

**Submission to the Treasury**  
**Exposure Draft - Trade Practices Amendment**  
**(Cartel Conduct and Other Measures) Bill 2008**

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## **Criminal Penalties for Serious Cartel Conduct - Discussion Paper and Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 - Exposure Draft**

1. This submission is made by the Clayton Utz Competition Group. The Group practises in the area of cartels as well as other areas governed by of the *Trade Practices Act 1974* ("**TPA**"). It has over 20 years experience dealing with the Australian Competition and Consumer Commission ("**ACCC**") and advising businesses, both large and small, affected by the TPA. The Group also has significant experience in dealing with international cartels and with the ACCC's 2005 Immunity Policy for Cartel Conduct ("**Immunity Policy**") and former Leniency Policy.
2. The purpose of this submission is to raise certain practical issues which arise from the Exposure Draft of the *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008* ("**Draft Bill**"). Our comments are based on our experience advising and acting for a wide variety of Australian and multi-national corporate clients in this area.

### **Executive Summary**

#### **Criminal Sanctions**

3. We support the overall initiative to introduce criminal sanctions for appropriately defined "hard core" or "serious cartel conduct",<sup>1</sup> as recommended by the 2003 Dawson Review. We also support the Federal Government's initiative to move quickly on this measure, given the time which has elapsed since the recommendations of the Dawson Review.
4. Speedy reform seems easiest to achieve if the reforms are focussed on a clear definition of criminal offences and resist the temptation to tinker with exiting civil provisions in Part IV.
5. In our submission, it is critical that a clear and easily understood distinction be drawn between cartel conduct which may give rise to criminal sanctions, and cartel conduct which will remain subject only to a civil penalty.
6. It should be clear to those who may be considering embarking upon conduct which potentially contravenes the law whether, if detected, their liability would fall to be determined by a criminal process or a civil process<sup>2</sup>.

#### **Dishonesty**

7. At present, the only distinction in the Draft Bill between civil and criminal conduct is whether the conduct was engaged in with the "*intention of dishonestly obtaining a benefit*". We suggest that as "dishonesty" is determined partly by a subjective test, it alone is an insufficient basis to distinguish the two types of conduct. Any final bill should include new provisions which specifically and more narrowly define the serious cartel conduct which, together with the requisite dishonest intention, will give rise to criminal liability.
8. Whilst the scope and meaning of "dishonesty" in this context is somewhat controversial, we do not support proposals to remove from the Draft Bill the dishonesty element, or to omit other means of distinguishing between conduct which attracts civil and criminal liability. The exercise of prosecutorial discretion even under a generally framed Memorandum of Understanding, should not be the only means of distinguishing civil and criminal liability. We

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<sup>1</sup> This submission hereinafter refers to "hard core" cartel conduct as "serious cartel conduct".

<sup>2</sup> Cf *Melway Publishing v Robert Hicks* (2001)205 CLR 1 at 10-11[8], where a majority of the High Court of Australia adopted a similar test for determining the meaning of section 46 of the TPA.

suggest that that option will greatly increase the uncertainty individuals face in understanding the consequences of their conduct.

## **ACCC Immunity Policy**

9. We also suggest that the absence of a clear and workable distinction between the criminal and civil provisions of the Draft Bill has the potential to jeopardise the ACCC's Immunity Policy. We propose that the Prosecution Policy of the Commonwealth Department of Public Prosecutions ("**DPP**") should be brought into line with that of the ACCC so that availability of leniency is clear.

