

fair trading
coalition

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

Dear Sir/Madam

Please find attached for your consideration the Fair Trading Coalition's submission on the Exposure Draft of the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008.

Should you wish to discuss any aspect of this submission please do not hesitate to contact me on 02 6273 4333.

Yours faithfully

MICHAEL DELANEY
Executive Director of the Motor Trades Association of Australia
Convenor and Chairman of the Fair Trading Coalition

29 February 2008

members of the Fair Trading Coalition:

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| 1 Apple & Pear Growers Association of SA Inc | 7 Australian Petroleum Agents and Distributors Association | 13 Drycleaning Institute of Australia | 20 The Motor Trades Association of the Australian Capital Territory | 26 The Pharmacy Guild of Australia |
| 2 Australian Automotive Aftermarket Association | 8 Australian Private Hospitals Association | 14 Growcom | 21 The Motor Traders' Association of New South Wales | 27 Service Station Association Limited |
| 3 Australian Automobile Dealers Association | 9 Australian Service Station and Convenience Store Association | 15 The Horticulture Council | 22 The Motor Trades Association of the Northern Territory | 28 Victorian Automobile Chamber of Commerce |
| 4 Australian Hotels Association | 10 Chamber of Women in Business | 16 Independent Liquor Group NSW | 23 The Motor Trade Association of South Australia | 29 Western Australian Dental Implant Society AOS (WA) Inc |
| 5 Australian Motor Body Repairers Association | 11 Civil Contractors Federation | 17 Independent Liquor Stores Association | 24 The Motor Trade Association of Western Australia | |
| 6 Australian Newsagents' Federation | 12 Council of Small Business Organisations of Australia | 18 Liquor Stores Association of Victoria | 25 National Institute of Accountants | |
| | | 19 Motor Trades Association of Australia | | |

C/o Motor Trades Association of Australia
Motor Trades Association House, 39 Brisbane Avenue, Barton ACT 2600
PO Box 6273, Kingston, ACT 2604
Telephone: +61 2 273 4333. Facsimile: + 61 2 6273 2738
Email: info@fairtradingcoalition.org.au



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EXPOSURE DRAFT – TRADE PRACTICES AMENDMENT (CARTEL CONDUCT AND OTHER MEASURES) BILL 2008

SUBMISSION BY THE FAIR TRADING COALITION

1. INTRODUCTION

The Fair Trading Coalition (FTC) is an informal grouping of small business organisations committed to the strengthening of the *Trade Practices Act 1974*. The FTC was first established in 2002 to put forward a ‘small business’ view to the Dawson Review of the Trade Practices Act. The FTC has, since that time, continued to advocate for amendment of the Trade Practices Act. Members of the FTC are not bound by any rules or constitution and members are free to express their own views on trade practices matters.

The Members of the Fair Trading Coalition are:

- Apple and Pear Growers Association of South Australia Incorporated
- Australian Automotive Aftermarket Association
- Australian Automobile Dealers Association
- Australian Hotels Association
- Australian Motor Body Repairers Association
- Australian Newsagents’ Federation
- Australian Petroleum Agents and Distributors Association
- Australian Private Hospitals Association
- Australian Service Station and Convenience Store Association
- Chamber of Women in Business
- Civil Contractors Federation
- Council of Small Business of Australia
- Drycleaning Institute of Australia
- Growcom
- The Horticulture Council
- Independent Liquor Group NSW
- Independent Liquor Stores Association
- Liquor Stores Association of Victoria
- Motor Trades Association of Australia
- The Motor Trades Association of the Australian Capital Territory
- The Motor Traders’ Association of New South Wales
- The Motor Trades Association of the Northern Territory
- The Motor Trade Association of South Australia

- The Motor Trade Association of Western Australia
- National Institute of Accountants
- The Pharmacy Guild of Australia
- Service Station Association Limited
- Victorian Automobile Chamber of Commerce
- Western Australian Dental Implant Society AOS (WA) Ltd

The FTC welcomes the release for comment of the *Trade Practices Amendment (Cartel Conduct and other measures) Bill 2008* together with a Discussion Paper on the Bill and a draft MOU between the ACCC and DPP on criminal cartel matters. The FTC has long supported the introduction of criminal sanctions for cartel conduct.

