

7 March 2008

Competition and Consumer Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: cartelsbill@treasury.gov.au

Business
Council of
Australia



Dear Sir/Madam

CRIMINAL PENALTIES FOR SERIOUS CARTEL CONDUCT – DRAFT LEGISLATION

The Business Council of Australia (BCA) represents the chief executives of over 100 of Australia's leading companies. The BCA develops and advocates, on behalf of its Members, public policy reform that seeks to position Australia as a strong and prosperous economy and society.

The BCA welcomes the opportunity to make a submission to the following consultation documents dated January 2008 in relation to the proposal to introduce criminal sanctions for serious cartel conduct:

- Discussion paper for the purpose of consulting stakeholders in relation to the government's proposal to implement criminal penalties for serious cartel conduct
- *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008* exposure draft to amend the *Trade Practices Act 1974 (Cth)* (TPA)
- Memorandum of Understanding (MOU) between the Australian Competition and Consumer Commission (ACCC) and the Commonwealth Director of Public Prosecutions (DPP)

Cartel conduct refers to contracts, arrangements or understandings between competitors to fix prices, share markets, control output or rig bids. Such conduct harms consumers, businesses and the economy by increasing prices and reducing choice, service, innovation and efficiencies.

The BCA supports robust and effective competition law, because it is an important element of business regulation in Australia. Competition in free markets should be based on an assumption that the market is operating in a robust and transparent manner, and the BCA believes that cartel conduct is inconsistent with the efficient operation of markets.

The BCA has always supported the criminalisation of serious cartel conduct. The BCA also believes that there must be sufficient differentiation of serious cartel

conduct in order that the conduct can be considered criminal. Differentiation of serious cartel conduct must be able to be understood by ordinary people so that they appreciate that they will be subject to potential jail terms if they engage in that conduct.

Similarly, the process of investigating and prosecuting serious cartel conduct which constitutes a criminal offence should include certain safeguards available to individuals in other criminal investigations.

Consistent with our views on regulatory reform more broadly, the BCA believes any new business laws or proposed changes to existing laws should only occur where there is a clearly identifiable problem to be addressed, where the proposed reforms achieve the purpose for which they are intended without having unintended consequences, and where they do not stifle ordinary and legitimate business behaviour.

As such, any proposals to amend or reform the TPA require a proper economic analysis and consideration of the policy objectives and practical effect of the proposals.

This submission is in eight parts and the BCA makes the following recommendations:

A. Extension of cartel offences

- Recommendation 1: Many of the proposed changes are not mere refinements of the law or directed at criminalisation of serious cartel conduct. The Government has an opportunity to have a fresh look at these proposals consistent with sound principles of proper regulation making processes.

B. Regulation making processes

- Recommendation 2: No clear case has been made out in Australia for criminal offences for serious cartel conduct to be extended to corporations. The UK equivalent legislation does not extend to corporations. It would appear that the extension to corporations goes beyond the policy intention of deterring cartel conduct by individuals.
- Recommendation 3: If a concept of vicarious liability or corporate fault is retained, then the proposals as currently drafted go beyond the policy intention, and accordingly the BCA believes the corporate fault provisions in the Criminal Code should be applied.
- Recommendation 4: Further consideration, consultation and drafting of new concepts and definitions like "cartel provision" must be undertaken.
- Recommendation 5: Given the number of other changes to the TPA arising from the consultation documents, which have not been discussed or explained in the materials, and have the potential for far broader consequences than merely criminalising cartel conduct, the BCA believes that the government must proceed with a second round of consultation on these issues, including providing

re-drafted legislation and the MOU as well as a much more detailed explanatory memorandum for public comment.

- Recommendation 6: There should be timely review of the operation of the bill, including consultation with business and an actual assessment of how the bill has affected company behaviour (for example two years after the changes to the competition laws come into effect).

C. The 'dishonesty test'

- Recommendation 7: The 'dishonesty test' as drafted in the bill should be retained in the laws as the appropriate method of establishing a 'fault element' for a criminal offence and therefore distinguishing between civil and criminal offences.

D. Where should the 'dishonesty test' be directed?

- Recommendation 8: The BCA supports the current drafting of the 'dishonesty test' which is directed at an intention to 'obtain a benefit'.

E. Removing the 'dishonesty test'

- Recommendation 9: If a dishonesty test is not included in the laws, then there needs to be further consideration about defining 'serious' cartel conduct in the criminal provisions.

F. Defences

- Recommendation 10: A joint venture defence should be available against the criminal cartel offence if a dishonesty test or other differentiating threshold is not retained in the laws. The BCA also recommends that there is further consideration of additional defences such as withdrawal or reliance on legal advice.

