



**CHARTERED SECRETARIES
AUSTRALIA**

Leaders in governance

28 February 2008

Scott Rogers
Senior Adviser
Competition and Consumer Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: cartelsbill@treasury.gov.au

Dear Mr Rogers

**Criminal Penalties for Serious Cartel Conduct
Draft Legislation**

CSA is the peak professional body delivering accredited education and the most practical and authoritative training and information on governance, as well as thought leadership in the field. We represent over 8,000 governance professionals working in public and private companies.

The proposed legislation would see those who take part in cartels involved in price fixing, market sharing, bid rigging and related activity facing not only the risk of civil penalties but also criminal prosecution. As the persons responsible for implementing the accountability mechanisms of companies and, in many instances, as officers with statutory duties and fiduciary responsibilities under the Corporations Act, CSA members believe that it is appropriate for criminal sanctions to be introduced for cartel activity. CSA believes that breaches of competition law are as much a defrauding of consumers as breaches of the Corporations Act are a defrauding of shareholders.

1 How should the criminal prohibitions be distinguished from the civil prohibitions?

CSA supports the proposed approach of differentiating criminal cartel conduct from a civil breach by providing that a person only commits a criminal offence if they make or give effect to a contract or arrangement or arrive at an understanding with the intention of dishonestly obtaining a benefit.

CSA firmly believes that the likelihood of a criminal conviction and possible imprisonment will be a strong deterrent to individuals seeking to engage in cartel activity. CSA believes that civil penalties alone have proved an insufficient deterrent to serious cartel conduct. CSA notes that financial penalties — no matter how high — may be viewed by transgressors as simply a potential 'business cost', with no or little material impact on the bottom line. CSA notes that an

equivalent activity under the Corporations Act is insider trading, for which criminal sanctions exist and have proved at least in some cases to be an effective deterrent.

CSA believes that dishonesty is the appropriate distinguishing feature between criminal cartel activity and conduct that warrants only a civil penalty. The Criminal Code definition of dishonesty — that is, 'dishonest according to ordinary people's standards and known by the defendant to be dishonest according to ordinary people's standards' — is appropriate for cartel conduct. CSA does not consider that cartel conduct, including inadvertent cartel conduct, lacking this element of dishonesty should be subject to criminal penalties.

CSA also notes that it supports the retention of a dishonesty requirement for criminal cartel conduct rather than the alternative distinguishing elements canvassed in the discussion paper, namely fraud and secrecy.

2 Should telephone interception warrants be available in relation to the new criminal cartel offences?

CSA recommends the provision of telephone interception warrants in relation to the proposed offences.

CSA believes that the authorities should be provided with the powers they need to investigate and successfully prosecute the offence of cartel activity. CSA notes that the nature of cartel conduct is such that it may be very difficult to prove beyond reasonable doubt the existence of cartel conduct without evidence obtained through telephone interception warrants.

CSA contends that the use of telephone interception warrants for the investigation of cartel conduct should be supported for the same public policy reasons as their use in the investigation of money laundering and cybercrime. CSA believes that the legislative mechanisms by which authorities are granted such powers can be decided once the decision is taken to support their use in the investigation of cartel activity. CSA expects that these mechanisms would be substantially the same as those that apply to agencies investigating other offences for which telephone interception warrants are available.

CSA also believes that a five-year imprisonment term is appropriate having regard to similar criminal offences under the Corporations Act, provided telephone interception warrants are available to the authorities with this level of penalty. In this regard, CSA supports any legislative action that is necessary to ensure telephone interception warrants are available in relation to the investigation of cartel activity.

In preparing this submission, CSA has drawn in particular on the expertise of its national Corporate and Legal Issues and Legislation Review Committees.

Yours sincerely



Tim Sheehy
CHIEF EXECUTIVE