



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

10 March 2008

Email: cartelsbill@treasury.gov.au

Dear Sirs

**Proposed criminalisation of certain cartel conduct in Australia -
submission by the Working Group of the Antitrust Committee
of the International Bar Association**

The Working Group of the Antitrust Committee of the International Bar Association (the "IBA") encloses for your consideration a submission on the exposure draft of the *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008* (the "Bill") in Australia.

The IBA congratulates the Australian Government for adopting a consultative process with respect to the Bill and welcomes this opportunity to provide comments on a number of aspects of the Bill with the aim of offering a high level, comparative assessment based on international best practice.

Officers of the Antitrust Committee of the IBA would be delighted to discuss the enclosed submission in more detail, should that be of interest.

Yours faithfully

A handwritten signature in black ink, appearing to be "Inigo Igartua".

Inigo Igartua
Co Chair
Antitrust Committee

Encl 1

cc *Mr Martin Low QC - Co Chair - IBA Working Group*
Mr Gerwin Van Gerven - Co Chair - IBA Working Group
Mr Dave Poddar - Co Chair - IBA Working Group

Attachment One - List of Members of IBA Antitrust Committee Working Group



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|--------------------|------------------------------|
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**INTERNATIONAL BAR ASSOCIATION
ANTI-TRUST COMMITTEE
WORKING GROUP ON AUSTRALIA'S PROPOSAL TO CRIMINALISE CERTAIN
CARTEL CONDUCT
SUBMISSION REGARDING THE PROPOSED *TRADE PRACTICES AMENDMENT
(CARTEL CONDUCT AND OTHER MEASURES) BILL 2008***

Introduction

- 1.1 The Working Group of the Antitrust Committee of the International Bar Association (the “**Working Group**” of the “**IBA**”) sets out below its submission on the exposure draft of the *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008* (“**Bill**”) in Australia.
- 1.2 The IBA is the world’s leading organisation of international legal practitioners, bar associations and law societies. The IBA takes an interest in the development of international law reform and helps to shape the future of the legal profession throughout the world.
- 1.3 Bringing together anti-trust practitioners and experts among the IBA’s 30,000 individual lawyers from across the world, with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide an international and comparative analysis in this area. Further information on the IBA is available at www.ibanet.org.
- 1.4 Accordingly, the IBA welcomes the opportunity to comment on a number of aspects of the Bill, with a view to offering a high level, comparative assessment based on international best practice. The particular aspects of the Bill that the IBA has identified are:
 - (a) the dishonesty test as a means of distinguishing criminal offences from civil offences;
 - (b) how the Bill defines the “cartel provision”;
 - (c) the criminal penalties proposed by the Bill; and
 - (d) the interplay between criminal sanctions and immunity/leniency policies as a means of achieving greater efficacy of a cartel enforcement regime.

This submission now addresses each of these points, as well as a brief discussion on the availability of telephone interception warrants for cartel investigations.

- 1.5 The IBA also congratulates the Australian Government for adopting a consultative process and believes that such approaches are an indicative model for other jurisdictions.

2 The dishonesty test as a means of distinguishing criminal offences from the civil offences

Background on the criminal offences

- 2.1 The Bill creates two criminal offences which are based on a test of “dishonesty”. A person commits an offence if:
- (a) the person makes a contract or arrangement, or arrives at understanding, with the intention of dishonestly obtaining a benefit and the contract or understanding contains a cartel provision; or
 - (b) the person gives effect to a contract or arrangement containing a cartel provision with the intention of dishonestly obtaining a benefit.
- 2.2 A cartel provision encompasses price fixing; restricting outputs in the production and supply chain; allocating customers, suppliers or territories; or bid-rigging by parties that are, or would otherwise, be in competition with each other.
- 2.3 It is proposed that the element of “dishonesty” will be determined in accordance with the existing definition of dishonesty in the Australian *Commonwealth Criminal Code Act 1995 (Criminal Code)* and the *Corporations Act 2001*. This means that in order to successfully prosecute a person under the proposed criminal offence provisions, it would be necessary to demonstrate that:
- (a) the defendant did something “dishonest” according to the standards of ordinary people; and
 - (b) the defendant knew that what was done was “dishonest” according to the standards of ordinary people.

