

28 February 2008

By E-mail: cartelsbill@treasury.gov.au

The Hon Chris Bowen MP
Assistant Treasurer and Minister for Competition Policy and Consumer Affairs
Competition and Consumer Policy Division
The Treasury
Langton Crescent
Parkes ACT 2600

Dear Assistant Treasurer

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

We refer to your press release dated 11 January 2008.

Leighton Holdings Limited (LHL) welcomes the opportunity to comment on the exposure draft of the Bill and is pleased to make the following submission.

At the outset, we wish to make clear that LHL considers the introduction of criminal penalties to be appropriate for so-called "hard-core" cartel conduct. LHL has, however, a number of concerns regarding the drafting of the Bill. These relate to how the Bill would impact on joint ventures in the construction industry.

Almost without exception, joint ventures are the vehicle used to facilitate major construction projects in Australia and overseas. They necessarily involve collaboration between companies that are competitors.

In summary, LHL's concerns are that:

1. there is no defence for joint ventures to the new criminal cartel offences;
2. the new civil penalty provisions (CPPs) for cartel conduct would make joint ventures per se illegal unless a burdensome defence is established;
3. the joint venture defence to the new cartel CPPs does not apply to incorporated joint ventures;
4. the new civil and criminal prohibitions on "cartel conduct" are too broad;
5. the existing exceptions in the Trade Practices Act 1974 (the Act) have not been extended to the new criminal and civil cartel prohibitions in the Bill; and

6. the new deeming provision for related bodies corporate would prevent them from competing against each other.

LHL's reasons for these concerns are explained below.

About Leighton Holdings Limited

LHL is the parent company of Australia's largest project development and contracting group. The group includes Thiess, John Holland, Leighton Properties, Leighton Contractors, Leighton International and Leighton Asia. It employs over 27,000 people.

Through its subsidiaries, LHL conducts major construction projects throughout Australia and overseas, and competes in both the Australian and international construction markets.

LHL is a diversified service provider, utilising its financial and intellectual capital to provide integrated solutions to clients' infrastructure and project requirements.

The construction industry in Australia

Construction is an integral component of the Australian economy. In 2006–2007, the construction industry contributed 6.8% of Gross Domestic Product. The construction industry employs 937,300 people, representing 8.9% of employment in all industries (as at May 2007).

Joint ventures and the construction industry

Major construction projects are complex. They require a sequence of interdependent tasks by different types of specialist workers. This includes engineering, consulting, procurement, construction and construction management.

Joint ventures are fundamental to the construction industry because, amongst other matters, they allow for joint venturers to:

- **Pool resources.** Joint ventures bring together the technical resources to enable a team to furnish the type and magnitude of services that each participant would not be able to provide individually. Such resources can include specialist personnel, equipment and local knowledge.
- **Share risk.** Joint ventures allow for the sharing of the high levels of risk involved in construction projects. Risks and services can be allocated to the participant with the technical expertise to perform those services and manage those risks best.

- **Share bid costs.** These costs can often run into the millions of dollars, especially for a Public Private Partnership (PPP) or a Build, Own, Operate and Transfer (BOOT) project.
- **Meet financial and capital requirements.** This may include, for example, bonding facilities and equity contribution.

Joint ventures also allow for greater economic efficiency and a better and more comprehensive service to be provided to the client.

In recent years, governments throughout Australia have utilised PPPs as a vehicle for the delivery of major construction projects — in particular, the delivery of major public infrastructure. The new Federal Government has committed to invest in Australia's future and address long-term infrastructure bottlenecks¹. PPPs are to be considered by Infrastructure Australia as a means of delivering this infrastructure. PPPs are invariably delivered through joint ventures.

Joint ventures bid for PPPs in competition with other joint ventures. Bidding for PPPs by joint ventures is very competitive even though the joint ventures involve collaboration between competitors. It would therefore be a mistake to assume that the existence of joint ventures between competitors is anticompetitive or indicative of a lack of competition.