G. Immunity and the MOU

- Recommendation 11: Further detail is required to be included in the MOU in relation to a number of areas, such as ensuring that appropriate checks and balances are imposed on prosecutorial discretion and that there is consistency and certainty in the application of the immunity policy in relation to criminal cartels.

H. Investigative powers of the ACCC

- Recommendation 12: The ACCC should not be granted access to obtain the use of telecommunications surveillance devices at this time, with a review process for the future to determine whether existing investigative powers are sufficient.
- Recommendation 13: If the ACCC is granted wire tapping powers, then checks and balances should be detailed and documented in the MOU/TPA, with detailed procedural information about the collaboration between the ACCC and

the Australian Federal Police regarding their request and implementation as well as the storage and use of information obtained from the investigation.

- Recommendation 14: Additional consideration of other checks and balances on ACCC powers are also required, including in relation to announcing investigations and naming individuals or companies or disclosure of information.

Detail about each of the recommendations is outlined below.

A. Extension of cartel offences

The BCA is concerned that the Bill contains a significant number of proposed changes to the TPA, many of which go beyond merely criminalisation of cartels. The BCA is concerned that many of the changes are in relation to the current civil cartel provisions which are already understood by Australian businesses. If the reasons for the changes are not explained, there is a risk that the uncertainty created by the new cartel provisions may have significant behavioural and economic impacts that have not been thoroughly analysed.

The BCA is aware that the government has committed to introducing criminal cartel legislation within its first year of office. However, in also committing to sound economic leadership, the government should avoid haste in introducing this legislation and should undertake consultation and analysis to ensure that proper regulation making processes are followed and that the proposed changes to the TPA are workable and practical.

Recommendation 1: Many of the proposed changes are not mere refinements of the law or directed at criminalisation of serious cartel conduct. The government has an opportunity to have a fresh look at these proposals consistent with sound principles of proper regulation making processes.

B. Regulation making processes

It is now well recognised that there must be appropriate regulation making systems in place to guard against the introduction of unnecessary regulation and to improve the quality of existing and new regulation.

In August 2006, the federal government agreed to a number of initiatives to improve regulation making in Australia, including a new regulation-making process monitored by the Office of Best Practice Regulation and the use of a Business Cost Calculator to assess the impact of regulatory proposals on business.

It was with this in mind that on 14 May 2007, The Business Alliance for Red Tape Reform ('alliance')¹ released a '*Business Checklist for Commonwealth Regulatory Proposals*' to monitor government action in regulation making processes. The checklist was developed for business to determine whether specific new regulatory proposals are being, or have been, developed in accordance with good regulation making processes. Essentially the main questions that business asks under the checklist are:

¹ The alliance includes the Business Council of Australia (BCA), and the AEOA, AICD, AIRA, CSA, LCA, FICA and Finsia.

- Has a case for action been established?
- Have the alternatives to regulation been thoroughly examined?
- Was the 'Business Cost Calculator' used to determine costs?
- Did effective consultation with stakeholders occur at all stages of preparing the regulatory proposal?
- Was an adequate Regulatory Impact Statement prepared?
- Review

Not all of these questions will be relevant in every regulatory proposal. Those relevant questions to the current consultation documents are considered in more detail below.

Case for action

In relation to whether a case for action has been established, the BCA believes that any regulatory proposal needs to meet the *policy intention* for imposing criminal sanctions for serious cartel conduct, without having unintended consequences beyond the policy intention.

Cartel behaviour is already prohibited under the TPA. The BCA supports the prohibition against cartel conduct because cartels have an anti-competitive effect. Therefore, civil penalties are already in existence to deter cartel behaviour and have been successfully applied (eg in the *Visy* case).

So what then is the policy intention of criminal sanctions for serious cartel behaviour? If civil penalties are already in place to deter corporations from cartel behaviour then, criminal penalties are to *deter individuals* from dishonest behaviour. The Australian Law Reform Commission (ALRC) in its 2002 discussion paper "Securing Compliance"² discussed what behaviour should attract criminal penalties. The ALRC stated:

*The main purposes of criminal law are traditionally considered to be deterrence and punishment. The concept of criminality involves the notion of individual culpability and having a criminal intention for one's actions.*³

Therefore, the BCA believes the bill goes beyond the policy intention in relation to the direction of the proposed penalties. The maximum penalties proposed are:⁴

- for an individual – a term of imprisonment of five years and a fine of \$220,000;
and

² Australian Law Reform Commission, "Securing Compliance: Civil and Administrative Penalties in Australian Regulation" ALRC Discussion Paper 65

³ Australian Law Reform Commission, "Securing Compliance: Civil and Administrative Penalties in Australian Regulation" ALRC Discussion Paper 65, p. 45

⁴ Discussion paper for the purpose of consulting stakeholders in relation to the government's proposal to implement criminal penalties for serious cartel conduct, p.2

- for a corporation – a fine that is the greater of \$10 million or three times the value of the benefit from the cartel, or where the value cannot be determined, 10% of annual turnover.

