



AUSTRALIAN BANKERS' ASSOCIATION INC.

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Mr Scott Rogers
Senior Adviser
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The Treasury
Langton Crescent
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Dear Mr Rogers,

**Submission of the Australian Bankers' Association to the Discussion
Paper: Criminal Penalties for Serious Cartel Conduct**

This submission answers the question: should telephone interception warrants be available in relation to the new criminal cartel offences?

The decision as to whether the telecommunications interception (TI) regime should extend to the proposed criminal cartel offence should be balanced, reflecting competing considerations.

One consideration is the need to protect the privacy of the people being investigated as well as the people who are vicariously associated with them and the damage that may result from any loss of confidentiality in the communications and affairs of these people. On the other hand, there is the incremental benefit such extension may bring to the investigation and enforcement of the proposed criminal cartel offences.

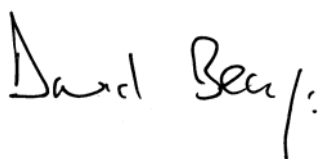
For the reasons below, the Australian Bankers' Association (ABA) considers that the privacy intrusion and the potential damage to a large number of innocent people and, ultimately, the banking industry if such a regime is introduced, significantly outweigh potential benefits that the extension of the TI regime may bring.

- (a) The extension of the TI regime to the investigation of cartel behaviour would compromise not only the privacy of those being investigated, but also the privacy of many other people who are vicariously associated with those being investigated. In order to operate their businesses, our members are entrusted with the confidential information of their customers and other counterparties. This information is often highly market sensitive with wide social and economic implications. Any TI regime, no matter the safeguard measures that are introduced with it, cannot guarantee the confidentiality of intercepted information, or that the

intercepted information would not be misused or misinterpreted. If such information is misused or misinterpreted, irreparable damage could be caused to both the people the subject of the investigation as well as those who are vicariously associated with them. Because of the number of potential "innocent bystanders" in any cartel investigation using intercepted communications and the damage that such investigation could cause to them if the intercepted information is misused, the ABA cautions against the introduction of the TI regime to cartel behaviour.

- (b) A hallmark of an efficient and competitive banking system is that all participants in the marketplace have confidence that the confidential information they entrust their counterparties with will not be disclosed without their consent. As the TI regime compromises the ability of the participants to conduct business in a confidential manner, the extension of the TI regime to the investigation of the proposed criminal cartel offences may significantly damage the integrity and competitiveness of the Australian banking system.
- (c) The Australian Competition and Consumer Commission and the Australian Federal Police already have a range of powers and tools that could be applied in the investigation and enforcement of the proposed criminal cartel offence. These include search and seizure and information gathering powers, as well as tools such as immunity from prosecution for cartel whistleblowers. Before additional powers are granted to these authorities to investigate cartel offences, empirical evidence should be analysed to determine whether the mere criminalisation of cartel behaviour with the risk of imprisonment is sufficient to deter the commission of such offences and whether the powers and tools available to the authorities are not already sufficient to assist in the investigation and prosecution of the proposed criminal cartel offences. Only after such analysis has been conducted and the results are publicised, could a decision be properly be made as to whether additional powers should be granted to the authorities.

Yours sincerely



David Bell