The first limb of the test is objective, whilst the second limb of the test is subjective.

- 2.4 The prosecution will also need to prove, beyond reasonable doubt, that the defendant made, or gave effect to, a cartel provision with the “*intention of gaining a benefit*”. Whether the benefit in question (which may be to a third person) is realised, or whether it may in fact be impossible to achieve, is irrelevant.
- 2.5 The comments which follow focus on the proposed “dishonesty” test, as well as the way in which the cartel offence itself has been drafted.

Submissions - dishonesty test

- 2.6 The IBA recognises that the “dishonesty” test presents both potential advantages and disadvantages and has international precedent for both its inclusion (and exclusion) from criminal offences for cartel conduct.
- 2.7 In terms of benefits:
- (a) the “dishonesty” test clearly demonstrates to the business community and the public at large that certain forms of anti-competitive conduct are especially ‘heinous’ and deserving of a criminal penalty; and
 - (b) the requirement to prove “dishonesty” acts a statutory filter to ensure that only the most serious cases of such conduct are the subject of a prosecution. In other

words, prosecutions should only be brought in the most serious cases, where prosecutors are confident that the factual background provides sufficient and compelling evidence of “dishonest” conduct.

2.8 The *Enterprise Act 2002* in the UK provides the only precedent among anti-cartel enforcement regimes for the inclusion of a “dishonesty” test when defining a cartel offence. Section 188 of the *Enterprise Act* defines the criminal cartel offence as “dishonestly” agreeing to engage in price fixing, restrictions of supply or production, market-sharing or bid-rigging. Experience in the enforcement of the *Enterprise Act* since its adoption in 2003 is insufficient to provide clear guidance as to whether it leads to over- or underenforcement or the right level of criminal prosecution.

2.9 However, the “dishonesty” test presents a number of disadvantages as follows:

- (a) proving a further subjective element of the offence (that is, proving beyond a reasonable doubt – in addition to the meeting of the minds that forms the agreement - that the defendant **knew** that what was done was “dishonest” according to the standards of ordinary people) may be problematic in practice. For example, while establishing the subjective element of the test may be relatively straightforward in cases in which the defendants clearly acted in a covert manner, the evidential burden may be more problematic in cases where the factual background does not clearly support a subjective finding of “dishonesty”, or where the defendant claims that in fact he acted with an altruistic purpose (such as a need to maintain profitability in light of aggressive competition from overseas competitors) and was not, in his view, acting “dishonestly”;
- (b) furthermore, the requirement of dishonesty may actually diminish the deterrent effect of the offence: it is conceivable that cartelists may try to structure their arrangements in a manner that emphasises the social or economic benefits associated with their agreement and thereby avoid the taint of dishonesty; and
- (c) at a policy level, the “dishonesty” test runs counter to the internationally recognised principle that hard core cartel behaviour, dishonest or not, has the most negative effects for consumers and should therefore be subject to severe penalties, including criminal sanctions.

2.10 International precedents for not subjecting a cartel offence to a “dishonesty” test include the United States and Canada. In the United States, it is only necessary to show (beyond reasonable doubt) that the defendant knowingly entered into the prohibited agreement in question. In Canada, it is necessary to show that the ‘cartel conspiracy’ restrained or injured competition “unduly”. In fact, it would appear that apart from the UK legislation, no other anti-cartel enforcement regime requires a dishonest state of mind.

2.11 **Conclusion - As set out later in this submission, the IBA believes that the proposed definition of the cartel offence in Australia is unworkably wide. In these circumstances dishonesty plays some role in distinguishing conduct deserving of a criminal penalty from other conduct that is caught. However, the IBA submits that it would be better to redefine the cartel offence more narrowly so as to only prohibit as criminal conduct that conduct which is generally (and internationally) considered as hard-core cartel conduct. If this were done then the element of dishonesty could be added as a requisite criterion in any decision by the Director of Public Prosecutions (“DPP”) to lay criminal charges.**