## **Other Changes to Existing Part IV Provisions**

10. We do not support the proposed changes to the existing civil provisions in Part IV. The changes are complex and significant and would raise substantial compliance issues, however their inclusion in the Draft Bill is not explained. They are not essential features of a criminal reform of cartel laws. We submit that they should be exposed for full comment and debate before further action is taken.
11. The costs and dangers of compliance in "tinkering" with existing provisions of Part IV without a full public debate are serious in terms of compromising the ability of the ACCC to perform its functions as well as the practical ability of the business community to comply with Part IV, and their legal advisers to provide effective advice as to what is, and is not, lawful.
12. Specifically, it is important that conduct that is currently lawful, through the operation of subsection 45(6) (such as vertical distribution arrangements) and the current joint venture defences are not brought into doubt by the introduction of criminal liability provisions or new civil provisions.

## Detailed Submission

### The Distinguishing Elements for "Serious Cartel Conduct"

13. The proposal to criminalise "serious cartel conduct" seeks to draw a distinction between criminal and civil conduct in two ways. First, the Draft Bill includes a statutory element of an "*intention of dishonestly obtaining a benefit*" ("**Dishonesty Element**").
14. Second, the draft Memorandum of Understanding ("**Draft MOU**") between the ACCC and the DPP<sup>3</sup> lists a number of factors which are said to reflect conduct of the type that can cause "large scale or serious economic harm", which the ACCC will "have regard to" before referring a matter to the DPP for prosecution ("**Discretionary Factors**").

### The Proposed Dishonesty Element

15. The only proposed statutory distinction between criminal and civil conduct is the Dishonesty Element.
16. It is proposed that dishonest be defined in the TPA as:
  - (a) dishonest according to the standards of ordinary people; and
  - (b) known by the defendant to be dishonest according to the standards of ordinary people<sup>4</sup>.
17. There are a wide range of view on the inclusion of the Dishonesty Element and we accept that it is a controversial inclusion in the Draft Bill.
18. It is well recognised that the High Court of Australia in *Peters v The Queen*<sup>5</sup> had some difficulty with defining the appropriate direction that ought to be given to a jury when considering the element of dishonesty. The Dawson Review cited the High Court's decision and observed that:

*Misgivings have been expressed about using the test of dishonesty in Australia to identify serious cartel behaviour. It is thought that its application in the context of cartel behaviour is likely to cause difficulty to a jury, particularly where the proscribed activities are merely referred to by name - for example, price fixing or bid rigging - and not by description*<sup>6</sup>.
19. The proposed Australian "dishonesty" standard is derived from the two part test adopted in *R v Ghosh*<sup>7</sup> which combines an objective and a subjective limb. Given the Australian proposal picks up the *Ghosh* standard of dishonesty, it is important to observe that the standard has been the subject of considerable academic criticism in the United Kingdom<sup>8</sup>. It is also notable that

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<sup>3</sup> The MOU between the DPP and ACCC is discussed further below at paragraphs 29 - 39 of this submission.

<sup>4</sup> Section 44ZZRB (Definitions); cf. Discussion Paper, p. 4. This is referred to in this submission as the "dishonesty test".

<sup>5</sup> (1988) 192 CLR 493.

<sup>6</sup> Dawson Review, p. 155.

<sup>7</sup> [1982] 2 All ER 689.

<sup>8</sup> See, for example, Elliot, "*Dishonesty: A Dispensable Concept?*" [1982] Crim.L.R. 395; Griew, "*Dishonesty: The Objections to Feely and Ghosh*" [1985] Crim.L.R. 431; Halpin, "*The Test for Dishonesty*" [1986] Crim.L.R. 283.

the United Kingdom is the only other jurisdiction in the world to have included the element of "dishonesty" in its criminal cartel offence<sup>9</sup>.

