

EXECUTIVE OFFICE



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12 February 2009

Mr John Hawkins
Committee Secretary
Senate Standing Committee on Economics
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

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

Dear Mr Hawkins

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

Further to my letter of 29 January 2009 indicating the Australian Competition and Consumer Commission's (ACCC) intention not to make a submission to the above inquiry, we have reviewed the public submissions made to the Committee and consider that we can make a contribution to one specific area of these deliberations.

A number of submissions to this inquiry focus on the amended joint venture defence. The ACCC offers its comments on this issue in the attached submission.

My colleagues and I look forward to discussing these issues with members of the Senate Standing Committee on Economics at its public hearing on Monday 16 February at 1.15pm.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Brian Cassidy'.

Brian Cassidy
Chief Executive Officer



SUBMISSION TO THE SENATE ECONOMICS COMMITTEE

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

February 2009

Introduction

The Australian Competition and Consumer Commission (ACCC) is a statutory body responsible for ensuring compliance with the competition and consumer protection provisions of the *Trade Practices Act 1974* (TPA). Deterrence, detection and prosecution of anti-competitive conduct and in particular cartel conduct, is a high priority for the ACCC.

The Australian Government introduced the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (the Bill) into Parliament in December 2008. Subsequently the Senate Standing Committee on Economics invited submissions in relation to the Bill. The ACCC notes that submissions to the Committee reveal significant debate in relation to the provisions which exempt certain joint venture conduct from the cartel offence and civil prohibition. This submission will accordingly address this specific issue.

The ACCC will also provide some context to that debate in its submission. Further, it will comment on why the criminalisation of cartel conduct in Australia is important.

The rationale for criminalisation of cartel conduct

Cartel conduct in its basic form involves an agreement between competitors not to compete. Price fixing is a form of cartel conduct, as is bid rigging, restricting outputs (eg agreeing to cut back on production at the factory) and allocating customers, suppliers or territories. All are presently illegal under the TPA – with civil sanctions and will be subject to criminal sanctions if the Bill is passed.

When a cartel determines how much a consumer or business should pay or who that consumer or business can deal with it is reasonable to expect that the consumer or business will not be getting the best deal possible. Further, without genuine competition the need to innovate, so as to keep existing customers, attract new ones and drive down production costs, diminishes. While the gains for cartelists may be large, the economy, consumers and businesses suffer.¹

The OECD recognised cartel conduct as extremely damaging and the most egregious form of antitrust violation in recommending member countries ensure their laws effectively deter, detect and remedy hard core cartel conduct.² The ACCC supports the criminalisation of cartel conduct because it believes it will enhance deterrence and detection of cartel conduct. Further, the parallel operation of a criminal cartel offence and civil prohibition, as is proposed in the Bill, will enable a proportionate response to cartel conduct.

¹ OECD *Report on the Nature and Impact of Hard Core Cartels and Sanctions against Cartels under National Competition Laws*, 9 April 2002 <<http://www.oecd.org/dataoecd/16/20/2081831.pdf>>.

² OECD, *Recommendation of the Council Concerning Effective Action against Hard Core Cartels*, 25 March 1998 <<http://www.oecd.org/dataoecd/39/4/2350130.pdf>>.

Deterrence

One of the reasons the ACCC has sought criminal sanctions for cartel conduct over a number of years is its value as a deterrent. Whereas pecuniary penalties, no matter how large, may be regarded as a cost of business, the risk of imprisonment alters the equation. Incarceration is a significant loss for that person – criminal conviction and gaol time have a price that money or profits cannot fix.

The incentive for individuals not to engage in cartel conduct is at its highest when the sanction for engaging in serious cartel conduct is gaol.³ When such a framework is in place the executive is forced to put their interests ahead of the company⁴ and if directed to engage in cartel conduct, they may be far more willing to inform the authorities.⁵

Gaol sanctions for cartel conduct will assist to deter cartel members from operating in Australia. The United States Department of Justice, which has a strong commitment to criminal prosecution of hard core cartelists, has detected international cartels which have carved out the USA from their cartel for fear of gaol sentences that apply in that country.

Detection

The criminalisation of cartel conduct in Australia can also be expected to assist the ACCC to better detect cartel conduct when it occurs. This is particularly so when the incentives presently in place under the ACCC's Immunity Policy for Cartel Conduct, which provides immunity from prosecution by the ACCC for the first cartel member to self report, are heightened by the availability of gaol sanctions for cartelists.

Some view the current incentives for coming in to the ACCC and confessing involvement in a cartel may be compromised by the threat of class action suits against immunity applicants. Criminal sanctions turn the minds of executives away from the company's financial losses to their own personal futures. Such an environment increases the instability of cartels and the propensity for individuals to self report.