Efficacy of the dishonesty test in the UK

- 2.12 It has been said that the lack of successful prosecutions (to date) in the UK under section 188 of the *Enterprise Act* provides evidence that the “dishonesty” test imposes an onerous burden which, in turn, renders the UK criminal cartel offence unworkable. In the IBA's view there has not been sufficient experience to date to determine whether or not this is the case. However, there is at least a prospect that the inclusion of dishonesty as an element of the offence will significantly limit the number of cartel prosecutions.
- 2.13 As far as we know from public statements, the UK Office of Fair Trading (“OFT”) is currently investigating three significant criminal cartel matters. However, there is only publicly available information in two of these matters.
- 2.14 The first alleged criminal cartel under investigation involves the alleged international bid rigging, price fixing and market allocation in the market for rubber marine hoses (“**Marine Hoses Cartel**”).
- 2.15 The United States Department of Justice (“DOJ”) and European Commission (“EC”) are also investigating the Marine Hoses Cartel. The IBA understands that the level of cooperation between the OFT, DOJ and the EC is significant.
- 2.16 Three individuals have now been charged in the United Kingdom and will appear in the British courts in 2008.
- 2.17 The second alleged criminal cartel under investigation involves allegations that individuals dishonestly fixed the levels of the passenger fuel surcharge set by Virgin Atlantic Airways and British Airways (“**Passenger Airlines Cartel**”). The criminal investigation proceeded in tandem with the civil investigation in the UK and we understand that there has been significant cooperation and liaison with overseas regulators.
- 2.18 Resolution was reached in the civil proceedings that British Airways would pay a fine of 121.5 million pounds by reason of its admitted civil contraventions. Virgin Atlantic Airways is not expected to pay any penalty as it qualifies in principle for full immunity under the OFT's leniency policy
- 2.19 The admission by British Airways that it contravened civil provisions does not imply that any individuals dishonestly fixed prices within the meaning of the *Enterprise Act*. The criminal investigation is continuing and, as far as we are aware, no conclusions have been reached as to whether criminal proceedings against individuals will be brought.
- 2.20 Commentators have noted that the emerging message is that the OFT is taking seriously its criminal enforcement responsibilities and has been encouraged by recent consideration of dishonesty by the English High Court in *Norris v Government of the United States of America and others* [2007] 2 All ER 29 (“**Norris Case**”). This case is however on appeal.
- 2.21 **Conclusion - As mentioned above, in the IBA's view it is not possible on the basis of the limited UK experience to date, to determine whether or not dishonesty is a workable distinction - particularly as the *Norris Case* is on appeal.**

Operation of the “dishonesty” test - how the subjective intention of a corporation will be assessed

- 2.22 In order to determine whether a corporation knew what was done (in order to obtain a benefit) was “dishonest” according to the standards of ordinary people, the Bill proposes that it will be sufficient to show that:
- (a) a director, employee or agent of the body corporate engaged in that conduct;
 - (b) the director, employee or agent was, in engaging in that conduct, acting within the scope of his or her actual or apparent authority; and
 - (c) the director, employee or agent had that state of mind.
- 2.23 The IBA notes that this proposal is inconsistent with the corporate responsibility provisions under the Australian *Criminal Code*, pursuant to which fault must be demonstrated at the corporate level (and not merely at an individual level).
- 2.24 In summary, the corporate responsibility provisions under the *Criminal Code* provide that fault at a corporate level can be established by proof that:
- (a) the board of directors, or a high managerial agent of the corporation, intentionally, knowingly or recklessly carried out the relevant conduct; or
 - (b) a corporate culture existed within the corporation that directed, encouraged, tolerated or led to non-compliance, or the body corporate failed to create and maintain the requisite corporate culture.

2.25 Conclusion - The IBA considers that the approach adopted by the Bill on corporate responsibility raises a number of problematic issues. In particular, the Bill introduces a test which is similar to a test of strict liability. In these circumstances, and given the sanctions which may be imposed for a cartel offence, the IBA respectfully submits that the approach adopted by the *Criminal Code* is preferable.