There appears to be no explanation or justification for directing criminal penalties at corporations. Imposing criminal penalties on corporations is in effect 'double dipping'. Presumably if criminal penalties are found against individuals, then the case for civil penalties against the corporation will have already been made out. In addition, if the aim of the legislation is to deter and punish individuals, then criminal penalties against corporations go beyond the intention of the proposal. As the ALRC states:⁵

Traditionally, redress against unlawful behaviour has been split into two types: criminal sanctions or punishment, and private civil remedies. The underlying idea behind the distinction is broadly that the criminal law is designed to punish and the civil law to compensate for the harm caused.

The UK Office of Fair Trading (OFT) recognised in its 2001 paper, *Proposed criminalisation of cartels in the UK*, that criminal penalties imposed on corporations for serious cartel conduct is problematic.⁶

The final issue we have considered is whether the cartel offence should be capable of applying to companies or undertakings, as well as to individuals, or only to individuals. There seems to be general agreement that it should apply only to individuals and we are also of that view. There is superficially an attractive argument to the effect that there would be an advantage in being able to bring criminal proceedings against both at the same time, so that a separate civil proceedings.....against the company would not be necessary. On the other hand, it would be consistent with the EC law and practice for undertakings to be dealt with under civil procedures and contacts with EC officials suggest they favour that approach.

Recommendation 2: No clear case has been made out in Australia for criminal offences for serious cartel conduct to be extended to corporations. The UK equivalent legislation does not extend to corporations. It would appear that the extension to corporations goes beyond the policy intention of deterring cartel conduct by individuals.

Additionally, in relation to the extension of criminal offences to corporations, the question is whose knowledge will be ascribed to a corporation in order for a criminal offence against a corporation to be established.

The bill states that it is sufficient that a director, employee or agent of a corporation has the 'relevant state of mind'. This appears to go beyond the corporate responsibility provisions that exist in the Criminal Code, which require the 'fault element' to be established at a corporate level rather than at an individual level (for example at the level of a board of directors).⁷

⁵ Australian Law Reform Commission, "Securing Compliance: Civil and Administrative Penalties in Australian Regulation" ALRC Discussion Paper 65, p. 47

⁶ *Proposed criminalisation of cartels in the UK (November 2001)* - a report prepared for the OFT by Sir Anthony Hammond KCB QC and Roy Penrose OBE QPM

⁷ See for example 12.3(2) of the Criminal Code

There does not appear to be any policy reason for the departure from the corporate fault provisions contained in the Criminal Code.

Recommendation 3: If a concept of vicarious liability or corporate fault is retained, then the proposals as currently drafted go beyond the policy intention and accordingly the BCA believes the corporate fault provisions in the Criminal Code should be applied.

The bill has included many new and uncertain concepts, such as the new definition of "cartel provision". In brief, a provision in a contract will be a cartel provision if it is between competitors and has the purpose/effect of fixing prices, output restrictions, market allocation or bid rigging. The introduction of an "effect" test has uncertain application both as a matter of economics and law, and may instead capture conduct that would not ordinarily be considered 'serious' or that is intended to be efficient and may even capture behaviour that promotes competition.⁸

In almost all instances in the bill or discussion paper, these changes have not been explained. In the absence of a clear policy explanation, it is difficult to see the justification for broadening some of the civil provisions, or creating uncertainty.

Recommendation 4: Further consideration, consultation and drafting of new concepts and definitions like "cartel provision" must be undertaken.

If the policy behind criminal sanctions for cartel conduct is to deter cartel behaviour, there is a risk that laws that are so robust in their deterrent effect, may also deter legal conduct. This is so where there may be room for doubt about the dividing line between illegal and legal conduct. Therefore, the penalties will overstep the mark if they lead to businesses being over-cautious or discouraging innovative and pro-competitive arrangements.

Accordingly, the BCA believes the element of dishonesty is essential to ensure that the criminal sanctions do not capture behaviour that goes beyond the policy objective of the proposed amendments. If the policy objective is to deter individuals behaviour (over and above the civil sanctions which already exist against cartel behaviour), then some threshold of deliberate conduct and moral reprehensibility such as dishonesty must be a requirement. This is discussed in greater detail below.

