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Our Ref: JAN:DJG 10031458

29 February 2008

Competition and Consumer Policy Division
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Dear Sir or Madam

Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008

This submission is put forward on behalf of Cooper Grace Ward Lawyers.

We are a large, Queensland law firm with a strong base in commercial and corporate transactions. As a firm we would like to comment on the proposed discussion issues surrounding the imminent introduction of the Trade Practices Amendments concerning cartels. If there are any queries regarding our business please feel free to contact the authors of this submission or visit our website www.cgw.com.au. This submission will attempt to cover the main discussion issues raised in the Treasury's Discussion Paper: *Criminal Penalties for Serious Cartel Conduct*. In making this proposal we have not attempted to formulate all possible legal arguments, instead we offer the following simply as our opinion based on experience within the legal industry.

Criminal Penalties for Cartel Conduct

Distinguishing Civil and Criminal Cartel Conduct

Dishonesty in Australia

The Discussion Paper aptly states that the differentiating element of dishonesty has had a long history in the Australian legal system. Importantly, dishonesty is a well established distinguishing factor between corporate civil breaches and criminal offences. A focus on the application of the dishonesty element in the corporate law context is, without a doubt, a relevant consideration. Many provisions in the *Corporations Act 2001* use the element of dishonesty to bring the breach under criminal jurisdiction (stated on page 4 of the Discussion Paper).

An example of the dishonesty element is contained in the cases concerning Rodney Adler's many breaches of the *Corporations Act 2001* and the *Crimes Act 1914* (Cth). They also illustrate how civil and criminal offences interact in a corporate context.¹ The interaction of these can be seen through Adler's breach of the basic director's duty of good faith, contained as a civil obligation in s181 and as a criminal offence in s184(1).² In this instance, Adler's breach was brought into the criminal jurisdiction by the added elements of recklessness and intentional dishonesty.³ The offences were proved beyond a reasonable doubt (as is the criminal standard of proof) and the added criminal elements were illustrated by the defendant putting his own personal interests above that of the company, by making misleading statements and, displaying an "appalling lack of commercial morality".⁴ As can be seen utilising the dishonesty element as a means of differentiating between

¹ *Adler v ASIC* 2003 179 FLR 1; *R v Adler* [2005] NSWSC 274; *Adler v The Queen* [2006] NSWCA 158.

² *Corporations Act 2001*.

³ *Corporations Act 2001*, ss184(a) and (b).

⁴ *R v Adler* [2005] NSWSC 335.

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Unfortunately, due to the recent release of the *Enterprise Act* there are no cases for us to illustrate the above law in action. It is however, a leading assumption that having adopted much of our common law counterparts legal principles that the element of dishonesty in differentiating cartel offences would be the most appropriate and best suited solution.

Dishonesty in the United States

The American cartel provisions were enacted a long time ago and refer to cartels as “trusts or conspiracies”.⁵ Section 1 of the *Sherman Act* declares that persons who engage in contracts that (whether trusts or conspiracies) restrain trade or commerce are guilty of a felony and outlines the applicable punishments. Unlike the United Kingdom provisions, the *Sherman Act* does not contemplate the inclusion of any added element to make cartel behaviour criminal. Instead, it outlines that any involvement in such “trusts or conspiracies” is an offence. These criminal provisions were followed by the *Clayton Act* (1914) which gave United States citizens who were injured by the above laws the right to sue.⁷ In Australia there is, and should be, a need to distinguish between civil and criminal offences so that there are two different consequences for the one breach (although they may relate to the same behaviour). We submit that the additional criminal penalties contemplated by the Amendments should not be imposed under Australian law without meeting the relevant standard of proof obtained through the prosecution illustrating that the defendants formed a cartel (or contract, arrangement or understanding to do so) with a dishonest intention. Although the United States law reiterates the serious effects cartels can have on the corporate and economic realms, we feel that in Australia, civil and criminal sanctions should be attracted by different kinds and levels of behaviour.

ACCC’s Investigative Powers

We submit our support to the ACCC having extended investigative powers even though the proposed term of imprisonment is less than seven years. However, the telecommunications interception warrant should only be issued by the judiciary (in this case perhaps a Federal Magistrate). For example, the provisions contained in s150 of the *Police Powers and Responsibilities Act 2000* (Qld) which requires officers to obtain warrants from justices. This allows for external, objective controls on the investigation to allow for the protection of privacy whilst achieving the ACCC’s goals.

Conclusions

Differentiating between corporate civil and criminal offences has long been completed with the assistance of an added element of dishonesty in the event of criminal behaviour. Having tried and tested this procedure in corporate law for many years it would be remiss drafting to express the cartel provisions in any other way.

In summary, we support the Bill in its current state in regard to the inclusion of the element of dishonesty and the extension of the ACCC’s investigative powers subject to certain conditions. It is

⁵ *Competition Act 1998* (UK), s2.

⁶ *Sherman Antitrust Act (1890)* 15 U.S.C. ss1-3.

⁷ *Clayton Act (1914)* 15 U.S.C. s4.



in our practical experience that these amendments will fit best with legal practice and law enforcement in Australia.

We would be happy to elaborate on any of the above should the Treasury so desire it.

Yours faithfully

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JAN10031458 1954490v1

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