



**AUSTRALIAN INDUSTRY**  
GROUP

**Ai Group**

**Submission**

**on the proposal to introduce**

**Criminal Penalties for Serious Cartel Conduct**

**March 2008**

## Overview

The Australian Industry Group welcomes the opportunity to provide input on the proposal to impose criminal sanctions for serious cartel offences.

In the submission below we argue that the proposal to introduce criminal sanctions for serious cartel offences should be accompanied by strong protections for business.

- In particular a criminal cartel offence should only apply if the contract, arrangement or understanding containing the cartel provisions is made or given effect to with the **intention of dishonestly obtaining a benefit**.
- Ai Group regards the proposed **maximum term** of five years as an appropriate maximum period of imprisonment.
- In relation to the proposal to amend the **vicarious liability provisions** of the TPA to ensure that corporations can be held responsible for contravention of a criminal cartel offence, Ai Group submits that a better approach would be to replace this approach with one approach more line with the corporate responsibility provisions under the Criminal Code.
- Under the existing proposal, the proposed cartel offences and the existing civil prohibition on exclusionary provisions would operate concurrently. The means by which the resulting overlaps are to be addressed should be clarified as part of a more general examination of the implications of the new cartel offences for the **coherence of anti-overlap provisions**.
- Ai Group proposes that the proposed **joint venture defence** should be extended to include criminal cartel offences rather than be limited to civil cartel offences.

In light of the need to further develop the proposal, Ai Group proposes that there should be a further round of public consultations conducted before legislation is finalised.

## **Background**

Criminal sanctions for serious cartel conduct, including imprisonment, were recommended by the *Review of the Competition Provisions of the Trade Practices Act* (Dawson Review) in 2003.

If introduced, the new legislation would bring Australian cartel laws into line with other jurisdictions, such as the United States, the United Kingdom, Canada, France, Germany, Ireland and Japan, which have already criminalised cartel conduct.

## **Proposed New Offences**

The Exposure Bill creates two new criminal offences for making or giving effect to:

- a contract, arrangement or understanding;
- containing a cartel provision;
- with the intention of dishonestly obtaining a benefit,

These criminal cartel offences will be contained in Part IV of the TPA and equivalent offences will be included in the Competition Code in each state and territory.

The Exposure Bill proposes to impose the following sanctions for contravention of the criminal cartel offences:

- for individuals: up to five years imprisonment and fines of up to \$220,000; and
- for corporations: a fine of up to the greater of \$10 million, three times the value of the benefit from the cartel or, where the value cannot be determined, 10% of the corporation's annual turnover.

The Exposure Bill also creates equivalent 'civil' cartel offences which replicate the criminal cartel offences but without any requirement to prove the mental element of dishonesty. The maximum pecuniary penalty for the civil cartel offence will be \$500,000 for individuals and, for corporations, the same as for the proposed criminal cartel offences.

The proposal is for the ACCC to be responsible for investigating and gathering evidence of alleged cartel conduct and for referring serious cartel conduct to the DPP for consideration for prosecution as a criminal offence. The ACCC will also be responsible for bringing proceedings for contravention of the civil cartel offences and seeking associated remedies, while the DPP will be responsible for prosecuting criminal cartel offences and seeking associated sanctions (including imprisonment).

## Distinguishing Criminal Cartel Offences – the Dishonesty Test

The Exposure Bill proposes to introduce a criminal cartel offence differentiated from a civil offence by providing that the criminal cartel offence is only made out if the contract, arrangement or understanding containing the cartel provisions is made or given effect to with the '*intention of dishonestly obtaining a benefit*'.

Ai Group strongly supports the proposal to differentiate the criminal cartel offence from the civil cartel offence on the basis of this dishonesty test.

Dishonesty is at the heart of serious cartel conduct under which customers are deceived when purchasing goods or services, unaware that the price and supply of those goods and services was determined by collusion rather than competition.