20. The main criticism of the dishonesty test is that it requires a jury to make a social assessment by putting themselves in the position of a hypothetical ordinary person and assessing whether, according to the standards of ordinary people, the relevant conduct was dishonest. In some matters this may be complex although in most cases it will be clear - (as it was in the recent *Visy* litigation<sup>10</sup>). In addition, the test requires the jury to assess whether the defendant *knew* that his or her acts were dishonest, according to the standards of ordinary people<sup>11</sup>. This moral assessment has the potential to result in some inconsistency, although in most cases the covert nature of the conduct will clearly demonstrate a consciousness of wrongdoing by those involved.
21. Aside from the complexity, there is at the same time concern that use of "dishonesty" may allow some defendant executives to escape liability by raising defences of "necessity" or "honest belief" that they needed to protect their business or their employees. We incline to the view that such cases will be very rare. In our experience, true hard core cartel conduct allowed no such ambiguity, and there was no question that those involved knew that they were acting to limit or prevent competition.
22. Given the need to balance the dangers posed by an over inclusive reform (where no element of dishonesty is required), against a possibly under inclusive reform which might allow an exceptional case for an accused to escape liability through lack of dishonesty, we would opt for the latter. We endorse the views of Stephen Odgers' "*Principles of Federal Criminal Law*" (2007) cited in that whilst:

*...the Law Commission was very critical of the fact that different juries would apply different standards... the view may be taken that it is a positive aspect of the test of dishonesty... that it links legal responsibility more closely to moral culpability and transfers the determination of community standards to the jury.*
23. The Australian community does not have a very long history of familiarity with concepts of cartel conduct. As a result, the relevant "community standards" that juries are expected to apply might, unlike other areas of criminal law, be better spelt out in the legislation or require some specific direction.
24. Although we acknowledge that the proposed dishonesty test derived from *Ghosh* (and used in similar formulations in other Australian statutory contexts) can be criticised to some extent as being somewhat uncertain, we believe that on balance it provides an important step in distinguishing between criminal and civil liabilities. We submit there should be a second step as well - how the offences are defined.
25. Rather than having mirror provisions for criminal and civil liability, separated only by a problematic and uncertain distinction, in our view the Draft Bill should include new provisions which specifically and more narrowly define "serious cartel conduct". Under this approach, cartel conduct which attracts a criminal penalty would be defined in the legislation by reference to:

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<sup>9</sup> Dishonesty is not required for cartel offences in the United States, Canada, Japan, Korea, France, Germany or Ireland.

<sup>10</sup> *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd* (2007) ATPR 42-185.

<sup>11</sup> *Peters v The Queen* (1988) 192 CLR 493.

- (a) a set of new statutory elements which define "serious cartel conduct" (for example, by elevating the Discretionary Factors in the MOU to elements of "serious cartel conduct" which must be satisfied in order for criminal penalties to apply; **AND**
  - (b) the Dishonesty Element.
26. While we acknowledge that there are problems with the Dishonesty Element, provided that "serious cartel conduct" is narrowly defined as described above, we think that the Dishonesty Element should be retained. In our view, the most critical feature of any final bill is that it provide a statutory distinction between criminal and civil conduct. In the absence of a statutory element, the distinction between criminal and civil cartel conduct would be limited to the Discretionary Factors outlined in the Draft MOU.

## **The Discretionary Factors For Deciding on Criminal Prosecution**

27. The Discretionary Factors are precisely that - factors which the ACCC will "have regard to" in determining whether or not to pursue criminal proceedings. In our view they do not provide sufficient certainty to achieve the clear distinction which must underpin the introduction of criminal sanction for "serious cartel conduct". If the statutory element of dishonesty were to be removed, the classification of conduct attracting criminal prosecution would be limited to the ACCC and DPP's unfettered discretion. This is problematic because it reduces certainty and predictability, two important underlying principles of the criminal law.
28. We acknowledge that prosecutorial discretion is accepted in other jurisdictions, such as the United States. However, in the United States, to our understanding, there is a clearly understood distinction, in both law and procedure, which makes it clear to the authorities and antitrust practitioners as to whether a contravention will be investigated and penalised on a criminal basis or a civil basis. Australia does not have the benefit of a long experience with this exercise of prosecutorial discretion. A system which lacks a distinguishing statutory element and relies on ACCC (and DPP) discretion would, in our view, result in even greater uncertainty than that which may result from the inclusion of the Dishonesty Element.

