

11 February 2009

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

## Second reading

**Mr BRADBURY (Lindsay) (1:51 PM)**—I rise to support the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 and to echo the comments of those speakers who have come before me in relation to the matters that are contained within the bill. Clearly, the point has been made consistently, and I wish to reinforce the point, that cartels are, in many respects, one of the great evils when it comes to anticompetitive activity within the marketplace. Cartels, of their nature, undermine the integrity of the marketplace and run counter to efficient outcomes within the marketplace.

It is essential that we have a robust regulatory regime in place to ensure the proper operation of the market, and that is why it has been well recognised throughout market economies over many years—and the member for Wakefield certainly emphasised this point—that there is a very significant and important role for government to play in intervening in the marketplace to set the parameters, to create the rules of the game, the rules of operation, the rules under which trade will occur, so as to ensure that the market and its participants, or their interests, are not being compromised throughout its operation in the ordinary course of events.

I saw a quote from Warren Pengilley, who wrote an article titled 'The law of collusion: aftermath of the Geelong petrol price-fixing case', which appeared in the Law Society Journal. Mr Pengilley—and I think that this really encapsulates the essence of laws designed to combat the activities of cartels—stated:

The law regards each marketplace competitor as being responsible for its own pricing decisions. The result of each competitor making its own decision will deliver, so economic competition theory runs, the best market outcome. This is because each competitor will seek to maximise its profit and make such decisions as are necessary to achieve this end. Conduct which complies with this concept is not illegal. It is when competitors seek to subvert this concept by making arrangements between themselves on agreed outcomes that the law steps in.

The comments that were made earlier by the member for Mayo are, I think, to some extent rebutted by the extract that I have just quoted. The member for Mayo was indicating that he holds a concern that entrepreneurial effort and entrepreneurial zeal will be discouraged by the introduction of criminal sanctions for those participants convicted of their involvement in cartel related activities. But it is an important process to follow through that there has to be a conviction, and of course the burden of proof in criminal matters, which continues to be the case in these matters, will be one of 'beyond reasonable doubt'. Clearly, the offence needs to be made out, and it is only after it has been made out that those

who have been engaged in the sort of activity that Mr Pengilley has so aptly described will then be dealt with according to the criminal law and the sanctions that are proposed within this bill.

The question that needs to be asked in relation to this debate is: why should matters such as these—that is, cartel related activities—be treated differently to other offences and other activities that effectively have the same substantive economic outcome? To clarify the comparison I am drawing: there are many instances in which individuals will seek to profit from others by doing things that effectively amount to stealing. We need to understand that collusion and the various activities that might be involved in cartel related activities amount to theft. It may not appear that there are victims, but there are victims of the crimes that we are contemplating in the course of discussing this bill. The victims are consumers. The victims are small businesses. Victims are right throughout the economy. Whilst to some extent they may be faceless and to some extent they may not even be aware that they are victims at the time when they are deprived of the money that these cartel related activities essentially rob them of, notwithstanding that, they are victims. It is in that context that we need to reflect upon the fact that these proposed criminal sanctions are essentially about recognising the gravity of these offences and the gravity of these activities. To participate in cartel related activities is essentially to participate in theft. The proceeds of the crime come from the larger amounts of money that consumers, small businesses and other individuals and participants throughout the marketplace are required to contribute in meeting the increased prices that flow through from these cartel related activities.

I think it is worth reflecting upon some of the acts and some of the offences that are currently on the statute books, not necessarily in relation to the Commonwealth parliament. In my home state of New South Wales, there is an offence, for example, under the Crimes Act, of 'directors et cetera cheating or defrauding'. That is section 176A of the Crimes Act. That section reads:

Whosoever, being a director, officer, or member, of any body corporate or public company, cheats or defrauds, or does or omits to do any act with intent to cheat or defraud, the body corporate or company or any person in his or her dealings with the body corporate or company shall be liable to imprisonment for 10 years.

It strikes me that this offence, which is on the statute books in New South Wales and has been there for many years, is not seen to be a particularly exceptional offence. I have certainly never been approached by anyone petitioning me to either effect any change to this offence or to lobby others to do so. Essentially, I think that is because there is, right across the community, a consensus that activities of this sort are reprehensible, and it is because they are reprehensible that the law, through the imposition of criminal sanctions, seeks to deter those activities. It strikes me as rather strange to hear particularly those from the other side suggesting that sanctions of this sort should not be imposed in relation to those matters that might emerge from cartel related activities.

It is worth noting that these particular proposals have a long history. We can go back to the many discussions at the international level through the OECD. We can look closer to home at the Dawson review, and the many valuable submissions that I have seen were made as part of that review. The Dawson review concluded—and I think this is of particular significance to the comments that I have just made—at page 19:

There was general agreement in the submissions made to the Committee that, notwithstanding the difficulty in arriving at an appropriate definition of serious or hard-core cartel conduct, it is sufficiently reprehensible to be punishable by the imposition of a gaol sentence.

It is that very element of there being a community consensus, a broad consensus—

**The SPEAKER** —Order! The debate is interrupted in accordance with the motion of earlier today.

**Mr BRADBURY (Lindsay) (3:28 PM)** —It is a difficult task to resume discussion about matters of state—however important the matters in relation to the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 may be—after the contributions that we have just witnessed in this place. I want to thank the members who have just recently made those contributions and acknowledge the spirit in which they have brought the interests, the views and the perspectives of their electorates before the House.