Submissions - the formulation of the cartel offence

- 2.26 The Working Group on Cartels of the International Competition Network (“ICN”) notes, and the IBA agrees, that a key touchstone in any cartel enforcement regime is the clear identification of prohibited conduct. As the ICN comments:
- “A clear delineation of such conduct provides guidance to the business community subject to the law and distinguishes hard core cartel behaviour for the purposes of punishment and deterrence as compared to less pernicious violations”¹.*
- 2.27 The ICN Report goes on to note that there is generally widespread consensus regarding the common components of a cartel. That is, the key components are:
- (a) an agreement;
 - (b) between competitors;
 - (c) to restrict competition.

¹ *Building Blocks for Effective Anti-Cartel Regimes - Defining Hard Core Cartel Conduct, Effective Institutions and Effective Penalties*, ICN 4th Annual Conference Bonn, Germany 6-8 June 2005

- 2.28 Similarly, the ICN Report notes that the categories of conduct most often described as “hard core” are typically defined as:
- (a) price fixing;
 - (b) output restrictions;
 - (c) market allocation; and
 - (d) bid rigging.
- 2.29 At this high level of analysis, the IBA considers that the cartel offence defined in the Bill is consistent with the categories of conduct identified in the ICN Report as constituting “hard core” cartel conduct.
- 2.30 That said, the IBA considers that the definition of the “cartel provision” in the Bill lacks specificity which, in turn, is likely to render the application of Australia’s criminal cartel enforcement regime unpredictable and uncertain.
- 2.31 As noted earlier, the Bill provides that it will be an offence for a corporation to make or give effect to a contract, arrangement or understanding that contains a cartel provision. The Bill then defines the cartel provision as follows:
- “44ZZRD (1) For the purposes of this Act, a provision of a contract, arrangement or understanding is a cartel provision if the following conditions are satisfied in relation to the provision:*
- (a) the purpose/effect condition set out in subsection (2);*
 - (b) the competition condition set out in subsection (3)”.*
- 2.32 In summary, subsection (2) provides that the purpose/effect condition is satisfied if the provision has the purpose, or has or is likely to have the effect, of directly or indirectly:
- (a) fixing, controlling or maintaining the price for goods or services;
 - (b) preventing, restricting or limiting the production of goods, the capacity to supply services or the supply of goods or services;
 - (c) allocating customers or markets between all or any of the parties to the contract, arrangement or understanding; or
 - (d) rigging bids.
- 2.33 Subsection (3) provides that the competition condition is satisfied if at least 2 of the parties to the contract, arrangement or understanding:
- (a) are or are likely to be; or
 - (b) but for any contract, arrangement or understanding, would be or would be likely to be,
- in competition with each other in relation to:
- (a) the supply or acquisition of the goods or services in question;

- (b) the production of the relevant goods; and
- (c) the supply of the relevant services.

2.34 The Bill also provides that:

- (a) the form of a provision;
- (b) the form of the contract, arrangement or understanding; or
- (c) any description given to a provision, or to the contract, arrangement or understanding,

is irrelevant to determining whether the “purpose/effect” condition is satisfied.

2.35 In the IBA’s view, the “purpose/effect” condition (as currently drafted) is unclear and inherently uncertain and risks placing Australia’s cartel enforcement regime at odds with the cartel enforcement regimes implemented in other jurisdictions.

2.36 In particular, the “purpose/effect” condition referred to above would see provisions of contracts, arrangements or understandings between competitors which have the likely **effect**, directly or indirectly, of price fixing, limiting output, allocating markets or rigging bids, constitute a “cartel provision”.

2.37 This, in turn, may capture conduct that would not ordinarily be considered to be “serious” or “hard core” cartel conduct -- the “ill” at which criminal sanctions are directed. The Bill may therefore capture provisions of agreements which are, for example, intended to promote competition, increase efficiencies, or reduce costs.

2.38 For example, if a group of competing manufacturers of goods were to agree that they need to acquire raw supplies at lower costs so, in turn, they may compete more effectively in a related downstream market increasingly contested by cheap imports from overseas, there is a risk that such steps may constitute a “cartel provision” under the Bill in the sense that:

- (a) such steps potentially constitute the making of, or giving effect to, a provision of an agreement or understanding;
- (b) which has the **effect** of fixing, controlling or maintaining the price for goods acquired by any or all of the parties to the agreement or understanding.