## **Immunity from Civil and Criminal Liability**

29. The ACCC's Immunity Policy is a critical part of the effort to identify, punish and deter cartel conduct in Australia. It recognises that, as cartels by their nature often involve secret behaviour which their participants go to great lengths to conceal, the most effective way to find out about their activities is from one of the participants. The Immunity Policy provides a significant incentive for a participant in a cartel to break ranks and co-operate with the ACCC.
30. In deciding whether to seek immunity from the ACCC under the Immunity Policy, most organisations will consider the likelihood that its employees did engage in a cartel, the risk that its participation (or potential participation) in the cartel will be exposed, the risk that it could be successfully prosecuted for its role in the cartel, the civil liability under class actions by customers and the likely penalties that it may face.
31. Most organisations will also consider the potential cost of co-operating with the ACCC to obtain immunity, including the likely amount of any fines it will have to pay, the cost and disruption caused by a wide ranging ACCC investigation, as well as its inevitable exposure to class actions by third parties who may have suffered loss as a result. As a consequence, an effective immunity policy must provide a cartel participant with a clear and real possibility of a better outcome than its continued participation, or silent exit from, the cartel.
32. This "incentive" approach has been recognised as necessary and effective around the world, despite concerns and significant discomfort that in some cases it results in "leading cartel participants" bargaining for and winning immunity. It is a pragmatic and economic approach

which does not allow for nice moral judgements about "degrees of guilt" or "similar culpability".

33. To our understanding, the thinking behind current cartel immunity policies in Australia has already wrestled with this dilemma and opted to follow the pragmatic and "results focussed" international approach. We suggest that that choice should not be unravelled by this criminal reform. The Government should recognise that the Immunity Policy is at odds with the usual DPP immunity policies underlying leniency applications for conventional criminal laws.
34. We therefore submit that the existing DPP immunity policies need revision to take account of and be consistent with the ACCC Immunity Policy. In order for the ACCC Immunity Policy to continue to be an effective once criminal sanctions are introduced, it must be able to offer cartel participants the real prospect of immunity from both civil and criminal liability. To do that, the ACCC Immunity Policy and the DPP immunity policies must be transparent and predictable - that is, cartel participants must be able to easily understand the circumstances in which they will be eligible for immunity, the grounds upon which immunity will or will not be granted, who will make that decision and when.
35. It is currently proposed under the Draft MOU between the ACCC and the DPP that the question of whether a specific individual or corporation will be granted immunity from civil liability will be determined by the ACCC in accordance with the Immunity Policy, while the question of whether they will be granted immunity from criminal liability will be determined by the DPP in accordance with the Prosecution Policy of the Commonwealth ("**Prosecution Policy**").
36. The Immunity Policy and the Prosecution Policy contain different eligibility criteria for immunity<sup>12</sup> and reflect fundamentally different approaches to when immunity should be granted. Whereas an applicant will be provided with immunity provided that they meet the specified eligibility criteria in the Immunity Policy, the same applicant has no such certainty as to whether they will be granted immunity from criminal prosecution as the DPP has a wide discretion as to whether to grant immunity, which is regarded as a course of last resort<sup>13</sup>.
37. While there are a number of anomalies between the Immunity Policy and the Prosecution Policy<sup>14</sup>, one example is that the DPP will only grant immunity from criminal prosecution where the applicant can reasonably be regarded as significantly less culpable than the defendant and their evidence is considered to be necessary to secure the conviction of the defendant<sup>15</sup>. While an applicant under the Immunity Policy cannot be the clear leader of the cartel, it may well be a significant participant in the cartel and, in a sense, more culpable than other members of the cartel who may face criminal prosecution for participating in the cartel. Such a participant would be eligible for immunity under the Immunity Policy but not under the Prosecution Policy.
38. The fundamental differences between the two policies are not reconcilable on the face of the Immunity Policy or the Prosecution Policy and will create uncertainty, and a corresponding

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<sup>12</sup> See [5.1] to [5.8] of the Prosecution Policy and [4] of the Immunity Policy.