As such, dishonesty represents an appropriate means of distinguishing between conduct that is criminal and conduct that should only be subject to civil penalties.

The incorporation of dishonesty as the mental element of the criminal cartel offence serves to reinforce and justify the imposition of criminal sanctions – that is, the requirement of dishonesty reflects the reprehensible and wrongful character of the conduct for which criminal sanctions are appropriate. It signals the seriousness of the criminal cartel offence and supplies the required degree of culpability necessary for criminal law purposes.

As a consequence, courts would be more likely to impose a sentence of imprisonment in respect of an offence based on the concept of individuals having engaged in dishonest conduct, rather than an offence based on other *mens rea* concepts (such as intention or recklessness) or where there is no distinguishing element between the criminal and civil offence.

Ai Group is aware of arguments that the dishonesty test may cause difficulties for juries. However we note 'dishonesty' is not a new concept in the context of 'white collar' crime and in fact is a well-established principle of comparable criminal offences in Australia.

- For instance dishonesty is an element of many existing offences under the Criminal Code including offences for theft, obtaining property by deception, obtaining a financial advantage by deception, general dishonesty, and conspiracy to defraud.
- Some of these offences include a requirement that the defendant dishonestly obtain a benefit or gain. For example, section 135.1 of the Criminal Code establishes a general dishonesty offence which requires,

as a mental element, that the defendant intended to dishonestly obtain a gain from or cause a loss to another person.

- 'Dishonesty' is also used under the Corporations Act to distinguish between civil and criminal prohibitions for a number of breaches, including in relation to directors' and other officers' duties. For example, under section 184 of the Corporations Act, a director (or other officer of the corporation) commits an offence if, relevantly, they are intentionally dishonest and fail to exercise their powers and discharge their duties in good faith in the best interests of the corporation or for a proper purpose.

#### *Not having a Distinguishing Element*

Ai Group believes that the criminal cartel offence does need to be differentiated from civil cartel offences with a distinguishing mental element.

Not including a distinguishing mental element would mean the criminal cartel offence was one of strict liability – a concept generally reserved for lesser offences, contravention of which is not subject to imprisonment.

It would also raise concerns that a considerable number of corporations and individuals could unknowingly or involuntarily commit criminal offences and be liable for imprisonment. As a consequence businesses could become excessively wary of entering into normal and appropriate arrangements to the detriment of investment and innovation.

## Length of Imprisonment

Ai Group regards the proposed maximum term of five years as an appropriate maximum period of imprisonment. We note that this period is comparable to the maximum length of imprisonment for cartel offences in other jurisdictions. The following table sets out maximum terms of imprisonment imposed by other jurisdictions with criminal cartel legislation:

Country	Maximum term of imprisonment
United States	10 years <sup>1</sup>
United Kingdom	5 years <sup>2</sup>
Ireland	5 years <sup>3</sup>
Norway	3 years <sup>4</sup>
Austria	3 years <sup>5</sup>
Canada	5 year <sup>6</sup>
France	4 years <sup>7</sup>
Japan	3 years <sup>8</sup>
Germany	5 years <sup>9</sup>

The table demonstrates that the common law countries with which Australian jurisprudence is most frequently compared (that is Canada and the United Kingdom)<sup>10</sup> also impose a maximum five year term. A maximum five year term as proposed is therefore consistent with comparable jurisdictions.

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<sup>1</sup> Cartels have been criminal offences punishable by imprisonment in the US since the *Sherman Act* was enacted in 1890. In 1974, the maximum penalties were increased to 3 years' imprisonment and fines of \$1m for corporations and \$100,000 for individuals. In 2004, the maximum jail term was increased to 10 years per offence. See Scott D Hammond, 'Recent Developments, Trends and Milestones in the Anti-Trust Division's Criminal Enforcement Program', Speech *ABA Section of Antitrust Law Cartel Enforcement Roundtable*, 16 November 2007.

<sup>2</sup> See section 188 *Enterprise Act 2002*.

<sup>3</sup> See *Competition Act 2002*.