Before my contribution on the bill before the House was interrupted a little earlier on, I was quoting an extract from the Dawson review, which, if I can paraphrase that extract, essentially pointed to the consensus that had emerged from the various submissions that had been made to the Dawson review—a consensus on the point that cartel related activity was sufficiently reprehensible to be punishable by the imposition of a gaol sentence. Indeed, it is that view and that consensus that emerged from the Dawson review and formed the basis of a recommendation from that review, that the government is now implementing what was an election commitment, made prior to the last election, in relation to cartel related activity, which now involves a bill proposing criminal sanctions to be imposed in respect of those sorts of activities.

As I indicated earlier, it is not exceptional for us, in various areas of the law, to impose criminal sanctions where there is behaviour that is sufficiently reprehensible. It would seem that something we would do as a matter of course is ensure that the statutes that are on the books in this place represent and reflect widely held community views in relation to these matters. It is worth noting that the ACCC has been in support of these proposals and certainly made a submission at the time to the Dawson inquiry. I would like to quote a section from the ACCC's submission, which said:

Hard-core cartels can be highly profitable for those involved and are difficult to detect. This makes the incentives high for businesses to engage in such fraudulent and clandestine conduct. It also makes it imperative that significant deterrents exist to counteract these incentives.

It is worth noting and understanding that, on the specific issue of deterrence and the deterrence value of those measures being proposed in this bill, the existing provisions in the law as it stands, which relate only to civil penalties, have given rise to a situation where, in the case of many corporations and many individuals guiding those corporations, decisions have been made to engage in activities that might otherwise be described as being uncompetitive, and they have done so on the basis that they have made a calculated risk and a calculated gamble that they may in fact get away with such activity. In the event that they are unable to get away with such activity, that calculated risk has factored in the cost of getting caught out. It is an unsatisfactory situation where a corporation and those guiding the direction of the corporation make a decision based upon this philosophy—that, even if they get caught out, that is a business judgement, a business risk, that they are prepared to factor into their operations.

When it comes to the question of deterrence, if the only stick with which the state has to defend the interests of consumers and small businesses is the civil penalties that currently exist within the act as it stands, clearly the deterrence value is not going to be as great as if the stick involved the criminal sanctions that are now proposed in the bill before us. It is regrettable that there are individuals driving corporations that would make those decisions, but I think that it is self-evident that those decisions have been made in the past. The very difficult nature of securing a prosecution in relation to these matters because of the highly secretive and clandestine nature of the discussions, actions, collaboration or collusion that might lead to cartel related activity has meant that over time there have been many organisations, businesses and individuals that have been prepared to take that risk. I suspect that their preparedness to do that will be greatly diminished if criminal sanctions are implemented, and it is in light of those criminal sanctions that I believe we will get much greater compliance with the law and a

reduction in cartel related activities.

In highlighting and identifying the challenges and difficulties associated with catching individuals and organisations involved in these activities, we also need to ensure that we provide the regulators with the necessary powers to secure the evidence that is needed in order to commence effective prosecutions in relation to cartel related matters. It is in that vein that I support the telephone interception provisions of this bill. Of course, provisions of this nature are always provisions that the parliament needs to give much and close consideration to before introducing. But, given the particular nature of these offences, their very secretive nature and the way in which these crimes—if I can use that word—are carried out, if we are to have any chance of bringing the participants in these sorts of activities to justice, it is imperative that we have powers such as the telephone intercept powers that are proposed in this bill.

To complement those powers, having an effective means of showing and demonstrating leniency to whistleblowers—who may be the agents who first bring forward concerns that lead to the use of telephone intercept powers that ultimately uncover cartel related activity—needs to be a necessary and complementary component of any approach to tackling cartels. That is why this bill strikes a very reasonable balance between, on the one hand, increasing the sanctions, introducing criminal sanctions and providing a greater deterrence and, on the other hand, providing more and more effective powers for enforcement agencies and regulators to try and uncover the sort of conduct that is the target of the legislation. Combined with the whistleblower protection, which will hopefully provide further leads that will ultimately lead to authorities tracking down this activity, this will root out cartel related activity where it is present, and that is in the best interests of consumers, the economy generally and also small businesses.

Before I conclude, I wish to reflect upon a couple of comments that I have noted from interested parties that are not able to make a contribution to this debate in the parliament. I note the comments of Professor Paul Kerin, professorial fellow at the Melbourne Business School, who was quoted in the Australian on 26 January as saying:

Jail sentences would be even more valuable here than in the US. Our small markets and highly concentrated industries make price-fixing much easier. Jail sentences would make potential perpetrators think twice.

Apart from the obvious deterrence that comes with the criminal sanctions, I think we can see that there are particular reasons why, in the Australian market, these types of laws will have an even greater effect than they have in other areas where those laws are already in place. And it is not exceptional that we should be introducing these laws. They have been introduced in many countries around the world, and many of our key trading partners abide by these rules. I think it is important that we not only work collaboratively at the international level—as we have done in the past through the OECD—but that we implement laws domestically that reflect our participation in those forums internationally. I also note that Professor Bob Baxt, a partner at Freehills and former head of the Trade Practices Commission, made the comment:

What Chris Bowen has done is he's taken the heat out of this issue immediately, rather than fluffing around like Peter Costello did.

I do not want to reflect on the fluffing around of the member for Higgins. What I will say, however, is that the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs is not someone that fluffs around. As a consequence of his determination to not fluff around we have, in a very short space of time, seen legislation—bills brought before this House—that tackle something that even by their own admission members on all sides of this House have said is legislation that needs to be introduced. I am very pleased to see that it has now been introduced. I am even more pleased to see that it appears to

have bipartisan support. This is legislation that will deliver real benefits to consumers and ensure that we have a market that is competitive, with integrity. (Time expired)