Consultation

The BCA welcomes the government's timely release of the consultation documents in relation to the proposal to impose criminal sanctions for serious cartel conduct. The BCA supports further and more detailed consultation on these important proposed amendments to ensure that the practical effect of any proposals can be properly understood.

⁸ Considerable concern has already been expressed about the introduction of new civil provisions as well as new provisions in the bill such as the definition of a "cartel provision" (s 44ZZRD of the exposure draft bill) which is much more broadly defined than is justified for strict per se criminal or civil penalty prohibitions: see for example Caron Beaton-Wells and Brent Fisse, *Criminalising Serious Cartel Conduct: Issues of Law and Policy*, 18 February 2008

Whilst the discussion paper provides some explanation about the proposed amendments contained in the bill, the discussion paper fails to explain many of the changes.

The BCA is concerned that many of the changes, such as redefining civil provisions like price fixing, output restriction, bid rigging and market division, will have significant behavioural and economic impacts that have not been thoroughly analysed or explained. Careful consideration needs to be given to the redrafting of the civil provisions, which has occurred in the draft bill without sufficient explanation.

The BCA comments on some of the proposed changes under the draft bill, but understands that more detailed analysis on specific drafting and legal issues will be provided by legal experts such as the Law Council of Australia. Given the number and significance of the changes proposed, the BCA strongly argues that more thorough explanatory material, analysis and drafting of all the amendments is required.

The BCA is aware that the government has committed to introducing this legislation within its first year of office. However, the government should avoid haste in introducing this legislation and should adopt an appropriate and thorough consultation and analysis process to ensure that proper regulation making processes are followed and that the changes to the TPA are workable and practical.

Recommendation 5: Given the number of other changes to the TPA arising from the consultation documents, which have not been discussed or explained in the materials, and have the potential for far broader consequences than merely criminalising cartel conduct, the BCA believes it is appropriate that the government must proceed with a second round of consultation on these issues, including providing redrafted legislation and the MOU, as well as a much more detailed explanatory memorandum for public comment.

Review processes

One of the other crucial regulation making issues is whether consideration has been given as to how the newly implemented regulation will be reviewed in the future. Competition laws are crucial business laws that have important effects on the behaviour of companies and therefore the economy.

Recommendation 6: There should be timely review of the operation of the bill, including consultation with business and an actual assessment of how the bill has affected company behaviour (for example two years after the changes to the competition laws come into effect).

C. Establishing the ‘fault element’ of the criminal offence – the ‘dishonesty test’

Notwithstanding the BCA’s support for the criminalisation of serious cartel conduct, the BCA notes that cartel conduct needs to be appropriately defined as to what is ‘serious’ cartel conduct that is considered by the public and the business community as being reprehensible enough to warrant being a ‘criminal offence’. The Australian Law Reform Commission (ALRC) describe criminal offences as having a ‘physical’

and a 'mental or fault' element.⁹ Accordingly, it is sound policy that there must be a 'fault element' combined with the prohibited act, in order for the criminal offence to be established. As the ALRC state:¹⁰

Generally speaking, regulatory offences lack the violence or violation that characterises traditional crimes, with the exception of fraud. The decision to call some regulatory offences 'criminal' is often one of policy rather than one of principle, or may be based on the presence of an intention to commit the act or other mental element.

Dishonesty test

BCA is strongly supportive of a 'dishonesty test' being included in the bill in order to characterise cartel conduct as a criminal offence. The BCA believes that individuals should only be criminally punished where they have actual knowledge that they were acting in a morally reprehensible way (particularly where a prison term may be the result of a successful prosecution).

The BCA strongly supports the proposal to include a 'dishonesty test' in the bill, as there must be an appropriate differentiator between civil and criminal provisions, to ensure only morally reprehensible conduct is captured by criminal provisions. In summary, the bill provides that a person commits an offence if:¹¹

- the person makes/gives effect to a contract or arrangement, or arrives at an understanding (CAU) with the intention of dishonestly obtaining a benefit; and
- the CAU contains a cartel provision.

It is proposed that the element of 'dishonesty' will be determined in accordance with the existing definition of dishonesty in the *Commonwealth Criminal Code 1995* (Criminal Code) and the *Corporations Act 2001*. Essentially this means that a successful prosecution needs to satisfy an objective and a subjective limb of the dishonesty test, that:

- (a) the defendant did something 'dishonest' according to the standards of ordinary people (objective)
- (b) the defendant knew that what was done was 'dishonest' according to the standards of ordinary people (subjective)

A dishonesty test is important for many reasons including:

- A dishonesty test ensures that only those acts which truly have an element of moral reprehensibility are characterised as criminal and therefore prosecuted. Prosecutorial discretion alone cannot be the filter that ensures that only the most serious acts of cartel conduct are prosecuted.