LHL has been involved in a number of joint ventures for major construction projects in Australia. These include the:

- \$2.6 billion Thiess/John Holland joint venture to construct EastLink Tollway, Melbourne;
- \$1.9 billion Leighton Contractors/Baulderstone joint venture to construct the North South Bypass Tunnel, Brisbane;
- \$1.6 billion John Holland/Macmahon/Barclay Mowlem/Haliburton joint venture to construct the Darwin to Alice Springs Railway;
- \$1.3 billion Leighton Contractors/AbiGroup joint venture to construct the Gateway Bridge Upgrade, Brisbane;
- \$1.1 billion Thiess/John Holland joint venture to construct the Lane Cove Tunnel, Sydney;
- \$1.0 billion John Holland/Veolia joint venture to construct the Sydney Desalination Plant;

¹ Australian Labor Party, "Rudd Government to Dramatically Overhaul National Infrastructure Policy", Media Statement, 21 January 2008

- \$714 million Thiess/Siemens joint venture for national telecommunications maintenance activities across Australia;
- \$320 million John Holland/Macmahon/Multiplex joint venture to construct Package A Metrorail, Perth;
- \$300 million Leighton Contractors/Kumagai joint venture to construct Package F Metrorail, Perth; and
- \$31 million Thiess/United Group joint venture for landfill remediation, Queensland.

Other major construction projects in Australia that have been conducted through joint ventures include the:

- \$2 billion Transfield/Obayashi joint venture to construct the Melbourne Citylink tollroad
- \$610 million Baulderstone Hornibrook/Bilfinger Berger joint venture to construct the Cross City Tunnel, Sydney;
- \$250 million Baulderstone Hornibrook/Bilfinger Berger joint venture to construct the Royal Women's Hospital, Melbourne;
- \$240 million Macmahon/Bouygues joint venture to construct the Hale Street Bridge, Brisbane; and
- \$230 million Baulderstone Hornibrook/Clough joint venture to construct the Graham Farmer Freeway, Stage 1, Perth.

Background

As a matter of principle, joint ventures are not anticompetitive. As the United States Department of Justice has explained in the context of US antitrust law:

"In order to compete in modern markets, competitors sometimes need to collaborate. Competitive forces are driving firms toward complex collaborations to achieve goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering production and other costs.

Such collaborations often are not only benign but procompetitive."²

² US Federal Trade Commission and US Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (April 2000) 1.

In April 2003, the Dawson Review of the Act recognised that joint ventures can be economically efficient and procompetitive. Accordingly, the Review recommended that the scope of the existing joint venture exemptions be broadened and that legitimate joint ventures should not be penalised under the Act. This ultimately led to the introduction of specific joint venture defences for exclusionary provisions (s76C) and price fixing (s76D) as part of the Act.

In relation to the criminalisation of serious cartel behaviour, the former Treasurer stated in 2005 that:

“Legitimate joint ventures and intellectual property arrangements will not be penalised under the cartel offence and will only be penalised under the revised per se civil prohibition where they substantially lessen competition.”³

However, the Bill, in its treatment of joint ventures, is substantially at odds with this statement and the Dawson Review’s recommendations.

LHL’s concerns regarding the Bill

1. No joint venture defence for criminal cartel offences

Section 44ZZRO of the Bill contains a defence for joint ventures from the new CPPs for cartel conduct (ss 44ZZRJ and 44ZZRK). The defence does not, however, apply to the new criminal offences for cartel conduct (ss 44ZZRF and 44ZZRG).

This would mean that every joint venture would be a criminal cartel subject only to the issue of whether the joint venturers intended to obtain a gain dishonestly. While a bona fide joint venture should be able to show that the joint venture was not conducted dishonestly, the presumption of criminality would have a chilling effect on legitimate commercial activity. It would also be inconsistent with the fundamental principle of criminal law that a person is presumed innocent until proven guilty.

Instead, joint venturers would need to prove their innocence by establishing that:

- the parties to the contract, arrangement or understanding are, or will be, carrying on a joint venture covered by s 4J(a)(i) (ie, an unincorporated joint venture); and
- the cartel provision is for the purposes of the joint venture; and
- the cartel provision does not have the purpose of substantially lessening competition; and
- the cartel provision does not have the effect of substantially lessening competition; and

³ See Treasurer, “Criminal penalties for serious cartel behaviour” (Press Release, 2 February 2005)

- the cartel provision is not likely to have the effect of substantially lessening competition.

Further, the concept of dishonesty is not clearly defined and its application will depend on whatever content juries give to it⁴.

As a reasonable precaution when faced with the risk of criminal sanctions, every joint venture might need to apply for authorisation from the ACCC or risk being charged with a criminal offence.

The joint venture defence in s 44ZZRO could be extended to apply to the new criminal cartel offences. However, even this would still entail a reversal of the onus of proof with joint venturers required to prove their innocence.