2.39 The criteria of a “cartel provision” as defined by the Bill may therefore be satisfied, notwithstanding that the competitors in question were acting with a purpose of preserving their industry and their conduct, in fact, results in a more vigorous and dynamic market and lower costs for consumers.

2.40 This raises the possibility, therefore, that the definition of a “cartel provision” in Australia risks subjecting the conduct of multinational corporations, operating in different jurisdictions, to fundamentally differing tests. That is, corporations may find their conduct is potentially subject to a criminal cartel enforcement regime in Australia, but subject to quite a different regulatory regime in a different jurisdiction.

- 2.41 In addition, if the definition of “cartel provision” in Australia were to capture efficiency enhancing or pro-competitive conduct, the IBA submits that the Bill would be inconsistent with the OECD’s 1998 Recommendation² concerning effective action against hard core cartels. That Recommendation provided that:

“2.(b) the hard core cartel category does not include agreements, concerted practices, or arrangements that (i) are reasonably related to the lawful realisation of cost-reducing or out-put enhancing efficiencies...”

- 2.42 **Conclusion - The IBA has concerns that the definition of the “cartel provision” in the Bill is imprecise and runs counter to international best practice, as expressed by the ICN and the OECD’s 1998 Recommendation. In particular, the IBA considers that defining the “cartel provision” by reference to an effects test is likely to be highly problematic in practice and risks capturing provisions of contracts, agreements or understandings which deliver efficiencies or reduce costs. This, in turn, is likely to place Australia’s cartel enforcement regime out of step with overseas jurisdictions, with the result that conduct on the part of a corporation may attract criminal liability in Australia but not elsewhere.**
- 2.43 **For these reasons, the IBA respectfully submits that further consideration is given to how the “cartel provision” is defined in the Bill. In particular, the IBA recommends that further consideration is given to the potential consequences of the proposed “effects” test and the likelihood that such a test will subject businesses, in Australia and overseas, to considerable uncertainty when assessing whether their conduct is likely to constitute “hard core” cartel conduct attracting a criminal penalty.**
- 2.44 **The IBA also considers that the addition of “dishonesty” as an element of the offence may complicate further a bright line approach towards identifying criminal conduct and introduces a “state of mind” requirement that may be difficult to prove beyond a reasonable doubt. However, “dishonesty” may have a proper place as a requisite criterion for the DPP to lay charges. This may reassure the business community and the public that there is no risk of the DPP laying charges for any inadvertent transgression of the law**
- 2.45 **In these circumstances, the IBA respectfully submits that the preferable course would be to:**
- (a) redefine the 'cartel provision' more narrowly; and**
 - (b) require the DPP to include indicia of dishonesty among the requisite criteria for the laying of charges under the proposed legislation, though not to require dishonesty as a constituent element of the cartel offence.**

3 The proposed criminal penalties

- 3.1 The Bill provides that maximum penalties for the cartel offences are:

- (a) for an individual - a 5 year term of imprisonment and a fine of \$220,000; and

² Recommendation of the Council concerning effective action against hard core cartels (adopted by the Council on its 921st session on 25 March 1998)

(b) for a corporation - a fine that is the greater of \$10 million or three times the value of the benefit from the cartel, or where the value cannot be determined, 10% of annual turnover.

3.2 The financial penalties which may be imposed on an individual for contravention of the cartel offences is less severe than the maximum civil penalty for the same offence (being \$500,000). The financial penalties which may be imposed on a corporation are, however, consistent with the maximum penalty which may be imposed under the civil regime.

Rationale for criminal sanctions

3.3 According to the ICN, the primary policy objective for imposing penalties for cartel conduct is widely regarded as being a purpose of deterring future offences. This view is also supported by research undertaken by the OECD and the Global Forum on competition in the area of effective penalties³.

3.4 For example, in its most recent report on hard core cartels⁴, the OECD stated that:

“A policy of imposing strong sanctions for cartel conduct is an indispensable part of a successful anti-cartel programme To enhance deterrence and the effectiveness of a leniency programmes, countries should also consider introducing and imposing sanctions against individuals, including criminal sanctions where it would be consistent with social and legal norms.”

