



**CHARTERED SECRETARIES
AUSTRALIA**

Leaders in governance

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The Treasury
Langton Crescent
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Email: cartelsbill@treasury.gov.au

Dear Mr Rogers

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

Chartered Secretaries Australia (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 are an independent, widely respected influencer of governance thinking and behaviour in Australia and an expert commentator on issues affecting governance and legislation. We proactively encourage federal and state governments to create legislative frameworks that foster good governance practices and ethical behaviour.

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. To this end CSA lodged a submission in February 2008 supporting the Exposure Draft of the Bill.

However, CSA has some concerns with the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (the Bill) that was introduced and read for the first time on 3 December 2008. CSA notes that the Bill provides exemptions from the criminal and parallel civil prohibitions on cartel conduct, including if a cartel provision in a contract is for the purposes of a joint venture, and the joint venture is for the production and/or supply of goods or services.

However, CSA notes that the Bill does not provide for exemptions for franchising services. CSA believes that the Bill could have a serious impact on franchising agreements, as well as the appointment of agents in financial services.

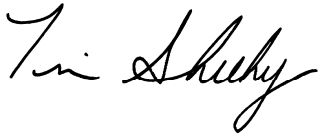
The provisions in the Bill relating to distribution agreements are likely to apply to franchising agreements, which means that current, genuine commercial activity that is legal will become illegal under the legislation.

CSA is of the view that this is likely to be an unintended consequence of the drafting. CSA notes that the Explanatory Memorandum attached to the Bill states that it is intended to criminalise conduct that is already prohibited, which supports the speculation that it is not intended to convert legitimate legal activity into criminal activity. Further supporting the speculation that the current provisions converting franchises into cartels is an unintended consequence of drafting is that if the Bill proceeds in its current form, franchises will become non-viable, which in turn defeats the government's stated policy to strengthen franchisors.

If the government's intention is to criminalise legitimate commercial activity, CSA notes that a long transition period will be required, as companies will need to restructure, given that franchises will automatically convert to cartels. Business will need a period to exit franchising contracts based on territoriality, particularly given the criminal and civil liability attached to cartel conduct set out in the Bill.

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

Yours sincerely

A handwritten signature in black ink, appearing to read "Tim Sheehy". The signature is written in a cursive, flowing style.

Tim Sheehy
CHIEF EXECUTIVE