Joint ventures should be exempted completely from the criminal cartel offences, which were always intended to apply only to “serious” or “hard core” cartels. If a provision of a contract, arrangement or understanding between competitors is for the purpose of a joint venture but is interpreted to have the purpose, effect or likely effect of substantially lessening competition, it should be dealt with as a civil matter, not a criminal matter.

Once an accused raises evidence that the impugned provision of a contract, arrangement or understanding between competitors was for the purposes of a joint venture, the onus should be on the prosecution to prove, beyond reasonable doubt, that the provision was not for the purposes of a joint venture.

2. Onus of proof for joint ventures under the civil penalty provisions

Under s 44ZZRO of the Bill, a provision is exempted from the cartel CPPs if the joint venturer establishes the numerous and difficult matters set out above.

Although a defence for joint ventures is welcome, the defence in s 44ZZRO places a burdensome onus on the joint venturer. Given that many joint ventures in the construction and other industries promote procompetitive behaviour, this is unwarranted and unnecessary.

The Bill should provide that if the relevant conduct was pursuant to a joint venture, the ACCC must prove on the balance of probabilities that the conduct was for the purpose of, or had the effect or likely effect of substantially lessening competition.

3. No defence for incorporated joint ventures

The joint venture defence under s 44ZZRO is limited to unincorporated joint ventures. This is in contrast to the current defences under ss 76C and 76D, which

⁴ Caron Beaton-Wells and Brent Fisse, *A Critique of the Exposure Draft Bill, Draft ACCC-CDPP MOU and Discussion Paper introducing Criminal penalties for serious cartel conduct in Australia* (18 February 2008) 46.

apply to joint ventures whether they are incorporated or unincorporated (see the definition in s 4J).

There is no reason for discriminating against incorporated joint ventures in this manner.

4. The breadth of the new definition of “cartel conduct”

The rationale for the introduction of criminal sanctions was to deter and sanction “serious” or “hard core cartels” appropriately. However, the new cartel offences and CPPs are very broad. They are entirely new provisions that are not based on the existing prohibitions against price fixing and exclusionary provisions (under ss 45A and 4D respectively). In a number of respects, they prohibit conduct that has previously been legal.

The breadth of the new prohibitions flows from the expansive definition of a “cartel provision”. Under s 44ZZRD, a provision of a contract, arrangement or understanding is a “cartel provision” if it satisfies both the “purpose/effect condition” and the “competition condition”.

The “purpose/effect” condition under s 44ZZRD is satisfied in relation to a provision if it has the purpose or has the effect or has the likely effect directly or indirectly of any one of sixteen enumerated matters. This is an exceptionally broad test, as being “likely to have” an effect indirectly is a very low threshold. As a result of this broad “effects test”, many companies may not be aware of the fact that they are engaging in prohibited conduct. This is clearly an undesirable outcome.

Adding the “effects test” in s 44ZZRD(2)(b)(iii) will have the effect of widening the definition of exclusionary provisions under s 4D. There is no reason for this to occur.

The expansive definition of a “cartel provision” is liable to have far-reaching consequences. For example, if two competing construction companies agreed to enter into a joint venture and bid jointly for a project (rather than individually), this would arguably constitute a “cartel provision” on the basis that it had the effect of “preventing, limiting or restricting” the supply of goods or services by the parties (s 44ZZRD(2)(b)(i)) — the limitation or restriction being that the provision prevented them from supplying individually. The provision would be deemed to be anticompetitive even if there was no anticompetitive purpose (unlike under s 4D) and even if the effect of the joint venture was, in fact, procompetitive.

A further example of the operation of the definition of a “cartel provision”, relating to related bodies corporate, is explained below.

No reasons have been given for this new expansive definition of cartel conduct, or why the new criminal offences could not be based on the existing prohibitions of price fixing and exclusionary provisions. The definition is at odds with the policy of

criminal sanctions being introduced only for “serious” or “hard core” cartel conduct. The definition is also complex and will create considerable uncertainty in the law.

5. Existing exceptions not extended to the new cartel prohibitions

A number of existing exceptions under s 45 of the Act have not been extended to the new criminal and civil cartel prohibitions. There is no anti-overlap prohibition for exclusive dealing (equivalent to s 45(6)) or resale price maintenance (equivalent to s 45(5)(c)). There are also no exemptions corresponding to s 45(8) (related bodies corporate) or s 45A(4) (collective acquisition of good and services). These exemptions play important roles in ensuring that the prohibition is restricted to anticompetitive conduct. There is no reason why these exemptions should be abolished in the new cartel offences and cartel CPPs.