3.5 Similarly, in its review of the competition provisions of the *Trade Practices Act 1974 (Cth)* and their administration, the Dawson Committee⁵ noted that:

“The predominant reason for suggesting that there should be criminal penalties was that the threat of imprisonment would be an effective deterrent to cartel behaviour”.

Comparison with overseas jurisdictions

3.6 Based on the premise that the primary objective of sanctions for cartel conduct is deterrence, the ICN Report indicates that overseas jurisdictions which allow for specific penalties for so-called hard core cartel activity include high fines and/or prison sentences.

3.7 In this regard, the ICN Report notes that another possible way of creating a strong incentive for responsible management to prevent cartel offences is the imminent threat of being sent to jail. At the time of the ICN Report, 42% of the countries surveyed had the power to imprison individuals.

3.8 The IBA is aware of 15 jurisdictions⁶ which currently have criminal sanctions for cartel conduct. Of those, 11 (73%) may impose a term of imprisonment for cartel conduct. The maximum term of imprisonment which may be imposed for the breach of criminal cartel

³ See, for example, a number of existing OECD publications, including the *1998 Hard Core Cartel Recommendation*

⁴ *Hard Core Cartels - Third Report on the Implementation of the 1998 Recommendation (2005)*

⁵ Report on the competition provisions of the *Trade Practices Act 1974* and their administration - 31 January 2003

⁶ United States of America, United Kingdom, Canada, Japan, Korea, Cyprus, Denmark, Estonia, Greece, Ireland, Israel, Malta, Norway, the Slovak Republic and Thailand.

provisions in overseas jurisdictions range between 1⁷-10⁸ years, with the majority of jurisdictions imposing a maximum term of imprisonment of 3-6⁹ years.

- 3.9 Accordingly, the IBA is of the view that the maximum term of imprisonment proposed by the Bill is consistent with overseas jurisdictions.

Is the proposed term of imprisonment likely to have a sufficient deterrent effect?

- 3.10 The ICN Report indicates that while a number of overseas jurisdictions provide for the imposition of jail sentences, practical experience suggests that most of those jurisdictions have not actually had recourse to those powers. At the time of the Report, the ICN found that only two jurisdictions which responded to its survey had imposed prison sentences, and one of them had only started convicting individuals in 2003, but had suspended the execution of all sentences.
- 3.11 The ICN Report also noted that the average length of imprisonment from 2001 - 2003 was roughly one year and nine months, which is reduced to one year and five months if suspended sentences are discounted.
- 3.12 On one view, the IBA acknowledges the argument that terms of imprisonment have, thus far, been applied cautiously in almost all jurisdictions other than the United States (both in number and average length of imprisonment) and may not, therefore, fully achieve the deterrent effect at which they are aimed.
- 3.13 That said, the IBA considers there is a counter argument that the caution with which prison sentences have been imposed may be a result of other factors, such as meeting the higher evidentiary burden required for a criminal conviction. This, in turn, suggests that the relatively small number of jail terms imposed in practice should not inexorably detract from their ability to have a deterrent effect.
- 3.14 For example, the OECD noted in its 2005 report on hard core cartels¹⁰ that there is anecdotal evidence that criminal sanctions against individuals can have a deterrent effect. The OECD cites:
- (a) instances of cartel members locating cartel meetings outside the United States in the mistaken belief that they could locate the threat of criminal sanctions under US antitrust law;
 - (b) examples of cartels carving out the United States from their operations to avoid the risk of criminal sanctions; and
 - (c) the experience of the United States where individuals have repeatedly offered to pay high financial fines if they could avoid jail time, but conversely, no individual has ever offered to go to jail in order to avoid paying a fine.

⁷ Cyprus

⁸ United States

⁹ For example, in the United Kingdom, Canada, Japan, Korea, Estonia, Ireland and Slovak Republic.

