

TRADE PRACTICES AMENDMENT (CARTEL CONDUCT AND OTHER MEASURES) BILL 2008 Second Reading

February 11, 2009

Mr SIDEBOTTOM (Braddon) (4:05 PM) —I too am pleased to be able to speak on what is a significant piece of legislation and an amendment to the current Trade Practices Act, the [Trade Practices Amendment \(Cartel Conduct and Other Measures\) Bill 2008](#). One of my great hobbies in life is musicals, particularly directing them. I have a particular interest in a current musical that you might not be aware of called *The Scarlet Pimpernel*, which has a history of very chequered reviews. Listening to the songs and reading the script of *The Scarlet Pimpernel* certainly reminds me of highwaymen and highway robbery. This legislation effectively deals with that very thing.

In the same vein as the former speaker and the member for Lyne earlier today, I think we ought to call this for what it is—that is, robbery and, in many instances, daylight robbery. Yet the irony is that it is done in the dark. It is done secretly and covertly and is often done over a great period of time. It is very difficult to detect. We know it exists but it is very difficult to prove. It is robbery and it affects not just the consumer—that is, everybody—but also businesses in general and small businesses in particular. I found it interesting and perhaps surprising that, when some members on the other side said that they were supporting this legislation, they said they feared that its implementation may be injurious to small businesses and legitimate business. I am not a lawyer by any means, but my cursory reading of the legislation tells me that it has taken this into account and has sought to get a compromise between tracking and prosecuting those who are guilty of outright major theft and protecting normal competitive practices. That is what it is designed to do.

What exactly is it that we are talking about when we say ‘cartel conduct’? It is not something that is just off in the ether and it is not something—contrary to claims from the opposite side—that we have only become interested in because of some high-profile cases in this country recently. These were high-profile cases that could not be charged with criminal offences but only with civil offences. So what is meant by it? I turn to the Australian Competition and Consumer Commission, which defines cartel conduct as essentially an anticompetitive arrangement between two or more businesses. The Organisation for Economic Cooperation and Development—the OECD, as we know it—defines hardcore cartel conduct more narrowly, and I think it is worth putting on the record:

... an anti-competitive agreement, anti-competitive concerted practice, or anti-competitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce.

That is a relatively comprehensive definition of what we mean by cartel conduct. That is at the basis of this legislation and the amendments contained within it.

Currently, part IV of the Trade Practices Act relates to restrictive trade practices. Although it does not specifically use the word ‘cartel’, it already contains provisions spread across a number of sections which regulate anticompetitive conduct between two or more businesses. It does this by dividing the conduct into one of two categories, and I would like to share these with you. Firstly, there is conduct which is of itself—referred to as ‘per se’—regarded as anticompetitive. This conduct is prohibited, regardless of whether it has the purpose, effect or likely effect of substantially lessening competition. The rationale behind a per se prohibition is that the conduct prohibited is so likely to be detrimental to economic welfare and so unlikely to be beneficial that it should be proscribed without further inquiry. In short, it is of its nature anticompetitive. Secondly, there is other conduct which is subject to a competition test.

I noticed with interest that some on the other side—in particular, the member for Pearce, for whom I have great admiration—finished her very well constructed speech of support for this legislation by defending the former government’s record on trying to tackle cartel operations. I found it extraordinary because she was defending the member for Higgins, the former Prime Minister, Mr John Howard, and those opposite for their history of procrastination on this issue over many years and their tardy record in doing something constructive and real about the Trade Practices Act and dealing with cartels. Those opposite can lean back and lazily say, ‘Oh, this has been too difficult.’ They criticise the current minister, the Minister for Competition Policy and Consumer Affairs, who is sitting at the table now listening intently to my speech rather than to those opposite. He has been criticised for rushing legislation into this House to deal with this most serious matter. In fact, the current minister—and I give him all credit in this; he has a tremendous capacity, ability and future in our Australian parliament, and thank heavens for that—has a precedent to work from because the legacy and history of people seeking to do something more constructive about this is quite long.

I know that the member for New England, who will follow me, will be able to give us a more detailed history of this. I take you back to the Dawson report of 2003, which was a highly comprehensive inquiry which effectively called for the criminalisation of cartel conduct. That was in 2003, so that is a fair time to hold your breath. In 2005 the response from the current member for Higgins was that the government in which he was Treasurer would amend the Trade Practices Act to introduce criminal penalties for serious cartel conduct. That

was in 2005, which was two years after 2003—everything was happening with haste, as we can see. The bill, in fact, was never introduced in 2005. I wonder why; I wonder what was at the back of this.

Mr Bowen —Was it in 2006?

Mr SIDEBOTTOM —Well, let us move on. In a doorstep interview on 9 October 2007, the then Prime Minister, the Hon. John Howard, stated that the coalition would continue to examine the strength of the trade practices law and make further changes if they were needed. However, he stated that he would not make any commitment beyond that. We know what happened to that. In the meantime there have been serious cases of cartel misconduct recorded in this community. Some members opposite claim that our hastiness in beating towards creating legislation to criminalise cartel conduct was based on a personal vendetta against some of those who were taking part in and found to be guilty of these malpractices. This was between 2000 and 2004.

In 2007, another company was severely penalised for such conduct. We made a commitment in 2007 that we would advance the legislation. The minister has carried out that promise. Contrary to what others have said—particularly the member for Pearce, who claimed in an extraordinary finish to her speech that the minister was forced to rush the legislation—my understanding, and I am not a lawyer or an accountant, indeed far from it, is that we have had a period of consultation, we have circulated a Treasury discussion paper and we have had other discussions with major agencies throughout the government over 12 months. Because of those consultations, the minister made changes to the amendments which are before us today. This is hardly a rushed piece of legislation.

The Labor Party made a commitment based on the history of a poor legacy in relation to criminalising what is highway robbery in this country. The legislation before us deals with that in a balanced, measured way. Indeed, and let us not forget this, it follows the example of many other countries, in fact—again, I am not an accountant—15 OECD countries and others, including the United States, Great Britain, Canada, Norway, France, Germany, Israel, Taiwan and so forth. It is not as if we have invented the wheel, indeed we have not even reinvented it. What we have done is to hopefully make it work and run more smoothly than it has in the past.

I congratulate the minister. I congratulate this government on behalf of my community, which I must say has felt the detrimental effects of what looks like collusion, often, in terms of paying major prices for major commodities, which unfortunately are controlled by very few players in the market.

The penalties that have been introduced in relation to this legislation I believe are appropriate. I believe they will act as a deterrent, as they must, and that individuals cannot escape their responsibility, particularly in relation to decisions that are made which are of an anticompetitive nature. I realise and I understand that there are sensitivities in terms of trying to balance the rights of individuals and their privacy and the need to intercept and get proof of cartel conduct of this anticompetitive nature. I believe the legislation has the balance right. I know the minister has given a commitment to monitor the legislation as it goes into practice, and I think that is absolutely important in this case.

I thank the minister. I thank the government for fulfilling its election promise. I think this is going to act as a strong deterrent. We join many around the globe in trying to tackle what is highway robbery in our economy. It is not fair. It is anticompetitive. It is anticonsumer. It is anti small business. I thank the House.