6. Related bodies corporate

Section 44ZZRC of the Bill provides that if a body corporate is a party to a contract, arrangement or understanding, each body corporate related to that body corporate is deemed also to be a party to that contract, arrangement or understanding.

The deeming provision would make it almost impossible for related bodies corporate to compete against each other. Rather than promoting competition, this would have a significant anticompetitive effect. The reason why the deeming provision would have that effect is illustrated by the following example.

Assume two related subsidiary companies bid in competition with each other in relation to a construction project. Assume also that one of the subsidiary companies enters into a contract, arrangement or understanding with a third party that includes a provision that “works out” a “material component” of that subsidiary company’s bid (using the language of s 44ZZRD(d)(v)). The third party could be a joint venturer, a subcontractor or possibly even the client who has requested the bids. There is nothing uncommon or anticompetitive about this.

Under s 44ZZRC of the Bill, both subsidiary companies would be deemed to be parties to the contract, arrangement or understanding with the third party. The provision of the contract, arrangement or understanding would then be a “cartel provision” because at least two of the parties (the two subsidiary companies) are in competition with each other (see s 44ZZRD(3)(j)), the same two parties bid, and “a material component of at least one of those bids is worked out in accordance with the contract, arrangement or understanding” (s 44ZZRD(2)(d)(v)).

If the third party was an unincorporated joint venturer, then the joint venture defence under s 44ZZRO might be available — although it is difficult to say under s 44ZZRO(2)(a) whether it could be utilised by the subsidiary company that was not party to the joint venture. If the third party had some other role (eg as a subcontractor), the joint venture defence would not be available and the subsidiary

company and the third party that made the contract, arrangement or understanding would be in breach of the new cartel CPPs and — subject only to the test of dishonesty — the new cartel offences.

This would be notwithstanding that both bids were made completely independently of each other and that there was nothing anticompetitive at all about the arrangement with the third party.

Also, it is unclear whether a related body corporate that is deemed to be party to a contract, arrangement or understanding by virtue of s 44ZZRC is consequently deemed to have made the contract or arrangement, or arrived at the understanding. It would be a strange result if a related body corporate could be a party to a contract, arrangement or understanding and yet be considered not to have made the contract or arrangement, or arrived at the understanding.

However, if related bodies corporate are deemed to have made the contract or arrangement, or arrived at the understanding, it would mean that s 44ZZRC effectively imposes accessorial liability (at least under the new cartel CPP in s 44ZZRJ) on all related bodies corporate of a party that makes a contract or arrangement, or arrives at an understanding or arrangement containing a cartel provision. This would be by the mere fact of them being related bodies corporate and regardless of whether they had any involvement or even knowledge of the cartel provision.

The deeming provision for related bodies corporate in s 44ZZRC therefore requires urgent amendment to prevent such a result.

Recommendations

1. The Bill should exempt joint ventures from the new criminal cartel offences altogether or at least provide a clear defence for joint ventures with the prosecution having the onus of proving that the defence did not apply.
2. In relation to the new cartel CPPs, the onus should be on the ACCC to prove that conduct pursuant to a joint venture had the purpose, effect or likely effect of substantially lessening competition.
3. The joint venture defence under s 44ZZRO should apply to both incorporated and unincorporated joint ventures equally.
4. The new definition of “cartel conduct” and the new cartel CPPs should be scrapped. The new criminal offences should be based on the existing prohibitions of price fixing and exclusionary provisions.
5. The new cartel offences and any new CPPs should contain exceptions equivalent to ss 45(5)(c), 45(6), 45(8) and 45A(4) of the Act.

6. The deeming provision for related bodies corporate in s 44ZZRC should be deleted or amended so that it:
- a) does not apply to a related body corporate of a party to a contract, arrangement or understanding if the related body corporate is, or is likely to be, in competition with the party in relation to the supply or acquisition of goods or services the subject of the contract, arrangement or understanding; and
 - b) clearly does not extend liability for cartel conduct automatically to all related bodies corporate.

Conclusion

LHL respectfully requests that the treatment of joint ventures under the Bill be given further consideration and the above recommendations be taken into account.

Please do not hesitate to contact us if you would like to discuss any aspect of this submission.

Yours sincerely



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