¹⁰ *Hard Core Cartels - Third Report on the Implementation of the 1998 Recommendation* (2005)

3.15 Conclusion - Taking into account the matters outlined above, the IBA considers that the criminal penalties proposed by the Bill:

- (a) are consistent with overseas jurisdictions which impose criminal sanctions; and**
- (b) generally satisfy the policy that a criminal cartel enforcement regime should have a deterrent effect.**

4 The interaction of criminal penalties and immunity policies as a means of encouraging “whistle blowing”

4.1 Immunity or leniency programmes are widely accepted as being a powerful and integral part of cartel enforcement regimes, providing clear and discernable incentives for participants in a cartel to report the cartel to the competition authorities.

4.2 The prospect of criminal sanctions may encourage individuals (or corporations) to come forward and provide information about cartels in exchange for leniency (or immunity) in jurisdictions which have such policies. As recognised by the ICN, criminal sanctions may therefore also serve a policy objective of encouraging “whistle-blowing”, thereby enhancing the overall efficacy of a jurisdiction’s cartel enforcement regime.

4.3 The OECD’s Third Report on the 1998 Recommendation makes a similar comment, noting that:

“Individuals as well as corporations might be more reluctant to voluntarily provide information about cartels under a competition authority’s leniency programme if they fear the possibility of criminal prosecutions of individuals. Clear and transparent rules must assure individuals and corporations who come forward and seek leniency that individuals will also have protection against criminal prosecution”.

4.4 For example, the immunity policy which is applied in the United States (since 1993) confers virtually automatic amnesty, in cases where a cartel participant is the first to come forward and provide evidence of a cartel. Moreover, the grant of amnesty to a corporation will automatically extend to all individual employees of the corporation.

4.5 Similarly, the UK OFT has also made it clear that leniency which may be afforded under its policy operating in the context of the civil regime will also be extended to criminal prosecutions.

4.6 In Korea, the Seoul Central District Court has also recently dismissed an attempt by the Seoul Prosecutors’ Office to bring criminal proceedings against two members of a resin cartel and one from a sugar cartel because the Korean competition authority, the Fair Trade Commission, had previously granted the companies leniency.

4.7 The IBA agrees that without the ability to seek leniency from criminal prosecutions, the efficacy of a competition agency’s immunity policy is likely to be greatly diminished. In turn, the effectiveness of a competition agency’s cartel enforcement regime is likely to be significantly reduced.

4.8 Conclusion - For this reason, the IBA respectfully submits that careful consideration should be given to the likely interaction in Australia between the Australian Competition & Consumer Commission (“ACCC”) and the DPP, in connection with extending the ACCC’s existing immunity policy to the context of a criminal regime. Based on international experience, the IBA considers it likely that the ACCC’s immunity policy for civil matters would be adversely impacted if immunity from criminal prosecution were not also available to leniency applicants.

5 Other issues - the availability of telephone interception warrants in relation to the proposed criminal cartel offences

5.1 As the proposed criminal cartel offence will attract a maximum penalty of 5 years imprisonment, a number of investigative tools will be available, as follows:

- (a) a “Stored Communications” warrant, which authorises an enforcement agency (including the ACCC) to access covertly communications that have ceased passing over the telecommunications system from a telecommunications carrier;
- (b) a “Telecommunications Data Authorisation”, which permits the disclosure of data which accompanies a communication but which is not part of the communication itself. Such an authorisation may be granted by an authorised officer of an enforcement agency (including an authorised officer of the ACCC); and
- (c) a “Surveillance Device Warrant” which authorises a law enforcement agency (such as the Australian Federal Police, but not the ACCC) to use surveillance devices (such as listening devices or tracking devices).

5.2 However, a “Telecommunications Interception” warrant, which authorises the interception of communications in their passage over a telecommunications system (such as phone tapping), would **not** be available. This is because such warrants are only available to assist in the investigation of a “serious” offence (generally punishable by a term of imprisonment of at least 7 years).

5.3 Conclusion - These types of investigative measures are available in the United States and Canada, the two jurisdictions with significant experience in the investigation and prosecution of criminal cartel offences. Both jurisdictions have resorted to these powers in the investigation of conduct that is frequently highly covert. The IBA would support the proposed extension of telecommunications interception powers provided they are subject to appropriate checks and safeguards.

13 March 2008