However in the absence of an Explanatory Memorandum or some background paper accompanying the Exposure Draft it is difficult to understand much of what is in the Bill and why certain choices have been made.

The Discussion paper does however, raise three specific issues for comment, namely:

- how to distinguish between criminal and civil cartels?
- the penalty levels; and
- whether the ACCC should have access to telephone interception powers?

It is noted that the issue of telephone interception powers is not addressed in the draft Bill, but it is raised in the Discussion Paper. The FTC notes also that should this Bill (or one similar) be passed by the Parliament it is expected that there will have to be consequential amendments to the Federal Court of Australia Act.

Set out below are the Fair Trading Coalition's comments on the Exposure Draft Bill, the issues raised in the Discussion Paper and the draft Memorandum of Understanding between the Australian Competition and Consumer Commission (ACCC) and the Director of Public Prosecutions (DPP).

2. THE EXPOSURE DRAFT BILL

2.1 "Cartel conduct"

The Exposure Draft Bill proposes that a new offence of "cartel conduct" be introduced with both civil and criminal sanctions. The criminal offence applies only when the cartel is entered into "with the intention of dishonestly obtaining a benefit". The FTC understands that the civil offence does not contain the same 'hurdle' to be met.

In relation to the criminal sanction, the FTC understands that the 'benefit' need not be realised and that it can, in fact, be a benefit to a third party.

Having considered the exposure draft and also the circumstances applying overseas, the FTC believes the current 'dishonesty' test in the draft legislation appears somewhat onerous on the ACCC; that is, the proposed test will make it quite difficult to successfully prosecute a breach in a criminal court. To overcome that issue, the

FTC believes that the ‘intention of dishonestly obtaining a benefit’ concept should be withdrawn from the Bill.

To differentiate between the proposed new civil and criminal offences, the FTC suggests that the reliance should simply be on the different burdens of proof or alternatively, to not have the new identical specific criminal and civil cartel conduct offences, but to just have the specific offence as criminal only and leave the rest of the section 45/45A as presently enacted.

Both the Dawson Committee in its Review of the Trade Practices Act and the Australian Law Reform Commission in its Report on ‘Principled Regulation’ stressed the need for clear and specific criminal cartel offences; neither Review advocated a ‘dishonesty’ element. The proposed Bill however contains that specificity and goes much further.

There is a new civil offence with the same very specific offences as the proposed criminal offence.

Under what is proposed in the Exposure Bill, section 45A which deems price fixing and other cartel behaviour to be a ‘substantial lessening of competition’ is to be repealed. That then raises the issue of what is the difference between the criminal and civil offence. ‘Substantial lessening of competition’ offences are still in section 45(1) (which includes primary boycotts) and in section 45D.

Further there is a version of exclusionary conduct in the specific cartel conduct offence but with an effects test (new section 44ZZRD(2)(b)(iii)). This would seem to change the current law in relation to exclusionary conduct and it is not clear whether that was intended.

The ‘dishonesty’ element in the Exposure Draft is, the FTC understands, different to that in the United Kingdom. The United Kingdom Act does not contain the “obtaining a benefit” element. In other words the proposed Bill contains a much tougher test. Not only is the test the higher criminal burden one, but it must also be shown that there was dishonesty with intention of gaining a benefit.

The FTC understands that there has not been a successful prosecution to date under the United Kingdom Act. Both the USA and Canada have had criminal sanctions for cartels for quite some time; with neither regime including a ‘dishonesty’ element. In both countries there has been active enforcement of their respective laws. If those jurisdictions can successfully prosecute matters without a dishonesty element then the FTC would argue that Australia should be able to do the same.

In relation to the use of a ‘dishonesty’ test in other Australian laws, that test does not usually apply to per se offences and it is the dishonest element that is the actual breach of the law. In the proposed Bill there is to be a “dishonest” breach of per se law. Hence, the FTC’s view, it is not correct to state in the Discussion paper that there are significant other examples of the use of “dishonesty” in Australian law.