The ACCC's Immunity Policy for Cartel Conduct has been successful in drawing cartel conduct to the attention of the ACCC. Announcements made by the ACCC and Commonwealth Director of Public Prosecutions (CDPP) as to the way they will approach potential applications for immunity and prosecutions for criminal cartel conduct have assisted to provide certainty and reassurance. However as long as Australian authorities can do no

³ S Hammond, 'Lessons common to deterring and detecting cartel activity', United States Department of Justice Antitrust Division, 12 September 2000, <<http://www.usdoj.gov/atr/public/speeches/6487.htm>>. 'Based on our experience, there is no greater deterrent to the commission of cartel activity than the risk of imprisonment for corporate officials.'

⁴ A Stephan, 'The Bankruptcy Wildcard in Cartel Cases', ESRC Centre for Competition Policy & The Norwich Law School, University of East Anglia, *CCP Working Paper 06-5*, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=912169#PaperDownload>.

⁵ United Kingdom, Department of Trade and Industry, *A World Class Competition Regime*, London, July 2001, <<http://www.archive.official-documents.co.uk/document/cm52/5233/523310.htm>>.

worse than seek to impose a financial penalty on companies and individuals, the incentive for cartelists to come in and self report will remain a distant second compared to those nations with a criminal cartel regime.

The tools that are available to investigate criminal activity will also assist to enhance detection and effective prosecution of cartels. They include enhanced investigative powers within the Bill – in relation to search warrants and telephone interception, as well as the additional capacities that will be made available by virtue of the offence under proceeds of crime, surveillance, extradition and mutual assistance legislation. In doing so they should add to the beneficial effect of criminalisation.⁶

Proportionality

The ACCC takes the view that serious cartel conduct should be prosecuted criminally. The parallel criminal and civil regime for cartel conduct will ensure that serious cartel conduct can be prosecuted criminally while less serious breaches can be pursued under the civil prohibition.

The memorandum of understanding between the ACCC and CDPP in relation to serious cartel conduct sets out a number of matters which the ACCC will have regard to in deciding whether to refer a matter to the CDPP.⁷ Those factors include whether:

- the conduct was longstanding or had, or could have, a significant impact on the market in which the conduct occurred;
- 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;
- 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;
- 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
- in the case of bid rigging, the value of the bid or series of bids exceeded \$1 million within a 12 month period.

From such a referral the CDPP will advise the ACCC whether a criminal prosecution should be commenced. In considering whether a criminal prosecution would be appropriate the

⁶ P Whelan, 'A principled argument for personal criminal sanctions as punishment under EC cartel law', *Competition Law Review*, vol. 4, no. 1, October 2007, pp7-40 at p34.

⁷ It is proposed that the MOU will be signed after amendments to the TPA receive Royal Assent and before the commencement of any new cartel provisions.

http://www.accc.gov.au/content/item.php?itemId=706268&nodeId=353cdd807d07c920e807e65c172e1086&fn=ACCC_CDPP_MOU.pdf

CDPP will have regard to the *Prosecution Policy of the Commonwealth* as well as the following factors set out in the memorandum of understanding:

- the impact of the cartel on the market;
- the scale of the detriment caused to consumers or the public; and
- whether any of the cartel members have previously been found by a criminal or civil court, or admitted, to have engaged in cartel behaviour.

The combination of these factors will ensure that where the law is broken, the punishment will be proportional to the contravention.

Insertion of a joint venture exception

An exception to the cartel offence and civil prohibition has been created for joint ventures involving joint production or supply within the Bill. The ACCC understands the exception was grounded upon a need to provide certainty for genuine joint venture parties while also not providing camouflage for cartelists. A number of parties making submissions to the Committee have commented upon this change – with the majority advocating that the existing approach to joint ventures within the TPA be applied to the new cartel regime.

At present the TPA makes potential claimants to the joint venture defences (in sections 76C and 76D of the TPA) establish that a provision of their agreement that relates to restricting supply or fixing prices, is for the purposes of the joint venture and does not have the purpose, effect or likely effect of substantially lessening competition (SLC).

An exposure draft of the Bill, from January 2008, provided a joint venture defence for *civil* proceedings (in section 44ZZRO). It substantially replicated the existing regime in the TPA and required the respondent to prove:

- the parties to the contract, arrangement or understanding (CAU) are, or would be, carrying on a joint venture;
- the cartel provision in the CAU was ‘for the purposes of the joint venture’; and
- the cartel provision did not have the purpose, effect or likely effect of SLC.

It could not be used as a defence in relation to a prosecution for alleged criminal cartel conduct. There would have been a serious problem with simply transferring the existing joint venture defences to criminal conduct. A joint venture defence for criminal proceedings based on the existing civil defences in the TPA would have resulted in the accused having to establish their defence to the standard of ‘balance of probabilities’ in their trial.⁸

⁸ *Criminal Code Act 1995*, section 13.5.