⁹ Australian Law Reform Commission, "Securing Compliance: Civil and Administrative Penalties in Australian Regulation" ALRC Discussion Paper 65, p. 67

¹⁰ Australian Law Reform Commission, "Securing Compliance: Civil and Administrative Penalties in Australian Regulation" ALRC Discussion Paper 65, p. 48

¹¹ Discussion paper, p 1

- A dishonesty test provides the differentiation from civil cartel conduct and establishes certain cartel conduct as sufficiently serious to warrant being a criminal offence and therefore attracting criminal penalties. As the bill is currently drafted, there is no difference between the definitions of civil and criminal cartels – and therefore there is no clear differentiator between a ‘serious’ cartel that can be considered criminal.
- The civil cartel provisions as currently drafted are extremely complex and cover a very broad range of conduct. Indeed, the bill amends the civil cartel provisions, creating new uncertainties about their application and breadth of coverage. As such, it is more difficult to say that cartel conduct as defined in the bill should of itself attract criminal liability. This is particularly so where the cartel conduct is not detrimental to competition or the public, but may still be in breach of the civil cartel provisions.
- Criminal sanctions must also be considered in light of the impact they may have on individuals, particularly in the case of inadvertent contravention, and the flow on effects that this may have on our economic prosperity. Concerns have already been raised by regulators about the impact of personal liability provisions in existing corporate laws, and their potential to hinder board decision making or act as a deterrent to experienced business people seeking directorships.¹² Given this, the BCA believes that criminal sanctions should also be considered in the broader economic context of the impact on skills and talent attracted to our Australian business environment.
- As previously outlined, a criminal offence should have a ‘fault’ element. The ALRC state that the¹³ *requirement of a mental element is considered the hallmark of our criminal justice system. It is an overarching principle of criminal law that doing a forbidden act should not of itself render a person guilty of a crime; it must also be shown that the person had a guilty mind.* This is consistent with other laws such as the position under the Corporations Act where directors can be sued civilly and criminally for breaching their directors’ duties, but fraud or equivalent is required for criminal liability to arise.

The subjective limb of the dishonesty test has been criticised as being difficult to prove in practice. For example, in a circumstance where there is little evidence of dishonest behaviour, a person being prosecuted may claim that they have partaken in cartel behaviour during an economic downturn for the purpose of protecting their business and employees, and therefore have not acted dishonestly.

The two limbs of the dishonesty test have evolved from the decisions in the *Feely*¹⁴ and *Ghosh*¹⁵ cases. Whilst the possible detriment of the subjective element of the test has been widely examined and discussed by academics and commentators, it must be recognised that the current definition of the ‘dishonesty test’ now in the

¹² This was recognised by Tony D’Aloisio, Chairman of Australian Securities and Investments Commission, in a speech in November 2007 to the Australian Institute of Company Directors in which he said that *‘able and experienced women and men are shying away from the listed environment because of higher liability risks.’*

¹³ Australian Law Reform Commission, *“Securing Compliance: Civil and Administrative Penalties in Australian Regulation”* ALRC Discussion Paper 65, p. 67

¹⁴ *Feely* [1973] QB 530

¹⁵ *Ghosh* [1982] 3 WLR 110

Criminal Code and Corporations Act arose from a thorough analysis of the issue and the conclusion from the Model Criminal Code Officers Committee that:¹⁶

The prediction that the Feely/Ghosh test will produce uncertainty and inconsistent verdicts in a large number of cases does not seem to be borne out in England or in Australia where it is already used in a number of jurisdictions for a variety of offences.

Some have suggested that the subjective limb of the dishonesty test could be deleted so that the test of dishonesty is an objective one. The BCA believes that consistent with the academic consideration of this issue in the past (such as that undertaken by the Model Criminal Code Officers Committee) as well as numerous other criminal offences under the Criminal Code, that the subjective assessment is required to establish the necessary moral reprehensibility to attract criminal penalties (which may include a jail term).

There is no significant evidence that including a dishonesty element will make it difficult to pursue criminal cases against serious cartel conduct. Experience has shown in cases in the UK which have a dishonesty element, that a successful prosecution is possible.¹⁷ Simon Williams, Director of Cartels Group, Office of Fair Trading UK (OFT) said in a speech to the IBC UK Competition law conference in December 2007:¹⁸

Thus if the courts (albeit under appeal) have held that the criminal cartel could be proved, even if the only element of the agreement relied upon to prove dishonesty was the intention to maintain the secrecy of the agreement so as to mislead third parties into believing that the price emerged from a competitive market, this opens up a very substantial amount of cartel activity to the reaches of the UK criminal law.