<sup>4</sup> See *EEA Competition Act*.

<sup>5</sup> See *Austrian Competition Act (Kartellgesetz, BGBl 1988/600)* Chap XIV.

<sup>6</sup> See *Competition Act*.

<sup>7</sup> See Bruno, Zanettin, *Cooperation Between Antitrust Agencies at the International Level 2002*, p 135.

<sup>8</sup> See *Antimonopoly Act*.

<sup>9</sup> Under German law, imprisonment can be imposed for bid-rigging in tender proceedings but the *Act against Restrictions of Competition* does not impose prison terms for cartel behaviour.

<sup>10</sup> Although in New Zealand cartel conduct is not a criminal offence.

## Other Issues

### *Attribution of Criminal Responsibility to Corporations*

The basis upon which a corporation is proposed to be held responsible for contravention of a criminal cartel offence is by way an amendment to the vicarious liability provisions of the TPA (contained in section 84(1)). Ai Group submits that a better approach would be to replace this with an approach more in line with the corporate responsibility provisions under the Criminal Code.

Under the present proposal, in order to establish the relevant state of mind of the corporation, it will be sufficient to show that:

- a director, employee or agent of the corporation engaged in the relevant conduct;
- the director, employee or agent was, in engaging in that conduct, acting within the scope of the person's actual or apparent authority; and
- the director, employee or agent had the relevant state of mind.

Under the amended section 84(1), a corporation could be held to have the requisite state of mind and be liable for contravention of the criminal cartel offence if, for example, an agent of the corporation engaged in cartel conduct in the course of the agency role, even if that conduct was not authorised or condoned by any director or executive of the corporation.

Vicarious liability can also be criticised on the basis that it is a form of strict liability and is 'inconsistent with the general principle that criminal responsibility is personal, not vicarious, and requires fault.'<sup>11</sup>

By contrast, the corporate responsibility provisions under the Criminal Code require fault that is corporate in nature (not simply fault on the part of the 'directing mind' of the corporation)<sup>12</sup>. Under section 12.3(2) of the Criminal Code, the corporate fault element can be established by showing:

- that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence;
- that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence<sup>13</sup>;

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<sup>11</sup> Brent Fisse, 'The Australian Cartel Criminalisation Proposals: an overview and critique', (2007) 4(1) *The Competition Law Review* 51, at 62.

<sup>12</sup> Brent Fisse, 'The Australian Cartel Criminalisation Proposals: an overview and critique', (2007) 4(1) *The Competition Law Review* 51, at 62.

<sup>13</sup> This does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.

- that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
- that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

### *Interactions with Other Provisions*

#### Repeal of price fixing but not exclusionary provisions prohibitions

The proposed definition of a 'cartel provision' in the Exposure Bill includes prohibitions on contracts, arrangements or understandings which restrict outputs of goods or services, which allocate customers, suppliers or territories or which involves bid rigging. In doing so, the definition of a 'cartel provision' covers what currently falls under the definition of an 'exclusionary provision'.

Unlike the price fixing prohibition, which is proposed to be repealed and replaced by the introduction of the definition of 'cartel provision', the Exposure Bill does not propose to repeal the prohibition on exclusionary provisions. The proposed cartel offences and the existing civil prohibition on exclusionary provisions would therefore operate concurrently.

This would result in significant overlap between the proposed cartel offences which prohibit 'cartel provisions' and the existing civil prohibitions on exclusionary provisions. In theory, parties which engage in market sharing could, for example, be liable for contravention of both the civil cartel offence *and* the prohibition on exclusionary prohibitions. Further, if the dishonesty element can also be established, the parties could *also* be liable for contravention of the criminal cartel offence.

Ai Group suggests that the means by which this overlap is to be addressed should be clarified. This clarification should take into account a need for a broader consideration of the implications of the proposed changes and anti-overlap provisions as discussed below and should take into account the issues also raised below in relation to the expansion of the prohibition of exclusionary provisions to include effect.