<sup>13</sup> See [5.5] of the Prosecution Policy.

<sup>14</sup> The Prosecution Policy does contain any equivalent to the provisions in the Immunity Policy relating to the ability to make an oral application ([2.5] of the "*ACCC Immunity Policy Interpretation Guidelines*" dated 26 August 2005 ("**Immunity Policy Guidelines**")), restrictions on the use of information provided to the ACCC in support of an application for immunity and the sharing of information by the ACCC with regulators in other jurisdictions ([2.6] of the Immunity Policy Guidelines).

<sup>15</sup> See [5.5] of the Prosecution Policy.

lack of predictability and transparency, as to how applications for immunity will be dealt with once criminal sanctions become law. In our view, this will ultimately manifest in less cartel participants approaching the ACCC for immunity.

39. Given the proven effectiveness of the Immunity Policy as a tool to detect and eliminate cartel activity in Australia, it is submitted that action should be taken to ensure that the current incompatibility of the Prosecution Policy vis-à-vis the ACCC's current practice does not undermine the effectiveness of the Immunity Policy. This issue can be readily resolved by the Prosecution Policy being supplemented by a specific section dealing with the prosecution of cartel offences that mirrors the Immunity Policy as agreed by the ACCC and the DPP.

## No Need for Amendments to Civil Liability Provisions

40. The Draft Bill, if passed, will have the effect of changing the long standing and settled operation of some key existing civil provisions of Part IV. It will do so by:
- (a) introducing new civil prohibitions that in some respects are broader than the existing per se civil prohibitions on price fixing and exclusionary provisions; and
  - (b) removing or modifying the existing exemptions and defences to the current per se civil prohibitions on price fixing and exclusionary provisions<sup>16</sup>.
41. The following new civil provisions are broader than their existing counterparts:
- **Price fixing:** The new provisions extend the concept of "price fixing" to the downstream resale of those goods or services by customers of the parties who made the contract, arrangement or understanding ("CAU")<sup>17</sup>.
  - **Production arrangements between competitors restricting outputs in the production and supply chain:** The new provisions extend the existing section 4D to CAU's between competitors which limit or prevent their production of goods or capacity to supply services<sup>18</sup>.
  - **Customer allocation:** The new provisions are in part based on the existing section 4D but go further by addressing allocation by geographical areas (i.e. the concept of "allocation" of customers or suppliers or areas to one or other of the parties to the arrangement)<sup>19</sup>.
  - **Bid rigging:** The new provisions make any arrangement between competing bidders a per se breach where "*a material component of at least one of the bids*" is worked out in accordance with the arrangement<sup>20</sup>.

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<sup>16</sup> The Draft Bill provides for the repeal of the joint venture defence to section 45A and the collective acquisition and joint advertising exceptions currently included in subsection 45A(4). It amends the joint venture defence to section 4D so that it is not available to incorporated joint ventures. It does not include a provision which corresponds to the exemptions in subsection 45(6), subsection 45(5) and subsection 45(7) for the new civil and criminal liability provisions.

<sup>17</sup> Subsection 44ZZRD(2)(a).

<sup>18</sup> Subsection 44ZZRD(2)(b).

<sup>19</sup> Subsection 44ZZRD(2)(c).

<sup>20</sup> Subsection 44ZZRD(2)(d).