In addition, the introduction of criminalisation of cartels requires case workers to 'learn' how to prosecute criminal cases in relation to serious cartels and therefore to develop the experience in such an area. Simon Williams has stated that the 'OFT is becoming an increasingly active criminal enforcer.'¹⁹

The BCA therefore supports the inclusion of the 'dishonesty test' as drafted in the bill, to ensure that there is sufficient distinction between the civil and criminal offences relating to cartel conduct.²⁰

¹⁶ Commonwealth, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, Model Criminal Code Chapter 3: Theft, Fraud, Bribery and Related Offences Final Report (1995)

¹⁷ See for example *Norris* case [2007] EWHC 71 per Lord Justice Auld

¹⁸ Simon Williams, *The Criminalisation of Cartels in the United Kingdom – January 2008*, Speaking notes for presentation to the IBC UK Competition law conference in December 2007, para 17.

¹⁹ Simon Williams, *The Criminalisation of Cartels in the United Kingdom – January 2008*, Speaking notes for presentation to the IBC UK Competition law conference in December 2007, para 22

²⁰ The BCA also notes that the Law Council of Australia in its submissions to the Dawson Committee also supported the inclusion of an element of dishonesty to "assist in identifying which cartel conduct is truly 'criminal' and should have the important consequence of reducing prosecutorial discretion as to whether particular conduct should be prosecuted as criminal".

Alternatives to the dishonesty test

The BCA suggests that alternatives to the use of a dishonesty test outlined in the discussion paper such as fraud or secrecy²¹ are not appropriate. As highlighted in the discussion paper, concepts of dishonesty already exist in laws such as the Criminal Code²² and are used in international laws²³ and is therefore an established test.

- Secrecy appears to exclude serious cartel conduct which is made public. There seems to be no policy justification for excluding from the criminal sanctions, serious cartel conduct which has been made public. Additionally, secrecy could be part of legitimate commercial business negotiations and is not always indicative of deliberate dishonesty.
- The concept of fraud, whilst found as an element of some criminal offences, is also an older common law definition. There appears to be more common usage of the concept of dishonesty than fraud in criminal offences, and therefore the concept of dishonesty seems to have replaced the use of the fraud concept.
- In Canada the test goes beyond this subjective assessment and requires a jury to consider whether the cartel lessened or might have the effect of lessening competition.²⁴ The discussion paper states that ‘*some have argued that the test of dishonesty may be difficult for juries to determine in complex cartel cases*’.²⁵ The BCA believes that the dishonesty test as currently formulated appropriately asks a jury to consider the evidence of the deliberate actions of a party. The Canadian test would perhaps be a more difficult test for juries to consider, as they would need to understand the effect on competition.

The BCA therefore believes the ‘dishonesty test’ is the appropriate test in relation to the criminalisation of serious cartels.

Recommendation 7: The ‘dishonesty test’ as drafted in the bill should be retained in the laws as the appropriate method of establishing a ‘fault element’ for a criminal offence and therefore distinguishing between civil and criminal offences.

D. Where should the dishonesty test be directed?

The competition laws must be drafted in such a way, that criminal penalties are only imposed for cartel conduct that is ‘serious’. Therefore, the definition of ‘serious’ cartel conduct needs to be clear, so that it is clear where criminal sanctions will be imposed. The ALRC state that the ‘*most serious sanctions, like imprisonment, are likely to be reserved for very serious breaches of the law or may be invoked where the court or Parliament seeks to focus on the immorality of the offence.*’²⁶

²¹ Discussion paper, pp.4-5

²² Dishonesty is already defined in the Commonwealth *Criminal Code Act 1995* (Criminal Code) and the *Corporations Act 2001*: see discussion paper, p.4

²³ Discussion paper, p.4

²⁴ Section 45 *Competition Act*

²⁵ Discussion paper, p.4

²⁶ Australian Law Reform Commission, “*Securing Compliance: Civil and Administrative Penalties in Australian Regulation*” ALRC Discussion Paper 65, p. 52

At present, the bill provides that the dishonesty test applies to 'obtaining a benefit'. The BCA supports a dishonesty test that is directed at behaviour that is attempting to gain or achieve an outcome, rather than merely dishonestly engaging in a particular type of conduct. This ensures that parties have *knowingly or deliberately* engaged in conduct to achieve a purpose.

Recommendation 8: The BCA supports the current drafting of the 'dishonesty test' which is directed at an intention to 'obtain a benefit'.

E. Removing the 'dishonesty test'

There has been little effort in the bill to define what is 'serious' cartel conduct. As highlighted previously, the civil cartel provisions have been amended and are complex and potentially broad in application. Because the civil and criminal cartel conduct provisions are the same, then under the current drafting of the bill the 'dishonesty test' is the significant differentiator between the civil and criminal penalty provisions.

