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**SUBMISSION TO THE COMPETITION AND CONSUMER POLICY DIVISION,  
THE TREASURY, ON DISCUSSION PAPER: CRIMINAL PENALTIES FOR  
SERIOUS CARTEL CONDUCT**

**by**

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## **Introduction**

The Government is to be commended for its commitment to introducing criminal penalties for cartel conduct. The desirability and appropriateness of attaching criminal penalties to cartel conduct is now widely accepted. There are, however, a number of difficulties with the way in which these reforms are proposed to be implemented in the Exposure Draft Bill. I do not propose to address them all, but will focus on the first question raised by the government; namely, how should civil and criminal cartel conduct be distinguished? I will also briefly address some of the other key difficulties arising from the proposed legislation and MOU.

## **The need for criminal penalties**

Criminal penalties are appropriate for cartel conduct, which is estimated to cost the worldwide economy many billions of dollars each year. Experience in other jurisdictions, other areas of law, and common sense, suggest criminal penalties should provide a more serious deterrent to engaging in cartel conduct than civil penalties alone.<sup>1</sup> The commitment to introduce such penalties for cartel conduct is, therefore, to be commended.

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<sup>1</sup> See further Julie Clarke and Mirko Bagaric, 'The Desirability of Criminal Penalties for Breaches of Part IV of the Trade Practices Act' (2003) 31(3) *Australian Business Law Review* 192-209

## Distinguishing civil from criminal liability

The proposed method of distinguishing civil from criminal liability is seriously flawed for at least five reasons:

1. *A dishonesty element is not necessary to distinguish civil from criminal liability*  
Even if it is accepted that a dishonesty element (in isolation) will not present great difficulty for juries and will not eliminate many cartels from the operation of the criminal regime (given the inherent dishonesty associated with cartels in most cases), the requirement is simply not needed to distinguish civil from criminal liability. A cartel adjudged criminal can be distinguished from one attracting only a civil penalty by the fact that only the former required proof of conduct beyond a reasonable doubt as determined by unanimous jury verdict. This is a sufficient distinguishing feature and would facilitate the removal of layers of definitional complexity from the proposed new laws. For this reason any attempt to replace 'dishonesty' with an element of 'secrecy' or 'fraud' would be similarly flawed.
2. *International precedent does not support inclusion of a 'dishonesty' element*  
The Discussion Paper makes reference to 'international precedent' for the inclusion of a dishonesty element. However, there is only one such precedent – the United Kingdom – and it is relatively untested and, arguably, seriously flawed.<sup>2</sup> By contrast, the bulk of international precedent for the introduction of criminal penalties, most notably the United States, does not support inclusion of a 'dishonesty' element (or any similar requirement). Even the OECD recommendations relating to 'hard core cartels' define such conduct by the nature of the acts involved and not by the motivations of the parties.
3. *Dishonesty is not an appropriate measure of 'seriousness'*  
It has been suggested that the requirement of 'dishonesty' would ensure only 'serious' cartel conduct is criminalised. Dishonesty is not, however, a true measure of the seriousness of the conduct; an overtly dishonest cartel might have little impact on the economy whereas an 'innocent' cartel (one created without knowledge of contravention) might have a serious economic impact.
4. *Ignorance of the law should provide no excuse*  
The inclusion of a 'dishonesty' element unwisely suggests that ignorance of the law should provide an excuse for otherwise criminal conduct.
5. *The method of including 'dishonesty' as an element is unduly complex*  
Even if dishonesty was considered an appropriate method of distinguishing civil from criminal cartel conduct, the proposed means by which it is included in the current Exposure Draft goes far beyond what is necessary.

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<sup>2</sup> See further Brent Fisse, 'The Cartel Offence: Dishonest?' (2007) 35 *Australian Business Law Review* 235.

The Exposure Draft imposes a requirement, not only that the conduct be dishonest, but that the dishonesty be judged according to the standards of 'ordinary people' and that the dishonesty occur with the intention of obtaining a gain. Both of these requirements, particularly the latter, will cause unnecessary technical evidentiary difficulties, prolonging the cost and duration of a trial. More significantly, they will also provide defendants with an 'escape route' from conduct that, by its nature, is appropriately treated as criminal regardless of the motivations of the parties involved. I have previously discussed the problems associated with these requirements (see Julie Clarke, 'Criminal Penalties for Contraventions of Part IV of the Trade Practices Act' (2005) 10(1) *Deakin Law Review* 141-176, attached)

## The MOU

The draft MOU between the CDDP and the ACCC inappropriately considers the value of commerce affected as relevant in determining whether criminal prosecution should be pursued. The Dawson Committee, when recommending the introduction of criminal penalties, made clear that it considered that 'any criminal sanctions that are created should apply to all who engage in the cartel conduct and not just to large corporations' (at p 163).

Cartel conduct captured by the cartel offence is already 'serious', by definition, and the proportionate response to criminal conduct is to apply a criminal penalty. The level of harm caused by the illegal conduct is more appropriately a matter for sentencing (as is the case with most criminal offences that can cause varying degrees of harm) and not for determining whether to pursue criminal prosecution in the first place. The use of turnover as a distinction also presumes that, the more value of commerce affected, the more damage incurred; in fact smaller cartels may have profound impact in, for example, smaller country towns where more harm may be caused to individual consumers, compared to larger cartels that might inflict more total net damage, but that damage is diffused amongst a wider group of consumers or competitors. Thus, simply because the amount of commerce affected by price fixing may be small does not render the offence less serious for the purpose of determining what cartel conduct should be pursued criminally.

The ACCC and/or DPP may appropriately choose not to proceed with criminal proceedings in certain cases, but this should not be decided based on some arbitrary measure of the value of commerce affected. This has the undesirably effect of suggesting to business that some 'serious cartels' are in fact not really all that serious. Moral culpability is a much more relevant and appropriate criteria for determining whether criminal prosecution should be pursued. In this respect it would be appropriate to consider motivating factors and issues of 'dishonesty' and prior history when determining whether a criminal prosecution should be pursued or whether to proceed only with civil action. If there is to be any consideration based on market impact, then the first consideration listed in para 4.3 of the draft MOU, namely that 'conduct was longstanding or had, or could have, a significant impact on the market in which the conduct occurred' is a much more appropriate benchmark.

## General observations

The definition of cartel offence and the new civil prohibitions are exceedingly (and unnecessarily) complex. Part of this complexity can be removed by simply defining civil and criminal cartel conduct in the same way. There are, however, other concerns with the language adopted in the Exposure Draft (including unexplained deviations from existing per se cartel provisions). The Discussion Paper has not called for comment on these issues and I do not propose to discuss them as part of this submission, but instead attach an earlier paper of mine (Julie Clarke, 'Criminal Penalties for Contraventions of Part IV of the Trade Practices Act' (2005) 10(1) *Deakin Law Review* 141-176) in which many of these issues are addressed. I urge the Treasury to consider a full consultation process regarding these issues, followed by serious and substantial redrafting of these provisions, before presenting a final bill. Failure to properly consider these matters, in an effort to rush through the new legislation, will generate considerable business and legal uncertainty.

## Summary

Legislation should be introduced to criminalise cartel conduct. However, a revised bill introducing criminal penalties for cartel conduct should

- remove the dishonesty element or, if it is retained, at least eliminate the requirement that the dishonest intent be to 'obtain a gain';
- simplify the definition of cartel conduct and consider a more logical numbering process;
- ensure that anomalous deviations from existing civil cartel provisions are either rectified or explained.

In addition

- the MOU should remove the reference to a defined value of affected commerce as a factor in determining whether or not criminal action should be pursued.



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