Dishonesty is what amounts to dishonest according to ordinary people's standards and that that is known to the defendant. So it is a both an objective and subjective test. The new section 44ZZRB has a detailed outline of the conduct caught; namely price fixing, bid rigging, restricting outputs and allocating customers and also that the parties must be in competition with each other.

The definition of parties is extended to cover all related body corporates. It is not at all clear why this is contained in the Bill and its inclusion is a matter of great concern to the Fair Trading Coalition. Many businesses will have 'related companies' but it would seem somewhat harsh that the related body corporates are automatically deemed to be a party to the 'contract, arrangement or understanding' without first ascertaining whether they were actually involved in the proscribed conduct. Such related body corporates may not even be in the same sector as the 'offending' corporation.

Recommendation 1

The FTC believes that the current proposed criminal conduct test of 'intention of dishonestly obtaining a benefit' is too onerous and as a result cartel behaviour will prove difficult to prosecute in a criminal court.

Recommendation 2

The FTC therefore recommends that the 'intention of dishonestly obtaining a benefit' concept be withdrawn from the Bill.

Recommendation 3

The FTC has always seen the difference between criminal and civil as being the onus of proof and the specificity of the criminal offence.

2.2 Penalties

The proposed penalties for criminal breaches for a corporation are up to \$10 million or three times any benefit obtained from a cartel or where the value cannot be determined 10 per cent of turnover. For an individual, the proposed maximum criminal penalties are imprisonment of five years jail and a fine of \$220,000.

In relation to the proposed penalties the FTC is not sure of the effectiveness of criminal sanctions for corporations and there seems to be little difference between civil or criminal sanctions when it comes to corporations.

The UK criminal provision applies only to individuals and the FTC would hope that any criminal action by the ACCC and DPP will focus on the individuals involved.

The FTC notes that the proposed Bill does not appear to extend the current prohibition on indemnification of fines and costs in civil TPA cases to the criminal offences.

Recommendation 4

The penalties appear appropriate but much will depend on how the ACCC/DPP approaches these and of course the approach of the Courts.

Recommendation 5

The FTC also recommends that the prohibition on indemnification of fines and costs be extended to cover criminal offences.

2.3 Other Aspects of the Proposed Bill

In the proposed Bill cartel conduct can be subject to an authorisation or notification application. This appears a little odd in relation to “dishonest” conduct.

The FTC would suggest that this is another reason why dishonesty might be an inappropriate test.

Agreements between related companies or joint ventures will be subject to a substantial lessening of competition test and not the new criminal offence. The onus to prove this defence is on the parties.

There are extensive provisions protecting cartel information which may be held by the ACCC. It is assumed that this is seen as necessary to support the ACCC immunity regime. The FTC suggests that when making an assessment whether or not to withhold or release such information that the ACCC be required to consult interested parties.

The Bill is retrospective in relation to the civil offence, as is expected, as it replaces section 45A. In relation to criminal it is retrospective as to the making of an agreement but not as to putting that agreement into effect.

Recommendation 6

The FTC does not support any retrospectivity in relation to the criminal provision.

The FTC notes also that both the Federal Court and the state Supreme Courts are proposed to have jurisdiction in relation to the proposed breaches. The FTC, for reasons of consistency, would prefer the Federal Court had exclusive jurisdiction.

2.4 Related issues

Juries

The FTC understands that juries will be involved in criminal cartel proceedings. It is however, not clear to the FTC whether that is the case and when juries will apply and when they will not apply.

Extradition

The FTC understands that extradition may apply to breaches of the new provisions. Again the FTC would like to know when and how that will work and the FTC believes that either the legislation and/or the ACCC/DPP guidelines should detail those arrangements; including whether any double jeopardy is likely to arise.

Costs

Currently in ACCC cartel cases parties found guilty of cartel conduct are liable to pay the ACCC's costs. What will be the situation in criminal cases and will Court costs be much higher where juries are empanelled?