Some have argued that a mere "intention to gain a benefit" without the concept of dishonesty should be enough to distinguish between civil and criminal cartel offences. The BCA does not believe that intention alone is enough to create the criminal offence. An intention to gain a benefit can be a part of an ordinary course of business activities and is not therefore a good indicator of a "criminal mind".

Accordingly, if a 'dishonesty test' was not included in the criminal provisions, then the BCA believes that there would need to be significant redrafting of the laws, including making the cartel conduct provisions much narrower for the criminal offence. This should involve significant additional consultation with stakeholders to ensure that there are appropriate threshold differences between the civil and criminal regimes.

Recommendation 9: If a dishonesty test is not included in the laws, then there needs to be further consideration about defining 'serious' cartel conduct in the criminal provisions.

F. Defences

The BCA supports the inclusion of an exception from the civil cartel provisions for a joint venture arrangement whether it is an incorporated or unincorporated joint venture.

Joint ventures are internationally recognised as potentially efficiency enhancing and positive for economic welfare. They arise in exploration, production, payment systems and other circumstances where pooling of assets may be required to provide sufficient resources or manage risk for individual corporate entities. Australia is now benefiting from joint ventures in the resource sector that have contributed to the economic prosperity we are currently seeing. Great care needs to be taken not to inadvertently chill the positive effects of joint ventures to the business community and the economy in general.²⁷

²⁷ Discussion paper, p.3

Whether through the retention of the dishonesty test or more expressly as a defence, a joint venture defence should also be available for the criminal offence because such genuine behaviour should not be considered to fall within the definition of a serious cartel.

Recommendation 10: The criminal offence of serious cartel conduct (as well as the civil) in the bill needs to ensure that genuine joint venture conduct whether incorporated or unincorporated, is not subject to prosecution - so that it does not inadvertently chill positive economic behaviour.

It is a preferable outcome that business does not need to go to the trouble and expense of establishing a positive defence - genuine joint venture conduct should not fall within the civil or criminal offence.

The BCA also recommends that there is further consideration of additional defences such as withdrawal or reliance on legal advice, incorporated either in the bill or the proposed MOU.

G. Immunity and the MOU

There are a number of deficiencies with the MOU, including in relation to the immunity policy and how it applies in the circumstances of criminal cartels.

For example, the ACCC will continue to grant immunity in accordance with the ACCC's immunity policy, but the Commonwealth Director of Public Prosecutions (DPP) will be responsible for considering whether to grant immunity under the Prosecution Policy of the Commonwealth.

This means that different standards will be applied and creates the potential for different results. It is important that there is certainty of application in the instances of application of immunity policies towards criminal conduct, not only in terms of protection of individuals, but to encourage individuals to come forward.

The BCA also suggests that the decision to grant immunity in relation to criminal prosecutions should not rest solely with the DPP, but the importance of the decision means that more consideration needs to be given to guiding the decision making process in relation to immunity in conjunction with the ACCC. It would seem that to enhance the ACCC's cartel detection and prosecution abilities, it must have greater say in the grant of immunity from criminal prosecution. Accordingly, more detail is needed in the MOU.

For example, consideration could be given to a collaborative decision making process between the ACCC and the DPP in relation to prosecutorial discretion and grant of immunity. This may ensure that those with expertise in prosecution of cartels and those with expertise in the prosecution of criminal cases are brought together in their decision making capacity.

Recommendation 11: Further detail is required to be included in the MOU in relation to a number of areas, such as ensuring that appropriate checks and balances are imposed on prosecutorial discretion and that there is consistency and certainty in the application of the immunity policy in relation to criminal cartels.

H. Investigative powers of the ACCC

Sufficient checks and balances are needed in relation to the investigative powers of the ACCC, particularly as the ACCC already has significant powers to search and gather information.

The discussion paper asks whether telephone interception warrants should be available in relation to the new criminal cartel offences.²⁸ The proposed amendments give the ACCC power to request the Australian Federal Police to obtain a surveillance devices warrant under the *Surveillance Devices Act 2004*.