Alternatively if the defence could have been raised by the accused and satisfied with a lower threshold,⁹ it would have required the prosecution – if it was to negate the defence – to disprove the joint venture defence beyond reasonable doubt.¹⁰ This would have required the prosecution to establish before a jury that the cartel provision had the purpose and effect of SLC.

In either case establishing whether competition has been substantially lessened is a difficult exercise which normally requires extensive market evidence and expert economic testimony. Establishing that a SLC did or did not occur before a jury would be very problematic.

The experience in Canada, where the prosecution needs to establish complex economic concepts to beyond reasonable doubt in criminal cartel proceedings, counsels against such a move:

- in Canada, the staple cartel provision of the *Competition Act*, section 45, makes it a criminal offence for competitors to conspire to prevent or lessen competition unduly;
- of the twenty-one contested conspiracy cases in the period 1980-2008 the Crown has succeeded in three instances;¹¹
- Canada's Competition Policy Review Panel, noting the above, recommended that the existing conspiracy provision in the *Competition Act* be repealed and replaced by a per se criminal offence to address hard core cartels;¹²
- the Canadian Government has introduced a Bill that would amend the *Competition Act*, replacing the competition test in section 45 with per se criminal provisions for hard core cartel conduct.¹³

Rather than introducing a defence involving a SLC aspect, the Bill provides exceptions to the cartel offence and civil prohibition for joint ventures based on the character of the conduct.

The types of conduct that can be regarded as a joint venture are quite broad and the categories are not closed however the proposed joint venture exception in the Bill defines the types of joint ventures to which it can apply. In limiting the types of joint venture conduct which can fall within the exceptions to joint production or supply the emphasis is towards exempting legitimate joint ventures that do not warrant treatment as a cartel.

Unenforceable arrangements or understandings relating to joint ventures, those more prone to use by cartelists as ex post justification, will not fall within the exception. The exception will apply to the activities of joint venture parties constituted by contracts, that is legally binding agreements whether written or unwritten. In circumstances where businesses may be

⁹ *Criminal Code Act 1995*, subsection 13.3(6) - to either put into evidence, or point to evidence that suggests a reasonable possibility (that the parties to the CAU were in a joint venture, the cartel provision was for the purposes of the joint venture etc).

¹⁰ *Criminal Code Act 1995*, subsection 13.1(2).

¹¹ Commissioner of Competition, Canadian Competition Bureau, *A Synthesis and Review of Recent Reform Proposals Regarding Canada's Competition Act*, 31 March 2008, <[http://www.ic.gc.ca/eic/site/cprp-gpmmc.nsf/vwapi/Competition_Bureau.pdf/\\$FILE/Competition_Bureau.pdf](http://www.ic.gc.ca/eic/site/cprp-gpmmc.nsf/vwapi/Competition_Bureau.pdf/$FILE/Competition_Bureau.pdf)>.

¹² Competition Policy Review Panel, *Compete to Win*, June 2008, <[http://www.ic.gc.ca/eic/site/cprp-gpmmc.nsf/vwapi/Compete_to_Win.pdf/\\$FILE/Compete_to_Win.pdf](http://www.ic.gc.ca/eic/site/cprp-gpmmc.nsf/vwapi/Compete_to_Win.pdf/$FILE/Compete_to_Win.pdf)>.

¹³ Bill C-10 (Budget Implementation Act, 2009) (Canada).

spending many thousands if not millions of dollars in setting up a joint venture, it should not be a problem for genuine joint venture parties if the exception is limited to those agreements which are enforceable at law. It is worth noting that the majority of cartels prosecuted by the ACCC involve arrangements or understandings rather than legally enforceable contracts.

The Bill does however provide persons with a capacity to seek authorisation from the ACCC if they wish to engage in coordinated activity without legally binding agreements and in circumstances not involving joint production or supply.¹⁴ That is the ACCC may 'authorise' businesses to engage in anti-competitive arrangements or conduct if it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.

The Bill provides that in order for a person to take advantage of the joint venture exception in relation to either the cartel offence or civil prohibition the person will need to point to evidence that suggests (but not prove) they meet the elements of the exception. Prior to a trial for the cartel offence the accused will need to notify the prosecution in writing of the facts they will rely on, the persons (and their addresses) whom they intend to call and documents they intend to produce to indicate they meet the elements of the exception. The ACCC regards this as important to guard against abuse of the exception.

Should the Committee consider changes to those provisions desirable, the ACCC strongly recommends that the Committee not endorse any proposal which would require arguments of SLC before a jury. Further, it recommends against a move to enlarge the scope of joint venture conduct that could fall within the exception. It is most important that the new exception not provide refuge for cartels.

¹⁴ Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, section 44ZZRM.