- The Draft Bill also expands the concept of "*exclusionary provision*" to "effects" as well as purpose as proposed under subsection 44ZZRD(2)(b)(iii). The old section 4D (exclusionary provision) is retained alongside the new subsection 44ZZRD(2)(b)(iii).
42. We submit that amendments of such significance should **NOT** be made at this time, for the following reasons:
- (a) amendments to the civil provisions did not form part of the recommendations of the Dawson Review, which comprehensively reviewed the scope and operation of sections 45A and 4D;
  - (b) to disturb the existing Part IV civil liability provisions at the same time as the introduction of criminal offences will involve significant compliance costs and create significant uncertainties for business and their legal advisers quite apart from the impetus for criminal liabilities.
43. The reasons and justification for the changes to the civil liability provisions proposed in the Draft Bill have not been disclosed, nor have they been debated or considered in a public way. We would prefer an approach of narrowly defining the new criminal offences and leaving a review and reform of the existing civil provisions to another day. This is especially the case if the Government is looking to fast track the introduction of criminal offences. Changes to the existing Part IV civil liability provisions should be exposed to a period of public discussion and a rigorous assessment of whether they are desirable or necessary and whether the benefits of the reform would outweigh the costs.

## **Dawson Review Consideration of the Civil Per Se Liability Provisions**

44. The principal purpose of the Draft Bill is to introduce criminal penalties for serious cartel conduct, in response to the recommendations made by the Dawson Review, and more recent calls for reform<sup>21</sup>.
45. The Dawson Review comprehensively reviewed the existing Part IV civil liability provisions and did not recommend any changes of the nature proposed in the Draft Bill.
46. To the extent that the Dawson Review recommended changes to the existing civil liability provisions, it recommended that the TPA be amended so that it is a defence to proceedings based upon the prohibition of an exclusionary provision and of price fixing if the relevant provision did not have the purpose, effect or likely effect of substantially lessening competition<sup>22</sup>. By contrast, the Draft Bill proposes the partial removal or modification of the defences that were introduced in 2006 in response to this recommendation.

## **Compliance Costs and Uncertainties**

47. There are long standing compliance programs, structural arrangements and a fairly settled understanding of the operation of Part IV which will need to be changed if this Draft Bill becomes law. These will be particularly affected by the omission of an "exclusive dealing" exemption in relation to the new cartel provisions, and the proposed changes to the current joint venture defences.

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<sup>21</sup> See Discussion Paper, p. 1.

<sup>22</sup> See Dawson Review, Recommendations 8.1 and 9.1.

48. In our submission, arrangements that are currently lawful through the operation of subsection 45(6) or the current joint venture defences should not be brought into doubt by the introduction of criminal liability provisions or new civil provisions.

## **"Exclusive Dealing" Exception**

49. The Draft Bill omits the "exclusive dealing" exception in subsection 45(6) in relation to the new cartel provisions in the proposed Division 1A. This exception is well understood<sup>23</sup> and very widely relied upon in practice. In our experience this exception is properly justified in most cases if judged by an "impact on competition standard", and protects many legitimate arrangements that do not have the purpose or likely effect of substantially lessening competition. An example is where a supplier competes against its own distributors and wishes to segment distribution areas by customer or geographic area of operation. If such an arrangement does not have the purpose or likely effect of substantially lessening competition, such a structure is lawful under the current provisions.
50. However, there is no adoption of subsection 45(6) in relation to the proposed Subdivision C where civil liability is imposed without reference to the "dishonesty" limb. This means that arrangements that have operated lawfully for a long time will automatically contravene the new civil liability provisions.
51. In relation to the proposed new criminal liability provisions in the proposed Subdivision B, we understand the reluctance to introduce complex defences into a criminal cartel offence which would allow a defendant to raise issues for determination by a jury requiring the determination of whether conduct involved the purpose or effect of substantially lessening competition in a market. However, the fact is that there are many routine distribution arrangements throughout Australia which are lawful under the existing civil provisions *by reason only* of subsection 45(6).
52. It would be unsafe and quite alarming for general corporate compliance for those arrangements to be put in jeopardy under the civil provisions and for such arrangements to be saved from criminal liability only by the application of the somewhat uncertain "dishonesty" test.