However, additional amendments may be required to enable the ACCC to request the use of telecommunications intercepts (telephone wire tapping). This is because a telecommunications interception warrant is only available for investigation of serious offences (generally serious offences are those punishable by terms of imprisonment of at least 7 years). In the BCA's view, there is no policy justification for the use of wire tapping by the ACCC. Some of the reasons for this view are summarised as follows:

- The ACCC already has significant investigatory powers, including the ability to use investigative techniques such as access to stored communications (which will provide the ACCC with access to information that was originally passed through telecommunications systems).
- The ACCC was recently granted additional search and seizure powers under Part XIX of the TPA for investigating section 45 contraventions. In addition, new powers are conferred under the proposed amendments in the bill. These new powers have not yet been effectively tested. Time should be given to determine whether the new powers that have been granted are sufficient for investigations of criminal cartel behaviour, and the powers should be reviewed in the future.
- Individuals partaking in secret behaviour will often meet in person rather than using telecommunications systems to negotiate a cartel arrangement.
- Telecommunications surveillance will involve access to private personal communications, much of which will be by people who are not involved in an alleged cartel or indeed any criminal activity.
- The cartel provisions have been amended by the bill, and there is now considerable uncertainty as to their scope and application. Considering that the types of activity that might be the subject of investigation may have been extended, then it is important to ensure that appropriate checks and balances are in place for investigative procedure.

Recommendation 12: The ACCC should not be granted access to obtain the use of telecommunications surveillance devices at this time, with a review process for the future to determine whether existing investigative powers are sufficient.

²⁸ Discussion paper, pp.5-6

If however the ACCC is granted wire tapping ability, then the BCA suggests that the decisions about wire tapping and implementation should be made by trained professionals in evidentiary, investigative and criminal procedures. Accordingly detail about collaborative decision making between the ACCC and the Australian Federal Police is therefore required as well as the use and storage of any information obtained in such an investigation.

Recommendation 13: If the ACCC is granted wire tapping powers, then checks and balances should be detailed and documented in the MOU/TPA with detailed procedural information about the collaboration between the ACCC and the Australian Federal Police regarding their request and implementation as well as the storage and use of information obtained from the investigation.

In addition, consideration of other checks and balances on information and disclosure are required.

For example, consideration is required about when and the circumstances in which the ACCC is able to announce criminal investigations or disclose the name of companies or individuals whilst such investigations are ongoing. For example, the UK Office of Fair Trading recently was forced to apologise for accusations it made against the UK supermarket chain Morrisons where it appears from the public commentary, that Morrisons may not have been involved in the alleged cartel.²⁹ The ramifications of inappropriate disclosure extend beyond damage to reputations, but also to the cost of inappropriate and speculative proceedings being brought by class action plaintiffs. Bill Batchelor, partner at Baker & McKenzie LLP in London has stated that *'the downside for named companies is not just about reputation. Being named as a target of a probe can also provoke class action lawsuits from the active plaintiff bar in the US.'*³⁰ The same issues that apply to corporate defendants apply equally to individuals.

Further consideration in relation to the proposed amendments contained in sections 157B–157D are also required. For example, under section 157C the ACCC has the discretion, taking into account an exhaustive list of factors, whether or not, to reveal protected cartel information to a person. It also raises a significant issue as to principles of natural justice if the drafting is intended as a departure from the current law where a defendant has a right to see the case (including documents) made against them. If such a departure from the existing concepts of natural justice are possible then this should be considered and explained using good regulation making processes, including greater transparency as to the explanation for such intended changes to the law.

The list of matters to be considered by the ACCC under this provision does not appear to be sufficient to allow the ACCC to consider factors such as the impact of disclosure on the individuals being investigated. The BCA is very concerned that this throws into doubt the adequate protection of commercially sensitive business information from competitors.

²⁹ 'Morrisons sues OFT for libel', Global Competition Review, 11 February 2008

³⁰ 'Morrisons sues OFT for libel', Global Competition Review, 11 February 2008

Additionally, more detail is required in the MOU about when the ACCC can refer information about the cartel conduct to the DPP (to give those who are granted immunity under the ACCC's immunity policy the same protections from prosecution by the DPP).

Recommendation 14: Additional consideration of other checks and balances on ACCC powers are also required, including in relation to announcing investigations and naming individuals or companies or disclosure of information.

Conclusion

The BCA strongly supports the operation of open and competitive markets. In an increasingly global business environment, open and competitive markets contribute to the long-term growth and prosperity of a comparatively small economy such as Australia, and provide the best outcome for consumers.

However, as with all areas of regulatory reform, the BCA is concerned to ensure that changes to the trade practices law (which is inherently an economic law) address a clearly articulated deficiency in the existing legislation, and do not have unintended consequences, create additional red tape or capture legitimate business and economic activity.

We support your commitment to consult with stakeholders in relation to the proposal to impose criminal sanction for serious cartel conduct. The BCA welcomes the opportunity to provide input into all the proposed changes and looks forward to further consultation documents being distributed for public comment on these important issues.

We look forward to discussing these issues further with you.

Yours sincerely



Robert Milliner
Chair
BCA Task Force on Business Regulation