2. MOU BETWEEN THE ACCC AND THE DPP

This is essentially an issue between the Australian Competition and Consumer Commission and the Director of Public Prosecutions. However the FTC does have some comments about the draft Memorandum of Understanding.

The ACCC can only send matters to the DPP which meet certain criteria of seriousness (as set out in clause 4.3 of the draft MOU). This seems to the FTC to mean that a defendant may challenge initially whether those criteria have been met before the actual alleged offence is able to be dealt with.

The FTC is concerned that at least some of the 'seriousness' criteria appear to be largely financial. There are also some subjective criteria, but these appear to be ultimately subject to the financial threshold test of \$1 million of effected commerce. This may mean that criminal cartel conduct in smaller geographic areas may escape criminal action and that other serious cases may also escape criminal action. It may therefore be appropriate that the Government consider removing the monetary threshold and that the question of whether a matter should be referred to the DPP be left to the ACCC.

As the DPP will effectively "run" the criminal cases with the ACCC as investigator, the FTC is somewhat concerned that the ACCC policy of giving priority to cartels may be compromised. The FTC hopes that the MOU does not hinder the ACCC's efforts which are aimed at effective market outcomes. The FTC suggests that there should perhaps be an annual review of the operations of the MOU by an independent agency or person.

3. TELECOMMUNICATION INTERCEPTION POWERS

This issue is a serious one and raises many concerns. The FTC supports giving the ACCC all the appropriate and necessary powers to adequately enforce the TPA. That may include telephone interception.

No doubt this suggestion flows from the fact that in the US and Canada such powers are used in cartel investigations. However, it must be remembered that in those jurisdictions either the FBI or the Police actually exercise the powers.

It is not clear, in what is currently being considered, how such powers would be exercised here in Australia and what safeguards would apply to those powers.

Most successful ACCC cartel cases arise from either whistle blowers or the Commission's immunity program and it is unclear whether phone interception powers are needed.

Recommendation 7

The FTC does not, at this point in time, support the ACCC having telephone interception powers.

Recommendation 8

The FTC recommends that further information (such as who would exercise the powers, how information would be protected and so on) be provided about telephone interception powers and that there then be further discussion on issues.

4. CONCLUDING COMMENTS AND SUMMARY OF RECOMMENDATIONS

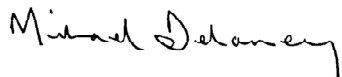
The Fair Trading Coalition has long supported the introduction of criminal sanctions for cartel activity and has welcomed the release for comment of this Exposure Draft Bill.

In relation to the Exposure Draft Bill, the FTC recommends the following:

1. The FTC believes that the current proposed criminal conduct test of 'intention of dishonestly obtaining a benefit' is too onerous and as a result cartel behaviour will prove difficult to prosecute in a criminal court.
2. The FTC therefore recommends that that the 'intention of dishonestly obtaining a benefit' concept be withdrawn from the Bill.
3. The FTC has always seen the difference between criminal and civil as being the onus of proof and the specificity of the criminal offence.
4. The penalties appear appropriate but much will depend on how the ACCC/DPP approaches these and of course the approach of the Courts.
5. The FTC also recommends that the prohibition on indemnification of fines and costs be extended to cover criminal offences.
6. The FTC does not support any retrospectivity in relation to the criminal provision.
7. The FTC does not, at this point in time, support the ACCC having telephone interception powers.
8. The FTC recommends that further information (such as who would exercise the powers, how information would be protected and so on) be provided about telephone interception powers and that there then be further discussion on issues.

The FTC hopes that the above comments assist in the further drafting of the Bill on criminal sanctions. The FTC would like to see the final Bill introduced into the Parliament as soon as possible.

The FTC notes that the Government proposes other changes to the TPA and suggests that the Government establish a consultative group to discuss those proposed changes to the Trade Practices Act.

A handwritten signature in black ink that reads "Michael Delaney". The signature is written in a cursive style with a long, sweeping tail on the letter 'y'.

MICHAEL DELANEY
Executive Director of the Motor Trades Association of Australia
Convenor and Chairman of the Fair Trading Coalition

29 February 2008