#### Joint venture defence

In line with the proposed repeal of the price fixing prohibition, the existing joint venture defence to price fixing in section 76D is also proposed to be repealed.

The Exposure Bill proposes to introduce a new joint venture defence in similar terms to the existing defences in section 76D and 76C. The defence would apply

in respect of proceedings for contravention of the civil cartel offences, but *not* criminal cartel offences.

There would appear to be difficulties with this. Conduct which is lawful under the civil law should not become unlawful under the criminal law merely because of the subjective intention of those persons who carried out the conduct.

Ai Group proposes that these difficulties could best be addressed by extending the joint venture defence to criminal cartel offences.

#### Expansion of prohibition on exclusionary provisions to include effect (as well as purpose)

The existing prohibition on exclusionary provisions only applies to a provision in a contract, arrangement or understanding which has the *purpose* of restricting the supply or acquisition of goods and services.

The proposed definition of 'cartel provision' in the Exposure Bill however looks to whether the provision in the contract, arrangement or understanding has the purpose, *effect or likely effect (directly or indirectly)* of (relevantly) restricting the supply of goods and services.

This expansion to include consideration of the *effect* (as well as purpose) of the relevant provision is a significant departure from existing jurisprudence on exclusionary provisions and cartel conduct where effect is irrelevant. The words '*directly or indirectly*' are also new and of uncertain scope.

The overlap between the proposed new cartel offences and existing prohibition on exclusionary provisions (as discussed above) means that, in circumstances where there the purpose element cannot be established but the effect element can be established, a party which would otherwise not be in contravention of the prohibition on exclusionary provisions may still be in contravention of the new cartel offences. As such the new offence may catch unintended effects.

#### Anti-overlap provision

The TPA currently contains a number of 'anti-overlap' provisions that clarify which section of the TPA is to take precedence over another when both might otherwise apply.

Section 45(6) of the TPA provides that section 45 does *not* apply to a provision of a contract, arrangement or understanding which would constitute a contravention of section 47 (the exclusive dealing prohibition).<sup>14</sup> In practice, this means that a

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<sup>14</sup> Section 47 prohibits 'exclusive dealing'. It defines a range of vertical restraints between suppliers and their customers as constituting exclusive dealing. These include restrictions and

contract, arrangement or understanding which contains an exclusionary provision in contravention of section 45 (for example, a market sharing clause) will fall to be considered under section 47. This will take the provision from being considered under a 'per se' or strict prohibition to a prohibition which is only subject to the substantial lessening of competition test.

Section 45(5) of the TPA provides that section 45 does *not* apply to a provision of a contract, arrangement or understanding *in so far as* the provision relates to conduct which would contravene section 48 (the resale price maintenance prohibition). In essence, it provides that 'vertical' price fixing is to be dealt with under section 48 and, as such, operates so that if a defendant has engaged in conduct which contravenes the resale price maintenance prohibition, it will not also be liable for a contravention of the price fixing prohibition.

The package does *not* include any proposed extension of these anti overlap provisions to the new cartel provisions.

Accordingly, an exclusionary provision which would contravene both section 45 and section 47 would be taken out of section 45 (to be considered under section 47) by virtue of the anti-overlap provision but may also be liable to contravene the proposed new cartel offences. Similarly, a provision which amounted to vertical price fixing would be taken out of section 45 (to be considered under section 48) but may also be liable to contravene the new cartel offences.

Ai Group proposes that the implications of the cartel offences for the coherence of anti-overlap provisions be considered more thoroughly.

### **Further Consultation**

In view of the need to develop further the existing proposal, Ai Group suggests that there should be additional opportunities for consultation with interested parties before legislation is finalised.

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conditions in relation to the supply of goods or services that are imposed by suppliers on their customers and by customers on their suppliers. However, pursuant to sub-section 47(10), exclusive dealing is *only* prohibited by the TPA if it also has the purpose or likely effect of 'substantially lessening competition'.