## **No Joint Venture Defence to New Cartel Offences**

53. The Draft Bill does not include any joint venture defences for the new criminal cartel offences. If the reason for the omission of those is that the new criminal cartel offences are limited to "dishonest" conduct, there is still a legitimate case to say that there should be an express provision stating that the joint venture defence is available:
- (a) irrespective of any "mental element"; and
  - (b) irrespective of the need to inquire into the mental state of those who created the joint venture structure or who operate it today.
54. The competition issues associated with joint ventures were comprehensively analysed in the Dawson Review. As noted in the Dawson Review:

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<sup>23</sup> See *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1.

*Joint ventures may be pro-competitive, particularly when they are employed as a means of developing new products or services or producing existing products or services more efficiently<sup>24</sup>.*

55. In our experience, many joint venture arrangements rely upon those defences. If this legislation becomes law in the form proposed in the Draft Bill, the only provision saving those joint ventures from liability under the new cartel provisions will be the somewhat uncertain "dishonesty" test. Further, if the joint venture is an incorporated joint venture, it will risk contravening the new per se civil provisions, even where it does not have the purpose, effect or likely effect of substantially lessening competition in a market.

## **Restriction of Joint Venture Defence to Unincorporated Joint Ventures**

56. The Draft Bill proposes to restrict the joint venture defence in civil proceedings to unincorporated joint ventures<sup>25</sup>. The proposed new per se prohibitions on allocations, production and bidding arrangements in proposed Subdivision C could cause problems for many legitimate joint ventures, without any actual adverse impact on competition. Many of these structures are incorporated.

## **Removal of the Collective Acquisition Exception**

57. The Draft Bill proposes to remove the collective acquisition exception to price fixing conduct currently contained in subsection 45A(4). No policy reason has been given for repealing this exception. There is no corresponding provision for the new price fixing prohibition proposed in the new Draft Bill nor are there any savings or transitional arrangements for conduct which relies on this exception. This is significant because, upon the commencement of the proposed new provisions, conduct which is legal under the current provisions will be rendered illegal.

## **Transitional Provisions**

58. In addition to the above submissions, we perceive there to be some difficulties in the operation of the transitional provisions in proposed new section 176. That section proposes to "save" the application of the joint venture defence in section 76D (which is otherwise repealed) in relation to proceedings instituted either before or after the commencement time concerning contraventions that took place before the commencement time.
59. As we see it, the proposed section 176 will operate to "immunise" from proceedings the "making of" and "giving effect to" a price fixing arrangement if it is for the purposes of a joint venture (being a joint venture under the current provisions of the TPA, which includes an incorporated joint venture) and does not have the purpose or effect of substantially lessening competition. However, section 176 will not "immunise" from proceedings a price fixing arrangement that was made for a joint venture prior to the commencement time but given effect to after the commencement time. This appears to us to be a significant omission and no policy reason has been advanced for it. Incorporated joint ventures which make or give effect to price fixing arrangements which do not have the purpose or effect of substantially lessening competition presently have a defence to allegations of price fixing conduct under section 76D of the TPA.
60. If the proposed section 176 is enacted, those arrangements made prior to the commencement time but given effect to after the commencement time will not have a defence and therefore will be rendered illegal.

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<sup>24</sup> Dawson Review, p. 140 and chapter 9 generally.

<sup>25</sup> See subsection 44ZZRO(2)(a).

## Conclusions

61. To address the issues we have highlighted, we submit that:
- (a) a clear distinction be drawn between criminal and civil cartel conduct through the retention of the Dishonesty Element;
  - (b) explicit new provisions to define "serious cartel conduct" rather than a mirror of the civil regime be introduced;
  - (c) action be taken to align the DPP's approach to immunity with the ACCC's current practice;
  - (d) the proposed amendments to the Part IV civil provisions not be introduced; and
  - (e) the proposed amendments to the existing exemptions / defences to the current per se prohibitions on price fixing and exclusionary provisions be reconsidered.