



14 January 2009

Committee Secretary  
Senate Economics Committee  
Parliament House  
Canberra ACT 2600

Dear Sir

The DomGas Alliance is pleased to provide this submission to the Committee's inquiry on the *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008*.

The Alliance welcomes efforts to further deter cartel behaviour and to promote competition in the marketplace. Proposed changes to the joint venture defence provisions of the Act will, however, significantly weaken the existing civil penalty provisions against price fixing and will encourage anti-competitive cartel conduct.

The Alliance has previously raised these concerns at the Committee's inquiry hearings on the North West Shelf joint selling arrangements on 17 November 2009. This submission provides further elaboration of the Alliance's concerns.

### **The existing civil penalty provisions**

Section 45 of the *Trade Practices Act 1974* prohibits arrangements that have the purpose or likely effect of substantially lessening competition. Section 45A further *deems* price fixing to have the purpose or likely effect of substantially lessening competition.

Section 76D provides a defence for joint ventures. Companies seeking to rely on the defence must prove that the price fixing provision is "for the purposes" of the joint venture *and that the provision does not have the purpose, effect or likely effect of substantially lessening competition in any market*.

Section 88 allows the ACCC to grant authorisations for otherwise anti-competitive arrangements. In doing so, the ACCC will balance the potential impact on competition with the public benefit of permitting the arrangement.

## **The proposed changes to the joint venture defence for civil penalty cases**

The Bill proposes removing the existing section 45A price fixing provision and creates new criminal and civil prohibitions against cartel conduct. Significantly, proposed changes to the joint venture defence for civil penalty cases will require joint venture participants to demonstrate that a price fixing provision was “for the purposes of the joint venture” but abolishes the competition test that now applies under section 76D. The fact that an arrangement substantially lessens competition will no longer be relevant to a joint venture defence against price fixing.

If passed, the amendments proposed will create a major loophole in the prohibition against price fixing and seriously weaken the Act. It will give participants in joint ventures such as the North West Shelf Joint Venture significant scope to price fix and thereby avoid competition without seeking authorisation from the ACCC.

The amendments depart from a recommendation of the Dawson Committee, as adopted by the government in enacting section 76D in 2006. There is no discussion paper explaining or justifying the major change now proposed. There has been little opportunity for public debate and submissions on this important issue.

## **The existing civil penalty provisions reflect an appropriate balance**

The Alliance believes that, for *civil* prohibitions against price fixing and other cartel behaviour, a joint venture defence based on the existing section 76D defence would reflect an appropriate balance that supports investment and development activity, while also ensuring consumers are protected.

It would ensure that whatever arrangements producers might enter into to develop an economic resource, such arrangements should not undermine the object of the *Trade Practices Act* in promoting effective competition.

The existing Act also provides a mechanism for producers to seek authorisation from the ACCC for arrangements that might otherwise infringe the Act. In deciding whether to grant authorisation, the ACCC is currently required to consider the impact on competition and any broader public benefits that might flow from permitting the arrangement.

Under the proposed amendments, however, there would be no need for producers to seek authorisation of their price fixing arrangement and to undergo a public benefits assessment by the ACCC.

## **Retaining the competition test for the civil penalty provisions will not undercut the proposed new cartel offences**

The Alliance understands the intent behind the removal of the competition test is to avoid complicating jury trials in criminal cases involving joint ventures. Applying a competition test in criminal cases would require the prosecution to persuade a jury beyond reasonable doubt that a cartel provision had the purpose or likely effect of substantially lessening competition. That would be a difficult task for the prosecution and juries would have to consider complex economic evidence and arguments.

Retaining the competition test for the joint venture defence in *civil* penalty cases would however still preserve this intent. Under the proposed changes, separate civil prohibitions and criminal offences will be created for price fixing and other cartel behaviour. The fact that a competition test might pose difficulties under the criminal penalty provisions does not justify removing the test for civil prohibitions, which are tried by a judge and not by a jury.

From a policy perspective, it appears incongruous for Parliament to be, on the one hand, seeking to deter anti-competitive cartel conduct through new criminal provisions; while on the other, significantly weakening the existing civil penalty provisions against price fixing.

It is relevant to note that a different burden of proof applies under the civil penalty provisions, which also provide a legal mechanism for parties other than the ACCC to take action to ensure compliance with the *Trade Practices Act*. Retaining the existing stringent civil penalty prohibition against price fixing is, therefore, critical to the deterrence of price fixing.

### **Alliance recommendation – retain the joint venture defence competition test for the civil penalty provisions against price fixing**

For these reasons, the Alliance urges retaining the existing joint venture defence requirement of a competition test in section 76D in the context of the proposed *civil* penalty provisions against price fixing.

This is especially important in the current economic environment. Industry and households are already facing immense pressures from falling commodity prices, export demand and employment, without the threat of escalating prices from producer cartels.

Retaining this test for the civil penalty provisions will not in any way undercut the proposed new criminal prohibitions. It will instead preserve the current stringent civil penalty prohibition critical to the deterrence of price fixing and other cartel behaviour.

Yours sincerely



Stuart Hohnen  
Chairman, DomGas Alliance